

## Relations between tribal arbitration and Formal Judiciary

Hussein Ahmed Alghushami

Dar Aluloom University

**Abstract:** This study aims to gain insight on the Relations between tribal arbitration and formal judiciary by highlighting the legal effect of tribal judiciary procedures on rules issued by formal judiciary. To this end, the researcher applies a descriptive-analytical approach, through collecting data and jurisprudence on the relationship between tribal arbitration and formal judiciary to explore and use their opinions in understanding research dilemmas. In addition, the key data of the research will be collected through in- depth direct interviews with relevant stakeholders. The researcher reached a number of findings, the most important of which is that the relationship between the tribal arbitration and the systematic judiciary takes two main forms. The first is when the role of the tribal arbitration is limited to containing the conflict and putting an end to the reactions merely by arbitral awards and decisions. In this case, the function of the tribal arbitration is complementary to that of the regular judiciary. The function of the tribal arbitration is an alternative to the regular judiciary when the representatives of the tribal arbitration intervene in the dispute by issuing awards and rulings that deal with the outcome of the dispute. The study also demonstrates that the tribal arbitration plays a strategic role in resolving disputes. It further alleviates the great burden of cases dealt by the formal judiciary. Moreover, the study recommends the prerequisite for the organization of the customary judiciary in terms of precedents and rulings.

**Keywords:** Law- Tribal Arbitration- Formal Judiciary- Yemen.

## العلاقات بين التحكيم القبلي والقضاء الرسمي

حسين أحمد الغشامي

جامعة دارالعلوم

الملخص: هدفت هذه الدراسة إلى معرفة العلاقة بين القضاء القبلي والقضاء الرسمي في الجمهورية اليمنية، وذلك عن طريق تسليط الضوء على الأثر القانوني لإجراءات القضاء القبلي على الأحكام الصادرة عن القضاء الرسمي، ولتحقيق الغاية من هذه الدراسة اعتمد الباحث المنهج الوصفي التحليلي، عن طريق جمع المعلومات وأقوال الفقه المتعلقة بموضوع العلاقة بين القضاء القبلي والقضاء الرسمي للوقوف على آرائهم والاستعانة بها لفهم إشكاليات هذا البحث، بالإضافة إلى تجميع البيانات الرئيسية ذات الصلة بالدراسة عن طريق إجراء المقابلات المعمقة (المقابلة المباشرة) مع عدد من ذوي الشأن. وتوصل الباحث إلى مجموعة من النتائج من أهمها أن العلاقة بين القضاء القبلي والقضاء النظامي تأخذ شكلين رئيسيين، الشكل الأول عندما يقتصر دور القضاء القبلي على احتواء النزاع ووضع حد لردود الأفعال دون تجاوز ذلك عبر إصدار الأحكام والقرارات، فإن عمل القضاء القبلي يعد مكملاً لعمل القضاء النظامي في مثل هذه الحالة. ويكون عمل القضاء القبلي بديلاً عن القضاء النظامي، عندما يقوم ممثلو القضاء القبلي بالتدخل في النزاع من خلال إصدار قرارات وأحكام تتعامل مع نتائج القضية. كما أظهرت الدراسة أن القضاء القبلي يلعب دوراً استراتيجياً في حل الكثير من الخلافات الكبيرة، كما أنه يخفف عن القضاء النظامي عبء ملفات القضايا. كما توصي الدراسة بضرورة تنظيم القضاء العرفي على صعيد المرجعيات والأحكام.

الكلمات المفتاحية: القانون- التحكيم القبلي- القضاء الرسمي - اليمن.

## 1. Introduction

The Yemeni community pays great attention to religious and social values and norms, noting that whilst they contribute to the community's consolidation and unity, they could not be abandoned. Most importantly, they are a source of pride for Yemeni people. For centuries the majority of Yemeni people have belonged to nomadic and village communities, depending on tribal arbitration to manage disputes and achieve justice.

According to Erwin van Veen, the international researcher from the Clingendael Foundation, more than 80% of people seek and resolve disputes successfully through customary arbitration in Yemen<sup>(1)</sup>. Also according to the results of the 2013 study the Danish Development Agency "DANIDA" has found that between 70% to 90% of total disputes in developing countries are resolved through informal mechanisms<sup>(2)</sup>. As a result, there is emerging international consensus on the need to deal with informal justice systems, as they are an important component of justice reform programs.

As it is crucial to promote rules of law and improve the functionality of formal justice institutions, an integrated approach to justice strategy depends greatly on informal justice systems and the leaders of local communities and local arbitrators. Therefore it is important to address relations between tribal and formal judiciary, to understand the extent of disputes and cooperation between the two- justice systems. In order to address the subject matter in a methodological frame, we will attempt to first address the tribal judiciary concept and then address the relationship between the tribal and formal judiciary.

## 2. Overview of the Research

### 2.1 Core research question

The motive behind drafting a study on the relationship between tribal and formal judiciary is to shed light on the legal impact of tribal judiciary procedures on rules issued by formal judiciary and how far tribal judiciary is impacted by rules issued by formal judiciary.

The core problem of the study is expressed in the following question:

What is the relationship between tribal arbitration and formal judiciary?

### 2.2 Subsidiary research question

The problem elements can be detected through answering multiple questions, mainly:

- Who are the representatives of tribal judiciary?
- What are the required features of the representatives of tribal judiciary?

---

From the struggle for citizenship to the fragmentation of justice: Yemen from 1990 to 2013" of Clingendael's Dispute Research Unit (CRU).

(2) <http://www.tdhegypt.org/default.aspx?lan=1>.

- What are the advantages and disadvantages of tribal judiciary?
- How far is the tribal arbitration impacted by formal judiciary rules?
- How far is the formal judiciary impacted by tribal arbitration rules?
- What is the relationship of tribal arbitration with prosecution procedures?

### 2.3 Research Hypothesis

There is a degree of coexistence between tribal arbitration and formal judiciary.

Tribal arbitration plays a complementary role to formal judiciary when the state's formal institutions are unable, at times, to perform their roles.

### 2.4 Objectives of the Study

This study aims to identify advantages and disadvantages of tribal arbitration, as well as people who normally represent tribal arbitration and the required features of the representatives of tribal arbitration. It also aims to:

- Explain the stance of Sharia and national law toward tribal arbitration.
- Explain the extent of tribal arbitration influence on formal judiciary rules.
- Explain the extent of formal judiciary influence on tribal arbitration rules.
- Explain the relationship of tribal arbitration with prosecution functions.

### 2.5 Significance of the Study

This study is unique in its field, as it has not emerged from abstract theory but rather it strives to clearly understand the relationship between tribal and formal judiciary in the present time. Also, it is considered as a serious attempt to enrich understanding of the relationship between tribal and formal judiciary, noting the lack of relevant studies and research and to be a reference for researchers. Additionally, its significance lies in the fact it coincides with the drafting of the new constitution, in response to the outcomes of the National Dialogue Conference and the legislative reforms that will follow. The hope is that this research will contribute in outlining the important aspects of the relationship between tribal and formal judiciary in Yemen.

### 2.6 Methodology of the Study:

To achieve this study's objectives and its hypothesis and to understand all aspects of the subject matter included, the researcher can apply a descriptive- analytical approach, through collecting information and jurisprudence on the relationship between tribal and formal judiciary, to explore opinions in order to understand research dilemmas, in addition to collecting the bulk of data through

direct interviews with relevant stakeholders (tribal arbitration representatives among tribal leaders, representatives of formal judiciary among lawyers, judges and prosecutors).

## 2.7 Scope of the Study

The scope of the study will be as follows:

### ▪ Human Scope:

Sample representatives of tribal arbitration from the tribal leaders and representatives of formal judiciary, for example, lawyers, judges and prosecutors.

### ▪ Geographic Scope:

The study application will be limited to Al- Baidha governorate, noting that this governorate is one of the main areas where tribal judiciary is practiced. Despite this geographical limitation, the finding of this study can be generalized to Yemen as a whole, as practices in the Al- Baidha governorate are representative.

### ▪ Timeframe:

The study will be conducted during the period of time from August to November 2014.

## 2.8 Tools of the Study

The researcher will utilize direct open interviews (face to face) with tribal leaders, representatives of formal judiciary such as lawyers, judges, and prosecutors, in addition to information from the researcher.

### Means of Collecting Information:

The researcher will identify the study sample and visit them in their domiciles to introduce himself and the study objectives and will ask a group of questions that endeavour to achieve the study objectives.

## 2.9 Structure of the Study

- 1- Preface
- 2- Concept of tribal arbitration
- 3- Representatives of tribal arbitration
- 4- Advantages and disadvantages of tribal arbitration
- 5- Sharia and law stand toward tribal arbitration
- 6- How far the tribal arbitration is impacted by formal judiciary rules?
- 7- Extent of tribal arbitration influence by formal judiciary rules
- 8- Extent of formal judiciary influence by tribal arbitration rules
- 9- Relationship of tribal arbitration with prosecution functions

## 2.10 Research Phases

The research will be divided into three phases as follows:

Phase one:

Where relevant information to the research will be collected from different sources.

Phase two:

Where collected data will be analyzed to assess the information and its relevance to existing data.

Phase three:

Where information will be reviewed, interpreted and the study will be drafted in its final form.

## 2.11 Challenges faced by the researcher

Any research includes difficulties, either in lack of sufficient time for the researcher, or lack of existing research. The researcher encountered the following difficulties;

- 1- Lack of previous research on tribal arbitration
- 2- Difficulties in collecting information due to the unstable security situation in the location where the research subjects reside
- 3- A lack of understanding of the objectives among the research sample

## 3. Concept of Tribal Arbitration

Addressing tribal arbitration in the Yemeni community and customary law, entails providing a definition to the tribal system, which is defined as "the pattern of life where one nation is distributed among independent human groups, where its individuals are related to each other by joint kinship, being either real or an illusion"<sup>(3)</sup>. It is worth noting that the customary rules implemented by Yemeni tribes are the remnants of the pre- Islamic era, with due considerations to the renewal or adaptation of some of these rules, to conform with the developments in economic, social, and cultural life<sup>(4)</sup>. Customary law is defined as the group of the nomadic laws and norms that are speculated and agreed upon and people start dealing with it. It then becomes a constitution used by people in resolving many issues and disputes amongst the people, where its system, rules and dictates are known and implemented by all<sup>(5)</sup>.

From the above, we may define tribal arbitration as the means, or method that is referred to in order to resolve disputes or disagreements, depending on a group of agreed upon concepts and values that are accepted by nomadic communities and considered as obligatory. Therefore, when addressing

---

(3) Ihsan Al- Nas, Tribalism, Dar Al- Nahdha Al- Arabia, Cairo, p.53

(4) Rashad Al- Alimi, Tribal Judiciary in Yemeni Community, Al- Wadi for Publication and Distribution p.41

(5) Hamd bin Hidan Al- Qahtani, Role of Customs and Norms in Resolving Tribal Disputes in Gash center Aseer, MasterThesis, Naef University, 2008, p.6

customary law in Yemeni communities, this term will refer to “rules decided upon by the Yemeni tribes to resolve their internal and external disputes”.

### 3.1 Sources of Tribal Law in the Yemeni Community

Tribal law has major sources and origins that are tackled as follows:

#### 1. Islamic Sharia

Islamic Sharia plays a significant role as one source of customary law in the Yemeni communities, where the customary law derives many of its rules from Islamic Sharia, such as blood money, which corresponds to the value of blood money decided by the Islamic Sharia. Cases regarding personal affairs, are also resolved by referring to Islamic Sharia and the justice principle in the customary law dictates that “whoever claims shall bring the proof, and whoever denies shall swear the oath”.

#### 2. Customs

Customs are another source of customary law and defined as previous deeds approved of by community's and the belief that they should be respected, as they are beneficial to the community. These actions are thus passed down for generation to generation and become customary for the tribe.

#### 3. Tribal Precedents

Tribal precedents and rules issued on previous claims are considered as a source to which tribal Sheikhs refer in their rulings and use as a basis for comparison.

#### 1. Ijtihad

*Ijtihad* is the practice of renovating and creating new justice rules which are delivered by a sheikh who is specialized in memorizing customary law rules and in adapting them according to the case in question. However such *Ijtihad* should not contradict existing rules but rather it should be consistent with developments surrounding the tribal community.

#### 2. Sheikh's Experience:

The personal experience of a Sheikh is crucial as one of the sources of customs and norms, therefore experience is a major source of customary legislature. The experience of the tribal judge comes from attending tribal judiciary sessions, rendering him knowledgeable about the origins of customs and norms.

### 3.2 Features of Tribal Judiciary

Tribal judiciary has a number of features, namely:

1. Tribal arbitrators are not fully dedicated to the judicial profession, rather they live normally and practice different professions and thereby they live inside their communities and are aware of the surrounding customs and norms
2. Tribal judiciary does not have a written constitution or laws, rather the judges issue their rules on the basis of previous experiences and what they learned from similar cases.
3. Tribal judiciary sessions are convened in public before a group of people, meaning it is not practiced behind closed room, as can be the case with formal courts.
4. Responsibility in customary rule impacts all relatives (father, son, brother and grandfather) not only the criminal. However in crimes of theft and assaults on honor, the criminal has sole responsibility
5. Tribal judiciary rules are severe, particularly in crimes against woman women. They thus create a strong deterrent for anyone who commits such a crime. Tribal arbitration has wide acceptance amongst different members of the community and people are often more satisfied with its rulings than with those from the formal courts'
6. Tribal judiciary rulings are mainly limited to financial fines or moral procedures such as apologies and there are no imprisonment, amputation or execution verdicts given

### 3.3 Tribal Arbitrator

The tribal arbitrator is the person who passes judgments on disputes before him, by issuing a verdict to disputing parties, on the basis of tribal customs and norms and the presented evidence provided by disputing parties.

#### Tribal Arbitrators in the Yemeni Community

The Yemeni tribal judiciary consists of three major categories<sup>(6)</sup>:

1. The Sheikh: The Sheikh decides on civil and criminal claims and his decision is not final and can be appealed to the Guarantying Sheikh "*sheikh adhaman*".
2. The Akil "chief of neighborhood": Undertakes the same judicial task of the Sheikh but within his sub-clan and normally decides on minor matter that are not required to be reported to the Sheikh, due to their minimal financial value. Any of the disputing parties may appeal the verdict to the tribes Sheikh.
3. Al- Maragha "Guarantying Sheikh "*sheikh adhaman*": They consider appeals, both civil and penal, that received a verdict by a Sheikh or *Akil*. They are specialised in the customary rules and in preserving them.

---

(6) Rashad Al- Alimi, Tribal Judiciary in Yemeni Community, Al- Wadi for Publication and Distribution, p.81- 83

### Features of a Tribal Arbitrator

For the tribal Arbitrator to be respected by others and gain their confidence, he has to have specific features:

1. Shall have inherited this profession, as the tribal Sheikh is selected by his tribe and is limited to members of specific family members.
2. Shall be of senior status in his tribe.
3. Should have sound experience and understanding with tribal judiciary, precedents and principles of customs and norms.
4. Should be patient, a good listener, with a sharp memory, capable of analysing rival arguments.
5. Treat disputing parties equally, by welcoming and paying attention to both parties in an equal way and consider all people equally. However, it is not necessary to be literate.

### 3.4 Advantages and Disadvantages of Tribal Arbitration

#### 3.4.1 Speedy Resolution

Tribal arbitration is known for fast resolution of matters and disputes between people. This is the most significant feature distinguishing it from the formal judiciary, which requires years to consider cases presented. In fact, there is a common saying that states "if you want to kill a case, just go to formal courts". This is unlike the tribal judiciary, where peoples' experience reflects a positive image with respect to the time required to end matters and disputes. Also, representatives of tribal judiciary work at all times and under all circumstances until the dispute is ended and they rarely postpone any matter. They take pride in their ability to resolve matters and disputes quickly and they compare their quick procedures with the slow ones of the formal judiciary.

The importance of reaching resolutions to disputes within relatively short periods of time by the tribal judiciary is shown in practice when representatives of the tribal judiciary prevent criminal disputes from escalating. They note that certain disputes require quick measures, diffusing disputes, paying compensation or treatment expenses for those injured. They thereby assist in pacifying the dispute and prepare disputing parties to accept the resolution.

The slow procedures at the formal judiciary have been exacerbated by corruption and the security situation in the country. However, the minimum time required by formal judiciary to apply law procedures and provisions, under normal circumstances, is an important issue, to ensure the application of justice. Thus, such slow procedures by formal judiciary could in many instances act in favor of achieving justice and ensuring rights, provided that such slowness corresponds to the time needed for legal provisions to be applied correctly. However, it is important that such slowness is not attributed to other reasons, such as the current situation of the formal judiciary, where the system suffers from a real crisis with respect to the human resources at professional and administrative levels, due to the discrepancy



between the available human resources, and the system's needs. The number of operating judges is much less than the actual number needed which results in prolonged litigation procedures that takes months, and even years. Additionally, due to the volume of cases seen by formal judges, in many cases, the judge will allocate only one or two witnesses, or the claimant alone, for a court hearing session, and postpone others to another session that might come after months. Often, more than one judge considers one case due to the prolonged procedures, the end of service of the original judge, or his transfer to another court. Consequently, many cases remain under consideration for years, without receiving verdicts. This creates a feeling among citizens that the formal system is inefficient and resorting to it is just a waste of time and effort. This leads to a lack of mistrust in the formal judiciary and increases the number of people who resort to other institutions such as the tribal arbitration<sup>(7)</sup>.

As discussed above, the tribal arbitration is considered a speedy system, where matters are not postponed and are decided upon quickly, following the review of reasoning and evidence, and matters are rarely postponed for more than a few days. The most complicated matter might not take more than one month. There are many sayings among the community, which reflect this situation, such as "courts are graveyards of cases", and that time resolves cases seen at courts, not the courts themselves. The tribal arbitration is known for its speedy procedures in implementing verdicts, sometimes within a few days, whereas the formal judiciary is unable to execute its verdicts, due to its structural inefficiency and a lack of respect of its verdicts by the community.

### 3.4.2 Reduced costs for litigants under customary arbitration

When the formal judiciary considers criminal and civil cases, it must apply legal procedures and provisions, including the administrative system related to lawsuit charges. This system specifies charges for initiating a lawsuit using a number of criteria, such as the value and type of the lawsuit.

On the other hand, the tribal arbitration does not include such a system for litigation charges, i.e. no predetermined charges as with the formal system. This creates the impression amongst the public that the formal judiciary is expensive, unlike the tribal judiciary. Consequently, they prefer to refer to the tribal judiciary to avoid paying the expenses of the formal system, as well as lawyers' fees. However, costs remain a relative matter. In the formal judiciary, the loser in civil cases incurs all litigation and lawyers' expenses and the winner is not charged with any expenses, unlike penal lawsuits, where no charges are imposed as the state, represented by the prosecutor, is the one that initiates a penal lawsuit, with certain exceptions provided for by the law.

---

7 Dispute Resolution in Yemen today, a report for the German development cooperation, GTZ discussion paper, 2006. The study indicated that more than 90% of disputes are prevented resolved through tribal judiciary, in a study by Nadwa Al-Dowsry, Tribal Governance and Stability in Yemen, Carnegie Endowment, April 2012, p.6

Despite the general impression that the tribal judiciary does not involve costs, practical experience shows the contrary. While most of the representatives of the tribal system receive money for their work, the amount differs from one Sheikh to another and from one case to another. Yet many people lack the money to pay for initiating a lawsuit before the formal judiciary, even if it is likely they will get it back. As we mentioned earlier, litigators do not incur any expenses when they first assign representatives of the tribal judiciary to interfere in the dispute, therefore the tribal arbitration is considered as an effective mechanism in achieving justice among poor, vulnerable and marginalised groups, or during post- dispute situations. Furthermore, the tribal judiciary ensures fast collection of financial compensation from the offender's family, normally within a few days.

### **3.4.3 Flexibility and Mobility**

The tribal judiciary can undertake their work under unstable situations, which is a positive feature in light of the deteriorating situation in Yemen. Representatives of the tribal judiciary can move around all areas and intervene and resolve disputes. On the other hand, the formal judiciary is directly impacted by unstable situations and the troubles that the country has witnessed recently. These problems have paralysed the formal judiciary and impeded the execution of verdicts issued. Also, the tribal arbitration can exercise more flexibility in the resolution of penal disputes, which contributes to the fast and practical resolution of the dispute. Also they deal with each case individually and recommend one or more proposals to resolve penal disputes and finally select the most acceptable resolution depending on the dispute requirements. Certainly we cannot expect such flexibility in the formal system, where the formal judge considers a case and has to follow a set of firm and consistent procedures and legal principles. Such consistency ensures the achievement of justice and equal treatment for the parties involved. Thus, flexibility can be a positive and negative feature at the same time, where in many instances it provides practical resolutions to the dispute, but at the same time, it might not ensure justice for all parties. This is because the major concern for tribal arbitrator is to end the dispute and prevent it from escalating, through a compromise that is accepted by both parties and such a compromise might not achieve justice in many instances, as it is based on the concession of some rights by each party, Also it is worth noting that the tribal arbitration system allows for parties to appeal the verdict twice using senior levels of the system before the decision becomes final and obligatory.

### **3.4.4 Violating the Principle of Personal Penal Liability**

Despite the positive role played by the tribal judiciary in resolving certain issues, it has certain disadvantages, namely the fact that issued verdicts are imposed on both the offender and his family. Although involving them is a sort of social solidarity, it directly impacts the spirit of the law and the personalisation of the penalty. The principle of individual personal liability is not only a core feature of earthly law but also a firm principle in the rules of Islamic Sharia, where it ensures justice. The Quran and

sayings of the Prophet stress an individual's penal liability. Verse 35:18 of the Sūrat Fāṭir clearly states: "No one who carries a burden bears another's load, even if the burdened soul cries out for help none will carry the least of its burden, however close a relative it may be. You can only warn those who fear their Lord in secret and fulfil their devotional obligations. Whosoever grows in goodness does so for himself. To God is the journeying back"<sup>(8)</sup>.

This verse of the Quran states that penalties and consequences are of individual nature, where no one can bear guilt for another and the individualism of the penalty has a decisive impact on the morale and feelings of the penalised. When somebody feels guilt and becomes personally accountable for that, this will lead him to charge himself as he cannot hope that anyone else will bear his sin. Also "every soul is pledged to what it does"<sup>(9)</sup>. Meaning each individual carries his soul's concerns and consequences and everyone is accountable for their actions.

Also the Prophet (Peace Be Upon Him) has been quoted as saying that "no one shall be held accountable for his father's or brother's sin"<sup>(10)</sup>. Meaning, whatever deeds committed by father shall not be the responsibility of the son and a brother's deeds shall not be borne by another son. When somebody becomes accustomed to sharing the responsibility of his negative deeds with his relatives, this will render him an irresponsible person and motivate him to continue his bad deeds, knowing that his relatives will bear responsibility for them. But when he is made to bear sole responsibility under the law, this will deter him from future wrongdoing and straighten his future path.

However, researcher cannot deny that the tribal arbitration works to achieve social consolidation, as the main function of this justice system is a social control mechanism that ensures the consolidation and structural unity of the tribal community in general and ultimately leads to the achievement of such consolidation within the community. Penalties within tribal rule are just tools to protect the rules and customs that are inherited by the community and ensure the political and economic adherence to these rules, as well as cooperation and the containment of disputes. Such consolidation and cooperation is shown by the collective responsibility that involves each individual in the tribe and group, which arises from the feeling for collaboration and unity to maintain the tribe in general. Thus, the tribal system works to achieve justice and secure social consolidation at the same time<sup>(11)</sup>.

---

(8) Surat Fatir, 18

(9) Surat Al=Mudathir, 38

10Ali bin Abi Bakr bin Suliman Nouredin, Mugama' Al- Zwaied and Manba' Al- Fwaied, Islamic Penalties Book, House of Scientific Books, 3/1070

(11) Rashad Al- Alimi, Tribal Judiciary in Yemeni Community, Al- Wadi for Publication and Distribution, p.113

### 3.4.5 Stability and Achieving Security

The tribal arbitration strives to achieve security through applying and committing to tribal provisions which contribute to pacifying people and creates satisfaction. This in turn removes tensions and revenge motives and consequently minimises crimes and achieves security for the whole community. The tribal reconciliation process pays great attention to the relationship between rival parties and makes sure that relations continue in good way, by bringing both parties together and achieving reconciliation to create intimacy between rivals. In this way it ensures that no grudges persist in the wake of a decision. Also, the tribal arbitration is considered as a conducive factor to spread social peace, as it strives to eliminate all rivalries and put an end to grudges and animosity created by rivalry. Such issues will not be eliminated by formal judiciary verdicts which may rather inflame hard feelings. Thus the tribal arbitration restores community harmony, as disputing parties accept tribal rules more than those of the formal judiciary and can coexist without feelings of victory or defeat, as a result of Sheikhs striving to maintain security and social peace in the community.

Dr. Mustafa Hasaneen has argued that feelings of satisfaction among former rivals is influential in preventing crimes in the Iraqi clans<sup>(12)</sup>. Additionally, Dr. Rashad Al- Alimi sees that such satisfaction is the most common denominator in all tribal rulings in the Yemeni community. However, if tribal judiciary achieves security in the community, it also limits the authority of official institutions, as tribal courts limit the roles of these institutions to that of a follower of the tribal courts.

### 3.4.6 Invalidation of Legal Rules

Despite the clear contribution of the tribal judiciary in preserving social peace, its interference in serious crimes such as homicide, physical assault, theft, abduction and rape crimes has implications for the rule of law. All of the above are serious crimes that impact the community's security, stability and public order and Yemeni lawmakers classify them as crimes that shall receive severe penalties. However, the tribal arbitrator often imposes different criteria when judging these matters rather than that of the state and its institutions. The tribal system normally limits its penalties to compensation and the penalty of imprisonment, for instance, does not exist. All this results in the actions of the tribal judiciary nullifying the legal ruling and the authority of the legislature, as it replaces official state law with customary rules derived from customs and norms. Also, the application of tribal rule despite the existence of a relevant legal rule has created two parallel legal systems; the formal judiciary that derives its procedural provisions and rules from the law and a second that consists of tribal arbitration based on Islamic law, customs and tribal precedent. This creates contradictions in the governing systems, where what is incriminated by formal law might not be incriminated by customary law, and vice versa.

---

(12) Mustafa Hasaneen, Iraqi Clans and System of Responsibility, Cairo University, p.41

### 3.4.7 Sharia and Secular Law's Stance on Tribal Arbitration

Tribal arbitration has a great impact on a community's safety and well-being. Human beings are inherently social and cannot live in isolation from others and tribal communities consist of relationships and conflicting interests which can lead to disputes and assaults between individuals. Islam is a legislature created to promote the common good, and that seeks to prevent actions that can lead to disputes and rivalry. It prohibits many offenses such as the illegal seizure of others' money or to do an injustice to oneself. The obligations of Islam aim to bring individuals, groups and communities to a righteous way, encouraging tolerance and forgiveness between people as preventive and curative measures for problems. Although the Islamic Sharia urges people not to dispute where Allah says "do not disagree"<sup>(13)</sup>, it also strives to remove reasons for dispute and disagreement among people through third party arbitration, approved by both parties, to decide on their dispute. Allah says "if you fear a breach between them appoint one arbitrator from the people of the man and one from the people of the woman, if they wish to have a settlement then God will reconcile them for God is all-knowing and cognizant"<sup>(14)</sup>. Also, "indeed by your Lord they will not believe till they make you judge in their disputes and find no constraint in their minds about your decisions and accept them with full acquiescence"<sup>(15)</sup>. This is also clear in the sayings of the Prophet (PBUH), where he said to Abi Shuraih "Allah is the judge and to Him is the judgement, so why Abi Shuriah nicknamed Aba Alhakam? He said when my people disagree on something they come to me and I decide upon that and both parties are satisfied, so the Prophet (PBUH) said: how good is this, do you have a son" he said; Shuraih, then the Prophet (PBUH) said; then you are Abu Shuraih"<sup>(16)</sup>. Also, the Prophet (PBUH) accepted the selection of Bani Qurithah's to Sa'ad bin Ma'az as judge, when Jews accepted his judgment in their issue with the prophet (PBUH)<sup>(17)</sup>.

Additional consensus can be found, as it has been told that Omer bin Khattab and Abi Ka'ab sought arbitration of Zaid bin Thabet, May Allah be Pleased with Him, and that Othman bin Affan, and Talha bin Obaidullah, sought arbitration of Jubair bin Muta'm, with the presence of the Prophet's followers<sup>(18)</sup>. Consequently, arbitration is approved among jurists and according to the Book of Sunna and consensus<sup>(19)</sup>. However the legitimacy of arbitration is not absolute, as there are cases for which arbitration is not permitted and it is up to the judiciary to decide upon them, having the competence therein. It has been stated in the Al- Bahr Al- Zakhar that arbitration is allowed in all instances, except for

---

(13) Surat Al- Anfal, 48

(14) Surat Al- Nisa, 35

(15) Surat Al- Nisa, 65

(16) Abi Dawood Suliman bin Al- Asha'th, Sinan Abu Daood, House of Scientific Books. 4/289

(17) Zeineddin bin Ibrahim bin Mohammed bin Nugaim, Al- Bahr Al- Raiq, House of Islamic Book. 7/25

18 Abu Ishaq Ibrahim Al- Sherazi, Al- Muhazab, House of Scientific Books, 2/292

19 Abdulfatah Mohammed Abu Elenien, Judiciary and Prove in Islamic Jurisprudence, Al- Amana Press, Cairo 1983, p.112

prosecution, damnation, marriage and the accusation of adultery, where it is up to the Imam and Wali. For Hanafi, Malaiki, Hanabila and some Shafi'e jurists, arbitration is not permitted in prosecution, the Islamic penalty of damnation, and marriage<sup>(20)</sup>.

Although tribal customary rule in the Yemeni community is a continuation of pre- Islamic litigation procedures, Islam has approved these procedures and rules. They have become part of Islamic litigation procedures that do not contradict with any Quran, Sunna or Islamic jurisprudence, rules and provisions<sup>(21)</sup>.

Since the independence of Yemen and the implementation of the modern judicial system, the state has been keen to urge people to use arbitration to resolve their disputes in a simple way<sup>(22)</sup>. Nonetheless, approval of arbitration is not absolute in Yemeni law. Article 5 of Yemeni formal Arbitration Law No. 22 of 1992, states that no arbitration is permitted in the following circumstances:

- 1- Islamic penalties, damnation and termination of marriage contracts.
- 2- Contesting judges' rules.
- 3- Disputes related to forcible execution procedures.
- 4- All cases where reconciliation is not permitted such as termination of marriage contracts.
- 5- All cases related to public order such as Islamic penalties.

### 3.4.8 Ruling Authorities' Dealings with the Sheikhs

The Yemeni Arab Republic that overthrew the Al- Mutwaklya Imam's rule, in the 26 September 1962 revolution established the Ministry for Tribal Affairs. This Ministry, designed to care for tribal issues, was created by the third government after the revolution in 1963. This was due to the situation at that time, where Yemeni tribes were divided between supporters and opponents to the 26 September movement. Many tribes supported royal forces until 1967, so the basis of this Ministry was to deal with the resulting security issues. While it was set up with a temporary objective that ended with the victory of republican forces in 1967, the Ministry of Tribal Affairs was one of the major ministries. The ministry played a role in decision- making processes and was headed by deputy prime minister, Minister of State for Tribal Affairs.

In the mid- 1970s, the 13 June corrective movement led by Colonel Ibrahim Al- Hamdi took power. His regime (1974- 1977) started with the downsizing of sheikhs' role in the army and state and he

---

(20) Dhiaeddin Mohammed bin Mohammed Al- Qirshi, Ma'alim Al- Qaria, House of Scientific Books, 1/270

(21) Rashad Al- Alimi, Tribal Judiciary in Yemeni Community, Al- Wadi for Publication and Distribution, p.68

22 The former arbitration law of 1980 is more clear in dealing with customary rules. It provided legal status for the ones that do not contradict with legal rules and Sharia, where Article 21 stated that "customs and norms has its provisions and saving bloodshed and ending disputes shall be taken into account". Article 4 stated that "the arbitrator shall be aware of judiciary and customary rules", thereby reflecting the significance of customary rules in public and practice.

abolished the Ministry of Tribal Affairs, viewing it as an obstacle for economic and social development. He changed it into a local administration department with a consultative role. Colonel Al- Hamdi further suspended the constitution, dissolved the Shura council, and on 27 July 1975 on Army Day, dismissed tribal Sheikhs from the leadership of military institution.

However, when the ex- president, Ali Saleh, assumed power he reinstated the Tribal Affairs Authority, under the Ministry of the Interior. It became a monetary distribution device on a monthly basis for hundreds of Sheikhs, with no law to govern it. It was managed according to personal instructions, to provide regular monthly grants to tribes' Sheikhs<sup>(23)</sup>, with about USD.520 million annual budgets<sup>(24)</sup>. There is currently an ongoing argument over the abolition of this Authority but there has been an absence of comprehensive political will for institutional and legal reforms. The good governance team<sup>(25)</sup> at the National Dialogue Conference recommended the abandonment of this Authority. However, this proposal was rejected by Sheikhs who considered it to be the selective targeting of Sheikhs. Additionally, the transitional government does not wish to provoke the Sheikhs, as it needs their support to secure tribes' loyalty and mobilise them against its rivals<sup>(26)</sup>.

### 3.4.9 Professional Status of Tribal Arbitration Representatives

The survey revealed that very few of the older tribal arbitration representatives are public servants, so they are totally dedicated to tribal judiciary work. Younger representatives tend to occupy public posts, mainly as district directors, deputies and advisors to the governor, to gain their loyalty for political reasons. As a result the number of governor's deputies and consultants is inflated to the extent that the number of deputies exceeds the number of districts.

**Table (1) Professional Status of Tribal Judiciary Representatives**

Professional Status	Employed by state	Unemployed	Total
Reps of tribal arbitration above 60 years of age	2	8	10
Reps of tribal arbitration below 60 years of age	12	3	15

### 3.4.10 Relations between Tribal Judiciary and Formal Judiciary

The relationship between the formal and tribal judiciary changes according to the central state's strength or weakness. Thus, whenever the central state is strong, its institutions will limit the influence of the tribal judiciary. However, the formal judiciary tends to cooperate with the tribal arbitration in many instances and often refers certain cases to the tribal courts. Also, some litigators request that they be

(23) Non- state Actors in Yemen; Reasons for Formation and Means of Remedies", Al- Jazeera Center for Studies, April 2012

(24) Abdulrazaq Al- Higri, MP, interview with AL- Gumhuryah newspaper, 7/5/2012

(25) NDC document, Good Governance, clause 20, p.112

(26) <http://www.aljazeera.net/nr/exeres/148b218-1099-46e2-9e38-a63225486015.htm>.

referred to tribal courts. Furthermore, many respondents believe that there is a cooperative relationship between the tribal and formal judiciary and that they can work together for a common cause.

**Table (2) Sample Responses about the Relationship between Tribal and Formal Judiciary regard competitiveness, disputing and cooperation.**

Number of respondents	Competitiveness	Disputing	Cooperation
40	4	12	24

### 3.4.11 Influence of the Formal Judiciary on Tribal Arbitration Rulings

As mentioned earlier, the formal judiciary's decision-making process can take years, whereas the tribal arbitration make fast decisions on disputes and the study revealed that people tend to refer to the tribal arbitration due to the inefficiency of the formal system, particularly due to the prolonged procedure. This is due in part to the fact that the tribal judiciary is not subject to the procedural rules that the formal judiciary must adhere to. As for the relationship of formal courts with tribal ones, it is mainly of cooperative nature, where formal courts endorse rulings made by tribal courts, even in penal cases that are considered by tribal courts and cooperate with executive agencies to oblige concerned parties to implement such verdicts.

**Table (3) Sample Response on the Influence of the Formal Judiciary's Rulings and Decisions on the Tribal Arbitration.**

Number of respondents	Influenced	Not influenced
40	9	31

### 3.4.12 Influence of Tribal Arbitration Rulings on the Formal Judiciary

The tribal judiciary has tangible influence on the actions of the formal judiciary. In the course of this research, a number of formal judges confirmed that formal courts request the litigating parties utilise tribal resolution processes to secure the release of detained or accused persons. The formal judiciary encourages people to go to the tribal judiciary to alleviate the burden on formal courts, as they are highly understaffed. Also, the tribal judiciary replaces the formal one in many instances and it also covers many districts in the governorates where formal courts and formal judiciary representatives do not exist.

**Table (4) Responses by Sample on Influence of Tribal Judiciary Rulings on the Formal Judiciary**

Number of respondents	Influenced	Not influenced
40	22	18

### 3.4.13 Relationship between the Tribal Judiciary and Public Prosecution Work

The research conducted for this paper revealed little influence and interaction between tribal rulings and public prosecution work and limited relations between representatives of the tribal judiciary and public prosecution. However public prosecutors refer cases that lack legal provisions to tribal courts



to decide on them according to customary law, prior to investigating them or submitting them to concerned institutions.

#### 3.4.14 Is the tribal arbitration a viable alternative to the formal judiciary?

Disputing parties refer to both the tribal and formal judiciary, yet the tribal arbitration features easy and fast procedures in case decision-making and provides acceptable resolutions quickly, as well as a high level of protection and security for rival parties. Also, it addresses the psychological consequences and potential for grudges among rivals by mediating between them before closing the case, to ensure that all disputes are ended financially, psychologically and morally.

Furthermore, it is clear that the tribal judiciary plays a vital role in Yemeni communities and we may say that there is a genuine benefit for the Yemeni people in maintaining tribal judiciary, considering the evident significance of its role. Some arbitrator see the tribal arbitration's role as that of complementing and supporting the formal judiciary and the two judicial systems have a cooperative relationship.

However, the tribal judiciary is not a full and unconditional alternative to the formal judiciary. This study has shown that the relationship between them takes two major forms. First, when the tribal judiciary's role is limited to containing disputes and putting an end to recriminations from involved parties by issuing required resolutions. Second, it plays a complementing role to the formal judiciary. The tribal judiciary will be an alternative to the formal one, when its representatives intervene in disputes by issuing resolutions that deal with cases' consequences. It is worth mentioning that the tribal arbitration has always played a strategic role in resolving many disputes that otherwise could have escalated. Also, it alleviates the great burden of cases on the formal judiciary.

### Conclusion

There is no doubt that many factors have assisted in the continuation of certain social systems in the Yemeni community, including arbitrary means of solving disputes, which is a Yemeni cultural legacy that has been sustained within the social structure for centuries. This study's findings can be summarised as follows:

- Customary law is dominant in the geographical area of this research and people mainly prefer the tribal system over formal courts
- There is growing recognition that the involvement of customary justice has contributed to stability and compensates for the inefficiency of formal judiciary system
- There is a need to integrate the tribal mechanism for dispute settlement into the formal system, to facilitate cooperation between the two systems and formalise the role of tribal arbitration as a complement to formal institutions

- The cost of litigation before the formal judiciary is one of the factors that pushes people to refer to tribal judiciary
- The formal judiciary faces genuine challenges with respect to human resources at different professional and administrative levels
- The tribal arbitration plays a strategic role in resolving disputes. It also alleviates the great burden of cases on the formal judiciary.

This study makes the following recommendations based on its findings:

- We recommend developing applicable mechanisms to expedite decisions on disputes amongst parties, such as activating judicial inspection in formal judiciary, noting that slow procedures in the formal judiciary is one of the major factors behind the volume of referrals to the tribal judiciary
- In light of the severe shortage of resources in the formal judiciary, the reform, reconstruction and regulation of the formal judiciary is necessary

#### List of References and Sources:

- The holy Quran
- Abu Ishaq Ibrahim Al- Sherazi, Al- Muhazab, House of Scientific Books
- Abi Dawood Suliman bin Al- Asha'th, Sinan Abu Daood, House of Scientific Books
- Ihsan Al- Nas, Tribalism, Dar Al- Nahdha Al- Arabia, Cairo
- Hamd bin Hidan Al- Qahtani, Role of Customs and Norms in Resolving Tribal Disputes in Gash Center Aseer, Master Thesis, Naef University, 2008
- Rashad Al- Alimi, Tribal Judiciary in Yemeni Community, Al- Wadi for Publication and Distribution
- Zeineddin bin Ibrahim bin Mohammed bin Nugaim, Al- Bahr Al- Raiq, House of Islamic Book
- Dhiaeddin Mohammed bin Mohammed Al- Qirshi, Ma'alim Al- Qaria, House of Scientific Books
- Abdulfatah Mohammed Abu Elenien, Judiciary and Prove in Islamic Jurisprudence, Al- Amana Press, Cairo 1983
- Ali bin Abi Bakr bin Suliman Nouredin, Mugama' Al- Zwaied and Manba' Al- Fwaied, House of Scientific Books
- Non- state Actors in Yemen; Reasons for Formation and Means of Remedies", Al- Jazeera Center for Studies, April 2012
- Abdulrazaq Al- Higri, MP, interview with AL- Gumhuryah newspaper, 7/5/2012
- NDC document
- Mustafa Hasaneen, Iraqi Clans and System of Responsibility, Cairo University

- "From the struggle for citizenship to the fragmentation of justice: Yemen from 1990 to 2013" of Clingendael's Dispute Research Unit (CRU).
- <http://www.tdhegypt.org/default.aspx?lan=1>.
- <http://www.aljazeera.net/nr/exeres/148b218-1099-46e2-9e38-a63225486015.htm>.
- Abu Ghanem Fadel, tribal structure in yemen between continuity and change. 2003.