Desert Justice: Bedouin Private Law

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Abstract

Bedouins rarely consult government courts. For a millennia, they peacefully resolved disputes and ensured safe cooperation through private methods of dispute resolution. How can a voluntary legal system persist wherein accused parties are not forced to attend trials? Why are dozens of oaths required to introduce witnesses in arbitration? Why are superstitious ordeals routinely consulted? Whereas contemporary academics have failed to explain these practices' persistence, this paper creates a rational choice framework to answer the aforementioned questions. Bedouins' private law efficiently mediates and deters criminal activity given three constraints: the high monitoring costs of crime, low incidence of evidence, and high cost of verdict enforcement.

1. Introduction

Bedouins are nomadic peoples living in the deserts of the Middle East. For centuries, their norms and lifestyles rendered them outcasts to surrounding societies; to this day, their nomadic practices are only surrendered upon state mandates to do so. Though often tacit, contemporary scholars and laymen alike relegate Bedouins' customs and practices to that of a backwards, primitive, or uncivilized past. Sir Wilfred Thesiger wrote that:

"Their way of life naturally made them fatalists; so much was beyond their control. It was impossible for them to provide for a morrow when everything depended on a chance fall of rain or when raiders, sickness, or any one of a hundred chance happenings might at any time leave them destitute, or end their lives" (Thesiger 1959).

Thesiger, like many, recognize the harsh conditions Bedouins face. A frequent term one finds associated with Bedouin life is "volatility", used to summarize the harsh deserts and frequent violence (Chatty 2009). It is easy to denounce desert living, but it is commonplace for academics to exaggerate the violence often equated to Bedouin living. These assumptions are falsely founded on Bedouins' lack of government-provided protection, and ignore or denounce the host of remedies Bedouins employ to enforce private property. To argue that Bedouins live in perpetual violence is devoid of reality, and methodically ignores their decision-making capabilities. It is methodically fallacious to posit that a population has lived in near-death conditions for centuries when their opportunity cost is so readily apparent.

A more appropriate approach to interpreting Bedouin life starts with asking why these individuals remain in their perceivably terrible conditions. Perhaps it is the case that their conditions are not truly so terrible. Though Bedouins have historically remained without

government-provided law and protection, they are not without law or protection. For almost any crime, Bedouins may appeal to assessors, arbitrators, and holy men to resolve their complaints peacefully and voluntarily. Academics that recognize these methods of dispute mediation rarely consider them to be effective. But perhaps they should.

No previous literature has seriously explained how Bedouins enforce property claims without extraneous legal enforcement. This paper uses a rational-choice approach to examine how Bedouins resolve disputes, and emphasizes why these practices are efficient given obstacles they face. Bedouins' system of private law efficiently mediates and deters criminal activity, given three constraints: the high monitoring costs of crime, low incidence of evidence, and high cost of verdict enforcement.

Section two begins with background information necessary before continuing with the rest of the paper. The following three sections each describe a specific aspect of Bedouin legal customs. Section six concludes.

2. The Bedouin Today

In the past century, Bedouins have changed much due to external constraints. Some governments actively intervene in Bedouin affairs. For example, Israel passes laws against vagrancy which are deliberate attempts to settle Bedouins in their territory (Ginat 2007). Bedouins that do not live in walled buildings are fined and arrested. This clearly incents Bedouins against maintaining nomadic tendencies, and associated traditional practices.

Borders have also become more strictly defined and enforced in the past century. Clans become separated, making nomadism harder when certain geographic areas become inaccessible. Some legal customs like divine ordeals are not consulted often enough for each clan to have an

administrator; this means that some clans must travel to consult an ordeal. Section five discusses at length how ordeals are important for resolving disputes; if some Bedouins are denied access, then they must find alternative methods of resolving certain disputes. Often that means consulting lesser ordeals, but it can also mean appealing to government courts. Further, if clans are separated, their relationships diminish, and clans are less incented and able to be held financially accountable for its members.

Further, the opportunity cost of remaining a desert nomad increases by the second. Desert living may be similar to town-dwelling in the 9th century, but it is substantially different from the market specialization and innovation that exists in surrounding cities. In other words, Bedouins forego much more by maintaining their cultural practices now than ever before, if material well-being is any indicator of profitability.

3. An Introduction to the Bedouin Legal World

All of Bedouin legal customs depend on evidence, or lack thereof. In western cultures, individuals are accustomed to verdicts only being decided if evidence proves one guilty beyond reasonable doubt. None can debate that a great legal system is one that collects enough evidence to condemn bad actors. If Bedouins' standard for condemning bad actors was the procurement of uncontested proof, hardly any criminal would ever be proven guilty. In the desert, many crimes may go completely undetected.

This is one of the issues that pervades Bedouin life, and is further an issue that scholars do not understand from personal experience. Most serious crimes in the United States, for example, always leave some form of hard evidence. At best, a camera recording or first-hand

witness. Footprints, dogs barking, pieces of fiber from clothing, a second-hand witness: these are also all hard evidence, and things that Bedouins rarely have access to, if ever.

Moreover, citizens of the United States also generally have access to a police force, one that can be called and will respond quickly. At the least, police act as witnesses, and ones that are on-call in the event that they're needed. Many physical and accidental crimes are documented fairly quickly, like assaults or fender benders. The availability of police greatly multiplies the possibility of evidence being found, but it is beyond the scope of this paper to definitively show all the ways that this is true.

Bedouins, though, do not have police, and for good reason. It would be ridiculously expensive to have a response team available for a Bedouin to call in the middle of the desert. For this to happen, every group of half a dozen Bedouins would need idle labor on-call to respond; and, a method of reaching them. Any effective police would prove too expensive because of the sheer dispersion of Bedouin peoples.

Bedouins deal with the rarity of evidence when seeking dispute resolution by consulting one of three methods of dispute mediation, according to amount of evidence: assessorships, arbitration, and ordeals. Assessors are consulted when evidence is condemning, arbitration when evidence is disputed or replaced with oaths, and ordeals when there is no evidence whatsoever. The model below gives explains which method is used.

Certain Evidence		No Evidence
Assessors	Arbitration	Ordeals

The next three sections address each of the three methods of dispute resolution that Bedouins undergo.

4. The Market for Assessors

When there is enough evidence for one's fault, Bedouins appeal to assessors. The reader may first ask who actually decides whether fault is established, or whether assessors are consulted. There is no central authority that makes these decisions, but rather it is a conclusion drawn by both the accused and accuser, and by onlookers[1] alike (Kennett 1925) (Bailey 2009). Accusers will naturally argue that the evidence is condemning, this needs no explanation. Onlookers, usually clan members of the two parties, will also look at the evidence and form their own opinions. Though there is clearly always an incentive for the accused to deny any charge, their reputation is on the line. If all of the onlookers knew that the accused had committed the crime, then it would behoove the accused to accept the charge of guilt. If the accused were to seriously try and dispute an accusation known to be true, he or she would be considered an untrustworthy liar. In a society wherein reputation determines marriage, transactions, and livelihood, one does not want their reputation to be hindered. By forcing individuals' reputations to be at stake when making their case, they are incented to plead the truth, so long as the evidence is stacked against them. Therefore, it would almost always behoove an accused party to submit under pressure, as he or she is only adding to their punishment by holding out further.

[1] I use this term loosely. This is not to say there are literally individuals watching a debate take place. By onlookers, I mean individuals generally living in the same area(s) that will form opinions on accusations regardless of how they (onlookers) are affected, if at all.

Assessors are individuals that measure the extent to which parties are responsible for criminal charges. They both assess the crime, and declare what fine shall be paid. In some instances, the assessor may choose which party is at fault, but if both parties are willing to consult the assessor then both have already admitted possible fault before even engaging with the assessor (Ginat 2007) (Kennett 1925) (Bailey 2009). Assessors are privately provided; there is no central authority that trains or approves assessors. Each clan generally has one assessor for each kind of crime that is most prevalent; for crimes not very prevalent, there are assessors in nearby clans with different specializations, or one assessor may broaden their specialty on a case-by-case basis. Intra-clan disputes are settled by clan assessors when possible, unless there is a conflict of interest, in which case a neighboring clan's assessor will step in. Inter-clan disputes are settled by a third-party clan's assessor.

Assessors are paid a fee for their services, which is attached to the fine levied on parties at fault. Assessors develop reputations for their work; some are considered better than others, and any man may attempt to become an assessor if others are willing to pay him for it. Typically, though, assessorship is passed down through generations, inherited from fathers; a father would train a son to take the title of assessor upon his death. This leads some to wrongly conflate assessorships with something similar to a feudal title; assessorships are not some kind of divine right bestowed upon its holders (Ginat 2007). This inheritance makes sense when reputation is considered. A "good" assessor that trains his son will likely train him well; thus, the son inherits the "brand" of good assessorship from his father.

Common assessorships typically include that of wounds, land disputes, cattle disputes, and petty theft (Kennett 1925). Less common assessorships that would not typically appear in each clan were that of murder, rape, large-scale theft, and bride-prices. Ultimately, the idea of

assessorships is not a hard one to grasp; they are consulted when there is enough evidence for both parties to accept one's fault. Bedouin legal norms become more interesting when evidence is not so straightforward.

5. Arbitration

There is often not undisputable evidence that a party has committed a crime, or is at fault. Assessorships are only useful insofar as they produce recommended fines. Assessors evaluate the extent to which parties are at fault, not whether they are at fault to begin with; this is decided by public opinion and the accused. Arbitration is a method Bedouins use to produce a *verdict*, not merely a fine.

There is always an incentive to resolve any dispute. If an accused party is innocent, they will want to clear their name, and not admit fault. If an accused party is actually guilty, they would be asked to stand before an arbitrator only if there is not enough evidence to directly condemn the accused without any assessorship. The question would naturally arise: why would a guilty party even show up? The answer to this is similar to that of assessors, but even more convincing. Not only would accused parties ruin their reputation, but they are further solidifying their own guilt. If they show up to arbitration, there could at least be a chance that they are exonerated. If they do not show up, they might as well admit guilt and simply cede fault to an assessor.

Further, if two parties do not reconcile, they both lose. It cannot be exaggerated how important securing the commitment of one's neighbors is for mere survival in Bedouin society. If

two clans shun eachother, their division of labor decreases significantly; they are both worse off. The lack of trade impoverishes both sides, and incents both to resolve the conflict. Additionally, each clan must also worry about the threat of violence that the other clan imposes. If each clan derives benefit from trading with the other, both are incented against aggression towards the other. Without the benefit of trade, both are marginally more incented towards violence and theft.

There are no formal punishments in Bedouin legal customs aside from fines. The only time any punishment may be levied beyond a fine is in the case of bloodmoney, when an accused or guilty person may be killed. This is not a punishment levied by any individual person, it is only colloquially accepted when the accused or guilty individual either refuses to show up for arbitration, or refuses to pay a fine. Whether an accuser is justified in slaying the accused is an art, rather than a science; the action is generally only justified for serious crimes, such as murder. For example, if person (x) murdered person (y) and did not show up to the arbitrator's trial, it would be colloquially acceptable for person (y)'s family to strike down person (x) to take retribution. However, if person (x) merely stole a slice of delicious flourless chocolate cake, it would not be colloquially accepted for person (y) to strike down person (x) if they declined to pay a fine or show up for arbitration. There are documented cases wherein clans seek compensation for an unjust killing for bloodmoney; ironically, some of these cases result in retribution murders when the fines levied are not paid (Kennett 1925). However, this does not happen often.

As aforementioned, arbitration is used when evidence is lacking. Many cases revolve around witnesses that provide no credible proof by western society's standards. These cases are decided by what the witnesses offer, yet they frequently give only *third-hand* accounts (Stewart

2005) (Bailey 2009) (Kennett 1925). As an example, first-hand accounts are when a witness observes the accused committing a crime; second-hand accounts are seeing evidence connecting the accused to a crime. Third-hand evidence is when a witness saw neither a condemning act, nor anything directly connecting the accused to the crime. In other words, it is usually hearsay and rumors. It is for this reason that many governments consider Bedouin courts to be fraught with false verdicts, and many scholars mistakenly interpret this the same way (Ginat 2007). However, the witnesses are actually providing valuable information. This is because of the process by which witnesses are introduced.

In Bedouin courts, oaths must be given to introduce witnesses. The number of oaths required is dependent on the severity of the crime. Evidence suggests that the number of oaths for various crimes is consistent, but those numbers are not recorded extensively. Kennett witnessed a Bedouin murder trial in which sixty oaths were required to introduce a witness. At first glance, it is hard to imagine why this practice persists; indeed, many scholars and government officials also neglect this practice as it does not appear to have much meaning. Leeson, however, found a similar phenomenon in ecclesiastical courts of Medieval Europe. He wrote that:

"Oath swearing had limited usefulness. Certain defendants' oaths were unacceptable, such as those of unfree persons, who composed much of the medieval population. Foreigners, persons who perjured themselves, those who had failed in a legal contest, and those with tarnished reputations also had unacceptable oaths. In cases in which oath helping was used, defendants' inability to produce the requisite number of compurgators created a similar problem" (Leeson 2012).

Leeson does not provide an explanation for the oaths he found, only that they were often used as a way to find evidence. Though, Leeson's paper concerned ordeals, and as such he did not explain further the mechanism by which oaths produced actual evidence. Many contemporary explanations of oath-taking phenomena interpret the trusting of oaths as some kind of superstition; that, because of religion, people were merely tricked into believing oaths. This does not seem to be the case. If oaths did not produce actionable evidence, then arbitrators would not solicit them. Further, the oaths must have been more costly than merely saying words. Contemporary interpreters have largely misunderstood oaths because they do not understand that oaths *were indeed* more costly than just saying words. Oaths were putting one's reputation on the line; this paper has already discussed the heavy cost of tarnishing one's reputation in a society wherein all transactions are predicated on one's reputation. By requiring oaths, arbitrators are taking advantage of localized knowledge. In the wake of little to no hard evidence, Bedouins put their reputations on the line to secure a kinsman's innocence.

This process produces *accurate* verdicts, because the process of oath-taking is an entrepreneurial venture wherein oath-takers only profit if their oaths are correct. The standard oath-taker will only swear if they expect the likelihood of their oath being correct to be exceedingly high. Since oath-takers are always kinsman of the party introducing a witness, arbitrators are using the intimate knowledge kinsman have of eachother to determine whether a party is being truthful in their assertions. Therefore, the process of requiring oaths is, in of itself, the "evidence" that is brought forward. The testimony witnesses give are not evidence because they are convincing in of themselves, they are convincing because potentially dozens of individuals staked their reputation on it being true.

A question then arises: what is the point of witnesses at all? Why not merely require oaths regardless of witnesses? For one, it requires oath-takers to remain consistent and, above all, *precise* in what they are swearing. If one were to merely swear to the truthfulness of an accusation or defense, then when their testimony later proves untrue, they could easily claim some form of vague truth in what they personally meant in swearing an oath.

Perhaps more convincingly, it seems that witnesses were more akin to lawyers than witnesses. For one, witnesses were paid; further, they were usually the older and wiser men of each party's clan (Kennett 1925) (Stewart 2005). In introducing a witness to a Bedouin court, one is actually introducing a wise man to argue the case on your behalf. Witnesses' payment is indicative of this, as they are the only person in court (other than the arbitrator) to be *paid* for their time; why not compensate all the oath-takers? It would seem that the witnesses are paid because they provide an actual service.

Last but not least, arbitrators are essentially highly specialized assessors. Assessors usually do not make a living of assessing, whereas arbitrators do. Arbitrators also compete with eachother on the grounds of fairness and accurateness. They are paid by the accusing party, and if the defendant is found guilty, they are required to pay the fine. In order to ensure compliance with verdicts, both parties are required to pay the maximum fine possible before the trial begins; then, the winner of the trial is refunded.

To ensure financial recompense, entire clans are held accountable for fines. Many authors interpret this to mean that Bedouins are a collectivist society, because clans are so often held accountable for individuals' actions. This is a bad explanation, and one that lacks methodological individualism. There is no abstract ideal of collectivism that persuades or pressures Bedouins into thinking of their kin more than themselves; in fact, it is rational to do so. One's clan is one's

brand name; it is the mechanism by which others may assess one's trustworthiness. A well-known clan with a good reputation may give its members more benefits in trading, as any trading partner knows that the other's clan will be held financially responsible in the event that the trade was intentionally or accidentally rigged against him. If a clan is known to not cover debts of its members, then individuals will be more averse to trading with them. It behooves clan members to maintain their brand name by ensuring that debts are paid, even if they individually were not liable for debts. Some authors have tried to describe similar phenomena; Posner posits a few reasons why clans may exist, namely that they provide insurance for all members (Posner 1980). While covering debts is not something Posner explicitly mentions, it stands to reason that clans act as vessels for insurance when individual members cannot cough up the money. Without this insurance, they may be killed by the party owed money, as aforementioned. In sum, clan responsibility ensures verdict enforcement without using centralized force of any kind.

6. Ordeals

When absolutely no evidence is available, Bedouins resort to a ritual wherein the accused must undergo an ordeal to prove his or her innocence. The most common ordeal for the past few centuries has been the *bisha'h*. To undergo the bisha'h, one must lick a spoon which has sat on red hot coals for an indiscernible amount of time. The ordeal is conducted by a *mubasha*, an individual that has a form of magic holiness about him which is inherited by a son upon passing. As mubashas are described in primary sources, they similarly compete with other mubashas just as assessors and arbitrators do (Ginat 2007) (Kennett 1925). The only difference is that a mubasha cannot be a random person. A mubasha must come from a line of mubashas because superstition asserts that only special people can invoke Allah to intercede on behalf of the defendant.

The trial by ordeal begins when the defendant agrees to the accuser's ask. The key to ordeals, just as other Bedouin legal customs, is that it be voluntary. Ordeals are unlike assessments and arbitrations in that there is little at stake upon refusal; since there is never evidence in cases surrounding ordeals, there is never much social pressure nor much threat of being killed. If a case is brought to a mubasha, the only incentive a defendant may have is in marginally clearing one's name and, more importantly, restoring relations with the clan of the accuser.

Once both parties embark upon a visit to the mubasha, they spend an entire day at the mubasha's residence. The mubasha speaks with both parties individually, together, and individually once more. The goal of the mubasha is to broker a settlement before the ritual need be consulted. If no compromise can be reached, then the ordeal begins. While the spoon sits atop the coals, the mubasha prays. Then the spoon is removed, water is splashed on it to emphasize its heat (it will sizzle and steam), and the accused must lick the spoon three times. Then five minutes pass; this is the time in which Allah intervenes on behalf of the accused if they are innocent. If his or her tongue is deemed unscathed after the time is up, they are innocent.

As with most ordeals, this one seems asinine. However, there is already extensive literature explaining how superstitions yield positive results. Leeson explains of European ordeals that they create a separating equilibrium, in which usually only innocent individuals will undergo the ordeal to begin with (Leeson 2012). Holding that all participants truly believe that Allah intervenes, only an innocent individual will have faith that they will come out not only innocent, but also safe. A fire-scorched tongue sounds as bad as it is. This explains why most

ordeals result exoneration; Leeson found that a majority of medieval European ordeals resulted in exoneration. Similarly, Bedouin ordeals have an 80-90% exoneration rate (Ginat 2007).[2]

There are a few fundamental premises to Leeson's argument. The first being that ordeals are voluntary; Bedouin ordeals were certainly that. The second premise being that the administrator of the ordeal has opportunities to rig the ordeal for or against undertakers; this is also true of Bedouin ordeals, as mubashas control how much water cools down the spoons, how long the spoons are off the coals, and how long the spoons touch tongues. A third premise of Leeson's argument is that ordeals be used when there is no evidence. As he wrote:

"Since evidence was absent for crimes involving unobservable acts or states of mind, ordeals were often used to try accusations of magic, idolatry, and heresy. Other crimes unlikely to produce evidence that often used ordeals include incest and adultery"

This final point about evidence is important for Leeson's entire argument because if there truly were any hard evidence, it would be wholly more effective to go off of that. This is because ordeals must be limited in use; if they are used too often, then they may be proven wrong more frequently, which disrupts the separating equilibrium because individuals will lose faith. Bedouin ordeals superficially appear as if they do not follow Leeson's rule of evidence not being present, because it appears that many Bedouin disputes do not have hard evidence, yet not all evidence-less disputes are brought to ordeals. If one considers oaths to be evidence, as the last section explains them to be, then it becomes clear that ordeals are truly only used when there is no

[2] The listed exoneration rate is around 83%; however, unlike Leeson's European ordeals, multiple people may be tried at once in Bedouin ordeals. If one person is found guilty, all of the accused are found guilty, regardless of their tongues. While Ginat includes these guilty verdicts for his 83% figure, I argue that the norm of holding all individuals responsible largely persists because usually clan members are tried together. Since clans are always held financially and reputationally responsible for fines, it makes sense that they would be considered "guilty", but that does not mean they are literally at fault for the crime. If the figure is adjusted for this, the real exoneration rate is around 92%.

evidence. Why? Because Bedouin ordeals are only consulted *when no oaths are taken*. A rule that every mubasha is incredibly strict with, is that if *any* oath is taken whatsoever, there cannot be any ordeal (Ginat 2007) (Kennett 1925). Oaths are considered to be mutually exclusive with Bedouin ordeals. This only makes sense if one considers oaths as evidence; with this point in mind, Leeson's premises succeed in explaining Bedouin ordeals' accuracy.

7. Conclusion

There are a few points that this paper tries to make apparent. Firstly, that criminal behavior can be aptly dealt with regardless of whether a government is present enforce court attendance and verdict enforcement. Both of these are enforced via private mechanisms in Bedouin culture. Secondly, that clan responsibility is individually incentivized, and not the result of abstract collectivist ideals. Thirdly, that oaths are evidence when the reputations of oath-takers are meaningful and at stake. Lastly, that Bedouin ordeals fit Leeson's framework for ordeals, thus proving that Bedouins' employment of trial by ordeals is an accurate method of assessing guilt and innocence.

Ultimately, this paper contributes to literature surrounding private governance, superstition, and cultural norms. This paper gives a living example of a society that lives safely and peacefully without government courts. David Friedman notably wrote about a similar Icelandic society, but his example only existed for three-hundred years and ended eight-hundred years ago (Friedman 1979). Bedouins continue these practices today, and have persisted in them for hundreds of years. They are an amazing example of the organization markets can achieve without any centralized authority. Though they are often considered backwards and uncivilized, they live in order and trust.

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