

**The London School of Economics and Political  
Science**

*Competing Rationalities: The Evolution of Arbitration  
in Commercial Disputes in Modern Jordan.*

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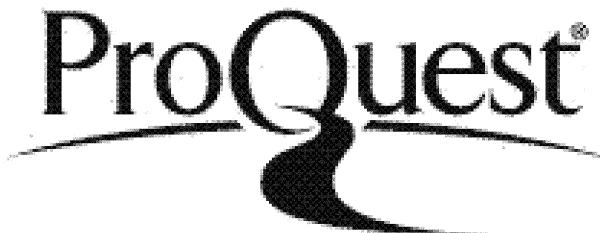


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*In dedication to  
My teacher, inspiration and ideal  
Dr Fahmi Zimmo  
The only Dad that I ever knew*

## **Declaration**

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## Abstract

International commercial arbitration is recognised as the most widely accepted form of dispute resolution in international trade in both the Middle East and the West. But in the Middle East divergent, competing rationalities are constantly close to the surface and repeatedly collide in arbitration cases of international commercial disputes. The Islamic Middle East focus is on maintaining tradition and safeguarding relationships, features that both stand at the heart of the dispute resolution culture of the region. By contrast, in the West, international commercial arbitration is adversarial and individualistic, following the neo-classical model of law. In recent times when the western model has been superimposed on this deeply entrenched dispute resolution culture, hostility and dissatisfaction have resulted. In addition, instances of perceived or actual Western ignorance and bias against *Shari'ah* have led to even more resentment on the part of the Arab players. Both Islamic law and tribal customs impose a duty of reconciliation on any intervener in a dispute. This third party must attempt to help the disputing parties reach a settlement that is just and fair. This clash of cultures is explored in detail in this thesis which uses Jordan as the case study. Jordan has a rich and embedded tribal history and traditions, which remain very much a part of contemporary society. The tribes of Jordan are critical stakeholders of the state and their customs are presented as key pillars of the identity of a Jordanian. Reconciliation is a positive feature of Middle Eastern dispute resolution dimensions of which this thesis suggests could be incorporated in the international commercial arbitration model, making it more representative of, and responsive to, a wider variety of cultural traditions.

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## Chapter One

### Introduction

‘Dispute processes are in large part a reflection of the culture in which they are embedded; they are not an autonomous system that is predominately the product of insulated specialists and experts.’

Oscar Chase, *Law, Culture and Ritual* (2005)

Divergent rationalities underpin dispute processes in the West and the traditional Middle East. The culture of international commercial arbitration is individualistic and adversarial whereas the Islamic/Arab culture remains based on traditional solidarity and aims to maintain relations as a form of negotiated order. In looking at arbitration in the Arab world and the West, I explore the distinctive rationalities that these different contexts involve.

The western model of arbitration is situated firmly in a neo-classic framework, whereas the Middle Eastern is more kin-based with a strong Islamic dimension. An Arabic party, for example, needs to locate the person that they are dealing with within an appropriate social space, thus identifying their family and tribe before any business discussions can take place. The purpose of this “is to ensure the empathetic anchoring which is essential for good business relations”<sup>1</sup>. In the West, individuals are less concerned with social rank and more interested in personal value and professional success. The ‘anchoring’ stage that is so important to an Arabic party is not part of western cultural baggage.

Disputes are found everywhere in the social world “both within groups and between them”<sup>2</sup>. Disputes are unavoidable and dispute resolution is an instinctive function of society itself. In his study of the interaction between law, the courts and society,

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<sup>1</sup> N. Antaki, “Cultural Diversity and ADR Practices in the World” in Goldsmith, Ingen-Housz and Pointon (eds.), *ADR in Business: Practice and Issues Across Countries and Cultures* (The Netherlands: Kluwer Law International, 2006), 265

<sup>2</sup> S. Roberts, *Order and Dispute: An Introduction to Legal Anthropology*, (Oxford: Martin Robertson, 1979), 45

Shapiro<sup>3</sup> suggests that “all cultures and societies possess multiple avenues for conflict resolution for individuals who cannot settle their disputes themselves”<sup>4</sup>. At the root of these mechanisms is the triad, i.e. two disputants and a third party who is to help resolve the dispute. The intersection of two factors, the consent of the disputants as to the third party, as well as to the norms used by their triad, and the mediated solution to the dispute, place those avenues on a continuum. As we move along this continuum, from mediation to arbitration and, finally, to adjudication, the solutions evolve from being a consensual arrangement accepted by both parties to being an oppositional decision imposed by a third party independent of the explicit consent of either party.<sup>5</sup>

Therefore, in every society, past and present, institutions and mechanisms for dealing with disputes exist and, these are culturally linked to their context.<sup>6</sup> They reflect the parties’ backgrounds and cultures. In a world that has become a ‘village’, the most basic commercial contracts may cross borders and be affected by plural cultural sensitivities. Even the perception of conflict, as well as the way it is handled, is very different from culture to culture.

For the purposes of this thesis, I will focus on commercial arbitration in Jordan. Jordan was chosen because it is a burgeoning economy and because of this, many commercial disputes have an international dimension. This inevitably leads to a clash between cultures when different rationalities (representing both local processes and international commerce) come into contact with each other. Two arbitration cases that took place in Amman illustrate the deeply contrasting pictures of dispute resolution in the West and the Middle East.

## 1.1 Two Arbitration Cases

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<sup>3</sup> M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1984)

<sup>4</sup> *ibid* 1

<sup>5</sup> *ibid* 1-5

<sup>6</sup> O.G. Chase, *Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context*, (New York: University Press, 2005)

The following two arbitration cases are practical examples of both international and local arbitration in Jordan. They give the reader a flavour of what arbitration looks like in reality, the importance of the respective players, the culture and the framework that disputes must be resolved within. The methodology of this research is ethnographic and thus, a snapshot of the ‘village’ where I conducted my fieldwork sets the scene for the rest of the thesis. The first arbitration is truly international; a Spanish claimant with English lawyers who employed Jordanian representatives, a Jordanian defendant with Jordanian lawyers and three Jordanian arbitrators. The second is local with the panel, the lawyers and the parties all Jordanian. These variables result in striking differences in approach.

### **1.1.1 An international Dispute**

The case was an international construction arbitration between a Jordanian University (the defendant) and a Spanish Contractor (the claimant). The contract was to build and equip a teaching hospital in Jordan including the supply of all the medical equipment, worth \$500 million. The employer’s lawyers were a Jordanian firm. The contractor’s lawyers were an English firm with Jordanian agents. The place of arbitration was Amman, Jordan. The language of arbitration was Arabic and English. The arbitrators were three Jordanian engineers with different specializations. The claimant was the contractor with a \$200 million claim. This firm alleged that the employer’s engineer’s instructions were inadequate and the workshop plans insufficient and most of the designs supplied were either incomplete or out of date. The employer had a counterclaim of \$300 million for breach of obligations on the part of the contractor and the supply of sub-standard medical equipment, as well as a delay in completion of 1 year.

All pleadings were in writing and in Arabic. The witnesses had a choice of giving their evidence either in Arabic or English. There was a clerk who handwrote a record of all the testimonies, then these records were typed up. Most of the work done with regards to the contractor’s claim was done by a quantity surveyor.

The two sides agreed that they would not interrupt the examination, cross-

examination and re-examination of witnesses with objections. The questions asked by the Jordanian employer's lawyer were long winded and at times sounded like pleadings. The arbitrators did not step in and the other side could not object. For two days there were no questions relating to the dispute. At some stages, witnesses were asked to read from documents or try to remember dates that were clearly stated in documents and were undisputed. Most of the Spanish contractor's witnesses had been flown in from abroad. The relationship between the Jordanian lawyer and the tribunal was friendly and they did not stop him from doing what he wanted. There was a clear transformation in attitudes between the tribunal and the Jordanian lawyer when the tribunal interrupted or attempted to take some control of the proceedings. However, the friendly manner, like 'an old boys club', returned after these breaks.

The Jordanian agents were represented by a woman lawyer. She was trained by and worked for a number of years with the leading lawyer for the defendant. On certain days her boss attended and then the whole dynamic of the hearings changed. He would interrupt and object to the style of the Jordanian lawyer. This ended up in a 'screaming match' and the arbitrators suggested talking to the two men in a separate room to calm matters down and to get them to shake hands. The ensuing calm was however only temporarily.

There were pleadings exchanged by both sides regarding the way things were being conducted at the previous hearings. After intense discussion, matters regarding the way the arbitration would be conducted were agreed and the arbitrators seemed to be playing a more active role by interrupting and trying to keep the questions asked by the hospital's lawyer relevant.

The contractor's lawyers told me that they were consciously trying not cause too much of a fuss as this may have risked antagonizing the tribunal or making the lawyer for the employer "more bitter". However, the fact that the cross-examination was not completed within the agreed time limits was causing the contractor many problems in producing the witnesses for examination in Amman.

At some point, the lawyer for the employer asked the witness to read the contents of site instructions. One of the arbitrators intervened and told the lawyer that

“documents speak for themselves”, but this was not accepted immediately. The employer’s lawyer argued that he could ask the witness anything he liked, as the contractor’s lawyers had done when examining their witnesses. He pointed out that the tribunal could not make up a rule in the middle of witness evidence.

While cross examining the witness in English, on a number of occasions the lawyer for the employer called the witness a liar in Arabic. At certain points, the lawyer would outline in Arabic what each set of questions was aiming to achieve. He sat closest to the tribunal and a mere whisper from him was heard by them.

At one point the lawyer for the employer started shouting at a witness and was very aggressive towards him. The witnesses complained to the tribunal asking them to instruct the lawyer to address him as politely as he was addressing everyone else. One of the arbitrators replied that he should carry on being a polite witness as this was the correct manner. Then, the tribunal ordered a break and while nothing formal was said to the lawyer, the tribunal may have said something informally to the employer’s lawyer because when we returned from the break he was questioning the witness calmly, almost whispering. He looked like he was making a special effort to be calm.

The lawyer kept whispering under his breath, just loud enough for the tribunal to hear; that the witness was not answering the questions. Even though the tribunal requested the lawyer not ask the witness to read from the documents, as this was unnecessary, the lawyer ignored them. It seemed to be a request, not a direction.

When the contractor’s English lawyers examined the witness their approach was very calm and formal both towards the witness and the tribunal.

### **1.1.2 Commentary**

I spoke to one of the arbitrators in private and he told me that the problem with lawyers is that they do not change their attitudes from court to arbitration. They try to highlight the strong points in their case through the witnesses, even though they are

clear from the documents. In the court, the judge has a huge workload and cannot spend the time reading and grasping all the papers, unlike an arbitrator who reads the documents more than once. Thus, there is no need at all to go through the documents. No matter what a witness says, the documents are taken to be the true evidence. Therefore, all the questions that the employer's lawyer asked about documentary content and information arising from this were a complete waste of time and money, but the arbitrator said, the lawyer needed to show his client that he had worked hard and read all the papers.

The lawyer from the English firm representing the Spanish contractor advocated mediation to me and told me a story about the American mediator Michael Shane. He mediated a dispute regarding one of the bridges in Hong Kong. The claim was for \$800 million. The Hong Kong government settled and paid the claimant \$270 million and both parties felt that they had each won. From the start Michael Shane, told both parties "to get real" on certain matters. He used confidential negotiations with each party to a maximum and never disclosed what he said to the other party in reality. The contractor was concerned about losing the claim, due to the fact that they did not comply with some strict notice requirements included in the contract. Also, the employer was concerned that the case of the contractor relating to unfair terms would be successful. Michael Shane picked on both parties' weaknesses and this led to effective negotiations and the settlement of the dispute.

The quantity surveyor in this case told me that Dispute Adjudication Boards (DAB) appointed at the start of the contract had been useful in practice, especially as the characters on the board were strong and professional. They had conducted regular visits and dealt with isolated matters as they arose. The board's members had to get familiar with the characters and the project, which would then equip them to deal with matters as they arose. A complex project which had a lot of tunneling work and ground issues had found the expertise of the DAB helpful in keeping matters running smoothly. The board made decisions on many matters, such as whether a change could be considered a variation or not.

The arbitration ended about six months after I left. The employer's lawyer discovered that the Spanish company had merged into a new entity before the

arbitration started. The new entity had no right to sue the University as it was not recognized as its legal successor. The authority of the Jordanian lawyers was taken from the regional office, not the branch office that had undertaken the project. The English solicitors thus did not have proper authority to act on behalf of the contractor. At the start of the arbitration, the claimant did not exist as a legal entity. Therefore, the case was dismissed by the arbitrators for lack of jurisdiction.

I interviewed the two lawyers who represented the University. One of them, a young lawyer who had completed a PhD from Kings College London, explained “the reason for the hostility was due to the fact that the opponents were not on good terms”. He said; “Usually arbitration sessions are much nicer. This arbitration was a “bone breaking” matter. After all, it was the largest arbitration in the history of Jordan. He felt the lack of lawyers on the tribunal panel led to a lack of control of the hearings. “There were legal arguments that were made by the two sides that I felt the tribunal did not fully understand”. Even though the three arbitrators had a lot of arbitration experience, they could not control the sensitivities between the two parties and just stayed out of it so they were not accused of any bias.”

I was told by the more experienced Jordanian lawyer for the University that “the Spanish government was pressuring the Jordanian government, claiming that the award was wrong and it should never have been allowed. An application was submitted to court to set aside the award but it was refused. Recently, I received a letter from the Spanish embassy requesting that we negotiate some sort of settlement.”

I informally saw the local lawyer for the Spanish company and asked him about the case, he was very angry and said that they planned to start a new arbitration. As far as I know this has not happened yet.

### **1.1.3 A Local Arbitration**

This involved arbitration between a publicly owned company and a Jordanian contractor over a major construction project. There were three arbitrators; two

lawyers and one engineer. The chairman was noticeably younger than the other two arbitrators and the lawyers for both sides, but he had a PhD. This arbitration related to a dam that had been constructed by the claimant, a Jordanian construction company. The defendant was a local government agency. The dam had collapsed almost immediately after construction. The claimant alleged that the defendant did not pay the final payment of 450,000 JD and also stated that the reason for the collapse of the dam was the ground conditions that the defendant were aware of, but did not inform the contractor about. The defendant claimed that the dam was badly constructed and that it was the claimant's duty to examine the ground conditions. Thus, the defendant claimed damages for the collapsed dam.

One of the two lawyer arbitrators was very active in asking questions of the witnesses and wanted to make sure that the record of testimonies was clear. The other engineer arbitrator wanted to ensure that the other arbitrators grasped the technical details of the dispute. This was done while the witnesses were being examined, which caused some problems of procedure and sometimes a lack of clarity. The arbitration panel believed that it was important to have clear statements on record and thus on some occasions asked the witnesses to repeat their answers a number of times.

One of the parties' lawyers wanted to exhibit a document, the other side's lawyer said in a friendly fashion that he had no right, but that there was no objection. The other side then said that they did have a right, which resulted in an argument. As a result, the side who originally had not objected then decided to object on record out of spite. One of the arbitrators then intervened to calm everyone down and the document was exhibited and no objection was recorded.

Usually, a discussion would evolve between the arbitrators and the witnesses. I was told by one of the arbitrators that this was the way arbitration should be conducted taking advantage of its informal nature. Another arbitrator believed that this was a sign of the lack of experience of some of the arbitrators during witness examination. The arbitrators asked the parties to arrange a site survey. They just wanted to look around and see what they were deciding on.

Because this panel had two lawyers and one engineer, the hearing seemed to be much calmer with more cooperation between the panel members compared to many arbitrations where the panel consists of three lawyers. There seemed to be more team work. The personality of the arbitrators reflected considerably on the mood of the hearings. It was a clear advantage having an arbitrator who is an engineer and an expert in the field who could specify exactly what he wanted from the technical witnesses using his knowledge to the fullest. Therefore, the engineer arbitrator was very active when the contractor was being examined.

The public company (defendant) was awarded considerable damages but the contractor applied to set the award aside and that is still ongoing.

\* \* \* \* \*

The differences between the two arbitrations are not restricted to procedures and nationalities alone, they felt different when I observed them. The input of the arbitrators in the local arbitration was absent in the international arbitration. In the international arbitration, the arbitrators were reserved in their actions and comments. Whereas in the local arbitration, the arbitrators were involved 'in the thick of the action'; they asked questions, directed the hearings and resolved any conflict arising between the parties' counsels. The social prestige and respect of the arbitrators and the lawyers themselves played a vital role in keeping order in the hearings of the local dispute. The social stature of the Jordanian players in the international arbitration was not used as part of the techniques of the running of the hearings. It was reserved to unofficial comments and discussions in the breaks.

Many interviewees insisted that it is essential to have a lawyer on the panel. These contrasting arbitration cases seem to support this view. The presence of an experienced lawyer as an arbitrator of a similar age to the parties' representatives meant that matters never 'got out of hands'. Whereas, in the international arbitration, the panel suffered in some way from a lack of legal expertise. It sometimes led to the arbitrators falling hostage to the defendant's lawyer. Also, the claimant having a

female lawyer excluded her from the ‘boys’ discussions’ in the breaks. The rest of the claimant’s team were excluded because they were British and therefore, did not speak Arabic. Everyone was polite, but not engaging.

In summary, the main difference between the international arbitration and the local arbitration was that the international hearings were very adversarial with no co-operation between the players, whereas the local arbitration seemed to be much more collaborative. It is noteworthy, that each arbitration is different and these differences are in part a reflection of the personalities and perceptions of the players.

The social stature of players in Jordan is important and this will be explained in detail in part two of the thesis. Local arbitrations in Jordan are akin to the traditional arbitrations that have been conducted along tribal and Islamic lines for many centuries and these will be explored in the thesis in great detail. International arbitration in Amman is imported from the perceived norms of arbitration as formulated by the West and, thus, its workings are not as smooth and effective as seen in the local arbitration.

## **1.2 Thesis Outline**

The first part of this thesis explains how arbitration culture has developed in the western world as a result of disenchantment with court-based adjudication. In part two, we see this culture superimposed on a deep, existing structure in the Middle East, which causes a clash between the Western and Eastern norms of dispute resolution is specifically played out particularly in chapter four. This chapter comes after chapter three on dispute resolution in Islamic law. The two great streams underlying contemporary arbitration are examined further within one jurisdiction in parts three and four. We begin our journey in part three describing the deeply embedded tribal structure and justice system that has become part of the Jordanian state, in order to draw a picture of the landscape of the traditions and culture. Then, the clash of the two rationalities in Jordan is analysed within chapters six and seven which describe the westernisation of arbitration in a way that ignores and even in some instances offends the deeply rooted reconciliatory approach to dispute

resolution. The interviews with the Jordanian arbitrators provide the native voice throughout the thesis. In each chapter of the thesis, there is a specific battle of rationalities that takes place in order to produce the final picture of international commercial arbitration in the Middle East, and specifically in Jordan.

This thesis will not have a traditional literature review as it deals with many areas of writing. When it was necessary to outline the literature in order to help with the contextualisation or in the form of background, I did so within the required parts. For example, chapter two have a literature review of international commercial arbitration and chapter seven describes the range of views and writing with regards to *wasta* which provide the literature review for these two areas.

### **1.3 The Growth of International Commercial Arbitration**

‘There is [now] clear evidence of something of a world movement... towards international arbitration.’

Sir Michael Kerr, Lord Justice of Appeal<sup>7</sup>

Over the last 100 years, international commercial disputes across the western world have almost abandoned the neoclassical model of court based dispute resolution in favour of arbitration. The courts’ role in resolving international trade disputes, usually arises “where the parties have failed to make an express choice of forum in their contract”<sup>8</sup>, thus they head to court by default. The reason for this shift is not just to improve speed or reduce costs, as it is often emphasised at arbitration conferences, but rather that corporations and government entities that are engaged in international trade are not willing to litigate in the other party’s home court. As a result, “arbitration is the only game in town”<sup>9</sup>. Hunter explains that the advantages of speed and cost only exist in “domestic arbitration before a sole arbitrator and even then

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<sup>7</sup> Lord Justice Kerr, preface to Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (Paris: I.C.C. Publishing, 1990), xii

<sup>8</sup> M. Hunter, “International Commercial Dispute Resolution: The Challenge of the Twenty-first Century”, *Arbitration International*, Vol. 16 No. 4 (2000), 379, 380

<sup>9</sup> V.V. Veeder, “The Global Counsel Top 10 Arbitration Specialist” (Global Counsel, June 2002) at [www.practicallaw.com/global](http://www.practicallaw.com/global)

only in specialised fields.”<sup>10</sup> It is also important to remember that one of the most positive features of arbitration in the international context is that arbitral awards through the New York Convention<sup>11</sup> enjoy much greater global recognition than the judgments of national courts.

Consequently, there is no doubt that arbitration is the chosen dispute resolution process in international trade and this trend has formed certain norms that are recognised among arbitration practitioners. This model of international arbitration is perceived by many non-westerners as a false western panacea, imposed from the outside and hence insensitive to indigenous culture and needs. In the Middle East, the model caused great hostility and tension in the 1950s and 1960s and in some way, this resentment has not completely disappeared. Instead it has been redirected against major arbitration players, rather than directly against the process itself. The main reason for this uneasiness appears to be the ignorance and lack of understanding of many western arbitrators as to the longstanding Islamic and tribal dispute resolutions which exist in the Middle East. To help address this issue, the international arbitration players must acknowledge these deep rooted local traditions, of which arbitration always formed a part.

#### **1.4 Arbitration in Jordan**

‘The momentum for Arbitration in Jordan is self perpetuating.’

Interview with Jordanian lawyer  
(May 2004)

The Islamic Middle East has not fully embraced what might euphemistically be referred to as a “modern” arbitral system.<sup>12</sup> The lawyer-scholar must accept and internalize the fact that history and religion are the keys to understanding commercial arbitration in this part of the world. Islamic law pervades the commercial world, as well as a Muslim’s way of life. Also, Islam has always been a religion of trade and of

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<sup>10</sup> n 8 above

<sup>11</sup> 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards

<sup>12</sup> A.J. Gemmell, “Commercial Arbitration in the Islamic Middle East”, 5 *Santa Clara Journal of International law* (2006), 169

world traders.<sup>13</sup> In the Pre-Islamic Arab community, negotiations tended to be the most relied upon method of dispute resolution.<sup>14</sup> If the parties failed to resolve their differences, a *hakam* (an arbitrator) was appointed. A *hakam* could be any male possessing high personal qualities who enjoyed a favourable reputation in the community and whose family was noted for their competence in dispute settlement.<sup>15</sup> If the *hakam* agreed to arbitrate, the parties then put up a meaningful form of security (property or hostages) to ensure their compliance with the *hakam*'s decision.

The decision of the *hakam* was final, but not legally enforceable. It was an authoritative statement as to what the customary law was or should be. In fact, Schacht refers to a *hakam* in such situations as “a lawmaker, an authoritative expounder of the normative legal custom or sunna.”<sup>16</sup> Schacht continues, “[t]he arbitrators applied and at the same time developed the sunna; it was the sunna with the force of public opinion behind it, which had in the first place insisted on the procedure of negotiation and arbitration.”<sup>17</sup> Arbitration continued as a dispute resolution practice in the Mohammad *Sall-Allahu Alayhi Wa Sallam* (s.a.a.w) and post-Mohammad (s.a.a.w) eras. In fact, for a Muslim, “arbitration carries with it no better imprimatur than that given to it by the Prophet himself.”<sup>18</sup>

The formal commercial legal order in Jordan is an import from civil law jurisdictions, as well as English law. However, indigenous dispute resolution has vigorously survived underneath and alongside these formal rules and procedures. Mallat<sup>19</sup> confirms that the commercial law of the Middle East is an exact copy of European law, albeit with the long-standing traditions of trade in the region. He contends “a brief presentation of commercial law decisions across the Arab world is sufficient to show the dominance of western principles in the field and the direct translation of western terminology and rules for local transactions.”<sup>20</sup> However, he

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<sup>13</sup> L. Lim, “Terrorism and Globalization: An International Perspective”, 35 Vand. J. Transnat'l L. (2002) 703, 704

<sup>14</sup> J. Schacht, *An Introduction to Islamic Law*, (Oxford: Clarendon Press, 1964), 7

<sup>15</sup> *ibid*

<sup>16</sup> *ibid* 8

<sup>17</sup> *ibid*

<sup>18</sup> n12 above, 173

<sup>19</sup> C. Mallat, “Commercial Law in the Middle East: Between Classical Transactions and Modern Business”, *American Journal of Comparative Law*, Vol. 48, No.1 (Winter 2000), 81

<sup>20</sup> *ibid*

also admits that arbitration is a different matter in that; it is influenced by Islamic traditions and cultural phenomena. Mallat attributes this, to what he calls the revenge of classical law upon the state and the slowness of its judicial system. Merchants in both the Middle East and the rest of the world resort to arbitration to avoid the judicial system for a variety of reasons, some of which include the process in court may be too slow, too unpredictable, too open, too unreliable or too expensive.

The advent of commercial arbitration in the second half of the twentieth century was superimposed on the existing local culture of arbitration for dealing with commercial disputes. This de Sousa Santos calls localised globalism, when “transnational practices and imperatives [impact] on local conditions that are thereby destructured and restructured in order to respond to transitional imperatives”<sup>21</sup>. This seems to be what happened with regards to commercial arbitration in both Jordan and the wider Middle East.

Many Middle Eastern scholars and practitioners trained in the West have often returned to their countries of origin ready to impart what they have learned about western conflict resolution techniques, as if there were no existing methods of dispute resolution in these countries. Actually, there are deep cultural, social and religious roots that underlie the way Arabs behave when it comes to conflict resolution and reconciliation. These involve issues such as patrilineal families, the question of ethnicity, the relevance of identity, the nature of tribal and clan solidarity, the key role of patron-client relationship and the norms concerning honour and shame. Religious beliefs and traditions are also relevant to conflict resolution and control. Some of the indigenous techniques found in the Middle East today alongside arbitration are *wasta* (intercession) and rituals of *sulh* (settlement) and *musalahah* (reconciliation).

Geography has an impact on the way people interact and behave for the protection of honour and their scarce resources. For example, the Arabian Peninsula and Jordan are characterised by desert and other arid land. In the desert, the fittest and strongest survive and there is ‘strength in numbers’, therefore tribal people have had to stick

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<sup>21</sup> B. de Sousa Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, (Routledge: London, 1995), 263

together and support each other due to such difficult conditions. In recent times, people of the Middle East have increasingly moved away from pastoral nomadism, but this life has left a very deep imprint on Middle Eastern culture, society and politics. One anthropologist hypothesises that the characteristics of pastoral nomadism account for the strikingly similar cultural orientations found throughout the vast area of the Middle East; “we find remarkable similarities among the traditions of many people throughout a large region...Islamization, the spread of a religious faith, is offered as an explanation for this informality...Extreme arid conditions resulted in independent little herding groups dispersed across the desert and steppe...This situation is reflected in the atomistic form which political alliances tended to take.”<sup>22</sup>

As well as the tribal heritage of the Arab world, Islamic traditions are also relevant to any examination of arbitration law within the Arab systems. Behind the statutes of most Arab countries, and more importantly in the mind of an Arab party, counsel or arbitrator, lies a rich layer of *Shari'ah*.<sup>23</sup> Saleh argues that “whilst most of the statutes codify accepted legal principles which are borrowed from the West, there is still a body of uncodified shari'a that may remain influential, mainly with regard to behaviour of the parties and arbitrators, even though they are not embodied in a modern piece of legislation.”<sup>24</sup> It is essential to understand that some of the norms of pastoral nomadism, especially the ones relating to dispute resolution, were further reinforced by the arrival of Islam.

The people of the Middle East remain famous for their loyal attachment to their families, distinctive rituals of hospitality and conflict mediation, as well as effective and flexible kin-based collectivities. Lineage and tribe have, until quite recently, performed most of the social, economic and political functions of communities in the absence of centralized state governments. The family in the Middle East is dominated by the powerful role patriarchy plays in decision-making. A related element in understanding social and political behaviour in the Middle East is kinship.

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<sup>22</sup> M. Meeker, *Literature and Violence in North Arabia*, (Cambridge, MA; Cambridge University Press, 1979), 7

<sup>23</sup> S. Saleh, *Commercial Arbitration in the Arab Middle East: Shari'a, Lebanon, Syria and Egypt*, (Oxford: Hart Publishing, 2006)

<sup>24</sup> *ibid* 5

Despite the creation of modern states following the collapse of colonial rule, the basic unit of identification for the individual is not the state, the ethnic group or the professional association, but the family.

Alongside the family and kinship, there are religious considerations; “even where the Shari'a is not applied in current practice, there could be a reversion to it in any particular case...Without doubt, a knowledge of the Shari'a will become increasingly important for practitioners...”<sup>25</sup> Religion in the Middle East plays a very important role in influencing an individual's life in both private and public interactions. The socio-cultural and historic environment that saw the birth and spread of the three main global monotheistic religions encouraged close relations between the private and public in the individual's life in the Arab world. Islam is “a complete way of life: a religion, an ethic, and a legal system all in one.”<sup>26</sup> *Din*, the Arabic word for religion, “... encompasses theology, scripture, politics, morality, law, justice, and all other aspects of life relating to the thoughts or actions of man . . . it is not that religion dominates the life of a faithful Moslem, but that religion . . . is his life.”<sup>27</sup>

The penetration of this tribal heritage and religious underpinning into the commercial world within the Middle East has created a gap between the Arab way of doing business and that in the West. It is quite clear that the co-existence of these two rationalities is potentially problematic. The differences are not just in the general landscape, but in the detail and perceptions of specific matters. For example, Irani argues that conflict from a western perspective is considered to have a positive dimension, “acting as a catharsis to redefine relationships between individuals, groups and nations and makes it easier to find adequate settlement or possible solutions.”<sup>28</sup> Whereas conflict in the East is considered to be negative, threatening and destructive to the normative order and needs to be settled quickly or avoided. These two views of conflict are sufficiently dissimilar to make the argument that

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<sup>25</sup> M. Ballantyne, “Book Review of Commercial Arbitration in the Arab Middle East: A Study in Shari'a and Statute Law” *Arbitration International*, Vol. 4, No. 3 (1989), 269, 272

<sup>26</sup> S.M.H Tabatabae, *The Quran in Islam: Its Impact and Influence on the life of Muslims*, (London: Zahra Publications, 1987), 86

<sup>27</sup> D.S. Roberts, *Islam: A Westerner's Guide-From Business and the Law to Social Customs and Family Life*, (London: Hamlyn, 1981), 67-68

<sup>28</sup> G. E. Irani, “Islamic Mediation: Techniques for Middle East Conflicts” MERIA Vol. 3, No. 2- June 1999, 1

each side has a very different starting point when it comes to understanding conflict and, consequently, conflict resolution.

Western societies today strongly privilege individualism, thus, social pressures and relationships do not operate as influential factors in dispute resolution. Parties are committed to the process as a result of legally binding procedures or because the process serves their individual interests. Conflict is not necessarily seen as a negative interaction that should be avoided. The western model calls for a direct method of interaction and communication. Also, in the western model, any intrusion of emotions and values is perceived as an obstacle to reaching an agreement.

By contrast, conflict resolution in the Middle East aims to restore order. Even though a dispute might begin between two individuals or two families, it soon involves the entire community or clan. The initiation and implementation of any intervention is based on the social norms and customs of the society. These social codes operate as a pressuring tool to reach and implement an agreement between two parties. Bargaining moves are conducted on the basis of preserving social values, norms and customs. Future relationships are crucial elements in settling disputes in the Arab-Islamic context. Priority is given to people and relationships over task and structures. Face to face bargaining or negotiation could be perceived by the parties as antagonising the situation or as a humiliating act for the victim.

One of the clearest contrasts between western and Middle Eastern dispute resolution lies in the nature of the third party intervener. In the Middle East, the third party is a leader who lives in the community and has high status and who brings considerable knowledge of events, the character of the dispute and the disputants. In the western case, third parties are usually strangers to the dispute. They lack the closeness and connection to the disputants. Such distance is appreciated and encouraged in a western context. The Middle Eastern intervener advocates a settlement that relates to notions of justice as accepted in the society and enforces social norms. Western settlement aims at achieving lasting agreements.

The credibility of the third party in the Arab-Islamic context is based on kinship connections, religious merit and knowledge of customs and community. In the

western case credibility is based on training, professional degrees and experience. In the Arab context, emotions are relevant in dispute resolution, in contrast to the western intervener, who is expected to remain detached from the disputants and be committed to the process itself.

There is no denying that in the East and West disputing landscapes are different. The very concept of conflict as well as resolution is unaligned. The striking collective nature of the East when contrasted with the largely individualistic phenomena of the West sets these two worlds apart. This could be explained by the cultural heritage of the Middle East, which is tribal and Islamic in nature. These features have seeped into the legal culture of Jordan, which is the main focus of this thesis and in turn influenced the attitudes and behaviour of the players in the Jordanian arbitration process.

In the remainder of this chapter, I explore the literature on disputing theory and the definition of legal culture in order to give some parameters to this research. In the last section, I explain my ethnographic methodology which highlighted the differing features of the international arbitration culture and the local Jordanian arbitration process.

## **1.5 Legal Culture**

There is agreement in the literature that the basic conceptual understanding of “justice must satisfy the appearance of justice” must be found at the heart of disputing theory<sup>29</sup>. Bruner<sup>30</sup> makes the essential point that the “appearance of justice” is not the same everywhere. There are longstanding debates about culture and legal culture, which I will review in this section. After examining the differing definitions and arguments over these two concepts, it seems that it is quite difficult to have one narrow definition. However, for the purposes of this thesis, culture is taken as the interaction between norms, cosmology and practice.

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<sup>29</sup> The famous dicta of Felix Frankfurter, J.S. Bruner, “Foreword” n 6 above, ix

<sup>30</sup> *ibid*

Chase<sup>31</sup> contends that the ways in which disputes are managed plays an important role in shaping the cultures in which they operate and dispute processes are a reflection of the culture they are found within. The question that Bruner puts is “how particular dispute resolution systems, once in play, both fit the culture and work their way back into it to accentuate or modify its way of life”<sup>32</sup>. Bruner answers this question in part by using Chase’s example of the *benge* oracle<sup>33</sup>, used by the African Azande for resolving their disputes. Bruner says “one cannot understand such seemingly bizarre ritualization unless one understands the pervasive ritualization of witchcraft as a whole in this fascinating society.”<sup>34</sup> In the same way, one cannot understand the peculiarities of Jordanian arbitration without fully grasping how the family, kinship and religion fit within the disputing culture, and more extensively legal culture. Newman confirms that in order to understand the disputing processes in a society, one must recognise “the ‘idiom’ of law, the language in which its concepts and conflicts are expressed, is surely a matter of cultural determination...Many ritual taboos, religious practices and normative values are embodied in legal codes...”<sup>35</sup>

Chase argues that the link between disputing and culture is most robust in “cultures that do not strongly differentiate between disputing practices and everyday life.”<sup>36</sup> The legitimacy of these practices will depend on general satisfaction with them. Thus, it is not surprising that institutions imposed from outside may differ considerably from local processes as disputing institutions are “a product of, a contributor to and an aspect of culture.”<sup>37</sup> In some societies, like Jordan, explicit legal norms merge with other normative understandings, embedded in custom and invoked implicitly in the way disputes are resolved and life is lived.<sup>38</sup> Chase concludes that the relationship between disputing and culture is reflexive; “that the processes by which disputes are addressed will be influential ingredients in the ongoing social task of maintaining or “constructing” the culture in which they are

<sup>31</sup> ibid

<sup>32</sup> ibid x

<sup>33</sup> A system where a small dose of poison is fed to a young chicken in which the chicken death’s or survival signals the innocent and guilty party.

<sup>34</sup> n 6 above, ix-x

<sup>35</sup> K. S. Newman, *Law and Economic Organization: A Comparative Study of Preindustrial Societies*, (Cambridge: Cambridge University Press, 1983), 210

<sup>36</sup> n 6 above, 10

<sup>37</sup> ibid 7

<sup>38</sup> n 2 above, 170-171

located.”<sup>39</sup> Therefore, disputing culture is a set of social practices that predominate disputes and influence practices, beliefs and norms.

Since law is a product of dispute, and “law’s operation is but a special case of disputing practices importantly influencing culture”<sup>40</sup> then also systems of dispute resolution are culture specific, as they are created by human beings and they reflect the characterisations necessary to identify that legal culture. Pierre Bourdieu<sup>41</sup> describes the law as the “quintessential form of active discourse, able by its own operation to produce its effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law”<sup>42</sup>.

Legal scholars talk about culture in two ways. First, there is a notion of a general legal culture which is usually taken to mean those aspects of national culture that find expression in the legal system.<sup>43</sup> Legal culture “points to differences in the way features of law are themselves embedded in larger frameworks of social structures and culture which constitute and reveal the place of law in society.”<sup>44</sup> As Freidman put it, legal culture consists of the “attitudes, values, opinions held in society with regard to law, the legal system and its various parts...those parts of the general culture – customs, opinions, ways of doing and thinking that bend social forces toward or away from the law.”<sup>45</sup> The second notion is that culture consists of shared norms and expectations produced by legal actors. Actors engaged in repeated interaction over time produce culture.<sup>46</sup> Lawyers form an epistemic community that is a community of professionals with common training and expertise. It is culture as a product of law, rather than as a constraint on law, an effect rather than a cause.<sup>47</sup>

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<sup>39</sup> n 6 above, 138

<sup>40</sup> *ibid* 127

<sup>41</sup> P. Bourdieu, “The Force of Law: Towards a Sociology of the Juridical Field” (Richard Terdiman, trans.) (1987) 38 *Hastings Law Journal* 805

<sup>42</sup> *ibid* 839

<sup>43</sup> D. Nelken, “Towards a Sociology of Legal Adaptation” in D. Nelken & J. Feet (eds), *Adopting Legal Cultures* (Oxford: Hart, 2001), 25

<sup>44</sup> *ibid*

<sup>45</sup> L.M. Freidman, *Law and Society: An Introduction* (Englewood Cliffs: Prentince- Hall, 1977), 76

<sup>46</sup> P.M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *Int’l Org* (1992) 1, 3

<sup>47</sup> T. Ginsburg, “The Culture of Arbitration”, 36 *Vand. J. Transnat’l L.* (2003) 1335

Nelken<sup>48</sup> describes two forms of analysis within the realms of legal culture. The first he calls the “explanatory approach” where causal priority between competing hypothetical variables is developed. This approach “uses various aspects of legal culture to explain variation in levels and types of legally related behaviour.”<sup>49</sup> The second approach Nelken names “interpretative”, where the aim is understanding how aspects of legal culture fit together. This approach “seeks to use evidence of legally relevant behaviour and attitudes as an index of legal culture.”<sup>50</sup>

Chase says we must use the tools of “cultural contextualization of incident”<sup>51</sup> in order to understand the meaning of particular dispute processes. To achieve this “we must observe the relevant practice closely and must place them within the culture in which they operate.”<sup>52</sup> According to Nelken, an interpretative stance is more helpful than the explanatory approach to treating culture as part of a flow of meanings and is less interested in drawing a definitional line between legal culture and the rest of social life. On the other hand, Chase claims that interpretative explanations are insufficient. Disputing is not about meaning making alone; it is essential that we explore the way functional and cultural representations are interpreted. “A disputing practice will be better understood when we see how it works symbolically and functionally.”<sup>53</sup>

In order to understand what is meant by legal culture, it is important to define the term “culture”. In reality, the definition of both these concepts is contested. Culture was defined by Tylor<sup>54</sup> as “that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society.”<sup>55</sup> Raymond Williams states “culture is one of the two or three most complicated words in the English Language...because it has now come to be used for important concepts in several distinct intellectual disciplines and in several

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<sup>48</sup> D. Nelken “Using the Concept of Legal Culture” *Australian Journal of Legal Philosophy* (2004) 29:1

<sup>49</sup> *ibid* 9

<sup>50</sup> *ibid*

<sup>51</sup> C. Geertz, “Fact and Law in Comparative Perspective” in C. Geertz (ed.), *Local Knowledge: Further Essays in Interpretive Anthropology*, (New York: Basic Books, 1983)

<sup>52</sup> n 6 above, 3

<sup>53</sup> *ibid* 4

<sup>54</sup> E. Tylor, *Primitive Culture* (London: John Murray, 1871)

<sup>55</sup> *ibid* 1

distinct system of thought.”<sup>56</sup> Anthropologists have traditionally defined culture as “the way of life of people.”<sup>57</sup> Many definitions have revolved round the idea that culture represents a set of practices, values, beliefs and customs acquired by individuals as members of a distinctive society, and those resulting from interaction between people, which have accumulated, assimilated and been passed on to subsequent generations.

Different scholars have tried different approaches to the same difficult measuring of legal culture, but it seems that none are entirely satisfactory. Others have suggested that the concept is misleading and should be abandoned altogether. However, Nelken sets out a spectrum to which culture corresponds:

“...one way of describing relatively stable patterns of legally oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions ...to various forms of behaviour ...and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are, not just what we do.”<sup>58</sup>

Blankenburg and Bruinsma<sup>59</sup> define the concept of legal culture as including four components: law on the books, law in action as channelled by the institutional infrastructure, patterns of legally relevant behaviour, and legal consciousness, particularly, a distinctive attitude toward the law among legal professionals.<sup>60</sup> In this thesis, it is the legal consciousness that relates to dispute resolution in Jordan that I am describing and explaining. However, it is important to note that this concept has suffered harsh criticism. Cotterrell<sup>61</sup>, for example, argues that the concept of legal culture lacks rigour and is ultimately theoretically incoherent. He illustrates this view with reference to a variety of meanings given to the concept by Friedman over the years. Cotterrell says legal culture is of little use because it is difficult to build such a variable term into testable explanations, especially as “the concept is sometimes

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<sup>56</sup> R. Williams, *Keywords: A Vocabulary of Culture and Society* (Glasgow: Fontana, 1976), 76

<sup>57</sup> G. Mathews, *Global Culture/ Individual Identity: Searching for Home in the Cultural Supermarket*, (New York: Routledge, 2000)

<sup>58</sup> n 48 above, 1

<sup>59</sup> E. Blankenburg, & F. Bruinsma, *Dutch Legal Culture*, (Netherlands: Kluwer, 1994)

<sup>60</sup> *ibid*

<sup>61</sup> R. Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*, (Aldershot, England: Ashgate Pub. Company, 2006)

taken as what needs to be explained and at other times is asked to play the role of explanation.”<sup>62</sup>

Friedman<sup>63</sup> refers to legal culture as “public knowledge, attitudes and behaviour patterns towards the legal system.”<sup>64</sup> He also describes legal culture to consist of “attitudes, values and opinions held in society, with regard to law, the legal system and its various parts.”<sup>65</sup> It is imperative for the purposes of this thesis to make the distinction that Friedman outlines between the legal culture of “those members of society who perform specialised legal tasks”<sup>66</sup> and that of other citizens. He considers those members “especially important”<sup>67</sup> and refers to them as “internal legal culture.”<sup>68</sup> However, according to Nelken<sup>69</sup>, Friedman prefers to concentrate on the importance of external legal culture. Cotterrell criticises the distinction as unclear and argues that this division does not aid in the understanding of the social significance or the workings of the legal systems. He warns of “serious consequences for the explanatory usefulness of the concept of legal culture”<sup>70</sup>. Cotterrell suggests that in complex modern societies, legal culture should not be used as a description of existing empirical variability, but as “an ideal-type category to be used heuristically.”<sup>71</sup> Friedman disagrees and argues that the attitudes of judges and lawyers as an elite and powerful group contribute significantly to legal culture.<sup>72</sup>

According to Friedman, the value of legal culture is that it helps us line up relevant phenomena concerning the relationship between law and culture into one very general category, under which we can then subsume other less vague and more measurable phenomena.<sup>73</sup> Legal culture “is indeed an umbrella term to cover a range

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<sup>62</sup> *ibid*

<sup>63</sup> L.M. Friedman, *The Legal System: A Social Science Perspective*, (New York: Russell Sage Foundation, 1975)

<sup>64</sup> *ibid* 193

<sup>65</sup> n 45 above, 76

<sup>66</sup> n 63 above, 233

<sup>67</sup> *ibid*

<sup>68</sup> *ibid*

<sup>69</sup> n 48 above

<sup>70</sup> n 61 above

<sup>71</sup> R. Cotterrell, “The Concept of Legal Culture” in D. Nelken (ed), *Comparing Legal Cultures* (Dartmouth Publishing Company Ltd, 1997), 23

<sup>72</sup> L. Friedman, “The Concept of Legal Culture: A Reply”, in D. Nelken (ed.), *Comparing Legal Cultures* (Dartmouth Publishing Company Ltd, 1997), 36

<sup>73</sup> *ibid* 33

of measurable phenomena.”<sup>74</sup> Friedman says legal culture “determines when, why, and where people use law, legal institutions or legal process; and when they use other institutions or do nothing...it sets everything in motion.”<sup>75</sup> The causal significance of legal culture, he says, seems to be asserted. Cotterrell does not seem to be convinced by the arguments made by Friedman. Cotterrell argues “the concept of legal culture explains too much...yet at the same time, it explains very little...legal culture itself embraces such an indeterminate array of elements and operates on such an indeterminate set of levels of generality or specificity.”<sup>76</sup> He suggests that the enquiries that aim at conceptualising legal culture should be concerned with specific and differentiated elements that can be identified and related within these aggregates.<sup>77</sup> Cotterrell concludes that “strictly speaking there is no legal culture, but only culture seen from a certain standpoint of legal relevance to the observer.”<sup>78</sup>

Tate<sup>79</sup> examines legal culture and concludes that it is not reducible to public opinion or the attitudes of legal professionals. He also argues that institutions and legal culture are “mutually exclusive”. However, he agrees with Cotterrell that “legal culture has that slippery residual variable quality about it...It is everything and nothing simultaneously. It is the totality of laws, practices and opinions. And it somehow simultaneously stands apart from these things and effects how they work. It is both cause and effect.”<sup>80</sup>

Even though Friedman is a strong advocate of the concept of legal culture, he also admits that the concept is “an abstraction and a slippery one”<sup>81</sup>. Therefore, it seems the question; “why maintain a concept that is so hard to pin down?”<sup>82</sup> is justified. Cotterrell answers this question stating that the concept serves an artistic rather than a scientific function; “it allows impressions of general tendencies to be sketched.”<sup>83</sup>

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<sup>74</sup> ibid 34

<sup>75</sup> n 45 above

<sup>76</sup> n 71 above, 20

<sup>77</sup> n 61 above

<sup>78</sup> ibid

<sup>79</sup> C.N. Tate, “Book Review of Dutch Legal Culture”, *The Law & Politics Book Review*, Vol. 6 No. 9 (August, 1996), 122

<sup>80</sup> ibid 122

<sup>81</sup> L.M. Friedman, *The Republic of Choice: Law, Authority and Culture*, (Cambridge, Mass.: Harvard University Press, 1990)

<sup>82</sup> n 71 above, 20

<sup>83</sup> ibid

He contends that the use of legal culture simply infers and suggests explanations in behavioural terms, where they cannot be easily supported by systematic empirical analysis. This does not mean that Cotterrell does not see the possible usefulness of the concept. He outlines that in certain contexts;

“...the idea of an undifferentiated aggregate of social elements, co-present in a certain time and place, may be useful and even necessary in social research...the concept of legal culture may be useful to embrace provisionally an entire contextual matrix in which state law operates.”<sup>84</sup>

However, Cotterrell insists that the discussions of legal culture as a means of inferring and suggesting general impressions of behaviour that could not be supported by empirical analysis is defective. It is a convenient concept through which provisional reference can be made to the general environment of social practices, traditions and values within which law exists.<sup>85</sup> Chase<sup>86</sup> also contends that the difficulties with the concept of legal culture are its vagueness and the failure of individuals to acknowledge departures from a social orthodoxy.<sup>87</sup>

Despite Cotterrell’s criticisms Friedman argues that as legal culture lies in states of mind i.e. attitudes and behaviours, the measuring of which empirically would not be easy, but that this does not mean that they do not exist. Legal culture does not have to be directly measured but it covers a wide range of phenomena that can be measured. The fact that inferences cannot be rigorous does not mean they are not worth making. He contends that there is a natural tendency among academics to overrate the importance of purely intellectual elements of culture, culture as a concept is no worse than other overarching social science concepts. He concludes legal culture “is a useful concept, despite its failings; and I would hate to have to give it up.”<sup>88</sup> Amsterdam and Bruner agree with Friedman, “we seem to need a notion of culture that appreciates its integrity as a composite – as a system in tension unique to

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<sup>84</sup> ibid 29

<sup>85</sup> ibid

<sup>86</sup> n 6 above, 6

<sup>87</sup> ibid

<sup>88</sup> n 72 above, 39

a people not in perpetuity but at a time and place.”<sup>89</sup> The problem with legal culture does not just relate to definitions and measurements, cultural analysis is difficult because “it is virtually impossible to sort out the causal relationship between culture and behaviour, even when the former is not defined tautologically as the latter.”<sup>90</sup> Notwithstanding these arguments, Cotterrell<sup>91</sup> insists that the concept of legal culture is inadequate and theoretically incoherent.

This concept has some natural boundaries as described by Van Erp;<sup>92</sup> “in a community which shares a common culture, all members do not necessarily share the culture of that community's legal sub-community.”<sup>93</sup> In my interviews with the arbitration profession in Amman, I focused on a small minority of lawyers and engineers who dealt with arbitration. They were all men and had an average age of 55 years old. Their backgrounds were very similar and building a legal culture for them is one of the aims of this research. Nelken makes a distinction between the legal cultures of all the different branches of law. He says “lawyers specialising in some subjects may have less in common with other lawyers outside their field than they have with those abroad.”<sup>94</sup> This is certainly true of my interviewees in Amman; they shared many opinions and attitudes with each other as well as their international counterparts.

It seems clear that the concept of legal culture has some usefulness. The beliefs, assumptions and practices understood as cultural no doubt affects the operation of the legal system and the players within it. However, a way must be found so these characteristics can be systematically included to the description of legal cultures, avoiding facile, deterministic and tautological explanations. Chase<sup>95</sup> makes the critical point that the definition of legal culture must depend on the purposes that the definition aims to explain. Cotterrell<sup>96</sup> reflects that this concept is most useful when

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<sup>89</sup> A.G. Amsterdam, and J.S. Bruner, *Minding the Law*, (Cambridge, Mass.: Harvard University Press, 2000), 231

<sup>90</sup> World Bank, “Legal Culture and Judicial Reform” at <http://www1.worldbank.org/publicsector/legal/LegalCultureBrief.doc>

<sup>91</sup> n 61 above

<sup>92</sup> S. van Erp, “The Editorial”, *Electronic Journal of Comparative Law*, Volume 5.1, March 2001

<sup>93</sup> ibid

<sup>94</sup> n 48 above

<sup>95</sup> n 6 above, 7

<sup>96</sup> n 61 above

it emphasises the complex and diverse social matrix in which modern legal systems exist. However, the reliance on a general concept of culture makes the theoretical identification of a specifically legal culture problematic. The most appropriate use of culture, according to Cotterrell, is when the clusters of social phenomena whose exact interrelation is unknown and “whose collective significance is recognizable and requires emphasis.”<sup>97</sup>

Geertz observes that “man” creates governance “by enclosing himself in a set of meaningful forms, ‘webs of signification he himself has spun’...”<sup>98</sup> Chase states that the web is spun with a number of matters that inform each other. These are social arrangements, symbolic systems, epistemology, psychology and practices.<sup>99</sup> The thesis that law ‘mirrors’ society, in other words law roughly reflects the culture in which it is found is not manifest in Jordan. As argued by Tamanaha<sup>100</sup>, globalisation of commerce and the transplantation of legal practices and concepts have undermined this premise. However, the western institution of arbitration has not been easily transferred to Jordan and the Middle East. One matter is clear, culture informs legal culture and they both inform the disputing processes and in turn the particular society’s view of justice.

## 1.6 Methodology

In order to experience and understand the legal culture of Jordan, I used an ethnographic approach. The use of this method provided me with a holistic picture which helped me understand the subject fully by peeling off layer upon layer of the legal dynamics of Jordan while I living as a participant-observer within the Jordanian arbitration scene. Ethnography allowed me to study and interpret cultural diversity through field work. It provided an account of Jordanian culture, the legal society and the arbitration community in Amman. The relationship between law and society and in turn culture is perfectly suited to this ethnographic approach. Merry explained, “The focus of our work is not on law and society, but on the ways in which law and

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<sup>97</sup> ibid 34

<sup>98</sup> n 51 above, 167, 182

<sup>99</sup> n 6 above, 3

<sup>100</sup> B.Z. Tamanaha, *A General Jurisprudence of Law and Society*, (Oxford: Oxford University Press, 2001)

society are mutually defining and inseparable. One fundamental point is that law is intimately involved in the constitution of social relations and the law itself is constituted through social relations.”<sup>101</sup> For the purposes of this research, I have used a wide meaning to ‘law’, to include rules, customs, rituals and regulations. My field research consisted of a period of nine months where I resided in Amman and then I visited regularly over the next three years.

The site of my fieldwork was Amman, the capital of Jordan. Within that geographical location, I circulated around a number of Jordanian law firms, the main courthouse in Amman, professional conferences and workshops relating to arbitration in the Middle East and Europe. The research consisted of observations of arbitration cases and interviews with arbitration specialists in Amman who were both lawyers and engineers.

My field research began in one of the law firms in Amman. In the firm, there were two partners; one of them a renowned Arab arbitrator, as well as three lawyers and two trainee lawyers. I worked there as a trainee lawyer, closely involved with the partner specialising in arbitration. I assisted in drafting arbitration claims and defences, researching the law, as well as sitting in on meetings with clients and taking instructions.

My next field research site was the office of a unique Jordanian firm which has three partners and a number of lawyers both senior and junior. The uniqueness of this firm stems from its strict division into three departments, each run by one of the partners with his own team. The departments are litigation and arbitration; merger and acquisition and banking and finance. I attended morning meetings of the litigation and arbitration department and went through the files on international arbitration cases that have been completed and also ones that were still active.

My third field research site was the firm of a well respected Jordanian lawyer who has over 40 years experience. His son is also a lawyer and worked in the firm alongside two other lawyers. He conducts a large number of local arbitration cases,

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<sup>101</sup> S.E. Merry, "Culture, Power, and the Discourse of Law" (1992) 37 N.Y.L. Sch.L.Rev. 209, 209

both as a lawyer and as an arbitrator. He gave me access to all his arbitration cases and I was able to attend all hearings of the arbitration cases he conducted or was involved in. I attended about 20 arbitration cases with him.

In each arbitration hearing, I would sit in the back of the room and take notes on what was being discussed. At the end of most hearings, I would discuss what occurred with this lawyer and took his views, feelings and opinions. I contacted leading commercial lawyers in Amman in order to attend as many arbitration hearings as possible and succeeded in attending ten other arbitrations.

I also interviewed a large number of Jordanian lawyers and engineers who I had observed and who were recommended by fellow arbitration specialists. I concentrated on engineers who are known for their arbitration experience and who regularly sit as arbitrators.

My field research included workshops that took place in Amman on arbitration, alternative dispute resolution (ADR) and construction law. I gained extensive insight into the thoughts and opinions of the arbitration community in Amman over coffee breaks and lunches. I also attended international conferences in the Middle East and Europe to keep up to date with the latest issues, thoughts and perceived problems. It was very important to be seen as part of the 'mafia' of arbitration as this allowed me to gain a lot of information about how matters are perceived by the arbitration community in the Middle East.

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### Chapter Two

#### The International Commercial Arbitration World

“Commercial arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, and an agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction.”<sup>1</sup>

This comment upon commercial arbitration could arguably apply equally to both the western and Middle Eastern understanding of arbitration. It goes to the heart of the issue surrounding the legitimacy of arbitration. Originally, the international commercial arbitration model gained its legitimacy from the players within the field. They were a tight knit community with specific backgrounds, known and recognised among each other. Some of these key players will be described later in the chapter. However, as arbitration spread around the world with the growth of globalisation, it started to expand away from the core players that lent it legitimacy. As this happened, the legitimacy of arbitration increasingly came from the framework of the model itself. At the same time, arbitration has developed into a system that resembles the courts with rigid procedure, on the face of it making the identity of the players irrelevant.

The arbitration world remains a closed community. It is often perceived as a rather “closed and arcane European club”<sup>2</sup> who are purportedly selected, according to Dezelay and Garth, “for their “virtue” – judgment, neutrality, expertise”<sup>3</sup>. A very successful arbitrator puts it strongly “It’s a mafia because people appoint one another. You always appoint your friends – people you know.”<sup>4</sup> However, this small tight knit circle has been slightly weakened by the invasion of American lawyers. In practice, arbitration has shifted from an informal justice dominated by Continental

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<sup>1</sup> M. J. Mustill “Arbitration: History and Background”, *Journal of International Arbitration*, Vol. 6 No. 2 (1989), 43, 43

<sup>2</sup> Y. Dezelay & B. G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transitional Legal Order*, (Chicago: The University of Chicago, 1996), 8

<sup>3</sup> *ibid*

<sup>4</sup> *ibid* 10

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academics to offshore justice dominated by U.S. litigators. Therefore, DeZalay and Garth divide arbitrators into two groups: the “Grand old men” and the “Technocrats”. Both of these two groups can be seen as insensitive to the Islamic and Arab cultures, as will be discussed later in this thesis.

The ‘grand old men’ are the pioneers of arbitration exemplified mainly by very senior European professors imbued with “traditional values of the European legal elites.”<sup>5</sup> They are of the opinion that arbitration should not be a profession: “arbitration is a duty not a career.”<sup>6</sup> Whereas the ‘technocrats’ are a new generation of practitioners who came to arbitration because of the rapid growth of this market in the 1980s. A leading figure of this younger generation describes his generation as “technically better equipped in procedure and substance.”<sup>7</sup> They present themselves as international arbitration professionals and also as entrepreneurs selling their services to business practitioners. The large Anglo-American firms, which dominate the international market of business law, support these technocrats. As it stands, both groups compete for appointments and present themselves as the better arbitrators. However, the language and the ‘advertising campaign’ conducted by them both is very similar, focusing as it does on the advantages of arbitration compared to other dispute resolution mechanisms. They organise conferences and workshops to market themselves in particular, and arbitration in general, under the auspices of one of the arbitration institutions.

International commercial arbitration is private justice. The parties decide to submit their dispute to private adjudication, by one or more arbitrators, appointed in accordance with rules the parties themselves have agreed to adopt. Arbitration is a binding, non-judicial and private means of settling disputes based on an explicit agreement by the parties involved in a transaction. Such an agreement is typically embodied in the terms of a contract between the parties. Parties typically choose their neutral private judge (arbitrator) and accept his decision as binding upon them. International commercial arbitration can be conducted in two ways, as an ad hoc or institutional arbitration. Ad hoc arbitration does not rely on the supervision or formal

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<sup>5</sup> ibid 34

<sup>6</sup> ibid

<sup>7</sup> ibid 36

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administration of an arbitration centre. In contrast, institutional arbitration is practised under the auspices of an arbitral center, usually according to the institution's own rules of arbitration. There are few grounds for appeal of an arbitral award whether ad hoc or institutional and the terms of the award are widely enforceable thanks to the success of the 1985 New York Convention<sup>8</sup>.

Parties from different legal and cultural backgrounds are able to design a dispute resolution mechanism using the contract rather than the strict formalities of their legal systems. Arbitration is often described as a hybrid form of dispute resolution. “An international arbitration will usually have no connection with the state in which the arbitration takes place, other than the fact that it is taking place on the territory of that state.”<sup>9</sup> International commercial arbitration begins as “a private agreement between the parties and continues by way of private proceedings, in which the wishes of the parties are of great importance. It ends with an award that has binding legal force and effect and which, in the appropriate conditions, the courts of most countries of the world will recognise and enforce”<sup>10</sup>. Arbitration could be organised with a considerable lack of formality which allows it to be conducted in different countries and against different legal and cultural backgrounds.<sup>11</sup>

The two main advantages of international commercial arbitration are firstly that it gives the parties an opportunity to choose a ‘neutral’ forum and a ‘neutral’ tribunal away from their respective national courts and secondly that arbitration awards can be enforced internationally under the provisions of the New York Convention 1958. Other advantages include the flexibility of proceedings and confidentiality.

With globalization, international trade has increasingly involved a large number of cross-border projects and contracts. This inevitably means more disputes between parties from different nationalities, jurisdictions and national courts. The number of arbitration forums has grown over the last fifty years and the case load of major

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<sup>8</sup> 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention)

<sup>9</sup> A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, (London: Sweet & Maxwell, 2004), 1

<sup>10</sup> *ibid*, 11

<sup>11</sup> *Ibid*, 1

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arbitral institutions has more than doubled during the same period. The Economist predicted that arbitration is “the Big Idea set to dominate legal-reform agendas into the next century”<sup>12</sup> and this seems to certainly have happened. Thus, it would be safe to say that arbitration is now the accepted method of dispute resolution for international business disputes and it is a key institution in the structuring of international markets.

Arbitration is indeed a concept which has meanings that are extensive across differing fields of application. Casella proposes that “the availability of arbitration influences the size of the markets, while at the same time the legal doctrine shaped by the arbitrators, and the recourse to arbitration by traders, both depend on the evolution of markets.”<sup>13</sup> In the West, this has led to the status of arbitration undergoing great changes within the last few years, moving towards wider acceptance, reduced court interference during the proceedings and simpler yet stricter rules for the enforcement of the arbitration awards.

Arbitration’s success is reflected in the arbitrations of high-profile disputes, such as those arising out of the internationalizations of oil concessions in the 1970s and 1980s and huge international construction disputes such as the Channel Tunnel. Success is also evident in the tremendous growth since the late 1970s in the number of arbitration centres, arbitrators and arbitrations. To allow for this popularity, states all over the world have modernised their laws on arbitration.

In theory, arbitration seems to be a perfect form of dispute resolution that parties construct and control all of which makes it attractive to international commerce. However, as we will see in chapter 4, this is not always the case and the picture is far from perfect. Ideally; “Arbitration must be legal-culturally neutral...the reality of today’s international commerce is far from such a stage. There are very many different arbitral practices associated with different legal and commercial cultures.”<sup>14</sup>

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<sup>12</sup> The Economist, 18–24 July 1992, 17

<sup>13</sup> A. Casella “On market integration and the development of institutions: The case of international commercial arbitration” *European Economic Review* 40 (1996) 155, 158

<sup>14</sup> Y. Taniguchi, ““Is There a Growing International Arbitration Culture? An Observation from Asia”, in Van den Berg (ed.), *International Dispute Resolution: Towards an International Arbitration*

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In this chapter, I will paint a picture of the international arbitration field drawing on a study by Dezelay and Garth.<sup>15</sup> The study showed that the commercial arbitration world operates as a “loose social space” which has its internal dynamics, inner competitions and conflicts, but which also generates commonly accepted practices and rules in the sociological sense.”<sup>16</sup> The field of international arbitration has renowned players, common practices and debates as well as agreed discourse, which will all be explored in this chapter. These matters have created accepted norms within the field and in turn, some argue, a culture of international commercial arbitration. This will also be examined below. The battle of rationalities between the ‘grand old men’ and the ‘technocrats’ is evident in each part of this chapter.

### 2.1 The Players

Historically, the identities of the players in international commercial arbitration have been vital to its survival and development, as in the past the legitimacy of this private justice was derived from the arbitrators themselves. Therefore, only a very select and elite group of individuals have been able to serve as arbitrators. The arbitrators of the past and the present have what Dezelay & Garth term “symbolic capital” which is “recognised power...*recognition*, institutionalized or not, that they receive from a group.”<sup>17</sup> The values of the specific types of capital and their market-recognised equivalence are not necessarily stable. Different types of symbolic capital has gained and lost value over time in the international commercial arbitration field. The various forms of symbolic capital have included academic standing, scholarly publication, formal positions in the legal, economic or political system, as well as particular experience and training in alternative dispute resolution, connections to business, connections to political power, particular language skills and proficiency in technical

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*Culture*, International Council for Commercial Arbitration Congress Series, No. 8 (The Netherlands: Kluwer Law International, 1998), 39

<sup>15</sup> n 2 above

<sup>16</sup> A. Sayed, “Towards a Reflexive Sociology of the Arbitration Field in the Arab World” *Journal of International Arbitration*, Vol. 25 No. 2 (2008), 289, 291

<sup>17</sup> P. Bourdieu, “Epilogue: On the Possibility of a Field of World Sociology” in Bourdieu, Coleman (eds), *Social Theory for a Changing Society* ( New York: Russel Sage, 1991), 72

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aspects of arbitration practice.<sup>18</sup> In other words, these points are seen as having a certain value as ‘capital’, depending upon the purpose and audience for which they are assessed. Thus, particular experiences, expertise and connections have a capital value to the extent that they are recognised as having such value by the rest of the group.<sup>19</sup>

The symbolic capital of the players involved in arbitration is changing. It seems now the arbitrators are drawn from large, international law firms with extensive experience in commercial legal work and representation of clients in arbitrations in particular. In order to enter arbitration circles anywhere in the world, one must have a platform, whether an academic position or a partnership in a significant law firm. “The platforms can be very different. The generation of the grand old men tended to develop their platforms outside of arbitration and then enter the field at a very high level.”<sup>20</sup> However, the symbolic capital of the technocrats comes entirely from their activities in the field of international commercial arbitration. They are usually specialists in a field of law and internationalists. Their portfolios are well diversified within arbitration and their symbolic capital is their arbitration know-how. The ‘symbolic capital’ of a group of leading arbitrators both grand old men and technocrats will be discussed below.<sup>21</sup>

One of the leading men of international commercial arbitration is Pierre Lalive, a Swiss professor and lawyer. He occupies a key place in the history of arbitration and “everyone with rudimentary knowledge about international commercial arbitration knows his name.”<sup>22</sup> His curriculum vitae gives some indication of his stature at the top of the field. He has had an impressive academic career in the field of international law. He has written numerous books and articles and he is a member of all the leading international law and arbitration institutions and clubs. His portfolio of symbolic capital, therefore, covers the national, the transnational, pure international law and the practice of business and law. Practice and academia, added to a good

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<sup>18</sup> n 2 above

<sup>19</sup> ibid

<sup>20</sup> ibid

<sup>21</sup> The Biographical materials on prominent arbitrators is based on research conducted by Y. Dezelay & B. G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transitional Legal Order*, (Chicago: The University of Chicago, 1996)

<sup>22</sup> n 2 above, 19

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family pedigree are his key symbolic capital. His first involvement with arbitration was as a legal clerk in one of the relatively few arbitration cases of the time, the Buraimi matter between Saudi Arabia and the United Kingdom. The cosmopolitan symbolic capital represented by Professor Lalive – including his apprenticeships in major international arbitrations – made him able to move easily into any national or international field that required the services of legal professionals. Professor Lalive could enter at the top because his presence would lend prestige to whichever organization or activity he elected to enter, thus making him one of the key players in international arbitration.

Another central player is Judge Gunner Lagergren from Sweden. He is an example of a very well known arbitrator whose other activities have also remained central to his career. The judge's career is that of a distinguished lawyer to whom governments and businesses will entrust very complex and politically controversial disputes. His stature – the symbolic capital of a leading international public arbitrator and cosmopolitan Swedish judge – has enabled him to drop in and out of commercial arbitration as he chooses without affecting his stature.

A man with a slightly differing career, but the same stature, is William D. Rogers, a partner in the Washington D.C. law firm of Arnold and Porter. Like Judge Lagergren, he has not invested much of his time in building capital and relationships within the arbitration community. From his position of eminence as a cosmopolitan U.S. lawyer with ties to government and business, he is in demand as an arbitrator. His service as an arbitrator reinforces his prestige and authority and allows him to deploy his services in whatever is the most high-profile, significant international matter of the moment.

The career of Jan Paulsson, a partner at Freshfields, Paris, and one of the leaders of the emerging generation of technocrats, illustrates a different track than that of the characters above. His career is in essence transnational. He is an arbitration specialist, beginning his work as a new associate for the Coudert Brothers in 1975 on one of the Libyan oil nationalisation cases. As counsel, he has represented parties in seven ICSID cases – many more than any other lawyer. He has co-authored the leading book on International Chamber of Commerce arbitration, published countless

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articles in English and French, is the general editor of Arbitration International, and a vice president of the London Court of International Arbitration. His symbolic capital comes entirely from his activities in the field of international commercial arbitration. Paulsson is an expert who has grown up with arbitration. Like other members of his generation, including most notably Albert Jan van den Berg, the editor of the Yearbook on Commercial Arbitration and a lawyer and professor in the Netherlands, his capital is based above all on his arbitration know-how, which is distinctly different from the players mentioned above.

There are relatively few well-known arbitrators from Third World countries. One of these is the World Court Judge Mohammed Bedjaoui from Algeria. He has had a cosmopolitan education with a French doctorate and experience practising law in France. His career includes Dean of the Faculty of Law at the University of Algiers, Minister of Justice and permanent representative of Algeria to UNESCO. However, even though he has had a great national career, an arbitrator from the Third World must gain access to and credibility from the centre of arbitration. He must have a connection to Paris, London or another legal centre. Judge Bedjaoui's education and then practice in France gave him the recognition required.

Another leading character from the Third World is an Egyptian, Ibrahim Shihata, the vice president and general counsel of the World Bank since 1983 and the secretary-general of the World Bank's International Centre for the Settlement of Investment Disputes. He is also the editor of the ICSID Review. Dr Shihata's role in arbitration continues to be important, but his focus remains on the broader concern in which arbitration is a part: economic development and the role of law in economic development. His interest in arbitration is a by-product of his economic influence.

These profiles show how these prominent individuals have succeeded in the field of international arbitration. We have seen different generations, one formed mainly within their national settings outside of arbitration as the grand old men, and another formed in the international arena and within the arbitration field, the technocrats. There are judges, academics and practitioners, as well as lawyers from the Third World gaining recognition as arbitrators when they achieve recognition from the individuals and institutions at the centre. This generational gap that exists in the

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international commercial arbitration arena is also present in the Arab commercial arbitration world.

### 2.2 The Practice

“Commercial arbitration has changed beyond recognition within a working lifetime.”<sup>23</sup>

Like the evolution of the dominant group of arbitration from the ‘grand old men’ to the ‘technocrats’, the practice and form of arbitration has also changed. According to Mustill, arbitration has become a very profitable service industry, “the arbitral institutions, the arbitrators, lawyers, expert witnesses and the providers of ancillary services, all now charge fees on a scale which quite literally would have been inconceivable thirty years ago”<sup>24</sup>. This demonstrates how far arbitration has come from its early days.

This is not the only change in arbitration. Most commentators agree that the participants in a trade dispute, in former times, would submit to arbitration in good spirit. They would be looking for a resolution that was quick, cheap and informal, and for a decision which would be based on practical common sense and specialised knowledge of the trade.<sup>25</sup> This produces a decision which the loser would accept whether he agreed or not. This might still be the case in domestic arbitration, but in multi-million dollars international claims, that is certainly no longer the case and it can be argued that it never have been the case anyway.

Consequently, this transformation is seen by many, especially the grand old men, as a disadvantage. Berger describes what he calls “second generation arbitration”, where arbitrations are fought as intensely and with as much zeal for taking every available advantage, whether procedural or otherwise, as any action in court. This, many say, is caused by the American litigators that are now playing a principal role in arbitrations. According to a senior observer; “The [US] lawyers are changing the

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<sup>23</sup> n 1 above, 54

<sup>24</sup> ibid 54

<sup>25</sup> ibid

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rules of the game.”<sup>26</sup> Dezelay and Garth explain this as a social construction and a product of international developments. They say; “...events in the political and economic fields, especially decolonization, the oil crisis and the petrodollar mega-projects, intersected with the legal developments”<sup>27</sup> are the causes of such a change. “The vigour of the offensive brought by the American lobby to enlarge the club and to rationalize the practice of arbitration such that it could become offshore - U.S. - style – litigation.”<sup>28</sup>

Therefore, two very different styles have come to bear. The litigators with their aggressive tactics and adversarial procedure and the ‘noble arbitrators’, where the terrain remains the law. Electing arbitration, says an American close to the new generation, “doesn’t mean that I necessarily want to give up all groupings of full-scale litigation and what might come with it.”<sup>29</sup> The art seems to consist of “precisely knowing how to combine judicial attacks and negotiation behind the scenes in order to lead to an optimal solution from the point of view of the interest of the clients.”<sup>30</sup> This is obviously the opposite of the traditional Continental model found within the club of international commercial arbitration, a model of ‘auxiliary justice’, where the duty of counsel is to clarify and aid the judges in rendering good justice. No matter what the causes of this transformation, it is clear that “the Anglo-American model of the business enterprise and merchant competition is tending to substitute itself for the continental model of artisans and corporatist control over the profession.”<sup>31</sup> There is no doubt that Anglo-American litigators have changed the landscape of arbitration and in many ways may have changed some of its aims.

This battle between the grand old men and the technocrats in order to dominate the field of international commercial arbitration is similar to the battle between the lawyers and non-lawyers within the arbitration of construction disputes described by Flood and Caiger<sup>32</sup>. Both sides try to “monopolise fields through the process of

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<sup>26</sup> n 2 above, 51

<sup>27</sup> ibid 31

<sup>28</sup> ibid 53

<sup>29</sup> ibid 55

<sup>30</sup> ibid 56

<sup>31</sup> ibid 39

<sup>32</sup> J. Flood and A. Caiger, “Lawyers and Arbitration: The Jurdification of Construction Disputes”, MLR 56:3 (1993) 412

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jurdification”<sup>33</sup>. Bourdieu states, “The juridical field is the site of competition for monopoly of the right to determine the law. Within this field there occurs a confrontation among actors possessing technical competence which is inevitably social and which consists essentially in the socially recognised capacity to interpret a corpus of texts sanctifying a correct or legitimised vision of the social world”<sup>34</sup>. Thus, what is happening with the international commercial arbitration in both the west and the east could be described as jurdification.

This transformation of the system and the almost non-existence of the form of arbitration that was previously seen as successful has not been damaging, as arbitration is far from withering away. On the contrary, arbitration is growing and the community, far from dissolving, seems to be forming a nucleus of a sort of offshore justice. This success could be explained quite easily. The main aim of arbitration is to avoid one of the parties’ national courts therefore the ability to achieve that through a forum that is close to the general model of the courts is even better. Dezelay and Garth say the current model “can be much better understood as simply a delocalized and decentralized market for the administration of international commercial disputes, connected by more or less powerful institutions and individuals who are both competitive and complementary.”<sup>35</sup> These notional benefits of arbitration could be altered to become its flaws, as at the same time certain shortcomings can be perceived as advantages. This all depends on the aims of the players of that particular dispute and thus that particular arbitration. After all, arbitration can be anything the parties want it to be; there are limited rules and regulations that may restrict party autonomy.

### 2.3 The Discourse

The perceptions of the leading arbitration players are similar and in some ways repetitive. There is no doubt that many of the writers quote other writers in their work and vice versa making the discourse spherical in character. Examination of

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<sup>33</sup> ibid

<sup>34</sup> P. Bourdieu, “The force of Law: Towards a Sociology of the Juridical Field”, (R. Terdiman trans.) Hastings L.J. 38 (1987), 805, 8017

<sup>35</sup> ibid 58

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these writers has led to the conclusion that a promotional campaign is being carried out by these characters for the great virtues of arbitration. However, to the parties, the three main advantages are flexibility of procedure, enforceability of the award and confidentiality. A recent survey conducted by Queen Mary College, University of London into the attitudes and practices surrounding international arbitration found that the majority (73%) of corporations prefer arbitration to resolve their cross border disputes than litigation through national courts. The study consisted of interviews and online questionnaires to 150 in-house lawyers based at major corporations around the world.<sup>36</sup> In addition, 95% of corporations expect to continue using international arbitration.

International commercial arbitration is an essential dispute resolution mechanism for international trade and commerce. Sir Robert Jennings defines commercial arbitration as “uncommonly well adapted to developing new rules and practices better suited to the conditions of the modern world, and to finding new and reasonable accommodations between the reasonable needs of both host state and foreign investor.”<sup>37</sup> Berger goes even further and asserts, “the future development of world trade relations is depending on the existence and well functioning of a generally accepted, easily comprehensible and manageable extra-judicial dispute settlement process through arbitration.”<sup>38</sup> Arbitration is seen as fundamental to world trade and a necessary incentive to foreign investment.

Bockstiegel explains the practical motives behind arbitration, which are that states will press for the jurisdiction of their courts for reasons of sovereignty and national prestige, while foreign parties will press for avoiding the states’ courts.<sup>39</sup> A foreign enterprise will fear the possible collision of interests of the judges in certain jurisdictions, where they rely on the state for salaries, advancement and social security. The state, thus, has many means of exerting pressure on them. The mere

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<sup>36</sup> “International Arbitration: Corporate Attitudes and Practices 2008”, [http://www.pwc.co.uk/eng/publications/international\\_arbitration\\_2008.html](http://www.pwc.co.uk/eng/publications/international_arbitration_2008.html)

<sup>37</sup> R. Jennings, “Forward” in M. Hunter & A. Redfern, *Law and Practice of International Commercial Arbitration*, (London: Sweet & Maxwell, 1986)

<sup>38</sup> K. P. Berger, *International Economic Arbitration*, (Boston: Kluwer Law and Taxation Publishers, 1993), v

<sup>39</sup> K. Böckstiegel, *Arbitration and State Enterprise*, (London: Kluwer Law and Taxation Publishers, 1984), 17

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possibility of this is enough of a reason for foreign private enterprises to try to avoid the jurisdiction of the national courts of the contracting state enterprise. Thus, the natural solution is an international arbitration tribunal. This fear is also relevant even when the home contracting side is a private entity. Professor Park agrees, “arbitration and mediation impose themselves on transactions with foreign dimensions as means to reduce the prospect of ‘home town justice’ in the other side’s courts. In an international sale or investment dispute, arbitration and mediation commend themselves not so much by virtue of their alleged efficiency, as by their utility in reducing both political and procedural bias.”<sup>40</sup>

Hunter narrows the matters into the practical difficulties of playing, what he calls, the ‘away game’. This includes issues such as all documents and witness testimony must be translated into the language used by the national court of one of the parties.<sup>41</sup> It will also be necessary to engage lawyers with local rights of audience, which means that at least one of the disputing parties will not be able to have their own trusted lawyers in the driver’s seat. It must be admitted that these practical issues are real. Judge Brower recognises the importance of these complications and remarks in strong terms:

“By and large, parties to international transactions choose to arbitrate eventual disputes *not* because arbitration is simpler than litigation, *not* because it is cheaper, *not* because it is ‘final and binding’ and therefore substantially unreviewable, and *not* because arbitrators may have greater relevant expertise than national judges, although any one of those factors may be of interest; they arbitrate simply because neither will suffer its rights and obligations to be determined by the courts of the other party’s state of nationality.”<sup>42</sup>

In Gaillard and Savage’s opinion, the most valuable advantage of international commercial arbitration is the substantial liberty that the parties possess to design their own dispute resolution mechanism, largely free of the constraints of national

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<sup>40</sup> C. Buhring-Uhle, *Arbitration and Mediation in International Business*, (Hague: Kluwer Law International, 1996), viii

<sup>41</sup> M. Hunter “International Commercial Dispute Resolution: The Challenges of the Twenty- first Century”, *Arbitration International*, Vol. 16 No.4 (2000), 379, 381

<sup>42</sup> R. B. Lillich, *International Arbitration in the 21st Century: Towards “Judicialization” and uniformity? : The Twelfth Sokol Colloquium*, (London: Brill Academic Publishers, 1994), ix

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law.<sup>43</sup> There seems to be a consensus among writers that the birth of international commercial arbitration was mainly due to the need for parties to jointly construct a forum where they could resolve their disputes in a non-allied form.

Parties' choice and autonomy cannot be underestimated; they are at the heart of arbitration. Ahdab proposes that this provides the universal environment of arbitration, allowing parties to keep their cultural identities enacted in a truly international trade. He says arbitration is the "bridge between cultures and a security rail for investment."<sup>44</sup> He quotes Mathieu de Boisseson, who he calls "one of the corner stones of French and European arbitration", expressing what Ahdab says is a forgotten underlying choice behind arbitration, that is when parties resort to arbitration they are not waiving their linguistic and cultural identity, but "on the contrary, if they choose a truly international justice, an emanation of an international community of merchants, this is because they wished to refer to an authority and procedure able to decide on their dispute but also to respect their cultural originality."<sup>45</sup> Hence, not just avoiding one party's national court, but also keeping their cultural values. In a lot of ways, arbitration is a compromise between different cultures and customs and this makes global trading easier. Therefore, according to Redfern and Hunter,<sup>46</sup> international arbitration is the established method of determining international commercial disputes.

It is clear that one of the principle advantages of international commercial arbitration is adaptability. There is no uniform or standard method of procedure. What is supposed to happen is the arbitrators, the parties and their advisors will tailor a procedure to fit the dispute with which they are confronted. International commercial disputes take on a myriad of different forms. Redfern and Hunter state, "...any attempt to design a uniform arbitral procedure will be fraught with problems. It would also run the risk of defeating the purpose of international commercial arbitration, which is to offer both a binding and *flexible* means of resolving

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<sup>43</sup> E. Gaillard & J. Savage, *International Commercial Arbitration*, (London: Kluwer Law International, 1999), 1

<sup>44</sup> A. Ahdab, *Arbitration with the Arab countries*, (Boston: Kluwer Law International, 1999), 3

<sup>45</sup> *ibid* 3-4

<sup>46</sup> n 9 above

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disputes.”<sup>47</sup> On the other hand, there are a set of characteristics that are important aspects of “the emerging global economy.”<sup>48</sup> Nevertheless, the rule of thumb should be that only general guidance and a checklist may be offered as to ways of arbitrating international commercial disputes speedily and effectively, but the need for initiative and open-mindedness in adopting, adapting and developing the appropriate procedures to deal with particular disputes cannot be overstated.

International commercial arbitration occurs in different settings, these being either individual, with all arrangements made by the parties (ad hoc arbitration), or institutional, provided by administrative bodies e.g. ICC<sup>49</sup>, LCIA<sup>50</sup> and CRCICA<sup>51</sup> (institutional arbitration). In either case, the result of arbitration proceedings is normally intended to be an award, which may if necessary be judicially recognised and enforced against a defaulting party. Arbitral awards are in fact backed by the judicial power of states and thus result in a legally binding decision equivalent to the judgment of a court. Thus, making it a real substitute for litigation.

Friedmann and Mestmacker<sup>52</sup> offer what they consider a more profound reason for the favoured status of arbitration, which is obviously consistent with the previous writers mentioned. Firstly, there is opportunity of the parties to select a third party with special expertise and knowledge in a particular area and without special loyalty to a national legal system. Secondly, arbitration offers privacy and confidentiality and finally, there is the flexibility of the process. However, they propose another advantage; arbitration offers the possibility of highly specialised judgments. Thus, business people have access to judges who are familiar with the ‘usages of the trade’ and with the technicalities of the specific transaction being reviewed unlike national laws which have to respond to the needs of all citizens of the country. This allows arbitration to be tailored to the particular type of economic activity and to “be tied to the heterogeneity existing among economic agents.”<sup>53</sup>

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<sup>47</sup> *ibid* 88

<sup>48</sup> n 2 above, 34

<sup>49</sup> The International Commercial Court, Paris

<sup>50</sup> London Court of International Arbitration, London

<sup>51</sup> Cairo Regional Centre for International Commercial Arbitration, Cairo

<sup>52</sup> D. Friedmann & E. Mestmacker, *Conflict Resolution in International Trade*, (Baden-Baden: Nomos, 1993)

<sup>53</sup> n 13 above, 158

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Mattli takes the value of the ability to tailor needs further and proposes that the institutions of arbitration such as ICC and LCIA can respond much more quickly to demands for new dispute-resolution rules and services than public courts. The reason is evident: private courts are demand driven. The very same market actors who request new rules also control these courts. Casella<sup>54</sup> notes these forums are shaped from the “bottom” that is, by the firms that voluntarily finance and share the “club goods”. Thus, the demanders are also the suppliers; they possess full information on how new business practices or changing market conditions affect their dispute-resolution needs. Institutions, therefore, are capable of quickly responding to new needs by creating new services and by rewriting the charters of their courts. The frequent revisions of the rules of major arbitral institutions attest to the high degree of institutional flexibility of these forums. Casella goes on to say that international arbitration is understood to provide a “super-national” jurisdiction created by international businessmen, shaped by the evolution of international markets, and itself responsible for some of this evolution. It has been theorized as the road towards a transitional law, a “self-made economic law” created spontaneously by private traders and evolving independently of national parliaments and courts. Arbitration “is a kind of social jurisdiction, as opposed to state jurisdiction. International commercial arbitration is the jurisdiction of the business circles engaged in international trade.”<sup>55</sup> This has led the ‘club’ to attempt to formalise a “transitional” procedural law and “*lex mercatoria*”. The former as procedural rules that govern the conduct of the arbitration and the latter a substantive law to govern the substance of the dispute. Both rest on the premise that local arbitration laws and municipal laws are by definition inapplicable to international arbitration, which is visualised as occupying a juristic universe of its own governed by the law of the international trading community, detached altogether from the mundane preoccupations of any single national system of arbitration law.

In my opinion, this description of arbitration as wholly controlled by business and finance is extreme to say the least. There is obviously no doubt that the corporate world plays a vital part in the success of arbitration, but this success would not be

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<sup>54</sup> *ibid* 156

<sup>55</sup> *ibid*

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possible without the cooperation and recognition of national courts, not just for the enforcement of arbitral awards, but also in the enforcement of procedural orders in the assistance of tribunals. On the other hand, one cannot deny the two major successes of this “club” on the international arena: the Model Law and New York Convention. Both of which have served international commercial arbitration and increased its use and familiarity across the globe.

The 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law) was drafted to provide harmonized standards for national legislation to regulate private arbitration processes. It also played an important role in setting minimum standards, at least on the statute books, for the arbitration processes. There are now 37 countries in five different continents that have adopted or enacted legislation based on the Model Law. This includes Jordan.

The UNCITRAL Arbitration Rules 1976 were followed by the UNCITRAL Model Law 1985 and were drawn up with the assistance of a wide range of experts hailing from different regions of the world. The drafting body for these two instruments was UNCITRAL, the United Nations Commission on International Trade Law, which was itself chosen on a regional basis from amongst members of the United Nations in order to ensure that it was broadly representative of the world's principal legal, social, cultural and economic systems. Nine members are from Africa, seven from Asia, five from Eastern Europe, six from Latin America, and nine from Western Europe 'and others'. These others included Australia, Canada, New Zealand and the United States.

The legislative history of the Model Law so painstakingly framed and discussed and then reviewed and finally adopted by the Commission, is a great success story. It is indicative of how an international body, by consensus, can draft an instrument for adoption by varying political, cultural and economic systems in the East and the West. On 11 December 1985, the General Assembly of the United Nations put its stamp of approval on the Model Law when it adopted a resolution recommending that all states give consideration to the Model Law view of the desirability of uniformity in the law of arbitral procedures and the specific needs of international commercial arbitration practice.

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In 1985, the U.N. General Assembly adopted the Resolution approving the Model Law on International Commercial Arbitration. The resolution expressly recognised “the value of arbitration as a method of settling disputes arising in international commercial relations, because arbitration contributes to the development of harmonious international economic relations.”<sup>56</sup> This Model Law will help eliminate any confusion that may be suffered by the parties and allow them to make a more informed choice as to the law and seat of arbitration.

The second instrument essential to modern arbitral procedure is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) which has been ratified by 160 countries<sup>57</sup>. It allowed arbitral awards to be enforced all over the world. Carboneau puts it idealistically,

“The New York Convention has successfully developed a transitional judicial framework relating to arbitration – a framework characterized by the reference to emerging international commercial realities and the dynamic interplay between the content of an international instrument and the interpretive and enforcement powers of national courts. The convention truly international stature and law making capacity are built upon two factors: its passive and largely symbolic function of codifying an existing and emerging international consensus on arbitration, and its endorsement by national legal processes that seek to affirm and integrate the convention’s content and underlying intent and thereby, entrench the Transnational recognition of and support of arbitration.”<sup>58</sup>

Nariman explains the journey to the most successful multilateral convention so far adopted by the United Nations. He sees the hunt for a commercial dispute resolution process as caused by the disintegration of colonial empires, the establishment of independent nation states and the increased growth of trade between them. The New York Convention was born out of the failure of the 1927 Geneva Convention as an effective treaty for the enforcement of foreign awards. In 1953, the International

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<sup>56</sup> United Nations Commission On International Trade Law UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, vii,

[http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)

<sup>57</sup> As at June 31, 2004

<sup>58</sup> T. E. Carboneau, *Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds*, (Urbana: University of Illinois Press, 1989), 67

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Chamber of Commerce (the ICC) took the initiative for drafting a new instrument concerning foreign arbitration awards and submitted it to the United Nations. This was to become the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Under the Convention, almost in one bound, foreign arbitral awards became more acceptable and easier to enforce than foreign judgments. Thus, cementing the place of arbitration across the world.

International commercial arbitration has become big legal business and national legal systems compete for international arbitration cases. This is due to the increase in world trade and consequently the conflict potential of international transactions. Thus, international commercial arbitration has become a lucrative source of revenue for the countries hosting arbitration tribunals, especially now as it has developed into a “growth industry.”<sup>59</sup> Legislatures all over the world, including in the Middle East, have begun to respond to the needs of international commerce and have enacted new arbitration laws as “marketing strategies”, signaling to the international commercial community that their legal environment is user friendly and is conditioned for commercial services. However, according to Caron, this is not necessarily favourable for the parties. He says; “This is not to imply that there is a perfect market. A limiting factor is that consumer knowledge often is incomplete. Even for the knowledgeable consumer, there are so many variables to weigh that it can be quite difficult to select the ‘best’ mechanism.”<sup>60</sup> Consequently, there is more confusion than choice.

Goldman is also pessimistic about the trend towards harmonisation and argues that identical rules found in different legal systems or arbitration rules may in practice give rise to contrasting solutions due to the traditional differences between nations and the differing pace with which states accept new ideas.<sup>61</sup> Bourdieu offers another explanation for the difficulties surrounding international harmonisation and for some of the complications of international institutions.<sup>62</sup> As these rules rely in great part on

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<sup>59</sup> n 1 above, 55

<sup>60</sup> B. E. Carter, D. D. Caron, F. Roessler, M.S. Millhauser, T. E. Dawson, Reporter, “Comparative Analysis of International Dispute Resolution Institutions,” 85 Am. Soc'y Int'l L. Proc. (1991) 64

<sup>61</sup> E. Gaillard & J. Savage, *International Commercial Arbitration*, (London: Kluwer Law International, 1999)

<sup>62</sup> n 2 above

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the lawyers of individual states and since these lawyers are trained nationally, and for the most part make their careers nationally, it is not surprising that they seek, as a matter of course, to deploy their ways of thinking and practising in the construction of international institutions. This “makes the international, the site of a regulatory competition between essentially national approaches.”<sup>63</sup>

Berger also criticises the legislature’s eagerness to meet the concerns and needs of the foreign consumer, which have led to the phenomenon of private lawmaking.<sup>64</sup> Draft arbitration laws are designed and discussed by private committees of experts, comprising lawyers from private practice, law professors, interested arbitral institutions and representatives from other lobbying groups. These private committees rarely consider the needs of the local community and the way the new arbitration legislation would fit within the state’s legal system.

Hunter argues that all this is not enough, an innovative system that satisfies the needs of commerce is required.<sup>65</sup> There is no doubt that arbitration is a useful refinement of state-provided dispute resolution and will always be necessary, but he criticises this as “no more than refinements applied to a system that has been in use for tens of thousands of years. They are not truly innovative developments that are capable of providing a real response to the rapidly changing environment in which international commerce is conducted.”<sup>66</sup> Now we see the clear lines between the theory of arbitration and its practice. It seems perfect on paper, however when taken and modified in different settings and environments, cracks start to show. At present, there are calls from many writers for an alternative to arbitration in the same way as arbitration is an alternative to litigation.

David adequately summarises the main motives behind resorting to arbitration; improving the administration of justice, the search for another justice, the search for conciliation, and for a dispute resolution process outside the province of the courts.<sup>67</sup> He says in the first series of cases, parties want the dispute to have the same

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<sup>63</sup> *ibid* viii

<sup>64</sup> n 38 above

<sup>65</sup> n 41 above

<sup>66</sup> *ibid* 392

<sup>67</sup> R. David, *Arbitration in International Trade*, (Boston: Kluwer Law and Taxation Publication, 1985)

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conclusion, which would have been given by the court, but they expect this solution to be given in better conditions by an arbitration tribunal. This way the dispute will be settled more quickly, cheaper, after a less formal procedure, by persons who are trusted by the litigants or who have technical knowledge not to be expected in the case of ordinary judges. In the second group of cases, the parties want their disputes to be settled with regards to substance by a different set of rules i.e. not the law of the state, but by rules derived from commerce and commercial usages. The third category of cases, the parties want a solution that is acceptable and voluntarily enforceable by them both, so that smooth relations might continue between them in the future. In the fourth series of cases, the parties resort to arbitration because the nature of the dispute cannot be resolved by a court. This arises especially if the arbitrator is called to fill in gaps in a contract or to vary the terms of the contract. Parties do not resort to arbitration for one purpose alone, there are a variety of motives. However, nearly always, parties will appreciate the fact that, in arbitration hearings, there is less solemnity and less bureaucracy, procedure is less rigid and the discussion takes place in a more peaceful climate.

On a more empirical level, a study<sup>68</sup> on the advantages of arbitration, where written and oral responses from 68 lawyers and arbitrators were obtained, found the “most significant advantages” of international arbitration were that it provided a neutral forum and that the New York Convention facilitated the enforcement of awards. Other “important advantages” included the confidentiality of the process, the expertise of the arbitrators, the lack of an appeals process, and limited discovery. Nothing seems to be surprising there but the study by Naimark and Keer<sup>69</sup> who surveyed parties and lawyers involved in arbitrations administered by the American Arbitration Association (AAA) from January to November 2000 produced different results. One of the questions in the survey asked participants to rank a variety of factors “in order of their importance IN THIS DISPUTE ONLY.” The factors were “speed of outcome,” “privacy,” “receipt of a monetary award,” “a fair and just outcome,” “cost-efficiency,” “finality of a decision,” “arbitrator expertise,” and

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<sup>68</sup> C. R. Drahozal “Of Rabbits and Rhinoceri: A Survey of Empirical research on International Commercial Arbitration”, *Journal of International Arbitration*, Vol. 20, No. 1 (2003), 23

<sup>69</sup> R. W. Naimark & S. E. Keer, “International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People”, 30 Int’l Bus. Law (2002), 203

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“continuing relationship with opposing party.” Far and away the highest ranked factor was “fair and just outcome,” which “was nearly twice as important as the next closest rankings.” By contrast, privacy and the desire to continue a relationship with the opposing party ranked at the bottom.

The low ranking of “continuous relations” was explained by Myers, who is the head of a major international construction group; “...proceedings which occurred after the completion of an [international construction] contract...are resolved in a distinctly adversarial atmosphere in which large sums of money are sought, with little or no “commercial downside” – meaning that the commercial relationship has normally expired and the parties have nothing to lose by refusing to accommodate each other for the sake of continuous harmonisations of commercial relations.”<sup>70</sup>

In conclusion, international commercial arbitration is an instrument devised by international trade and commerce to maintain control over their contracts and disputes. This is ensured by retaining a closed community with admission by invitation only and formulating norms that guarantee that arbitration will remain the dominant form of international dispute resolution. However, this traditional hegemony has started to be affected by the admission of American lawyers and will be affected further when developing countries grasp the virtues of arbitration and uses them to their advantage.

### 2.4 The Culture

As can be seen international commercial arbitration is a community with its own players, institutions, regulations, rules and discourse. Thus, leading some to contend that now we have a culture of “international commercial arbitration”. For the purposes of this section I will use Bourdieu definition of culture and that is a field that “is organised around a body of internal protocols and assumptions, characteristic

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<sup>70</sup> J. Myers, “Private Justice in a Global Economy: From Litigation to Arbitration”, *International Organization* 55(4), Autumn 2001, 919, 935

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behaviours and self-sustaining values”<sup>71</sup>. Many see arbitration as a meeting point for different legal cultures, a place of convergence and interchange wherein practitioners from different backgrounds create new practices to help resolve international disputes effectively and efficiently. There is increasing discussion of a transitional culture common to practitioners, arbitrators and the parties involved in the arbitral process.<sup>72</sup> The culture of arbitration is typically referred to as the gradual convergence in norms, procedures and expectations of participants in the arbitral process.<sup>73</sup> Ginsburg<sup>74</sup> states that arbitration culture can be facilitative, encouraging, efficient as well as an effective form of communication. Also, it can be monopolistic; trying to keep out new entrants with different cultural claims. Gray feels that in the past 20 years “we have come to some consensus as to what the basic arbitration procedures should be, as well as what should be the fundamental relationship between arbitration and the court.”<sup>75</sup> The culture of arbitration contains sub-cultures, which sometimes seems like the only form of culture that is recognised. This is because there is no general consensus on what the culture of arbitration should constitute. These sub-cultures would be specific to a certain type of dispute or a certain sector, for example, construction or maritime.<sup>76</sup>

Taniguchi argues there is “a distinct commercial arbitration culture in the West”<sup>77</sup>, which non-westerners perceive as exclusionary. However, “arbitration has become a legitimate method of dispute resolution virtually everywhere in the world with a varying degrees and scope of application.”<sup>78</sup> Therefore, “if arbitration culture means the popularity of arbitration and enthusiasm about it, there is today a growing international commercial arbitration culture.”<sup>79</sup>

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<sup>71</sup> P. Bourdieu, “The force of Law: Towards a Sociology of the Juridical Field”, (R. Terdiman trans.) Hastings L.J. 38 (1987), 805, 806

<sup>72</sup> n 2 above

<sup>73</sup> Van den Berg, *International Dispute Resolution: Towards an International Arbitration Culture*, International Council for Commercial Arbitration Congress Series, No. 8 (The Netherlands: Kluwer Law International, 1998)

<sup>74</sup> T. Ginsburg, “The Culture of Arbitration”, 36 Vand. J. Transnat'l L. (2003) 1335

<sup>75</sup> W. Gray, “Is There a Growing International Arbitration Culture?”, in Van den Berg (ed.), *International Dispute Resolution: Towards an International Arbitration Culture*, International Council for Commercial Arbitration Congress Series, No. 8 (The Netherlands: Kluwer Law International, 1998), 24

<sup>76</sup> n 14 above

<sup>77</sup> ibid 36

<sup>78</sup> ibid

<sup>79</sup> ibid

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Assuming that there is some sort of international commercial arbitration culture, what does it actually look like, is it the design and production of the grand old men or the technocrats? There are in some ways two general cultures, which represent the particular groups of players. However, there are similarities between the groups and the cultures, “this fight for power contains the true transformation that is taking place – the passage from one mode to another for the production of arbitration and the legitimating of arbitrators.”<sup>80</sup>

In the original culture of the grand old men, the arbitration market selected those at the top of their domestic profession to become senior arbitrators: “high profile, high visibility...national aura behind them.”<sup>81</sup> Those arbitrators see arbitration as “a duty not a career...Arbitrators should render an occasional service, provided on the basis of long experience and wisdom acquired in law, business, or public service.”<sup>82</sup> Arbitral decisions were not revered so much for their legal accuracy or precision, as for their sense of fairness and practical wisdom. These kinds of arbitrators were often an expert from the same industry as the parties, who exercised a sort of paternal authority.<sup>83</sup>

The arbitrator was expected to render a just and equitable result, even if that sometimes meant disregarding the express terms of the contract or the clear provisions of the chosen law. These modes of decision-making are sometimes described in terms of formal doctrines, such as *amiable compositeur* and *ex aequo et bono*,<sup>84</sup> which expressly authorise arbitrators to disregard the stricture of so-called auxiliary rules, such as statutes of limitations, in order to do justice.<sup>85</sup> The doctrine of *amiable compositeur*, which is often translated to mean “author of friendly compromise,” has been described as “allow[ing] arbitrators to decide cases in accordance with customary principles of equity and international commerce. This power permits arbitrators to arrive at an award that is fair in light of all

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<sup>80</sup> n 2 above, 39

<sup>81</sup> *ibid*

<sup>82</sup> *ibid* 5

<sup>83</sup> W. L. Craig, “Some Trends and Developments in the Laws and Practice of International Commercial Arbitration”, 22 TEX. INT’L L.J. (1995) 1

<sup>84</sup> J. Beechey, “International Commercial Arbitration: A Process Under Review and Change” Aug/Oct DIS. RES. J. (2000) 32

<sup>85</sup> C. Lecuyer-Thieffry & P. Thieffry, “Negotiating Settlement of Dispute Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes”, 45 Bus. L. (2000) 577

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circumstances, rather than in strict conformity with legal rules [but] . . . generally [they] may not disregard mandatory provisions of substantive law or the public policy of the forum state.”<sup>86</sup> The doctrine of *ex aequo et bono* is very similar to *amiable compositeur*, except that the powers of the arbitrators are slightly broader, enabling them to disregard even mandatory provisions of substantive law in order to reach an equitable outcome.

In the newer developing culture of the technocrats, the large Anglo-American law firms that have come to dominate the international market of business law have created an arbitration culture that is based on rationalisation of arbitration.<sup>87</sup> This has facilitated their introduction into the ‘arbitration club’ and then allowed their legal techniques to establish their pre-eminence. The arbitration culture of the technocrats is similar to the court process with procedural and substantial law restraints and is certainly much more restrictive than the culture created by the grand old men. “The Anglo-American model of the business enterprise and merchant competition is tending to substitute itself for the Continental model of legal artisans and corporatist control over the profession.”<sup>88</sup> The younger arbitrators strongly criticise the vagueness and uncertainty of *lex mercatoria* and emphasise the vital importance of technical sophistication, which of course they have.

Fuller argues that judicial function, and in the same way arbitration, lies not in the substance of the conclusion reached, but in the procedures by which that substance is guaranteed.<sup>89</sup> One does not become a judge by acting intelligently and fairly, but that is precisely why one becomes an arbitrator. Fuller feels that when arbitration started to become concerned with procedure, it lost its real purpose, which is a decision by an expert arbitrator that is familiar with the parties’ trade customs and that is respected and voluntary. “It was never about the procedures.”<sup>90</sup>

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<sup>86</sup> n 84 above

<sup>87</sup> n 2 above

<sup>88</sup> Y. Dezelay, *Marchands de droit*, (Paris: Fayard, 1992), 45

<sup>89</sup> L.L. Fuller, “Collective Bargaining and the Arbitrator”, *Proceedings of the Fifteenth Annual Meeting, National Academy of Arbitrators*, (Washington: Bureau of National Affairs, 1962), 8

<sup>90</sup> *ibid* 10

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However, the problem is that arbitration as practised today resembles litigation. The senior generation of arbitrators believe that the original success of arbitration was finding tailored solutions in order that the parties preserve their long-term contractual or business relationships. “The senior generations defended the status quo of informal, compromise-oriented arbitration close to businesses and the *lex mercatoria*, insisting that only very experienced and scholarly individuals, selected on the basis of their excellent legal careers, had the stature and judgment to resolve such cases.”<sup>91</sup> They say the technocrat’s model is a “highly litigious process.”<sup>92</sup> The technocrats on the other hand argue, “arbitration can only be successful and legitimate if practiced in a more legalised fashion.”<sup>93</sup>

In my opinion, both sides can be argued, it all depends on what the parties want. If the parties want to protect their relationships, for example, then the grand old men arbitration culture is more appropriate but if they want an offshore court-like substitute, then the technocrats’ model serves the parties best. Commercial arbitration handles disputes among business people who are practical people more concerned with efficiency than theory, more with money than ideals. Thus, the dispute resolution device they prefer may acquire different characteristics than those in general use.<sup>94</sup>

When examining the arbitration landscape carefully, one sees a number of norms that are still in dispute between the two groups of arbitrators. One of these is the suitability of the arbitrator to carry out some form of mediation within the arbitration process. The debate revolves around whether an arbitrator should adapt his procedures to the case at hand, and even at times go as far as ignoring procedural limitations, if he senses that there is a possibility for a settlement. In some situations, it is appropriate to assume the role of a mediator and “exert the gentle pressure of threat of decisions to induce agreement.”<sup>95</sup> Fuller distinguishes the moralities of arbitration and mediation. He says that mediation lies in finding an optimum

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<sup>91</sup> n 2 above, 10

<sup>92</sup> n 14 above

<sup>93</sup> n 2 above 10

<sup>94</sup> n 14 above

<sup>95</sup> H. Shulman, “Reason, Contract, and Law in Labor Relations”, *Harvard law Journal* 68(6), April 1955, 999

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settlement, where one party gives what it values less for what it values more. Arbitration, on the other hand, lies in reaching a decision according to the law of the contract. I think this distinction is artificial, there is absolutely no reason why these two processes cannot overlap or be used together to achieve the best results.

Parties in the Middle East, due to their history and culture, generally prefer and feel that they have more in common with the grand old men's way, but find themselves forced into arbitrations that look more and more like an adjudication before a national court. The majority of recognised arbitrators in Jordan are highly experienced lawyers and engineers who have practised in commercial and construction cases. Their symbolic capital is their extensive experience in law and engineering. Now, more and more young lawyers recognise the potential success that arbitration can provide and use their bilingualism and western education as their form of symbolic capital. The more that they look like their western counterparts, the more successful they think they will be. Obviously, when foreign investors, companies and their lawyers, look for lawyers in Amman, they would rather deal with people that they think understand them. Thus, they recognise similar cultures and this becomes the template for social interaction, making it easier for them to work together.

The 'arbitration club' consists of key players who play both counsel and arbitrators. The international arbitration community, which is connected by personal and professional reactions, is cemented by conferences, journals and actual arbitration. These same individuals from each country possess very similar symbolic capital and are repeat players. This is true for both the Middle East and the West.

The professional status of international practitioners is in part what confers legitimacy, real and perceived, on the international commercial arbitration system. International arbitration is derived from party consent, which is orchestrated by international lawyers. It is the international lawyer who selects the rules, laws, sites and arbitrators on behalf of the client. International lawyers wield dramatically more power in the international commercial arbitration system than their counterparts do in domestic litigation. International commercial arbitration is a *jurisprudence confidentielle*, "a confidential or secret theory and practice of law, known to a few

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key lawyers who sometimes perform legal functions in accord with it.”<sup>96</sup> The functioning of the entire system depends on party confidence (to select arbitration) and national court accreditation (to enforce arbitration agreements and awards). With expanding global markets, law is an ever more important tool for mediating trade when parties lack a common culture.<sup>97</sup>

This chapter explored the evolution of arbitration in the West in the 20<sup>th</sup> Century. It notes a clash between the ‘grand old men’ of arbitration and the ‘technocrats’. These two groups have very different perceptions of how arbitration should be conducted and more fundamentally what its aims and spirit should be. The arbitration world has recognised great players from either group and, to some extent, this has confused what could be seen as the culture of arbitration. However, certain norms and principles have been established within arbitration, most notably party autonomy and third party intervention, which is common to both sides. Whether there is an international commercial arbitration culture or not, there is certainly an arbitration community of recognised players with specific symbolic capital which is restrictive and closed and therefore perceived by non-westerners as potentially discriminatory and susceptible to bias. The interaction of this culture with the Middle East will be examined in chapter four after the longstanding principles of dispute resolution in Islamic law and tradition are outlined in chapter three.

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<sup>96</sup> W. M. Reisman, *Folded Lies: Bribery, Crusades and Reforms*, (London: Collier Macmillan Publishers, 1979), 12

<sup>97</sup> R. L. Abel & P.S.C. Lewis, “Putting Law Back into the Sociology of Lawyers”, in R. L. Abel & P.S.C. Lewis (eds.), *Lawyers in Society: Comparative Theories*, (Berkeley: University of California Press, 1989)

## Part 2

### Chapter Three

#### **Sulh: The Essence of Islamic Dispute Resolution**

*“Shall I inform you of merit greater than fasting, charity, and prayer? It is in the conciliation of people.”*

Prophet Mohammad *Sall-Allahu Alayhi Wa Sallam*  
(s.a.a.w), *Hadith* of Abi al Darda reports

In part one, we explored the western rationality of dispute resolution and more specifically arbitration. In part two, I will outline the overarching principles of eastern rationality and how it interacts with the western version. In this chapter, the reconciliatory nature of the Middle Eastern dispute resolution will be traced back to pre- Islam and will show how it was confirmed and adopted by Islam.

Dispute resolution in Islam is closely bound to the textual language and the interpretation of both the *Qur'an* and *Sunna*. In Islam, arbitration is the preferred dispute resolution process in any type of dispute including leadership, wars and marital disagreements. There are a number of examples in history to demonstrate the success of arbitration in the avoidance of bloodshed and crisis. Arbitration as a concept and as a mechanism has a long history and an entrenched position in the Arab and Islamic Middle East. *Shari'ah* is not only a source of law, it also informs cultural, economic and political life in the Middle East. Majeed argues, “it is clear that tides in the vast ocean of commerce and law are changing. Increasingly, there is a questioning of legislation imported from Western sources, and calls for a return to the *Shari'ah*.<sup>1</sup>

The main divergence between conceptions of justice in the East and West is concisely explained by a Jordanian lawyer who was a former member of the World Bank Dispute Resolution Committee “*Islam has a special understanding of justice. The justice in the West is like maths; calculated. It is exactly what you agreed on, but in Islam it is very important to extract the bitterness of the wronged party. This could*

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<sup>1</sup> N. Majeed, “Good Faith and Due Process: Lessons from the *Shari'ah*” *Arbitration International*, Vol. 20, No. 1 (2004), 97

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*not happen except if he gets all his losses back and feels that the wrong has been corrected regardless of the previous agreement. The injured party must be compensated for their actual loss regardless of the agreement.”* On the other hand, he also maintained that “*arbitration in Arab and Islamic history has almost the same rules and principles as in our modern times. The most important principle of arbitration is “In his house you go to the arbitrator” which means you cannot have the arbitrator in an environment that will affect his impartiality and therefore the parties must respect the position of the arbitrator and go to his house. This insulates the arbitrator from any pressure he may experience in another person’s house and confirms his special status and importance. This is one of the most important principles of arbitration which Shari’ah insists on. Neutrality must be complete in all matters including the actual place where the arbitration takes place – an arbitrator is a judge. These ancient principles are shared with modern principles.”*<sup>2</sup>

A distinct feature of Islam is the codified set of rules and regulations that regulate and control society in its behavioural aspects, as well as in its relations towards the state. Islam includes a just economic order, a well balanced social organisation and codes of civil and criminal laws. The fundamentals of *Shari’ah* contain two parts; first rules governing *ibadat* (devotion of rituals), which are legislated by God and explained by the Prophet, and second rules which govern, for example, civil transactions and state affairs. Islam is not just a religion, it is a way of life. *Din*—the Arabic word for religion, “. . . encompasses theology, scripture, politics, morality, law, justice, and all other aspects of life relating to the thoughts or actions of men . . . it is not that religion dominates the life of a faithful Moslem, but that religion . . . is his life.”<sup>3</sup>

This chapter explores “the duty to reconcile” imposed on all Muslims. *Sulh* (amicable settlement) is a settlement grounded upon compromise negotiated by the disputants themselves or with the help of a third party. In Islam, *Sulh* is ethically and religiously the superior way for disputants faced with conflict. *Sulh* is also a duty on any person who is adjudicating between the conflicting parties, whether a judge

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<sup>2</sup> Interview with Jordanian lawyer in Amman in June 2004

<sup>3</sup> D.S. Roberts, *Islam: A Westerner’s Guide-From Business and the Law to Social Customs and Family Life*, (London: Hamlyn, 1981) 67-68

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(*qadi*) or an arbitrator (*hakam*). *Sulh* is a legal instrument intended not only for the purpose of private conciliation among individuals and groups in lieu of litigation, it is also the procedural option that could be resorted to by a *qadi* (judge) within the context of his courtroom or an arbitrator in his conference room. Thus, *Sulh* is part of every Islamic dispute resolution mechanism.

This chapter also traces the validity of arbitration in *Shari'ah* and clarifies its conciliatory nature. Arbitration is defined in *Shari'ah* as “two parties choosing a judge to resolve their dispute and their claim. Traditionally, the differences between arbitration and formal dispute resolution through judiciary...the parties themselves select the arbitrator and... the parties themselves must voluntarily accept and obey the decision of the arbitrator.”<sup>4</sup> Like a judge, ultimately an arbitrator in Islam could impose his will on the parties based on the arguments presented before him and *Shari'ah*. However, the fact that the arbitrator has been chosen by the parties lends legitimacy to his decision, more so than a judge appointed by the state. Therefore, arbitration is preferred to adjudication.

In the last part of this chapter, Jordanian arbitrators describe how important arbitration was and still is in the country and the region. They explain how arbitration has a long and honourable history within Arab and Islamic cultures, a tradition in the heart and mind of every Jordanian and Arab.

After the advent of Islam in the seventh century, the Arabian Peninsula became the geographical base for the Islamic state, ruled by the Prophet Mohammad (s.a.a.w) and his successors, the *Caliphates Rashdeen*<sup>5</sup>. There are two main sources of Islamic law, firstly, *Shari'ah* which is the *Qur'an* that God revealed to Mohammad (s.a.a.w) who is considered to be God's final Prophet. Then there is the *Sunna*, which is the words and deeds of Mohammad (s.a.a.w). There are also three secondary sources of *Shari'ah*; *Ijma*, *Qiyas* and *Ijtihad*, which will be explained in detail below.

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<sup>4</sup> H. Mahassini, “General Principles of Islamic Law relating to International commercial arbitration” *The ICC International Court of Arbitration Bulletin*, Special Supplement, Vol. 3, No. 1 May (1992), 21, 23

<sup>5</sup> Rashid means “wise”: those who immediately succeeded the Prophet

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Islam is a religion originating from the teachings of Mohammad (s.a.a.w) of the *Qur'an* and *Sunna*. The *Qur'an* contains 114 *suwar* (chapters) and 6616 *ayat* (verses) and 77,934 words which cover virtually all aspects of life and society. Mohammad (s.a.a.w) as the Prophet became the ruler and lawgiver of a new Islamic society first in Mecca and then in the Medina from A.D. 622. When Mohammad (s.a.a.w) acted as a judge in his community, he acted in the function of *hakam* (arbitrator). Mohammad (s.a.a.w) attached great importance to being appointed by the believers as a *hakam* in their disputes, as it renewed their belief in him as a Prophet and as a person. Therefore, as long as Mohammad (s.a.a.w) was alive, he was regarded as the ideal person to settle disputes between believers through conciliation.

The *Sunna* is the term used to refer to the normative behaviour, decisions, actions and tacit approvals and disapprovals of the Prophet. The *Sunna* has been heard, witnessed, memorized, recorded and transmitted from generation to generation (as the Arabs have a great oral tradition).<sup>6</sup> The *Sunna* is the second source of Islamic law after the *Qur'an*. The Muslim nation follows the Prophet and learns from him even today.

The *Sunna* was compiled into collections according to the recorder's name and referred to as *hadith*.<sup>7</sup> By the third *Hijri* (lunar) century, there were six recognised groups of *hadiths* which are considered to be accurate among the Muslims: al Bukhari (256/870), Muslim (251/865), Abu Daúd (275/888), al Tirmidhi (279/892), al Nasa'i (303/915), Ibn Majah (273/886), with the first two collections being the most respected.<sup>8</sup> The authenticity attributed to these collections was determined based on the scrutiny of references and the cross checking of witnesses employed by the respective collectors, as well as the *isnad* (credibility of the chain of authorities attesting to the accuracy of a particular tradition).<sup>9</sup> These *hadiths* are an important part of *Shari'ah* and thus Muslims' lives.

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<sup>6</sup> M. C. Bassiouni and G. M. Badr, "The Shari'ah: Sources, Interpretation, and Rule Making," 1 UCLA J. Islamic & Near E. L. (2002) 135, 141

<sup>7</sup> I. Faruqi and L. Faruqi, *The Cultural Atlas of Islam*, (New York: MacMillan Publishing, 1986), 114

<sup>8</sup> n 6 above

<sup>9</sup> F.M. Kutty, "The Shari'a Factor in International Commercial Arbitration" (2005) *Bepress Legal Series*, 875

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The companions of the Prophet would first consult the *Qur'an*, and then the *Sunna* before deciding on any issue or problem in accordance with this *aye*:

*"O you who believe! Obey Allah and obey the Apostle and those in authority from among you; then if you quarrel about anything, refer it to Allah and the Apostle, if you believe in Allah and the last day; this is better and very good in the end."*<sup>10</sup>

This process is still followed by Muslims. If these two primary sources are silent, then they resorted to extrapolating and deducing from the first principles gleaned from the two divinely inspired sources of the *Qur'an* and *Sunna*. To aid Muslims of that time and the future, the second *Caliph* of Islam, Umar ibn al-Khatt'ab, instituted the body of legal opinions of the companions of the Prophet as a tertiary source that could be consulted by later jurists (*fujaha*).<sup>11</sup> It is clear that Islamic law has three distinguishable facets, namely revelation (the *Qur'an* and the *Sunna*, which is also considered divinely inspired), interpretation and application.

Early Muslim jurists and scholars set out to canonize the *Sunna* and developed *fiqh* to systematize the development of the law.<sup>12</sup> A distinction must be made between *Shari'ah* and many of the technical legal rules derived from the *Qur'an* and *Sunna* through *fiqh*.<sup>13</sup> A *faqih*<sup>14</sup>, or jurist, derives these rules and thus his decision is not eternal, but open to re-interpretation in the light of, *inter alia*, new social, economic, educational and political circumstances and needs.<sup>15</sup>

The doctrines of the different sects of Islam have produced an immense wealth of differing opinions ranging from extreme conservative opinions to the most liberal ones, however, none of those opinions can contradict the *Qur'an* and *Sunna*. The field of the settlement of disputes is one of the richest fields of differing opinions between the sects of Islamic law.

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<sup>10</sup> Verse 59 in *Sura Nisa* (Women)

<sup>11</sup> n 7 above, 275

<sup>12</sup> M. H. Kamali, "Source, Nature and Objectives of Shariah," 33 *Islamic Quarterly* (1989), 211, 212

<sup>13</sup> *ibid*

<sup>14</sup>"A *Faqih* means a jurist; an expert in the field of law, who possesses outstanding knowledge of revealed sources and methodology, and the intelligence to make use of the basic sources through independent reasoning and the principles provided by the *Shari'ah*.

<sup>15</sup> A. G. Muslim, "Islamic Laws in Historical Perspective: An Investigation Into Problems and Principles in the Field of Islamization" 31 *Islamic Quarterly* (1987), 69

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It is important to note that the areas governed by strict, detailed and clear rules in Islam are relatively limited and are mostly related to religious practices such as praying and fasting. The relationship between members of society in different fields, including dispute resolution, is governed by general principles interpreted and explained by the three secondary sources of Islamic law; *Ijma*, *Qiyas* and *Ijtihad*.

The *qiyas* is reasoning by analogy to solve a new legal problem. The *Ijtihad* is defined as the intellectual effort by a *mujtahid* (one who is qualified to do *ijtihad*, a jurist consult) in deriving rules consistent with the first principles of Islam. *Ijtihad* could refer to the use of *qiyas* to extend a rule or independently taking account of the *Maqasid al Shari'ah* (the higher purposes or objectives of the *Shari'ah*). To carry out these techniques it was imperative that jurists, "be familiar with the broad purposes of the Law, so that when choices are to be made, they will be able to choose interpretations which accord with the spirit of the Law."<sup>16</sup> In principle, the *Shari'ah* permits legal rules to be changed and modified in accordance with changing circumstances. The justification for *qiyas* and *ijtihad* is found in the *Qur'an* and *Sunna*. As evidence of his support for *Ijma*, Akaddaf cites the Prophet Mohammad (s.a.a.w), "[m]y nation will not agree unanimously in error."<sup>17</sup> *Ijma* or consensus of the community is a third source of Islamic law. Once a fresh *ijtihad* or *qiyas* has been reached and a consensus develops around it (ratification by the community), then it becomes part of the *corpus juris* of Islamic law. Khaliq describes that *qiyas* are often used to apply Islamic principles to the modern era.<sup>18</sup>

The major schools of Islamic jurisprudence represent various regional and doctoral approaches to solving legal questions at the beginning of the first two centuries of Islam. All Islamic scholars agree that the *Qur'an* is the main source of *Shari'ah* and thus, whatever is stated in the *Qur'an* must be followed by Muslims, as well as the

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<sup>16</sup> B. Weiss, "Religion and Law: Middle Eastern Influences Upon the West" *The American Journal of Comparative Law*, Vol. 26, No. 2, Proceedings of an International Conference on Comparative Law, Salt Lake City, Utah. February 24-25, 1977 (Spring, 1978), 199, 204

<sup>17</sup> F. Akaddaf, "Application Of The United Nations Convention on Contracts For The International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?", 13 Pace Int'L L. Rev. 1 (2001), 18

<sup>18</sup> U. Khaliq, "Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated by the Shari'ah", 2 Buff. Jour. Int'L L. 1 (1995), 8

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*Sunna*. The primary differences between the schools lies in the circumstances in which their doctrines use the three techniques of interpretation.

“The great jurists of Islam --Shafi'i, Abu Hanifah, Malik and Ahmad ibn Hanbal -- all understood the compound term *usul al fiqh* -not as the general principles of Islamic law, but the first principles of Islamic understanding of life and reality ...The *faqihs* of the classical period were real encyclopedists, masters of practically all the disciplines from literature and law to astronomy and medicine. They were themselves professional men who knew Islam not only as law...”<sup>19</sup>

Numerous schools of jurisprudence developed and began along geographical lines, in Medina and Kufa (Iraq), but later evolved around individual scholars or jurists.<sup>20</sup> The four schools of *Sunna* jurisprudence are named after the respective founders: the Hanafi School (Abu Hanifah. d.767), the Maliki School (Malik ibn Anas, d.795), the Shafi'i School (d.819), and the Hanbali School (d.855).<sup>21</sup> Each developed its own scholarship by interpreting the *Qur'an* and *Sunna* using the three techniques: *ijihad*, *ijma* and *qiyas* regarding many areas of Muslim life including dispute resolution.

### 3.1 Reconciliation in Pre-Islam

The Arabian Peninsula was inhabited by tribes who descended from a common ancestor.<sup>22</sup> “It was to the tribe as a whole that individuals owed allegiance and it was from the tribe that protection of interests was obtained.”<sup>23</sup> Tribal justice was administered by the chief of the tribe based on “a body of unwritten rules”<sup>24</sup>. These rules were adopted to a form suitable to their way of life, which used arbitration and conciliation extensively.<sup>25</sup> How this worked in Jordan will be explored in chapter six. Tribal law is built upon two basic principles: (1) the principle of collective

<sup>19</sup> I. Al- Faruqi, “Islamization of Knowledge: Problems, Principles and Prospective” in *Islam: Sources and Purpose of Knowledge*, Seminar on Islamization of Knowledge, (Herndon, Virginia: International Institute of Islamic Thought, 1988), 34

<sup>20</sup> *ibid* 62

<sup>21</sup> G. Makdisi, “Legal History of Islamic Law and The English Common Law: Origins and Metamorphoses” 34 *Cleveland State Law Review* (1985), 3, 6

<sup>22</sup> N.J. Coulson, *A History of Islamic Law*, (Edinburgh: University Press, 1964), 9

<sup>23</sup> *ibid*

<sup>24</sup> *ibid*

<sup>25</sup> S. Mahmassani, *The Legislative Situation in the Arab Countries: its Past and Present*, (2<sup>nd</sup> ed., Dar El-Elm Lil Malain)

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responsibility; and (2) the principle of retribution or compensation. The objective is not merely to punish the offender, but to restore the equilibrium between the offending and the offended families and tribes.<sup>26</sup>

Amicable settlement and conciliation existed pre-Islam as will be shown in chapter five. There were many dispute resolution customs and traditions among the Arab tribes. “Within the framework of tribal Arab society, chieftains (*sheikhs*), soothsayers and healers (*kuhhān*), and influential noblemen played an indispensable role as arbiters in all disputes within the tribe or between rival tribes”<sup>27</sup>. The authority and stature of these men served as sanctions for their verdicts.<sup>28</sup> The decision of the *hakam* was final, but not legally enforceable. It was an authoritative statement as to what the customary law was or should be and later Islamic principles. In fact, Schacht refers to a *hakam* in such situations as “a lawmaker, an authoritative expounder of the normative legal custom or *sunna*.<sup>29</sup> The sole objective of these third parties was conciliation and the maintenance of harmony. Some arbitrators would go to great lengths to produce the necessary compensation or inducement, even out of their own pockets, in order to persuade the feuding parties to agree to a *Sulh*.<sup>30</sup>

Disputes within the tribes and between the tribes would usually be resolved by arbitration or conciliation. “A suitable ad hoc arbitrator (*hakam*) was chosen by the parties to settle the dispute”<sup>31</sup>. The arbitrator did not belong to a particular caste; the parties were free to appoint any person on whom they agreed. A *hakam* was chosen for his personal qualities and reputation, for example, if he belonged to a family famous for their competence in deciding disputes or for his supernatural powers. “A popular choice being the *kahin*, a priest of a pagan cult who claimed supernatural powers of divination.”<sup>32</sup>

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<sup>26</sup> R. Patai, *The Kingdom of Jordan*, (Princeton, NJ: Princeton University Press, 1957)

<sup>27</sup> A. Othman, ““And Amicable Settlement Is Best”: Sulh and Dispute Resolution in Islamic Law”, *Arab Law Quarterly*, 21 (2007), 66

<sup>28</sup> M. Hamidullah, “Administration of Justice in Early Islam”, 11 *Islamic Culture* (1937): 163

<sup>29</sup> J. Schacht, *An Introduction To Islamic Law*, (Oxford: The Clarendon Press, 1964), 8

<sup>30</sup> A. El-Tayib, “The Ode (Qasidah)”, in *The Cambridge History of Arabic Literature: Arabic literature to the End of the Umayyad Period*, A.F.L. Beeston et al. (Cambridge: Cambridge University Press, 1983), 68

<sup>31</sup> n 25 above, 10

<sup>32</sup> *ibid*

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The parties agreed on the choice of arbitrator, the course of action, and the question, which they were to submit to him. All of which will be recorded. If the *hakam* agreed to act, each party had to provide a security as a guarantee that they would abide by his decision. The decision of the *hakam*, which was final and its enforcement depended entirely on the arbitrator's respectability and stature within society. Arbitrators used persuasive means to ensure that an award was complied with by the parties, including making an award easy to follow and convincing the offender that he had committed a wrong.<sup>33</sup>

However, party autonomy was fundamental to arbitration in pre- Islam and continued to be important in Islam, just like in the West:

“The Arabs of Jahiliya (pre-Islamic period) knew arbitration because adversaries (be they individuals or tribes) usually resorted to arbitration in order to settle their disputes....Arbitration was optional and was left to the free choice of the parties. Arbitral awards were not legally binding, their enforcement depended solely on the moral authority of the arbitrator.”<sup>34</sup>

The arbitral proceedings were effective means of resolving disputes and ensuring harmony between conflicting parties. The arbitrators insisted that the parties attend the hearing which was a necessary condition for the validity of the arbitration. The process of arbitration relied upon the claimant proving his case and the respondent basing his defence on his oath.<sup>35</sup> If a claimant did not prove his case, then he could ask the respondent to swear an oath denying the claim. If the respondent did so, then the claim would fail. The tribes before Islam declared their oath before the statue of Hobel (an idol) that stood in the *Kabeh* in Mecca.

The Prophet Mohammad (s.a.a.w) was chosen as an arbitrator before he became a prophet due to his honesty and trustworthiness and sometimes he was referred to as a *kahin*. One of the most famous disputes during that time was in relation to the black stone. This was a dispute between the *sheikhs* of Mecca over the placing of a holy

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<sup>33</sup> *Kitab al-Aghani*, Bulaq, 1285, vols. II, 164

<sup>34</sup> A. Ahdab, *Arbitration with the Arab Countries*, (Boston: Kluwer Law International, 1999), 11

<sup>35</sup> Section 76 in The Medjella of Legal Provisions

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black stone.<sup>36</sup> There was fierce disagreement between the tribes as to who would have the honour of choosing the position of the stone. They could not resolve this so they asked Mohammad (s.a.a.w) to find them a solution. He took his *abaeh* (robe) and placed the black stone in the middle of it. Then, asked each *sheikh* to hold a side of his *abaeh* and told them together they could all place the holy stone in whatever place they agree on collectively. This resolved the dispute.

In some areas of the Arab world, dispute resolution was relatively structured and permanent. According to Coulson, “the general picture of primitive customary tribal law of Arabia in the sixth century requires some qualification.”<sup>37</sup> Mecca, for example, was a flourishing centre of trade that had a rudimentary system of legal administration with public arbitrators appointed that applied some sort of commercial law. In contrast, Medina was an agricultural area with some elementary forms of land tenure which also had a basic justice administration.<sup>38</sup> However in both these cities, the sole basis of law lay in the recognition of established customary practice.<sup>39</sup> The adherence to customs continued within Islam. *Al urf wal adah* is a rule that allows reference to customs and established practices as a legitimate source of law, as long as, they do not contradict *Shari’ah*. *Urf* or custom is of particular significance in our context as many of the rules of international commercial arbitration have evolved to the level of custom.<sup>40</sup>

Many of the rules of conduct practised before Islam continued to be honoured after its rise, especially customs relating to personal honour, hospitality and courage. The Prophet also encouraged such values as kindness, mercy and justice, which developed the earlier customs and practices of the region. The Prophet’s moral teachings are summed up in a tradition ascribed to him, in which he declared that he was “sent to further the principles of good character.”<sup>41</sup> Thus, many of the positive tribal customs were incorporated into Islamic teaching and jurisprudence.

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<sup>36</sup> The black stone have become a holy stone in Islam

<sup>37</sup> n 25 above, 10

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*

<sup>40</sup> n 6 above

<sup>41</sup> J.A. Bellamy, “The Makarim al-Akhlaq by Ibn Abi-Dunya” Muslim World, LIII (1963), 100, 119

### 3.2 Duty to Reconcile (*Sulh*) in Islam

The *Qur'an* encourages parties to use *Sulh* in order to resolve their disputes. “*Reconciliation between them, and reconciliation is better*”<sup>42</sup> and in another aye “*If two parties among the Believers fall into a quarrel, make ye peace between them . . . make peace between them with justice, and be fair: For God loves those who are fair and just.*”<sup>43</sup> The Prophet Mohammad (s.a.a.w) also insisted on *Sulh* and said it was more rewarding than fasting, praying and offering charity. The Prophet encouraged compromise and mediated disputes between fighting clan members as well as those between his Companions and their creditors.<sup>44</sup> A well-known *hadith* of the Prophet warns:

“*You bring me lawsuits to decide, and perhaps one of you is more skilled in presenting his plea than the other and so I judge in his favour according to what I hear. He to whom I give in judgment something that is his brother's right, let him not take it, for I but give him a piece of the Fire.*”<sup>45</sup>

*Sulh* was the method preferred by the Prophet, who made it plain that he was sceptical of judicial proceedings, which were devised by man and therefore fallible. Parties who won their cases by dint of eloquence at the expense of truth were threatened with the direst sanctions.<sup>46</sup> “Thus, the trial process is not regarded as an ultimate truth-finding mechanism that will lead to substantive justice. It can be tainted and subverted by the imperfect nature of man”<sup>47</sup>, therefore, it should be avoided when possible.

The second *Caliph* of Islam, Umar ibn al-Khaṭṭ'ab was unequivocally critical of adjudication: he was reported as saying, “*Dispel the disputants until they settle amicably with one another (yastalatu); for truly adjudication leads to rancor.*”<sup>48</sup> An

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<sup>42</sup> Verse 128 *Sura Nisa (Women)*

<sup>43</sup> Verse 9 in *Sura AlHujurat* (The Chambers)

<sup>44</sup> n 27 above

<sup>45</sup> *ibid*

<sup>46</sup> *ibid*, 64

<sup>47</sup> *ibid*, 69

<sup>48</sup> *ibid*

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important legal treatise<sup>49</sup> written by Molla Khusrew in the fifteenth century indicates “[Adjudication] is needed [only] when there is no *Sulh* between two litigants.”<sup>50</sup> However, an arbitrator or a judge cannot turn the parties away if they cannot be reconciled. This was confirmed by Umar ibn al-Khatt’ab, “And strive for conciliation so long as the rendering of judgment does not become evident to you.”<sup>51</sup>

It is preferable to reconcile and settle disputes through *Sulh* to maintain the ties of family, brotherhood and community. In *Shari’ah, al-khayr al-‘am* (general good) is an overarching principle which is implied in the *Qur’ān*. It is intended to promote the public welfare of believers; and guide men to do good and avoid evil. More specifically, *Shari’ah* is designed to protect the *maslaha* (public interest), since man is not always aware of what is good for him and his people,<sup>52</sup> only God knows that which is in the best interest of all. Consequently, another principle of *Shari’ah* is the collective interests of the believers as a whole; the interests of the individual are protected only in so far as they do not come into conflict with the general interest. Another principle of *Shari’ah* is *makarim al-akhlaq* (good character) and believers are commanded by God to observe these principles in good faith.<sup>53</sup> And to educate individuals to inspire faith and instil the qualities of trustworthiness and righteousness and establish *adl* (justice), which is one of the major themes of the *Qur’ān*.<sup>54</sup> Thus, “[c]ollectivity has a special sanctity attached to it in Islam”<sup>55</sup>, which has resulted in a duty being imposed on any person who has been chosen to resolve a dispute between parties to try to reconcile them first and foremost.

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<sup>49</sup> Titled *Durar al-Hukkām fi Sharh Ghurar al-Ahk*

<sup>50</sup> n 27 above

<sup>51</sup> *ibid*

<sup>52</sup> “Fighting is enjoined on you, and h is an object of dislike to you; and it may be that you dislike a thing while it is good for you, and it may be that you love a thing while it is evil for you, and Allah knows, while you do not know.” Verse 216 in *Sura Albaraa* (Cow)

<sup>53</sup> “O my son! keep up prayer and enjoin the good and forbid the evil, and bear patiently that which befalls you; surely these acts require courage” Verse 17 in *Sura Lokman* (Name of Prophet) and “O you who believe! avoid most of suspicion, for surely suspicion in some cases is a sin, and do not spy nor let some of you backbite others. Does one of you like to eat the flesh of his dead brother? But you abhor it; and be careful of (your duty to) Allah, surely Allah is Oft-returning (to mercy), Merciful.” Verse 11 in *Sura Alhojrat* (The Chambers)

<sup>54</sup> There are at least 53 instances where the *Qur’ān* commands *adl*.

<sup>55</sup> A. K. Brohi, “The Nature of Islamic Law and the Concept of Human Rights” in Human Rights in Islam, Report of a Seminar organized by the International Commission of Jurists, University of Kuwait and the Union of Arab Lawyers (Geneva: International Commission of Jurists, 1980), 48

### 3.2.1 Is *Sulh* an Unequivocal Duty?

*Sulh* is permissible in any dispute except “a *Sulh* that makes *haram* that which is *halal* and makes *halal* that which is *haram*.<sup>56</sup> Also, only fair and just *Sulh* is allowed by the *Qur'an* as shown in this aye “make peace between them with justice, and be fair: For God loves those who are fair and just.”<sup>57</sup> Ibn al-Qayyim (d. 751/1350) warned that many people did not give due weight to the equitability of *Sulh* and reconciled upon wrong, unjust settlements (*Sulh zalim ja'ir*).<sup>58</sup> Examples of balanced settlements are those mediated by the Prophet between his Companions, when both sides equally cooperated to meet each other's claims.<sup>59</sup>

A question that seems to be posed here is, what is the limitation of the duty to reconcile within *Shari'ah*. Although it is more commendable that parties to a conflict work out a mutual agreement on how to solve their problem, jurists are conflicted as to whether a judge should favour *Sulh* and suspend adjudication when it is clear to the judge which party is liable. It seems that the quote from Umar above<sup>60</sup> authorises a judge to decide the case if he clearly sees that one party is liable. This argument is supported by a comment attributed to Sufyān ibn Uyaynah (d. 198/814), who qualified Umar's precedent : “We lay this down as a principle (only) if there is a doubt, and when there is a kinship between the parties. As for when it is clear which way judgment should be given, it is not obligatory upon him to turn them away.”<sup>61</sup>

Al-Sarakhsī, a great Hanafi jurist, (d. 490/1097) cites Umar's tradition on *Sulh*, saying that a judge is under no obligation to proceed immediately with judging “if he wants *Sulh*”. In cases where the parties are related or where it is unclear where judgement should lie then a judge should try to restore harmony and prevent hostility

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<sup>56</sup> Abu Dawūd (d. 275/889), Sunan Abī Dawūd (d. 275/889), under Kitāb al-Aqdiya (Beirut: Dār al-Kutub al-Ilmiyya, 1996), vol. 2 (3594); Ibn Māja, Sunan Ibn Māja, ed. Bashshār Awwad Marūf (Beirut: Dār al-Jīl, 1998)

<sup>57</sup> n 43 above

<sup>58</sup> n 27 above

<sup>59</sup> M. ibn Abī Bakr, Ilām al-Muwaqqiīn an Rabb al-Ālamīn in Billāh al-Baghdādī, M. al-Mutāsīm (ed) (Beirut: Dār al-Kitāb al-Arabi, 1998), 1:112

<sup>60</sup> “And strive for conciliation so long as the rendering of judgment does not become evident to you.”

<sup>61</sup> n 27 above

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between the disputants.<sup>62</sup> However, if a judge can easily see who is the righteous party then he must give judgement and only consider *Sulh* if the parties consented.<sup>63</sup>

Ibn Sīrīn<sup>64</sup> argued that judges should only reconcile the parties if the case had some legal obscurity or contradictory evidence. He emphasized that the *qadi* should confine himself to his adjudicative duty, for which disputants resort to him in the first place.<sup>65</sup> Al-Kāsānī argued that it is merely ‘unobjectionable’ for a judge to turn disputants away towards *Sulh* as it is propelling them towards goodness and avoiding harm.<sup>66</sup> The judge is not to persist in deterring them from an adjudication, though, and should adjudicate between them according to the *Shari’ah* if they insist on it, for “there is no benefit in turning them away.”<sup>67</sup>

Al-Shafi indicates that a judge should command disputants to attempt *Sulh* and try to facilitate their conciliation. But this could only be permissible with the consent of the parties. “Al-Shafi warns the judge against judging if the decision is not plain to him, for this amounts to oppression. The judge has the burden of ascertaining exactly where judgment should lie, no matter how long it takes”.<sup>68</sup> Al-Shirazi insists that the judge must command the parties to attempt *Sulh* even if the righteous claim is obvious. If they fail then judgement is obligatory. The majority of jurists prefer for a judge to steer parties towards *Sulh*, even if it is clear how he should judge the case.<sup>69</sup>

Othman describes the Maliki School to be stricter with regards to a *qadi* considering *Sulh*, if it is clear to a *qadi* how judgment should be given.<sup>70</sup> It will not be acceptable among Maliki jurists to allow the wrongful party to escape liability due to a judge’s desire to apply *Sulh*. Even when they apply Umar’s precedent described above, they say that a judge should not deter the parties from adjudication more than once or twice. This is because Umar’s precedent is contingent upon the judge’s inability to

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<sup>62</sup> ibid

<sup>63</sup> ibid

<sup>64</sup> ibid

<sup>65</sup> ibid

<sup>66</sup> ibid

<sup>67</sup> ibid

<sup>68</sup> ibid, 75

<sup>69</sup> ibid

<sup>70</sup> ibid

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discover where the truth lies.<sup>71</sup> However, if that is clear then he must implement justice by giving a judgement. A Hanafi jurist, al-Sanānī pointed out that there is a prophetic tradition that makes it clear a judge should give priority to the reconciliation of parties rather than proceeding to judge, regardless of whether it is plain to him where judgment lies.<sup>72</sup>

From the Malikis school of *fiqh*, Ibn Farhūn emphasised that *sulh* should be strongly recommended in certain types of disputants and cases, which are the parties are related, they are people of high reputation and good standing in society, the dispute and hostility may be exacerbated, and it is not clear to the adjudicator where judgement should lie.<sup>73</sup> In these circumstances in particular judges and arbitrators should try to command *Sulh*.

There is a version of Umar's tradition that is slightly different from the one cited above: "Dispel adjudication between *blood relations* so that they reconcile with another; verily the rendering of judgment creates rancor among the people".<sup>74</sup> Thus, making *Sulh* a real option for a judge especially if the parties before him are related, in which case the preservation of family harmony should receive serious consideration.<sup>75</sup> "The judge similarly should suspend adjudication if they are virtuous men or if he fears the deterioration of an already hostile situation"<sup>76</sup>. If the arguments of each side are of equal strength and the subject matter of the case is vague or the case is obscure and difficult, then a *qadi* should not judge and must lead the parties to *Sulh*.<sup>77</sup>

Clearly, there are authorities indicating the negative and hostile effects of a judgment, thus championing *Sulh* as the best way to resolve disputes, especially in cases that are difficult to decide and the parties' kinship and social reputations are affected.<sup>78</sup> However, there are jurists who do not approve of *Sulh* when it results in a

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<sup>71</sup> ibid

<sup>72</sup> ibid

<sup>73</sup> ibid

<sup>74</sup> ibid

<sup>75</sup> ibid

<sup>76</sup> ibid, 77

<sup>77</sup> ibid

<sup>78</sup> ibid

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benefit to an undeserving or untruthful party therefore disappointing the expectations of the legally entitled one. This is why the consent of the parties is vital in *Sulh*, no matter who facilitates it. According to Jindani, “for an agreement to succeed there must be a consensus to a resolution of a dispute”<sup>79</sup>. The consent of the parties as to their adjudicator is also well established in *Shari’ah* in the form of arbitration, which is outlined in the next section. The parties choose a *hakam* whom they respect and trust to resolve their dispute, thus, party autonomy is the core of *Sulh* and arbitration.

### 3.3 *Sulh* in Arbitration

*Shari’ah* has not completely separated *Sulh* and arbitration. Much of the *Qur’anic* authority and *hadiths* supporting arbitration could also be used as authority for *Sulh*. The *Qur’an* and the *Sunna* approve arbitration in the form of a third person chosen by the parties to resolve their disputes either through conciliation or adjudication.

#### 3.3.1 *Qur’an*

Arbitration is approved by the *Qur’an* and referred to in a number of *ayat* (verses) as an acceptable dispute resolution mechanism. For example,

*‘And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment, Allah will make them of one mind. Lo! Allah is ever Knower, Aware’*<sup>80</sup>

Also, this *aye*,

*‘Surely Allah commands you to make over trusts to their owners and that when you judge between people you judge with justice; surely Allah admonishes you with what is excellent; surely Allah is Seeing, Hearing’*<sup>81</sup>

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<sup>79</sup> M. Jindani, The Concept of Dispute Resolution in Islamic Law, Ph.D diss., University of Wales, Lampeter, 2005, 287

<sup>80</sup> Verse 35 in *Sura Nisa* (Women)

<sup>81</sup> Verse 58 in *Sura Nisa* (Women)

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The first *aya* confirms that arbitration must be used to resolve disputes between married couples before divorce is granted. It outlines the need for two arbitrators (one from each side). The second *aya* from the *Qur'an* imposes a duty on any person who judges a case and apportions blame between parties to do so fairly and justly. This *aya* authorises those who judge to make decisions that are binding.<sup>82</sup> These *ayat* could also be interpreted to impose *Sulh* between conflicting parties. Either way, the main aim of arbitration is to ensure that disputes between Muslims are resolved amicably and justly.

There are two schools of thought regarding the nature of arbitration which will be dealt with in detail below. The first one is arbitration through conciliation (*Sulh*) and the second is binding arbitration. The *ayat* have been interpreted as offering support for both schools, leaving the choice to the parties and making arbitration a voluntary process, unlike other obligatory rules in the *Qur'an*. This shows the flexible and evolutionary nature of *Shari'ah* which allows the parties to choose and adapt the process to suit them and their dispute.

### 3.3.2 Sunna

The Prophet Mohammad (s.a.a.w) developed the *Sunna* through teaching the people and tribes of the Arabian Peninsula. He tried to develop a climate where the Islamic nation resolved their disputes peacefully and without resorting to violence. The Prophet Mohammad (s.a.a.w) recognised that any case that could be resolved by conciliatory arbitration should be, as this is better for the community.<sup>83</sup> Schacht contended “[t]he arbitrators applied and at the same time developed the Sunna; it was the Sunna with the force of public opinion behind it, which had in the first place insisted on the procedure of negotiation and arbitration.”<sup>84</sup> Arbitration continued as a dispute resolution practice in the Mohammad (s.a.a.w) and post-Mohammad (s.a.a.w)

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<sup>82</sup> n 34 above, 17

<sup>83</sup> n 7 above, 114

<sup>84</sup> n 29 above

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eras. In fact, for a Muslim, “arbitration carries with it no better imprimatur than that given to it by the Prophet himself.”<sup>85</sup>

Mohammad (s.a.a.w) advised both Muslims and non-Muslims to refer their disputes to arbitration. One of the first non-Muslims that followed this advice was the tribe of Bani Kornata.<sup>86</sup> Mohammad (s.a.a.w) acted both as an arbitrator and as a party who accepted the decision of an arbitrator. The prophet was the preferred choice of arbitrator, the “principle of referring differences or disagreements for determination by the Prophet is encapsulated in many verses of the Qur'an...However, the exercise of judicial authority whether of a conciliatory nature or of judicial nature, could under the provision of the Qur'an and under Prophetic tradition be delegated to other persons”<sup>87</sup>. Another example of the use of arbitration during the Prophet's time was a clause in the Treaty of Medina, the first treaty entered by the Muslim community, signed in 622 A.D. between Muslims, Non-Muslim, Arabs and Jews which called for disputes to be resolved by arbitration.<sup>88</sup>

The Sunni schools of *fiqh* have found the *hakam*'s decision to be binding like a contract or akin to a judgement of the court. Even though the arbitral award may be weaker in comparison to a judgement, according to some schools of *fiqh*, this does not release the parties from following it, according to the rules of *Shari'ah*. Thus, an arbitral award is binding in the same way as a contract. According to *Shari'ah*, a contract is divine in nature, and there is a sacred duty to uphold one's agreements:

*“O you who believe fulfil any contracts [that you make]...Fulfil God's agreement once you have pledged to do so, and do not break any oaths once they have been sworn to. You have set God up as a Surety for yourselves.”* <sup>89</sup>

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<sup>85</sup> A.J. Gemmell, “Commercial Arbitration in the Islamic Middle East”, 5 *Santa Clara Journal of International Law* (2006) 169, 173

<sup>86</sup> Libyan Am. Oil Co. (LIAMCO) v. Libyan Arab Republic (Apr. 12, 1977), 20 I.L.M., 1 (1981)

<sup>87</sup> n 79 above, 67

<sup>88</sup> n 34 above, 12

<sup>89</sup> The *Fatawa* of Ibn Taymiya, III, 326

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This special position of contracts is best summed up by the Islamic maxim *Al Aqd Shari'at al muta'aqqidin* which essentially states, “[t]he contract is the Shari'a or sacred law of the parties.”<sup>90</sup> This makes it abundantly clear that contractual relationships are viewed strictly under *Shari'ah*. Indeed, all contractual obligations must be specifically performed, unless they contravene *Shari'ah* including arbitral awards or *Sulh* during arbitration or otherwise.<sup>91</sup>

The *Qur'an* and the *Sunna* confirmed the validity of arbitration, but the difficulty that arose was in the characteristics of implementation. Therefore, the four schools of *Shari'ah* explained the process of arbitration, which obliges each Muslim within each school to follow its teachings.

### 3.3.3 The Hanafi School

The Hanafi School confirmed that according to the *Qur'an*, *Sunna*, *Ijma* and *Qiyas*, arbitration is a legitimate dispute resolution process because it serves important social needs and simplifies disputes. It is also less complex than the courts.<sup>92</sup> The scholars in this school emphasised the contractual nature of arbitration and stated that it is binding like any other contract. Some scholars argue that an arbitrator has the same duties as a judge but others considered the arbitrator to be closer to an agent or conciliator.<sup>93</sup>

### 3.3.4 The Shafi School

According to this school, it is permitted for the parties to chose an ordinary person who does not possess any of the judge's qualities to resolve the dispute, whether or not there is a judge available in the place where the dispute arose.<sup>94</sup> The scholars within this school confirmed the validity of arbitration by giving an example from

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<sup>90</sup> M. C. Bassiouni, *The Islamic Criminal Justice System* (New York: Oceana Publications, 1982), 10

<sup>91</sup> S. H. Amin, *Commercial Law of Iran* (London: Vahid Publications, 1986)

<sup>92</sup> n 9above

<sup>93</sup> *ibid*

<sup>94</sup> Al Mawardi, *Adab Al Kadi*, T. II, 382

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history that shows Muslims referring disputes to the *Caliph* Umar ibn al-Khaṭṭ’ab, who acted as an arbitrator on many occasions. It is pointed out that an arbitrator is inferior to a judge as the arbitrator could be removed at any time by the parties before an award is rendered.<sup>95</sup>

### 3.3.5 The Maliki School

This school placed arbitration as one of the highest forms of dispute resolution. It contended that an arbitrator decides a case based on his conscience, therefore it allowed one of the disputing parties to be appointed as an arbitrator if he was chosen by the other party.<sup>96</sup> Unlike the other three schools, this School stresses that an arbitrator cannot be revoked after the commencement of arbitration proceedings. An arbitration award is binding on the parties, unless if a judge declares it to be flagrantly unjust.

### 3.3.6 The Hanbali School

The scholars of this doctrine hold that the decision of the arbitrator has the same binding nature as a court judgment. Therefore, an arbitrator must have the same qualification as a judge and must be chosen by the parties.<sup>97</sup>

### 3.3.7 The Medjella of Legal Provisions

The ‘Medjella’ of the Legal Provisions’ (the Medjella), the first codification of *Shari’ah* under the Ottoman Empire, confirmed the conciliatory nature of arbitration. Its articles were drafted and derived from the science of *fiqh* (academic writings and case law) relating to civil acts and the prevailing opinion of the Hanafi<sup>98</sup> doctrine. There was a whole section in the Medjella dedicated to arbitration. The main

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<sup>95</sup> *ibid* 385

<sup>96</sup> n 34 above, 19

<sup>97</sup> *ibid* 20

<sup>98</sup> A Sunni school of jurisprudence

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provisions reflected the contractual nature of arbitration, which was closer to conciliation and compromise than to court judgements. Juries of the Medjella explained that an arbitral award was inferior to a court judgment, thus, a judge was authorised to invalidate an award if it was against his principles, whereas he was obliged to enforce a judgment given by another judge.<sup>99</sup> However, this did not restrict the parties from enforcing *Sulh* between themselves, thus making it binding between the parties just like a contract.

The duty of an arbitrator closely resembled an agent authorised by the parties to obtain a conciliation order. This principle was outlined by two provisions in the Medjella. According to the first provision<sup>100</sup>, 'should the parties have authorised the arbitrators...to conciliate them, the agreement of the arbitrators is deemed to be a compromise...which the parties must accept' as if they had compromised themselves." According to the second provision<sup>101</sup> 'if a third party settles a dispute without having been entrusted with this mission by the parties, and if the latter accept his settlement, the award shall be enforced by application of Article 1453, according to which 'ratification is equivalent to agency'.'<sup>102</sup> Consequently, unlike a judgement, an award required the agreement of the parties and thus, a judge could annul an arbitration award if he saw fit, but could not annul a judgement.

The Muslim concept of arbitration, according to the Medjella, could settle disputes in a way that resembles conciliation. Article 1850 of the Medjella stated "legally appointed arbitrators may validly reconcile the parties if the latter have conferred on them that power." Therefore, if each of the parties has given power to one of the arbitrators to reconcile them and the arbitrators terminate the case by a settlement, the parties may not reject the arrangement.<sup>103</sup> The technique proposed by Article 1850 enables each party to appoint its 'arbitrator' and the two arbitrators thus appointed are in turn authorised to settle the dispute by means of conciliation (*Sulh*).

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<sup>99</sup> A. Haedar, *Dorar Alhokam fe Sharah Majalet Alhokam*, Judgements within the Provisions of the Medjella

<sup>100</sup> Section 1844 in The Medjella of Legal Provisions

<sup>101</sup> Section 1847 in The Medjella of Legal Provisions

<sup>102</sup> Section 1853 in The Medjella of Legal Provisions

<sup>103</sup> Code Civil Ottoman - Trad. Démétrius Nocolaides 1881

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Muslim scholars have all agreed upon the legal principle of arbitration, although they have formulated different opinions in relation to the definition of arbitration and the scope of its application. According to the first view, arbitration is a type of non-compulsory conciliation, however, the second thesis sees arbitration as similar to judgments, fair and binding on the parties. Either way, the validity of arbitration is unequivocal in Islam and the duty to reconcile the parties is imposed on anyone resolving disputes between Muslims.

A Muslim arbitrator has a duty of conciliation and a moral obligation to clarify the facts, establish the truth and find the appropriate principles of *Shari'ah* to be applied. Islamic law allows the parties to confer upon the arbitrators the power to settle their disputes by a binding decision according to rules agreed upon or what the arbitrators consider just and fair.

The word *hakam* has been given different meanings. The word can be used in its broad sense to refer to an authorised person to dispose of rights, to settle differences between different persons by suggesting settlement or helping them to reach it, or by issuing a binding decision to settle the dispute. The agreement of the parties defines the type of authorization in each case.<sup>104</sup> It is noteworthy that even though the word *hakam* may refer to the conciliator or the arbitrator, Islamic law recognised the difference between the two. The word *hakam* refers in its strict sense to a person who is 'authorised' in a specific mission.<sup>105</sup> Islamic law commands an arbitrator to try to reconcile the parties first before making a decision on their dispute. Islamic parties place themselves entirely in the hands of a person whom they know, respect and believe to be capable of helping them out of the deadlock.<sup>106</sup> The overarching characteristics of any arbitrator, whether he is trying to reconcile the parties or to make a decision is to do so, are neutrality and justice.

Many of the Jordanian arbitrators reminded me of this during the interviews on the culture and history of arbitration in Jordan and the region. They were very proud of

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<sup>104</sup> M.I.M. Aboul-Enein, "Liberal Trends in Islamic Law (Sharia) on Peaceful Settlement of Disputes", (2000) 2 J. Arab Arb. 3

<sup>105</sup> *ibid*

<sup>106</sup> G. E. Irani and N.C. Funk, 'Rituals of Reconciliation: Arab-Islamic Perspectives' (1998) 20:4 *Arab Studies Quarterly* 1, 4

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this heritage and insisted that arbitration is actually the natural way of dispute resolution in the Arab world.

### 3.4 ‘Arbitration is Part of Our Culture’

Some interviewees were very keen on emphasising the history and culture of arbitration in Jordan. Arbitration has long existed in both the tribal and Islamic cultures of the country. A lawyer who joined the Bar in 1965 and an experienced arbitrator said “*you need to remember that we have a culture of accepting arbitration, especially between traders*”.

A former member of the World Bank dispute resolution committee insisted that, “*there are pages and pages of thesis, research and books written on arbitration in the Middle East. Arbitration is a very important dispute resolution mechanism in the Arab world as it is the closest mechanism to our paternal, patriarchal and tribal society. Society insists that when a dispute arises, it is referred to arbitration. Thus, arbitration should flourish in the Arab world due to the culture of the society. However, this is not the case as the situation is a mess. Civil codes and the lack of understanding of the legislature lead to chaos*

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An experienced lawyer with a PhD in international law from George Washington, who had also worked for 15 years in Kuwait explained, “*I won’t say that arbitration is alien to Middle Eastern culture because historically before the court system was created people used to know their arbitrators like that old merchant in Amman. In every village, there was someone people referred their disputes to. My grandfather was a ‘Muktar’ and people came to him to solve their disputes. Historically, it was a man with high moral value and often it was done free of charge. The introduction of a sophisticated law such as UNCITRAL law into the community shows that the community is changing – what is left is how to adapt this tool to this community or the community to the tool. Of course arbitration is changing because Jordan itself is changing. It used to be a closed society, now it is opening up. There are large multi-million construction projects. Amman is changing. It is no longer arbitration for the construction of a two storey house. It is highway, dams, roads, multi storey*

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*buildings. The projects are more sophisticated, therefore the concept of arbitration is taking place more and more”.*

The old merchant mentioned earlier was a trader called Misbah Al-Ezmilah and he was described by the same lawyer as “*an old merchant who carried moral weight in the community. He conducted arbitrations free of charge like judges in Muslim history. He considered it a service to God. He used to say “the service of rights is a service of God”. Merchants used to go to him with their disputes and whatever he decided, they obeyed because of his moral weight. He did not issue written awards”.*

Islamic principles play a major role in Jordanian society. A lawyer for 35 years stated, *the environment in Jordan has Islam very much part of it and you will find Islamic principles in every walk of life and in every process”.*

A long standing member of Jordanian Bar Association and an experienced local arbitrator added “*the main concept of arbitration is personal freedom and this existed in our law and in Shari’ah for many centuries”.*

A young lawyer with a PhD from London does not however seem to see any difference between arbitration in Jordan and arbitration elsewhere. He claims “*the lawyers that work in arbitration are usually educated abroad and have dealt with international clients who are commercial people that know the theme of arbitration. This bridged the gap between Jordanian arbitration and international arbitration. It is therefore difficult to see a difference between the two”.*

Legal arbitration was also common in Jordan. A lawyer who has been practising arbitration for 25 years said “*the first law of arbitration in Jordan was in 1953. Arbitration is very old in Jordan and stable. All lawyers in Amman do arbitration or have the ability to do it. Disputes in trade, construction, sales contracts always use arbitration. It is always better. It should be advised by all lawyers”.*

A lawyer and very experienced international arbitrator who has received two PhDs from Cairo and Bristol that explained Jordan “*is one of the Arab countries that has had arbitration for many years. Traders naturally refer to arbitration and ‘wasta’. Also, the chamber of commerce has panels of arbitrators which resolve disputes*

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*between traders amicably by conciliation, which is not strictly arbitration, but they call it arbitration. Arbitration and 'wasta' are part of the culture'.*

It is clear from this chapter that arbitration is very much part of the Islamic jurisprudence. Arbitration through conciliation and adjudicative arbitration are both recognised and authorised by the *fiqh*. However, mediation and arbitration through compromise are the more favoured options. The Jordanian arbitrators mostly agreed that arbitration is part of Jordan's history and culture and it has been practised by various merchants for many years. In light of the *Qur'an*'s explicit blessing and the Prophet Mohammad's (s.a.a.w) teachings, one would expect that a smooth and orderly transition into the modern workings of arbitration would have occurred in the Middle East, but this is not the case.<sup>107</sup> The rocky journey of international commercial arbitration within the Middle East will be discussed in chapter 4.

There are growing calls, some say demands<sup>108</sup> from the Islamic and Arab world for international commercial arbitration to become more inclusive of Islamic legal tradition and of the cultural sensitivities of the East. Islamic legal tradition is flexible and could easily be incorporated into the arbitration system. Kutty<sup>109</sup> argues that the move towards democracy by many of the Islamic nations will increase the demands for an international regime that is encompassing and representative of other traditions beside, those of the West. Indeed, with the increase in democratically elected Islamist governments around the world some nations which were seen to have been moving away from *Shari'ah* at one time appear to be returning to it.<sup>110</sup>

The concepts of *ijtihad*, *ijma*, *qiyyas*, and *urf* combined with the divine characteristic attributed to contractual obligations make it possible to develop a viable and modern framework for international commercial arbitration within the bounds of the *Shari'ah*. The real problem Kutty claims is whether "the advocates of international commercial arbitration ...are prepared to engage in dialogue for a more inclusive and

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<sup>107</sup> n 85 above, 174

<sup>108</sup> A. A. Shalakany, "Arbitration and the Third World: A Plea for Reassessing Bias Under the Spectre of Neoliberalism," 41 Harv. Int'l L. J. (2000) 419, 420

<sup>109</sup> n 9 above

<sup>110</sup> ibid 890

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reflective international arbitration framework.”<sup>111</sup> Whatever the answer to this question, it is certainly undesirable and may no longer be possible for the West to continue to impose their dominant position and values on the Arab Middle East and to continue to judge other societies using their own standards. It is unrealistic to expect that international commercial arbitration rules and practice will continue to have legitimacy in the Middle East and the larger Islamic world if *Shari'ah* principles and methodology are completely ignored or undermined. As Abul-Fadl points out, dominance cannot be equated with truth, although it no doubt benefits from the old confusion of right and might.<sup>112</sup> Sornarajah criticises the western attitude:

“[Those] latter views [third world objections and oppositions] are regarded as polemical and the Western views are regarded as acts of high scholarship which are to be repeated as often as possible despite the mythical foundations on which they rest.”<sup>113</sup>

But he admits, the developing world is forced to accept arbitration if they wish to receive any long-term foreign investment.

As the current international commercial arbitration framework is exclusively derived from western legal heritage, it is creating obstacles in the acceptance and continued legitimacy of international commercial arbitration in the Middle East, and even beyond in the other Islamic nations. This contradiction of the objectives underpinning international commercial arbitration, which are to ensure enforceability of arbitration agreements/clauses and arbitral awards and to insulate the arbitration process as much as possible from interference by domestic courts and other national or international institutions. “This can only be achieved when there is mutual respect and understanding of the various laws, practices, cultures and religious worldviews prevalent in the world today.”<sup>114</sup>

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<sup>111</sup> *ibid* 891

<sup>112</sup> M. Abul-Fadl, “Beyond Cultural Parodies and Parodizing Cultures” (1991) 8:1 *American Journal of Islamic Social Sciences*, 15

<sup>113</sup> M. Sornarajah, *International Commercial Arbitration: The Problem of State Contracts*, (Singapore: Longman, 1990), 5

<sup>114</sup> n 9 above, 894

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It is clear from this chapter that arbitration has a long history in the Middle East and that the conciliatory approach is preferred in Islamic jurisprudence. Bearing this in mind, it is no surprise that hostility arose in the 20<sup>th</sup> century in the Middle East when the western arbitration model was superimposed on this existing structure. The effect and results of Western rationality meeting Arab/Islamic heritage are described in the next chapter.

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### Chapter Four

#### Arbitration in the Middle East During the 20<sup>th</sup> Century

“Foreign and domestic pressure on regional governments to improve their country’s investment climate has produced widespread and competitive arbitration law reform throughout the Middle East”<sup>1</sup>.

The history and practice of arbitration in the Islamic Middle East was explored in the previous chapter. In this chapter, I explain the interaction between the western model of international commercial arbitration and the eastern reconciliatory approach to dispute resolution. There are many examples of hostility between the two. However, as time has moved on, some form of agreement seems to have developed, on the surface at least, between the West and the Middle East.

For many years, the rules and practices of international commercial arbitration were looked upon as being solely for the protection of the businesses of the western industrial world. This understandably led to great distrust in the developing and underdeveloped world. When public corporations from the Third World were unsuccessful in disputing claims against large multinational corporations, they always expressed their disappointment with the system, not with the merit or demerit of the cases which were lost.

Many newly independent countries of the Middle East experienced this unsatisfactory system and a number of countries, especially in the Gulf, issued ministerial decrees forbidding arbitration clauses in contracts with them. One of the first was the Kingdom of Saudi Arabia, which in 1963 issued a ministerial decree prohibiting all public corporations in the state from submitting either to a foreign law, or to the jurisdiction of foreign courts and even to foreign arbitration. Kadiki<sup>2</sup> offers an explanation for the hostile attitude of some of the Arab countries towards

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<sup>1</sup> P. Punwar, “Country focus: Arbitration in the Middle East”, *Managing Partner* 9(7) 11 Dec 2006 at [http://www.mppmagazine.com/display.asp?articleid=CE4288F6-3701-4C13-8E29-C94BC0EAD513&eTitle=Country\\_focus\\_Arbitration\\_in\\_the\\_Middle\\_East](http://www.mppmagazine.com/display.asp?articleid=CE4288F6-3701-4C13-8E29-C94BC0EAD513&eTitle=Country_focus_Arbitration_in_the_Middle_East)

<sup>2</sup> K. Kadiki, “The Arbitration Clause according to the Islamic Shariah and the Positive Laws of Arab Countries” *The ICC International Court of Arbitration Bulletin*, Special Supplement, Vol. 3, No. 1 May (1992), 35

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arbitration. He contends that these attitudes were derived from political concerns “resulting either from dire experiences in certain cases or from awards which were considered as being unfair.”<sup>3</sup>

The cases Kadiki refers to are a number of arbitration cases surrounding oil agreements between a foreign investor and newly independent Arab state during the 1950s and 1960s. The oil agreements contained an arbitration clause, but omitted a choice of law clause. One of the issues that had to be determined by the arbitrator was the proper law of the contract. Despite the proper law being an Arabic law, the arbitrator chose not to apply this. The effect these decisions had on the Middle East was that “even the majority of passionate supporters of arbitration have admitted that the arbitrators in the *Abu Dhabi*, *Qatar* and *Aramco* cases were biased and offered only a mere façade of neutrality. It was an attempt to weaken the new development strategies of these states by subjecting these states to the jurisdiction of the biased international legal doctrines.”<sup>4</sup> These cases created hostility in the Arab Middle East that is still felt today. Many western arbitrators are still seen as biased and ignorant a view which will be outlined in the final two sections of this chapter.

There is obviously more than one explanation for the hostility found in the Middle East towards international commercial arbitration. A number of these will be explored in this chapter and further reasons are outlined in this thesis. However, during the intense period of early independence in many of the Arab states, international commercial arbitration was a foreign colonial mechanism. Its legitimacy was created by western players, as described in chapter two, and this had very little relevance to the Arab world as the players were unrecognised within the structures of the region. To add insult to injury, when these players were arbitrators where the Arabs were a party, they seemed biased and hostile to them and their systems, which confirmed Arab fears and apprehensions.

The three main cases which caused controversy during this time will be discussed below. Then, the recent apparent change in Middle Eastern attitudes towards

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<sup>3</sup> ibid 38

<sup>4</sup> J. Paulsson “Third World participation in international Investment Arbitration”, 2 Foreign Investment L.J. (1987), 21

arbitration will be explored. Many of the countries in the region have enacted modern arbitration legislation, ratified the New York Convention and created arbitration centres of their own. However, this does not mean that arbitration is accepted and that Arab parties are keen on it. There is still resentment towards arbitration felt by many of the Arab arbitration community towards some leading arbitrators in particular, and to some extent towards the ICC International Court of Arbitration (ICC). The final section of this chapter quotes Jordanian arbitrators on their views of international arbitration. These views are not particularly positive.

#### 4.1 The Hostility

The cases that antagonised the Arab world started with the first Arab oil arbitration case, *Petroleum Development Trucial Coasts Ltd. v Shaikh of Abu Dhabi*<sup>5</sup>, where a dispute took place in 1951 after 10 years of the signing of the contract. The contract was made in Abu Dhabi and wholly performed in that country, but there was no choice of law clause. The Umpire, Lord Asquith conceded, “If any municipal legal system was applicable, it would *prima facie* be that of Abu Dhabi”. But he then declared “No such law could reasonably be said to exist...it is fanciful to suggest that in this primitive region there is any settled body of law principles applicable to the construction of modern commercial instruments and that the Sheikh of Abu Dhabi administers a purely discretionary justice with the assistance of the Quran.” He applied principles “rooted in good sense and common practice of the generality of civilised nations – a sort of modern law of nature” as the criteria for the award. Great insult was taken at the arrogance of Lord Asquith’s presumption that “a sort of modern law of nature” was seen as more competent to deal with commercial transactions than the national legal system of a state that relies on principles that are hundreds of years old. Lord Asquith did not even request an expert on Islamic law. This award started the “cultural resentment among third world countries.”<sup>6</sup>

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<sup>5</sup> Case No. 37, ILR 1951; ICLQ 247

<sup>6</sup> M. Al-Jumah, “Arab State Contract Disputes: Lessons From The Past”, *Arab Law Quarterly*, Vol. 17, No.3 (2002), 215, 219

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The second arbitration in this catalogue of cases is *Ruler of Qatar v International Marine Oil Company Ltd*<sup>7</sup>, the arbitrator, Sir Alfred Bucknill, held that the proper law of the concession agreement was the law of Qatar, as there was no choice of law clause, but also held it to be inappropriate to govern a modern oil concession. According to the arbitrator “there are at least two weighty considerations against the view [i.e. the adoption of the Islamic law]. One is that, in my opinion, after hearing the evidence of two experts in Islamic law, Professor Anderson and Professor Milliot, there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments.” The arbitrator went on to say, “I am satisfied that the law does not contain any principles which would be sufficient to interpret this particular contract.” It was noted at the time that the experts’ opinions regarding Islamic law relied upon by the arbitrator were neither Muslims nor Muslim lawyers and arguing that there are no adequate contractual principles in Islamic law reflects great ignorance of this legal tradition. Islamic jurisprudence has sophisticated contractual and commercial principles that have served the Arab world for hundreds of years. Islam has always been a religion of trade and of world traders.<sup>8</sup>

The third case was *Saudi Arabia v Arabian American Oil Co. (Aramco case)*<sup>9</sup>, the arbitration related to the interpretation of a Concession Agreement. It was clearly stated in the Agreement that in case of dispute, the Muslim law as taught by the Hanbali School would apply. However, the parties envisaged that matters beyond the jurisdiction of Saudi Arabia would be determined by the arbitration tribunal, a distinction that caused much controversy. According to the tribunal, chaired by Professor Sauster-Hall, based on the intention of the parties, it could be decided that they never intended to apply Muslim law, even though such a clause existed. The arbitrators thus applied general principles of law and they justified their decision on the basis that the law, which a reasonable person would apply, should be the applicable law.

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<sup>7</sup> 1953 ILR 20, P.534

<sup>8</sup> L. Lim, Terrorism and Globalization: An International Perspective, 35 Vand. J. Transnat'L L. (2002) 703, 704

<sup>9</sup> 27 ILR 117 (1958), 163

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There are mixed feelings about these arbitral awards. Al-Jumah contends, “it is to be noted that the arbitration should provide a guarantee to the company, but at the same time it should also be beneficial to the state.”<sup>10</sup> Others have said that the arbitrators were protecting the foreign investor from the detrimental legislative or administrative actions of the host state and supporters of the state were using post colonialism as an attempt to legitimise their breach of contractual obligations.<sup>11</sup> Al-Jumah makes the point that the arbitrators chose a side and designed the awards to “suit their need, especially in the choice of law clauses.”<sup>12</sup> In some cases, the arbitrators incorporated international law into Arab state law in order to help foreign investors. In two examples, the *AMINOIL*<sup>13</sup> case where, Kuwaiti law was the applicable law, and the *Pyramid Oasis*<sup>14</sup> case, where Egyptian law was the law specified in the contract, the arbitrators in both of these arbitrations supplemented these laws with general international law.

These cases show that even though there was clear stipulation in the contract as to the application of the Islamic Code, “it was rejected without even an attempt to get to know the adaptability of the Code to the situation which arose.”<sup>15</sup> Al-Jumah offers an explanation to the above awards stating,

“The Western world is ignorant to the Islamic law and its legal system. It cannot be said that Islamic law is not developed to meet the needs of the present day situations. It is to be noted that Islamic law is not a primitive law, which does not allow any sort of development, but is susceptible to the needs of the society.”<sup>16</sup>

Another possible explanation for the arbitrators’ decisions in the above cases is that they were unimpressed by Islamic law for whatever reasons, so they decided the disputes according to laws that they were more familiar and confident in applying.

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<sup>10</sup> n 6 above, 217

<sup>11</sup> ibid

<sup>12</sup> ibid 227

<sup>13</sup> Arbitration between Kuwait and the American Independent Oil Company (AMINOIL) [1982] 21 ILM 976

<sup>14</sup> S. Pac. Prop. (Middle East), Ltd. v. Arab Rep. of Egypt, 32 I.L.M. 933, 949 (1993)

<sup>15</sup> ibid 238

<sup>16</sup> ibid 239

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The distrust of international arbitration according to Nariman<sup>17</sup> was not confined only to the losers. In the Middle East, mistrust of international arbitration had deep roots and continued to cause misgivings. In a memoir<sup>18</sup> presented at a Conference of the Sovereigns and Heads of State of OPEC countries in 1975, it was stated that 'Western arbitrators', because they belonged to a certain hemisphere and social system, had a conception of law that was a reflection of their own system. 'They have a tendency', the memoir went on, 'to consider that the arguments of the Third-World client are devoid of any legal basis, and hold them to be ineffective once they fail to correspond with their own conception of the law' whether it is ignorance or bias, western arbitrators during these times damaged the image of arbitration not just in the Middle East but also in other parts of the world such as Latin America.

Professor de Castro, former judge of the International Court of Justice, wrote the arbitration clause "was imposed by the more or less hidden forces that direct international trade in order to free themselves from any legal provision that might stand in their way"<sup>19</sup>. He raised the spectre of a co-ordinated international campaign by industrial nations aimed at 'turning arbitration into a mythical rite against which any criticism would be seen as the commission of an act of sacrilege'. Stark words, but they represent reservations about arbitration that are prevalent to this day. Another former judge of the International Court of Justice, Keba M'baye from Senegal, observed that "the notion that there is a system of international justice would not be shared by some countries notably in Africa, Asia and Latin America who still see arbitration as a foreign judicial institution imposed upon them"<sup>20</sup>. He went on to note that it was seldom that developing countries were a venue of international arbitration or that they produced arbitrators.

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<sup>17</sup> F. Nariman, "East Meets West: Tradition, Globalization and the Future of Arbitration", *Arbitration International*, Vol. 20, No. 2 (2004), 123

<sup>18</sup> Memoir of 1975, quoted by Doyen Ahmed Mahiou, Professor of the University of Algiers, in his commentary on 'Reconciling Arbitration with the Needs of Public Corporations while Preserving its Advantages' in 60 Years On: a Look at the Future, *60th Anniversary of the ICC International Court of Arbitration* (ICC, 1984), 198

<sup>19</sup> Ariely, D, *The Hidden Forces that Shape our Decisions*, (London: HarperCollins, 2008), 36

<sup>20</sup> Saunders, M and Salomon, C, "Regional Rumble: Growth in North/South Trade", Legal Business Arbitration Report, 2008, [http://www.dlapiper.com/files/Publication/e9fc288-d6a2-4e84-9b16-0139755e1b1c/Presentation/PublicationAttachment/906e9b20-e2f4-4dbd-b582-0509542a18d0/AR08\\_DLA\\_Piper.pdf](http://www.dlapiper.com/files/Publication/e9fc288-d6a2-4e84-9b16-0139755e1b1c/Presentation/PublicationAttachment/906e9b20-e2f4-4dbd-b582-0509542a18d0/AR08_DLA_Piper.pdf), 27

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David<sup>21</sup> contends that arbitration in the Middle East is seen as a form of justice administered in a foreign country, by foreigners who have a view of justice different from that held by an Arab. He goes on to argue that consent to arbitration is rarely free, the award rendered is frequently regarded as unjust, because it does not take into account facts, needs or ways of thinking which should have been appreciated in the opinion of a Middle Eastern lawyer or businessman. Some arbitration clauses are repudiated, because they are regarded as an inadmissible infringement upon the sovereignty of the state. “While the arbitral hermeneutics of these three awards had to be bewildering to Middle Eastern arbitral observers, they were baffling and remain so to Western scholars. Looking over the landscape created by these awards, it is no wonder that the Islamic legal world looked suspiciously at the ‘logic’ and ‘rationales’ used by the arbitrators in these cases which, in turn, led to a subsequent, and perhaps justifiable, distrust of the ‘Western’ arbitral process.”<sup>22</sup> The profound and lasting impact of these arbitrations on the region’s arbitral psyche should not be underestimated. It is no wonder that ‘Western’ forms of commercial arbitration have not, to this day, become integral to the Islamic legal system.

### 4.2 The Shift in Attitudes

In the last decade, there have been some changes, at least on the surface, with regards to arbitration in the Middle East. There is evidence of developments that suggest that arbitration is going well in Arab countries at the legal level and that a climate is being created to go beyond the crises of arbitration that were caused by the famous awards of 1950s and 1960s.<sup>23</sup> Developments include modifications to Arab countries’ arbitration laws and the creation of a number of arbitration centres. Also, according to Ahdab, a number of doctoral theses have appeared on the subject of arbitration in Arab Universities in a range of countries. All this leads to the view that recently the Middle East has started to re-engage with international commercial arbitration.

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<sup>21</sup> R. David, *Arbitration in International Trade*, (Boston: Kluwer Law and Taxation Publications, 1985)

<sup>22</sup> A.J. Gemmell, “Commercial Arbitration in the Islamic Middle East”, 5 *Santa Clara Journal of International Law* (2006) 169, 179

<sup>23</sup> A. Ahdab, *Arbitration with the Arab Countries*, (Boston: Kluwer Law International, 1999)

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This could be due to the fact that people in the Middle East have discovered certain benefits to arbitration. There seems to be general consensus between observers that developing countries now perceive arbitration as crucial to attracting long term foreign investment. Thus, it seems that the distrust towards arbitration has progressively disappeared; most Arab countries have now ratified international conventions concerning arbitration or enacted laws or ordinances authorizing state agencies to provide for arbitration with respect to international commercial contracts. Also, Islamic scholars have backed arbitration and confirmed that “under Islamic law, the principle of arbitration is well recognized.”<sup>24</sup>

Also, during the previous period hostility, some Arab parties used commercial arbitration to their advantage. As an example given by Hunter,<sup>25</sup> which he considers to be a typical experience during the mid- 1960s in the Arab states in the Gulf region, on several occasions when he would advise an Arab state that he could negotiate a more favourable outcome than the likely result of an arbitration award, the minister concerned would reply to the effect:

“But, Martin, the public view is that this project [it may have been a power station, a hospital, a road or whatever] was disastrously bungled by my Ministry. If I approve a settlement the newspapers and hostile deputies in the National Assembly will attack me. I will even be accused of being bribed to pay the contractor's claims. It is not my money. If the arbitrators make a big award against us it doesn't matter. I will simply send it down to the Ministry of Finance with a request for a cheque. In public I will say that the arbitrators were incompetent...”

The abundance of construction activity and foreign investment in the Middle East has led to the growth of arbitration in the region, including the proposed launch of arbitration centres in Saudi Arabia and Qatar. Accession to international conventions by the majority of Gulf Cooperation Council (GCC) countries and as well as other Middle Eastern countries has also increased support for arbitration. A notable exception, until very recently, has been the United Arab Emirates (UAE), where the absence of internationally recognised rules governing the enforcement of foreign

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<sup>24</sup> n 2 above, 38

<sup>25</sup> M. Hunter, “International Commercial Dispute Resolution: The Challenge of the Twenty-first Century”, *Arbitration International*, Vol. 16 No. 4 (2000), 379, 380

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awards – with the exception of treaties with France and the countries of the GCC – meant that foreign arbitral awards could not be enforced by UAE courts. On 21<sup>st</sup> August 2006 however, the UAE, finally, signed the New York Convention.

The President of the LCIA Arab Users' Council and Member of the LCIA Court, Essam Al Tamimi, Founder and Managing Partner of Al Tamimi & Company, one of the largest firms in the Gulf, explains; "Arbitration has provided international investors with a stage to settle their disputes without having to worry about local procedures or being acquainted with local courts...dispute settlement is the major concern for them and arbitration provides comfort. It not only provides the choice of venue, but also the choice of arbitrators who may be specialized in the concerned area."<sup>26</sup> With the young underdeveloped judicial and legal systems in the GCC countries, arbitration has been a critical factor in driving foreign direct investment. This is especially true for joint ventures set up with multinational companies to construct large infrastructure projects, which act as the foundation for continued economic growth and development. "It is evident that the GCC countries have made a political decision to be part of the international community and to bring their laws, practices and judicial system to the international level," Al Tamimi continued. "They fully recognize that it is not possible to become international without recognizing the importance of arbitration in all sectors of international business whether industrial, banking or trade." The Arab world has clearly recognised the necessity of accepting arbitration in the global economy.

Another argument put forward for the emergence of international arbitration in the Middle East is that multinational corporations, pursue commercial activities without wishing to be tied down to state borders. They have attempted to subordinate political, cultural and ideological authority to the dictates of commerce and commercial practice. Because conflict is a by-product of business, the international business community has devised methods of dispute resolution that do not involve the nation state.<sup>27</sup> This, I suggest, has been realised by the Arab countries and thus

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<sup>26</sup> E. Al Tamimi, "UAE acceded to the New York Convention", 15 July 2006, Dubai UAE, [http://www.arbitrators.org/Institute/PR\\_UAE\\_Newyork.asp](http://www.arbitrators.org/Institute/PR_UAE_Newyork.asp)

<sup>27</sup> R. Thirgood " International Arbitration: The Justice Business", *Journal of International Arbitration*, Vol. 21, No. 4 (2004), 341, 341

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they have had to adopt western style commercial arbitration laws if they wanted ‘a slice of the cake’ in international commerce.

This argument of subordination is limited. The arbitration community could not ignore the national courts, as without the aid and assistance of local municipal courts, transnational arbitral awards could never be effectively enforced. Dr Herrmann, former Secretary-General of UNCITRAL, former President and current honorary President of the LCIA, describes international arbitration to be similar to reputations. It rests on public confidence and the principal member of the public whose confidence is essential to sustain a foreign award is the local judge in the court of enforcement – and local judges react differently in different jurisdictions. “It is quite unfair to expect judges to attach too much significance to a piece of paper signed by an arbitrator, however eminent in some far away part of the world, of whose name or reputation the judge in the court of enforcement has not even heard!”<sup>28</sup> Nariman states, “Since how national courts actually function depends a great deal on the knowledge, quality and equipment of its judges (and of the lawyers appearing before them and assisting them) the need for a widening of the awareness-base of the New York Convention becomes apparent, amongst both judges and lawyers.”<sup>29</sup> Thus, judges are essential to effective functioning of arbitration.

Thirgood<sup>30</sup> puts forward a combination of factors that contributed to the success and growth of international commercial arbitration, and I would say that some of these factors have clearly contributed to the positive reception of arbitration in the Middle East in the last decade. These factors include: the growth in international trade; commerce and investment; the inability of courts to adapt to modern, international, commercial practices and abandon local traditions and procedures; the reluctance of international business people to be judged in someone else's backyard; the improvement of judicial and legislative attitudes towards arbitration; and the establishment of an effective treaty network guaranteeing the enforcement of arbitration agreements and awards.

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<sup>28</sup> F. Nariman, “East meets West: Tradition, Globalization and the Future of Arbitration”, *Arbitration International*, Vol. 20, No. 2 (2004), 123, 131

<sup>29</sup> *ibid*

<sup>30</sup> n 27above, 349

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The move towards arbitration within Arab countries was also a response to the ICC and other arbitral institutions quest or “battle”, as described by Legal Counsel of the ICC Secretariat, Mathew Secomb, “to ensure that arbitration becomes the norm in transnational dispute resolution. The aim is to educate governments and commerce of the benefits of actively supporting international commercial arbitration.” Ahdab optimistically states “Arbitration...can serve, as well as possible, the economy of our world, which has become a small village.”<sup>31</sup> This seems to me the current widely held view of Arab countries that seek the benefits of arbitration in attracting foreign investment and commerce.

However, there remains a real problem which was crystallised by Redfern and Hunter as “the fear that arbitral tribunals, established under the auspices of arbitral institutions based in the world’s major industrial nations, will have an inbuilt cultural and social bias against them, however impeccable the intellectual integrity of the individual arbitrators may be.”<sup>32</sup> Nariman advises both national judges and international arbitrators to ensure that arbitration does not suffer from cultural bias:

‘Judges in national courts raise their sights and adopt a transnational outlook, remembering always the true consensual nature of all international arbitration...international arbitrators adjust their sights as well, with robust judgement and a clearer articulation of the decisions made. A good arbitrator is one who writes acceptable reasons for stated conclusions, reasons that satisfy the loser as well as the winner.’<sup>33</sup>

Hence, an arbitrator who “imbued with his own legal culture and always [falls] back on it, is certainly an enemy of arbitration.”<sup>34</sup> Nariman predicts “East must meet West not in conflict or distrust as before, but in harmony – a symbiotic harmony.”<sup>35</sup>

Matters have changed considerably since the 1950’s and 1960’s not just within the legislative framework, but also on a practical level. In a survey conducted by

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<sup>31</sup> n 23 above, 5

<sup>32</sup> M. Hunter & A. Redfern, *Law and Practice of International Commercial Arbitration*, (London: Sweet & Maxwell, 2004), 216

<sup>33</sup> n 28 above, 126

<sup>34</sup> n 23 above, 3

<sup>35</sup> n 28 above, 136

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Bedjaoui<sup>36</sup> on the cases of the ICC found serious improvements and a significant growth in popularity of arbitration. There were on average 69 cases involving Arab parties in the 1980s. This grew to 62 cases in the 1990s. These figures fluctuated over the ten years and the highest number of cases was in 1986 which was 108. Every Arab country without exception was a user of the ICC. Arab parties have not just been passive participants i.e., defendants (481), in the decade between 1981–1990. 279 Arab parties brought cases to the ICC as claimants. These arbitration cases are not only with European parties, but they included some inter-Arab arbitrations too.

With regards to the nationality of the arbitrators, statistics show that parties from the Asian and Pacific regions have overwhelmingly chosen western arbitrators in international arbitration cases: between 1987 and 1990, they chose, out of 38 of their appointments, 35 arbitrators from Western Europe or North America. Bedjaoui suggests an explanation for the predominance of western arbitrators in ICC arbitrations: “knowledge of the applicable law, which would be western in character in the cases concerned and also to a lesser extent, in the choice of places in Europe or America as the venue for the arbitration.”<sup>37</sup> He goes on to say that,

“Certain strata of the Arab business world remain dominated by the impression that their interests will be in better hands if entrusted to a western co-arbitrator. This can be seen as the expression of a more general reflex or phenomenon, whereby one seeks qualities of professionalism, technical acuteness and “know-how” to rely on, and attributes them more readily to a Westerner than to an Arab.”<sup>38</sup>

Nevertheless, whenever the ICC had to appoint a co-arbitrator where an Arab party failed to do so, it usually chooses a person with the same nationality as the Arab party. In the 1980s, it was practically unheard of for a national of an Arab country to be appointed as the chairman or sole arbitrator in a dispute. This has though changed significantly. In the first couple of years of the 1990s, Arabs have on 33 occasions

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<sup>36</sup> M. Bedjaoui, “ The Arab World in ICC Arbitration” *The ICC International Court of Arbitration Bulletin*, Special Supplement, Vol. 3, No. 1 May (1992), 7

<sup>37</sup> *ibid* 14

<sup>38</sup> *ibid*

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been in the chair and the ICC Court was responsible for 29 out the 33 Arab chairmen or sole arbitrators.

When it came to choosing the venue for arbitration, Europe was a firm favourite with 199 out 237 cases from 1986 to 1990 involving at least one Arab party. Meanwhile, the Arab world was the scene of 33 arbitrations: 17 in North Africa and 16 in the Middle East. Statistics show how in 157 cases, the applicable law was specified in the contract, and in 96 it was not specified. Islamic law, or more specifically Arab legislation, was specified rather more often (78 times) than European law (64).

### 4.3 The Reality

The ICC figures are encouraging, but it seems that the commercial arbitration model has not reached the grassroots in the Middle East. In other words, even if arbitration is practised in the Middle East, it is practised in a more conciliatory fashion, rather than in the adversarial western manner. On many occasions, the Arab parties choose to resolve their disputes using mechanisms that look like mediation or that are at least akin to arbitration by *amiable compositeur*.<sup>39</sup> The arbitrator will conduct the arbitration more like a conciliation by a nominated third party, who tends to adopt a role more akin to that of a mediator sanctioning an agreement between the parties; his decision is final, although his mandate can be terminated before he gives it, since he is acting on the parties' instructions.

This tendency to resort to a mediated settlement is not generally found in the case of commercial or civil disputes in which one of the parties is a foreign natural or legal person. Here, the norm is recourse to adversarial arbitration. Unlike Arab arbitration, it is not spontaneous: whether domestic, international or foreign, it is triggered by an arbitration clause which the Arab party has signed and probably lost sight of since. It is a common occurrence for the Arab party to seem to be taken by surprise by a request for arbitration. To the Arab way of thinking, arbitration, whether foreign, international or even domestic, is regarded as a concession to the foreign party.

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<sup>39</sup> S. Saleh, "The Settlement of Disputes in the Arab World Arbitration and Other Methods- Trends in Legislation and Case Law", 1(2) Arab L. Q. (1986) 198

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International or domestic arbitration is often seen by the Arab party as depriving him of the right to be heard by his duly appointed judges. International or foreign arbitration is generally held on alien territory according to foreign rules of procedure and substantive laws and before a majority of foreign arbitrators. It can almost be said that it is only when left with no alternative- and then racked by apprehension- that an Arab party will comply with an arbitration clause. Sometimes attempts are made to later have it declared null and void by the courts in his own country.

The fact remains that the western model of international commercial arbitration was just planted in the Arab/Islamic Middle East with no thought as to cultural and historic heritage and dispute resolutions that already exist in the region. Majeed<sup>40</sup> argues, “increasingly, there is a questioning of legislation imported from Western sources, and calls for a return to the *Shari’ah*....The marriage between Western legislations and the cultural and religious underpinnings of the *Shari’ah* often turns out to be an unhappy one.”<sup>41</sup>

The essence of arbitration lies in resolving disputes with mutual respect and understanding of the various laws and practices indigenous to each culture. However, the reality is very different and the world of commerce has not reached a truly international and comparative approach to international dispute resolution. In many parts of the Middle East, arbitration as a western model is seen as unfamiliar and unnecessary, causing great dissatisfaction when imposed by the foreign party.

This does not mean that the situation with regards to arbitration has not improved in the last ten to fifteen years, international commercial arbitration is becoming increasingly accepted in the Middle East. However, concerns are still being voiced from the developing and Islamic worlds with regards to the lack of cultural inclusion in the western model:

“Today, cries of foul play over arbitration are neither as vociferous nor as troubling as they were up to the end of the last decade. Why they occur now, as they occasionally do in the Arab Middle East, the oppositional

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<sup>40</sup> N. Majeed, “Good Faith and Due Process: Lessons from the *Shari’ah*” *Arbitration International*, Vol. 20, No. 1 (2004), 97

<sup>41</sup> *ibid* 101

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claims are articulated increasingly in terms of a demand for incorporating the Islamic legal tradition in the international practice of arbitration.”<sup>42</sup>

The assumption and belief that *Shari’ah* is being sidelined, and that the current international commercial arbitration framework is exclusively derived from Western legal heritage may create obstacles in the acceptance and continued legitimacy of international commercial arbitration in the Middle East, and even beyond in other Islamic nations. The proponents of international commercial arbitration cannot afford to alienate people whose experiences, socioeconomic predicaments and cultural/religious norms may not align completely with Western conceptions.<sup>43</sup> In the case of Islamic nations, we have seen that there is no inherent opposition to the concept of arbitration, yet, there are areas of tension and concern.

This is clearly not acceptable if we recall that the twin objectives of the legal framework underpinning international commercial arbitration are to ensure enforceability of arbitration agreements/clauses and arbitral awards and to insulate the arbitration process as much as possible from interference by domestic courts and other national or international institutions. This can only be achieved when there is mutual respect and understanding of the various laws, practices, cultures and religious worldviews prevalent in the world today.<sup>44</sup>

There is a clear need for dialogue in this regard between the proponents of both the Western and Islamic perspectives. The aim of such a dialogue will be to help develop an international commercial arbitration regime in which the business community can have confidence, while staying true to the core principles of *tahkim* under *Shari’ah*.<sup>45</sup> This will help remove a potential crutch that may be used by those who oppose the international commercial arbitration movement as being one of purely Western import.

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<sup>42</sup> A. A. Shalakany, “Arbitration and the Third World: A Plea for Reassessing Bias Under the Spectre of Neoliberalism,” 41 Harv. Int’l L. J. (2000), 420

<sup>43</sup> D. S. Sullivan, “Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy,” 81 Geo. L. J. (1993), 2369.

<sup>44</sup> F.M. Kutty, “The Shari’a Factor in International Commercial Arbitration” (2005) *Bepress Legal Series*, 875, 985

<sup>45</sup> G. Sayen, “Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia,” 24 U. Pa. J. Int’l Econ. L. (2004) 905, 906

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Arbitration is still thought of as an ad hoc arrangement in which the choice of a specific person is a key consideration and, fairly often, as one which does not lend itself to collective decision-making. In the circumstances, what can be done to ensure that international arbitration is genuinely accepted by Arab parties? The answer is to be found not only in legislation, which can easily be imported from the West, but also on four levels. The first is economic: pressure of international trade; where such pressure exists, some momentum has already been gained. A second level is cultural: comprehension and assimilation of legislation by the bodies which adopt and implement it. Then there is the human level; the selection of Arab arbitrators, who should play a more active part in the settlement of disputes involving parties from the Middle East. Finally, there is the geographical level: it is not enough, in my view, for arbitrators to be exported to the West; facilities should be made available for international arbitration to be established and conducted in the countries of the Arab Middle East.

### 4.4 The Crisis

As described in chapter two, international commercial arbitration has become formalised with strict procedures, appearing much more like an 'offshore' court. This framework is seen in the West as lending the legitimacy to the process, however, this does not sit easily with Arab players. Arbitration has a long history in Arab and Islamic societies, as outlined in chapter three, and it is seen as a process of conciliation, based on the legitimacy of the arbitrator, who is respected and trusted to bring the parties together and produce a compromise. The new system of arbitration is adversarial and strict, which clashes with Arab norms of arbitration and over the years this has caused friction and further negativity, which in turn created the latest crisis of commercial arbitration in the Middle East.

At the start of 2007, there were certain parts of the community of arbitrators in the Middle East who felt that a number of prominent Swiss and French arbitrators who arbitrate a large number of Euro-Arab cases were biased and prejudiced towards Arab parties. The GCC Commercial Arbitration Centre based in Bahrain called on Comite Francais de l' Arbitrage in Paris to have an open dialogue with the Middle

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East on the subject of arbitration and to stop the campaign against Arab arbitrators in France.

An article was written by an Egyptian lawyer in September 2006 describing a number of cases where an Arab party was mistreated or prejudiced by a European arbitrator. One of the cases referred to was an arbitration case between the Lebanese Republic and a German company. The date of a hearing where ten Lebanese engineers had to attend to give evidence was fixed on the day of '*Al Fitr*' feast despite the requests of the Lebanese lawyers to delay the hearing by three days. The engineers attended the hearing as directed. Another case highlighted was submitted to the Court of Appeal in Cairo in a hearing held on 28 October 2003. This arbitration referred to a dispute between Saudi and Danish companies. Both parties nominated Egyptian arbitrators on their behalf and the two arbitrators nominated a Swiss arbitrator as chairman. Apparently, the Swiss chairman without any request from the parties or consultation of his co-arbitrators, appointed a Swiss expert. After a number of objections and sole decisions by the chairman, the arbitrator nominated by the claimant resigned. The claimant challenged the chairman before the Cairo Court of Appeal, but before the tribunal examined the merits of the claim, the chairman resigned. The author claims that the chairman "out of spite" followed the case and wrote an article in the Swiss Arbitration Association (ASA) Bulletin, in which he attacked the lawyers representing the Saudi company.

El Deen claims that there is a "club of beneficiaries from the Euro-Arab arbitration", where the names of those arbitrators have somehow "became compulsory in the Arab arbitration cases."<sup>46</sup> It is claimed that "nine out of ten of the Arab parties lost their cases without any explanation or justification due to a blind bias in favour of European investors."<sup>47</sup> The reason for this situation is that Arab parties nominate European arbitrators and European lawyers "for security reasons and the arbitration becomes European as well as the awards...statistics show that one Arab arbitrator is

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<sup>46</sup> M. A El Deen, "Secrets About The Rise the Euro-Arab Arbitration Crisis", *El Watan Al-Arabi*, 13 September 2006, 38, 38

<sup>47</sup> *ibid* 39

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nominated for every twenty Euro-Arab arbitration cases and that the Arab and commercial Arab companies lose their cases at a 29% rate in every ten cases”<sup>48</sup>.

After these complaints, emails were exchanged and the issue discussed and considered by lawyers involved in arbitration in the Middle East. The supporters of these claims, who want to get more Arab arbitrators involved in Euro-Arab arbitration, organised a conference in late 2006 in Spain excluding a number of Swiss and French arbitrators and another in September 2007 in Italy doing the same. I spoke to a number of prominent Arab arbitrators who explained to me that in some way there are now two main camps; one group that deal with the Cairo Regional Centre and that is trying to build a Mediterranean arbitration community and arbitration culture separate to the western bias of European arbitrators, and a second that are supporters of the French and Swiss arbitrators and deal with the ICC. This second group are considered to be ‘traitors’ in some quarters.

This article and the discussions since have led to concerns as to the future of commercial arbitration in the region. It seems that the hostility of the 1950s and 1960s has returned but wearing a different mask and for now this is directed against certain individuals. However, the main difference between now and the previous phase of boycotting arbitration is that this time the Arab world is creating its own arbitration community with its own players, discourse and practice, excluding those who they consider to be biased or non-compliant.

### **4.5 International Commercial Arbitration through the eyes of Jordanian Arbitrators**

The last part of this chapter outlines the views and feelings of the Jordanian arbitration community towards international arbitration and the ICC. These views were recorded during 2004 and 2005 and they show the great dissatisfaction by those players.

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<sup>48</sup> *ibid* 42

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### 4.5.1 International Arbitration

A lawyer that who been practising since 1985 and specialises in civil and commercial law explained, “*as third world countries, clients cannot afford the expenses of international arbitration. It is a heavy burden. International arbitration costs can reach several millions.*”

A former judge, who has been a lawyer for 16 years warned “*people in Jordan feel that they cannot afford to go to arbitration abroad and therefore may decide not to claim at all. The local party is always the weaker one. We need to protect them and the new Arbitration Act does not do so, as it allows arbitration abroad. In Jordan, the new law disadvantages the local party considerably. The law is wrong.*”

An experienced arbitrator and lawyer who specialises in commercial and civil law advises his *clients to go to court whether Jordanian or foreign as it is always less expensive. For Jordanian clients, in particular it is not advantageous to go to arbitration. Arbitration is always imposed upon them by foreign parties. Only if the dispute is specialised or has complicated issues will it be worthwhile for the Jordanian party to go to local arbitration.*”

A young arbitrator said “*foreign arbitrators have no knowledge of Arab laws as they are not translated. They cannot do any research if they do not speak Arabic. In a case where the chairman was a foreigner and the applicable law was Jordanian, it was very difficult for him. He could only rely on second hand translation and information which made it very difficult. Now, in international arbitration there is at least one local arbitrator. In the 1960-1970s there were a lack of competent Arab arbitrators, but now this problem does not exist anymore. I have actually noticed that some of the foreign companies appoint local arbitrators. The chairman is a non-local usually. The foreign party appoints an arbitrator, who is fluent in the language of the law and the local party also appoints a local arbitrator, then they appoint the chairman from a neutral country. This way all the information regarding the substantive law comes from two arbitrators, rather than one.*”

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An international arbitrator with an LLM and PhD in International law from George Washington University insists “*the worst issue with arbitration is the cliques. There is an inherit bias towards Arab laws from foreign arbitrators. I have filed complaints with the ICC. I do not see any shortcomings in our laws and I have never encountered any problems within Arab law as it deals with commercial disputes of any kind. We have a well established system of law, they are just ignorant. We never been hostile to arbitration, we are hostile to the bias.*”

### 4.5.2 International Chamber of Commerce (ICC)

The ICC is seen by all those interviewed as very expensive and therefore inaccessible to Jordanian parties. Most lawyers try very hard to avoid ICC arbitration. The criticisms of the ICC are not restricted to cost alone, some interviewees felt the ICC is unrepresentative.

A former judge said “*there is no doubt that the ICC is a European Model.*”

A very experienced lawyer and a member of the committee of the Jordanian Bar explained “*arbitration has been forced on Jordanian firms through western companies. This sometimes leads to ICC arbitration, which is beyond the financial ability of Jordanian businesses. Jordanian business folds to western terms and pressure. The market in Jordan is small and there are always a number of alternative parties that would accept the terms of the western parties. The ICC is beyond all of the financial means of Jordanian business.*”

A young arbitrator says, “*I like the ICC and even in cases where it is not ICC, I try to write terms of reference as it focuses the effort and saves time. This way the main issues are identified and all the evidence. However, I do not advise my clients to refer their disputes to the ICC because it is very expensive.*”

An experienced lawyer who works mainly in international arbitration said “*the problem for Jordanian clients is the high fees. It is a very big problem.*”

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A lawyer with an LLB from School of Oriental and African Studies in London, who represents clients in arbitration cases explained “*the ICC is causing great harm. An Arab party will always end up on the losing side and the reason for this is bias. I try to avoid an ICC clause as much as possible. LCIA has a better track record. If I had to choose between ICC and LCIA, I would choose LCIA as they charge lower fees. In cases where there is only one European arbitrator among local arbitrators, the European is a prisoner to the local lawyers on the panel or to the expert.*”

A lawyer that has a PhD from George Washington in international law has “*a negative view of the ICC in particular because that is my experience. ICC arbitration is populated by European arbitrators who are biased. I am not saying they are prejudiced against Arabs; this mental set up is slanted against our ways. For example, if you take an English lawyer and present to him a provision in Jordanian law that it is different to English law, ‘it will take a lot of salt for him to swallow it’. He is culturally and mentally slanted against what is not English.*”

The engineers also agree, one engineer said, “*The ICC is very expensive. The Arab party is in an environment that is very different. When a contractor who has been working in Saudi for a long time goes to arbitration in Paris, he starts to pretend that he does not understand Saudi ways and procedures. The arbitrators in the ICC certainly do not understand. Therefore, no wonder the Arab countries lose a lot of cases that they should not lose.*”

The journey of international commercial arbitration in the Middle East has been and in some ways still is an unhappy one. This bias always been caused by those who view *Shari'ah* to be too obscure, archaic and too different to be taken seriously. International commercial arbitration in the Arab world has been on a rollercoaster with occasional highs, but mostly lows. International arbitration has not won over Middle Eastern players. Many countries have adopted harmonising laws and signed international conventions begrudgingly, thus this apparent change seems to be ‘skin deep’. Recently, Arabs have started developing their own separate culture of modern commercial arbitration instead of trying to fit into the current international arbitration culture. The next two parts of the thesis will concentrate on Jordan and how these

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different cultures and rationalities work themselves out in the commercial arbitration environment of Amman.

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### Chapter Five

#### Jordan and its Tribes

“Jordan’s founding myth goes back to the 1916 Arab Revolt of coalition of tribes led by the Hashemite family against the rule of the Ottoman Empire.”<sup>1</sup>

In the parts one and two of this thesis, the competing rationalities of the West and the Middle East were described, as well as the result of their convergence. In the next two parts of the thesis, the two rationalities will be examined in the context of the Hashemite Kingdom of Jordan. This chapter will give a brief history of Jordan and how the tribes and their culture were intertwined into the fabric of the state as well as describing tribal justice. The effect of tribal heritage on modern Jordan is further examined in chapter nine. This chapter and the next are vital in order to give the background for understanding the heritage and culture of contemporary Jordan and the practice of arbitration within it.

The majority of the population of Jordan is a combination of people from East and West Banks of the Jordan River. The East bankers are largely descendants of the nomadic tribes who sallied around in the Arabian Desert, either to establish their tribal territories or to settle down in villages and towns within the present day boundaries of Jordan. The people of the West Bank, also have nomadic ancestry but their origin is much more heterogeneous. “Canaanites and Hebrews, Syrians and Greeks, Romans, Byzantines and Arabs, all the ethnic groups who invaded and settled in Palestine in the long pre-Islamic history of the country contributed to the racial picture of the West Bank.”<sup>2</sup> The best way to describe the mixture of the Jordanian population is to use the words of Muhammad Afash ‘Idwan<sup>3</sup> “Jordan is a conglomerate. Jordan is the bedu, the city dweller, the Palestinian, the refugee, the Circassian, the Christian, the Muslim, the American. It’s a melting pot.”<sup>4</sup> This is in

<sup>1</sup> Y. Alon, *The Making of Jordan: Tribes, Colonialism and the Modern State*, (London: I.B. Tauris, 2007), 2

<sup>2</sup> R. Patai, *Country Survey Series: Jordan*, (New Haven: Human Relations Area File, 1957), 35

<sup>3</sup> Information Minister in February 2003

<sup>4</sup> n 2 above, 26

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terms of composition of its population, but it is certainly tribal in its identity and norms. This was caused by the fact that the Transjordan Emirate was excluded from the Jewish area of settlement and given its independence in 1923. Therefore, the country was not exposed to cultural change and old Muslim Middle Eastern traditions continued undisturbed in such areas as family, social and economic life.<sup>5</sup>

All Jordanians were originally identified (and in a lot of ways still are identified) by family, clan and tribal affiliation. This form of social organisation was created by the lack of urbanisation and distance from centres of power or economic influence during Ottoman times. “In the absence of state security, tribal forms of protective social and economic affiliation expressed through kinship...extended into agricultural regions and villages. Hence, tribalism in Transjordan was not limited to nomads; rather, the tribes of Transjordan filled every economic niche from nomadic camel breeders to settled farmers, forming a complex web of integrative social alliance.”<sup>6</sup>

Tribalism and the legitimacy of tradition are considered the foundations of the Jordanian state and central to its cultural heritage as well as the basis for legitimacy and survival of the monarchy. The role of tribes and tribalism, although transformed over the years, remains a fundamental pillar of both society and political culture. Although, numerically few Jordanians lived the traditional life of the nomadic Bedouin, the cultural traditions based on this life-style have hardly diminished. Indeed, conceptions of modern Jordanian cultural and national identity are deeply intertwined with the country's Bedouin heritage.

The Hashemite ruling family needed tribal support for the process of state-building due to the specific historical context of the time. This allowed for the integration of the tribes into the modern state and their acceptance of the political order that was formulated by the Hashemites. According to Alon, “in the course of this process, tribal people developed a clear stake in the survival of the Jordanian state...It also

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<sup>5</sup> *ibid* 36

<sup>6</sup> M.C. Wilson, *King Abdullah, Britain and the Making of Jordan*, (Cambridge: Cambridge University Press, 1987), 57

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allowed tribes to carve out a political role for themselves within the framework of the modern state.”<sup>7</sup>

### 5.1 The Tribal Foundations of the Jordanian State

On the eve of the establishment of the Transjordanian Emirate in 1921, almost the entire country’s population was organised along tribal lines and adhered to tribal values and customs. The tribe determined practically every aspect of people’s lives, forming in most cases “their principal frame of reference.”<sup>8</sup> The forging of political alliance, control over land and water, seasonal migration, the provision of personal security, conflict resolution and marriage arrangements all took place either within the tribal system or in accordance with its conventions. Before the arrival of Abdullah, powerful tribes were the country’s effective rulers.

*Sharif*<sup>9</sup> Abdullah bin Husayn, the second son of *Sharif* Husayn of Mecca and one of the leaders of the Arab Revolt in 1916 arrived in Ma’an in Transjordan from the Hijaz on 21 November 1920.<sup>10</sup> The Husayn tribe descended from Quraysh, the tribe of the Prophet Muhammad. Abdullah arrived in Ma’an with 2,000 tribesmen and stayed there to gather support and discuss strategy with those who made the trip to Ma’an to meet him. He was welcomed by the tribal leaders and the sheikhs of the Huwaitat tribe, one of the biggest tribes in Jordan.<sup>11</sup> Also, traditional leaders from the general area of Transjordan and sheikhs of tribal segments of various sizes and importance, community leaders and other local notables visited Abdullah in Ma’an. Their positions of leadership were based on a combination of inherited familial prestige, personal merit and wealth. They were in control of Transjordan south of Amman, the territory within which Abdullah had first to establish a base. If they were openly hostile, his claims to leadership would be difficult to establish, something Abdullah was very aware of. He was fluent in tribal customs and conventions, which aided him to a great extent when he realised that if he was to rule

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<sup>7</sup> n 1 above, 1

<sup>8</sup> ibid 13

<sup>9</sup> Means noble and indicates descent of a direct lineage from the Prophet Mohammad (s.a.a.w)

<sup>10</sup> n 6 above

<sup>11</sup> ibid

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Transjordan, he must secure the loyalty of the tribes, which he achieved in his first four months in the region.<sup>12</sup> The gravity of the Hashemites in Arabian politics in the aftermath of the First World War and their mantle as Islamic leaders, recognised descendants of the Prophet strengthened Abdullah's appeal. Also, Abdullah's own political experience and skills in tribal politics certainly played a role and soon he was universally acknowledged as *sheikh mushayekh*<sup>13</sup>.

Six months after his arrival in Ma'an, on 1 March 1921, Abdullah moved to Amman and chose it to be the seat of his government. On arrival, he was welcomed by a large number of sheikhs from all the surrounding districts. In April 1921, the first government was formed in Transjordan.<sup>14</sup> Abdullah was careful to establish and maintain alliances with the strong nomadic tribes. For that purpose, he removed tribal affairs from the authority of central government and governed them personally or through the Department of Tribal Administration headed by his cousin and confidante, Emir Shakir bin Zayd. The result was the emergence of two almost separate systems of government. Nomadic and semi-nomadic tribes were under Abdullah's personal rule and enjoyed the persistence of a chieftaincy- like pattern of rule, whereas the settled population was controlled by the central government along modern lines.<sup>15</sup>

Abdullah needed the support of the tribes for his own survival, as he was dependant on the strong tribes who held physical control over the country. He therefore established eight governments, which were organised along tribal lines. By securing the support and co-operation of only a few dozen notables, Abdullah managed to achieve a degree of control over the population as a whole. Abdullah also relied on the tribes' military power, as he did not have an army of his own. This was necessary in order to assert his control over the country and to defend it from external threats.<sup>16</sup>

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<sup>12</sup> n 1 above

<sup>13</sup> The leader of all the Sheikhs

<sup>14</sup> n 6 above

<sup>15</sup> ibid

<sup>16</sup> ibid

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The weakness of central government and the small number of British personnel made it necessary to control the population indirectly via local leaders.<sup>17</sup> In their capacity as the recognized leaders of tribes, villages and town quarters, *sheikhs* and notables became part of the state apparatus and fulfilled administrative chores, working closely with government officials. Later on, Abdullah appointed some of the tribal leaders into the government and the administration in order to create a new role for the sheikhs and maintain their privileged status, while gradually limiting their autonomy. However, this did not mean an eradication of tribal identity, on the contrary, state policies enhanced existing tribal modes of politics. In the later years of the mandate, within the general framework, the administrators learned to take advantage of the tribal system to facilitate efficient and economical control over the country.<sup>18</sup>

At the time, the political life of the country was dominated by four main forces: the palace, the bureaucracy, the British and the tribes.<sup>19</sup> Abdullah played the role of arbitrator between the different tribes and maintained a balance between them so that he could remain in power.<sup>20</sup> He relied on the British for protection from Wahhabi raids and to suppress the defiant tribes who refused to pay taxes and extend allegiance to the new government.<sup>21</sup> The Emir, desperate to consolidate his regime, started to woo the Bedouins by land distribution and tax exemption. The chiefs enjoyed free access to the Emir, who acted on their behalf in government affairs. Abdullah maintained a chieftaincy-like political system based on close personal relations, an open-door policy, mediation, *wasta* and conciliation.

The concept of the state was not new to the tribal chiefs, according to Alon<sup>22</sup>, and they were not inherently opposed to it. The late Ottoman era proved that the tribes were amenable to state patronage. Providing the new administration allowed the sheikhs a degree of autonomy, and room to exercise their leadership over their fellow tribespeople, they would co-operate with it. In addition to securing the sheikhs'

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<sup>17</sup> *ibid*

<sup>18</sup> n 1 above

<sup>19</sup> *ibid*

<sup>20</sup> n 6 above

<sup>21</sup> n 1 above

<sup>22</sup> *ibid*, 41

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allegiance, Abdullah encouraged their participation in the building and strengthening of his rule and consequently of the Emirate. Abdullah entrusted the sheikhs with administrative tasks, as a form of recognition of their leadership of their tribes.

The government took advantage of three characteristics of society at the time: the notion of tribal solidarity, the tribe as the basic unit of organisation and identity and the leadership role of the sheikhs.<sup>23</sup> The tribe were recognised by the government as the basic administrative unit. This served purposes ranging from tax distribution, collection or exemption to the control of the spread of diseases or organising the elections to the Legislative Council. Many of the tribal chiefs sat on the Council, which further tied them to the state.<sup>24</sup> They enjoyed handsome salaries, immunity during sessions, public recognition and a platform to express themselves. The tribal practices of conflict resolution were also endorsed to achieve better public security and chiefs were employed as mediators between the government and the tribesmen in order to achieve control. The government unable to secure law and order in tribal areas demanded that the sheikhs guarantee security in their area of influence themselves, to prevent crimes of all kinds and to arrest or report on criminals or suspects.<sup>25</sup>

As the political, military and economic dominance of the state grew, tribal society was relegated to a position of dependence on the government. However, tribal identity did not disappear. On the contrary, tribal organisation and ethos remained the main feature of society. This was partly due to the policies of the state that choose to rule indirectly through already established channels within the tribal structure (as this was easier and cheaper). This was achieved by keeping the tribe as a basic administrative unit and ruling via the sheikhs and continuing to delegate responsibility for maintaining law and order, collecting taxes, settling disputes and distributing state largesse. “Sheikhs thus remained the main link between the central government and the population, maintaining their relevance as important political actors even as the power of the central government increased.”<sup>26</sup>

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<sup>23</sup> n 1 above

<sup>24</sup> ibid

<sup>25</sup> ibid

<sup>26</sup> n 1 above, 139

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The next ruler of Jordan was Abdullah's grandson Hussein who took power in May 1953 after his grandfather's assassination. Right from the start, King Hussein intended to convey a sense of accessibility, thus, his first state act after his grandfather was assassinated was to travel throughout the country along with other prominent members of the family to hoist the flag in a characteristic Bedouin way signifying a formal summons to the local sheikhs and tribal leaders.<sup>27</sup> The visits to the Bedouins and remote areas continued throughout his rule. The king wrote about these visits, "I looked forward eagerly to my periodic trips into the desert to visit my tribes. What a different life! I was their king but with them, I did not feel lonely, I felt one of them. I was Hussein to them. The only protocol was that of the Bedouin, whose life is based on three concepts- honour, courage and hospitality...I think I keep a special watch for anything the Bedouin needs...the Bedouin consider me the head of their tribe."<sup>28</sup> To cement Bedouin allegiance to the Hashemites, in February 1955, King Hussein distributed eight thousand *dunams* (2,000 acres) of prime Jordan Valley land to Bedouin who participated in his grandfather's Great Arab Revolt.<sup>29</sup> During his first decade, King Hussein relied on steadfast tribal support by reserving some key cabinet posts for men known for their loyalty.

Mindful of the intensely personal nature of his ties with the Bedouins, King Hussein visited them often, socializing in their tents and playing the role of paramount tribal sheikh. As people of Bedouin origin constituted a disproportionate share of the army, disproportion continued at the higher command levels in the mid-1980s. The legitimacy of tradition, considered almost synonymous with Bedouin or tribal culture, has been defended as part of the near sacrosanct foundations of the state and as central to cultural heritage. The role of tribes and tribalism, although transformed, remained a fundamental pillar of both society and political culture in the late 1980s.

As in the days of the Emirate, tribal values and culture continue to be appropriated by the regime and actively promoted. There is no doubt that the Kingdom's centre of

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<sup>27</sup> S.H. Fathi, *Jordan: An Invented Nation? Tribe- State Dynamics and the Formation of National Identity*, (Hamburg: Deutsches Orient- Institute, 1994)

<sup>28</sup> H. bin Talal, *Uneasy Lies the Head, An Autobiography*, (London: W. Heinemann Ltd., 1962), 53-54

<sup>29</sup> R. Patai, *The Kingdom of Jordan*, (Princeton, NJ: Princeton University Press, 1958), 57

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gravity is a powerful monarch, who alone can delegate authority. This prerogative was established with Abdullah I's power to nominate all posts. The highest executive power, which is the government, is nominated by him and therefore completely dependent on his support. Therefore, real power rests in the King's court.

The lack of any influential political parties and the weakness of parliament after the post 1957 reforms, led to a growing stature and importance of the new elite-based powerhouse of Jordanian politics, the royal court or *diwan*. The *diwan* fulfilled a variety of functions and was populated by a stratified elite called the 'king's men' or 'the palace elite'. This included members of the extended Hashemite dynasty, notable families and tribal leaders. The *diwan* has been described "as influential as the cabinet ...and as an executive council in a vital sector of domestic politics."<sup>30</sup> According to King Hussein, its principle function was to play a "mediating role between him and the cabinet."<sup>31</sup> Part of the *diwan*, is a special department "called the Tribe's Council, whose task is to liaise between the monarchy and the Bedouins."<sup>32</sup> This council emphasises the King's image as a patron-ruler and continues the tradition that Abdullah established in 1920s of a super-tribal leader. The council provides the link and facilitates the involvement in the network of state patronage. This inter-dependency has served the King and the Kingdom well.

In the later years of King Hussein's life, the *diwan* grew as a reflection of the King's personal authority. He called "most of the shots often hiding behind a façade of a superficially empowered Prime Minister."<sup>33</sup> There no doubt that the legitimacy of the regime in Jordan after 1957 is tied inextricably with the role of the local elite and the important base of support it created for the King. The officials of the *diwan* were able to represent the monarch's policy directly back in their localised spheres of power and use this in turn to keep the King in touch of the grassroots. King Hussein was also able to maintain this connection by personally receiving all visitors to the Royal Court and by frequent visits to all parts of the country. The Royal Palace is

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<sup>30</sup> S. A. Mutawi, *Jordan in the 1967 War*, (Cambridge: Cambridge University Press, 1987), 12

<sup>31</sup> S. A. Mutawi, *Jordan in the 1967 War*, Ph.D diss. University of Reading, 1985, 50

<sup>32</sup> *ibid* 52

<sup>33</sup> B. Milton-Edwards and P. Hinchcliffe, *Jordan: A Hashemite Legacy* (The Contemporary Middle East; London: Routledge, 2001), 40

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regarded by the people of Jordan as *al-bayt al-amm* or the ‘House of all Jordanians’ because as they say, *bayt al-Sheikh bayt al-umum*; ‘the house of the Sheikh is the house for all the tribe’. They look at the King as they would to the *sheikh al-mishayik*.

There are certain characteristics that can be identified within Abdullah I, which continued through Hussein’s rule, and later with Abdullah II. The Emir ruled Jordan with many characteristics of tribal chieftaincy. One of them was unmediated personal politics. Abdullah I’s long camping among the tribes turned into Hussein’s *ziyaras*.<sup>34</sup> During his long tours of the country, visiting the different tribal communities, he allowed every tribesmen or woman to approach him and raise complaints, pleas for assistance or just enjoy the opportunity to meet him in person.<sup>35</sup> During the 1950s, King Hussein was working daily in his Basman Palace in Amman, where he was always available to all who wished to see him and often in the afternoon, he would travel up and down the country seeing to everything himself, meeting farmers, soldiers and workers.<sup>36</sup> Even today, King Abdullah II spends much of his time visiting the country, addressing large gatherings of public leaders from different sectors of society or meeting tribal leaders.<sup>37</sup>

Bedouin society is strongly characterised by equality. Leaders are recognised, but are not given strong authority based on other assets such as economic power. An example of this equality is that King Hussein is addressed by his first name when he visits Bedouin camps; he is treated as the first among equals rather than as royalty. To prove this, a story is told about the poet Mustafa Wahbah al-Tall, who invited Emir Abdullah I to his house and offered him lentil soup for lunch saying, “Oh Abdullah, you are going to eat what your people eat. You are no better than they.”<sup>38</sup>

Today, the three groups in charge of the country are; the King as the political and social father of the whole country, officials who implement his directions and

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<sup>34</sup> L.L. Laybe, *Home and Homeland: the Dialogics of Tribal and National Identities in Jordan* (Princeton, N.J: Princeton University Press, 1994), 145

<sup>35</sup> *ibid*

<sup>36</sup> J. G. Sparrow, *Modern Jordan*, (London: George Allen and Unwin Ltd, 1961)

<sup>37</sup> Jordan Times (Amman), 13 & 19 June 2005, 12 October 2005, 13 March 2006

<sup>38</sup> n 2 above, 57

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provide a link with the population and the people, who are represented by their sheikhs well versed in their social life and tribal concept. Fathi<sup>39</sup> argues that Hussein's legitimacy formula was particularly effective with the Bedouin because they attach great importance to traditions. The formula consisted of Hussein's Sharifian descent and the historical role of the Hashemites. Therefore, Hussein's repeated appeal to Jordan as a family was very significant for a culture where the family and clan are central. King Hussein, in his memoirs confirmed, "When I think of my family, I think with pride of everyone in Jordan, who was standing by me as we faced the storms, inspired me in serving them. When I think of the tribe to which I belong, I look upon the whole Arab nation. My life is dedicated to an ideal, just as the Hashemites have been throughout history."<sup>40</sup> King Hussein had a number of qualities that the Bedouins expected in their leader, for example, personal courage, eloquence and beautiful command of Arabic.

King Hussein will always be a descendent of the prophet and therefore was especially qualified to serve as a supreme tribal leader. The older Bedouin and those in the armed forces identified with the King on a personal level and their loyalty to Hussein was grounded in this highly personal relationship. "King Hussein symbolises his state...Jordan is a Hashemite kingdom in name, but Hussein's kingdom in the public mind as it was Abdullah's kingdom before his assassination."<sup>41</sup> The Bedouin in particular love the king and identify with the success of Jordan and take pride in its heritage.

King Hussein protected the tribe and their tribalism and it could be argued that any attack on the tribes could be considered an attack on the king, due to the perceived close connection between them. He replied to negative articles in the Jordanian press during the early 1980s "launching attacks on our social institutions and their customs and values. I have not been happy about this attack. Most recently, I have noticed that some articles have been directed against tribal life, its norms and traditions. This is most regrettable because it harms a dear sector of our society. I would like to

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<sup>39</sup> n 27 above

<sup>40</sup> n 28 above, 81

<sup>41</sup> P.A. Jureidini & R.D. McLaren, *Jordan: The Impact of Social Change on the Role of the Tribes*, (Washington: Praeger, 1984), 55 & 56

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repeat to you what I told a meeting of tribal heads recently, “I am al-Hussein from Hashem and Quraish, the noblest Arab tribe of Mecca which was honoured by God and into which was born the Arab Prophet Mohammad.” Therefore, whatever harms our tribes in Jordan is considered harmful to us, as this has been the case all along and it will continue so forever.”<sup>42</sup> The King’s stress on his tribal and Islamic origins signalled the continued and strong base tribal allegiances play in Jordan. He said in an address to the Badiyah Police Headquarters in 1976, “We are Arabs and we shall not neglect our worthy customs and lose our distinctive characteristics inherited from our noble ancestors...the traditional customs, of which we are justly proud, will continue to be observed”<sup>43</sup>

Although numerically only a few Jordanians live the traditional life of the nomadic Bedouin, the cultural traditions based on this life-style have hardly diminished. Indeed, conceptions of modern Jordanian cultural and national identity were deeply intertwined with the country's Bedouin heritage. Scholars have acknowledged and emphasised the centrality of the tribe and tribal political culture to the Hashemite monarchy and in turn to present-day Jordan.<sup>44</sup> Milton-Edwards et al argue that “the rulers of the new state would have to expend considerable energy in creating and establishing a new level of national identity which was Jordanian in character and yet managed to respect pre-existing loyalties and ties.”<sup>45</sup> Anderson refers to successive decades where the Hashemites engaged in the construction of an “imagined community”, a form of national identity and nationalism whose foundations lay in historical myth and a rolling definition of what it means to be Jordanian. The paradox is caused by the Palestinians who hold Jordanian citizenship, but uphold their right to return to their country, thus, producing uncertainty and confusion in identity.<sup>46</sup>

It is clear that even today, most Jordanians still define themselves in terms of their ‘tribal’ and regional origins. Also, Jordanian national identity has come to symbolize

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<sup>42</sup> Jordanian Times, January 28, 1985

<sup>43</sup> A.S.S. Oweidi, *Bedouin Justice in Jordan (The Customary Legal System of the tribes and its integration into the framework of state polity from 1921 onwards)*, Ph.D. diss., Cambridge University, 1982, 86

<sup>44</sup> Y. Alon, “The Tribal System in the Face of the State-formation Process: Mandatory Transjordan, 1921-46”, *Int. J. Middle East Stud.* 37 (2005), 213

<sup>45</sup> n 33 above

<sup>46</sup> B. Sakijha, *National Integrity Systems [NIS] Country Study Report: Jordan 2001*, (The Hague: The Netherlands Ministry of Justice and Transparency International, May 2001), 4

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the Bedouin tribes. The notion of ‘tribe’ has plural resonance in the Jordanian context. At times, it referred to Jordan’s past, where the tribes were important to the political and social situation of the region known as Transjordan. It also linked to the background and special relationship to the ruling Hashemite family. At other times, with reference to Jordan’s present, it validates certain moral virtues that characterize the Jordanian people and represents the legacy of tribal social life. Sometimes the term is used to criticize aspects of contemporary society and culture deemed backward and outdated. Whichever definition of tribalism is taken, one phenomenon is clear, that the Jordanian people are still famous for their loyal attachment to family, distinctive rituals of hospitality and conflict mediation and arbitration, as well as effective and flexible kin-based collectivity in lineage or tribe.

Ties grounded in patriarchal kinship, with their attendant networks of social and economic obligations, continue to lie close to the surface in contemporary Jordanian society. The modern effect of this collectivity will be explored in detail in the context of transaction formation and dispute resolution in chapter 9. In the next chapter, the tribal justice system that was part of the Jordanian state until the late 1970s will be described. This system served the tribes well and helped them to live together in a certain level of harmony for centuries.

## 5.2 Tribal Justice and Dispute Resolution

“The Arab tribe was and in most cases still is so democratic as to be almost entirely lacking in discipline”<sup>47</sup>

The journey through Jordan’s history and cultural make up started with the outline of the tribes’ role in the building of the Hashemite state. It would be unconceivable to talk about the tribes of Jordan without exploring their sophisticated justice system and dispute resolution, which is the aim of the rest of this chapter. This is because this system dealt with conflict in a way that Jordanians still use and cherish. Third party intervention is an important part of this dispute resolution practice.

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<sup>47</sup> B. J. B Glubb, *The Story of the Arab Legion*, (London: Hodder and Stoughton, 1948) 176

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As outlined before and will be shown again, Jordanian identity is based on kinship and family. This is due to the fact that the original habitat in the desert of the tribes was violent and the harsh. There was relentless competition for resources and a lack of state authority. This led the tribes to function as a single unit with strict rules and tradition in both war and peace. The tribes co-operated with and fought each other from time to time to secure their existence. Thus, the rules and norms of dispute resolution, including punishments for offences, evolved to strengthen the unity within the tribe itself and place the welfare of the group at the forefront. There were also rules that dealt with conflict between tribal members themselves. These customs were recognised among the tribes, and while some of the customs differed from tribe to tribe, the general principles were the same. For example, in all the tribes the sheikhs and judges decided and ruled on any dispute or issue that arose between the tribes. Tribal people relied on their sheikhs for their strength and discipline.

Arranged hierarchically, the Arab tribal society comprises of the *ashira* (tribe) - the largest descent group-followed by the *hamulas*, the *fakhds*, the *lazam* and finally the extended patriarchal families.<sup>48</sup> The largest politico-administrative unit is the *hamula*. Every *hamula* has an elder as a mediator and a *wasta*. The more prominent *hamulas* were headed by a Pasha during Ottoman rule who was chosen by the authorities to mediate on their behalf.<sup>49</sup> Members of *hamulas* usually choose their elders on the basis of wisdom, age and generosity. Each *ashira* is headed by a sheikh and an elder is responsible for the welfare of his *hamula*. It is the sheikh's duty to represent his tribe, to act as an arbiter and a judge in litigation, to give consent for marriages and divorces, to protect the feeble, to receive guests and to protect the honour of the tribe.<sup>50</sup> For example, if there are disputes within the *hamula* in which kinsmen cannot resolve, then the elder intervenes. If a dispute or homicide takes place between members of different *hamulas* or *ashiras*, then a *jaha* will be formed. The *jaha* ensures that the matter is resolved quickly and the harmony between the families restored. The elders were looked upon as the upholders of tribal norms and values.<sup>51</sup>

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<sup>48</sup> F. Al-Kalani, *Shariah Al- ashaer fi al Wattan Al-arabi (The customs of the tribe in the Arab countries)*, (Amman: Aldar Alarabia, 1985)

<sup>49</sup> *ibid*

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

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Even today, the sheikh is assisted by the *majlis* (tribal council) composed of the heads of the various subdivisions of the tribe, the *majlis* meets daily in the guest tent of the sheikh when the tribe is encamped.<sup>52</sup> At its sessions, which last from midmorning to about noontime, there is an informal discussion of questions such as when to break camp, where to find grass, news of other tribes and cases of litigation.<sup>53</sup> No vote is taken, and the sheikh in his capacity as chairman is able to influence the deliberations only through the force of his personality, wisdom and understanding. The position does not carry any power to compel the members of the council against their wishes. Traditionally, the position of a sheikh depended upon the good will of the elders and his tenure was ultimately in their hands.<sup>54</sup>

The position of a sheikh is usually inherited, however, the rules are not rigid. For instance, it is not expected that the first-born son of the sheikh should always succeed him upon his death. When a sheikh dies and sometimes even prior to his death, if he is ill or old and weak, the tribe will be strongly preoccupied with the question of succession and usually a consensus will be reached as to which one of his sons, nephews or other close relatives is the most suitable to step into his shoes.<sup>55</sup> In cases where the sheikh has a preference for one of his sons, he may entrust him with the responsibility of handling tribal affairs guided by his prestige and advice, thus, giving him a chance to prove himself. In cases where two members of the tribe aspire to become the sheikh and both have a considerable following, it could result in the tribe breaking up and forming two separate tribes.<sup>56</sup>

Tribal law (*urf* or *ada*) is the local customary law. It varies from tribe to tribe and it is orally transmitted inter-generationally.<sup>57</sup> Conformity is expected of every member of the tribe as a matter of course. The repository of the traditional laws in each tribe is the sheikh or sometimes a body of specially elected elders who act as judges when

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<sup>52</sup> *ibid*

<sup>53</sup> *ibid*

<sup>54</sup> *ibid*

<sup>55</sup> A. A. Abadi, *Jraam Aljinyat alkubrah aind alashaaer Alardoniaia (Major Crimes in the Jordanian tribes)*, (Amman: Aldar Alarabia, 1986)

<sup>56</sup> *ibid*

<sup>57</sup> *ibid*

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cases arise and whose decisions are respected. The office of tribal judge (*arifa*) is hereditary in certain families. Judges specialise in certain areas dealing only with a certain, clearly defined category of cases. There are judges of: blood affairs, money matters, cases relating to horses, financial arrangements in connection with divorce, disputes between sheikhs, *howdah*-rights, differences arising out of raids etc.<sup>58</sup> Another type of hereditary office is that of the peace-negotiator, the *qalid*, whose duties include the rendering of guarantees that his tribe will loyally adhere to the conditions laid down in a concluded peace treaty.<sup>59</sup>

Tribal law is built upon two basic principles: the principle of collective responsibility and the principle of retribution or compensation. The objective is not merely to punish the offender, but to restore the equilibrium between the offending and the offended families.<sup>60</sup>

The principle of family solidarity, *asabiyya alkabalya*, informs the collective responsibility concept and thus makes it an important part of the tribal society and justice system.<sup>61</sup> The extent of tribal support for a person is a function of the degree of kinship or the extent of other social relationships and the closer the degree of relationship, the stronger the *asabiyya* to that person. The *asabiyya* for the brother is stronger than the *asabiyya* for a nephew and the *asabiyya* of the nephew is stronger than the *asabiyya* for the cousin. This is well described in a famous tribal adage “I against my brother; my brother and I against my cousin; my cousin and I against the outsider.” The *asabiyya* is the fundamental base of tribal society connecting and pulling together the tribal members to each other and creating for each person certain responsibilities and corresponding duties.<sup>62</sup> Thus, each member will back the other expecting the other person to do the same. Also, when a member supports his tribe then he will presume that they will back him, even if he were the offender. The tribe takes responsibility for the member if he offends and avenges him if he were harmed. This is summarised in the tribal saying “Aid your brother whether oppressed or

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<sup>58</sup> n 43 above

<sup>59</sup> ibid

<sup>60</sup> n 29 above

<sup>61</sup> n 48 above

<sup>62</sup> n 55 above

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oppressor!” Ibn Khaldun<sup>63</sup> (1332-1407 CE) stated in his introduction to Arab history that this protected the tribes and caused fear in their enemies. This was also referred to in the *Qur'an* about Yousef’s brothers, who said to their father “surely it grieves me that you should take him off, and I fear lest the wolf devour him while you are heedless of him.”<sup>64</sup> The strength of *asabiyya* within the tribe, and its demonstration to other tribes, acts as a deterrent. The absence of *asabiyya* is seen as a sign of weakness and vulnerability.

The *asabiyya* defines the collective responsibility of tribal society and ensures its continued existence. It is “a social code where the overriding necessity is that tribe or clan hold together and defend each other in order merely to survive in the face of other foreign and marauding nomads, and in the face of severe desert conditions which make this survival impossible except through the unity, co-operation and symbolic divisions of roles in tightly-knit but necessarily permanently-mobile groups of families.”<sup>65</sup>

There are two types of *asabiyya*. The *asabiyya albaseeta* (simple) relates to the loyalty of the Bedouin to his close relatives. This appeared in pre-Islamic times when groups of people lived together in small units. An individual would not think of overriding these small units.<sup>66</sup> This form of *asabiyya* did not join with other units because of the competition between them. Therefore, these small units were independent and lived in isolation from other units.

As time went by, another type of *asabiyya* developed, which is the *asabiyya murakab* (multiple). Small units of *asabiyya* joined other small units and became a big *asabiyya*. The loyalty of the small units was transferred to the larger unit.<sup>67</sup> Thus, the tribe became large and so did the *asabiyya*. This form of *asabiyya* developed during Islamic times and the larger tribes became the ruling tribes in that era. This played an important part in Islamic history and the spread of Islam. The large units that the

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<sup>63</sup> Ibn Khaldun, (*The Muqaddimah: An Introduction to History*), trans. Rosenthal, (ed.) Dawood (New Jersey: Princeton University Press, 1981), 128

<sup>64</sup> Verse 13 in *Sura Yousef*

<sup>65</sup> G. bin Muhammad, *The Tribes of Jordan: At the Beginning of the Twenty-first Century*, (Jordan: Jamīyat Turāth al-Urdun al-Bāqī), 22

<sup>66</sup> n 55 above

<sup>67</sup> n 48 above

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smaller units joined were usually Muslim, and all the members of the smaller units converted to Islam.<sup>68</sup> Problems arose when the newly formed *asabiyya* wanted to choose their sheikh. Each member owed his loyalty to the candidate from his smaller unit. This was one of the most dangerous disputes that faced the *asabiyya murakab*. Usually, these disputes were resolved in accordance to *Shari'ah*, which mandated arbitration. The sheikhs of the small units would arrive at a consensus as to who would be the sheikh of the collective unit.<sup>69</sup>

It is important to discuss the foundations of the *asabiyya alkabalya*. The first and main foundation is the blood tie. The second is an alliance connecting two or more tribes with common interests, including the common goal of stopping injustice and securing safety within society.<sup>70</sup> An example of this would be of the small units getting together in Mecca and forming the Korish to support the offended and deal fairly with the offender. The young prophet Mohammad (s.a.a.w) attended this meeting and he was impressed with this treaty. This type of alliance with a number of smaller tribes added to the stature and the dominance of the powerful tribes.<sup>71</sup> If a member of the powerful tribe is killed then his *diya* (blood money) is double that of members of lesser tribes. In certain circumstances where a small unit joins a powerful tribe for protection, the protecting tribe has the authority.<sup>72</sup>

Sometimes, the alliance will be confirmed by *laaket aldam*, where the sheikhs put their hands in a container full of blood. A famous instance that occurred in Mecca related to the placement of the holy black stone. The dispute between the tribes reached a boiling point and blood was likely to be spilled. Two tribes of Mecca formed an alliance to defend and protect each other until death and they demonstrated their allegiance by using *laaket aldam*.<sup>73</sup>

The third basis of the *asabiyya* is the attachment of one tribe to another and the amalgamation of them into one. One of the tribes will detach from their kinship and

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<sup>68</sup> ibid

<sup>69</sup> ibid

<sup>70</sup> n 55 above

<sup>71</sup> ibid

<sup>72</sup> n 43 above

<sup>73</sup> ibid

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join another tribe and become part of it and its *asabiyya*, transferring loyalty to the tribe they have joined.<sup>74</sup> The fourth and final source is slavery and this occurred when individuals who were slaves or prisoners, and their *fedyya* (ransom) has not been paid, become part of the tribe. This form of *asabiyya* was forbidden after the emergence of Islam.<sup>75</sup>

The effectiveness of tribal mechanisms in containing disputes can be attributed to a “complex system of special customs and regulatory procedures within each group.”<sup>76</sup> The concept of collective responsibility, extending either to tribe as a whole or to the tribesman’s extended family up to five generations removed (*khamsa*), offered all individuals a measure of protection. Collective responsibility is a two edged sword. On the one hand, it could potentially turn a conflict between two individuals into a war between two families or tribes and on the other hand, the knowledge that a person’s actions might drag the whole tribe into a bloody conflict also restrained individuals.<sup>77</sup> When a crime is committed, collective responsibility facilitates quick settlement, as the culprit’s entire tribe are liable to pay compensation to the victim’s family. Compensation, in cash or in kind, is the chief means of settling disputes, hence the existence of elaborate protocols of compensation. Third parties stand to gain much in terms of prestige if their intervention and mediation (*wasta*) lead to the settlement of a dispute.<sup>78</sup>

Bedouin have traditionally have placed great importance on the concept of honour (*ird*). Slight or injury to a member of a tribal group was an injury to all members of that group, likewise, all members were responsible for the actions of a fellow tribal member.<sup>79</sup> Honour inhered in the family and the tribe and in the individual as the representative of the family or tribe. Slights were to be erased by appropriate revenge unless a third-party mediated to facilitate reconciliation based on adequate compensation.<sup>80</sup>

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<sup>74</sup> ibid

<sup>75</sup> ibid

<sup>76</sup> n 43 above, 40

<sup>77</sup> ibid

<sup>78</sup> n 65 above

<sup>79</sup> n 48 above

<sup>80</sup> ibid

### 5.3 The Tribal Legal System

The main sources of Bedouin law are<sup>81</sup>: Islamic *Shari'ah*; the *awayid* (custom) judicial precedent; *Ijtihad* (creative judgement); the judge's experience and wisdom and the opinions of the tribal elders.<sup>82</sup>

Bedouin judges aim to satisfy the litigants, to dispense justice and achieve Allah's will. When the parties come before a Bedouin judge, they remind him of Allah and adjure him to be honest and fair.<sup>83</sup> In deciding the case, Bedouin judges adhere to the Islamic principle that states "the plaintiff has the onus of proof and on him who denies the charge (the defendant) is the necessity of taking the oath" because the aim of judicial proceedings is the discovery of the truth, and not merely apportioning blame. When deciding the case, Bedouin judges observe more than one source of law.<sup>84</sup>

The *awayid* were passed down from generation to generation. Two types of Bedouin *awayid* are recognised according to Oweidi<sup>85</sup>. The first deals with major criminal offences such as homicide, which are recognised as crimes in all the tribes, though the degrees of gravity and penalties for these crimes differ from tribe to tribe.<sup>86</sup> The second type of *awayids* are more particular in that each tribe has its own to suit their circumstances and it could conform or conflict with other tribes' *awayid*. However, the fact that all of them broadly faced a similar habitat implied a basic coherence of rationalities, facilitating dialogue and consensus building.<sup>87</sup>

Judicial precedent (*al-sabiqah*) is used extensively in the Bedouin legal system. The ratio of precedents is derived from decisions in similar cases and important decisions by Bedouin legislating judges.<sup>88</sup> When a judge pronounces his judgement, he supports his decision by reference to previous decisions in similar cases, whether by

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<sup>81</sup> n 43 above

<sup>82</sup> *ibid*

<sup>83</sup> n 55 above

<sup>84</sup> *ibid*

<sup>85</sup> n 43 above

<sup>86</sup> *ibid*

<sup>87</sup> *ibid*

<sup>88</sup> *ibid*

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him or by another judge. The precedent must not conflict with the tribe's *awayid* and must be from a judge within the tribe or tribes allied to them.<sup>89</sup> Judges have to cite *sabiqah* as this gives them greater legitimacy among the tribe. Precedents are also used in influencing the parties to accept judgements, especially in complicated and serious cases.<sup>90</sup>

The Turki al-Haydar case demonstrates the importance of precedents within the Bedouin legal system.<sup>91</sup> In October 1945, Turki al-Haydar, a member of the Bani Sakhr tribe, murdered two slaves belonging to the al-Zabn clan of the same tribe. Turki also killed a mare that the slaves were caring for. The mare belonged to Mikhlid, a bodyguard of Emir Abdullah. Mikhlid claimed his right to *mithani* (compensation) for his dead mare from the dead slaves' masters, al-Zabn, since they received the *diyah* (blood money) for the slaves and the mare. The Al-Zabn clan rejected Mikhlid's demands and contended that Turki (the murderer) must pay the mare's *mithani* to Mikhlid. Turki refused since he had paid the *diyah* of the mare directly to al-Zabn. The case was brought before a tribal judge, Muhammad al-Zhayr of the Bani Sakhr. Addub al-Zabn supported his argument with reference to a precedent that confirmed that the one who killed a mare must pay the *mithani* to the owner. Relying on this precedent, the judge pronounced that "since this precedent took place among the Bani Sakhr in two analogous cases, Turki (the killer) must pay the *mithani* to Mikhlid, who has no right to ask al-Zabn (the victims' master) to pay him that, even if they received the mare's *diyah*."<sup>92</sup>

*Al-Ijtihad*<sup>93</sup> within the tribal legal system means a new creative judgement without a precedent, made by a specialist judge, whose special area of jurisdiction involves legal and theological issues. An example of this is the case of Lafi and Jazza al-Halabi. Lafi and Jazza al-Halabi of the Bani Sakhr tribe shot and seriously injured Ali al-Sibilah, also of the same tribe. The crime took place when Ali was the *dakhil* (one seeking protection) of the sheikh Hadithah al-Khurayshah of the Bani Sakhar. Hadithah alleged *taqti al-wajh* (crime of dishonouring a person) against Lafi and

<sup>89</sup> n 48 above

<sup>90</sup> ibid

<sup>91</sup> n 43 above , 157

<sup>92</sup> ibid

<sup>93</sup> This is the usual meaning of the word. In this sense it defined within the tribal legal process.

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Jazza and demanded that the attackers be expelled from the tribal territory and compensation be paid to both the wounded man and Hadithah himself. The case was brought before the tribal judge Muhammad al-Zhayr, who formulated a new *ijtihad* to deal with these issues in general, since he was authorised to do so. His *ijtihad* was,

“The person who [attacks] another and [causes] a serious injury must be expelled from his tribe’s territory until the wound has healed. After the wound has healed, the wrongdoer must seek protection from one of his tribe’s sheikhs or any other notable person, in order that they intervene on his behalf to obtain the acceptance of a settlement by the injured party. Should the wounded man refuse the *jaha*, the two parties must present their case to a judge who is experienced in the assessment of injury cases, in order to assess the compensation to be paid for the wound and to arrive at a settlement of the case. The crime of *taqti al-wajh* takes priority in the settlement over the case of serious injury.”<sup>94</sup>

The above *ijtihad* established a new principle in cases of serious injury accompanied by *taqti al-wajh*.

From childhood, the Bedouin attend judicial processes that are open to the tribepeople. This gives them the chance to hear the case including the pleas, the judge’s summing-up and findings. A Bedouin judge preparing his son or close kin to be his successor would send his potential successor to attend cases before other judges within and outside the tribe. This would allow him to observe the judicial process and benefit from the other judges’ experience.<sup>95</sup> The protégé would be expected to come back and discuss the judicial proceedings and the findings that he was sent to observe with the judge who sent him. Apart from facilitating the teaching of a potential judge, such practices also help the sitting judge in expanding their horizons by learning about the principles and procedures used by other judges. “The legal experience of Bedouin judges represents the sum total of the experience both of the judges and the Bedouin. Experience is for judges and people alike a highly valued source of tribal legislation.”<sup>96</sup>

It is not just the judge who makes the law. Tribal elders do so too. They include all persons holding responsible positions within the tribe such as sheikhs and notables.

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<sup>94</sup> n 43 above , 158

<sup>95</sup> n 48 above

<sup>96</sup> n 43 above , 160

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Elders have the authority to formulate new laws of which they are the principle source due to their wisdom, experience and interest in a tribe's affairs. In 1960, a dispute over land in al-Fjayj took place between the al-Dhyabat and al-Hidban clans on one side and the al-Tuwayhah on the other. All the parties belonged to the Huwaytat tribe. These clans accepted and approved without question their sheikhs' decisions, because sheikhs "are our elders and whatever decision they make would be acceptable to us without reservation."<sup>97</sup>

Bedouin judges are responsible for enforcing tribal law and order and maintaining harmonious social relations within the community, in order to achieve justice. Therefore, the person who is honoured with such a position must have all the appropriate qualifications and additionally his family must possess virtuous qualities. The Bedouin judge must be of high social standing within the community reflecting strong kinship ties, spiritual standing and/or descent from a respected family. The position that a judge holds and enjoys within his own family and the wider kinship relations plays a major role in determining his seniority and functioning. Any weakness within his family diminishes the enforceability and effectiveness of his decisions, while the strength of his kin improves his public standing and increases public confidence in him. The Bedouin judge must also be a man of great importance, highly respected, effective, with high moral standards, selflessness, proven impartiality, non-materialistic and pious. He must be well informed and fair-minded.<sup>98</sup> He must have a sharp mind and be intelligent enough to deal with any type of case within his jurisdiction. He should gain people's confidence by giving a convincing and satisfactory exposition of his decisions. He should be well informed about tribal *awayid* and must have adequate experience in settling tribal disputes. He must also be wise and farsighted.<sup>99</sup>

The Bedouin judicial system has a highly sophisticated system of classification. Tribal judges fall into categories according to their power, role and the subject of their specialisation. Oweidi<sup>100</sup> has re-classified the complex nomenclature used by

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<sup>97</sup> ibid 161

<sup>98</sup> ibid 190-194

<sup>99</sup> ibid 195

<sup>100</sup> ibid 202

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the tribes into three main categories. The first is the judge with powers to legislate. The second is the judge who deals with serious and important tribal cases and is referred to as the “cutter of the truth”. The third is the judge of first instance who deals with simple cases or prepares cases and transfers them to a more competent judge. If a case falls outside the judge’s jurisdiction, then the judge will send it to another specialising in that particular type of case.

A judge may also consider it necessary to refer the dispute to arbitration. An arbitrator, mutually agreed upon by the parties, would be appointed who is well acquainted with the subject of the case. The arbitration may be performed by one or more arbitrators called *hakam/muhakkim*. Arbitration takes place in cases involving disputes over marriage, ownership of land, horses or camels and where both parties have a strong case and are unprepared to compromise. In disputes regarding marriage, the arbitrators are usually two from each side in accordance with *Shari’ah*. The two arbitrators try to bridge the gap between the parties and create an atmosphere for settlement before they give their decision. The aim is for the arbitrators to provide a solution that will be binding upon the judge, as well as reinstating good relations between the two sides.

Oweidi<sup>101</sup> summarises the main principles underlying Bedouin legislation as follows: Bedouin legislation and law are subject to Bedouin *awayid*. The accused is considered neither innocent nor guilty until the case is proven. Justice must be seen to be done. Judicial decisions are subject to appeal. The law is preserved by conciliation and by settling disputes in such a way as to satisfy both parties in litigation. The law is applied with flexibility, according to tribal principle and customary practice. A case must be presented before the judge at the appointed time and place.

Judicial decisions are subject to appeal, if one of the parties felt that the judgement is unfair. Further, any member of the Bedouin community has the right to appeal against any judicial decision of any tribal judge. The tribal appeal system is also a form of judicial review which ensures that judges are just and reasonable. In the mid-

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<sup>101</sup> ibid

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1960s, for example, Muhammad al-Fayiz and Awwag as-Sattam both of the Bani Sakhr tribe, went to judge Sharari al-Bikhit of the same tribe and asked him to give his judgement with regards to their dispute. Sharari gave his judgement in favour of Awwad. Mohammad appealed against the decision and the case was transferred to two other judges of the Bani Sakhr tribe, Zahir al-Dhiyab and Ali al-Khurayshah, who acted as a tribal Court of Appeal. They decided that the judgement of Sharari was unfair, since he did not accept the testimony of Mohammad's brother in favour of Mohammad. The judges' acceptance of Mohammad's appeal and the rejection of the decision of Sharari was based upon the Bani Sakhr's underlying principle of giving testimony and evidence on oath. The appellate judges said, "Sharari should have accepted al-Nuri al-Fayiz's testimony whether it was favourable to, or against his brother Mohammad, since the Bani Sakhr's principle of testimony is that the testimony of a witness should not be rejected unless it is untruthful or the witness himself be unreliable."<sup>102</sup> The judges also rejected the earlier judgement because the Sharari accepted the *yimin* (oath) of Awwad, but rejected that of Mohammad.<sup>103</sup>

The decisions of Bedouin judges are implemented by *kufala* (guarantors) appointed by both parties. The *kufala* make sure that both parties follow the judgement and adhere to what is ordered. They also pay the *diyah* (blood money) if their party were to default. If a party refuses to implement a final judgment, then the violator is condemned by the community and becomes an outlaw and forfeits his tribal rights. Non-compliance is considered contrary to tribal law and a flagrant violation of the tribal code of social discipline. A severe punishment, such as ostracism, is deemed necessary to maintain social control and to ensure social equilibrium.

It is important to note that a dispute does not directly go to a tribal judge. There will be a number of stages prior where conciliation and arbitration are tried between the parties. When the parties appear before a judge, they do so with their next of kin, elders, witnesses and *kufala*.<sup>104</sup> This clearly shows the involvement of the whole community in the proceedings. The judge again tries to reconcile the two parties. If this is unsuccessful the judge hears both sides and their witnesses and then

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<sup>102</sup> ibid 166

<sup>103</sup> ibid

<sup>104</sup> ibid

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pronounces a judgement which is binding on the loser. The judge sits alone, but may consult experts on certain matters.

“Bedouin judicial system and legislation is highly sophisticated”<sup>105</sup> because the judges also have to restore friendly relations between the parties after the case has been resolved. It is very important for a judge to reconcile the parties. This is one of the main reasons why the Bedouin are reluctant to admit to the jurisdiction of civil courts.<sup>106</sup> Decisions of the civil courts are enforced by coercion, whereas the decisions of the tribal judges are implemented through conciliation and arbitration by the kin of the parties. This is demonstrated by a Bedouin saying “the state is the state and the Bedouin are the Bedouin” symbolising two totally different and separate approaches towards justice.<sup>107</sup>

According Owidi, bedouin judgements are nearly always accepted by both parties and are given public approval by Bedouin society.<sup>108</sup> The effect of this is to promote reconciliation between the kinsmen of the conflicting parties. The convicted party and his kinsmen must follow the *awayid* by sending a highly respected *jaha* to the injured party’s family to express their sympathy and ask for forgiveness in order to re-establish good relations between the two clans.<sup>109</sup> In contrast, the civil courts operate within the law of the state and only recognise individual responsibility and do not involve the kinsmen.<sup>110</sup> Another Bedouin saying that outlines this point is “the state courts neither heal the sick nor quench the thirsty”. In other words, they do not give the parties and the wider community full satisfaction according to Bedouin concepts of justice.<sup>111</sup>

The ordinary tribal sheikh has no authority to enforce compliance. The tribal law is based on an absence of central authority and, furthermore, punishment. It is solely based on different forms of compensation and methods of maintaining harmony.<sup>112</sup>

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<sup>105</sup> ibid 169

<sup>106</sup> n 47 above

<sup>107</sup> n 29 above

<sup>108</sup> ibid

<sup>109</sup> n 55 above

<sup>110</sup> n 47 above

<sup>111</sup> n 55 above

<sup>112</sup> n 43 above

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In tribal law, there is only the aggrieved seeking justice with the support of his tribe and his extended family. It is also noteworthy that the perception of the same crime differs according to the circumstances and the identity of the victim. For example, if a person were to kill a man from a friendly tribe, it would cost him seven camels in compensation. However, if he killed someone from his own tribe then it will cost him fifty camels and other expenses.<sup>113</sup> These other expenses could include a girl (known as *ghurra*), a rifle, a camel and in olden days, a slave. The significance of these items is that the murderer deprived the victim's family of a valuable asset in the form of a fighting man. The blood-money is intended to make good the loss. The girl is to be married to the nearest relative of the deceased and to produce a male child. The slave, the rifle and the riding camel are the accoutrements of a warrior.<sup>114</sup>

Another aim of paying blood money is to reestablish good relations between the kin of the offender and the victim. Blood money was paid in installments over three years under the umbrella of the guarantors for both parties to ensure that they would not fail in their obligations. During the three year period, the two parties to the conflict would have a mutual need for each other; the victim's party a need for compensation and the culprit's party a need for security and protection from avenging kin of the victim. As a result, they would be obliged to maintain friendship and good relations with each other.<sup>115</sup> Also, it would be very difficult for the Bedouin to pay a heavy penalty all at once. In some situations, the installments are divided among the kin, which strengthens the ties within the tribe.

In all tribal trials, the oath plays an important part. The cases are to be decided on the oath of innocence of the accused. Glubb Pasha describes how an accused man pleaded passionately in his own defense, but refused to swear by his innocence, where a single oath would have secured his acquittal.<sup>116</sup> After Islam spread among the Jordanian tribes the oath became "by Allah". This form of evidence is still used in Jordan's civil courts when the party does not have any documentary evidence.

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<sup>113</sup> ibid

<sup>114</sup> ibid

<sup>115</sup> ibid

<sup>116</sup> n 65 above, 176

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A custom that was widely used within tribal justice is trial by fire or *bish'ah*. This is a supernatural means of revealing the identity of a culprit, unknown to the injured party, which was highly effective in the social milieu of Jordan tribes. This custom was forbidden by official *fiat* and eventually died out when the last *mubesha* (the person administering the trial by fire) died in 1974. The right to administer this test was usually passed down from father to son. Only professional *mubeshas* were capable of carrying out the trial. The *mubesha* would bring a flat spoon, the size of half a crown, sat on the ground in front of the fire and place the spoon in the heart of the embers. The accused would sit beside him, while the other parties and the witnesses sat round and watched. The heating of the spoon took a long time, and the *mubesha* would keep taking it out of the fire until it was red hot, looking at it, turning it over and putting it back in front of the offender. During this process, the *mubesha* would talk continuously, expounding to the accused and the others witnessing the ceremony the certainty of the revelation of the guilt and the pain of burning. Meanwhile, he watched the face of the accused. At last the spoon would be ready, and the accused was required to put out his tongue, and the hot spoon was laid quickly upon it. An interval of some minutes was allowed, and then the accused was asked to put out his tongue once more. A blistered tongue established guilt; the contrary, of course, was innocence if the tongue were not blistered.

Glubb<sup>117</sup> found the process of immense value when working as a magistrate. He says the *mubesha* would not, of course, consent to reveal the secrets of their hereditary art, but in many cases in which there were no witnesses, Glubb had found the *bish'ah* was helpful in identifying the offender. The *mubesha* took the trouble to enquire into the case before it was referred to him, and obtained a shrewd idea of the identity of the criminal.<sup>118</sup> Then, during the intentionally prolonged process of heating the spoon, he talked continuously to the accused and watched his face closely. Glubb suspected that the *mubesha* made up his mind whether the accused was guilty or not, and pressed the spoon on his tongue or touched it lightly according to the result which he wished to produce.<sup>119</sup>

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<sup>117</sup> ibid

<sup>118</sup> ibid

<sup>119</sup> ibid

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In practice, more than half of the accused persons who set out to lick the spoon lost their nerve while the spoon was in the fire, and voluntarily confessed their guilt, thus avoiding the blistering of their tongues.<sup>120</sup> A further twenty-five per cent ended up with blistered tongues, and twenty-five per cent were declared innocent. The efficiency of the process depended, of course, entirely on the skill of the *mubesha*.<sup>121</sup>

### 5.4 Tribal Justice after the Jordanian State

Up until 1976, people legally defined as Bedouin were subject to special laws. This included the members of nine named tribes. The definition of who was considered to be a Bedouin was revised in the Bedouin Control Law of 1929 and again in the Tribal Courts Law 1936, as well as in a number of electoral laws over the years. During the 1920s and 1930s, the state passed a number of laws in order to bring tribal justice within its power and control.

Thus, after the formation of the Transjordan Emirate in 1921, the government enacted a law requiring all tribal judgements to be collated and recorded.<sup>122</sup> Then in 1924, the Emirate passed other laws to regulate Bedouin justice. The laws mandated that all tribal judgements must be written and recorded. In the Tribal Courts Law of 1924, Bedouins were obliged to register their claims in a designated court. The government became even more concerned with the recording of judgements in 1936, thus, section 12 of the Tribal Courts Act 1936 mandated that all judgements must be written and sent to the *mutasaref* (chief). Section 6 of the same Act states that “the court must give one of the parties upon his request a certified copy” of judgement and section 9 states that “whether the decision of the tribal appeal court declares the defendant innocent or guilty, all judgements must be certified by the Emir.”

The Tribal Courts Law of 1924 included five sections relating to tribal judges. Section 3 states that the judge deciding the case must be recognised by the state. The tribal leaders chose a list of six tribal judges, of whom the government had the power

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<sup>120</sup> *ibid*

<sup>121</sup> *ibid*

<sup>122</sup> *ibid*

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to confirm two as permanent judges and two as reserves to sit in the tribal court. The Tribal Courts Act of 1936 in section 3 states that “one judge will sit permanently but the parties could choose two further judges to sit with him in order to resolve their disputes.” The parties had to choose their judges from a list approved by the Emir. If a judge who was not on the approved list decided a case, his judgement was considered void and the parties could ignore it without an appeal. These provisions imposed the state’s authority on tribal justice.

Even though the state controlled the composition of the panel of judges, the parties had the freedom and the obligation to negotiate and again to agree upon the judge to decide their case in accordance with section 10 of 1936. An example, of how the law worked during these times is as follows. On 17 December 1940, a chief of police sequestered two individuals in different rooms in the police station and asked their respective sheikhs to attend. When they presented themselves, he asked them to choose three judges from the approved list, which they did, but they later found out that these judges were unavailable. They therefore returned to the police station and chose another set of three judges to resolve their dispute. The parties did not confirm two of the three judges and confirmed one to decide their dispute.<sup>123</sup>

The chief of police, upon receiving a complaint, was expected to decide on the importance of the case and refer it to the appropriate tribal judge to deal with. After the judge decided the case, he would send the written judgement to the chief of police. All judgements were pronounced in the name of the Emir and any judgment that included excessive punishment or compensation was to be approved by him. Since 1948, when the Emirate was changed to the modern state of Jordan, judgements have been pronounced in the name of the King and any excessive punishment or compensation has had to be approved by specific authorities. The enforcement of judgments given by tribal courts was the responsibility of the leader of the Arab Legion according to the laws of 1929 and 1936. After 1948, this authority was transferred to the police generally and the Bedouin police specifically.

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<sup>123</sup> n 43 above

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All judgements were to include details of the place and the date of the hearing. Hearings could only be conducted during the daytime, thus, if sunset occurred while the case was being conducted then the hearing had to be adjourned to another day. The judge had to also include the subject matter of the dispute, the evidence and authority relied upon in his judgement. The judge had to pronounce his judgement in the presence of the parties and justify it on the basis of precedent and *awayid*. For example, a judge in an arbitral award satisfied the above conditions as follows, “we are the chosen panel to resolve this dispute. After our deliberation, we unanimously decided...We relied on our knowledge of our traditions and *awayid* and the strength of family ties between the disputing parties and the importance, past, present and future...”<sup>124</sup>

Witnesses were to be identified by name and if that were not possible, then they were to be pointed out to the judge. Before judgement was given, and before any agreement, the Bedouin appointed guarantors in order to ensure compliance. The guarantor, promised to pay the compensation or *diya* if the party were to default. There was also another kind of guarantor, whose role was to ensure that the offended party did not seek revenge and offending parties thus felt safe after the matter had been dealt with by a judge. This has changed over the years and now it is the state that acts as the guarantor. Judgements are usually accepted by the Bedouin as the judge, in all probability, is also their sheikh, and his decisions are expected to be complied with by the parties.

It is clear that the state recognises the Bedouin and the Bedouin accept the state's authority. By including Bedouin justice within the legal system of Jordan, the state has acknowledged the Bedouin way of life, but reserved some aspects, such as appeal and enforcement, to itself. The acceptance of the Bedouin is reflected in their agreement to submit all judgments to the government and have their choice of judges approved. Due to this partnership, all Bedouin judgements have come to be recorded, unlike in the more distant past when they were just orally given. These written judgments are referred to, when necessary, forming the corpus of a common law

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<sup>124</sup> ibid

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system and, incidentally, also provide a valuable source of history of Jordan and its tribes.

### 5.5 Tribes and Dispute Resolution

*Karameh* or ‘honour’ is intrinsic and fundamental to Bedouin life. A well known Bedouin adage- ‘I will not live if affronted and neither will my affronter’ - testifies to this. For instance, it is commonly held that life bearing an insult and hence without honour is worse than death. The very freedom of the Bedouin is dependent on his honour and therefore, a Bedouin will not accept imprisonment or the authority of another.

One of the important constituents of Bedouin *karameh* is the *ar'd*; the honour of their women.<sup>125</sup> Broadly understood *ar'd* involves grace and virginity for the unmarried and grace and sexual fidelity for the married. A Bedouin woman’s good reputation is dependent on and stems from the reputation of her family. Thus, it is incumbent on the men in her family to protect and look after her and her *ar'd*. Because a man’s reputation is reflective of and reflected by the reputation of his family and tribe, protection of the *ar'd* of a woman is taken as an important and vital element of the protection of the reputation of the whole tribe. Offence to a woman, in any shape or form, is considered a major crime and indicative, metaphorically, of the death of the whole tribe. Death is preferred to living with such an offence. Thus, for instance, if any person were to commit adultery, he or she could be sentenced to death or, if certain extenuating circumstances were present, then ordered to pay compensation as if a murder had taken place. An adulterous woman is considered as good as dead by her tribe and an adulterous man is lost forever as if he was never born.

In the 1970s, the state started to be involved in the processes of dealing with such crimes.<sup>126</sup> For example, it started ordering a couple involved in adultery to marry in order to protect them from tribal law. Some tribes refused to accept such state intervention though a few accepted begrudgingly. There are two types of crimes in

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<sup>125</sup> n 2 above

<sup>126</sup> n 1 above

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the Bedouin worldview. One type encompasses attacks on the physical persona and the other type encompasses crimes such as injustice, crimes against property and injury to honour. The crimes of murder, *ar'd* and *karameh* are considered to be major crimes by the Bedouin.

An individual's life is considered to be an element of the collective life, thus the individual and the collective are considered to be one and the same. Therefore, any attack on the individual is considered to be an attack on the group and vice versa. If an individual injures another then the offender's whole tribe is held responsible. When the offended tribes claim their compensation or revenge they direct their claims against the offender's tribe as a whole, not just the individual. The payment of compensation is treated as if from the whole of the offender's tribe and is usually paid from the resources of the relatives of the offender. This responsibility parallels the responsibility of the offended tribe to seek revenge. Hence, any member of the offended tribe can discharge this responsibility by killing any member of the offender's tribe, not just the offender himself. All are collectively responsible for the punishment, revenge or compensation of any member of the tribe. All are jointly and severally responsible for the compensation, punishment or revenge.

There are no differences of inherent status between the male members of the tribe. All of them are equal whether a sheikh or not, each individual is on a par in Jordanian tribes. Because of this equality, the *diya* or compensation for a crime committed against any of them is roughly the same. The basis of Jordanian tribes is equality and collective responsibility.

An example of the collective responsibility in Jordanian tribes would be the following case from 1948.<sup>127</sup> One of the sons of a tribe killed a man from a neighbouring tribe and the tribal court ordered the compensation be paid by his father, two brothers and his relatives up to the fifth degrees of kinship whose names were recorded in the judgement. This shows that compensation was to be enforced against and to affect the whole tribe and would thus play an important part as a control mechanism of tribal society. The individual was expected to know that if he

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<sup>127</sup> Interview with a tribal elder and criminal lawyer in Amman, August 2005

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were to commit a wrong, he has wronged his whole tribe, therefore he must consider all the serious consequences that follow for his whole tribe, before committing a serious offence such as murder.

The exceptions to both collective and individual responsibilities were instances of killing in self defence, to protect money, to defend one's home or in guarding a woman's *ar'd*.<sup>128</sup> In such circumstances, he was thought of as defending his right to life. Whenever a crime is committed, there are certain procedures to be followed. They are *atwa* (temporary truce), *jaha* (delegation of responsible elders) and *sulh* (an agreed settlement). If the accused is found guilty, his family and his tribe would be expected to pay compensation, which is the *diya*. In situations where a person is killed while raping a woman or unlawfully entering someone's home (*hormet al' bayet*), then it is expected that his blood would not be compensated. However in certain circumstances, a *jaha* will be constituted by the offending party to restore the friendly relations between the parties, with *sulh* and *diya* ordered depending on the gravity of the crime.

In Jordanian tribes, major crimes are dealt with by attempting to arrive at *sulh* and resolving the dispute in order to contain the issue and stop the offended party from reacting violently. *Atwa*, *jaha* and *sulh* are used in the same way in small disputes as in major crimes.<sup>129</sup> Because time and the propriety of the process are of essence, any wrong or mistake committed during the *jaha* could lead to severe consequences and exacerbate disputes and defeat the purpose of the *jaha*.

When a major crime is committed, the first practice is the *jala'*, in which an offender leaves the area where he lives to stay somewhere else. The purpose of *jala'* is to reduce the attendant tensions of the situation and avoid retributive offences. If one of the relatives of the offended party were to see the offender, he may become impassioned and commit the same or a more serious crime against the offender. Such unwelcome consequences may be visited upon the offender's relatives of the first degree, as well as other relatives, such as uncles and cousins on both paternal and maternal sides. Thus, the *jala'* usually applies up to the fifth patriarchal and

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<sup>128</sup> n 55 above

<sup>129</sup> *ibid*

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matriarchal degrees. Once the offender and his extended family leave the area, it is followed by a period of *atweh*, in which there is a ceasefire between the parties and they prepare for negotiations with the aim of arriving at a *sulh*.

### 5.5.1 Jala'

The *jala'* has three types. The first is *kasry* (coercive) *jala'*, which is when the offender and his tribe are removed from the area to protect them.<sup>130</sup> When the state became responsible for enforcing this, it would imprison the offender in order to protect him. In certain situations, where the tribe of the wrongdoers refused to leave because they did not believe they deserved that or due to confidence in their strength and *asabiyya* or because they believed that their relative did not commit the wrong but the other side were the ones responsible then, the sheikhs and notables of the area would intervene and deport the victim's family with or without their approval. After the state was created in the early 1920s, it took on the responsibility of enforcing this type of *jala'* and ensuring the security of all parties.

The second type is *jala' tilka'a* (willing) which is when the offender and his relatives decide to leave their home immediately after the crime is committed.<sup>131</sup> Usually, the offender would inform his family of his crime and seek refuge in a sheikh's home or gives himself up to the authorities. His relatives to the fifth generation move to a safe place and others approach a notable neutral in order to accompany them to the victim's family to request *atweh*. Otherwise, the victim's family has the right, after a period of three days and a third of a day (*fooreat dam*) to attack the wrongdoer's relatives and their property. In general, these acts became much rarer because the government began to impose financial penalties and, in some situations imprisonment. This right is only available if the offender's family do not *jala'* or do not adhere to the conditions of the *atweh*.

The third is *aktiyaryan* (voluntary), which occurs when the offended family choose to leave to avoid any confrontation and they remain away until the *jaha* and the

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<sup>130</sup> n 48 above

<sup>131</sup> ibid

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judiciary deal with the matter.<sup>132</sup> In this situation, no damage to person or property would be allowed.

The period of *jala'* differs according to the type of crime and its seriousness. In the case of murder, the usual period of *jala'* is seven years. In certain situations, this may extend to 25 years or a lifetime. When the offender returns, he must request *sulh* and the offended family are obliged to accept it. If they do not, then they must leave their homes, i.e. *jala'*. In circumstances when the *jala'* is for life, then the offending tribe joins another tribe away from their original area. A father from the Bani Sakhr killed another from the same tribe while having an argument over a camel. Immediately, the father took his family and left his tribe and joined the Huwaytat tribe. About 25 years later, after the death of the father, the eldest son, who was an army recruit, requested the chief of the army to head a *jaha* to the Bani Sakhr to secure a *sulh*. After securing *sulh*, the children and grandchildren of the offender returned to their original tribe.<sup>133</sup>

When a person wounds another he must leave the tribe until the wounds have healed. Once the wound of his victim has healed, the wrongdoer asks the sheikh to constitute a *jaha* to the wounded and his family. If the *jaha* is refused, then the wrongdoer would be wounded in the same way or monetary compensation would be assessed. In cases where the victim is physically marked or his bones were broken, the attacker must depart the tribe and only return after the matter was resolved, i.e. when the *jaha* has achieved settlement.

The person leaving his tribe must go to a tribe that is neither a friend nor an ally of his original tribe, regardless of distance. The *jala'* to an enemy tribe is a painful punishment. The person lives as a stranger without relatives, friends or allies and among enemies. Thus, he will not be able to respond to an insult and ask for assistance from his original tribe as they are both geographically and socially remote.

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<sup>132</sup> ibid

<sup>133</sup> Interview with tribal leader in Amman May 2004

### 5.5.2 Atweh

The *atweh* is an agreed period of peace given by the offended family to the offender and his relatives and it is guaranteed by the guarantors.<sup>134</sup> Since 1921, the agreement has to be in writing and signed by the parties, the guarantors and the witnesses. In a case involving two soldiers where one wounded another, a first *atweh* was given for a certain period; but, at the end of that period, the wrongdoer's family requested an extension for the *atweh* as their *jaha* was not ready and the wounded soldier had not fully recovered. Usually, when a second *atweh* is granted, it is given subject to conditions. In this case, the condition was that the family leave the tribe (*jala'*) until the matter was completely resolved. The following matters were found in an *atweh* bond that was recorded on 30 June 1955:<sup>135</sup>

- 1) the date of when the *atweh* was given
- 2) period of *atweh*
- 3) the names of both parties
- 4) the place where the *atweh* was given
- 5) the names of guarantors and the nobles and sheikhs of the *jaha*
- 6) Witnesses and attendees
- 7) Signature of the parties, guarantors and witnesses
- 8) Certified by the government's deputy
- 9) Conditions (occasionally)

There are a number of types of *atweh* and these depend on the stage in the procedures for *hudna* (truce) and *sulh*, as well as the nature of the offence.<sup>136</sup> The first is *atweh fooreat dam* where a *jaha* is sent immediately to the victim's family requesting a truce. In circumstances where a *jaha* could not be gathered, it is permitted for one person from the offender's side to meet another from the offended side and agree on an *atweh* for a period of three days and a third of a day. The second is *atweh amniyya*, where the police enforce a truce for a minimum of one week and to a maximum of three months. The third type is *atweh haak'* where both sides grant the other a period of peace until the matters have been investigated or a judge decides

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<sup>134</sup> n 55 above

<sup>135</sup> n 43 above

<sup>136</sup> n 55 above

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who the wrongdoer is. The fourth is *atweh shaaraf*, which relates to attacks on women and their honour and the male relatives of the woman insist that the *atweh* is referenced in these terms in order to make clear to everyone that the woman was a victim and not a consenting participant. The fifth, *atweh yadeeyah* (normal), occurs in instances of non-serious or minor injuries. The sixth is *atweh hay' mayeet* (alive or dead) and it relates to situations where the victim is in a critical condition and it is unknown whether he will recover. If a person dies then a relevant *atweh* from the above types takes place, but if he pulls through then *atweh yadeeyah* takes place. The seventh type is *atweh imhaal*, where a period is given for the offender's tribe to discuss among themselves how they will go about resolving the dispute. This may be extended a number of times until the final *atweh*, which is called *atweh ikbaal*, where the two sides meet and negotiate the final agreement, *sulh*.

The *atweh* occurs when the offender's relatives, not including those within five degrees of kinship, visit the offended family as a *jaha* requesting a truce. The wrongdoer's tribe must seek the *atweh* whether it is accepted or not. If this does not occur it is seen as a major insult to the offended tribe and becomes a cause for greater problems. The *atweh* is seen as the first step towards restoring honour. In most situations, the *atweh* is granted, however sometimes in the case of major crimes such as murder, the *atweh* can be refused. In this situation, the police intervene and imprison the assailant for his protection and his family try to secure the *atweh* again. If it is refused a second time, the police have the power to imprison the victim's family if it is perceived that they do not want *sulh*. If the police were to intervene, then the offender and his relatives up to five degrees of kinship depart the tribe and seek protection from the sheikhs of other tribes.

The victim's family assembles their friends, allies and the sheikhs of the tribe to receive the *jaha* from the offender. A cup of black coffee is offered to the designated speaker of the *jaha*, who is expected to refuse to drink it saying "we will not drink your coffee until you grant our requests." The noble on the other side says, "Let's hear your requests." After the requests are outlined and the *atweh* is granted, the speaker of the tribe receiving the *jaha* says, "You are most welcome, drink our coffee."

### 5.5.3 The Negotiations

Negotiations between the two parties are conducted either directly or indirectly through a third party.<sup>137</sup> The third party, called the *waseet* (mediator), must be agreed upon by both parties. Usually, a respected and diplomatic person is appointed as a *waseet*. The *waseet* explains to each party the other's side point of view excluding any insults or negative comments that he might have heard. He will be prepared to tell 'white lies' and the saying; 'lying is the salt of men though lying is shameful' is indicative of this. In other words, the *waseet* is permitted to misrepresent the truth or even lie if this will help the parties to settle. The *wasta* (mediation) could be started by the *waseet* himself or by either of the parties, but usually he is asked by the wrongdoer. The *waseet* discusses with the party who appointed him what he can provide the other side in the form of concessions. He hears in detail the truth of what happened from the person who approached him. Typically, the *waseet* acts tactfully and with integrity as the proper resolution of the dispute impacts his reputation and social status. The more his reputation grows, the more he will be asked to intervene and resolve disputes in his community. The *waseet* could be one person or a maximum of three. The *waseet* attends the offended tribe to discuss the matter and work out how they will reach *sulh*. This would usually occur after either *atweh imhaal* or *atweh ikbaal*, which gives the green light for *sulh*. The offended family will tell the *waseet* their conditions and he will inform the other side. The family of the victim discusses these and decides if they will accept. If not, then they make an offer and the *waseet* will go back to the offender's family with this offer. This process may last several weeks or months until a final settlement is reached and agreed upon by the conflicting parties.

In other situations, the parties may choose to go to a tribal judge for a decision as to who the wrongdoer is, the seriousness of the crime, the punishment and the amount of compensation.<sup>138</sup> In certain circumstances, the *sulh* can occur immediately if the *jaha* attends the victim's family without any previous arrangements and consists of very important and noble men. For example, a *jaha* that was headed by Prince Naief

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<sup>137</sup> n 48 above

<sup>138</sup> n 55 above

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bin Abdullah (the uncle of King Hussein) secured the *sulh*, in a case, without any previous negotiations or disagreements or even any compensation.<sup>139</sup> The nobility of the members of the *jaha* showed the respect and honour that the offender's family were demonstrating to the victim's tribe.

In major disputes between tribes, the state may intervene to act as a *waseet*, to get them to agree to a settlement. If that were not possible, the case is referred to a tribal judge. In a case dated 17 December 1940, the two parties were brought to the police station and placed in two different rooms away from each other. Their tribal sheikhs and the police chief discussed how to resolve the dispute and it was agreed that a tribal judge would resolve the matter.<sup>140</sup>

After the negotiations are completed in any of the above circumstances, the parties agree upon the time and place for *sulh* and the amount of compensation to be paid. At this point, the offended must forgive the offender. The meeting for *sulh* is the sole responsibility of the offender's tribe and they must make all the necessary preparations to receive the *jaha* for confirmation of *sulh*. This may include food, drink and transportation for all the nobles and sheikhs attending the *jaha*.

#### 5.5.4 Sulh

The processes and ritual of settlement and reconciliation are similar in format in most disputes. For example, in cases of murder, the family of the murderer will act quickly in order to thwart any attempted blood revenge. First, family members will call for *atweh* and proceed to engage village elders and notables who possess sufficient status to qualify as *waseet*. Each individual who accepts the plea of the perpetrator's family, becomes a member of a delegation of mediators called a *jaha*.<sup>141</sup>

The delegation initiates a process of fact-finding and questioning of the disputing parties and any witnesses. The task of the *jaha* is not to judge, condemn or punish the offending party, "but rather, to preserve the good names of both the families involved

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<sup>139</sup> n 133 above

<sup>140</sup> n 43 above

<sup>141</sup> n 48 above

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and to reaffirm the necessity of ongoing relationships within the community. The *sulh* ritual is not a zero-sum game.<sup>142</sup> The purpose of the ritual of *sulh* is to satisfy the community's need for peace and stability, to satisfy the needs of each family for dignity and security, to compensate the victim's family, even if this is largely symbolic and to pre-empt reprisals and as far as possible, save face.

Sometimes, a single murder may turn out to be linked to a sporadic blood feud with a long history. Many practitioners of *sulh* and *musalahah* deem such cases difficult to settle, but not insoluble. Where the statuses of the victim and perpetrator are clear, of course, the task of settlement is usually easier and provided the close relatives of the victim can be persuaded to overcome strong feelings of resentment and ignore the pressure to show strength through retribution, a blood price is paid to the family. The payment usually involves an amount of money, *diya*, set by the mediators. This 'blood money', or the transfer of goods (sometimes animals or food etc.) may prove quite costly to the family of the perpetrator, but the symbolic significance of compensation is at least as important as the substance of the payment. The transfer of money or goods is a substitute for possible death; the family that forsakes revenge gains in standing, while the family of the murderer is humbled and indebted by this act of forbearance and magnanimity.

The ritual process of *sulh* does not end with a payment to the victim's family, which may on occasion refuse to accept material compensation and thereby further raise both its standing and the symbolic indebtedness of the perpetrator's family. The ritual usually ends in a public ceremony of *musalahah* (reconciliation) performed in the village square or some other public meeting place. First, in a public act of reconciliation, the families of both the victim and offender line up on both sides of a road or path, exchange greetings, and accept apologies (which are due, in particular, to the more aggrieved party). Next, members of the two parties shake hands under the supervision of the *muslihs* or *jaha*. Often, the murderer must directly approach the family of the victim, in what amounts to a humbling act of atonement and a test of the ability of the victim's family to forgive. Following these public displays of

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<sup>142</sup> L.E. King-Irani, "The Power of Transformation and the Transformation of Power: Rituals of Forgiveness and Processes of Empowerment in Post-War Lebanon" in W.I. Zartman, ed. *Traditional Medicine*, (Boulder, CO: Lynne Rienner, 1999)

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reconciliation, the family of the murderer typically visits the home of the victim to drink a cup of bitter coffee. The ritual then concludes with a shared meal hosted by the family of the offender.<sup>143</sup>

Jordanians, especially villagers, continue to follow a tribal mode of conflict resolution as defined by 'tribal law' (*al-qanun al-asha ari*). Tribal law as outlined above is an unwritten code of procedures emphasising intermediaries and intermediation (*wasta*), delegations (*jaha*), dyadic diplomacy, compensation, truce (*atwa*) and final reconciliation and peace-making (*sulh*). The process of tribal conflict resolution is based on the principle of collective responsibility on the part of a stipulated and limited set of patriarchal kinship. The *sulh* ritual, "stresses the close link between the psychological and political dimensions of communal life through its recognition that injuries between individuals and groups will fester and expand if not acknowledged, repaired, forgiven and transcended."<sup>144</sup> For this reason, the ritual is still used to achieve reconciliation, especially following blood feuds, honour crimes and cases of murder.

According to a Jordanian judge, Abu-Hassan, there are two types of *sulh* processes: public and private *sulh*.<sup>145</sup> Public *sulh* is similar to a peace treaty between two countries in that its purpose is to "suspend fighting between [two parties] and establish peace, called *muwada'a* (peace or good relationship), for a specific period of time."<sup>146</sup> This usually takes place because of conflicts between two or more tribes that result in death and destruction affecting all the parties involved.

Given the severity of life conditions in the desert, competing tribes long ago realized that *sulh* is a better alternative than endless cycles of vengeance. When *sulh* is enacted, each tribe initiates a process of taking stock of its losses in human and material terms. A tribe with lesser losses compensates a tribe that has suffered more. According to tradition, stringent conditions are to be set to settle the tribal conflict

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<sup>143</sup> G. E. Irani and N. C. Funk, 'Rituals of Reconciliation: Arab-Islamic Perspectives' (1998) 20:4 *Arab Studies Quarterly* 1, 4

<sup>144</sup> n 142 above

<sup>145</sup> M. Abu-Hassan, *Turath al Badu' al Qada (Bedouin Customary Law)*, (Amman, Jordan: Manshuraat Da'irat Ath-Thaqafa wa al-Funun, 1987), 257

<sup>146</sup> M. Khadduri, "Sulh" in C.E. Bosworth, E. van Donzel, W.P. Heinrichs and G. Lecomte, (eds.) *The Encyclopaedia of Islam*, Vol. IX, (Leiden Holland: Brill, 1997) 846

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definitively. The most famous of these conditions is that the parties in conflict pledge to forget everything that happened and initiate new and friendly relations. The consequences and effects of public *sulh* apply whether the parties that perpetrated crimes have been identified or not at the time of the *sulh*.<sup>147</sup>

Private *sulh* takes place when both the crime and the guilty party are known. The family of the victim and the family of the offender may be of the same tribe or from different tribes. The purpose of private *sulh* is to achieve restorative justice and to make sure that vengeance will not be wreaked against the family of the perpetrator, leading to an escalation of conflict.

An individual or a *wasta* delegation of elders (*jaha*) would be sent by the perpetrator's family to the victim's family to mediate or intercede on their behalf and to inhibit revenge being taken following an incident involving personal injury. The *jaha* seeks a truce between the parties, with the hope of an eventual agreement to resolve the conflict. The *lazam*, which is a patrilineal unit that traces its descent to the fifth paternal grandfather i.e. to the fifth agnatic generation, is responsible for paying the *atwa* (truce money) and the *diya* (final reconciliation money). Those who have to pay as well as leave the area until the final reconciliation takes place are the first three generations. The fourth and fifth generations pay a certain amount of money and in return they are allowed to stay in the area with a guarantee of protection. In modern times, only the offender will be imprisoned, rather than have him leave, and after the final reconciliation takes place he is released.

*Wasta*, mediation, has a long and honourable history and is still practised in modern Jordan. As was shown in chapter five, the traditions of solidarity and kinship are part of the Jordanian identity and society, and so are many of the tribal dispute resolution mechanisms described in this chapter. In criminal cases in particular, the tribal system functions in parallel to the court system and is officially recognised by the state. Present day Jordan has adopted many features of tribal society, especially in dispute resolution and the overarching principle of reconciliation. The final part of

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<sup>147</sup> n 145 above

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this thesis will explore the formal and informal forms of dispute resolution in contemporary Jordan with its distinctly tribal flavour.

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### Chapter Six

#### Formal Dispute Resolution Mechanisms

“Frequently you have a clash between the more sterile letter of the law and the justice that underlies it, and I think one of the things I've been trying more or less, where it was possible, is to go with the justice rather than the letter of the law.”

Harold H. Greene, federal judge for the US District Court for the District of Columbia, in an interview in March 1990

In the previous chapters, the tribal heritage and dispute resolution were explored. In this chapter, I will focus on the formal arbitration system in Jordan. The Jordanian legal landscape, especially arbitration, is Western in character. The law was developed along similar lines as the UNCITRAL Model Law and the principles applied in Jordanian courts relating to the enforcement of arbitral awards are international principles that have been imposed on the courts through international treaties. This is the Western model of international commercial arbitration being overlaid onto the history, tradition and customs that were described in chapters three and five. In order to provide some context to the formal arbitration system, I start by describing the Jordanian judicial landscape and the judges' backgrounds.

#### 6.1 The Judiciary

The Jordanian legal system is mainly European in origin, especially at the textual level, as well as based on *Shari'ah* (Islamic law). During the nineteenth century, when what is now geographically Jordan was part of the Ottoman Empire, some aspects of European law, especially French commercial law and civil and criminal procedures, were adopted. English common law was also introduced during the mandate years from 1921 to 1946.

During the Ottoman, *Shari'ah* was enforced in the towns and settled countryside. However, in the desert customary tribal law was the dominant system. For the non-Muslims, the Ottoman regime used the millet system, which accorded communities the right to manage their personal affairs according to their own religious laws. Even

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Today, religious courts in Jordan are still divided. The Muslims use the *Shari'ah* courts and non-Muslims have their own special tribunals. “*Shari'a* Courts have jurisdiction over personal status matters relating to Muslims, as well as cases involving blood money where parties are Muslim or where one party is Muslim and the other agrees to the jurisdiction of the *Shari'a* Court. Appeals lie with the *Shari'a* Court of Appeal in Amman.”<sup>1</sup>

The other two categories of courts established are the civil courts (*nizamiyya*) and ‘special tribunals’. The *nizamiyya* courts have three levels. Claims are made to either primary or magistrate (conciliation courts (*sulh*)) courts according to their seriousness. The *sulh* courts exercise jurisdiction in cases involving small claims and offences punishable by small fines or up to two years’ imprisonment.<sup>2</sup> The more serious cases are heard by the *nizamiyya* courts and they exercise general jurisdiction in both civil and criminal matters. The *nizamiyya* court also hears appeals from the *sulh* courts.<sup>3</sup> The highest court of the land is the Court of Cassation which is Jordan’s Supreme Court. There are also the Courts of Appeal. There are also a number of special courts that deal with specific matters such as state security, the interpretation of the Constitution, or the judicial review of governmental decisions.<sup>4</sup>

Jordan has a civil law system and the current Civil Code was enacted in 1976 which drew from Syrian legislation, which in turn was modelled on the Egyptian Civil Code of 1948.<sup>5</sup> The Jordanian system was influenced by the Ottoman, French and British legal systems, as well as by Egyptian and Syrian. The sources of Jordanian law are legislation, constitutional law, Islamic law and custom.<sup>6</sup>

The independence of the judiciary and the courts is enshrined in the Constitution; “judges are independent, and in the exercise of their judicial functions, they are subject to no authority other than that of the law.”<sup>7</sup> Article 101 states, “the courts

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<sup>1</sup> <http://www.law.emory.edu/ifl/legal/jordan.htm>

<sup>2</sup> *ibid*

<sup>3</sup> <http://countrystudies.us/jordan/57.htm>

<sup>4</sup> <http://www.legal500.com/c/jordan>

<sup>5</sup> M. Burgris, “Judicial Reform and the Possibility of Democratic Rule in Jordan: A policy Perspective on Judicial Independence”, ALQ 21 (2007) 135

<sup>6</sup> *ibid*

<sup>7</sup> Article 97 of the Jordanian Constitution

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shall be open to all and shall be free from any interference in their affairs.” However, the judiciary remains subject to pressure and interference from the executive branch. The Higher Judiciary Council appoint judges, determine their advancement and dismisses them from the judiciary. The Council consists of 12 senior judges who are appointed by the King. It is overseen day-to-day and funded by the Ministry of Justice.<sup>8</sup>

Kilani<sup>9</sup> suggests that the executive power given by law to deputise judges and recommend pensioning them would challenge the judiciary and their independence. This authority could be abused to pressure judges to deliver the desired rulings. Senior judges could also order desired rulings as the Jordanian judges are monitored by them. Also, notables would ask judges to change their minds or determine a case in a certain way.<sup>10</sup> There are also weaknesses with regards to the recording of the court’s sessions’ minutes and disorder in keeping cases with one judge.

In order to curb the above problems a higher committee for the independence of the Judiciary was formed in 2001. It was involved in the promulgation of two laws: the Judicial Independence Law and the Fundamentals of Criminal Hearings Code, enacted in February 2001. It is important to note when reviewing the opinions and views of the Jordanian arbitrators later in this chapter with regards to the courts and the judge, that there are about 740 judges in the Kingdom for a population of just under 6 million people. Therefore, judges are over stretched and have a very heavy caseload.

### 6.1.1 The Judicial Institute of Jordan

Jordan has a ‘career’ based judiciary and the Judicial Institute of Jordan is the official institution in the Kingdom responsible for judicial education and training. It was established pursuant to Law No. (3) in 1988, which remained in effect until the issuance of the Judicial Institute of Jordan Regulation No. (68) in 2001 and its

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<sup>8</sup> F. Kilani “Independence of the Judiciary”, *Arab Archives Institute Jordan Press Foundation*, January 2001

<sup>9</sup> *ibid*

<sup>10</sup> *ibid*

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amendments in accordance with regulation No. (68) in 2005. The Judicial Institute of Jordan prepares qualified persons for judicial positions through its Judicial Studies Diploma programme, and offers a Continuing Legal Education (CLE) programme designed to raise the competence of judges and to keep them abreast with the latest legal, judicial and specialized developments in their field.

I interviewed the head of the Judicial institute and he stated that there are two main aims of the institute: preparatory and continuous training. The Judicial Studies Diploma programme is a two-year programme consisting of 25 courses over the course of four mandatory academic terms. Students are also required to attend a five-month practical training programme at regular courts during their fourth term. They are also required to submit a specialized research paper.<sup>11</sup>

Students at the institute must cover a number of subjects including communications and investigative skills, judgment drafting, trust, independence and ethics, international law and all the treaties Jordan is a signatory of. They are also trained in the use of technology such as DNA and crime scene investigation and cases requiring specific technical knowledge such as IT crimes, banking, GATT, intellectual property and ADR; arbitration, mediation and case management. Students sit for examinations in all these subjects and submit a dissertation at the end of the two year diploma. In the final term of the course, students sit next to a judge in a court to get some practical experience. They also attend placements in the Central Bank, insurance companies, banks and with the coroners.<sup>12</sup>

The entry requirements for the Institute consist of an entrance examination- both oral and written, followed by an interview. The number of people admitted each year is based on the needs of the judiciary. In 2005, 25 students were admitted from a total of 310 applicants. In the same year, 23 students graduated, 5 of whom were women. In 1996, the first woman judge was appointed in Jordan. Today, there are about 60 women judges in Jordan but they are all in the lower courts.

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<sup>11</sup> The Judicial Institute of Jordan Course Outline

<sup>12</sup> ibid

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Both sitting judges and administrative staff in the courts undergo specialised training as “the success of judges relies on their administrative staff and vice versa.”<sup>13</sup> Training consists of lectures and workshops. Each judge has a yearly plan of training.

The head of the Judicial Institute told me that they “live in a different world from 30 years ago, cases are different, numbers are larger and the types of cases are much more varied. Cases are more complex and far reaching. The judges have a very heavy workload. The majority of judges are very good. We try to improve all the time.”

Judges are appointed on nomination by the Minister of Justice, the decision of the Judicial Council and the endorsement of the King. Any person appointed as a judge must meet the general requirements set forth in the Judicial Independence Law of 2001. The appointee must be a Jordanian national and at least twenty-seven years of age. He/ she never have been convicted of a felony and never have been convicted by a court or a disciplinary board for a matter that contravenes honour, even if it was included in a general pardon. The appointee must exhibit laudable conduct and maintain a good reputation.

The Council has the power to appoint the person they see fit, from those nominated by the Minister of Justice, to a judicial position at any level, taking into consideration his/her credentials and experience. Such an individual shall not be appointed at a higher level than that of his peers who graduated in the same year and possess the same credentials as him/her.<sup>14</sup>

### **6.1.2 Case Management in Jordanian Civil Courts**

The case management department at the Amman First Instance Court was officially launched on 1 October 2002 as an initial step towards expanding it to the rest of the first instance courts in the Kingdom. The case management department was established in accordance with article (59) of the Civil Procedures Law which stated that: "a judicial administration unit called the civil case management department

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<sup>13</sup> Interview with the Head of Judicial Institute in Amman in July 2005

<sup>14</sup> Judicial Independence Law 2001

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would be established in a first instance court provided that the Minister of Justice determines in which courts would these departments be established in".

"Civil case management is one of the modern management techniques designed to speed up the litigation process, ensure optimal utilization of court time and shorten administrative and judicial procedures that used to cause delay in case adjudication and compel the trial judge to adjourn a case several times before disposing it."<sup>15</sup>

Case management provides for early judicial control over a case by placing it from the beginning under the direct supervision of a first instance judge, starting with case filing, organizing pleadings, processing notifications, completing evidence filing, holding a case management conference with the parties, determining points of agreement and disagreement and defining the main point of conflict and preparing the complete case file before going to the trial judge for processing.

### **6.2 Jordanian Lawyers<sup>16</sup>**

In 2008, there are about 8000 lawyers registered with the Jordanian Bar Association and about 19 per cent of them are female. There are over 2000 trainees registered with the Association and over 26 per cent of them are women. The applicant to the Bar Association must hold a Jordanian Nationality and must have done so for at least 10 years and must have a minimum age of 23 years old. He/ she must be a resident of the Kingdom of Jordan, enjoying full civil capacities and exhibiting laudable conduct and maintain a good reputation. The applicant must hold a law degree from a Jordanian university or an equivalent law degree from a foreign law school, provided the certificate and its source are acceptable for registering as a lawyer. He/ she cannot be employees of any government department or municipality and have no criminal record or have been convicted by a court or a disciplinary board for a matter that contravenes honour.

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<sup>15</sup> <http://eng.moj.gov.jo/Home/tabid/36/Default.aspx>

<sup>16</sup> All the information in this section was obtained from the Jordanian Bar Association, Ministry of Education and various conversations with Jordanian lawyers.

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A graduate of a first degree (BA) will have to train for two years in a law practice with a lawyer who has been in practice for more than five years. People with postgraduate studies have to train only for one year.

The trainee lawyer will have to pass an oral and a written test, then complete a dissertation which he/she will present to his colleagues, and be examined by specialised lawyers in the field of his dissertation as with a viva.

There are 21 universities in Jordan. Eight of them are public, but only six have law schools. There are 13 private universities and only one does not have a law school. The majority of older lawyers in Amman acquired their law degrees from Syrian and Egyptian universities, and very few continued to postgraduate studies. The few that did, usually wanted a career in teaching at the University of Jordan, a public university. The younger generation of lawyers are mostly trained in Jordanian universities. The students that can afford postgraduate studies (usually children of lawyers) study masters in the UK, France and a few in the USA, usually specialising in commercial, banking or shipping law. There are a small number of lawyers who go on to do PhD, especially later on in their careers.

There is no real specialisation in the Jordanian legal market. Lawyers in general only specialise in family and criminal law and the majority of the law practices are either sole practitioners or a small firm of under five lawyers. The landscape is changing and the younger generation of lawyers are trying to set up larger law firms with specialised departments along the same lines as English and American firms. The first and most recognised firm in Amman along those lines is Ali and Sharif Zu'bi Law Office. The minimum requirements for employment of any new lawyer in established practices in Amman are fluency in English and IT skills. A Masters' in law from Europe or the USA is considered to be a good basis for a successful career in the new culture of lawyers in Amman.

The legal profession seems to be inherited. Almost every successful lawyer in Amman has, at least, one of his children as a lawyer. The name of the practice changes from the name of the father to the joint names of the father and the child, usually a son. There are very few partnerships, except between siblings. Lawyers

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working in firms or single lead offices, who are not sons or brothers of the owners, are never recognised on the letter heads.

In the past, almost every Jordanian lawyer, no matter how long he/she had been in practice, would be at the main court house at least two to three times a week, even if they did not have any cases. This was the way the older generation of lawyers interacted and socialised. This was the main social scene of all the lawyers. There was an impression that if you were not regularly seen at the court house, then your practice had no cases and this gave the impression that of an unsuccessful lawyer. This phenomenon is now reducing and many lawyers attend court very rarely. The perception that is now popular is not to be seen at the court house because that gives the impression that you have international cases and work in banking and commerce, which is seen as more prestigious than local legal work.

When looking at the dispute resolution landscape in Jordan, it is important to understand both formal and informal dispute resolution methods and their respective institutions. The judicial institutions of Jordan have been outlined here, the formal and informal dispute resolution processes will be explored later in this chapter and chapter seven respectively.

### **6.3 Arbitration Act 2001**

The Arbitration Act, number 31 of 2001, which repealed Act number 18 of 1953, which was based on English Arbitration Act 1950, was modelled on the UNCITRAL Model Law 1958 and the Egyptian Arbitration legislation, number 27 of 1994 with some modifications. The legal committee in charge of examining the different statutes around the world and drafting Jordanian law found the Egyptian version the closest to the Model Law and, at the same time, the most suitable for the Jordanian legal climate.<sup>17</sup> The few amendments that were made to the Egyptian text are aimed at making the statue suitable to Jordanian reality.<sup>18</sup> It is noteworthy that Jordan and Saudi Arabia are the only two Arab countries that have chosen to have their

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<sup>17</sup> Explanatory document of the Arbitration Act 2001

<sup>18</sup> ibid

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arbitration law in a separate statute and not as a part of the Civil Law Litigation Code.

Jordan was among the leading Arab countries that ratified the 1954 Convention on the Enforcement of Judgments between the Arab Countries<sup>19</sup>, which was later replaced by the Riyadh Convention for Judicial Cooperation of 1983<sup>20</sup>. In 1972, Jordan joined the Washington Convention, which established the International Center for the Settlement of Investment Disputes (ICSID). A few years later, in 1979, Jordan also joined the New York Convention.

The debate in the Jordanian Parliament on the arbitration act was generally not contentious. However, article 36 that dealt with the substantive law of the arbitration caused fierce debate. Part (a) of the article allowed the parties to choose the law of arbitration, whether Jordanian or not. Some Members of Parliament said that this gives foreign investors and companies the power to impose their law on the Jordanian party, even though the contract is performed in Jordan and is closely connected to Jordan. One Member of Parliament explained that many foreign companies that contract with a Jordanian party have also got foreign funding for the project, thus the Jordanian side does not get to negotiate the terms of the contract as the terms come with a ‘take it or leave it’ invitation to sign. Thus, some members felt that they needed to protect the local party. A well respected lawyer and former judge for 25 years agreed; *“People do not go to arbitration outside Jordan because it is very expensive. Clauses with regards to dealerships and franchises, for example, always have an arbitration clause in the country of the parent company. These clauses are usually unfair and will be enforced in Jordan, whether fair or not. The foreign party always formulate a contract that takes away the rights of the Jordanian party as the contracts are usually standard contracts.”*

These arguments did not succeed as the chairman of the legal committee explained that the contract is the highest law in commerce and that Jordan could not compromise on this principle under any circumstances. The importance of this

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<sup>19</sup> Convention on the Enforcement of Judgments between the Arab Countries of 1954, 1195 Jordanian Off. Gaz. (Sept. 1, 1954)

<sup>20</sup> Riyadh Convention for Judicial Cooperation of 1983, 3329 Jordanian Off. Gaz. ( July 16, 1985)

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debate is that it indicates that many people in Jordan and certainly in the wider Middle East feel that foreign companies impose both the process and the law on the Arab party, which I believe contributes to the distrust and negative feelings towards arbitration in the region outlined in chapter 4.

A former judge, who has been a lawyer for 16 years, warned that the “*people in Jordan feel that they cannot afford to go to arbitration aboard and therefore may decide not to claim at all. The local party is always the weaker party. We need to protect them and the new Arbitration Act does not do so as it allows arbitration abroad. In Jordan, the new law disadvantages the local party considerably. The law is wrong.*”<sup>21</sup>

A very experienced lawyer and arbitrator feels that the “*Jordanian companies have arbitration forced upon them when contracting with foreign companies. I try for my part to include the Jordanian law or the jurisdiction of the Jordanian courts in the arbitration clause, but that is often refused. For example, with a \$250 million contract in Iraq, the Arab party wanted to use Jordan as a neutral forum for the arbitration, but the western party refused; it was make or break for the deal. The only thing we achieved is avoiding the International Chamber of Commerce (ICC).*”<sup>22</sup>

Part (b) of Article 36 of the Arbitration Act, deals with circumstances when the parties do not agree on the substantive law of the dispute, then the article says that the tribunal must decide “which law is the most connected law to the dispute” instead of using the conflict of laws principle as outlined in the Model Law. A Member of Parliament suggested that “we should draft something that will allow this part to fall within the Jordanian reality and situation.”<sup>23</sup> Another member suggested that the law must impose on the tribunal when deciding the applicable law, to give priority to Jordanian law.<sup>24</sup> This was not approved as it was argued that this would contravene the spirit of arbitration. One member pointed out that none of the Jordanian laws are

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<sup>21</sup> Interview with Jordanian Lawyer in Amman in March 2004

<sup>22</sup> Interview with Jordanian Lawyer in Amman in May 2004

<sup>23</sup> Slamat Al-Ehyari, Parliamentary debate, 67

<sup>24</sup> Parliamentary debate of Jordanian Arbitration Act 2001

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actually 100 per cent Jordanian. They are all based on foreign laws from all over the world, which makes it suitable for international commerce.<sup>25</sup>

An interesting feature of article 36 is part (d), which allows the parties to agree to authorise the tribunal to impose *sulh* on the parties, as well as to decide the dispute according to the principles of justice and equity without being restricted by any laws. This article seems to be used regularly by some of the arbitrators I interviewed in Amman.

Jordanian arbitral awards are enforceable through the Jordanian Court of Appeal according to article 53 of the Act. The court allows 30 days for the other party to apply to set aside the award, after the expiry of this period, the award is given the necessary form for enforcement after the court checks just two matters; firstly that nothing within the award contravenes Jordanian public policy and secondly that the award was notified to the losing party appropriately.<sup>26</sup> The decision of giving the award an enforceable form is not reviewable and cannot be appealed. On the other hand, if the Court of Appeal refused to enforce the award, then the applicant could appeal to the Cassation Court to review that decision, according to article 54 of the Act. Many lawyers have criticised this disparity as contravening the doctrine of 'equality between litigants'. A respected arbitrator explained "*The Court of Appeal does not understand its role in the applications for annulment. The judges act in a supervisory capacity not as an appeal forum, even the language they cannot get right. Also the issue that only the party that had an award annulled, can appeal to the Cassation Court is simply unfair.*"<sup>27</sup> Another arbitrator said "*Therefore there is no justice among the parties.*"<sup>28</sup> Article 54 was confirmed by the highest court of Jordan on 13 May 2005, confirming the decision of the Court of Appeal, which allowed an award to be enforced as final and binding without any right to appeal.<sup>29</sup> The effect of Article 30 of the Arbitration Act is also criticised by some arbitrators in Jordan. One experienced arbitrator, who attended his first arbitration in the 1950s, explained; "*When an award is set aside – then the arbitration clause is null and we*

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<sup>25</sup> *ibid*

<sup>26</sup> Arbitration Act No.31 article 54 (a)

<sup>27</sup> Interview with Jordanian Lawyer in Amman in May 2004

<sup>28</sup> Interview with Jordanian Lawyer in Amman in March 2004

<sup>29</sup> Judgement No. 4211/2004 given on 13th May 2005 by the Cassation Court

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*have to start from point zero at court – I don't understand that, after the parties spent one to two years in arbitration, they have to go court.”<sup>30</sup>*

Another criticism of the Act surrounds the lack of any guidance as to what happens if one of the arbitrators in a tribunal of three or more resigns from the arbitration, whether for genuine reasons or as a delaying tactic by the appointing party. Articles 38 and 41 allow majority findings by the arbitrators with regards to both interim and final awards. However, the law does not deal with situations where at the time of making the award, there are only two arbitrators rather than three. A case described to me highlights this issue, after the arbitration process had lasted seven years, two of the arbitrators agreed on an award but the third disagreed and subsequently resigned. According to the law, a lawyer said “we must appoint another arbitrator; however the party that appointed this arbitrator had appointed four arbitrators before him who had also resigned. It seemed like delaying tactics. So, we asked that the arbitrators give their award by a majority decision, but they refused. So now the matter is before the courts.”<sup>31</sup>

Article 48 makes it clear that arbitral awards are not subject to appeal but an application to set aside the award could be made subject to articles 49, 50 and 51. The grounds for this application must only relate to procedural matters, which are restricted to the grounds within the law.

A damning assessment of the Act was given by a very experienced lawyer and arbitrator. “*The Act is missing some key features in order to help push arbitration forward. When the Act was enacted, people were excited about arbitration. When the gaps started to show in the Act, people started to shy away from arbitration. The Act gives the arbitrators complete freedom on procedural matters – including mandatory rights of justice – for example we saw arbitrations where arbitrators produce an award without even seeing the parties- they would decide the case on the documents alone and not even have one hearing. This is against the ABC of adjudication. It is important that the parties get to present their case and have their say. The future of arbitration is worrying, except if the law is reformed in order to fill the gaps that*

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<sup>30</sup> Interview with Jordanian Lawyer in Amman in April 2004

<sup>31</sup> Interview with Jordanian Lawyer in Amman July 2004

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*have been identified in practice.*<sup>32</sup> Other lawyers and arbitrators feel that the law works well. One said “*I think we have the right tools in the form of the law. That is good, but we need the people to implement it in the right way and make good use of it.*”<sup>33</sup>

### 6.4 Foreign Awards

A foreign award can be defined as an award made outside the country where enforcement is sought. The losing party will often attempt to either appeal against the award or have it set aside. This can be done either directly, by appealing against the award itself, or indirectly, by attempting to persuade the court not to enforce the award. The courts are not authorised to review the merits of the dispute or the reasoning of the arbitrator. Rather, the courts may examine the award only to determine whether certain procedural requirements have been met, or to determine that the award does not violate public policy.<sup>34</sup>

There are three possible routes to enforce foreign arbitral awards in Jordan. If an award had been given leave for enforcement by the judicial authority of the country where it was made, then the party trying to enforce it must apply to the Jordanian courts under the Enforcement of Foreign Judgements Act, No. 8 of 1952, unless, the award was granted in one of the Member States of the Riyadh Convention. In circumstances that the award has not been given the necessary judicial authority, then the New York Convention will apply.<sup>35</sup> It is noteworthy that international treaties and conventions are supreme to national law and are given priority in implementation.<sup>36</sup>

#### 6.4.1 Enforcement of Foreign Judgements Act

Under the Enforcement of Foreign Judgements Act of 1952, the applicant must apply to the High Court for a hearing on the enforcement of an arbitral award. The

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<sup>32</sup> Interview with Jordanian Lawyer in Amman in May 2004

<sup>33</sup> Interview with Jordanian Lawyer in Amman in August 2004

<sup>34</sup> Judgement No. 2996/1999 given on 30th May 2000 by the Cassation Court

<sup>35</sup> Judgement No. 768/1991 given on 6th February 1992 by the Cassation Court

<sup>36</sup> *ibid*

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procedural Rules of the High Court are applicable to such proceedings. The court could refuse enforcement of the foreign judgement under specific grounds outlined in Article 7 of the Act and these are:

- a) If the court that gave the judgement has no jurisdiction.
- b) If the losing party was not a national or a resident in the jurisdiction of the court that produced the judgement or the party did not recognise the court's jurisdiction.
- c) If the plaintiff did not inform the defendant of the proceedings and if the defendant did not attend the litigation even though he was a national or a resident of that jurisdiction.
- d) If the judgement was granted by fraud.
- e) If the losing party convinced the Jordanian courts that the judgement before them is not final or it contravenes public policy and morals.

Article 7(2) outlines that the Jordanian courts may refuse to enforce a judgement where the state of the court that produced the judgement does not enforce Jordanian judgements. In other words, the country where the award has been made should exercise reciprocal enforcement of Jordanian court and arbitration decisions.

Once the court has agreed to enforce the judgement, it will be enforced in Jordan as if it were a Jordanian judgement.<sup>37</sup>

### 6.4.2 The Riyadh Convention

The Riyadh Convention is a regional multilateral convention between Arab States. Therefore, it applies only to foreign awards made in another Arab member State. It concerns enforcement and recognition of not only arbitral awards, but also court judgements. The Riyadh Convention affirms the executory character of arbitral awards made in a member state without taking into account the nationality of the winning party. The enforcing court cannot examine the substance of the dispute when the judgement or award is referred to it for enforcement; it can only accept or

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<sup>37</sup> Article 9 of the 1952 Arbitration Act

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refuse (in certain cases) to enforce it. For an award made in one Arab State to be enforced in another, the Riyadh Convention requires that the enforcement order for the award be granted by the judicial authority of the country in which the award was made. Thus, the Riyadh Convention requires two enforcement orders, one from the country where the award was made and one from the country where the enforcement is sought.

Article 37 of the Riyadh Convention provides that arbitral awards from Originating States will be recognised and enforced in Recipient States, subject to the exceptions set forth in Articles 28 of the Riyadh Convention and to the following additional exceptions:

- a. If under the law of the Recipient State, the dispute that is the subject of the arbitral award from the Originating State is not arbitrable;
- b. If the arbitration agreement upon which the arbitration was based was void or had expired;
- c. If the arbitrator(s) was not competent under the terms of the arbitration agreement or the laws under which the arbitral award was made;
- d. If both parties to the arbitration were not duly summoned to appear; or
- e. If the terms of the arbitral award are such that the enforcement of the arbitral award would be against the public policy of the Recipient State.

Article 30 also has a list of grounds for the court to consider before enforcing an award or judgement:

- a. The judgment is contrary to Islamic law or the Constitution or public order of the Recipient State;
- b. The judgment is a default judgment and the defendant was not properly notified of the case or the judgment;
- c. The dispute in respect of which the judgment was issued:
  - i. Was previously finally adjudged in the Recipient State;
  - ii. Was referred to the courts of the Recipient State before it was referred to the courts of the Originating State and is still before the courts of the Recipient State;

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- d. The judgment is against the government of the Recipient State or an official of the Recipient State for acts arising out of the performance of his duties as an official of the Recipient State; or
- e. The enforcement or recognition of the judgment would be contrary to an international agreement or convention in force in the Recipient State.

### 6.4.3 The New York Convention 1958

Unlike the Riyadh Convention, the New York Convention applies to foreign arbitral awards, but not to judicial decisions. Article 3 of the New York Convention provides that each contracting state will recognise arbitral awards and enforce them in accordance with the Contracting State's rules of procedure. The New York Convention applies not only to the recognition and enforcement by Contracting States of arbitral awards made in other Contracting States, but also to the enforcement by Contracting States of arbitral awards made in non-Contracting States, provided that such arbitral awards satisfy the basic conditions set down in the New York Convention. Certain countries have excluded this provision, but not Jordan. The Jordanian Cassation Court confirmed that the Jordanian Courts will enforce awards under the New York Convention regardless of whether the State where the award was made reciprocally enforces Jordanian judgements and awards or not.<sup>38</sup>

A Contracting State may, however, pursuant to Article 5 of the New York Convention, decline to recognise and enforce an arbitral award:

- a. Where the party against whom the arbitral award is invoked can prove that:
  - i. The parties to the arbitration agreement were under some incapacity according to the law applicable to them;
  - ii. The arbitration agreement was not valid under its governing law;
  - iii. It was not given proper notice of the appointment of the arbitrator or of the arbitration or was otherwise unable to present his case;
  - iv. The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to the arbitration;

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<sup>38</sup> n 35 above

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- v. The composition of the arbitral authority was not in accordance with the arbitration agreement; or
- vi. The arbitral award is not yet final or has been set aside or suspended by the jurisdiction of the seat of the arbitration; or

b. Where the competent authority of the Contracting State where enforcement of the arbitral award is sought finds that:

- i. The subject matter of the dispute is not capable of settlement by arbitration under the law of the Contracting State where enforcement of the arbitral award is sought; or
- ii. The recognition or enforcement of the arbitral award would be contrary to the public policy of the Contracting State where enforcement of the arbitral award is sought.

A party enforcing an arbitration award in Jordan could choose to enforce it under the New York convention first. If this was not possible, then the Riyadh Convention and then the Act would be used. This is due to the fact that an award under the New York Convention can be enforced without the authority of any other national court. The Riyadh Convention requires this and so does the Act.

### 6.5 The Mediation Act

“Mediation is a method of alternative resolutions aimed at reducing the demand on courts and reduces the time, effort and expenditure on all parties to the litigation process. It also contributes towards providing a conducive and competitive investment environment in line with the quantitative and qualitative developments witnessed by the Kingdom in various areas.”<sup>39</sup>

The Mediation Act for Civil Disputes Resolution No. 21 of 2006 came into force on 16 March 2006, but cases were not referred to mediation until 1 June 2006. The first mediation department was established in the Amman First Instance Court on 1 June 2006 as an initial step towards establishing mediation departments in other courts across the Kingdom in pursuance of the Act. The Act sets up a judicial section called

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<sup>39</sup> <http://eng.moj.gov.jo/Home/tabid/36/Default.aspx>

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the “mediation section” which consists of mediation judges from both First Instance courts as well as the High Court. They are chosen by the Head of the High Court for a period determined by him.

There are also private mediators appointed by the Head of the judicial committee on recommendation from the Minister of Justice. Private mediators are chosen from retired judges, lawyers, other professionals and people with relevant experience and who are known to be fair and impartial. The litigants must agree that their case be referred to mediation.

Part 3 (b) of the Act gives an incentive to encourage parties to settle their disputes amicably by refunding half of the court fees paid by the claimant, which the defendant must pay back if he loses. There is a three month period given to the mediator to resolve the dispute. If the dispute is resolved in part or completely, an agreement is written down and signed by both parties. This agreement will then be sent to the case management judge or the first instance judge and it becomes final and binding. If the parties do not reach a solution then the mediator must provide the court with a report detailing the level of co-operation of each party during the mediation. If one of the parties did not attend the mediation, then article 7(d) gives the court the power to impose financial penalties on that party or its representatives. All the negotiation and discussion in the mediation is confidential and cannot be used in future litigation.

From June until December 2006, 136 cases were referred to mediation from the judges of the Amman Court. 74 cases were settled by mediator judges. In 2007, 273 cases were referred in total, and 256 were settled. It is important to note that mediation is only available in the main court in Amman. It is expected that other courts will start mediation some time in 2008. However, there has not been any mediation by any of the private mediators. A judge I spoke to explained that litigants do not feel comfortable in referring their disputes to a private mediator. It seems that in some ways this is obvious, as the disputants would have tried private mediation among friends and family which failed and that is why they ended up in court, so they feel that there is no point referring the dispute to a person who does not have the authority of the state. The mediating judge it seems is seen as a judge and the parties seem to feel much more comfortable complying with his suggestions. All the

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mediators, both private and judiciary, were sent by the Jordanian government to the USA to train in mediation along American lines.

Many codes of civil procedure include more or less effective provisions for judicial mediation. Jordan adopted the Mediation Act (2006), which is inspired by Western models but this is in no way sufficient to modify paradigms.

A particularly well-informed lawyer attributes this failure to the fact that the execution, or carrying-out, of the settlement agreement remains optional.<sup>40</sup> It should be added that American-style mediation has not convinced clients, who still prefer recourse to their social networks or even to the courts to resolve their disputes.

### 6.6 The Commercial Chamber

The Amman Chamber of Commerce is one of the major organizations representing the private sector in Jordan, it has more than 40,000 registered members. It was founded in 1923 as a non-profit organization to regulate and represent the interests of all trade firms in Amman and the surrounding areas, and is one of the oldest Chambers of Commerce in the Hashemite Kingdom of Jordan.

The Chamber provides a service for traders to resolve their disputes. There are three resident arbitrators. The same people have been there for 8 years. They are all traders with ten years of experience in arbitration. The arbitration committee was set up over twenty years ago in 1986. However, arbitration and mediation have been a part of the chamber's by-laws since the 1950s.

Most of the awards are by mutual consent. The arbitrators occasionally refer to professionals or specialists for specific advice, but with the consent of the parties. The articles of the Chamber sets the fee at ten JDs (about \$14), but this is not usually enforced.

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<sup>40</sup> F. Kemicha, 'The Approach to Mediation in the Arab World', WIPO Conference on Mediation, Geneva, 29 March 1996, online: WIPO Arbitration and Mediation Center, <http://arbiter.wipo.int/events/conferences/1996/kemicha.html>

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Since 1990, only two awards have been set aside by the courts. An arbitration that took the longest time in the history of the Chamber lasted for about eight months due to its complexity. The arbitrators try to find the best possible options for both parties, using elements of trust and confidence. One of these arbitrators told me “*We rely on Shari’ah and commercial customs. We are active arbitrators, we investigate the cases...The arbitrators are very pleased as they feel that they are doing a service to God.*”<sup>41</sup> He said the main advantage of the Chamber is that it is free. Parties only pay the experts fees if necessary. Over 90 per cent of the cases are resolved. Lawyers are allowed to attend hearings, but they are not allowed to speak. There are parties who choose to directly approach arbitrators themselves privately, who are themselves also members of the Chamber, as this affords maximum secrecy. The Chamber gets about one to two cases a week and a few are not within the commercial sphere. The average is 50-70 cases yearly and about 30 per cent are non-Jordanian parties.

### 6.7 Arbitration in Amman as Seen by the Arbitration Players

“*Arbitration is the arbitrator*”

Aly El Ghatit, famous arbitration lawyer  
in interview in Feb 2005 in Cairo

Many of the lawyers I interviewed in Amman and the people I spoke to on the Arab arbitration circuit put a lot of emphasis on the arbitrator as the ‘make or break’ element of any arbitration. An experienced lawyer and arbitrator said “*success in arbitration depends on the personality and choice of the panel.*”

The importance of the arbitrator was demonstrated by the classification of a young law lecturer at the University of Jordan and a former Minister of State for Public Reforms. According to this, arbitration cases in Jordan are divided into two types; the first is when “*the parties have successfully chosen the right arbitrator, which ensures that the award is more likely to be enforced as he understands the procedures.*” The second type is when the “*arbitrator comes to the arbitration “off hand”*,

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<sup>41</sup> Interview of an arbitrator in the Jordanian Chamber of Commerce in Amman on 15 July 2006

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*consequently many of the awards, if not most, are annulled as they have major and fundamental violations.”*

When making choices about the arbitration process, the choice of arbitrator is given number one priority in the minds of the lawyers representing the parties. A famous international arbitrator said “*what makes a good arbitration is a good arbitrator; in his manner, knowledge, experience, fairness. Good arbitrators are rare in most countries.*”

Other observers said that there are other factors that make a successful arbitration. A member of the Chartered Institute of Arbitrators in London explained, “*A good arbitration has three features; well qualified arbitrators, qualified lawyers and a good choice of seat, because the law is applicable to the seat.*”

A very experienced engineer and arbitrator listed the main characteristics of a successful arbitrator:

- *Experience in arbitration*
- *Understanding of the Arbitration law of the seat and the applicable law to the arbitration*
- *Ensures justice and equity*
- *Strong personality*
- *Well known and respected*
- *Cannot be bribed*
- *Sole arbitrations are quicker and more efficient.*

### **6.7.1 Perceived Advantages and Disadvantages of Arbitration**

There are a number of advantages and disadvantages that are generally recognised with regards to arbitration. Many of these were mentioned in the interviews, but there were Jordan-specific issues.

A very experienced lawyer and arbitrator explained his strategy; “*arbitration would be my choice of dispute resolution for commercial disputes because of the ease of the*

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*process. I have a rule, disputes over a half million US Dollars go to arbitration. For anything less than that, the courts are better.*

Another very experienced international arbitrator and lawyer stated; “*Complex cases that need specific knowledge and need a lot of effort are best suited to arbitration, especially technical cases where you need the tribunal to understand expert evidence well. There is no way these kinds of cases can be resolved in court.*”

A lawyer who graduated from King’s College, London with a PhD in investment and World Trade Organisation law is very optimistic about arbitration in Jordan. He said “*arbitration solves disputes in a conciliatory manner and avoids the complexity of the judiciary. It is important for commercial claims as commercial men are profit oriented people and arbitration is closer to the commercial mentality than the courts. The great thing about dispute resolution is the fact that you can create your own rules. Promptness of settlement is also very important for businesses that are counting on the money.*”

### **6.7.2 Lawyers and Arbitration**

The other player in the arbitration process alongside the arbitrator is the lawyer.

Many arbitrators complain that the lawyers representing the parties still use the same adversarial manner they use in court.

A lawyer and arbitrator with an LLM and PhD from George Washington describes how “*lawyers need to be ‘brain washed’ from the routine of court tactics, which do not work in arbitration. The lawyers in Jordan act as if they are before a state court. I get very upset and try to explain to them that you are not before a court. I tell the lawyers before an arbitration tribunal, you must forget procedures and concentrate on substance. Your right of defence is guaranteed. I felt like ‘I was an alien’. There is no real co-operation between the lawyers on both sides. This tension that exists in the courtroom still exists in arbitration. It is the same style.*”

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An international lawyer and arbitrator that has two PhDs from Cairo and Bristol Universities explained, “*The main problem we face in arbitration is caused by bad management of arbitration. Whenever I am an arbitrator and especially a chairman, I do not allow any of the usual judicial practices. I accept most applications as long as they trying to help the process while maintaining complete impartiality and equality between the parties. At the start of the arbitration, I agree with the parties the initial procedures, like claims and defences, time periods but most lawyers do not know anything different from the court procedures.*”

An experienced lawyer and arbitrator with a PhD from George Washington in international law explains; “*lawyers in Jordan are deeply versed in procedure. They can kill any case using procedure. This is not arbitration, this is not even law. There are procedures, but just to ensure equal defence and equal opportunity. The best lawyers are now the ones that use procedures to delay the case. If this is good for court, and I do not believe that it is, it is bad for arbitration. It is very important in arbitration to have the matter completed as soon as possible. Jordanian lawyers invariably perform before an arbitration tribunal the same way they would before a court and this is very bad for the reputation of arbitration in Jordan.*”

A young lawyer who works in arbitration said, “*Arbitration is not necessarily shorter, but it is definitely more expensive. Some arbitration panels conduct the case in the same way as a judge in court; witness testimony must be written down, it takes two hours to write down two pages, arbitration is not shorter for sure. In theory, it should be less rigid and use fewer formalities, but that is not the case. Many of the youngsters complete masters and PhDs in arbitration and think that they can become arbitrators straightaway. I been in practice for seven years and I would not dream of putting my name forward as an arbitrator.*”

A former judge who has become a practising lawyer explained; “*there is a lack of general qualifications among lawyers and this impacts on arbitration. Trust in arbitration is low in Jordan.*”

A former member of the World Bank Committee on dispute resolution offered the criticism that, “*there are a lot of arbitrators who conduct arbitration without even*

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*understanding the concept of arbitration or without reading any literature or history of arbitration or understanding international standards of arbitration.”*

A civil engineer of 30 years and a very experienced arbitrator said “*there is limited arbitration experience in Amman. About 30 per cent of lawyers and 10 per cent of engineers have arbitration experience. 90 per cent of the arbitration cases I have participated in are like a court and the main reason for that is the lawyers.*”

The vast majority of lawyers I interviewed, and some engineers, have insisted that having a lawyer on the arbitration tribunal is vital. A renowned engineer who did his first arbitration in 1966; “*I think it is very important to have a lawyer on the tribunal. Arbitration is both technical and legal.*”

A very experienced engineer and arbitrator disagrees; “*the presence of lawyers depends on the needs of the dispute. In my experience, in disputes that are technical, only engineers are needed on the panel of arbitrators. There would be contractual issues, but engineers would be able to deal with them through their experience. By having a lawyer on the panel, one loses a voice in the technical deliberations. If a legal issue arises, the arbitrators can employ a legal expert to assist them if necessary.*”

An experienced lawyer with an LLM from the LSE agrees. He insisted, in a particular case, on the appointment of a Jordanian sole arbitrator who is an expert in construction; “*a quantity surveyor with a good reputation and high technical calibre.*” His choice was based on the dispute itself, “*there was no need for a lawyer on the tribunal as the dispute was the verification of a claim that is purely technical. This would avoid the need for an expert report. The other party were insisting on a lawyer arbitrator but I resisted. There were no legal rights claimed and thus no legal matters to be decided. If there are legal elements to the dispute, then it is preferable to have a lawyer.*”

### 6.7.3 Arbitration is a Business

There is a general feeling developing in Jordan and the wider Middle East that many arbitrators treat arbitration as a business. A businessman said “*arbitration is like a cake, everyone wants the biggest share; the arbitrators, the lawyers, and the parties lose either way. It is big business.*”

Arbitration has become commercialised and is taking too long. Many older arbitrators describe how they will insist that the parties try to negotiate a settlement before starting arbitration proceedings so as to avoid arbitration all together if possible as they believe it is the best course of action. Then, if the parties do not succeed, the arbitrator will get the parties to agree on him imposing a settlement, which a number of arbitrators are very proud to say they have succeeded in doing. After the agreed settlement, the arbitrator produces an award of these agreed terms. These older arbitrators feel that the new arbitrators are ‘hungry’ and as soon as they are appointed they start the proceedings and ask for large fees.

A lawyer and arbitrator with a PhD in international contracts and dispute resolution from France believed “*locally there are people that think that arbitration is for building fortunes. Jordanian law imposes VAT on lawyers and arbitrators fees which make arbitration even less encouraging.*”

A lawyer of over 35 years experience and extensive arbitration experience complained, “*Fees are the biggest problem, there are much more than court fees and the award still ends up at court and the client must pay the court fees anyway. Thus, arbitrator's fees are an extra cost. Some of my clients are losing more money by going to arbitration. For example, from a 4,500JD claim, 500JD went to the arbitrator, 50JD to the clerk and 125JD was lawyer's fees. While if we went to court it would have cost 135JD to go to court. We settled in one month.*”

A lawyer who has been involved in arbitration and feels that he was one of the people that promoted it said “*fees for arbitration could cause a lot of problems if the arbitrators do not set fees within reasonable limits in order to protect the process of*

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*arbitration. One must look at the value of the dispute, the complexity of the case, the length and experience of the arbitrators in order to decide the fees.*

An engineer who worked a number of local arbitration cases and has studied law at undergraduate level suggests, “*the fee of arbitrators should be per hour and that way it may put pressure on the lawyers to become efficient and not waste time in hearings.*”

A young lawyer and arbitrator justified the high fees charged by arbitrators; “*they are at the top of their profession. The more you have a boom in the economy the more you will need commercially orientated procedures such as arbitration.*”

A former judge agrees, “*The expenses of arbitration are very high but within the normal range of commercial dealings.*”

### 6.7.4 The Story of the Courts and Arbitration

Arbitration can not work effectively without a supportive judiciary. Also, arbitration is the alternative to court and many players in the region use arbitration to escape the national courts.

A distinguished academic who received his LLM from Harvard and PhD from Queen Mary London confirmed “*there is an understanding of alternative dispute resolution within our judiciary. The judges have a good understanding; there are conferences and workshops so there is a real awareness and acceptance of arbitration and alternative dispute resolution (ADR).*”

A distinguished lawyer and arbitrator felt that the advantages outweigh the disadvantages of arbitration and says that this was due to “*our courts being in an appalling state, thus, I prefer arbitration. The results of arbitration in Amman are encouraging and it is important that the arbitrators do not give arbitration a bad name.*”

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An experienced lawyer and arbitrator who achieved an LLM and PhD from George Washington gave a different point of view. *“There is always jealousy between the court and arbitration. A trained judge that sees an engineer becoming an arbitrator considers this an infringement as the judge cannot become an engineer, but an engineer can become a judge. However, I think because of the judge’s workload, they are welcoming ADR. This is not an Arab specific issue, it is a worldwide matter.”*

Many interviewees confirmed that arbitration is welcomed by the courts as a way of reducing their very heavy workload.

### 6.7.5 Advantages of Arbitration Compared to the Court

There is a general agreement that arbitration, with all its delays, is still faster than the courts. Some interviewees insisted on describing how as arbitrators they complete the process in under a year, but the average it seems for arbitration cases in Jordan as between one and two years.

These are some of the main advantages mentioned by interviewees.

A respected lawyer and arbitrator feels, *“arbitration is mostly done by experts in the field of the dispute, unlike the courts. In addition, arbitration has proved to be relatively quicker as a fact finding process, and the outcome is likely to be accepted by the parties involved. Moreover, international arbitration cases conducted in Jordan are more likely to be accepted and enforced in foreign jurisdictions than local court decisions; this is mainly due to the New York Convention.”*

An experienced lawyer and arbitrator explained *“there is no real saving of money in arbitration as it costs more than going to court in some cases, but there is a time saving element except when losing parties apply to annul the award. In these situations, the courts take a long time, thus, no real time saving is possible. During arbitration, the parties get closer to each other and the arbitrators try to encourage the parties to settle. In most cases, the parties settle, which is the real advantage of arbitration. We do exert some pressure on parties to settle their disputes.”*

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An experienced judge who has been practising law and arbitration confirmed, “*Arbitration saves effort, time and money - money not so much especially when appointing a very experienced arbitrator, but time for sure.*”

An experienced lawyer and arbitrator confirmed “*the main difference between court and arbitration is the element of speed.*”

An experienced lawyer who does some arbitration cases felt, “*speed as an advantage relies heavily on the type of case. Good judges decide cases quickly. This is similar in arbitration. Some arbitrators do not allow delay, but some do. In general, arbitration is shorter than court proceedings as it is only one stage and there is no appeal.*”

A young arbitrator said; “*in Jordan the personal aspects are greatly observed and appreciated in arbitration as well as court processes; since the community is relatively small, and the group who are involved in arbitration is even smaller, every one knows every one. If a person is respected, he will gain recognition, if he is not, most likely the arbitrators will be stricter.*”

A young lawyer and arbitrator points out: “*Some arbitrators are very conscious of the period it takes for an arbitration to finish as they do not want to gain a reputation that their arbitration tribunals take a very long time to conclude.*”

A young lawyer who works in arbitration argues: “*The market is small and few people work within it. Sole arbitrators try to encourage a settlement rather than give an award to protect their chances of getting appointed in the future.*”

There is no doubt that there are advantages to arbitration and the main one is informality in comparison to courts. “*The main advantage to arbitration is not speed, it is informality,*” a long standing former judge said. “*The arbitrator allows the parties to present as much evidence as they want, whereas a judge puts down strict limits as he has a heavy caseload. A first instance judge has about 25 cases listed each day. Arbitrators allow flexibility in presentation of pleadings and evidence.*”

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Another advantage mentioned by a lawyer who been in arbitration since the 1950s is that “*there is no need to translate documents to Arabic from English, for example, if the arbitrators can read them in English. Also witnesses are able to give evidence in English.*”

A lawyer that does mainly local arbitrations, who is also a member of the Jordanian Bar Association committee and a former head of the Bar Association feels that “*some of the advantages of arbitration are also its disadvantages. For example, when some arbitrators ask for large fees, the parties decide to go to court instead. When looking at arbitration directly, it seems expensive, but if you look at it indirectly, it is cheaper than the court. However, the speed of the process relies on the tribunal. The tribunal must include a lawyer to be able to grasp the law and thus increase the success of enforcement of the award. There are judicial requirements and the arbitrators must be aware of them as legal problems could destroy the arbitration.*”

The ability to have consecutive hearings once the trial starts, was cited as valuable by arbitrators in Jordan. An experienced lawyer who specialises in international arbitration states: “*Jordanian courts take a holiday from July to September for 6-8 weeks, but arbitration hearings continue during that time even though courts are not sitting.*”

A very experienced lawyer and arbitrator said: “*I have arbitration hearings on Fridays if necessary to keep the case moving.*”

A young arbitrator who qualified as a lawyer in 1998 after spending a number of years as an academic feels that arbitration is cheaper than the courts. “*If a case is concluded through arbitration within one to two years, this kind of case, i.e. its size, will take about 15 years in the court. In court, lawyers cannot present their case adequately, regardless of the number of witnesses and documents, especially in construction cases like the ones I worked on. The circumstances of our courts can not allow this amount of evidence, except if the judge only does one case every six months and that is impossible. In international cases where the witnesses are from*

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*outside Jordan, they need to be heard everyday to get through their evidence, they cannot keep coming back. This is not possible before the courts. ”*

An experienced engineer and arbitrator felt that “*arbitrators realise that parties referring disputes to arbitration are looking for flexibility and speed. We try to have weekly hearings except if there is a foreign witness then we have daily hearings. In court it is very different; there is a hearing here and a hearing there, which makes cases last for years, especially construction disputes.*”

A very experienced engineer and arbitrator stated the main advantage to arbitration is the fact that “*arbitrators study the case in detail unlike judges. Therefore, this could lead to more just decisions.*”

An experienced lawyer and arbitrator sympathised, “*the longest cases in court are construction cases, which last about ten years, so arbitration is essential for these types of disputes as the courts are very ineffective. Judges really do not understand these disputes. To help the construction community, we need a specialised judiciary. At present, I pray God help the people in the construction industry.*”

An experienced lawyer and arbitrator explains, “*The cases that last for four years in arbitration would last so much longer in the court due to the amount of the evidence, especially witness evidence. I have a case that so far has 2000 pages on record. A key witness, for example, could last for four months. Sometimes, it is not possible to have hearings daily as the lawyers need to prepare their questions and then their cross-examination. There are cases that concluded in three, six months or one, two and four years. There are no real delaying tactics in arbitration as the majority of lawyers that do arbitration are of high calibre and it is not in their nature to delay. They are more concerned with justice and rights.*”

In contrast, an engineer blames the lawyers for the delay in arbitration; “*there is no doubt that arbitration is faster than the courts. Even though it may take longer because of the lawyers, but it is still faster. Lawyers need to delay the process to give an impression to their clients that they are putting in a lot of effort and therefore deserve their large fees. The time is very short when there are no lawyers. I have*

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*done a lot of arbitration with no lawyers, just the parties and it was shorter as the procedures are much more straightforward. The difference between the court and arbitration is that arbitrators can ask for evidence and documents, whereas the court cannot. Therefore, arbitrators could get closer to the truth. ”*

An experienced lawyer and arbitrator felt: “*The procedure in arbitration is the same as the courts. Usually, when there is a sole arbitrator then the procedures are shorter and easier in comparison. When the two parties are local, the procedure looks very much like the courts, obviously there is some flexibility to process, but not enough. ”*

A young arbitrator and a lecturer in the University of Jordan believes, “*people prefer to go to court because it is less expensive; not many local parties go to arbitration as there are very few large contracts. They prefer the courts as they are traditional people. Arbitration is still reserved mainly to large and complex cases. ”*

A former judge who is currently a practising lawyer and arbitrator confirms “*the number of arbitration cases is limited, the courts are still more popular. ”*

A lawyer who specialises in international arbitration believes: “*There are a lot of local arbitrations but I do not deal with them. I encourage local clients to include arbitration clauses in their contracts. ”*

An experienced arbitrator and a member of International Chamber of Commerce of Jordan disagrees with the above: “*Arbitration is growing because people are fed up with the courts not because they like arbitration. There is a lack of confidence in the courts. I used to be a supporter of arbitration, but now I am not so sure because of the high fees and the reason that courts decide to set aside the awards. ”*

An experienced quantity surveyor and arbitrator said: “*Arbitration has become very similar to litigation and mediation is also going the same way. It is the lawyers' way of ensuring the existence of their monopoly. There is a responsibility on the nations with developed legal systems to set an example; countries such as France, the USA,*

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*the UK and Egypt. They must create an effective, efficient system and we must learn from the mistakes of the developed nations. ”*

A very experienced international arbitrator and lawyer explained that: “*In situations where there is an incompetent judiciary and hopeless arbitration, we are better off using the judiciary. We choose arbitration to avoid going to the judiciary. Unfortunately there is no escape, as the enforcement of awards in the Court of Appeal are lasting for one to two years. This is wrong and a serious problem of our courts. The impartiality issue concerning arbitration, plus the fact that awards are taking a long time to be enforced by the courts, leads me to say that we are better off in court. It is a circle; it needs to be perfect; an excellent arbitrator; a good lawyer and a judge who understands arbitration. Only, in these circumstances will arbitration be better than the court, but if one of those elements is missing, then I prefer the courts. ”*

Many of the lawyers interviewed launched fierce criticism against the courts and their ability to deal with arbitration procedures and awards.

A distinguished lawyer and arbitrator who graduated in 1974 complained: “*There is a lack of legal understanding by the court of arbitration. For example, the law says that the decision to appoint an arbitrator by the court is final and cannot be appealed. One of the grounds for setting aside an award is the improper appointment of an arbitrator. There was a case where my opponent asked the court to appoint an arbitrator on my client’s behalf. The court did not inform us of the application and appointed an arbitrator through a procedural hearing. An arbitrator was appointed without us being present and the award was set aside after the whole arbitration took place because the appointment was not done properly. In another case, a party asked the court to appoint one arbitrator, but it appointed two on behalf of the party and the chairman, as it was clear from the contract that the panel consists of three arbitrators. The law states a certain procedure to the appointment for the third arbitrator, which only requires the court to appoint the chairman if the two appointed arbitrators fail to do so and an application is made to court to make such an appointment. In this case, no such application was made. ”*

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A former judge and current practising lawyer and arbitrator gives this example where “*a party requested from the court to appoint an arbitrator on behalf of a party that had failed to do so. The court ignored the choice of the applicant and appointed three arbitrators as it saw fit. I think this shows that the sight of the judiciary is not clear regarding arbitration.*”

An experienced lawyer and arbitrator felt the way to avoid these kinds of problems is to have “*a specialised panel of judges in the Court of Appeal that deal with arbitration cases specifically.*”

A practising lawyer who represents clients in arbitration, but refuses to be appointed as an arbitrator, explains the need for a specialised Court of Appeal. He says that each panel of judges deals with arbitration in a different way. “*It depends on the particular panel of judges that the case comes before, some judges just review the award on paper, others ask for oral pleadings. Whatever type of arbitration, whether local or international, the courts have the final word.*”

A former judge and a current lawyer and arbitrator felt the lack of specialisation in the Jordanian legal profession is “*...causing difficulties. Specialisation is also necessary for judges. The reason, in my opinion, is that a large number of pieces of legislation are being passed and this is creating a gap of knowledge, expertise and skill in the legal world. The courts may be able to push the profession towards specialisation.*”

A lawyer and arbitrator explained to me that contrary to what is required by law; courts review all awards for enforcement with an oral hearing on the instruction of the Head of the Court of Appeal. “*Even though Article 54 of the 2001 Act clearly states otherwise, some cases were delayed for over a year on an application for enforcement then the case was appealed to the Cassation Court. Cases for the appointment of arbitrators by the Court have taken three to four years.*”

One lawyer and arbitrator warns, “*The law is too new to judge the courts' decisions, but very few awards are being set aside by the courts. The court respects both local and international awards.*”

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Another distinguished arbitrator and former judge explains: “*The position of the courts in relation to arbitration cannot be judged sufficiently as the number of cases presented to the courts is not higher than ‘the fingers of both hands’.* We are still at the beginning of the road. The relationship between the courts and arbitration has not been finalised and the principles have not been clarified. It is all very new.”

A professor at the University of Jordan with 26 years of legal experience feels, “*Jordan has a relatively new Arbitration Act with lots of loopholes. Only time and experience will reveal both the advantages and disadvantages of arbitration in Jordan.*”

A former lecturer at the University of Jordan and a current practising lawyer and arbitrator gives a different point of view. He feels: “*The condition of the judiciary could be a secondary reason for the increase in arbitration. The main reason is that you can choose your arbitrator and tailor the process to the dispute. The situation with regards to the training of judges has improved considerably. There are courses, scholarships for masters and PhDs which were not available in the past. There is some sort of unofficial specialisation among judges. For example, some judges who have achieved a PhD in commercial law have those kinds of cases directed to them. I think the status of judges is getting better. The main problem for judges is the time allocated to deal with each case.*”

However, serious criticism of the legal profession and judges was levelled by an arbitrator who is involved mainly in international arbitration. “*Judicial standards are getting worse and judges are creating bad lawyers. Lawyers are the standing judiciary and judges are the sitting judiciary.*”

A long standing lawyer and arbitrator thinks the increase in arbitration is due to the failure of the courts: “*The court decisions are contradictory and there is lack of knowledgeable judges, especially relating to certain cases such as construction, the length of cases in courts and the lack of specialised judges means that people do not have any other choice but to submit their disputes to arbitration. Basically, I say the use of arbitration is to avoid the use of the courts. I think if our judicial system was*

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*stronger and had more qualified people then the use of arbitration would decrease because arbitration is very expensive. An example of the court system's failure was demonstrated in an article where the Bar Association asked all lawyers to submit a list of cases they submitted to the Cassation Court. There is a desperate shortage of judges in the highest court. We have cases in the court that have been there for two years and still have not even been allocated to the relevant panel. So how do you want people to trust our court system?"*

An engineer and arbitrator who is much more optimistic said, "*Arbitration in Amman is successful except for some problems but it is still better than the courts. Judges do not understand technical matters and there are huge delays in the courts.*"

A seasoned construction manager and arbitrator told me, "*The main reason people go to arbitration in Jordan for technical disputes is that the judges are very weak, especially matters of construction.*"

A well established lawyer and arbitrator was furious about the current state of the country. "*This is our reality and anybody that says otherwise is lying. With this current mentality of judges, we will never develop. A judge rang me to find out our fees and the fees of the arbitrators. He said he would work for several years and not get paid that much.*"

There was also strong comments from a Bar Association committee member and an experienced lawyer and local arbitrator, "*I advise my clients to choose arbitration over the courts. I have no confidence in the judiciary. There are political and other pressures on them. This causes my lack of confidence.*"

An experienced lawyer and arbitrator described how "*there are mixed feelings towards arbitration but as long as the courts are of this low status, arbitration will continue. The benefits of arbitration to many lawyers outweigh its disadvantages.*"

A lawyer with over 30 years' experience in arbitration felt that "*the new generation of lawyers and judges are not well educated and do not read. The judgements of the courts are badly drafted and lack reasoning.*"

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Not everyone feels that arbitration is better than courts however,

An experienced lawyer and arbitrator feels that “*in court you get ‘three bites at the cherry’. One of them will be the right decision. Whereas in arbitration there is no appeal and one is stuck with the award.*”

A former judge who is currently a practising lawyer and arbitrator states: “*I do not advise my clients to include an arbitration clause in their contracts as arbitration in Jordan is not trustworthy. The weakness of the courts is also due to the lack of qualifications and expertise, but in court there are three stages to correct any mistakes and ensure justice, unlike arbitration.*”

As seen, there are mixed feelings among Jordanian arbitrators in relation to arbitration and the Jordanian courts. While there are strong supporters of arbitration, others prefer the courts, but the majority do not favour either completely. A number of arbitrators decide on whether they refer a case to arbitration based on the value of the claim or its complexity. It seems there is a consensus that arbitration is not suitable for all types of cases. The most unified criticism from the arbitrators is the court-like manner of arbitration, which I submit is caused by the Western model of arbitration. In the next chapter, I paint a picture of how the Jordanians resolve their disputes in modern Jordan by using *wasta*, which is in itself changing.

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### Chapter Seven

#### Informal Dispute Mechanisms

“Tribal society and tribal ethic is still alive and well in Jordan, albeit obviously not in the same physical form that it was a century ago or even half a century ago...the tribes of Jordan still consider themselves as such...’you can take the Arab out of the desert, but you cannot take the desert out of the Arab.’”<sup>1</sup>

The formal institutions in Jordan in the form of arbitration and the courts are a fair representation of the Western influence on the Jordanian legal and dispute resolution systems. However, despite the perceived adoption of Western models of commercial arbitration in particular and dispute resolution in general, Jordanian people and culture are still very much tribal, with deeply embedded heritage and customs. The modern interaction of the tribal traditions with the Western model is looked at in this chapter. This chapter represents Jordanian rationalities of dispute resolution and transaction formation in the form of *wasta*. It also shows the modern use of third party intervenor and the tensions between the two rationalities.

#### 7.1 Wasta and the Tribes

At the turn of the Twenty-first Century, the population of Jordan was five million people, of which a quarter come from nomadic and semi-nomadic tribes; at least 350,000 are Jordanian Bedouins and 650,000 semi-nomads. Added to this, another 30% of the population are settled Jordanian tribes of East bank origin. This means according to Princess Ghazi bin Muhammad<sup>2</sup>, a former Advisor to the King on Tribal Affairs, the majority of the population of Jordan is still tribal, even to this day. In modern Jordan, there are strong national institutions as well as countless social customs, ranging from individual tribal accents and gestures, eating with one’s hands and wearing traditional Arabic clothes, to openly wearing weapons and engaging in blood feuds. There are institutions that are particularly reserved to the Bedouin and

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<sup>1</sup> G. bin Muhammad, *The Tribes of Jordan: At the Beginning of the Twenty-first Century*, (Jordan: Jamīyat Turāth al-Urdun al-Bāqī, 1999), 20

<sup>2</sup> *ibid*

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desert tribes, such as distinct voting districts and certain seats in parliament. The Desert Police Legion is composed entirely from Bedouin and semi-nomads and there is a ministerial-level post of “Advisor to H.M. the King for Tribal Affairs”, usually filled by a member of the Royal Family itself or by a *Sharif*<sup>3</sup> who is traditionally responsible for the conditions of the tribes and advises the King on tribal matters, while promoting their interests within government. Tribal sheikhs are recognised by royal decrees. The government has allocated special scholarships and projects specifically for the tribes in order to improve conditions and deal with any specific desert related problems and issues.

Tribal heritage is not just genetic, it is a way of life where “a person and his/her tribe think the same way; believe in the same principles; assimilate the same values and ethos; act according to the same unique rules and laws; respect the same hereditary sheikh; live together; migrate together; defend each other; fight together and die together. In short, it is the consciousness of belonging to that tribe and behaving accordingly.”<sup>4</sup> This consciousness and pride is still very much alive among the Jordanian people and every member of the tribe recognises the history of his tribe and knows that ‘if push comes to shove’, the tribe will defend him and stand by him in times of crisis or personal adversity. This applies equally to “westernized individuals from old settled tribes who will fall back on modes of behaviour and considerations that are entirely tribal...a former minister and Chancellor of a University whose entire higher education had taken place in the West thought his brother was murdered and as a result was considering a blood feud.”<sup>5</sup>

Even though state authority struggled at first in winning over the loyalty of the tribes and endured rebellions during 1920s and 1930s, it eventually succeeded on turning the tribes around as described in chapter 5. Prince Abdullah’s Hashemite religious legitimacy helped considerably in winning over the tribes, as well as a number of practical and well-thought through measures such as a policy of generous governmental concessions and the Emir befriending the sheikhs as a strategy of

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<sup>3</sup> A Sharif is a Hashemite also descended from the Prophet Muhammad and thus paternally related to the Royal Family

<sup>4</sup> n 1 above, 13

<sup>5</sup> n1 above, 17

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uniting or isolating them depending on the situation. All of which aided him in his quest to secure good relations with the tribes. Also, recruiting a large number of tribesmen into the army not only produced an excellent army, but extended the loyalty of those men to the state and its authority. Vatikiotis argues that the army created the state, “the army was a vehicle and an instrument for the pacification and integration of a predominantly tribal society into a state to whose central authority the tribes became responsive and to whose administrative control they became subjected.”<sup>6</sup> Thus, the tribes played a central role in the construction of the Kingdom of Jordan.

According to Ayubi<sup>7</sup> the system recognised the “traditional authority networks” of the Bedouin and has incorporated them within the state structure. The result is “bedouocracy” with its emphasis on family and kin relationships or “petro-bedouocracy”. Bureaucracy co-exists with kinship and further it could be argued that it is held together through patronage. “Patronage is an integral part of informal politics or more accurately of an informal system of influence.”<sup>8</sup> It is not an overstatement to assert that the right family name in Jordan is a resource of its own right. The politics of sociability and personalised mediation are essential to Jordanian society. In the past an individual would go to a tribal sheikh or notable with his request, yet as the state developed, it “preserved the system, but increasingly extended [its] influence over the ability of the old leaders to satisfy individual requests.”<sup>9</sup> In this way, patronage has become institutionalised within the state, whereby “webs of personal connections...constitute the basic sinews of the social system.”<sup>10</sup>

The family, the tribe and the village constitute the significant units within which social life is lived and circles of relationships are built. In this pattern, politics

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<sup>6</sup> P. Vatikiotis, *Politics and the Military in Jordan: A Study of the Arab Legion 1921-1957*, (London: Cass, 1967), 5

<sup>7</sup> N. Ayubi, “Arab Bureaucracies: Expanding Size, Changing Roles” in Dawisha and Zartman (ed.) *Beyond Coercion- The Durability of the Arab State*, (London: Croom Helm publications, 1988), 31

<sup>8</sup> S.H. Fathi, *Jordan: An Invented Nation? Tribe- State Dynamics and the Formation of National Identity*, (Hamburg: Deutsches Orient- Institute, 1994), 185

<sup>9</sup> P. Robins, *Jordan to 1990- Coping with Change*, (London: The Economist Intelligence Unit, Special Report No. 1074, December 1986), 13

<sup>10</sup> J.A. Bill and C. Leiden, *Politics Leadership: Towards a General Analysis*, (London: Sage publications, 1987), 75

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becomes less a matter of principles and issues of allegiance given or withdrawn on the basis of attitudes towards the personality of the individual leader. People turn to the figure most able to help them and their families personally, to lend money, provide food when it is scarce, give employment and act as an advocate before higher authority. The patron – follower relationship remains a basic factor in Jordanian life.

Tribes remain important social and cultural categories, having adapted to new realities and transformed in the face of them. Moreover, in the course of this process, the tribal population of Transjordan has become the backbone of the Hashemite regime and among the most enthusiastic supporters of the kingdom. Even today, tribal identities, though significantly modified since the days of the Mandate, continue to play a major role in Jordanian politics. Scholars of modern Jordan have acknowledged the special relations between the tribes and the Hashemite monarchy. They have also emphasized the centrality of tribes and tribal political culture in contemporary Jordan.

The tribes in Jordan have managed to hold on to their traditions, thus, making these traditions very much part of the Jordanian way of life. The tribes have also sustained their own dispute resolution system, which is still used when a crime of blood, such as murder or rape, is committed. The Jordanian criminal law system runs parallel to tribal justice. Antoun states “the process of consensual ad hoc conflict resolution within the context of wide ranging social networks”<sup>11</sup> is simply how disputes are resolved.

The family in Jordan is the primary agency for economic cooperation, social control and mutual protection. The first loyalty of the individual is to his family, on whose wealth, welfare and reputation his own depends. Prescriptions relating to family obligations, marriage and the defence of family honour are binding and there is a strong tradition of kin solidarity which antedates the advent of Islam. Deep family loyalty manifests itself in business and public life no less than in domestic matters. Within the family, sons are not only economically dependent on their father, but they

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<sup>11</sup> R. Antoun, “Civil Society, Tribal Process, and Change in Jordan”, Int. J. Middle East Stud. 32 (2000), 441, 447

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are socially and politically fully aligned with him and can not make decisions without his approval. If a son wants to trade, he can not do so without the consent of his father. If he wants to marry, then it is his father who would discuss it with members of the *lazam* and with them is responsible for arranging the marriage with the girl's family. Also, if the son is involved in a dispute, he can not go to the elder of the *hamula* or members of his *lazam* without his father's *wasta*.

This mutually protective nature is taken as a matter of course and kinsmen are to render to each other special favours and services. Bearing this in mind, one can understand why King Hussein described his realm as "the big Jordanian family". One must note that the Hashemites rule as a family, they express their dominance in a patriarchal rhetoric brimming with kinship metaphors and they "preside over a body politic in which households and their influential heads are of far greater significance than electoral constituencies, public opinion or individual citizens and their rights."<sup>12</sup> The entire Jordanian system is built on the interplay between families, many of them sheikhs' families representing tribes. Shryock and Howell point to the origins and nature of the political system of Jordan "...Abdullah and Hussein built a political system that corresponds to, addresses and depends on these houses in fundamental ways: as targets of incentives, punishment and rewards; and cite methods of recruitment to public office; and as a means of exclusion from power."<sup>13</sup>

King Hussein invoked an image of community and an authorised style of political exchange that made sense to his subjects. In the 1970s, a new term was introduced; *al-usrah al-urduniyyah al-wahidah*, the unified Jordanian family. In his final years of rule, he consolidated his role as national father figure and King Abdullah II has managed to continue his father's language of political kinship. Shryock and Howell argue that Jordan's identification with a household is an idea officially endorsed by the Hashemites. Jordan's politics and Jordanian society as a whole is best analysed, according to Shryock and Howell, as a manifestation of "house politics", a mode of

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<sup>12</sup> A. Shryock and S. Howell "Ever a Guest in Our House: The Emir Abdullah, Shaykh Majid Al-Adwan, and The Practice of Jordanian House Politics, as Remembered by Umm Sultan, The Widow of Majid", Int. J. Middle East Stud. 33 (2001), 247, 247

<sup>13</sup> ibid 266

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domination in which families, the royal one being only the most central and effective, serve as instruments and objects of power.

Thus, the Hashemite Kingdom of Jordan can be described as “an estate made up of material and immaterial wealth, which perpetuates itself through the transmission of its name down a real or imaginary line, considered legitimate as long as the continuity can express itself in the language of kinship or affinity, or most often, both.”<sup>14</sup> This concept of ‘house politics’ helps us further understand Jordanian society and the role tribal heritage plays to this day.

The tribal system makes the socioeconomic setup tightly knit and based on *wasta*. The sons of the tribes are socialised to refer to their leaders in order to help them resolve disputes. This is built into their attitudes from an early age. The youngster refers to his father to resolve problems between him and his family or relatives. Thus, the father is his *wasta* or mediator between him and his relatives. As the child gets older, he will start to refer also to the elders in his family whether they are uncles or cousins, thus everyone is very used to helping each other. At times of crisis, everyone rallies round their tribal son, referred to as *fazaa*. As seen in chapters five and six, tribesmen are familiar with what is considered to be arbitration or *wasta*; the arbitration of the father for his sons, in addition of relatives and also the sheikh for the members of his tribe. Usually, only when disputes are complex and serious will tribal members refer the matter to their sheikh. There are certain traditions and customs that have special status and are considered sacred, which has led to their survival with little change.

“Almost all economic and political transactions in the country are based on tribal networking.”<sup>15</sup> If anything is clear, it is the fact that “the seeds for later *wasta*” were planted at the time of the formation of the Kingdom. *Wasta* was a central dimension in the formation of the Kingdom. Robert and Sarayrah argue that the tribal sheikhs were very much involved at the time when Prince Abdullah was trying to build the nation and in the affairs of government, including in the appointment of tribal

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<sup>14</sup> C. Levi-Strauss, *The Way of the Masks*, (London: Jonathan Cape, 1983)

<sup>15</sup> M. Hammami “Political Uncertainty, Investment Decisions and Development Policy Implications”, Workshop: Research Bank on the World Bank, Monday, September 18, 2006, Singapore, 12 [http://wbln0018.worldbank.org/extru/SharePapers.nsf/\(\\$all\)/4A0BF1733A82700B852571FD004CBA D9/\\$File/HAMMAMI.PDF](http://wbln0018.worldbank.org/extru/SharePapers.nsf/($all)/4A0BF1733A82700B852571FD004CBA D9/$File/HAMMAMI.PDF)

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members to government jobs and army positions. Lust-Okar argues that "the economic dependency of the predominately Transjordanian areas makes these citizens more likely to strengthen their ties to the government, mediated through *wasta*."<sup>16</sup> The tribes started to function as a vehicle for channelling and allocating resources and services originating from central government and thus became dependent on it. When the Jordanian bureaucracy expanded during and after the 1960s, an agency head would fill positions with employees from his extended family or region and then his successor will fire these employees and replace them with his own relatives. Nowadays, "the appointment of kinfolk continues but in a modified form"<sup>17</sup> rather more subtly. For example, a minister may exchange appointments with another or appoint someone from another family to prevent his own being fired. This reciprocity widens the network of family influence and allows the tribes to remain the dominant political and social unit.

The stability of the Hashemite monarchy depends on the Palace's ability to manage state resources in the face of competing interests. Jordan is an arid land and the majority of its resources come from aid provided by the US<sup>18</sup> to maintain a pro-Western stance. These resources are mainly distributed among tribal elites to obtain political support, "because it relies on mediating competitions over state resources, the regime restricts access to resources, reinforcing the roles of societal elites who can provide points of access."<sup>19</sup> Thus, *wasta* is vital for manoeuvring in the public sphere and indeed vital for the success of a wide variety of activities, no matter how simple, such as obtaining a driving licence or renewing one's passport. *Wasta* ensures that governments continue to reflect the family and tribal relationships. Elders cooperate and compete to maximise self and family interest.

The origin of the concept of *wasta* comes from the tribal heritage of the country, which was systematically and carefully interwoven into the fabric of the Kingdom as

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<sup>16</sup> E. Lust-Okar "Reinforcing Informal Institutions Through Authoritarian Elections: Insights from Jordan" unpublished, 6

<sup>17</sup> R.B. Cunningham & Y. K. Sarayrah, *Wasta: The Hidden Forces in Middle Eastern Society*, (London: Praeger, 1993), 10

<sup>18</sup> Jordan receives more than \$1.696 billion from the US in cash assistance from 1997 to 2005 alone, in addition to development projects and expert assistance within government ministries. US provide three-quarters of Jordan's aid. "USAID Jordan: Cash Transfer" at [www.usaidjordan.org/sectors.cfm?inSector=23](http://www.usaidjordan.org/sectors.cfm?inSector=23)

<sup>19</sup> n 16 above 5

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described in chapter five. A large part of this notion is related to dispute resolution, which centres on collective bargaining and lasting relations, as outlined in chapter six. *Wasta* is a melange of networks; collectivism, patronage, support, mutual benefits and dispute resolution that maintain all these things. The fact is; “The *wasta* system is generalised in the society and performs important functions within the family and clan as well as outside it. One needs *wasta* in order not to be cheated in the market place, in locating and acquiring a job, in resolving conflict and legal litigation, in writing court decisions, in speeding governmental action and establishing and maintaining political influence, bureaucratic procedures, in finding a bride.”<sup>20</sup> *Wasta* is at the heart of Jordanian society and helps to ensure the survival of the tribal identity.

### 7.2 Wasta in Modern Jordan

‘*Wasta*’ means, literally *the middle* and is associated with the verb *yatawassat*, to steer parties towards a middle point or compromise. *Wasta* refers to both the act and the person who mediates or intercedes.<sup>21</sup> *Wasta* has been an institutional part of Jordanian society since its creation. Its tribal origins centered around an intermediary role that is associated with prevention of retaliation in inter-personal or inter-group conflict. However, *wasta* has evolved from conflict resolution as a means of survival to intercession to maintain one’s place of honour within contemporary Jordan. According to Cunningham and Sarayrah, “*wasta* seeks to achieve that which is assumed to be otherwise unattainable by the applicant. In recent years, *wasta* as intercession has become prominent, particularly in seeking benefits from government.”<sup>22</sup>

The more modern face of *wasta* is this intercessory *wasta* that involves a protagonist intervening on behalf of a client to obtain an advantage for that client. Many individuals, supported by their *wasta* backers, may be seeking the same benefit. When the seekers for a benefit are many and the opportunities are few, only aspirants

<sup>20</sup> S. Farouson, “Family Structure and Society in Modern Lebanon”, in L. Sweet, (ed), *Peoples and Cultures of the Middle East*, (New York: S.N., 1970), 270

<sup>21</sup> n 17 above, 1

<sup>22</sup> *ibid*

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with the strongest *wasta* are successful. Succeeding or failing depends on the power of the *wasta*. The exact classification of this multi-dimensional concept is very difficult. At one extreme of the spectrum, it is a useful dispute resolution notion and on the other, it is taking advantage of one's influence, power and connections to attain one's targets and objects. However, both notions are inter-connected and dependant and the common thread is reliance on family and recognition of kinship hierarchy.

*Wasta* has many different facets, but mainly describes personal informal networks based on friendship, kin or patron-client relations. *Wasta* relationships, involving reciprocal and co-operative obligations, have expanded to include other significant loyalties such as ethnic or religious groups, political parties or social clubs, as well as friends and acquaintances. It also extends to private agreements, whereby services are provided in exchange for gifts or specific fees. Thus, "the societal value of supporting extended family can be overridden by personal interest."<sup>23</sup> Traditionally the family is the basis for intervening to resolve disputes or to seek a benefit, and family loyalty remains the foundation of the *wasta* system in contemporary Jordan, whereas other forms of *wasta*, especially financially motivated ones, are frowned upon by society.

Fathi<sup>24</sup> refers to *wasta* as a form of mediation which is widespread in Jordan. Farsoun explains that "the *wasta* procedure is complex, its rules varied depending on the sphere and nature of activity whether it is legal, familial and economic."<sup>25</sup> Furthermore, *wasta* may take the form of formal mediation and interference or it could be informal through sponsoring or recommending. At the political level, *wasta* is one of the forms of patron-clientship "with the political figure securing loyalty in exchange for assistance in the form of mediation."<sup>26</sup>

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<sup>23</sup> ibid 10

<sup>24</sup> n 8 above

<sup>25</sup> n 20 above

<sup>26</sup> D.G. Bates and A. Rassam, *Peoples and Cultures of the Middle East*, (New Jersey: Englewood Cliffs, 1983), 245

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*Wasta* refers to a socially predetermined pattern of social interaction, which is regarded as of value in itself. Cunningham and Sarayrah<sup>27</sup> explain that some *wasta* acts are legal and moral within most cultural contexts. The search for *wasta*, according to Pawelka and Boeckh<sup>28</sup> does not primarily refer to material gain, but to immaterial issues such as an enhancement of social status, the search for scholarships, licenses, a parliamentary seat or other advantages and privileges that might enhance the well-being or social status of a person looking for *wasta*. Caiden and Caiden<sup>29</sup> say that *wasta* is not treated as a legal issue, but as a systematic practice.

Danet<sup>30</sup> argues that people in the Middle East both rail against *wasta* and practise it themselves, making a chasm between verbal expression and behaviour, complicating generalized societal norms. Sharabi describes *wasta* as “the lubricant of the patronage system.”<sup>31</sup> *Wasta* is used to secure appointments and advancement and to influence legal rulings. This is possible by the continuing importance of traditional tribal codes of conduct and dispute resolution. Cunningham and Sarayrah explain; “Understanding *wasta* is key to understanding decisions in the Middle East, for *wasta* pervades the culture of all Arab countries and is a force in every significant decision. . . . *Wasta* is a way of life.”<sup>32</sup>

Cunningham and Sarayrah argue that *wasta* has changed over time. Patrons who used to help their followers mostly for reasons of prestige now seek monetary rewards. Also, its main goal has changed from defusing tribal conflict to acquiring economic benefits. They identified three categories of request for *wasta* in modern Jordan. The first is *wasta* sought or performed for family and friends, which activates the oral communication network. Second, *wasta* requests from close friends outside the family denote a peer relationship, an exchange system where individuals have

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<sup>27</sup> n 17 above, 4

<sup>28</sup> P. Pawelka and A. Boeckh, “Patrimonial Capitalism: Economic Reform and Economic Order in the Arab World”, 25 April 2004, 40, <http://w210.ub.uniduebingen.de/dbt/volltexte/2005/1947/pdf/complete.pdf>

<sup>29</sup> Caiden, G. and Caiden, N., “Administrative Corruption”, *Public Administration Review* 37(3) 1977, 301

<sup>30</sup> B. Danet, *Pulling Strings*, (Albany: SUNY Press, 1989)

<sup>31</sup> H. Sharabi, *Neopatriarchy: A theory of Distorted Change in Arab Society*, (New York: Oxford University Press, 1988), 45

<sup>32</sup> n 17 above, 3

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different skills and abilities, but share a comparable social status. The third, contact based *wasta* involves people not connected by kinship or friendship. Someone facing difficulty in obtaining the desired result through personal effort seeks the services of a *wasta*. There are no fixed rules, but there is an understanding that the *wasta* provider will demand a favour at a future date in many different ways including another *wasta* or political loyalty of backing.

One of the ways *wasta* is practised in Jordanian society is through parliamentary elections. It is noteworthy that Jordanian electoral law prescribes a set number of seats for Bedouin representatives. “Politics is strongly focused on personality and consists largely of changing networks of dyadic ties. These ties are informal contracts between two individuals and are based on mutual expectations of loyalty and assistance, rather than commitments to abstract principles or codes.”<sup>33</sup> Thus, elections provide an important competition over access to resources. Parliament is a base from which one can call upon ministers and bureaucrats to allocate jobs to constituents. Parliamentarians receive discretionary funds which they can allocate as they see fit in responding to constituents’ needs. As Kilani and Sakijha conclude:

“Parliament, whose main task is to monitor government’s performance and legislate laws, is gradually becoming the haven for *wasta* practices. Voluntarily or out of social pressure, parliamentarians’ role in mediating, or, in other words using *wasta* between citizens and the state [is]...becoming their main task.”<sup>34</sup>

It is clear that the party system in Jordan is weak and it is the tribe which serves as the main constituency for a politician. Being a member of parliament, a senior administrator, an academic or military officer can guarantee an individual a leadership position among his tribe, even if he does not hail from one of the sheikhs' families. Once in power the occupier of the position is expected to serve the interests of his kinship group. His effectiveness in performing this social duty then forms the main criterion for his fellow tribesmen to judge him. The predominant social norm is that this figure would be expected to be easily accessible and would be asked to help

<sup>33</sup> D.G. Bates and A. Rassam, *Peoples and Cultures of the Middle East*, (New Jersey: Englewood Cliffs, 1983), 244-245

<sup>34</sup> B. Sakijha and S. Kilani, *Wasta in Jordan: The Declared Secret*, (Amman: Jordan Press Foundation, 2002), 58

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his constituency handle all sorts of bureaucratic matters. “In fact, he functions as a modern sheikh.”<sup>35</sup> Patai says that a person in a leading position is expected to use his influence to employ as many of his relatives as he can. “This is looked upon as just as natural as building up a business enterprise based upon family participation in the United States; it has none of the unpleasant flavour of American patronage attached to it.”<sup>36</sup> The solidarity and responsibility of the group obliges its leaders to exercise some sort of supervision and control over the behaviour of its members and to put pressure on them whenever necessary.

As well as parliamentarians, Bedouin officers who retired from military service have started to build their authority within the tribe in competition with traditional sheikhs. For instance, in 1965, retired Brigadier Irfayfan Khalid and retired Colonel Barakat al-Trad tried to win the chieftainship from their cousin, the traditional Sheikh Nayif al-Khurayshah of the Bani Sakhr. This led to the tribe of Khurayshah splitting into two opposing factions over the chieftaincy.

### 7.3 The Changing Face of *Wasta*

Despite its deep and legitimate roots in Jordanian culture, *wasta* today is widely stigmatised. A study conducted by the Arab Archives Institute, largely based on a pioneering opinion poll in 2000<sup>37</sup>, showed that while 87 percent of respondents stressed the need to eradicate *wasta*, more than 90 percent believe they will be using it at some point in their lives. The study detailed four hundred Jordanians, where 320 were politically active members of elites such as doctors, journalists, lawyers and politicians. The majority believed that they need *wasta* to get business done in a government office, with 45.8 percent responding that they would seek *wasta* before beginning their task, and 19.16 percent looking for it after beginning. Not surprisingly, some deputies thus complain that the public lacks an interest in public issues, turning to the deputies instead only to provide everything from university admissions to appointments as ambassadors and ministers. The poll also showed that

<sup>35</sup> Y. Alon, *The Making of Jordan: Tribes, Colonialism and the Modern State*, (I.B. Tauris, 2007), 155

<sup>36</sup> R. Patai, *The Kingdom of Jordan*, (Princeton, NJ: Princeton University Press, 1958), 288

<sup>37</sup> B. Sakijha and S. Kilani, *Wasta in Jordan: The Declared Secret*, (Amman: Jordan Press Foundation, 2002)

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more than 60 percent of respondents felt subjected to social pressure as a result of *wasta*. Similarly, a German Development Institute survey<sup>38</sup> found that of 58 business elites interviewed, 86 percent believed that *wasta* was important for doing business with public institutions and 56 percent of the respondents admitted to use *wasta* themselves. More than three-quarters of 180 low- and middle-ranking civil servants surveyed believed *wasta* was either very important (51%) or somewhat important (25%) in order to gain employment in their department.

In 2000, King Abdullah II told a group of Jordanian editors, “I stand against cronyism. Everyone who works on consolidating it or ignoring its existence is my personal enemy...government should establish a code of honour to put an end to *wasta*, favouritism and cliques.”<sup>39</sup> Through a high-level ministerial committee on corruption formed in 2000 and an ad hoc committee on corruption and favouritism formed in 2002, Jordan has started taking direct steps to fight corruption. Again, in a conference entitled “Towards Transparency in Jordan,” in Amman in April 2002, the King and his Prime Minister at the time, Ali Abul Ragheb, condemned corruption and confirmed political and legislative reforms coinciding with reforms in public administration, financial and judicial areas, hoping that all together this would enhance social and economic justice and transparency.

“We look upon the phenomenon of “*wasta*” (patronage) and favouritism, a public complaint, as another form. While we are proud of our values of solidarity, social responsibility and human understanding of others' problems, which are rooted in our Arab and Islamic heritage, favouritism and patronage infringe on the rights of others, have squandered public funds, and deprived some citizens of their rightful opportunities. Thus, patronage that deprives others of their rights is incongruent with Jordanian values and should be regarded as a gross violation of justice and equality that is punishable by law.”<sup>40</sup>

However, the link between legitimate solidarities associated with *wasta* and corruption remains extremely complex. There remain gaps in the legislation and

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<sup>38</sup> M. Loewe et al., “The Impact of Favouritism on the Business Climate: A Study on Wasta in Jordan”, Bonn: German Development Institute, May 2006

<sup>39</sup> B. Sakijha and S. Kilani, *Wasta in Jordan: The Declared Secret*, (Amman: Jordan Press Foundation, 2002)

<sup>40</sup> Letter of His Majesty King Abdullah II to Prime Minister H.E. Dr. Adnan Badran on Anti-Corruption Fight (26 June 2005) on website [www. kingabdullah.jo](http://www. kingabdullah.jo)

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institutions available to reduce corruption, and the state's treatment of corruption cases is not consistent. Jordanian law prohibits public officials from taking bribes, but there are no requirements that they report the receipt of gifts or hospitality, nor are there any restrictions on post-public sector employment.<sup>41</sup>

The eradication of *wasta* is extremely difficult. It involves Jordan's political and economic elite. Jordan's economic system is characterised by the duality of informal social patterns and formal institutions pertaining to the concept of a market economy. Strict hierarchies of power and personal relations continue in many cases to determine the success or failure of economic activity. This social norm cannot be "wiped clean as if it was a stain on the carpet."<sup>42</sup> Sharabi states "No amount of external criticism can change the inner structure of the patronage system, for wherever patriarchal relations exist...patronage dominates."<sup>43</sup>

Distinguishing the many dimensions of *wasta* is problematic. From the protagonist's perspective, every *wasta* use is a legitimate attempt to cut through red tape or to level the playing field. As viewed by those who do not have access to strong *wasta*, the entire system is corrupt and *wasta* is an opprobrious term. It is clear that *wasta* is a double edged sword; some features enhance fairness by softening a rigid system or helping the disadvantaged. On the other hand, the dark features of *wasta* allow those with family or financial power to benefit disproportionate; thus the higher one's status in the family, social order or occupational benefits, the better one's chances of achieving objectives through *wasta*.

The reality of the situation seems to boil down to *wasta* becoming a taboo word that means corruption and cronyism. The truth is that the original functions of *wasta* are noble and should be encouraged in any dispute resolution process. The traditional tribal *wasta*, the *sheikh*, was a man of honour, whose word was his bond, who would assume responsibility for his acts. Today's *wasta* is too often a middle-man, seeking

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<sup>41</sup> B. Sakijha, National Integrity Systems [NIS] Country Study Report: Jordan 2001, (The Hague: The Netherlands Ministry of Justice and Transparency International, May 2001), 5

<sup>42</sup> O. Schlumberger "Jordan's Economy in the 1990s" in George Joffe Jordan In Transition, 1990-2000, (London: C Hurst, 2001), 243

<sup>43</sup> H. Sharabi, *Neopatriarchy: A theory of Distorted Change in Arab Society*, (New York: Oxford University Press, 1988), 47

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fame and fortune by doing favours. This form of *wasta* is spreading in Jordan due to the social and economic difficulties the country faces. It seems clear that using western political and economic concepts will not cure the difficulties that corruption causes.

Sakjiha and Kilani<sup>44</sup> explain that the experience of the past ten years shows that the issue of *wasta* had been frequently tackled, but with little effect. This is due to several reasons which are constitutional, legal, political, civil and economical. For example, the Jordanian constitution places several restrictions on prosecuting senior officials and Jordanian laws conflict with each other which create loopholes making them ineffective. The fact is that real representation of the people is absent in parliament and civil society institutions are weak therefore they do not perform their anticipated role in fighting corruption. Also, the private sector's contribution to the economic process is meager and traditions with certain acquired rights may encourage certain pro-corruption practices.<sup>45</sup>

The government has tried on many occasions to deal with the issue of *wasta* in many different ways. For example, King Hussein on occasions appointed cabinet ministers who had weak clan loyalties and were willing to ignore family pressures, in order to avoid *wasta*. However, it remained and remains a delicate subject as a significant number of supporters of the King believe in traditional tribal practices and feel protected by their *wasta* connections. In the early 1990s, King Hussein called on the then Prime Minister, Zaid bin Shaker, to reduce the influence of *wasta* in hiring decisions. This was a response to the high unemployment rate in the country at the time, but unfortunately like all the previous attempts, very little was achieved.

On July 30, 2000, the government, upon one of King Abdullah's directives, formed a higher ministerial committee to fight corruption. The committee, under the chairmanship of the Deputy Prime Minister and the Minister of Justice, was composed of the directors of the Audit Bureau, the Monitoring and Inspection

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<sup>44</sup> n 41 above, 4

<sup>45</sup> ibid

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Bureau<sup>46</sup>, the Anti-Corruption unit at the Intelligence Department in addition to the Minister of Administrative Development, and the Companies Monitor at the Ministry of Industry and Trade. Although, the committee is purely governmental and was criticised for its lack of representatives from civil society institutions, it was nonetheless an admission of the incapacity of the existing agencies to perform their proper role in fighting corruption. The press questioned the reasoning behind designating a government-committee to monitor the performance of the government itself and its institutions.<sup>47</sup> Hussein Rawashdeh, a writer in *Ad-Dustour*, commented on the governments' willingness to fight corruption by saying: "with the exception of very few cases, the war of words that successive governments launched against corruption did not yield any result. The public would not be convinced now that the formed committee...will eventually lead to containing the [epidemic] or limiting its spread after it [has become] impossible to do so."<sup>48</sup>

There have been other attempts at reform by the Jordanian executive, under the leadership of King Abdullah II. For example, on 9 December 2003, Jordan signed the United Nation Convention Against Corruption (UNCAC) and ratified it on 24 February 2005. In the same year, the King stepped up the fight against corruption by directing the government to form an independent commission that is to draft a law to combat corruption, explicitly including "*wasta*" as a target.<sup>49</sup> However, the main obstacles remain the mechanisms used to ensure more transparency, justice and integrity and the creation of the anti-corruption commission as an independent body. Anti-corruption efforts in Jordan have thus been strained by failures at certain stages over the past few years and these necessitate the creation of a new institution to fight corruption and promote reform, especially in the judicial system. Therefore, the Anti-Corruption Commission law intended to fulfil a "clear strategy"<sup>50</sup> to combat

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<sup>46</sup> The Bureau is the executive branch's arm in monitoring the different government institutions in the field of fighting corruption. It unveils violations and pinpoints the ones responsible. It also ensures that laws and legislation are properly implemented in the civil status field, or government tenders or government works. The department does not issue a regular report but its director presents the annual work to the press without revealing the details of violations.

<sup>47</sup> Hilmi Asmar. *Ad-Dustour*, August 10, 2000

<sup>48</sup> *Ad-Dustour*, August 7, 2000

<sup>49</sup> website [www. kingabdullah.jo](http://www. kingabdullah.jo)

<sup>50</sup> n 40 above

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corruption and prosecute its perpetrators.<sup>51</sup> This resulted, for the first time in the history of Jordan, in criminalizing the use of *wasta*.

Thus in September 2006 the government, led by Prime Minister Bakhit, pushed for an independent committee that would have absolute freedom to investigate anyone in government, including himself and his government. Most deputies opposed him. Moreover, when *wasta* was debated as part of an Anti-corruption Commission draft law, some MPs felt that *wasta* was acceptable if it was being used to help the poor and ensure that their rights were being upheld, others argued that penalties should be imposed on officials accepting *wasta* and not those who “mediate to get services for others.” At the end of the debate, the Lower House endorsed only three articles out of 25 of the draft law. Nevertheless, the draft law was passed by the Senate on 27 September 2006 after endorsing an amendment introduced by the Lower House under which the Anti-corruption Commission would be linked directly to the Prime Ministry.

This link to the Prime Ministry has fuelled much criticism. Such a move, observers say, strips the Commission of its powers and has turned it into window-dressing. Hani Dahleh of the Arab Human Rights Organization told the Jordan Times, “Linking the Commission to the Prime Ministry means it is no longer independent. Executive council officials would receive orders from the Prime Minister, who is under scrutiny himself... Apparently there is no honest policy to fight corruption.”<sup>52</sup> Dahleh held that the officials at the Commission must be “untouchable” and the government should not be able to control their employment.

The Anti-corruption Commission law received the royal assent on 4 December 2006. Under this law, an official body entrusted with combatting corruption in the public sector will be established in the Kingdom with the name of the Anti-corruption Commission. The Commission will have a free mandate to pursue current and former officials who are suspected of being involved in corruption. The law stipulates that the commission will be autonomous, with its officials enjoying absolute immunity

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<sup>51</sup> Jordan Times, Monday, June 27, 2005

<sup>52</sup> M. Ben Hussein, Jordan Times (Amman) 28 September 2006, [http://www.mfa.gov.jo/events\\_details.php?id=16205](http://www.mfa.gov.jo/events_details.php?id=16205)

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from prosecution.

The law specifies the level of officials answerable to the law, including the Prime Minister and his Cabinet, members of Parliament and judges. Article 8 details the commission's duties and authorities, including investigating financial corruption and scrutinising individuals who break the law. It also authorises the commission to impound fixed and non-fixed assets from suspects and freeze their authority. Deputies were critical of this decision. The Deputy Mahmoud Kharabsheh<sup>53</sup> complained: "The government is keen on establishing an independent commission, but lawmakers seem not to care." He then went on to say: "The Commission should investigate the activities of the executive authority because billions are being spent in contracts and agreements. Therefore, the Commission should be sovereign."<sup>54</sup> Walid Sadi, an expert in international law, believes the Commission is better off linked to the judicial rather than the executive. "The manner in which members of the executive council are appointed is incorrect. Appointments must come from the judiciary, not the government."<sup>55</sup>

The law defines corruption as any act that violates official duties and all acts related to *wasta* and nepotism that could deprive others from their legitimate rights, as well as economic crimes and the misuse of power. A poll, conducted by the University of Jordan's Centre for Strategic Studies in November 2006, showed that citizens believed that nepotism, fraud and graft have steadily increased in both the public and private sectors. Over 60 percent of those polled believe that corruption is "rampant" within the public sector, while over 50 percent said it had also become more widespread in the private sector.<sup>56</sup>

During a meeting with Transparency International in 2006, His Majesty King Abdullah said: "An anti-corruption culture should be instilled in the minds of people so they realize that the values of merit, justice, integrity, equal opportunity and the rule of law are the ones the community should seek to enhance."<sup>57</sup> The Commission

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<sup>53</sup> Balqa, First District

<sup>54</sup> [http://www.mfa.gov.jo/events\\_details.php?id=16205](http://www.mfa.gov.jo/events_details.php?id=16205)

<sup>55</sup> n 52 above

<sup>56</sup> Jordan Times (Amman) 5 December 2006

<sup>57</sup> n 52 above

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received several complaints and cases which were dealt with in an institutionalised manner, some are still pending investigation, while others have been referred to the parties concerned. The Commission is planning to prepare periodic reports on the kind of cases it dealt with and the measures taken to address them. The reports will also include cases referred to the concerned judicial authority, stressing that any person who is proved to be involved in an act of corruption will be held accountable under the law.<sup>58</sup> Only time will tell what is the impact of this legislation is and that of the Commission on Jordanian society and the way Jordanians conduct themselves.

The image of *wasta* may have changed considerably in the last two decades and this modification can be seen in the comments of Jordanian arbitrators in the next section. Many say that the concept causes many problems in arbitration both domestic and international.

### **7.4 Partisan Arbitrators and *Wasta***

In Jordan, the biggest problems complained of are partisan arbitrators who are emotionally attached to the appointing party and the *wasta* calls that arbitrators are subjected to.

An arbitrator and lawyer who was a member of the World Bank committee for dispute resolution believes “*the real problem is how an arbitrator could disengage himself emotionally, consciously or subconsciously from the party that appointed him?*”

A seasoned lawyer and arbitrator stated, “*There is a lack of understanding among the arbitration community and its biggest product is impartiality. The sense is that once an arbitrator is appointed, he is impartial and cannot have any emotional attachment to the side that appointed him seems to be missing from the Jordanian understanding of arbitration.*”

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<sup>58</sup> Jordan Times (Amman) 22 August 2006

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A young lawyer states, “*Arbitrators are not aware of the need for impartiality. Both clients and some arbitrators do not understand that when an arbitrator is appointed, he is independent and is not on the tribunal to argue the case of the party that appointed him. Some arbitrators actually defend the point of view of the party that appointed them.*”

A lawyer and arbitrator for over 40 years criticised the understanding of the parties of arbitration. He said, “*People do not understand that you are not representing the party that appointed you. Experienced arbitrators are able to avoid this.*”

A former judge who now works as a lawyer believes, “*the party appointing an arbitrator sees that person as his representative in the tribunal. Parties usually explain the case and try to check the person's point of view on the dispute before appointing him.*”

A young lawyer who graduated with an LLM and PhD from London disagrees that the partisan issue is as critical as is described by other lawyers. He claims “*sole arbitrators are better but either way I do not believe it is a serious problem, there are checks and balances within the system itself.*”

A judge for 25 years who has been a lawyer for 16 years feels, “*having three arbitrators is useful because each party feels that there is someone on the panel that presents their case adequately during the deliberation. This does not mean that they are being impartial, but rather someone that understands their points and arguments. For a sole arbitrator, the parties need to have a great amount of trust in this one man and it can be very hard to get both parties to agree on one arbitrator. However, trust is important whether it is one or three arbitrators.*”

A large number of the interviewees complained about the pressures *wasta* placed on arbitrators. “*As an arbitrator – the party will ask my friends and colleagues to speak to me to explain their points of view. I was a sole arbitrator in a case and a very old friend of mine called me who knows the parties. I want you to be kind to the parties. I replied, you cannot say that to me, I have to make my decision based on the evidence and nothing else. He got upset and did not speak to me for a long time. It is*

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*important that the parties have the right arbitrator that they trust and feel he will do his job properly. ”*

Some of the interviewees gave me practical examples of how they suffer from *wasta*. An arbitrator and lawyer for 25 years described how while he was writing an award after listening to the witnesses and reading all the documents, one of the parties attended his office with their lawyer and said: “*We want to take five minutes of your time. I said you are most welcome, but if you mention one word about the case then I will have to ask you to leave. In another case, I had to stop the hearing because one of the arbitrators was filling in the gaps of the examination of one of the witnesses. If the lawyer missed something he stepped in to aid him. It was obvious that he was helping his appointer. I said to him I would annul the whole arbitration and the other side threatened to remove him.*”

A possible explanation for the attachment of some arbitrators to the client who appointed them could be found in the comments of an arbitrator who got his LLM from Harvard and PhD in Letters of Credit from Queen Mary, London. “*I got appointed as an arbitrator and once you are appointed, it starts – from one case to another. The same arbitration firms just reappoint you.*”

To another this was a major problem. A lawyer for 30 years and an experienced arbitrator felt: “*Some people find it very easy to appoint arbitrators as they have a list of five to six people that they consider part of the group and they just get appointed over and over again. There are firms that seem to appoint the same people. That raises questions. An appointment by a certain firm always leads to the same arbitrators. Do you agree with me that this makes it very difficult for an arbitrator to decide against that firm as they provide 'his bread and butter'?*”

As this is a very important issue to Middle Eastern entities whether lawyers, engineers or clients. Many leading arbitrators have suggested a number of ways to resolve this attachment to the appointing party. One renowned Egyptian arbitrator and lawyer<sup>59</sup> said that the parties agree on three arbitrators and an arbitral institution

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<sup>59</sup> Dr Yahya Al-jamal Conference Sept 2005

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of their choice choose one out of those three, thus maintaining party choice, but severing the direct connection between parties and arbitrators. The Jordanian interviewees also had suggestions to help sever any attachment the arbitrator may feel towards the party that appointed him.

An arbitrator who worked in Kuwait from 1975- 1990 and in Amman since 1993 suggested, "*An independent body to nominate the arbitrators for both parties.*"

An experienced lawyer and arbitrator in international arbitration recommended: "*The parties all three arbitrators choose from a list that was compiled between them. Each party puts forward the names of one to twenty arbitrators in order of choice and then the first three that they agree on will form the tribunal. Arbitration will gain credibility and would spread further if the way arbitrators are chosen is changed. However, the parties should always be involved in the choice of arbitrators. This way the parties get a tribunal that they feel comfortable and agree with.*"

A highly respected engineer who has been involved in arbitration since 1966 feels, "*the parties should have a say in the third arbitrator.*" (who is the chairman and is usually appointed by the two arbitrators that were appointed by the parties.) He explains "*if I am appointed and another engineer is appointed, we put together the names of three (usually) or five (if we cannot agree) lawyers/ engineers and ask the parties to choose two names from the list. Usually, at least one, if not the two, are common between them and in that way they choose the third arbitrator. This will increase the confidence in the tribunal and arbitration.*" He went on to say, "*Impartiality is everywhere and is not limited to our culture.*" He also suggested a solution for this problem, "*the party set out the characteristics of the arbitrators (engineer, age range, nationality) that they require and allow an arbitration centre of their choice, or where the arbitration has been referred to appoint three arbitrators that conform to these characteristics.*"

It is clear that some Jordanian arbitrators believe the choice of arbitrators should be protected and even extended to include the third arbitrator. The issue with *wasta* is particular to some arbitrators where they feel that they have experienced pressure to decide in a certain way. The strict rules of international commercial arbitration are

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what caused these arbitrators problems. It may be that talking to the parties individually could help to settle the dispute, which is an outcome many older arbitrators feel should be attempted at least.

### 7.5 Differences between East and West Embodied in the Use of *Wasta*

The concept of *wasta* in its many facets seems to be difficult to grasp in some quarters. Some of the difficulty is explained by Pawelka and Boeckh as due to the differences between the Eastern and Western worlds. They argue that Westerners usually display loyalty towards office, ideology or constitution, in other words, towards some abstract value. However, the realities of social life in the Arab world do not work in the same way as they do in liberal democracies. “As a result, the search for individual advantages or for the benefit of one’s family or one’s clientele – something that is usually regarded as self understood and perfectly normal – is often labelled ‘corruption’ by Western authors writing on the subject.”<sup>60</sup> They go on to explain that this terminology does not capture Middle Eastern realities since it is inherently based on the systems of the industrialized countries of the West. There is, they say, a strong normative bias against the Arab ways.

“Acting corruptly in a Western context means to *deviate* from a given norm. This norm is so strong that norm violation, if known, is considered a crime that will be punished by the judiciary. Corruption is thus a term of Western origin with a strongly negative connotation that depicts criminal behavior. Quite the opposite is the case with *wasta*: It is a term of Arab origin that does not denote behavior against, but *according* to a social norm.”<sup>61</sup>

Despite the rapid social and cultural changes wrought by modernisation, the cultural profiles of Arab-Islamic societies still differ profoundly from those of the West. Although pastoral nomadism has declined rapidly in favour of village- and city-based modes of social life, nomadic peoples and their traditions have nonetheless left

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<sup>60</sup> n 28 above

<sup>61</sup> ibid

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a deep imprint on Middle Eastern culture, society and politics.<sup>62</sup> Urban professional classes have indeed emerged, yet the peoples of the Middle East have not yet disposed of loyal attachment to families and distinctive rituals of hospitality and conflict mediation. Nor have they dispensed with their flexible and effective kin-based collectivities, such as lineage and the tribe, which until quite recently performed most of the social, economic and political functions of communities in the absence of centralized state government.<sup>63</sup>

Even today, the institutions of the state do not always penetrate deeply into society, and 'private' justice is often administered through informal networks in which local political and/or religious leaders determine the outcome of feuds between clans or conflicts between individuals. Communal religious and ethnic identities remain strong forces in social life, as do patron-client relationships and patterns of patriarchal authority.<sup>64</sup> Group solidarity, traditional religious precepts and norms concerning honour and shame retain their place in Middle Eastern society and more so within Jordanian society. Thus, dealings such as transaction formation, as well as dispute resolution are performed completely differently than in the East. The many differences are outlined in the next two sections. The way *wasta* influences these dealings is significant for anyone working in the Middle East

### 7.5.1 Wasta and Transaction Formation

The preference for highly personalised relationships is evident in the bargaining process of Jordanians. The process is traditionally the dominant way goods are bought and sold in Jordan. A Jordanian finds it natural to bargain in almost any situation, thus calling for the two parties' agreement. One can say that he finds security and satisfaction in the 'give and take' of the bargaining process. Bargaining provides the opportunity for parties to demonstrate their virtuosity and to exchange gossip and opinions, as well as arrange a transaction. A sharp and persistent

<sup>62</sup> D. Eickelman, *The Middle East and Central Asia: An Anthropological Approach*, (New York: Prentice Hall, 1997)

<sup>63</sup> L.E. King-Irani, "Kinship, Class and Ethnicity: Strategies for Survival in the Contemporary Middle East" in D. Greener, (ed.) *Understanding the Contemporary Middle East*, (Boulder: Lynne Rienner, 1999)

<sup>64</sup> n 31 above

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bargainer gains in social prestige, while to refuse to bargain is apt to be taken as an insult or gratuitous breach of convention as bargaining is seen as the natural way of doing business.

The emphasis placed on the personal relationship is also reflected in the tendency to rely on oral rather than written agreements, which stems from the Bedouin tradition. Written agreements are employed, but there is a finality about them that is distasteful to Jordanians. A Jordanian man's word is his honour and he is bound by it. Before 1914, tribesmen and town merchants engaged in commercial undertakings with no written documents or signed undertakings as the two parties trusted each other. The transactions were made orally usually in the setting of the public guest house. If one asked a tribesman how much he owed a merchant, he would say "I don't know, ask him"; without any doubt that the merchant would speak the truth.<sup>65</sup>

*Wasta* and kinship ties that are entrenched in society make it easy to distinguish between Western and Arabian ways of conducting business transactions. McConnaughay explains that the differences between Western and Eastern expectations in commerce are that "commercial contracts between Western parties tend to include a detailed recitation of the parties' respective rights and obligations (not only actual but contingent), and the parties fully expect to honour and be governed by this recitation during the course of their relationship... In contrast, law and contract traditionally have not shaped commercial expectations in Asia."<sup>66</sup> McConnaughay uses the Far East to demonstrate this distinction. I think his explanation for this lack of reliance on the law in the Far East applies equally to the Middle East, but perhaps for different reasons.

"Unlike in the West, where law is bound up with ideas of deistic origin and moral authority, the associational reference for law in most of the Far East was imperial or despotic rulers, for whom law served merely the instrumental purpose of imposing on the general population arbitrary commands and duties having everything to do with the rulers' discretionary prerogatives, but little or nothing to do with private spheres of life and commerce... Commercial matters were governed like other

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<sup>65</sup> B.J.B Glubb, *The Story of the Arab Legion*, (London: Hodder and Stoughton, 1948)

<sup>66</sup> P. McConnaughay, "Rethinking the role of law and contracts in East-West commercial relations", Law and Economics Working Papers Series, Working Paper No. 00-09, December, 2000, 3

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interpersonal relationships, with status and mutual accommodation rather than external principles of law or contract shaping and controlling expectations and performance.”<sup>67</sup>

Business relations in the Arab world are not cold impersonal matters governed by the general principles of law and of contract in a world apart from home and family. Business is a segment of the whole web of friendship, kinship obligation, and personal relations that support a particular way of life. Due process of law, sanctity of contract and free enterprise based on purely individual rights never became the sacred trinities that they are in the West. Whereas Westerners know the primacy of law, Arabs know the primacy of interpersonal relationships. Arab commercial relationships are ‘relational’ in the same sense that Western commercial relationships are ‘legal’. Thus, leading to the paradox that the West has conceptions of discreet bounded notions of contract, whereas Arabs have fluid and multi-layered notions of the same.

An interesting example that demonstrates how the two sides differ in their expectations and practices is described by a lawyer from the Middle East, who had just become a partner in a big American law firm. An old friend wanted to entrust him with an important case. After the initial telephone contact, his friend and potential client invited him to a good restaurant to continue the discussion. The firm’s invoicing rules required that the lawyer send him a detailed account of his fees. This account detailed the fine details of the ‘professional services’ in the case, i.e. the telephone conversation and the time taken by the meal, also the cost of sending and receiving faxes. Indeed, in the Middle East it would be unimaginable to bill for a first telephone call, and even more so to bill for time spent being entertained by a friend or for two pages of faxes. The invitation to lunch was a gesture of friendship and gratitude on the part of a person who would offend a friend by offering to pay him. From an individualist perception however, nothing is more natural than to keep professional activities and amicable relations apart.

The primacy of relationships in the governance of Arab commercial affairs, moreover, has resulted in the development of a host of subsidiary values and

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<sup>67</sup>ibid

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expectations opposite to those developed in the West: group interests have prevailed over personal interests, situational and circumstantial considerations have prevailed over contractual terms and expectations, conflict avoidance and negotiation or conciliation have prevailed over all-or nothing adjudication, and custom and usage (along with the rest of these values) have prevailed over written law. Further, those fundamentally different Arab conceptions of the role of law gave rise to contracting and dispute resolution practices that are significantly different from those known in the West.

The most significant difference is that the contract records not the ‘conclusion’ of a business deal, as a contract signing in the West, but the business relationship’s beginning. Jordan and especially Amman is very small and everyone knows each other or knows someone that does. Whenever people meet for the first time, it is important to identify the person’s tribe or origin from his/her surname. Then, the individuals will try to refer to someone from that family or tribe that he/she knows. The purpose of this “is to ensure the empathetic anchoring which is essential for good business relations.”<sup>68</sup> Also, to some extent, it is the Jordanian way of establishing trust. They will try to know someone in the other person’s family, thus demonstrating that they are an insider.

Usually, contractual and business partners become friends and possibly relatives through marriage. Also, the whole process of business dealing is informal, for example before any form of business related interaction occurs, Jordanians will exchange polite conversation about the health and well-being of the family while they drink coffee to break the ice. These Jordanian particularities are very much part of their way of life and are part of their personal and business interaction.

Also, if the dealings are not going smoothly or there are glitches, *wasta* is used to find someone that would be able to sway the other party or help the parties reach an agreement. This person is usually in some way hierachal to the parties; he would be

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<sup>68</sup> N. Antaki, “Cultural Diversity and ADR Practices in the World” in *ADR in Business: Practice and Issues Across Countries and Cultures* by Goldsmith, Ingen-Housz and Pointon, (London: Kluwer Law International, 2006)

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senior in the family or the tribe, in employment structure or religious or political affiliations.

This same concept is used in relation to dispute resolution. The senior member or members of the tribe or any group that the parties have an affiliation with, would be asked to intervene in order to influence the parties to reach a workable solution for both of them.

### 7.5.2 Wasta and Conflict Resolution

Tribal values shape much of Jordanian culture, but in particular conflict resolution. Tribal methods of conflict resolution and customary law continue to operate, regulating social relations and informing legal procedure. The Tribal Control Laws of 1936 served as the legal basis for the Tribal Courts for forty years. In 1976, the Laws and the Courts were abolished to allow for the application of one law for all citizens. In practice, tribal law continues to regulate social relations in Jordan today. State officials, as well as the King, actively encourage it and sometimes act as mediators in conflict resolution conducted following tribal custom. Often, formal court proceedings are accompanied by an agreement for compensation arrived at between the two families through the process of *wasta* and *jaha*. Such successful resolution has the effect of encouraging the court to be lenient on the offender. Thus, tribal customary law remains an integral part of the Jordanian legal system.

The process involving *wasta* and *jaha* described in chapter 6 runs parallel to formal criminal sanctions in Jordan. For example, if someone runs over another person, the court will hold the perpetrator in custody for his protection (and obviously because he has committed a crime) in the same form as *jala'*. A *wasta* delegation of elders will attend the victim's family and request permission to bring a *jaha* to solve the matter. They also ask if the victim's family could write to the court explaining that the perpetrator's family have 30 days, for example, to come along with a *jaha* and in the meantime, they will not seek revenge for their relative. The court then releases the driver on bail. Once this is done, the *jaha* is organised and attempts to resolve the matter whether in monetary compensation or another way. A point that is worth

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mentioning is that the perpetrator will not be allowed to enter the *jaha* negotiations. He waits outside until the victim's family agree on reconciliation, then he walks in and thanks both sides for their efforts. There are two reasons for this; one, having the offender in the room might exacerbate the feelings of the victim's family and two, it is inappropriate for someone who is requesting something from another to do so in person because that might make the other party feel pressured and uncomfortable. One of the *jaha*'s requests is for the victim's family to waive 'their personal claims' before the court. Once the courts are aware that *jaha* is being organised then the trial will be adjourned until the *jaha* negotiations are completed. Once personal claims are waived, the sentence passed will be reduced considerably as the crime could be treated as a traffic violation rather than manslaughter depending on the particular circumstances of the case.

In a recent case where a police officer was shot dead by a thief he was trying to arrest, the victim's family accepted a truce and the attendance of a *jaha* within three months but excluded the killer from any negotiations. In other words, they did not waive their personal claims, but agreed not to seek revenge against any other members of his family. They also imposed a condition that the defendant would not appoint a defence in court and would accept the death penalty. This agreement is quite unusual and tested the system's ability to resolve matters that could have resulted in bloodshed. Thus, the reconciliatory nature of the system was relied upon and recognised as valuable within Jordanian society and the legal system. The main source of (and aims of) the success of this process is the maintenance of relationships and the desire for harmony between the tribes. The elders recognise that one day they may be the tribe accepting the *wasta*, but the next they will be seeking it.<sup>69</sup>

Antaki<sup>70</sup> distinguishes two models of dispute resolution mechanisms. The first is intuitive and informal and the second is cognitive and formal. He argues that the East subscribes to the first and the West to the second model and the parties usually adhere to one of these two models. Western approaches to reconciliation concentrate on the individual. The individual in the East is enmeshed within his own group or tribe. Thus, the ritual of *wasta* in Jordanian society is necessarily to resolve disputes

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<sup>69</sup> Interview with a tribal elder and criminal lawyer in Amman, August 2005

<sup>70</sup> n 68 above, 266

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and foster reconciliation. It is recognised by the government as a legally acceptable tradition of Bedouin tribes that could be invoked in parallel to any official justice.

An American statesman and lawyer, the Honourable Eliot Richardson, has said it best in a publication of the Euro-Arab Arbitration System. "To pursue a lawsuit is to gamble on victory. To elect conciliation is to seek fairness. Victories undermine relationships. Fairness strengthens them. Those who build for the long term would do well to choose conciliation." It is not just business relations that need to be maintained in the Arab world, family and societal connections as a whole need to be promoted and protected, which is more likely to occur through arbitration and mediation rather than litigation.

Conflict in the West is accepted as natural and a product of self-interest and competition which is solvable and leads to stronger relationships and peace. The basic assumption, Irani and Funk<sup>71</sup> argue, made by Western conflict resolution theorists is that conflict can and should be fully resolved. "This philosophy, whereby virtually every conflict can be managed or resolved clashes with other cultural approaches to conflict."<sup>72</sup> Whereas Western proponents of conflict resolution underscore the primacy of individual choices in facilitated settlement processes, the traditional Arab-Islamic approach is communally oriented. Individuals are considered to be enmeshed in webs of relationships that must be preserved. This preservation of social harmony and the building of consensus sometimes requires individual sacrifice. Where the Western approach to conflict resolution is framed by provisions of the state's legal system, the Arab-Islamic approach is legitimated and guaranteed by the *jaha* led by communal leaders and village elders, who facilitate a process of acknowledgment, apology, compensation, forgiveness and reconciliation.

While the Western third party relies on a secular idiom, guidelines from a specialized field and personal experience, the Arab-Islamic process depends on explicit references to religious ideals, sacred texts, stories and moral exemplars, as well as to local history and custom. Western conflict resolution aims to satisfy individuals,

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<sup>71</sup> G. E. Irani and Nathan C. Funk, 'Rituals of Reconciliation: Arab-Islamic Perspectives' (1998) 20:4 Arab Studies Quarterly 1, 4

<sup>72</sup> *ibid*

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interests and needs through a fair deal that is sealed by a formal, written agreement. In contrast, the Arab-Islamic process prioritizes relational issues, such as restoring harmony and solidarity and restoring the dignity and prestige of individuals and groups. Far more is at stake than the interests of individuals. Disputing families and lineage groups solicit the intervention of prominent individuals to prevent the escalation of the conflict and the disruption of communal symbiosis. The process is therefore completed with a powerful ritual that seals a settlement and reconciliation with handshakes and a collective meal.

The scale of disputes and their frequency are greater when the parties do not speak the same language and do not have the same perceptions or do not believe in the same values, in other words they belong to different cultures.<sup>73</sup> The choice of the dispute resolution mechanism depends on their parties' culture and also on the time and place of the dispute. The existence of a young but clearly defined culture of international commercial arbitration which is now accepted, Antaki argues is sealed from cultural differences.

Cultural difference and the long present hierarchies of the colonial world engender a generalised suspicion on the part of Jordanian parties towards contractors who may appear to charge too much or to have done too little. Somehow, such conflict brings with it feelings of colonisation, victimisation and inferiority, especially in a country like Jordan which shares borders with many of the politically volatile countries in the region. There is sometimes a feeling of revenge. Unfortunately, I think these negative feelings are exaggerated when arbitration is conducted under the International Chamber of Commerce (ICC) with its huge fees that may easily cripple even the richest businesses in Jordan. In non-ICC arbitrations, many Jordanian arbitrators try to encourage the parties to agree on terms of reference, but this is usually resisted by the parties. This seems to be explained by the Jordanian parties need for fluidity and flexibility in dispute resolution and commercial relations. The leading arbitrators, in Jordan, are in a sense in a difficult situation. They sympathise in some way with the Jordanian parties and maybe feel somewhat similar, but they cannot afford to be seen

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<sup>73</sup> n 68 above, 266

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as biased or partial because they may lose future appointments in international cases, which might generate them high revenues.

Anthropologists classify societies according to four main social orders, differentiated by the way in which they perceive the cause of a dispute and its resolution.<sup>74</sup> These social orders are: *imposed order*, where justice is the expression of an external and superior force that decides who is wrong and who is right by virtue of a legal norm; *negotiated order*, where the solution results from the voluntary effort of all the parties involved and is the expression of a force within the group, mobilized in order to find a consensual means of preserving the homogeneity of the group or the continuation of social relations; *accepted order*, which is based on the self-discipline and education of the members of a group for which divergence from the norm, like incitement to conflict, contributes to disorder or disharmony; and *contested order*, which is more a ferment of transformation than a coherent answer to the problems of society. It seems that Western societies fall within the imposed order paradigm and Jordanian society falls loosely within that of negotiated order. Therefore, Jordanians prefer amicable solutions that do not disturb the established order.

Certain Arab economic operators argue that renunciation of national courts does not signify the acceptance of a new allegiance to an arbitration board, the majority of whom are foreigners. “Although certain Arab parties consent, although unwillingly, to insert an arbitration clause in contracts binding them to foreign parties, it is in the conviction that arbitration cannot be terminated by sentences in terms they would not accept. When they discover that such is not the case, they are extremely disappointed.”<sup>75</sup> However, it is not difficult to see from the history of the region that amicable means for settlement of disputes, particularly commercial disputes, are deeply rooted in Arab customs and traditions and have long been implemented in practice.<sup>76</sup> As seen in chapter 3, in Islamic jurisprudence, mediation and arbitration are considered preferable to litigation before courts of law. Moreover, arbitration is

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<sup>74</sup> ibid 268

<sup>75</sup> F. Kemicha, “The Approach to Mediation in the Arab World”, WIPO Arbitration and Mediation Center, 1996 <http://arbiter.wipo.int/events/conferences/1996/kemicha.html>

<sup>76</sup> S. Al-Hejailan, “Mediation as a Means for Amicable Settlement of Disputes in Arab Countries”, WIPO Conference on Mediation, Geneva, 29 March 1996, online: WIPO Arbitration and Mediation Center, <http://arbiter.wipo.int/events/conferences/1996/jailan.html>

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an alternative very near to mediation, in that the arbitrator also assumes the responsibilities of a mediator in certain circumstances.

International commercial arbitration finds itself at the very centre of the conflicting understandings and historical bitterness engendered in a colonial context. This situation is compounded by the contrast between Western commercial interests' quest for certainty and predictability of outcomes and the Arabic focus on sustaining relations and a culture of seeking pragmatic solutions to conflict. An interesting phenomenon in Amman that was brought to my attention is that a large number of arbitration cases between two Jordanian parties are agreed upon *after* the dispute has arisen and has been dealt with in the court process. Most Western lawyers would say that if there was no arbitration clause before the dispute arose, it would be very difficult to get the parties to agree when relations have became tense. Also, many of the parties in local arbitrations give the power to the arbitrators to enforce *sulh*, the amiable compositeur role, thus parties may feel more content and involved in the process.

The institution of international arbitration was originally designed purposefully to avoid any preordained notion of how differences between parties from different nations or legal traditions should be addressed and resolved. As argued in chapter two, this design does not seem to work well in practice. This is despite the fact that the New York Convention provides a legal framework for international commercial arbitration that offers three features critical to the potential accommodation of non-Western traditions and expectations in international commercial relationships. The first is the virtually complete autonomy of parties to international commercial transactions to design dispute resolution procedures and mechanisms unconstrained by the peculiarities of national laws and practices. The second is the assurance that arbitral awards rendered pursuant to those procedures and mechanisms will be reliably recognised and enforced in virtually all of the world's major trading nations. The third feature, which is critical to the accommodation of non-Western traditions and expectations, is the increasingly unfettered autonomy of parties to international commercial transactions to freely designate whatever law or decisional rule they wish to apply to their dispute, to the exclusion of otherwise applicable law. In combination, these three features of international commercial legal practice offer the

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potential of new paradigms of dispute resolution capable of respecting and accommodating the traditions and practices of non-Western participants in international commercial transactions, consistent with the success of the transactions for all parties.

Unfortunately like the judiciary, which began as an art and became a science, arbitration for a long time remained an art but has also now changed into a science. The process has become more complicated and judicialised, now imitating court proceedings.<sup>77</sup> Nán disagrees “International commercial arbitration has become, more than ever before, a multicultural phenomenon. In other words, the cultural approach to the conduct or administration of international commercial arbitration shared by arbitration users, their counsel, arbitrators and arbitration institutions is not the consequence of notions or ideas exclusively fashioned by a group geographically localized in this or that country or group of countries, nor does it trace back its origins to a specific or single legal tradition.”<sup>78</sup> This is theoretically true, but unfortunately the reality is very different.

The movement that seems to be developing among leading Arab arbitrators to limit the appointment of some of the most respected French and Swiss arbitrators in West/East disputes as outlined in chapter four, claims a clear bias on the part of those arbitrators against Arab parties and nations. Arab arbitrators say they experience this unfairness while they are co-arbitrators or representatives of Arab clients. My feeling is that Eastern arbitrators are exaggerating the situation somewhat, but that does not mean that in reality there is no ignorance on the part of the Western arbitrators in relation to Arab and Middle Eastern cultures.

Arbitration and other forms of alternative dispute resolution is viewed by many in the East<sup>79</sup> as a false Western panacea, a programme imposed from outside and thus insensitive to indigenous problems, needs and political processes. George Irani contends,

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<sup>77</sup> n 68 above, 270

<sup>78</sup> H.A Grigera Nán, “Cultural Differences from the Perspective of the ICC Arbitration System”, 5th Biennial Dispute Resolution Conference (New York, IFCAI, 1999) 88, 117

<sup>79</sup> M. Abu-Nimer, “Conflict Resolution in an Islamic Context: Some Conceptual Questions” *Peace and Change*, Vol. 21, No. 1 (January 1996), 22

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“There is a need to fathom the deep cultural, social and religious roots that underlie the way Arabs behave when it comes to conflict reduction and reconciliation... Issues such as the importance of patrilineal families; the question of ethnicity; the relevance of identity; the nature of tribal and clan solidarity; the key role of patron-client relationships; and the salience of norms concerning honour and shame need to be explored in their geographical and socio-cultural context.”<sup>80</sup>

Antaki promotes a form of dispute resolution that he says is a hybrid system that combines the best of arbitration and mediation, serving the international commercial community most effectively. He describes the person conducting the procedure as “a neutral third party, [who] acts sometimes as a mediator and sometimes as an arbitrator without being overly concerned with the traditionally narrow legal descriptions. Here, the third party’s personal qualities are more important than the formal nature of his actions.”<sup>81</sup> This is the face of *wasta* that could serve both Western and Eastern parties. The A in alternative dispute resolution (ADR), Antaki argues, has become appropriate dispute resolution disregarding the purity of the procedure, but concentrating more on the effectiveness of the results, which may be the solution to the hostility between East and West and a more effective and efficient dispute resolution mechanism for the whole world.

*Wasta* has many faces and it is clear from successive governments’ measures and experienced Jordanian arbitrators that there are faces of *wasta* that are unfavourable and even negative. However, this does not mean that *wasta* as a concept needs to be eradicated, but rather turned it back ‘to its origins’. The face of *wasta* that employs the “principle of mediation as a pre-emptive quality control mechanism can generate both effective performance and societal harmony”<sup>82</sup> has many merits. Cunningham and Sarayrah suggest that some principles of the tribal conflict resolution system should be recognised and maintained. They argue that one can make positive and appropriate use of the powerful third party and well-connected insiders in order to

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<sup>80</sup> G. Irani, “Islamic Mediation Techniques for Middle East Conflict”, *Middle East Review of International Affairs Journal*, Vol. 3, No. 2, June 1999, 1

<sup>81</sup> n 68 above, 271

<sup>82</sup> R. B. Cunningham & Y. K. Sarayrah, “Taming Wasta to Achieve Development”, *Arab Studies Quarterly*, Summer 1994

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resolve conflicts amicably. There is a necessity to airing repressed grievances in a public arena and thus trade moral condemnation and symbolic goods for substantive concessions. Thus creating a society where social harmony must prevail over individual interest.<sup>83</sup>

The face and content of *wasta* have changed considerably over the years, but its original spirit of reconciliation and mediation lives on and is used daily within Jordanian society in some form or another. *Wasta* is often misunderstood by Western observers and this is one example of the competing rationalities of West and the Middle East. In this chapter, I demonstrated the effect and process when Western and Arab rationalities meet. *Wasta* reflects the tribal and traditional solidarity that existed in Jordan since its creation and continues to affect any model of dispute resolution or otherwise that is imported or imposed onto the Jordanian society.

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<sup>83</sup> ibid

## Concluding Remarks

“Minds fed on the myths of the dominant culture need to be provoked into rethinking their complacencies.”<sup>1</sup>

The Western notion that *Shari’ah* is an unsophisticated, obscure and defective system breeds significant distrust within the Islamic world and devalues an influential legal system in the eyes of many in the West.<sup>2</sup> The continuing attitude of certain Western arbitrators (characterised by a lack of sensitivity towards the national laws of developing countries, either due to ignorance, carelessness or unjustified psychological superiority complexes) negatively affects the promotion and acceptance of the Western model of arbitration. Where such ignorance exists, it is unjustified as the acceptance of arbitration in the Middle East is evident. Bahrain was a centre of international commercial arbitration before Paris and London and European merchants and traders used it in the early 1900s to resolve their commercial disputes.<sup>3</sup> Also, in Saudi Arabia for instance, until the 1950s arbitration was the primary tool for resolving oil concession agreement disputes.<sup>4</sup> Despite this history and tradition, international commercial arbitration in the Islamic world in recent history can best be summarized as a troubled or ‘roller coaster’ experience.<sup>5</sup> However, El-Kosheri predicts “the era of a universal, less formalistic “arbitration culture”, more liberated from its existing ties with the Western “litigation culture” is not far away.”<sup>6</sup>

## The Competing Rationalities as Described in this Thesis

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<sup>1</sup> M. Abul-Fadl, “Beyond Cultural Parodies and Parodizing Cultures” (1991) 8:1 *American Journal of Islamic Social Sciences* 15

<sup>2</sup> S. Avieri, “The Return to Islam”, *Global Studies: The Middle East* (1973) 167

<sup>3</sup> H. A. Radhi, “State Courts and Arbitration in the Gulf Cooperation Council (GCC) Countries”, ICC Int’l L. Ct. Arb. Bull., May 1992

<sup>4</sup> S. Saleh, *Commercial Arbitration in the Arab Middle East*, (Oxford: Hart, 1984)

<sup>5</sup> C. N. Brower & J. K. Sharpe, “International Arbitration and the Islamic World: The Third Phase,” (2003) 97 A.J.I.L. 643

<sup>6</sup> A. S. El-Kosheri, “Is There a Growing International Arbitration Culture in the Arab-Islamic Judicial Culture?”, in Van den Berg (ed.), *International Dispute Resolution: Towards an International Arbitration Culture*, International Council for Commercial Arbitration Congress Series, No.8 (The Netherlands: Kluwer Law International, 1998), 48

The title of this thesis is competing rationalities, which encompasses both the normative and the practical levels on each side of the spectrum and consists of objectives, aims and principles. In each chapter, the thesis examines a specific paradox and then contrasts the particular context in order to paint the picture of contemporary arbitration in the Middle East. Chapter two, for example, describes the international commercial arbitration model that the Middle East, and specifically Jordan, stand contrasted with. It also highlights the tensions found in international commercial arbitration, particularly in the form of arbitration in the 'grand old men' style as opposed to the ways of the 'technocrats'. The model created out of these battles, which is adversarial and individualistic, is set in clear contrast against the Eastern model of dispute resolution and that in turn informs the competing rationalities examined in the rest of the thesis.

Whilst part one of the thesis covers the Western arbitration world, part two describes Eastern rationalities and the effect of these on relations in the commercial world between the East and West. Chapter three explores the traditional solidarity which created the regime of conciliation in the Middle East. Chapter four, on the other hand, shows the 'fireworks' that resulted, and which are still burning today, when the international commercial arbitration model, described in chapter two, was superimposed on the Islamic conciliatory model of dispute resolution. The competing rationalities in this chapter defines the differences between the written text in the form of legislation and treaties and even rhetoric to the reality and true feelings of the people in the Middle East. Most of the countries in the Middle East are now signatories to all major international treaties, but one can see from the comments of the Jordanian arbitrators interviewed that they are not seen in a particularly positive light.

Part three of the thesis focuses on Jordan as the case study of a Middle Eastern state and a representative of tribal societies which are also strong in the Gulf in particular, as well as some areas of Syria, Palestinian, Lebanon and Iraq. Chapter five outlines how certain key men in the state of Jordan have used the competing rationalities of the state versus the tribe to their utmost advantage. They managed to reconcile the two rationalities in order to create the state of Jordan, which they then ruled by making the tribes important stakeholders of the system. On the other hand, the

competing rationalities of the state against the tribes did not do well when it came to formal dispute resolution, even after the demolition of the tribal justice legal system in the 1970s. As was seen, informal tribal justice is very much a thriving rationality in Jordan and in some situations, such as criminal matters, works in conjunction with the formal court system.

Part four of the thesis addresses the formal processes as described in chapters six. The Eastern rationality of informal dispute resolution and transaction formation is outlined in chapter seven. The criticisms made by the Jordanian arbitrators of the court system and formal institutions explain the continued survival of *wasta* in Jordan. At the same time, a certain form of *wasta* was severely criticised by the Jordanian arbitrators. Many arbitrators felt strongly that arbitration was the lesser of two evils. The arbitrators highlighted the specific use of arbitration within the Jordanian setting, for example, in construction cases where there is a large volume of evidence, in cases where there are foreign witnesses and cases where there are documents in languages other than Arabic. Otherwise, they were not complimentary of the arbitration process, which is designed along the same lines as the international commercial arbitration model in chapter two.

One overarching point that surfaced from the interviews was the criticism regarding the court-like fashion and strict procedures that arbitration seems to have developed of late. Many believe this means the process is losing the core characteristics of arbitration. These criticisms outline the difficulty that arbitration in its current form (seen as 'offshore justice') faces in the Arab/Islamic Middle East. I clearly contrast how Western practice and rationality in chapter two and Eastern in chapter seven are 'competing' with each other. This may sound the extreme, but at any point along the spectrum, the two worlds are effectively still in competition.

It is not hard to see a world that in ten to twenty years subscribes in some way to the norms of India and China, the fastest growing economies on earth. Also, it is noteworthy that the hostility towards arbitration in the Middle East has changed over the last fifty years from boycott, to engagement, to change from the inside of the process or even, in some situations, creating an alternative avenue that subscribes to the Arab/Islamic norms. It does not seem unlikely that, with the rise in oil prices and

the increase in sovereign investment funds in the Gulf States, Arabs may stop asking for inclusion and instead create/ assert the norms that the rest of the world may have to abide by when contracting with them.

This has already started. At present Arab arbitrators seem to be divided into two groups. One group, sponsored by the Cairo Regional Centre which adopts the Arab norms and interests, is creating an Arab arbitration ‘mafia’ like the one that existed in the days of the grand old men with a few invited and approved European arbitrators. The second group is sponsored by the ICC in Paris and the majority of the arbitrators are European with a few invited Arab arbitrators included. These two groups represent the latest manifestation of the competing rationalities of the arbitration landscape in the Middle East.

### **The Paradox of Competing Rationalities**

It seems clear from chapter three that there is a rich legal tradition of *Shari’ah* with a sophisticated system with its own methodology and mechanisms for evolution to meet the needs of contemporary society. The dismissal of *Shari’ah* as an archaic and irrelevant system is not conducive to Western organisations developing the mutual respect required to fashion an inclusive international system. It is not desirable (and indeed may no longer be possible) for the West to continue to impose their dominant position and values on others and to continue to judge other societies using their own standards. The proponents of international commercial arbitration cannot afford to alienate people whose experiences, socioeconomic predicaments and cultural/religious norms may not align completely with Western conceptions. It may not be very realistic to expect that international commercial arbitration rules will be consistent with all Islamic interpretations. Yet, given the flexibility inherent in *Shari’ah*, it is equally unrealistic to expect that international commercial arbitration rules and practice will have legitimacy in the Middle East and the larger Islamic world if *Shari’ah* principles and methodologies are completely ignored or undermined. Arbitrators must have an understanding and appreciation of these very principles, as well as the cultural and religious differences when determining intent,

choice of wording and linguistic anomalies, as well as analysing the negotiation and drafting of contracts.

Arabic mediation and conciliation forms of dispute resolution aim to protect the long term relations of the parties, whereas the court-like manner of strict procedures and adversarial style inherent in Western approaches usually result in bitter and damaged relations. Contemporary Arab and Muslim societies, even the richest, most Westernized or most economically developed ones, remain much more traditional in their way of thinking than the foreign observer might imagine. Social conventions dictate behaviour and everyday language is loaded with ancient values.<sup>7</sup> It is, indeed, extremely rare, almost inconceivable, for legal action to be taken today against a business partner, a family member, a neighbour, an employer or an employee without it having been preceded by a long period of negotiation and many amicable interventions on the part of friends, business partners or other people close to the parties involved.<sup>8</sup> Traditional institutions for dispute resolution are still very much alive in many regions, especially in Jordan. As was shown in this thesis, they are part of the everyday lives of Arab people.

The Arabs' attachment to tradition does not prevent them from following the movement of progress. These countries are commercial and trading entities that maintain sustained and intense relations with the rest of the world. There is no denying that the Arabic-Islamic world is apt to adapt to modern Western life and that there is a true marriage of universal civilization in many instances. However, adaptation does not signify elimination. Arabs should not be forced to just copy Western civilization, since they have their own originality and history. "It is necessary to build the bridge between history and contemporary reality... it is extremely important for the future of a true inter-penetration of civilizations and mentalities."<sup>9</sup> It is a universal human effort to try to find solutions that are correct and satisfying regardless of the name attributed to them. There should not be a legal

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<sup>7</sup> R. Cohen, 'Language and Conflict Resolution: The Limits of English' (2001) 3:1 *International Studies Review* 25, 37

<sup>8</sup> F. Kemicha, 'The Approach to Mediation in the Arab World', WIPO Conference on Mediation, Geneva, 29 March 1996, online: WIPO Arbitration and Mediation Center, <http://arbiter.wipo.int/events/conferences/1996/kemicha.html>

<sup>9</sup> I. Al Fallouji (Geneva, Switzerland) comments in the WIPO Conference on Mediation, Geneva, 29 March 1996, online: WIPO Arbitration and Mediation Center, <http://www.wipo.int/amc/en/events/conferences/1996/discussion3.html>

boundary, nor a legal prison. Law must build a bridge between civilizations. Both worlds should recognise the other's differences and use the helpful features of their respective civilizations as part of their dispute resolution mechanisms.

Notwithstanding the fact that arbitration, conciliation, settlement and mediation are separate words with distinct meanings, in reality they shade into one another and settlement is the result of any of these. Therefore, it is a result, not a process. The prominent international arbitration expert Professor Neil Kaplan writes:

"There is a long history of conciliation in Asia particularly in the People's Republic of China, where arbitration and conciliation are considered part of the same organic process. The Chinese see the conciliator, aware of the needs and motivations of the parties, as the ideal arbitrator when the parties are unable to resolve their dispute voluntarily. In their view there is no need--in fact, a lost advantage--to have different people serve as conciliator and arbitrator. In the West, however, conciliation and arbitration are viewed as two very different procedures. It is unthinkable that an arbitrator, in the course of his or her arbitration, would switch hats to act as a conciliator and, should the attempt at conciliation fail, continue with the arbitration. Parties would be reluctant to put all their cards on the table before a conciliator knowing that the same person may, in the end, arbitrate their dispute."<sup>10</sup>

In some way, the Arab/Islamic procedure falls in the middle of these two positions. In fact, the combination of arbitration and conciliation or the use of conciliation or mediation in arbitration has been endorsed not only in the East, but also in many parts of the West, for example in Germany. Combining both arbitration and mediation together creates "an ADR dynamic that makes the whole a more effective force than the sum of the two components used individually."<sup>11</sup> It maybe that only some elements of mediation could be introduced into the arbitration process, which could bring considerable improvement by promoting settlement and possibly increased satisfaction resulting from this.<sup>12</sup> Hoellering contends "while its [mediation] combination with arbitration can take on different forms...it continues to

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<sup>10</sup> N. Kaplan, "HKIAC's Perspective on Arbitration and Conciliation Concerning China", in A. J Van den Berg, *New Horizons in International Commercial Arbitration and Beyond*, (The Netherlands: Kluwer Law International, 2005)

<sup>11</sup> J. P. Sanderson, *Innovative Dispute Resolution: The Alternative*, (Scarborough: Carswell, 1994), 6

<sup>12</sup> M. E. Schneider "Combining Arbitration with Conciliation", in Van den Berg (ed.), *International Dispute Resolution: Towards an International Arbitration Culture*, International Council for Commercial Arbitration Congress Series, No.8 (The Netherlands: Kluwer Law International, 1998)

be conventional wisdom that arbitration and mediation operate best when employed as separate processes, since each has its own purpose and ultimate morality.”<sup>13</sup> This issue of combining the two processes is controversial among the Western arbitration community, where no real consensus has been reached yet, but it is a matter that causes few problems in the Middle East.

In reality, there are a number of common features between some versions of international commercial arbitration and the traditional Arab/Islamic models. The dominant opinion among international arbitrators who are considered grand old men is that “Arbitration is a duty not a career...Arbitrators should render an occasional service, provided on the basis of long experience and wisdom acquired in law, business, or public service.”<sup>14</sup> Some of these elements are also relevant to arbitration in the Islamic Middle East. Many of the arbitrators in the region feel that arbitration is a duty or a service to God. The sheikhs, for example, as well as the community, feel that he has a duty to resolve disputes between his tribesmen. In Islam, Allah confirmed this duty in the *Qur'an*: ‘*And if two parties or groups among the believers fall to fighting, then make peace between them both...make reconciliation between them justly, and be equitable. Verily! Allah loves those who are the equitable. The believers are nothing else than brothers (in Islamic religion). So make reconciliation between your brothers, and fear Allah, that you may receive mercy.*’<sup>15</sup>

In the rare case that a party was tempted to lapse from grace, in either the international arena or the tribal structures, “the prospect of disapproval by one’s peers [was] deterrence enough.”<sup>16</sup> Informal control mechanisms were particularly effective among lawyers involved in international arbitration, because they were an intimate group of practitioners whether European or Arab, who shared a tacit understanding of what constituted proper behaviour.<sup>17</sup> It is noteworthy that among

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<sup>13</sup> M. Hoellering, “Comments on the Growing Inter-Action of Arbitration and Mediation”, in Van den Berg (ed.), *International Dispute Resolution: Towards an International Arbitration Culture*, International Council for Commercial Arbitration Congress Series, No.8 (The Netherlands: Kluwer Law International, 1998), 124

<sup>14</sup> Y. Dezelay & B. G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transitional Legal Order*, (Chicago: The University of Chicago, 1996)

<sup>15</sup> Surat 49 ‘The Dwellings’, Ayat 9-10

<sup>16</sup> D. F. Vagts, “The International Legal Profession: A Need for More Governance?” 90 AM. J. INT'L L. (1996) 250, 250

<sup>17</sup> n 14 above

this group of ‘grand old men’ these informal controls still exist. This form of compliance extended to the parties, for example, the ICC Arbitration Rules of 1923 provided only that the parties were “honour bound” to carry out the award of the arbitrators. It was expected at that time that moral norms and “the force that businessmen of a country can bring to bear upon a recalcitrant neighbour”<sup>18</sup> would be sufficient to ensure respect of arbitral awards.

In the West, traces of informality in the arbitration process could be found in dispute settlement mechanism organised by closely structured groups such as traders of certain commodities. The arbitration system of some the western commodity exchanges rely heavily on group solidarity, just like in Arab tribes. The arbitrators are in close contact with their respective parties and first seek to reach settlement. The principle sanction for failure to comply with the decision is blacklisting and exclusion from the group.<sup>19</sup> In the past, international arbitration was not that far away from this informal model and quite close to the Arab/ Islamic model. Recently, the most senior judge in England, Lord Chief Justice Lord Phillips said: “Those who are in dispute are free to subject it to mediation or to agree that it shall be resolved by a chosen arbitrator. There is no reason why principles of sharia law or any other religious code should not be the basis for mediation or other forms of dispute resolution.”<sup>20</sup> Also, the Archbishop of Canterbury, Dr Rowan Williams, suggested Islamic law could utilise marital law, financial transactions and arbitration in disputes.

Bearing the above in mind, it does not seem too difficult to imagine an international commercial arbitration model that is less adversarial, but more conciliatory, informal, focused on relationships and even culturally sensitive. Collectivity and group solidarity are at the heart of Islamic society, especially the ones based on tribal structures. These inform the reconciliatory nature of dispute resolution in these communities and focuses on long term relations and harmony in order to maintain

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<sup>18</sup> G. Ridgeway, *Merchants of Peace: Twenty Years of Business Diplomacy through the International Chamber of Commerce, 1919-1938*, (New York: Colombia University Press, 1938), 322

<sup>19</sup> n 12 above

<sup>20</sup> S. Doughty, “Sharia law SHOULD be used in Britain, says UK's top judge” 4<sup>th</sup> July 2008, Mail online at C:\Documents and Settings\ALRAMAHI\Local Settings\Temporary Internet Files\OLK1AD7\Sharia law SHOULD be used in Britain says UK's top judge Mail Online.htm

cooperation. The system is held together by hierachal kinship and community based structures that allow it to function effectively and efficiently.

It is difficult to comprehend arbitration without understanding the identity of the arbitrators and how together they form arbitration, making the cultures of these players of major relevance to the arbitration process itself. As Islamic and tribal cultures are very much part of Middle Easterners, the understanding and appreciation of these cultures might help achieve a more harmonious relationship between East and West, not just in commerce but in many other fields. Arbitration is here to stay as the leading dispute resolution mechanism for international trade, thus by making it effective and familiar to all cultures, it will guarantee the aim of all dispute resolutions; “justice must be seen to be done”.

This thesis has shown that there are many differences between the Arab Middle East and the West as the Middle Eastern party can be seen to have an intrinsic community and a collective attitude to conflict, whereas the Western party is probably more individually minded and procedurally orientated, thus causing friction between the two sides. The distinctions between them relate to the perceptions of conflict, the formation of procedure and the status and function of the third party intervener. International commercial arbitration is sufficiently equipped to accommodate these two norms, if it is used effectively. Many of the features discussed in this thesis would improve the international model and allow it to apply more widely to many more cultures, indeed the increasing significance and influence of Middle Eastern organisations and resources worldwide might force this to be the case.

“Whatever the culture which might prevail at any given moment, there is always another possibility, an alternative to understanding and to virtue, weaned to the idea that whatever the culture which might prevail at any given moment, there is always another possibility, an alternative to understanding and to virtue.”<sup>21</sup>

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<sup>21</sup> n 1 above

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