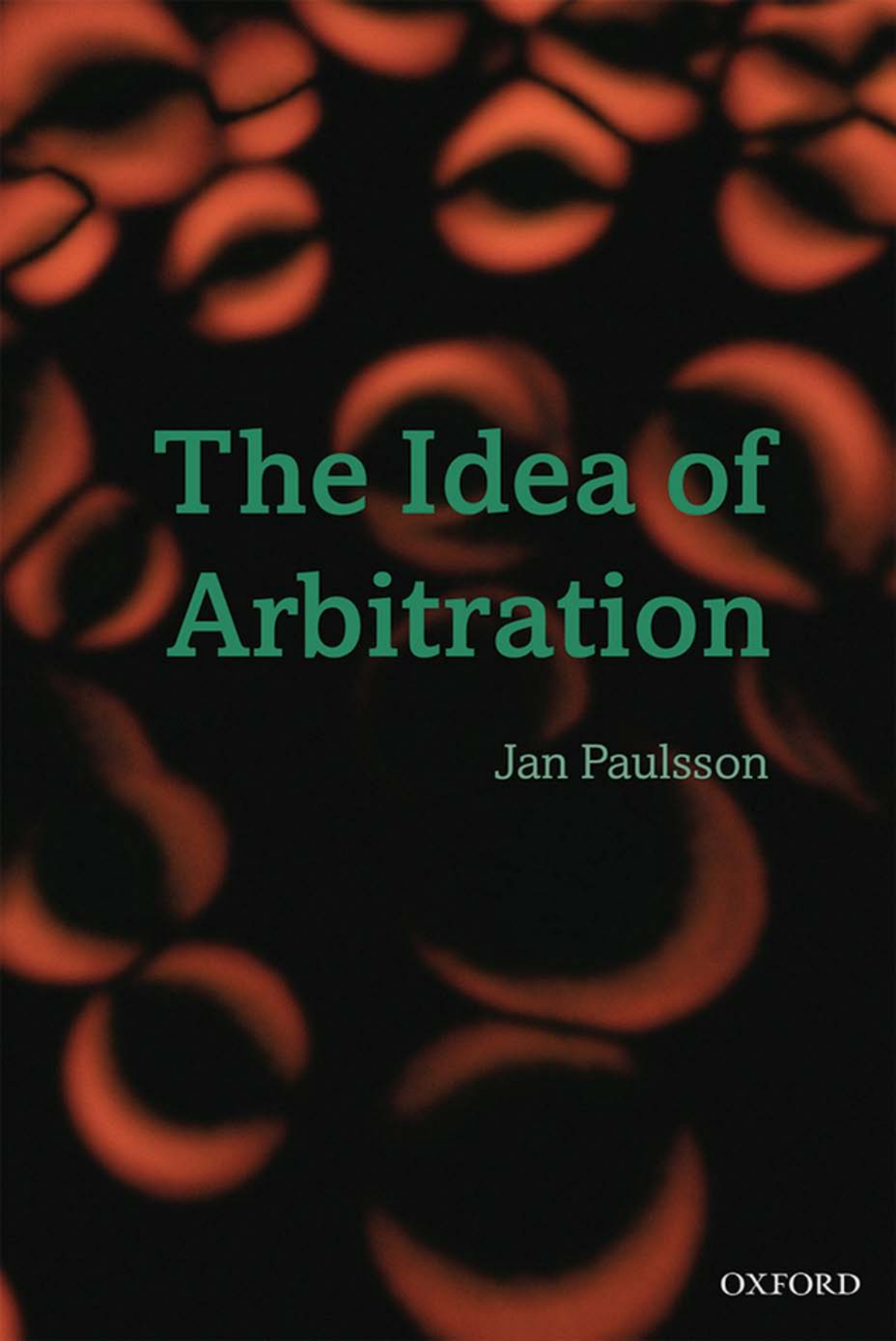
The Idea of Arbitration
Jan Paulsson
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UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2013

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013943834

ISBN 978–0–19–956416–3 (hbk.)
ISBN 978–0–19–956417–0 (pbk.)

Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

For Manne and Mia and for other gentle souls who accept that
those who disagree with them may turn out to be right,
and who are therefore never in the wrong.

Foreword

This book is not about the practice of arbitration. It will have little to say about arbitral procedures, whether national or international. It is not a manual for effective advocacy or case management, nor a reference book of any kind.

Instead, its aim is foundational. How is arbitration meant to function in society? What makes us want to confide in an arbitrator? What do we expect of the arbitrator? May our rulers legitimately place limits on our agreement to arbitrate, or on its consequences? May third parties put a spanner in the works? When arbitrators have been chosen, may their conduct or decisions be questioned? To what extent? By whom? Under what authority? How may the arbitral process be designed to achieve legitimacy? What future does arbitration have in our changing and interpenetrating societies?

It is odd that in this field the English language library is so barren. To compare with the Pantheon of French scholars alone, there is no Motulsky or David, no Goldman or Oppetit. Practitioners, as professionals in an expanding field, conduct themselves with ever greater forensic skill. But what is the nature of their activity, and how should its social value be appraised? To answer these questions, we need more than commentary on cases and legislation, or instruction in the skills of lawyers and arbitrators.

No unifying theory will be presented here. There is, however, a premise: that the arbitral process has proven itself to be a valuable social institution—in many although not all places, for many but not all purposes. Whether this remains true will depend on how it responds to the variety of challenges described in these pages—matters of both legitimacy and effectiveness.

There is also a methodological premise: that even readers who are new to arbitration deserve more than superficial generalities, and are prepared to think things through. If they are then stimulated to refine, adapt, or correct the propositions advanced in this book, it will have served its purpose.

Durrat, Bahrain, July 2013

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List of Abbreviations

AJIL	American Journal of International Law
Arb. Int.	Arbitration International
Arbitration	The Journal of the Chartered Institute of Arbitrators
ASIL	American Society of International Law
ATF	*Arrêts du Tribunal fédéral* (Swiss Supreme Court reports)
CAS	Court of Arbitration for Sport (Lausanne)
CJEU	Court of Justice of the European Union
EU	European Union
ICC	International Chamber of Commerce (Paris)
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes (Washington)
ICSID Review	ICSID Review, Foreign Investment Law Journal
JDI	*Journal du droit international*
Model Law	The UNCITRAL Model Law on International Commercial Arbitration
New York Convention	United Nations Convention for the Enforcement of Foreign Arbitral Awards (1958)
PCIJ	Permanent Court of International Justice
Recueil des Cours	Lectures of the Hague Academy of International Law
Rev. arb.	*Revue de l'arbitrage*
UNCITRAL	United Nationals Commission for International Trade Law

Note on Previous Work

A number of passages in the book have been adapted from lectures or contributions to collections published elsewhere. Apart from those referenced in the text, they include, preceded by indications of the relevant sections of the book in which they appear:

Sections 2.6 and 6.4: 'Arbitration in Three Dimensions', 60 *International and Comparative Law Quarterly* 291 (2011), Inaugural Lecture as Centennial Professor at the London School of Economics, November 2009.

Section 3.2: 'Jurisdiction and Admissibility' in G. Aksen, K.-H. Bockstiegel, P.M. Patocchi, and A.M. Whitesell, eds., *Global Reflections on International Law, Commerce and Dispute Resolution* 601 (Liber Amicorum for Robert Briner, ICC Publishing, 2005).

Section 4.6: 'Thinking Simply about Public Policy' in Y. Derains and L. Levy, eds., *Liber Amicorum Serge Lazareff* 280 (Editions Pedone, 2011).

Sections 4.5 and 6.1: 'International Arbitration is not Arbitration', 2 *Stockholm International Arbitration Review* 1 (2008), Brierly Lecture, McGill University, Montreal, May 2008.

Section 9.2: 'Why Good Arbitration Cannot Compensate for Bad Courts', 4 *Journal of International Arbitration* (2013), Freshfields, University of Hong Kong Lecture, Hong Kong, April 2013.

Section 9.3: 'Universal Arbitration—What We Gain, What We Lose', 79 *Arbitration* 184 (2013), Alexander Lecture, London, November 2012.

Section 9.6: 'Scholarship as Law' in M.H. Arsanjani, J.K. Cogan, R.D. Sloane, and S. Wiessner, *Looking Into The Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff, 2010).

1

The Impulse to Arbitrate

1.1 Fundamental Speculations

The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers.

It is difficult for courts to achieve this kind of acceptance; public justice tends to be distant and impersonal. Arbitration is a private initiative. It does not ask that ordinary citizens struggle with Rousseau or Locke or other philosophers' abstractions of a general 'social contract', lacking any mooring in time and space, which might otherwise be enlisted to justify law's dominion. The ideal of arbitration is freedom reconciled with law.

Acceptance of arbitration is a distinctive feature of free societies. It is rejected by totalitarian states. It is viewed with scepticism by enthusiasts of central planning. An elite group of experts may well overwhelm us with explanations of what policies best correspond to our properly understood needs. A majority of citizens may well insist that their representatives have a mandate to impose political programmes. The judicial machinery of an institutionally mature state may be the most reliable regulator of behaviour intended to conform to a rational determination of aggregate needs and legitimate political choices. Yet ultimately most of us find it demeaning to be told what we need; we have good reason, looking at history, to fear abuse by majorities, and we prefer to face judges as seldom as possible.

These disinclinations seem likely to intensify apace with the evolving complexity of modern societies, for reasons that go beyond commonplace dissatisfaction with the heaviness and lack of specialist knowledge of public authorities. Such attitudes are especially prevalent where smaller groups find it difficult to identify with a majority, or to adhere to the authority of distant experts and bureaucrats.

The very word 'arbitrament', although also having the meanings of (i) the power to decide for others and (ii) the decision of an arbitrator, has a primary sense of (iii) the right or capacity to decide for oneself, as in Milton's words: 'To stand or fall/Free in thine own/Arbitrament it lies.' In French, the noun *arbitre* means not only 'arbitrator' from the Latin root *arbiter*, but also 'free will' from the Latin root *arbitrium*. In modern usage, complete freedom is to act in accordance with one's *libre arbitre*.

We never attain this objective. Standing in our way is the eternal paradox of human attempts to live in community. We want freedom—and we want law.

As with many paradoxes, its mystery fades away if we restate it. In this case, the restatement could be: 'I want freedom for me, and law for the others.' As any child must learn, that reformulation will not work. We assuredly do not want all individuals to be little sovereigns. We are willing to give up some of our freedom. Indeed we insist on a bargain: we accept that criminal laws apply to us so that we can be protected by those same laws; we accept that we have to pay for the consequences of our reckless behaviour so that we can live in greater tranquility because that rule has the consequence that our fellow citizens will tend to behave prudently; and we accept that we are held to a bad bargain because if our contracts are not binding we will be stuck in the poverty of a primitive economic system where every transaction is instant—cash and carry—and wealth cannot be created by shared enterprise, by investment in reliance upon long-term commitments, or by the use of capital from willing lenders.

So we accept what we call 'the rule of law'. Yet there is much hesitation in that acceptance. Our attachment to the law varies as we see, or do not see, our reflection in it. We do not cherish the law of the warlord, nor that of the bureaucrat. We want the rule of law, not rule by law.

We also want *our* law, and thus is born the idea of arbitration. It is about liberty, not only efficiency. Totalitarian states have nothing against efficiency, yet are averse to consensual arbitration. What they dislike are individualized solutions, out of step with the regimented project.

The argument for arbitration begins with respect for private arrangements. Free people do not always act wisely and efficiently, and efficiency may be achieved in many ways other than opting for arbitration. Prohibiting lawyers in the courtroom may come to mind, or why not go the whole way and flip coins? The arbitral process would be transformed (and rejected) if it were kept under review by commissars requiring it to meet whatever might be their notions of efficiency.

So arbitration is a matter of political philosophy, not social engineering. The philosophical premise is that people are free to arrange their private affairs as they see fit, provided that they do not offend public policy or mandatory law. Of course that proviso may carry much weight; the exceptions may be formidable. One test of the degree of liberty in any society is therefore this: does individual freedom exist on the margins of mandatory law, or the other way around?

The restrictions on arbitration are not only those intended to prevent the parties from harming the public interest, but also those which purport to save the parties from themselves. Yet it is precisely a matter of public policy in free societies—occasional doubts notwithstanding—that citizens should not be herded about by anti-foolishness guardians. This is not the same thing as saying: 'you are free to deal with a fraudster, so do not complain afterward.' As we shall see in Chapter 4, there are limits to what may be arbitrated, and restraints on the means of obtaining consent, notably from parties in an inferior bargaining position.

To illustrate: we expect that no binding effect will be given to a purported agreement among the members of a cartel that their illegal price-fixing scheme be controllable only by a complicit arbitrator and not a court; but we fail to see why a party should not be free to agree to a sales contract that contains an arbitration

clause with one buyer, but refuse the same clause when selling the identical thing to another; or to agree to arbitration of Articles 1 to 10 of a contract, but not Articles 11 to 20; or to agree to arbitration provided that a prior expert determination be carried out with contractually binding consequences.

It is hardly surprising that we recoil from law when we see it as the projection of faceless officials who wish to control our lives in accordance with their vision of general order, without regard to the measured justice commanded by individual situations. It is hardly surprising that our ancestors recoiled from law when they saw it as the projection of conquerors who wanted to be our masters and saw the imposition of their law—whether they bluntly called it 'the King's law', or, more insidiously, that of 'the people'—as the brilliant prize of a power play.

Those who impose the law arrogate to themselves the power to decide what degree of individual injustice is acceptable in the supposed collective interest. Those in power need not have read Machiavelli to conceive the idea that even arbitrary decisiveness in individual cases may contribute to general tranquility. Those subjected to power, on the other hand, are dissatisfied with law as a mere instrument of order. And so we yearn for law embraced by its subjects: the dream of voluntary submission to decision-makers chosen to correspond to our own idea of justice, the antithesis of technique or craft or machinal predictability, the rejection of a system in which the professional intermediary is lord.

The reader might acquiesce so far, yet ask whether an *idea of arbitration* can plausibly be pursued given the modern reality that arbitration means very different things to different people. What common ground is there when one compares arbitration between two states, on the one hand, with, on the other, arbitration opposing a consumer and his giant private health insurer? Between a modest employment dispute debated informally over half a day and a billion-dollar case about energy prices, taking place over many months and occupying the attention of large teams of lawyers and experts? Or more generally between domestic and international arbitration? Is it not true that someone well experienced in one type of arbitration might be helplessly lost in another? That someone who credibly endorses the legitimacy of arbitration in one environment may have no warrant to defend the process as it is practised elsewhere—and that, by a parity of reasoning, a convincing critique of one type of arbitration may be irrelevant to another?

These questions should inhibit generalizations. Specialists in particular types of arbitration may be too quick to extrapolate. The idea of arbitration is made more diffuse by the complexities of modern life. We are unlikely to recapture the perfect laboratory of an ancient village, a tiny population perpetuating the attitudes, beliefs, and expectations of endless generations, most of them performing unspecialized tasks, travelling nowhere beyond a day's march, and knowing very little of the outside world. They could, more naturally than we, identify, address, and obey the arbitrator. Our world has multiplied the interactions of people having only an instrumental interest in each other, but no sense of living in the same community and therefore no profound impulse to earn and maintain the esteem of the other, no common store of trust, and no reason to be concerned that the other's opinions will resound back home. It is obvious that the idea of arbitration

is ever more transformed as we distance ourselves from the isolation of the simple ancestral environment where we might imagine it took root. The question for us is whether any common organizing principles remain to be rescued.

Similar doubts may be raised with regard to other areas of the law which have been transformed since their simpler origins. For example, consider the profusion of transactions which we still characterize as 'contracts'. A contract is created when a passenger purchases a train ticket, when a homeowner is connected to the municipal water supply, or when consumers swipe their credit cards and leave the store with the goods. An agreement to repair a residential roof is a contract, and so were the collateralized debt obligations which resulted in billions of dollars of losses to supposed sophisticated financial institutions and precipitated the worldwide crisis of 2008. One 200-page contract may be the subject of painstaking negotiations (a joint venture agreement between large multinational corporations) while another is a packet of forms and annexes signed after a discussion about little else than the price (a residential condominium sale). Yet there is common ground to be usefully explored, and what is true for contracts generally is also true for the contract to arbitrate.

This opening chapter speculates about the past; the final chapter of the book squints at the future. In between is an attempt to look carefully at the present. Chapter 2 explores the specifically legal (as opposed to philosophical or political) foundations of arbitration. Chapter 3 considers what happens when private parties challenge the arbitral process; Chapter 4 introduces the limitations of public policy. Chapters 6–8 deal with difficulties in the international sphere where arbitration has a special and expanding role to play in the absence of anything like a unified global political system. And lest it be thought that this work is an uncritical apologia for arbitration, it should perhaps be acknowledged immediately that the *practice* of arbitration has left so much to be desired that it too, no less than our imperfect courts, has its share of harsh critics. Chapter 5 is entirely devoted to the shortcomings of arbitration. In any event, the last section of this introductory chapter concedes that the nobler objective is, in principle, good courts.

1.2 The Arbitrator as Archetype

At the origin of origins, we might contemplate the arbitrator as an archetype. Encountering this expression, even strangers to analytical psychology think of Jung, who also gave us the words *extrovert* and *introvert*, used every day by people who have never heard of the collective unconscious.[1]

The ideas in our heads, so Jung came to believe, are no more our creations than are the people we see in the street. Just as we have instincts that determine

[1] Jung himself, at least in the early years following his estrangement from Freud and psychoanalysis, was undogmatic, ready to accept methods not invented by himself, as well as insights or speculations contributed by amateurs, and unlikely to be offended by the use of basic elements of Jungian thought to assemble a convenient metaphor.

our actions—like the pigeon's homing instinct, or the tiny oyster's urge to attach itself to a rock—so we have inherited ways that condition our perceptions and motivations. To structure his observations and inferences, Jung posited his famous archetypes as determinants of all things psychic.[2]

Like instincts, archetypes are collective because they are innate, universal, and depersonalized. They strike our mind's eye in the form of imperfect images, sometimes revealing, sometimes concealing. What emerges from the unconscious—image or idea, illusion or dream—reflects a psychic reality.

Even those with little appetite for such areas of inquiry[3] might find it a useful mental exercise to suppose that an arbitrator archetype affects our perception and reactions when we face a dispute.[4]

Jung's images of archetypes were those that presented themselves in the light of his own life experience; we may have ours, and are therefore not limited by his familiar cast. For example, Jung's Wise Old Man is unlikely to satisfy us due to one of the characteristics Jung assigned to him, namely *cleverness*, and due to Jung's own suggestion that the Wise Old Man was incarnated in popular imagination by the figure of Merlin, the Wizard of the Arthurian legends. Eccentricity and mischievousness are unlikely characteristics of the arbitrator archetype; perhaps least of all Merlin's aspect of otherness. We wish to be judged by someone wise and familiar, perhaps an idealized version of ourselves—not someone clever and strange.

[2] To be precise, Jung more modestly claimed only to propose archetypal *images*, since the archetype itself, being no more than a postulated element of our unconscious, could only be inferred; the best we can do *consciously* is to struggle to conjure up its image, using our experience and perception as far as they take us. This is not a trivial distinction, because it frees any of us to posit alternative archetypes—according to our own mental patterns or inspirations, and more or less likely to strike others as insightful. But let us simply say 'archetype' for short.

[3] Observe, however, that a trace of this thought can be found in the writings of as disciplined a legal scholar as Henri Motulsky, who suggested that the ancient traditions and stubborn survival of arbitration prove that 'private justice is perceived by the collective consciousness as a need', II *Ecrits* 14 (Dalloz, 1974).

[4] The discussion to follow may to some seem outdated—intuitive affirmations of the type not permitted since mid-twentieth century. Premises and methodologies have been transformed almost beyond recognition in some modern scholarship. See Owen D. Jones and Timothy Goldsmith, 'Laws and Behavioral Biology', 105 *Colum L Rev* 415 (2005). The authors, one a dual professor of law and biological sciences at Vanderbilt; the other a Yale emeritus professor of molecular, cellular, and developmental biology, begin with the premise that 'human behavior is the very currency in which law deals' and the observation that 'the process by which law informs itself about the cases of human behavior (as distinct from the effects and patterns of human behavior) is haphazard, idiosyncratic, and unsystematic'; their claim is that 'modern biology makes forcefully clear that the brain's design, function, and behavioural output are all products of gene-environmental interactions that have been shaped through time by various evolutionary and developmental processes' and that any behavioural model proposed as a tool for the strategy of law is 'probably inaccurate' if inconsistent with fundamental principles of developmental biology.

Not all scientists, it must be said, are impressed:

> Anthropologists, artists, biologists, philosophers, assorted gurus and prophets are guaranteed a respectful hearing for asserting… that we are the playthings of genetic programmes which may have adapted us to Stone Age life but not to human life as it is today.

Raymond Tallis, 'Against Dr Banglum' (review of Kenan Malik's *Man, Beast and Zombie*) in *Prospect* (February 2001).

Even the most appealing archetypes, in the Jungian perceptions, have two sides. Thus Mother, with her abundance and security, may overnourish us to the point of destroying our autonomy. And we may conversely greet even the dangerous Trickster with delight when we perceive him as being on our side. Just so, we may intuit that the arbitrator archetype may turn on us, and present a face of arrogance and indifference, or other poisonous fruits of omnipotence.

If there is an arbitral archetype, how did he find his place in our unconscious? Perhaps through the adaptive process of natural selection.[5] For in our ancestral environment, having a dispute was likely perilous, perhaps likely to get one killed, and leaving one's offspring vulnerable. Those who were drawn into the protective proximity of someone having the personal authority to impose peace would enhance their chances of survival, and that of their offspring. Our ancestors were by definition part of the stream of successfully adapting generations—after all, our very existence so suggests—and thus our neural heritage might include an attraction to something we could call an archetype.

In prehistoric times, one imagines, arguments would have been of a rudimentary legal nature; there was no legislature, no texts to be manipulated by crafty orators, only simple rules derived from communal practice, often strange to the outsider, transmitted from generation to generation as if by osmosis, and above all simple enough to enable anyone to argue his case. But arguments referring to proper conduct were unlikely to feature significantly because communal rules were so inflexible in their simplicity that their violation would be obvious. Palavers tended to be factual: had there been an unfulfilled promise? theft? a trespass? an insult? an interference with family life? the use of sorcery to harm, or to obtain some advantages? In seeking to establish or resist such conclusions, any device that might influence opinion might be used: cajolery, appeals to emotion or consanguinity, the pointed finger of shame—all destined to be decisive, depending on whether the disputant accurately sensed the dominant community feeling.

Safety can be imposed by force. But might does not make right; for that we need adjudication accepted by the belligerents as legitimate. In the world of the village, violence may well be directed, on occasion, against a foreign tribe, but very rarely inwards. Few but the deranged would even think it possible to act otherwise than to abide by the consensus reached in the palaver hut.

As society becomes more complex, and as individuals feel more secure in their rights, another motivation joins that of the urgent need for peace: aspirations to affect this process in some way, not just to be its object. Naturally other desiderata also appear as our environment changes. For example, the anonymous and usually fictitious public in a modern trial has little resemblance to the fully engaged public

[5] 'The honing of a heritable physical or behavioral feature through natural selection that produces increasing complexity and "fit" between the organism and its environment is called adaptation', Jones and Goldsmith, n. 4. Applying this postulate to the fundaments of law, two lawyers and a psychologist have provided what they see as a possible explanation for widely shared 'intuitions of justice' as a matter of 'evolved predisposition . . . arising from the advantages they provided', Paul H. Robinson, Robert Kurzban, Owen D. Jones, 'The Origins of Shared Intuitions of Justice', 60 *Vanderbilt L. Rev.* 1633 (2007).

in the palaver hut, and so the important idea is conceived of resolving differences away from the eyes of intrusive strangers. The vision of serene closure, without loss of dignity, is at the heart of the idea of arbitration. The modern world can hardly replicate the idealized palaver hut, but the simple aspirations remain even as we build more intricate institutions.

1.3 Arbitral Virtues

What exactly are the attributes of the arbitrator as archetype? It does not greatly assist us to speak of science, wisdom, and probity, for those characteristics, while of great importance, are generally prized in many types of public offices and private professions. More to the point, these qualities are precisely those desired in judges. So we need to perceive salient distinguishing factors.

This is not new territory. Distinctions between styles and cultures of decision-making have been much studied. The ideological premises of the organization of judicial authority, whether implicit or explicit, inevitably resonate in approaches to decision-making. In communities where the government sees its role as the realization of a social programme demanding discipline and conformity, court judgments are occasions to implement collective policies. In contrast, where the government perceives itself principally as the custodian of a pacific environment, permitting a wide range of individual strategies for self-fulfilment and community participation, judgments serve to resolve individual conflicts without forcing them onto a Procrustean bed of predetermined policy. This bipolar vision of the institutionalization of authority, while in reality seldom reaching either extreme undiluted, assists in the observation of judicial practice. The comparatist Mirjan Damaška, for example, concluded his study of *The Faces of Justice and State Authority* by positing that 'the policy-implementing mode is partial to inquest, while its antipode is similarly biased in favor of contest forms'.[6]

If this dialectic is to be found within the judicial apparatus itself, it is hardly surprising that it presents itself more acutely when one compares courts to arbitration. Arbitration is the quintessence of bespoke justice. Damaška captures a number of striking insights in this pithy description of officials of the judiciary who provide the contrast to arbitrators:

> Long terms of office create the space for routinisation and specialisation of tasks. Routinisation of activity implies that issues that come before the official are no longer apprehended as presenting a unique constellation of circumstances calling for 'individualised justice.' Choices are also narrowed: while there may be many ways to go about solving a problem, only one emerges as habitual. A considerable degree of emotional disengagement also becomes possible. Specialisation implies, of course, that only certain factors—those within a narrow realm—play a part in decision making. As a consequence of habitualisation and specialisation, a professional's official and personal reactions part company: he acquires

[6] 11 (Yale University Press, 1986).

the capacity of anesthetising his heart, if necessary, and of making decisions in his official capacity that he might never make as an individual.[7]

The propositions already advanced in this introductory chapter suggest an overarching promise: the arbitral archetype is expected to respect the *individuality* of the arbitrants and of their case. If so, what are the manifestations of this general perception? Experience suggests that the following idealized features may contribute to the overall effect of individualization.

Commitment. The parties desire an arbitrator who is personally and deeply engaged in the task at hand: resolving a dispute and forestalling contagious disharmony. In this commitment lies a promise to the arbitrants; they can trust the arbitrator to get to the bottom of the thing, to identify and to consider all the reasons, even idiosyncratic, why one feels the other is in the wrong; and in so doing, even when pronouncing an unfavourable decision, to have the moral assurance to look the loser steadily in the eye.

Capability. The arbitrator's word will carry weight only if it is based on an understanding of the debate. This is not a great problem in the ancestral village, where life and experience fall into shared and enduring patterns. To the contrary, it is a matter of fundamental concern for us moderns, unlikely to be pacified when an unfavourable award evinces ignorance of the environment, professional standards, and expectations of the parties, be it those, say, of the reinsurance industry or anti-doping regulations in sports. The untutored arbitrator, unable even to ask the right questions or to see what is crucially missing at the heart of a superficially impressive presentation, lacks the essential authority of the archetype.

Concern for the arbitrants, involving a mixture not unlike the skills and attitudes of good parents. Unlike Damaška's judge, the archetype does not 'anesthetise his heart'. Ultimately his interest in the arbitrants is personal and benign. This attentiveness might express itself in many ways, depending on the arbitrator's personality. The very premise at the core of the process is that the archetype is approached as an individual, reacts as such, and may therefore appear, in one guise, as approachable and encouraging, or, in another, as distant and authoritarian. An ultimately benevolent interest is not inconsistent with severity when faced with mischief. This is sometimes forgotten by the authors of 'hail fellow, well met' awards that reflect an excess of tolerance and a lack of rigour. The archetype's authority will erode if he cannot spot imprudence or impudence for what they are. Indeed, mature people are perfectly capable of accepting that they lost their case due to their own mistake—as long as the matter has been examined with thoroughness and fairness. The next time it may be their turn to rely on just but exacting standards.

Attentiveness to consequences. This is a matter of inherent difficulty. Arbitrators on occasion profess that they decide every case as though it is their last one—i.e. without glances over their shoulders—but this is not always either realistic or appropriate. The archetype's authority is valuable to the community, and in particular to future disputants. The community perceives the archetype as such;

[7] Damaška, n. 6, 19.

and the archetype arbitrator perceives the community as it observes him or her. Observation affects comportment. This creates a tension with the ideal of an individualized approach to the dispute. How could it be otherwise? Last but not least, concern for consequences includes a strong sense of the proportionality of the costs of the process, be they emotional or material.

Condignity. The reason for using this archaic word[8] is to avoid any of three obvious words—just, fair, equitable—which are worn so thin that the mind slides over them without thought, and yet so heavily laden that they provoke endless routine qualifications. The Latin root is *dignus* ('worthy'); a *condign* award or punishment is one that is merited or deserved—not the product of the decision-maker's mood, favour, or generosity, but of a just perception of the appropriate consequences of the parties' conduct. In scholastic theology, *condignity* is, quite congruently with this discussion, the kind of grace that is earned by works as opposed to what is freely given. We can see much in this single word. It excludes arbitrariness, yet does not presume oracular powers with respect to legal principles. Decision-makers focused on condignity would never complain that 'hard cases made bad law', for they are not conscious of 'making' any law at all. This approach is an essential feature of the individualization of disputes. It is inevitably subjective. The archetype is approached with confidence in his or her pre-existing sense of the condign, as demonstrated in prior conduct. Virtue, Aristotle stressed, is not a gift, but the fruit of devoted comportment.[9]

These imagined attributes are broadly speaking positive. But anyone prepared to borrow Jung's term must also consider one of its invariable components: the dark side of the archetype. The reader may recall an earlier allusion to the poisonous fruit of omnipotence. Persons perceived as possessing these fine attributes may be given great authority, and yet in time develop dangerous intimations of infallibility, an inflexible conviction that their ways of doing and seeing things are uniquely superior. A pejorative word is sometimes whispered among advocates who frequently appear in arbitrations in London, where distinguished jurists often step down from the bench to assume arbitral functions. The irreverent word is *judgeitis*. It reflects a serious concern; is the great man but fledgling arbitrator able to adapt to a new ethos of the problem-perceiving and decision-making function?

The idea of arbitration is above all at a great remove from some features of the imagined 'judicial temperament', such as an impersonal attitude and an indifference to the parties. As we shall see in Section 1.5, however, the virtues sought in an arbitrator are in fact also prized in a judge; the undeniable differences in attitude seem to be an occupational hazard—more likely the consequence of context and function than of a different view of justice.

[8] Employed in Shakespeare's sense: '*Moth:* Speak you this in my praise? *Armando*: In thy condign praise', *Love's Labour's Lost*, Act I, Scene ii. This exchange is between the bombastic Don Armando and his rapier-tongued page, little Moth. Don Armando has just described one of Moth's comments as 'apt', and explains that it was apt because it was quick, leading to the question and answer quoted above. Moth naturally does not let the answer lie. '*Moth:* I will praise an eel with the same praise.'

[9] *Nicomachean Ethics*, Book II, para. 4.

1.4 Dubious Historical Parallels

It is natural for the promoters of any institution to invoke historical lineage, suggesting that their approach echoes the wisdom of the ages. Proponents of arbitration also burnish its image by invoking supposed traditions of a distant past.

We are thus made to observe that in the pre-imperial centuries of millennial Rome, the function of the 'good man', the *bonus vir*, who would accept the mandate of resolving disputes, was recognized as one of the natural activities of useful citizens. Arbitrants[10] nominated arbitrators and were expected to define by agreement the penalty for non-performance of the award. In this early Roman period, there were no fewer than eight types of arbitrator.[11] As for Athens, upon retirement from military service at the age of 60, citizens were at one point in ancient times eligible for appointment as arbitrator, and identified as such on public lists which have survived.[12]

Lest it be thought that the enlisting of Greek and Roman antecedents masks a motive of imposing a Western canon, we are also directed to accounts of practices of vastly different civilizations, from Mesopotamia[13] and ancient China to more recent experiences in Muslim lands.

These references, standard fare in the opening pages of books about arbitration, have more than a whiff of propaganda about them. Selective quotations and anecdotes, or more or less inspired extrapolations, are unlikely to pass muster with serious historians; nor are they likely to give us solid ground for modern construction.

In the spirit of healthy scepticism, let us consider the doubts one might have about familiar references to just one of these alleged historical traditions. We shall see that modern arbitration cannot persuasively claim a lineage in classical Islamic law. This example should make us wary of others as well.

Time and again, those who wish to reveal the fundamental roots of arbitration in Islamic law refer us to the source of sources: the Koran itself. The celebrated lines are those of the 35th *ayat* (verse) of the Fourth *Sura an Nissa*, the *sura* on women, which recommends that in case of marital discord two persons, one from each family, should be appointed as *hakam*. This noun is translated into English as 'arbitrators' by those searching for exalted lineage, and herein may lie the seed of much unfortunate misunderstanding.

The context is immediately perplexing. The *ayat* is not part of a discussion of civil procedure; it appears in a recitation of recommendations for the behaviour and treatment of women; it has no specific relation to the verses that precede or follow it. More importantly, how is one to understand the choice of *two hakam*, one from each family? This does not seem to be an adversarial adjudication at all,

[10] This useful word (replacing the phrase 'parties to an arbitration') is not a neologism. *The Arbitrants* is the title usually given in English to Menander's comedy *Epitrepontes*, first performed in Athens c.300 BC. Not every arbitrant, of course, will in the end be a celebrant.

[11] Bruno de Loynes de Fumichon and Michel Humbert, 'L'arbitrage à Rome', 2003 *Rev. arb.* 285 ss.

[12] Derek Roebuck and Bruno de Loynes de Fumichon, *Roman Arbitration* (Holo Books, 2004).

[13] Sophie Lafont, 'L'arbitrage en Mésopotamie', 2000 *Rev. arb.* 557.

but rather negotiation conducted by two persons charged with representing conflicting interests. In other words, the mandate is not to make a binding decision but rather to resolve a conflict by diplomacy.

A consultation of available translations of the *ayat* confirms the complexities of Arabic—and compel the conclusion that this Koranic reference simply cannot be an endorsement of what we know today as arbitration. Some translators speak of two 'judges' appointed to seek 'agreement'; others propose 'arbitrators' seeking 'reconciliation'. An ambitious Compendium of Muslim Texts developed at the initiative of the Muslim Students Association of the University of Southern California proposes English versions translated by three different scholars; they render three distinct texts of the *ayat*: (i) 'arbiters' seeking 'peace', (ii) 'arbiters' seeking 'amendment',[14] and (iii) 'judges' seeking 'agreement'.

One suspects that the original language did not intend to make the distinctions between judges and arbitrators we observe today. It is plain that the result of the process—reconciliation, agreement, amendment, or peace—would be the product of consensus, or would not be at all. This suggests the possibility of very serious misapprehensions. If in times gone by a Westerner found himself presenting arguments to Muslims acting as arbitrators according to their conception, there was, one fears, a significant possibility that the Westerner's idea of the process was simply alien to those before whom he was appearing. If their essential conception of their task was to seek consensus, and their definition of their own office was that of agents of reconciliation, they might find it not only permissible but indispensable to determine what one party could live with—perhaps even by a confidential conversation with one side for the purposes of exploring possible concessions. The Westerner might be appalled at what he would consider to be improper behaviour. Even greater strains could develop within an arbitral tribunal, if it had a mixed composition. A Muslim arbitrator might think of himself as virtuous and diligent in determining what might be acceptable to his party, while a Westerner would lose faith in a colleague behaving in that fashion.[15] Thus prejudices develop; inaccurate notions of historical traditions have obvious potential for fomenting suspicion and rejection.

There is, as one would expect, a vast literature. Particularly useful are multidimensional authors who know the historical sources, understand the language, have a significant personal experience of arbitration, and are well familiar with modern legislation and practice in both Muslim and non-Muslim countries. Such credentials underlie Ali Mezghani's concise but important study, '*L'arbitrage en droit musulman*',[16] a welcome antidote to facile comparisons and suppositions. Whether the substance of his article is accurate or judicious is ultimately something a non-Arabist cannot evaluate with authority. What matters is that it is a

[14] The unexpected word 'amendment' is in fact also employed by other translators.

[15] One thinks of the rancour generated by the infamous *Buraimi Oasis* arbitration in the 1950s between the governments of Saudi Arabia and the United Kingdom, documented in J. Gillis Wetter, *The International Arbitral Process*, Vol. III, 357 (Oceana Publications, 1979).

[16] 2008 *Rev. arb.* 211.

painstaking analysis based on an identified and important body of sources, and is therefore a plausible representation of the relevant history of concepts. In the case of the 35th *ayat*, he confirms that one cannot conclude that it relates to arbitration; in his view it envisaged conciliators.[17] He notes that this very *ayat* is echoed in a seldom invoked provision of Tunisian family law, itself rather unsatisfactory in its terminology since it calls upon judges to name 'two arbitrators' to 'reconcile' disputing spouses. This article, directly derived from the Koranic prescription, could not possibly—irrespective of terminology—have referred to arbitration, since matters of personal status are explicitly non-arbitratrable under Tunisian law.

Mezghani goes on to observe that the secondary source of Muslim law, the Tradition of the Prophet, imposed on the faithful the obligation to accept the Prophet as '*hakam*' in the sense of '*judge*'. This, he says, is possibly due to the semantic structures of Arabic, where the root *hkm* (as he transliterates) is found in *takhim* (arbitration) and *muhakam* (arbitrator) but also in *hâkim* (judge, governor) and *hokm* (judgment, power).

In the early life of modern Arab states, hostility to arbitration as they regained independence was not, however, so much a reflection of Muslim values as that of a dual preoccupation of nation-building governments: to establish the authority of embryonic formal institutions internally, and to resist perceived foreign encroachments on sovereignty. The modern acceptance of arbitration in the Arab world is thus, in Mezghani's view, due more to increased confidence in successful nation-building than to a resurgence of forgotten traditions. For that matter, the purported traditions are little more than two vague legitimizing observations: (i) arbitration is not proscribed by Islamic law and (ii) it is not a Western invention. Beyond this baseline—minimalist but nevertheless important—respect for accuracy demands that one recognizes that appeals to the past seek to establish '*une fausse continuité historique*'.[18] Furthermore, the classical sources of Islamic law do not treat arbitration as an important topic; those who assemble evidence of Islamic views of arbitration are thus exposed to the criticism that they have gathered scattered and inconclusive passages from texts having a quite different primary focus. Some classical authors were hostile to arbitration because it could lead to decisions by persons not adequately versed in the *shari'a*,[19] or because it detracted from the rule of sovereigns; others accepted it only with respect to geographic zones where there were no judges. Legislation—as opposed to scholarly opinion—is of recent vintage. Historical arbitration laws are hardly indicative of a unified 'Islamic' view of arbitration because they tended to be predominantly anchored in one or another school of jurisprudence. Their modern counterparts consist of innovative responses to the realities of modern economic life.

[17] Mezghani reads the *ayat* thus: '*Dieu rétablira la concorde entre eux deux, s'ils veulent se réconcilier*', n. 16, 218.

[18] Mezghani, n. 16, 214.

[19] This attitude was not unique to Muslims; Paul rebuked the Corinthians for allowing their disputes to be resolved by 'unbelievers'; see n. 24 in Chapter 4.

Looking beyond the threshold issue of acceptance of arbitration to its regulation, Mezghani notes that the latter appears in classical Muslim legal sources as both rudimentary and inconsistent, in particular as to whether a woman, a slave, an unidentified person (such as 'the first man to enter the Mosque'), or an arbitrant himself, could act as arbitrator. On the other hand, there appeared to be consensus that arbitrators' mandates could be revoked unilaterally up to the moment they rendered their award. Indeed, some classical scholars considered that the consent of the parties was required even upon their receipt of the award. This clearly makes the process something which we instantly recognize as akin to conciliation, which is not arbitration at all if the word is to be useful.

More fundamentally, where is the *res judicata* of arbitral awards? For example, a Malekite arbitrator's award would be a nullity if it was contrary to the rules of that School. Some authors considered that an award was like a judgment, while others disagreed, reasoning that it was the product of conciliation, as contemplated by the 35th *ayat*. It is unsurprising that Mezghani concludes that arbitration's modest pedigree did not exceed that of a *marginalité historique*.[20]

One would not suspect Mezghani, an established scholar and experienced arbitrator, of harbouring an a priori wish to undercut the claims of historical lineages of arbitration in the Muslim world. Moreover, it ultimately does not much matter if persons unversed in Muslim legal scholarship or the Arabic glossary are incapable of fully appraising his study. What we observe is simply that claimed parallels to this world, long disappeared, are highly questionable. And that is likely to be true with other worlds as well, be it the lost empires of Rome, of the Incas, of Tokugawa Japan[21] or of the Soviet Union.[22] There is, in sum, nothing eternal or inevitable about arbitration; it must find its meaning and its acceptance in the modern world it purports to serve. It cannot be static.

1.5 Ambivalence Toward Law

The idea of arbitration looks to a decision viewed by the parties (and their peers) as consonant with legitimate expectations, with no thirst for legal orthodoxy or refinement beyond that of a fair hearing. Arbitration is a quest for civilized closure.

Does this observation suggest that arbitrators are naturally likely to defy the law? True, they cannot assert jurisdiction without judicial control (see Chapter 3);

[20] Mezghani, n. 16, 225.

[21] A period, we are told, which promoted amicable settlement and viewed litigation as a moral affront to society. See Tasuhei Taniguchi, 'Is There a Growing International Arbitration Culture? An Observation From Asia', *ICCA Congress Series* No. 8 (A.J. van den Berg, ed. 1996), dissenting from the concept of an international arbitration culture.

[22] 'Where the economy is organized by an encompassing plan and the firms are owned by the state… conflicts generated by the interaction of these firms are not the stuff conventional litigation is made of: they fall within the jurisdiction of a special tribunal, the *Arbitrazh*, obligated to institute a case on its own initiative if the firms involved have no wish to sue and the state interest calls for action. In essence, *Arbitrazh* is an administrative agency and proceedings before it are at bottom administrative in nature.' Damaška, n. 6, 204.