



State and Non-State Justice in Yemen

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1. What is non-state justice?

Yemen has a complex justice system, mixing a unified formal state law system, and historically strong informal justice systems blending classical shari`a and customary laws. The formal and informal norms, procedures, and actors involved are not separate, stable domains, but rather correlate in a continuous and complex dynamic of interaction.

Although derived from pluralistic sources, the formal legal system in Yemen is now a single unified body of law (*qânûn*). As a result of the codification process from the 70s onwards, Yemeni state law incorporates elements from *shari`a* (Islamic law), customary/tribal laws, excerpts from Egyptian and other Arab laws, and international principles. These various elements can be traced back in differing proportions, depending upon the legal field (personal status law, criminal law, commercial law). An example is the right of the victim of a violent crime to demand blood money (*diya*) from the perpetrator, a rule derived from *shari`a*, but now incorporated into state law. The Criminal Code even contains an appendix which lists the exact amounts of *diya* for each particular physical harm.

The court system has also been unified under the Law on Judicial Power (1/1990). Yemen does not have separate religious courts, nor a Constitutional Court.¹ The state legal system also allows other forms of dispute resolution, but only insofar as these are consistent with the officially prescribed rules and procedures. This is laid down in the Law of Arbitration (22/1992). Even though one can thus speak of a unified legal corpus, one cannot overlook the fact that within Yemeni law textual ambiguities and omissions exist, which leave room for other (informal) norms to 'intrude'. Likewise, it still occurs that court judges refer to non-codified legal sources in their decisions. Some examples are discussed later.

Alongside the formal state institutions, alternative systems operate to contain and resolve disputes. These affect tribal as well as non-tribal communities: every extended kin group, market, craft guild, community, and urban neighborhood, elects a leader who mediates disputes within the community and represents the community to the outside world, including state institutions. Sometimes, these locally elected leaders are approved by the state administration, but the state also appoints its own local representatives. Insofar as mediation processes operate beyond the formal control of the state, they are referred to as 'informal' or 'non-state' justice. It is generally held that these informal justice mechanisms deal with at least 80% of all the conflicts.

This paper focuses on tribal laws and procedures, as these constitute the most widespread and applied informal justice system(s) in Yemen. Historically, Yemen's tribal population can be found in the northern and eastern areas, and belong to either one of the two major confederations, Hâshid and Bakîl. But generally, the majority of Yemen's rural population, over 70% of the country, self-identify as tribal members, even those who don't actually belong to a specific tribe. The state has so far been unable to fully exercise its judicial authority through the court system, as a result of which the tribal law system is the predominant arena of justice today, and in the foreseeable future. Yet, one should always bear in mind that one cannot actually speak of wholly separate and distinct justice systems in

¹ The Supreme Court, however, includes a Constitutional Chamber.

Yemen, but should always regard these as a continuum or spectrum of methods and rules to resolve disputes.

1.1. Tribal customary law

'Customary law' is as much a code of conduct as a legal code, therefore one Arabic term is used to denote both 'custom' and 'customary law', namely *`urf* (pl. a *`râf*) or *`âda* (pl. *`âdât*).² There are various types of customary laws – e.g. agrarian customs, market customs, village customs, – but most widespread and most prominent is tribal custom, *`urf qabalî*. Successive rulers of Yemen, and others who reject tribal practices, also use the derogatory term *'tâghût*' (idol, false god). This term is mentioned in the Qur'an, and is being invoked to condemn customary practices that do not conform to *shari`a*.³ A term much used by tribal members themselves is *'shar` al-man`*', or simply *'man`*', meaning "law of honour" or "protection".

Tribal custom is primarily concerned with the maintenance of honour, the sanctity of the given word, and protection of the 'weak'. This latter category includes women, children, and persons who lend services to the tribe on the basis of contractual agreement, such as butchers, tailors, but also religious experts. A violation of custom is denoted as *`ayb*, (shame, dishonour), which is classified according to mounting degrees of gravity: the "black *`ayb*" for instance is the worst offense, in case of intentional killing of someone with whom there is an agreement of protection. The tribal system focuses heavily on responsibilities toward others. It covers only those areas that are defined as 'public responsibility', such as protection of persons, honour, and crime. The distinction in western legal systems between civil and criminal law, is not relevant to the customary system. Personal matters, including marriage, divorce, and inheritance, belong – technically – to the domain of *shari`a*, although in practice *shari`a*-rules are often affected by custom.

Customary law is applied by way of mediation (*sulh*) or arbitration (*tahkîm*). Its main objective is restitution and restoration of the social balance within or between tribes. Most effort is therefore spent to *prevent* conflict. In the same vein, punishments are not imposed upon an individual, but upon the collectivity: they are not only meant to compensate for loss, but also as a (materialized) apology for the violation of a person's, and a tribe's, honor, which requires extra amends. Both aspects – collective responsibility and restitution of social balance – are illustrated by the practice wherein the whole tribe pays the amends collectively. A tribal arbitrator traditionally does not inflict corporal punishments, but imposes payment of cash or commodities, such as cattle or weapons. In Yemen, women are never traded off as compensation in dispute settlement.

1.2. Mediation and arbitration

Yemeni non-state dispute resolution mechanisms inhabit a continuum of practices from impromptu mediation to more structured processes that mix mediation and arbitration. Litigants in tribal or rural areas are usually bound by tradition to refer to the customary system, either because it is deemed shameful to resort to the official court, or simply because

² Other often used terms are: *ahkâm al-aslâf* (rules of the forefathers), *silf al-qabâ'il* (traditions of the tribes) or *sunna* (custom).

³ For instance, Sûras 2:256, 4:60, 16:36.

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there is no court nearby. According to state law, one can choose in certain disputes between arbitration or court adjudication.⁴

Aggrieved parties will usually try to reach a settlement in disputes by mediation (*sulh*) and negotiation before resorting to arbitration. For instance, when a quarrel breaks out in public, bystanders will intercede voluntarily and negotiate with the adversaries to come to their senses and find a suitable compromise. Or, if the conflict starts out at a further distance, the contending parties themselves may attract attention from others by shooting in the air.

Disputes may arise over all kinds of issues such as trespassing boundaries, car accidents, or marital problems. In simple cases, a bystander or family member could act as intermediary. When the dispute is more complex, the number of mediators grows. They can group together on their own initiative, or be approached by members of the contending tribes. Upon arrival, they usually chant or recite a specific type of tribal poetry (*zâmil*) to announce their intention of mediating the dispute. They also bring along animals for sacrifice, as tokens of their good faith.

Another example of an often successful intervention, is to invoke the renowned 'Arab hospitality' of the disputing parties: a large delegation of (voluntary) intermediaries marches with white flags to the houses of both factions, splits up, and the mediators install themselves in both places as 'guests'. By imposing such moral and financial strain on the households to feed and lodge all these guests, the parties will usually quickly agree to settle.

Mediation is not institutionally structured by the state, it is rather a community-based institution, derived from custom and tradition. Its outcomes do not necessarily conform to state law, or even shari`a. However, the Law of Arbitration does provide a definition:

Article 2: "Mediation (*al-sulh*) is an agreement of two parties to appoint an arbiter (*muhakkam*) or more to judge between them other than the specialized court, and leaning on principles of equity and fairness."

Only when mediation fails, or if the matter is more complicated, the disputing parties will bring their case to arbitration. One can distinguish two kinds of customary arbitration:

1) Arbitration by the opponent (*tahkîm al-khasm*). A tribal member who has committed a crime, like homicide, designates the tribe of the aggrieved party as the arbitrator. This type of arbitration, in which no third party is involved, can only take place when the offender has confessed his crime in advance and submits himself to the decision without right of appeal. In exchange for turning himself in to his victim's tribe, the culprit is usually granted a reduction of the standard penalty (according to custom) by one third, and also he reduces the *'ayb* (shame) on his tribe.

2) Arbitration by a neutral arbiter (*tahkîm muhakkam muhâyid*), or a committee of arbiters. In this case, both parties agree – orally in the presence of witnesses, or in writing – on the arbitrator(s), usually from a tribe not involved in the dispute. The (written) agreement to arbitration is sustained by certain types of warranties (see 1.4.).

⁴ In many cases, however, a court procedure is obligatory (but see section 2.2.).

The term 'arbitration' is used, since the arbitrators are chosen by mutual agreement between the conflicting parties. The arbitration can be done by a single arbitrator (*muhakkam*) or a committee (*majlis al-tahkim*). Such committees do not have a fixed place, nor a fixed schedule for their sessions, except for the market tribunals (which take place whenever a market is held). Usually, the arbitrators set a time and place in consultation with both parties. The sessions take place on neutral ground, like the house of one of the arbitrators or of a neutral *shaykh*. The arbitral decisions are binding upon the parties (see 1.4.)

1.3. Types of disputes and judicial authorities

Disputes between tribe members can be brought before different authorities, depending on the kind and gravity of the matter. These authorities are not necessarily recognized by the state, as they operate in an alternative system. However, on voluntary basis, the 'tribal judges' mentioned below can apply at the Department of Tribal Affairs (Ministry of Interior), and receive a certificate with a monthly allowance (see 2.3.).

Tribal judges

1) The *`âqil* (head of the *`ashîra*, a subdivision of the tribe) hears simple cases like family disputes and conflicts related to property rights that involve only little material or immaterial losses.

2) The *shaykh* (head of the *qabîla*, the tribe) deals with larger cases such as homicide, assault, boundary disputes, highway robbery, and with cases appealed from the *`âqil*. In his role as "market-protector", the *shaykh* also presides over the tribunal that holds sessions at public markets, overseeing all cases related to sale and purchase, and guarding the safety of every individual on the market. Tribal markets and gatherings are protected by the tribe on which territory they take place, by virtue of a protection-agreement (*hijra*) that is concluded by the participating tribes. A violation in such a 'safe-haven' is regarded as a great shame.

3) The *marâgha* (highest tribal authority) considered the specialist *par excellence* of customary law, has been historically entrusted with the appeal of cases from the *shaykh*. He also takes on large disputes of an inter-tribal nature, like damages and bloodshed caused by wars between tribes. If a case has no precedent, or if no customary rule exists, or when there is a disagreement about its interpretation, the *marâgha* has the authority to create a new rule and set a new precedent. Customary law is not simply an oral tradition, but relies heavily on written precedents and signed agreements (see also under 1.4.) In 1997, 25 *marâghas* were counted among the tribes in northern Yemen. The post of *marâgha* is hereditary.

Shari`a- judges

A separate authority is granted to religious men who enjoy the status of *hijra* ("set aside", protection). In the tribal context, *hijra* is a form of protection-agreement which can apply to a place (house, ground, city), occasion (market, mediation), or person (mediators, religious men). A non-tribal individual, or family, who joins a tribe under *hijra* is protected from any aggression in return for supplying services to the tribe, such as adjudication. Traditionally, a *hijra*-judge belongs either to a family whose origins trace back to the Prophet (a *sayyid*) or to

a family of judges (*qâdî*)⁵, and has received (some level of) education in legal religious studies. Whenever they act as arbitrators in disputes, these *sayyids* and *qâdîs* are called *qudât al-tarâdî*, judges by mutual consent (of the disputing parties). They do not enjoy an official recognition different from other arbitrators. By virtue of their extensive knowledge of *shari`a*, the informal 'jurisdiction' of these *qudât al-tarâdî* relates exclusively to matters with a religious connotation, like marriage, divorce, and inheritance. In addition to their judicial task, the *shari`a*-judges also write down contracts of sale, marriage contracts, and even customary decisions, since most tribal members are illiterate. At present, many of these religious men have migrated to the cities, and officially accredited notaries are taking over several of their tasks.

In this instance as well, we find that the informal 'jurisdictions' between *shari`a* and custom are not clearly demarcated. For instance, according to classical *shari`a* (and modern Yemeni state law) a female heir would inherit half of the share of an equivalent male heir. Under customary law, she usually receives only a financial compensation (as a safety net) or even nothing at all. This is based on the argument that inherited land is of vital interest to a tribe's survival and should remain within the tribe's possession, in case a woman has married a man from another tribe. Still, in other cases customary law grants a woman more privileges than a man: any bodily harm afflicted to a woman has to be compensated with a significantly higher amount of blood money than compared to *shari`a* or state law. This follows from her tribal status as a 'weak' person, meaning that she is unarmed and cannot defend herself.

Others

In case one is not satisfied with the available tribal or religious judges, or these are not free, it is possible to ask anyone who is deemed authoritative or respectable to mediate or arbitrate. No special qualifications are required by state law, but usually someone is asked who has specific knowledge of the type of dispute and law at hand, or who is originally from the same region, or is a neutral outsider, or has any other basis of authority. Since recent times, some specialized arbitration centers have been created in the cities, to provide mediators or arbitrators on request (see 2.3.).

1.4. Settlement (methods, sources of law)

The procedure of a tribal settlement is surrounded by customs, traditions, and symbolic acts, all emphasizing containment of the dispute, reconciliation and compensation of damages. Indeed, containment – not resolution – is the most important feature of tribal settlement. This is achieved by a meticulous structure of guaranty, including persons and material objects, built around the sanctity of the given word (contract), to ensure that both parties refrain from aggression during the procedure, and comply with the eventual judgment. The procedures described below thus have an important symbolic function, but at the same time have actual value in the arbitration process.

Adâl (equivalence) implies that both parties submit one or more of their weapons (daggers, rifles, guns) or other valuable objects (cars, watches, mobile phones) to the arbitrators, according to the seriousness of the matter. These warranties are only returned after the dispute has been settled and the decision enforced, and nobody has violated the procedures. After the

⁵ In Yemen, the term '*qâdî*' also denotes a specific social class of 'judges', who are not necessarily court judges.

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`adāl, both parties could be invited by the arbitrator to eat a meal together, as it is a widely held custom that one cannot be enemies with the person with whom one shares food.

Guarantors (*dumanâ'* or *kufalâ'*) are designated by both parties in equal numbers. . These are individuals of revered status in the tribe, usually closely connected to their 'charges', who are responsible for both the person and the debts of their charge. If the latter fails to abide by the proceedings, he violates the honour (or: face, *wajh*) of his guarantor, which is considered a major shame, and requires high reparations. Once the guarantors are agreed upon, the parties of the dispute communicate only through them, not directly with each other anymore. During the Yemen Arab Republic, the *damîn* enjoyed an official legal status. This legitimation was withdrawn, however, in the latest arbitration law (1992) which prescribes a more western-style arbitration system.⁶

The arbitration committee takes its time to consult each party, or their guarantors, privately. Sometimes the arbitrators turn to learned persons or the leaders of the tribes present at the session, for their advice on the matter. Women are usually excluded from the proceedings, even if a woman is herself a party, since her presence among strange men is considered dishonourable. The parties or their representatives present all the available evidence, often spoken words put down in writing or confirmed by witnesses. The decision is delivered in writing and copies are handed over to each party after the signature of the arbitrator(s). The judgements are then publicly announced at market-places or at other tribal gatherings by the public crier (*dawshân*).

If the parties agreed beforehand to authorize the arbitrators (*tahkîm tafwîd*, arbitration 'by proxy'), no appeal is allowed. If the parties chose for simple arbitration (*tahkîm*) appeal is permitted, both within the informal system and to the official court (see further section 2.2.).

Sources

Little research has been done so far about the sources that are used for tribal law. Yemeni tribesmen, though very proud of their customs and traditions and eager to relate extensively about them, are very reluctant to pass on their written documents (treatises or case reports) to an outsider. Only few written accounts of customary law have been discovered, such as the *Qawa'id al-Sab'in* (the Rules of the Seventy), to which the subscribing tribes are bound in some cases of aggression, border disputes, civil matters, and arbitration. Some documents are said to resemble treatises of Muslim jurisprudence in their presentation of material.

More solid proof that customary law is not simply an oral tradition, is the wide array of contractual agreements that regulate the structure of tribal responsibilities and protection. Moreover, the proceedings (*marâqîm*) of all settled disputes are recorded in writing and deposited with the *shaykh* or the *marâgha*. These records, written or memorized, serve as precedents on which future decisions are based. The reliance on precedents, rather than law books, may illustrate that tribal law is not meant to be codified, since this would undermine its flexible nature as 'people's law' (as happened to *sharî'a*). Less strict rules of evidence, the fact that one can select ones own judges (or at the minimum, these are familiar), quicker procedures, and better instruments for enforcement, make customary arbitration even popular amongst non-tribal city-dwellers. But the traditional system is already showing some 'cracks',

⁶ See Article 24 of the Law of Arbitration 33/1981.

with the *marâghas* becoming a vanishing elite, and the *shari`a*-judges and tribal *shaykhs* moving away from their tribes, preferring to do business rather than justice. Since they remain the most experienced mediators and arbitrators of customary disputes, it often happens that these urbanized tribal and religious authorities are called upon by their rural tribesfolk, to return to settle a local dispute.

1.5. Enforcement

There are different means to ensure enforcement of the arbitration decision. As explained before, the parties have already from the outset delivered warranties and personal guarantors to ensure compliance. Another measure is the so-called 'honouring of the decision' (*tashrif al-hukm*), meaning that both parties agree implicitly or in writing (in cases of physical harm) to submit themselves to the decision. An important social pressure to enforce the judgement, is the imminent risk of being banned by one's tribe, which for a tribesman would mean his social death. Given all these strategies, it seems hardly conceivable that a tribesman will not submit to a tribal judgment.

Still, reality shows otherwise. The sense of personal and tribal honour, though ardently professed in words, does not seem to have the same practical impact: disputes over land, resources, or marriage often escalate to homicide and consequently to blood feuds, which can drag on endlessly at great human and material cost. Such blood feuds, known as *tha'r*, are the result of a failure (or unwillingness) to engage in a tribal resolution, and constitute one of the major causes of social instability in Yemen today (see under 2.3.).

2. Relationship between state and non-state justice sectors

2.1. Actual relationship over time

History

Under the latest Ottoman presence in Yemen (1872-1918), tribal *shaykhs* enjoyed prestige in the northern and eastern parts of Yemen, where neither the Turks nor the Imam could exercise their power. With the installation of the Mutawakkili Empire in 1918, Imam Yahya (d.1948), the highest authority of the Zaydi sect (a Shi`i branch), went to great lengths to control the tribal customary system. To assure himself of the loyalty of the tribal *shaykhs*, and to substitute customary practices with *shari`a*, he used to kidnap the sons of influential *shaykhs* in order to submit them to a religious and administrative education in his 'jail-schools', far away from their kinsfolk. But even this extreme measure could not prevent tribal elders from keeping their first loyalty to their own tribes rather than with the Imam, for the simple fact that they derived their authority primarily from their own tribesmen.

Eventually, the Imam was driven to grant official recognition to certain customary practices. Some of his reputed legal directives to court judges (*ikhtiyârât*) even legitimized particular customary rules over *shari`a*-principles, for instance that women could not inherit land. He also formalized a mixed judicial system in tribal areas, by appointing two judges to an administrative district: one for *shari`a*-cases, and one for *`urf*-cases. Tribesmen, in their turn, began to seek authorization for their decisions from the Imam, whom they regarded as their

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highest Islamic authority. Customary decisions would gain more legitimacy when carrying the official seal from the Imam. His son, Imam Ahmad, continued his father's pragmatic tribal policies until the overthrow of the Imamate in 1962.

Present

Today, the pragmatic attitude of the executive authorities and local governmental institutions towards tribal procedures and judgments varies according to the extent of influence of customary law in their districts. A Yemeni expert, Rashad `Alimi, distinguishes three types of interaction. State authorities, such as police officers, local council members, the district governor's office, or court judges:

- 1) cooperate with tribal authorities without interference from the official judiciary, especially in districts far away from the main cities. In these instances, the local authorities, rather than functioning as the link between government and citizens, act as an annex to the tribal system and 'ignore' laws and directives coming from their official superiors;
- 2) grant customary decisions an official status, through the court or police station. In case the decision does not conform to the laws and decrees issued by the state, but is likely to solve the dispute locally, this accreditation is given even without a legal basis. Enforcement will still be most effective in the hands of the tribes, but they could lean on local instruments of the state (police, prisons);
- 3) deny any effect to customary decisions by referring the claimants to the official court, in order to obtain a judgment in accordance with the positive law.

The first two positions are more likely to take place when the issue at stake concerns 'typically tribal' affairs, that is, disputes which arise within or between tribes. But even when a tribal dispute is submitted to court, the judge often refers such cases back to a tribal arbitrator, when he believes (or perhaps is pressured by tribal authorities) that it can better be solved and enforced informally. Or, if the case has been already settled informally, the court judge – if requested – could confirm that decision by an official stamp and registration. This happens sometimes even if it does not fully conform to state law or *shari`a*, presumably for pragmatic reasons. A third possibility is that one of the litigants appeals a customary decision at the court. In this case, the judge has the power to examine whether the decision went against *shari`a* or state law. In present times, like under the Imamate, tribes do see benefits from engaging with state institutions, without relinquishing their own power. This works both ways: representatives of the central government, including the President `Ali `Abdullah Salih, also at times act as mediators or arbitrators, and then usually go along with the customary laws and procedures. This happens especially in large tribal disputes which involve a great number of casualties and social unrest, or when a state official becomes the victim of a tribal killing.

It follows that jurisdictional relations between tribal and official authorities are not only antagonistic, as is often presumed, but more opportunistic (or: pragmatic), in any case hardly ever transparent. When asked, many state officials would not even qualify this situation as a matter of concern, but rather as the normal state of affairs in Yemen. Also tribesmen regard it as entirely natural that tribal and state law systems co-exist. They mostly consider it shameful to take recourse to an official authority, or even to register tribal decisions at the court, as

prescribed by law. Sometimes this is based on their complaint that court judges do not apply “proper *shari`a*” (note: not “proper state law”). But mostly, their complaints are that court judges are incompetent, corrupt, inefficient, and far away. As for women, they are almost completely cut off from official courts due to social restrictions of free movement, honour, (legal) illiteracy, or geographical distance.

With the migration of tribal families (especially the more affluent *shaykhs*) to the cities, tribal law has nowadays entered the very domain of the state. A grim result of this is that blood feuds between tribes in rural areas are now often being directed against urbanized tribal members, since they lack direct protection from their rural kinfolk. Particularly the capital San`a has now become a ‘free-zone’ for revenge killings. But even in San`a, it appears that state courts cannot adequately deal with murder that is part of tribal blood feud: it first depends on whether the public prosecutor can lay his hands on the case, or whether tribe members keep the matter in their own hands. And second, in the event that the case is brought to court, the judge will have to try it as a ‘simple’ murder, since the Criminal Code does not have a provision on murder emanating from blood feuds. A jail sentence plus a fixed (but lower) amount of blood money would then be the appropriate legal measure, but such a sentence is unlikely to actually stop the blood feud.

2.2. Legal relationship over time (efforts to create links in criminal and civil spheres)

Constitution and Civil Code

The formal justice system after the unification of North and South Yemen in 1990, is framed by the Constitution. In 1990, the Constitution designated *shari`a* as “a principal source” of legislation. The latest amendment of 1 October 1994 declares that “the Islamic *shari`a* is the basis of *all* laws” (Art. 3, emphasis added). The position of custom is not mentioned in the Constitution, but instead in lower codifications, such as the Civil Code of the Yemen Arab Republic of 1979/10:

[...] “If no text in this law is applicable, reference shall be made to the principles of the Islamic *shari`a* on which this Law is founded, failing which the judge shall decide in accordance with custom (*`urf*) that is consistent with Islamic *shari`a*, failing which [the judge shall decide] in accordance with the principles of justice conform the sources of Islamic *shari`a* in their totality.” (Art. 1)

Note that custom is only deemed lawful when “consistent with Islamic *shari`a*”. It is the judge who should verify this. Islamic *shari`a* is being defined in its broadest sense, yet without specifying what the “sources in their totality” actually consist of.

The latest Civil Code (19/1992) adds further restrictions as to what constitutes ‘lawful custom’:

[...] “With regard to custom, it is required that it be general and long-established, and does not conflict with the public order and public morality.”

The application of customary rules by judges in civil cases is thus allowed, but only within the framework set and controlled by the state system.

Criminal Code

The first official Criminal Code in Yemen was issued only in 1994: since 1962, North Yemeni judges, in the absence of a state-issued code, had been compelled to base their decisions either on *shari`a*-texts or on draft codes, of which several different versions were in circulation. The present Criminal Code states that:

“Criminal liability is personal, and there is no crime or punishment without a statutory law (*qânûn*)” (Art. 2)

This text clearly indicates that common liability, as known in tribal law, is not legitimated by statutory law, and that crimes and punishments can only be defined by state law. Homicide is a punishable crime (Art. 234 ff.), as are the Qur’anic offenses (*hudûd*) (Art. 12). As stated before, the code does not refer to blood feud.

Arbitration Law

The procedural relationship between formal and informal law is regulated in the Law of Arbitration. The first codified provisions about arbitration in the former Yemen Arab Republic formed part of the ‘Islamic legislations’ drafted by the Sharî`a Codification Commission in the late seventies.⁷ Law 90/1976 contained only four articles that dealt with arbitration proper, which situated arbitration as an alternative procedural course within the framework of state law.

The second Law of Arbitration (33/1981) approached arbitration much more with an eye to the tribal reality in Yemen, and allowed a separate jurisdiction for tribal law and procedure: (tribal) customs were allowed to overrule statutory norms in cases of homicide and dispute settlement, when these take place within and between tribes. The Law did not prescribe a control mechanism over such settlements.

The latest Law of Arbitration, issued two years after the unification (22/1992), orders that *all* types of arbitration on Yemeni territory fall directly under the state’s exclusive jurisdiction (Art. 3). It also declared that all customary settlements should be based on *statutory* principles (Art. 45, but see below). Cases in which customary arbitration is forbidden, are:

- the *hudûd* (Qur’anic crimes)
- *li`ân* (sworn allegation of adultery by a spouse)
- annulment of the marriage contract
- impeachment and prosecution of judges
- disputes related to procedures of compulsory enforcement
- other matters in which no mediation (*sulh*) is allowed, and
- everything connected to the public order (Art. 5).

⁷ This Commission was created in 1975 to draft laws by selecting those *shari`a*-principles from various schools of *fiqh* (Islamic jurisprudence) which were closest to the spirit of the century and the specific Yemeni context. About the position of non-state (tribal) justice in South Yemen (the People’s Democratic Republic of Yemen), no documents were available at the time of writing.

Nonetheless, there is evidence that the customary system does indeed continue to handle a number of these cases.⁸

‘Public order’ in most modern legal systems includes all criminal offenses and their punishments. But by not explicitly stating other crimes than the *hudūd*, such as injuries, homicide, or normal theft, this Law is ambiguous about whether such other crimes are liable to arbitration or not. In other words: does ‘tribal order’ fall officially inside or outside the scope of ‘public order’? Practice shows us that such other crimes are frequently settled by the informal system. Interestingly, when these are referred to the court system for appeal, the court classifies them as *civil* cases, on the ground that the Public Prosecution has not been involved in the case from the outset. Matters ‘in which no mediation is allowed’, are all those regulated by other codes, such as divorce initiated by the wife, nationality issues, and electoral fraud.

The Law further states that an arbitration decision can be based on customary law, as long as the *outcome* remains within the framework of the official code (Art. 45). As a control mechanism, the Law requires that arbitration decisions (*ahkâm al-muhakkamîn*) are registered at the competent court (Art. 20). This would be the Court of Appeal, since a customary decision equals a decision from a Court of First Instance. However, since there is no sanction for *not* registering arbitrations, and no incentive to do so, in practice only a very limited number is actually submitted. The court can review a customary decision when an official appeal is instigated by one of the parties, but only on the grounds specified by the Law (Art. 53-55).

In 1997, two significant amendments to this Law were issued: the first is that *any* principle can again be applied to settle disputes, so not only limited to *statutory* principles. The second is that all arbitration decisions ultimately have to comply to ‘the rules of the Islamic *shari`a*’ (new Art. 45). *Shari`a*, rather than ‘state-issued law’, is being designated as the ultimate legal reference for all arbitrations, including tribal settlements. As pointed out earlier, tribal arbitrators also uphold *shari`a* as the benchmark of their decisions. *Shari`a* can thus be considered as the ‘common link’ between the two systems (even if only symbolically).⁹ The question that follows logically would then be: who defines *shari`a* in Yemen? From which sources? And: has statutory law become the ‘new’ *shari`a*? This falls however beyond the scope of this paper.

2.3. Instances of interaction in criminal cases between state and non-state means of compensation/reconciliation

As explained earlier, court judges, government officials, and tribal arbitrators often cooperate on an *ad hoc* basis – and even beyond the framework of state law – in an attempt to contain and solve conflicts that particularly pertain to tribes. However, they can also be at serious odds with each other, and not able or willing to jointly handle such disputes. An example of such a field of contention relates to the issue of blood feuds (*tha`r*).

⁸ This is from the author’s ongoing research. It has yet to be determined what constitutes ‘public order’ or ‘other matters in which no sulh is allowed’.

⁹ *Shari`a* is a ‘common link’ because both tribesmen and state officials use conformity to *shari`a* as the ultimate (symbolical) justification of their systems. Even though practice often shows otherwise, and both systems deny such conformity of the other side, it still means that *shari`a* is a linkage between them.

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Blood feuds can emanate from simple disputes over land, a stolen mule, or marital problems, which mount to physical injury and eventually to homicide. If the perpetrator himself has not made amends or been killed in retaliation, another from the family or tribe may be attacked. However, because this is usually not accepted as an equal reprisal, a counter-revenge becomes compulsory, and so forth.

The reasons for the persistence of blood feuds in Yemen are complex and diverse. One cannot simply state that it is a failure of the tribal system, or conversely, an inherent part of tribal traditions, or even the result of a 'warfare-predisposition' of tribes. Poverty, resource conflicts, and the state also play a strong role in the perpetuation of these feuds. For instance, it is an established fact that these feuds occur (or start out) almost exclusively in rainfed areas, where access to land and water is scarce and the only means of survival. Other factors that are of direct or indirect influence are the failure of the court system to provide quick and effective justice, and actual state interventions to influence tribal policies and assert control over local resources.

Blood feuds have also increased as a result of the easy availability of fire arms in Yemen. Before the unification in 1990, carrying firearms was prohibited in the southern parts of Yemen. In the northern parts there was no legislation to regulate it. The new unified Republic issued a new law concerning the possession and carrying of firearms (Law 40/1992), but this only prohibits the carrying of unlicensed firearms in San'a city and other governorates' cities. Tribal and other rural areas are not mentioned, whereas these represent about 75% of the country. Even so, the law is not strictly enforced in the cities, where blood revenge has now become daily reality. As pointed out before, also the Criminal Code gives reason to question the formal position of the state towards halting blood feuds, as the law text does not qualify blood revenge as a crime.

A phenomenon directly related to blood revenge is the – unofficial – use of the state prison system by tribal leaders, in order to punish their tribesmen for various crimes, or to protect them from retaliation. This practice is contrary to the official prison rules, but most likely with the cooperation of prison staff. On the other hand, when the police arrests and jails a tribesman who has committed a crime, their fellow tribe members, or those from the offended tribe, may raid the prison to release the accused, in order to have him put on trial under the tribal justice system. Some affluent tribal *shaykhs* even have their own 'private' prisons, which they administer beyond the control of the state.

Legislative measures and improvement of court functioning have so far thus not proved effective, given also their limited outreach in a pluralistic society like Yemen. Other actions have consequently been initiated, both by the state and society.

One initiative in 1997, by the President himself, was the issuance of a decree to declare a general and state-sponsored reconciliation among the feuding tribes. Another decree entailed the creation of a Supreme National Committee to address and resolve blood feud problems, and consisting of representatives from different strata. Along with these measures, a public awareness campaign was to be set up, and extensive meetings to be held with tribal leaders, elders, and other prominent figures in society. The impact or degree of implementation efforts is unknown, but so far the feuds continue.

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Worth mentioning is also the existence of a Department for Tribal Affairs in the Ministry of Interior, which registers and legitimizes customarily elected local *shaykhs*, allots them a regular allowance, and offers occasional assistance and arbitration in tribal disputes. The Head of this Department, which used to be a Ministry before, is himself also a reputed tribal shaykh. Apart from this administrative control over (only registered) tribal leaders and tribal affairs, this department does not have the official authority to deal with blood feuds or other crimes. Most shaykhs see their dispute resolution work primarily as part of their tribal duty, and do not want money (or control) from the state. In general, non-affiliation with the state is seen as more honorable, though strategically, such alliance may lead to more power, and thus enhance one's tribal status as well.

A very recent development in linking state and non-state systems is the creation of arbitration centers that operate – formally – according to the Law of Arbitration, and are registered as NGOs. Of these arbitration centers, Dar al-Salaam in San'a is particularly concerned with the halting of tribal blood feuds, although they offer services in any kind of conflict: civil, criminal, personal status, labour, commercial, national or international. When approached to intervene in a tribal fighting, the center composes a mixed delegation drawn from its impressive 'database', including tribal leaders, judges, religious authorities, lawyers, and other prominent figures, who would be sent out to the location of fighting to offer mediation. After some initial successes since its launch in 1997, its efforts have gradually been thwarted from two sides: tribesmen still dislike 'foreign' intervention in their affairs and the government, though less openly, seems to take on a similar position. As a result, Dar al-Salaam has cut down its arbitration activities, and now focuses on raising awareness among tribes about the danger and consequences of carrying firearms.

3. Ideas for improving cooperation/interaction over time

All this leads to the observation that the seat of judicial and legal authority may effectively not be in San'a. Yet, even though informal tribal justice is preferred by most Yemenis, it may be for lack of a better alternative, rather than for adherence to (tribal) tradition. Most people find that customary arbitration has simpler procedures, is faster, enforcement is more guaranteed, it is less corrupt (though often more expensive than formal procedures, because of the higher bloodprices and the remuneration of the arbitrators and guarantors), and the parties can choose their own judges. Conversely, courts are held to be incompetent, overloaded, corrupted, inaccessible, impersonal, ineffective, or simply too far away. Even the Ministry of Justice admits that approximately 60% of all court judgments remain unenforced.

Despite the advantages and popularity of tribal justice systems, there is however no assumption that these systems are more rights-respecting. As indicated, women's access to tribal justice often depends largely upon the male members of their family and they often feel that their demands are not met. Similar problems of access regard other vulnerable groups, such as migrant workers and the poor. Nevertheless, it is not suggested that the rights of these groups are currently better protected in the state system.

Improvement of justice for all could best be attained by creating linkages between the state and non-state systems, which combine the best aspects of both: legitimacy, fairness, transparency, participation, (cost-)efficiency, and effectiveness. Some suggestions to establish such linkages are:

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- cooperation with, and establishing links between, the *actors* who operate in and between the justice systems, and who are chosen community representatives. These can be notaries, religious leaders (imams), *shaykhs*, but also judges, lawyers, school teachers. New actors, such as women and young people (law students) could also be brought in through such a program. They can be brought together in concerted platforms, workshops, or (semi-)institutionalized settings, to exchange information on their respective laws and procedures, to enhance their capacity in negotiation and conflict resolution, to build consensus on the needs and problems of their constituencies, and how to deal with these jointly, and how to facilitate access to their services for all citizens;
- raising the awareness and skills of community leaders regarding the formal state system, and broader legal issues and rights (human rights, court procedure, Law of Arbitration);
- assessment of local processes of settling disputes and needs, preferably by, or in cooperation with, local researchers;
- improvement of record keeping and registration of cases and complaints, to obtain more insight into the types and proceedings of conflicts, and thereby identify possible areas for the intended linkages, or enhancement of justice. This could be an extension of the function of the notary, who is elected by his community and also officially accredited by the Ministry of Justice. Or one could employ law students or graduates, who can form a free legal aid center, or involve a local NGO. People will feel empowered if they can register their complaints, and once aware of this possibility, will demand it.¹⁰
- providing basic legal services and information at places which local people frequent, such as local markets, mosques, and schools. If citizens become more aware of their rights and of due process, they are able to choose between different judicial forums, and command due process by their shaykh, judge or local leader;
- creation of family arbitration centers or NGOs, where local community members, especially women, poor, marginalised peoples in areas remote from courts, can turn for (free) legal aid, information, training, especially regarding family disputes (which are in fact the cause for most disputes);
- introducing ‘ambulant courts’, that is, formal judges who hold regular court sessions at localities that are removed far from a court building. This will improve access to justice. Or let the ambulant judges work together with local arbitrators;

¹⁰ In Yemen, there is a Ministry of Human Rights, which has built a good reputation (at least, under the former Minister) and where Yemenis voluntarily file complaints. There are also national and local human rights NGOs with some good reputation. Even though not much action has been undertaken so far on these complaints (not enough staff or competence), Yemenis found this opportunity to complain already quite empowering, because they had never been taken seriously before, and now there was someone official who listened to them, and was not linked to the authority they accused. Such legally trained persons (NGO’s, law graduates) can at the same time advise the complainant on other options to solve their problem. Most law graduates in Yemen do not find work, especially women, so this could help them to get employed, or a traineeship. It should also be said that the notary is usually well respected locally even though the court-institution as such is corrupted.

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- organizing local and national ‘platforms’ where actors from the different legal domains can meet and discuss linkages; both ‘old’ and ‘new’ judicial actors should participate, as mentioned above. This could be the first step towards enhancing larger public debates on issues of ‘rule of law’.

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