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'Justice delayed is justice denied'; so goes the motto taught in law school. In one way or the other, a slow judicial process is the greatest threat to the development of the rule of law in our region. The various articles on this page illustrate it in different ways.

The article by His Honour Judge Eugene Cotran, who is the first ever Arab-born British judge, and who has been active as a major advisor of the Palestinian community inside and outside Palestine over the years, addresses the basic problems of the nascent Palestinian state. Coming from such authoritative source, his warnings must be taken seriously. The judicial failures of the Palestinian authority, which shelves complaints and delays justice as a matter of course, may be as big a threat to the future of Palestine as illegal Israeli settlements.

The Euro-Arbitration seminar presently held this week in Beirut is hosted by a wide array of universities and arbitration associations in Lebanon and in the Arab world. It addresses another type of justice denied - slow court procedures - and searches for alternative modes of conflict resolution to court procedures. Most prominently, it explores arbitration, which is becoming increasingly crucial to stabilise and secure economic transactions world-wide, by ensuring swift and effective justice. Arbitration has a long way to go before it becomes effective in the Middle East. This is why such seminars are important and need to be encouraged and followed up.

The recent report of the International Court of Justice offers yet another minefield for the rule of law, which is plagued by double standards and faits accomplis in the region (nowhere more so than in Israel). It has been a long time since Israel has rejected the jurisdiction of the ICJ, but last Thursday's ICJ assertion of its competence in the dispute between Iran and the US offers a small glimpse of hope for revitalising the international rule of law in the region. The process, here again, is an unfortunately slow one.

New ways out of the arbitration deadlock

Judicial power must be restored to enhance the authority of the state

By Chibli Mallat
Special to the Daily Star

An appreciation of the arbitration process in the Arab world requires a return to basics. To appreciate the basics, we should return to the German sociologist, Max Weber: the state has an exclusive right to exercise coercion, including violence.

Judicial power wields, through the rule of law, the most sophisticated manifestation of state coercion. There is no rule of law without the state's monopoly of violence.

This stands in sharp contrast with arbitration, which is a consensual process by nature, at all levels of the process. Coercion, or its threat, does not naturally square with arbitration, as it does with the judicial process. By definition, judges must be obeyed, and judges' rulings applied with the force of the law.

It is not an essential element of arbitrators that they should be obeyed. Their award may be morally compelling, but they do not have the police force, or the imposition of fines, in order to force their award upon the recalcitrant party.

Whatever the reasons, and none is necessarily decisive, the bottom line is that the arbitration process does not in theory require coercion. By submitting to it rather than to the judge, the parties accept in principle the result of the award.

Here matters become in an Arab context particularly complicated, and the whole Weberian theory comes back to the fore with a vengeance.

Weber's conclusions on state coercion offer the general background to the proposition underlying the present article: so long as the judicial process in the Arab world does not rise up to the extent needed to justify state monopoly over violence, its ersatz in the form of arbitration will remain faulty.

Economic and international trade transactions are so important in the world nowadays that the slowness of conflict resolution in the courts has led to a flight away from judicial adjudication and to the consequent rise of arbitration. Arbitration has found great favour domestically and regionally, as it appears to [illegible] and simplicity in comparison with the uncertain and costly court system.

As a way to uphold commercial transactions by offering a simpler way to solve conflicts, however, it is plagued at all levels by the diffidence of the region's judiciary.

Judicial office in the Arab world suffers from a combination of executive meddling, overwork, and low salaries. As a result, the judge, who should in theory be relieved by the advent of arbitrators to take some of his or her work off his back, finds a glittering chunk of commercial law, typically involving commercial transactions with a large monetary significance, being diverted to wealthy lawyers, or worse, to retired or former judges.

When some of the fees of the arbitrators are known, and the most basic comparison conjured up in the judge's mind with his own fixed remuneration, the result can only be diffidence.

Unless the salaries of judges are increased to measure up with those of an arbitrator of commercial transactions, we will have increasing interest in arbitration, especially in commercial circles, to avoid the courts, and a proportionate and rising unease among judges.

This is compounded by the state's natural propensity to frown upon matters of importance adjudicated outside its control, which threaten its natural Weberian monopoly of power.

Ilustration of this unease is clear both in legislation and in case law. In such crucial areas as commercial distributorship, the common legal rule is that arbitration clauses will not stand in court.

Similarly, general legislation often prevents the enforcement of an arbitration award except after a perusal by the courts, typically for so-called public policy reasons. This acts in effect as a new trial, leading to delays of several years.

In one comparatively fast instance, a conflict erupted in Jordan between the parties in 1981. It took five years to see the award decided, and another four years for the last instance court to allow its enforcement.

Is there any practical way forward?

The bottlenecks in legislation and case law produce scepticism about the future of effective arbitration. The proliferation of legislation, protocols, arbitration courts and centres, all vying for a place in the sun (if not supremacy) in the Arab world, may be more a sign of weakness than of strength.

The practice is not encouraging.

One way to avoid the shortcomings of arbitration is the "new" field of alternative dispute resolution (ADR). The difference with arbitration is that the person who presides over an ADR procedure will not issue an award. His or her goal is an agreement between the parties in conflict. This is one way to avoid the pitfalls of implementation, since the parties who have just agreed on a compromise will also want it to be immediately effective.

There is no loser in ADR. Since the agreement is naturally binding, the crucial problem of the enforcement of the judicial or arbitral process does not arise.

But then, is there a legal process at all? In theory, such resolution as may result from ADR is nothing else but the good old gentlemen's agreement. In practice, a combination of ADR, arbitration and judicial process might offer ways out of the present deadlock between judges and arbitrators in the Arab world.

For those of us in daily practice, the situation is the more dramatic as business rhythms make arbitration an urgent need. While the idea of pushing arbitration forward seems compelling, it is difficult to imagine either state or judge becoming enthusiastic.

The more serious way out would be to bolster the judiciary. The more effective and comfortable the judiciary, the more a natural ally for the arbitrators, who take a lot of weight off the judges' back. But for arbitration to find a place in the sun, the financial and social balance cannot remain as dramatic as it is today. Frustrated judges will not readily give precedence to successful arbitrators.

Chibli Mallat is a practising lawyer and the editor of Commercial Law in the Middle East (London and the Hague, 1995). This article is a shortened version of the talk presented at the conference on Euro-Arab arbitration on December 18.