

THE CASE FOR AMERICAN MUSLIM ARBITRATION

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This Article advocates for the creation of Muslim arbitral tribunals in the United States. These tribunals would better meet the needs of American Muslims, who currently bring their religious disputes to informal forums that lack transparency. Particularly problematic, these existing forums often apply legal precedent developed in majority-Muslim nations, without taking into consideration the changed circumstances of Muslim living as minorities in the United States. These interpretations of Islamic law can have especially negative impacts on women. American Muslim arbitration tribunals offer the potential to correct these inadequacies. Furthermore, a new arbitral system could better meet the needs of sophisticated parties, like commercial entities, by supplying arbitrators able to navigate the intricacies of both Islamic and American law.

To be sure, a new arbitral system would not be a perfect solution. Like other forms of religious arbitration, and like commercial arbitration, the new system would provide benefits, but also create potential drawbacks. The benefits would include promoting freedom of contract and subject matter specialization and reducing the burden on civil courts. The potential drawbacks include imbalances of power between contracting parties, adhesion contracts, and disenfranchisement of vulnerable populations. Taking these benefits and concerns into consideration, American Muslim arbitration needs to be structured with various internal safeguards to protect vulnerable populations and ensure the decision to arbitrate is voluntary, especially in family law cases.

The Article makes one further claim: Muslim arbitration in the United States would provide a positive influence on the development of Islamic law. At a minimum, the creation of these tribunals should not be dismissed based on preconceived, Islamophobic notions of how Islamic law might be enforced in the United States, which are likely founded on misperceptions. But what is more, by moderating precedents developed in other, more unequal cultural settings, the new tribunals could aid the development of 21st century Islamic law.

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INTRODUCTION

The religious legal needs of American Muslims are mostly met via informal quasi-judicial forums that lack transparency. Foreign donors who seek to spread conservative, literal interpretations of religious law have historically influenced these settings.¹ As the American Muslim community has continued to grow, institutional development has increasingly become a domestic endeavor, although Muslim leadership has primarily sought religious education outside of the United States.² The American Muslim community is now in a point of transition. There is increasingly a movement towards the indigenization of American Muslim leadership and application of Islamic law. This is supported through the development of American Muslim religious institutions of higher learning. This indigenization movement could help foster the development of American Muslim Arbitration by producing dual system fluency among American Muslim leadership. The indigenization movement would also be served by the American Muslim Arbitration, as it would provide a forum for the application of indigenized Islamic law.

This has particularly important implications for development of the area of Islamic law known as *Fiqh al-aqalliyat*, the jurisprudence of

1. See David Ottaway, *U.S. Eyes Money Trails of Saudi-Backed Charities*, WASH. POST (Aug. 19, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A13266-2004Aug18.html> [https://perma.cc/9GDR-ZBDU] (quoting Ihsan Bagby chief author of the study “The Mosque in America,” as saying that non-governmental Saudi backed imams “became very active in pushing a far more militant brand of Wahhabism”).

2. 2 IHSAN BAGBY, *Activities, Administration and Vitality of the American Mosque*, in *THE AMERICAN MOSQUE* 2011, at 10, 14 (2012).

Muslims living as minorities in non-Muslim majority lands.³ This discipline “takes into account the relationship between the religious ruling and the conditions of the community and the location where it exists . . . [and] applies to a specific group of people living under particular conditions with special needs that may not be appropriate for other communities.”⁴ Unlike Jewish law, this is an area of jurisprudence still in its infancy within Islamic law, which was developed in the context of living under a Muslim sovereign in a Muslim majority context.⁵ This is in contrast with Jewish law, which traditionally assumed Jews would be living as minorities and jurisprudence developed accordingly.⁶ With the number of Muslims living as minorities in North America and Europe rising, American Muslim Arbitration would be poised to develop this much-needed area of jurisprudence in the modern era. The United States is therefore an ideal incubator for the global development of an Islamic law that responds to secular, democratic environments.

Due to a series of historical events centered around the colonial experiences of Muslim majority countries, Islamic law in many parts of the world became fossilized, lacking the structural and jurisprudential flexibility of classical Islamic law. Islamic law went through three major transformations that have radically altered how Islamic law was designed to function: (1) Islamic law was codified—a radical structural departure from the more common law like design of traditional Islamic law that contemporary European codification trends at the time heavily influenced;⁷ (2) The subject matter of Islamic law was severely curtailed to family law, and in some instances, criminal law, in many Muslim majority countries (which often occurred under European colonial rule);⁸ and (3) The conservative, literalist theology of Saudi

3. See Andrew F. March, *Are Secularism and Neutrality Attractive to Religious Minorities? Islamic Discussions of Western Secularism in the "Jurisprudence of Muslim Minorities"* (Fiqh Al-Aqalliyat) *Discourse*, 30 CARDOZO L. REV. 2821, 2824–25 (2009).

4. Taha Jabir Alalwani, *TOWARDS A FIQH FOR MINORITIES* 3 (Ashur A. Shamis trans., 2d ed. 2010).

5. See *id.* at 8–11 (describing the ways in which the circumstances in which traditional Islamic jurisprudence was developed differ from contemporary Muslim life in Europe and North America).

6. See David Wermuth, Comment, *Human Rights in Jewish Law: Contemporary Juristic and Rabbinic Conceptions*, 32 U. PA. J. INT'L L. 1101, 1101–02 (2011).

7. See Anver Emon, *Islamic Law and the Canadian Mosaic: Politics, Jurisprudence and Multicultural Accommodation*, 87 LA REVUE DU BARREAU CANADIEN 391, 413 (2008) (discussing the codification of Islamic law in the European era and the potential for the development of Islamic law in Canadian Muslim arbitration tribunals).

8. *Id.*

Arabia, in the forms of Wahhabism and Salafism rose and spread globally.⁹

Rather than presume that Islamic law in the United States would necessarily look like the Islam enforced in Muslim majority countries, there are reasons to believe that the religious liberty of the United States might provide the ideal forum for the continued development of classical Islamic law, which became derailed during the age of European colonization.¹⁰ American Muslim Arbitration could play the important role of facilitating interpretations of Islamic law in consideration of the socio-legal environment in which American Muslims are practicing Islam, namely, a democratic secular society, which promotes freedom of religion. The American value of freedom *of* religion is important in contrast to the values of other secular nations, such as France, that promote the value of freedom *from* religion. Freedom of religion creates a legal environment where religious laws can continue to develop and adapt to the exigencies of the time and place.

American Jews and Christians have already taken advantage of this flexibility through the creation of ADR organizations, both mediation and arbitration bodies, that enable religious practitioners to more fully fulfill their religious beliefs in accordance with the laws and society in which they live.¹¹ American Muslims are in the early stage of developing similar ADR institutions. Like commercial arbitration, religious arbitration falls under the Federal Arbitration Act (FAA).¹² The enforceability and judicial review of the FAA are particularly important, as enforceability and judicial review will likely influence the application of Islamic law to more closely align with procedural and substantive justice norms of the United States.¹³

American Muslim Arbitration would provide many of the same benefits traditionally envisioned of commercial arbitration. It shares the benefits of subject matter specialization, promotion of freedom of

9. See Ottoway, *supra* note 1; see also CHRISTOPHER M. BLANCHARD, CRS REPORT, RS21695, THE ISLAMIC TRADITIONS OF WAHHABISM AND SALAFIYYA 1-2 (2008).

10. Emon, *supra* note 7, at 413.

11. MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST 21-24 (2017) (describing what religious arbitration organizations must do to follow the requirements of the FAA).

12. See Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1947); Michael C. Grossman, *Is this Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 169-70 (2007).

13. See Rabea Benhalim, *Religious Courts in Secular Jurisdictions*, 84 BROOK. L. REV. (forthcoming 2018), discussing how minority religious arbitration bodies typically conform religious law to the procedural and substantive justice norms of the state.

contract, and alleviation of the burden on civil courts. Additionally, a system that permits “enforce[able] religious arbitration awards does more than simply enhance individual freedom of contract . . . it enables individuals to use arbitration agreements as a mechanism to ensure access to adjudication in accordance with shared religious beliefs and practices.”¹⁴

However, American Muslim Arbitration would likely face some of the same problems faced by contemporary commercial and employment arbitration, if not purposefully designed to alleviate these concerns. Specifically, concerns of inequality in bargaining power, adhesion contracts, and weak judicial review apply to religious and non-religious arbitration alike. In the context of religious arbitration, the specific concerns arise about the complete voluntariness of parties involved in family law disputes, which enters into the larger questions of women’s rights under religious law.

Muslims are themselves actively grappling with women’s rights issues under Islamic law.¹⁵ These concerns stem from several sources: (1) classical interpretations of Islamic law that privilege men in certain circumstances, especially with regards to testimony, inheritance, divorce and custody; (2) communal pressures on women to acquiesce to religious arbitration and forgo the secular rights that would be afforded to women in secular courts;¹⁶ and (3) a hyper-focus on family law within religious communities post-colonialism. In many regards, these concerns also reflect the challenges Jewish women face within the context of religious arbitration, which Jewish women’s organizations are actively working to alleviate.¹⁷

14. Michael A. Hefland, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231–305 (2011).

15. See SAMIA BANO, MUSLIM WOMEN AND SHARI’AH COUNCILS: TRANSCENDING THE BOUNDARIES OF COMMUNITY AND LAW 234 (2012) (citing Cassandra Balchin, *Negotiating Bliss*, OPENDEMOCRACY (Mar. 8, 2010), <https://www.opendemocracy.net/5050/cassandra-balchin/negotiating-bliss> [<https://perma.cc/X3JN-YK3R>]) (finding that Muslim women “want greater financial autonomy and security, a fairer division of property reflecting their contribution to the family’s finances, freedom of mobility and equality in decision making, a monogamous relationship, and, should mutual understanding break down, then equal access to divorce.”); see also Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in WOMEN’S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 216–17 (Lynn Welchman, ed., Zed Books, 2004) (describing American Muslim initiatives addressing legal issues relevant to Muslim women); see also AYSHA A. HIDAYATULLA, FEMINIST EDGES OF THE QUR’AN (2014) (discussing contemporary Muslim feminists’ scholarship).

16. See ELHAM MANEA, WOMEN AND SHARI’A LAW: THE IMPACT OF LEGAL PLURALISM IN THE UK 90 (2016); Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157, 159 (2012).

17. See SUSAN ARANOFF & RIVKA HAUT, THE WED-LOCKED AGUNOT: ORTHODOX JEWISH WOMEN CHAINED TO DEAD MARRIAGES 9–15 (2015).

In order for American Muslim Arbitration to alleviate these concerns, internal safeguards would need to be established to ensure full transparency in terms of the application of the law and complete voluntariness of parties involved in family law disputes.¹⁸ Other proponents of religious arbitration have recognized the potential dangers of religious arbitration, however, their solution often relies on judicial review.¹⁹ Rather than solely rely on judicial review in the form of the doctrinal checks of public policy and unconscionability, American Muslim Arbitration tribunals should be structured to preemptively protect against issues of mandatory arbitration clauses and violations of women's rights.²⁰ These internal safeguards are especially important in light of the Supreme Court's approval of pre-dispute arbitration clauses.²¹ Scholars have called for the Supreme Court to overturn its position but also acknowledge that this is unlikely to happen with the current Court.²² Therefore, American Muslim Arbitration must be designed to be self-regulatory, transparent, and require practitioners who are well versed in both Islamic and American law.²³

Arguments regarding the potential benefits of American Muslim Arbitration and the existing legal safeguards regarding the separation of church and state are unlikely to dissuade those concerned with "Sharia creep," the idea that Islamic law will infiltrate secular legal systems, eventually superseding secular law and requiring the application of Islamic law to all persons²⁴ Unfortunately, legislators and policy

18. See Mohammad Fadel, *Political Liberalism, Islamic Family Law and Family Law Pluralism*, in MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 164, 165 (Joel A. Nichols ed., 2010).

[L]egal recognition of family law pluralism is not without its genuine risks: The rules of Islamic family law, as well as the rules and traditions of other subcommunities within a liberal polity, are not substantively equivalent to the generally applicable rules of civil law. Any system of family law pluralism within a liberal polity, therefore, must establish institutional mechanisms to ensure that legal pluralism does not become a tool to deprive individuals of their rights as citizens.

Id.

19. See BROYDE, *supra* note 11, at 217.

20. Fadel, *supra* note 18, at 198.

21. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635–36 (2005).

22. *Id.*

23. See BROYDE, *supra* note 11, at 163–66 (describing the need for dual-system fluency in religious arbitration).

24. Asifa Quraishi Landes, *Five Myths About Sharia*, WASH. POST (June 24, 2016), https://www.washingtonpost.com/opinions/five-myths-about-sharia/2016/06/24/7e3efb7a-31ef-11e6-8758-d58e76e11b12_story.html?utm_term=.d7538e4aba98 [https://perma.cc/MC69-WE69].

makers are among those who fear Sharia creep and Islamophobia remains a reality. Under the current political environment, the movement to ban the application of Islamic law in civil courts has continued to expand.²⁵ In 2017 alone, legislators introduced 23 new anti-Sharia bills in 18 states.²⁶

Multiple members of the President's administration have indicated that they believe Islamic law poses a threat to the American Constitution, with the Former Attorney General of the United States, Jeff Sessions, stating, "Sharia law fundamentally conflicts with our magnificent constitutional order."²⁷ Former National Security Advisor, Michael Flynn, went so far as to question whether Islam actually is a religion, stating

I don't see Islam as a religion. I see it as a political ideology . . . [I]t will mask itself as a religion globally because, especially in the West, especially in the United States, because it can hide behind and protect itself behind what we call freedom of religion.²⁸

Likewise, Deputy Assistant to the President Sebastian Gorka has stated that he believes Sharia is "antithetical to the values of this great nation"²⁹ and has dodged answering whether the President considers Islam a religion.³⁰

These fears conspicuously disregard the opinions held by Muslims living in North America about secular law and Islamic law. American Muslims themselves note the increasing tendency among American

25. Elsadig Elsheikh et al., *Legalizing Othering: The United States of Islamaphobia*, HAAS INSTITUTE (Sep. 8, 2017), <https://haasinstitute.berkeley.edu/global-justice/islamophobia/legalizing-othering> [https://perma.cc/YA5X-NRD6].

26. Ed Pilkington, *Anti-Sharia Laws Proliferate as Trump Strikes Hostile Tone Toward Muslims*, GUARDIAN (Dec. 30, 2017), <https://www.theguardian.com/us-news/2017/dec/30/anti-sharia-laws-trump-muslims> [https://perma.cc/GS93-HFAT].

27. Peter Beinert, *The Denationalization of American Muslims*, ATLANTIC (Mar. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/03/frank-gaffneydonald-trump-and-the-denationalization-of-american-muslims/519954/> [https://perma.cc/92W3-EYHC].

28. Kat Rowoldt, *ACT! for America San Antonio - Lt. Gen. (Ret) Michael Flynn*, YOUTUBE (Aug. 15, 2016), <https://www.youtube.com/watch?v=VCaL04jD9vU> [https://perma.cc/8MUC-93GZ].

29. WMAL Washington, *Sebastian Gorka: Al-Qaida Now Is Recruiting Home-Grown Killers Within the U.S.*, YOUTUBE (Feb. 17, 2011), <https://www.youtube.com/watch?v=F9P7uVGK3Fw> [https://perma.cc/U6BU-PFPA].

30. *Trump Adviser Defends President's Approach to "Radical Islamic Terrorism,"* NPR (Mar. 1, 2017, 7:35 AM), <https://www.npr.org/2017/03/01/517899216/trump-adviser-defends-presidents-approachto-radical-islamic-terrorism> [https://perma.cc/3R7D-U2P5].

Muslims towards social liberalism.³¹ While there is little evidence to suggest that Islamic law is infiltrating the American legal system, there is evidence that American liberalism is influencing how American Muslims understand their faith.³² This trend is especially true of younger American Muslims.³³

Among older, immigrant Muslims, many came to the United States from Muslim majority countries where the state controlled Islamic law to some degree. For many of those Muslims the transition to a secular state is a welcome one. They have seen up close the abuses of states in the name of religion and the dangers of governmental interference in religious understanding. Given the limits on freedom of religion in many Muslim-majority countries, Islam is perhaps the religion most in need of the flexibility in the application of religious law that the American legal system provides.

The rise in Islamophobia comes at a time when the American Muslim community has reached a stage where the enforcement of Islamic law in the United States via arbitration would be possible and beneficial. The creation of sophisticated American Muslim Arbitration tribunals would have multiple benefits, including serving to support the American legal values of freedom of contract and freedom of religion. It could also serve as an important forum for the global development of Islamic law in secular, democratic environments, especially for family and commercial law. Additionally, it could alleviate civil court establishment clause conflicts through the creation of an alternative forum for cases involving Islamic law. In some instances, civil courts' application of Islamic law has resulted in detrimental financial impacts on women, due to civil courts' misunderstandings of the intricacies of Islamic divorce law.³⁴ The development of sophisticated commercial American Muslim Arbitration tribunals could also meet the need for commercial Islamic arbitral forums among American companies that are required to include Islamic law as controlling law in contracts with Muslim majority countries. If sophisticated and plural American Muslim Arbitration tribunals were created, they could change the course of Islamic law in the modern era and withstand the hostile political environment in which they would enter.

Part I of this Article presents the historical background, legal context, political environment, and theoretical framework in which

31. See Mustafa Akyol, *The Creeping Liberalism in American Islam*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/opinion/american-islam.html> [<https://perma.cc/MNZ2-C6FS>].

32. *Id.*

33. *Id.*

34. See Fadel, *supra* note 18, at 198; see also Tracie Rogalin Siddiqui, *Interpretation of Islamic Marriage Contracts by American Courts*, 41 FAM. L.Q. 639, 640 (2004).

American Muslim Arbitration would be situated. Part II situates American Muslim Arbitration within the larger frameworks of American and Islamic law, exploring the legal permissibility and function of American Muslim Arbitration within each respective legal system. Part III explores the particular benefits American Muslim Arbitration would provide to the American legal system and the development of Islamic law, and the specific benefits and legitimate concerns American Muslim Arbitration poses. It concludes by discussing some the necessary safeguards tribunals will need to implement to ameliorate the legitimate concerns regarding vulnerable populations and create forums for the dynamic development of Islamic law in the modern era.

I. AMERICAN MUSLIM ARBITRATION IN CONTEXT

American Muslims have critical unmet needs—like other religious groups, they want to apply the guidance of their faith to their American lives. Yet the only institutional tools they have for meeting those needs are inadequate, because they are transplanted from a drastically different national culture and rely on fossilized interpretations of Islamic law that interface poorly with contemporary American jurisprudence and culture. The reasons and ramifications for these miscues are complex and require basic background knowledge of the following: (1) the socio-political reactions to Muslim Arbitration in other common law, secular countries; (2) multiculturalism theories on legal pluralism; (3) the development of Muslim arbitration in the United Kingdom; (4) the American Muslim community's current stage of institutional and leadership development; and (5) the radical transformation of Islamic law in the colonial and post-colonial periods.

A. Past Controversies

A series of controversies in Canada and the United Kingdom³⁵ in the last decade have prompted the majority of the scholarship on

35. The event in the UK occurred in 2008 when then Archbishop of Canterbury, Rowan Williams, gave a speech “explor[ing] ways in which the legal system might ‘recognize [Sharia],’” observing that such recognition would entail “access to recognized authority acting for a religious group.” JOHN R. BOWEN, ON BRITISH ISLAM: RELIGION, LAW, AND EVERYDAY PRACTICE IN SHARI’A COUNCILS 175 (2016). His speech led to fierce opposition to the perceived imposition of Islamic law, with headlines declaring that “Islamic shari’a courts in Britain are now ‘legally binding’” and “Shari’a courts as ‘consensual as rape.’” See Matthew Hickley, *Islamic Sharia Courts in Britain Are Now “Legally Binding,”* DAILY MAIL (Sept. 1, 2008, 5:10 EST), <http://www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html> [<https://perma.cc/Y8FV-MW6Z>]; see also John Bingham, *Sharia Courts ‘as Consensual as Rape,’ House of Lords Told,* TELEGRAPH (Oct. 20, 2012, 7:00 AM),

Muslim arbitration.³⁶ These controversies reflect rising tensions around the question of the role of religious law in secular countries. Such alarm flared following events regarding the accommodation of Muslim arbitration in Canada and the UK.³⁷ These controversies portrayed a general perception of Islamic law that is antiquated at best and dangerous at worst, often with a focus on the subset of Islamic criminal laws that details corporal punishment (*hudud* laws).³⁸ The prevailing assumption about Islamic law presented during these controversies was that Islamic law “is a uniform thing, a fixed, unchangeable set of norms that is binding upon all Muslims.”³⁹

The first event was a lengthy international debate, which occurred in Ontario, Canada from 2003–2005. It arose in 2003 when the Islamic Institute of Civil Justice (IICJ) announced in 2003 that it “would begin offering arbitration services in family disputes in accordance with established Islamic law and the province of Ontario’s 1991 Arbitration Act.”⁴⁰ Although Jewish and Christian groups had for years been operating religious arbitration bodies under Ontario’s 1991 Arbitration Act and had “set up alternate dispute resolution boards that arbitrated in accordance with their religious principles,” these religious arbitration bodies did not trigger a state of alarm.⁴¹ Conversely, the IICJ’s announcement that they would establish an Islamic arbitral body, which “paralleled Jewish arbitration practices,” resulted in a massive debate.⁴²

In June 2004, in response to the public outcry and debate, former Attorney General of Ontario Marion Boyd was appointed “to conduct a formal review of the use of arbitration in family and inheritance law in the province.”⁴³ In December 2004, Boyd published her report with a

<http://www.telegraph.co.uk/news/religion/9621319/Sharia-courts-as-consensual-as-rap-House-of-Lords-told.html> [https://perma.cc/MBX5-7TBK].

36. See Anna C. Korteweg & Jennifer A. Selby, *Introduction: Situating the Sharia Debate in Ontario*, in *DEBATING SHARIA: ISLAM, GENDER POLITICS, AND FAMILY LAW ARBITRATION* 22 (Anna C. Korteweg & Jennifer A. Selby, eds., 2012).

37. *Id.* (“The resulting public debate did not reflect how ordinary Sharia is in the everyday lives of many Canadian Muslims, but instead portrayed it as alien within a liberal democratic context. Nor did the debate reflect the complexity or malleability of Sharia. Rather, it created two positions: one for the institutionalization of Sharia-based arbitration boards and one against.”).

38. See *id.* at 19 (describing reactions during the Ontario Sharia Debate as follows: “The media portrayed Islamic law as patriarchal and authoritarian, as punishment rather than rehabilitation-oriented, and (perhaps most importantly), as unchanging”).

39. JAN MICHIEL OTTO, *SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT* 615 (2011).

40. Korteweg & Selby, *supra* note 36, at 18.

41. *Id.* at 18.

42. *Id.*

43. *Id.* at 20.

set of extensive recommendations and “concluded that binding religious arbitration of family law issues based on ‘Islamic legal principles’ was permissible according to the Arbitration Act.”⁴⁴ Many of her recommendations are incorporated into the recommendations for American Muslim Arbitration detailed in Part III of this Article.

Boyd’s recommendations called for greater oversight of religious arbitration both pre- and post-arbitration. Boyd’s recommendations included: (1) Screening of arbitration parties, prior to arbitration, in order to determine whether any “issues of power imbalance” exist and to “ensure that both parties are agreeing voluntarily to arbitration and understand the nature and consequences of entering into the process,”⁴⁵ and (2) civil court judicial review of arbitration awards that would require the court to set aside arbitration awards that do not meet an established set of requirements designed to protect civil rights.⁴⁶ Had these recommendations been implemented, they would have resulted in a much higher degree of substantive review of religious arbitration in Ontario, addressing many of the critics of Islamic arbitration raised. However, Boyd’s report was not enough to squelch the swell of panic the IICJ’s initial announcement created and did not address the concerns of those who felt that Islamic law should not have any place in the Canadian legal system.

The movement against Islamic arbitration in Ontario included “prominent women’s organizations such as the pro-faith Canadian Council of Muslim Women and the secular International Campaign against [Sharia] Courts.”⁴⁷ Of particular concern was that women would be unequal under Islamic law, especially in regard to divorce.⁴⁸ By the summer of 2005, international opposition to Islamic faith-based arbitration resulted in “eighty-seven human rights groups” opposing the Ontario plan.⁴⁹ Most of this opposition “did not reflect how ordinary Sharia is in the everyday lives of many Canadian Muslims, but instead portrayed it as alien within a liberal democratic context.”⁵⁰ Such ordinary practices include respecting one’s parents, daily prayer, fasting during holy times, and abstaining from alcohol. Despite Boyd’s recommendations, as well as support from prominent scholars, the

44. *Id.* at 21.

45. Marion Boyd, *Ontario’s “Shari’a Court”: Law and Politics Intertwined*, in *ISLAM AND ENGLISH LAW: RIGHTS, RESPONSIBILITIES, AND THE PLACE OF SHARI’A* 176, 179 (Robin Griffith-Jones ed., 2013).

46. *Id.*

47. Korteweg & Selby, *supra* note 36, at 22.

48. *Id.*

49. *Id.* at 22.

50. *Id.*

outcry resulted in amendments to the Arbitration Act that banned religious arbitration.⁵¹

B. Multiculturalism Theories on Legal Pluralism

The development of Muslim arbitration in the UK has promoted literature focusing on multiculturalism theory, as it applies to religious legal pluralism.⁵² Contemporary multiculturalism theory challenges the conception of cultural identity as an “either-or” proposition. Rather, a multicultural individual in a society is conceived as a “citizen-insider, who simultaneously belongs to, and is affected by, both the group and the state authority.”⁵³ A multicultural individual may carry overlapping identities as a citizen of the state and a member of a religious or cultural group.⁵⁴ These multicultural identities may include “complex and overlapping affiliations” that are not necessarily in conflict with each other.⁵⁵ An individual’s identities may also be fluid and “[negotiated] through dialogue, partly overt, partly internal, with others.”⁵⁶

Yet, this overlapping, fluid identity when accommodated within the legal system of a secular society may result in the “paradox of multicultural vulnerability.”⁵⁷ The “paradox of multicultural vulnerability” refers to “the fear that the ‘accommodation of different cultures can conflict with the protection of certain members’ citizenship rights.”⁵⁸ Thus, while religious arbitration may promote an individual’s freedom of religion and right to contract, choosing religious arbitration may also “reduce the rights and obligations that person would ordinarily enjoy by virtue of their citizenship.”⁵⁹ This loss of rights and obligations originates when religious laws differ from the laws of the state, e.g. treatment of same sex marriage and women’s right to divorce. Thus, from an inter-group societal perspective religious arbitration may promote certain rights, while from an intra-

51. *Id.* at 23.

52. For a discussion of legal pluralism and religion, see RUSSELL SANDBERG, RELIGION AND LEGAL PLURALISM (Russell Sandberg ed., 2015).

53. AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS 6 (2001).

54. Russell Sandberg et al., *Britain’s Religious Tribunals: ‘Joint Governance’ in Practice*, 33 OXFORD J.L. STUD. 263, 269 (2013).

55. SHACHAR, *supra* note 53, at 5.

56. Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 34 (A. Guttman ed., 1994).

57. Ayelet Shachar coined this term in her book *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*. See *supra* note 53, at 3.

58. Sandberg, *supra* note 54, at 267.

59. *Id.*

group perspective, religious arbitration may “systematically work to the disadvantage of certain group members.”⁶⁰

Former Archbishop of Canterbury Rowan Williams helped promote one of the most prominent theoretical frameworks that ameliorates the paradox of multicultural vulnerabilities. In his famous 2008 speech, Williams promoted Ayelet Shachar’s concept of “transformative accommodation.”⁶¹ He defined “transformative accommodation” as “a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters.”⁶² He further stated that “we have to think a little harder about the role and rule of law in a plural society of overlapping identities.”⁶³ Thus, whether or not the paradox of multicultural vulnerability occurs with the creation of religious arbitration depends on the presence of safeguards to protect the voluntariness of the arbitration, and educational measures to ensure litigants are fully aware of their rights to pursue matters in civil court.

Furthermore, the legal pluralism that transformative accommodation promotes is a normal feature of legal systems.⁶⁴ Despite claims of “one law for all,” which was a rallying point against Islamic arbitration in Ontario, “it is normal for more than one “legal” system to co-exist in the same social arena.”⁶⁵ This is especially true in the United States where federalism is the norm and a long-standing acceptance of arbitration exists.

C. *The Muslim Arbitration Tribunal*

Islamic ADR in England emerged out of a meeting in 1982 of Islamic scholars in Birmingham. Their intention had been to create a “new Britain-wide shari’a council” that would address “a wide range of religious issues, from banking and mortgages to standards for halal food.”⁶⁶ Of the UK arbitration tribunals, the Muslim Arbitration Tribunal (MAT) has perhaps prompted the most attention from scholars and news sources that have both supported and criticized its role in the

60. *Id.* “While *inter*-group equality is concerned with establishing equal treatment between cultural and religious groups, *intra*-group inequalities is concerned with establishing equality within cultural and religious groups.” *Id.* at n.33.

61. Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, 10 *ECCLESIASTICAL L.J.* 262, 274 (2008).

62. *Id.*

63. *Id.* at 271.

64. For a discussion of joint governance and legal pluralism in regard to Britain’s religious arbitration tribunals, see SANDBERG, *supra* note 54 at 266–69.

65. BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 171 (2001).

66. BOWEN, *supra* note 35, at 47.

UK's legal system.⁶⁷ The MAT “provides a network of relatively formal and transparent arbitral tribunals for British Muslims.”⁶⁸ Established in 2007 with the mission “to provide British Muslims with a more effective alternative for resolving disputes in accordance with Islamic law,”⁶⁹ it has become the most visible Muslim arbitration in England. Other Islamic mediation organizations exist, such as the Islamic Shari'a Council (ISC)⁷⁰ and the Muslim Law Sharia Council, however, they “operate outside the British arbitration framework” and issue unenforceable decisions.⁷¹

Because the MAT operates as an arbitral body, it must rely upon civil courts to enforce its decisions.⁷² As a result, the MAT has modeled its procedural rules after the procedural rules of the civil courts.⁷³ Although distinct rules of procedure exist in Islamic law, the MAT utilized innovative methods to ensure that its arbitration procedures meet the requirements of England's arbitration acts and the requirements of Islamic law.⁷⁴ The MAT demonstrates explicit consciousness of the secular legal system in which it operates. On the MAT website, it differentiates itself from other Islamic RJBs in

67. See Orland Crowcroft, *Sharia Law UK: 'Ban Sharia? Say Goodbye to Chicken Tikka Masala' Says Muslim Leader*, INT'L BUS. TIMES (Jan. 27, 2016, 10:54 GMT), <https://www.ibtimes.co.uk/sharia-law-uk-ban-sharia-say-goodbye-chicken-tikka-masala-says-muslim-leader-1539341> [<https://perma.cc/8TP9-2K6C>]; see also Frances Perraudin, *Muslim Women Used as 'Political Footballs in Sharia Court Debate'*, GUARDIAN (Nov. 1, 2016), <https://www.theguardian.com/law/2016/nov/01/muslim-women-used-as-political-football-in-sharia-court-debate> [<https://perma.cc/7HD4-FWUM>]; Shari Miller, *British Sharia Court 'Protects Wife Beating Suspects by Sabotaging Criminal Proceedings Against Them' Women's Rights Group Claims*, DAILY MAIL (Oct. 30, 2016), <http://www.dailymail.co.uk/news/article-3886812/Top-sharia-court-protects-wife-beating-suspects-sabotaging-criminal-proceedings-against-women-s-rights-group-claims.html> [<https://perma.cc/Q6SA-UJZK>]; Joshua Rozenberg, *What Can Sharia Courts Do in Britain?*, TELEGRAPH (Sept. 14, 2008, 10:02 AM), <https://www.telegraph.co.uk/news/newstopping/lawreports/joshuarozenberg/2957692/What-can-sharia-courts-do-in-Britain.html> [<https://perma.cc/B7XY-QYL2>].

68. BROYDE, *supra* note 11, at 187.

69. *Id.* at 178.

70. See ISLAMIC SHARIA COUNCIL, <http://www.islamic-sharia.org/services/> [<https://perma.cc/BY4C-DXG5>] (“The Islamic Sharia Council was formed to solve the matrimonial problems of Muslims living in the United Kingdom in the light of Islamic family law. The council comprises members from all of the major schools of Islamic legal thought (*mad'hab*) and is widely accepted as an authoritative body with regards to Islamic law.”).

71. BROYDE, *supra* note 11, at 187. These courts have doctrinal differences rooted in their practitioners' adherence to and training in particular Islamic law schools of thought. Despite their differences, they typically accept “the other's judgments to be sound.”

72. *Why MAT?*, MUSLIM ARB. TRIB., <http://www.matribunal.com/why-MAT.php> [<https://perma.cc/7JE9-PTEZ>].

73. *Id.*

74. BROYDE, *supra* note 11, at 181.

England by highlighting its ability to “adher[e] to the English Legal System whilst still preserving . . . practices of Islamic Sacred Law.”⁷⁵

The Muslim Arbitration Tribunal in England followed in the footsteps of the Beth Din of America to deliberately create “innovative processes . . . ensur[ing] that its arbitrations would conform to the formal requirements of the Arbitration Act, garner the respect of British courts, and make judges more comfortable enforcing its rulings.”⁷⁶ The MAT has used innovation within the religious legal tradition, particularly in regards to procedure, to craft “an arbitration process that gives British Muslims the opportunity for effective dispute resolution services consistent with both British and Islamic law.”⁷⁷ In doing so, the MAT views itself “as building on Islamic law’s normative adjudicatory framework in light of contemporary views about what procedures best protect litigants and ensure just outcomes.”⁷⁸

The MAT also differentiates itself from other sharia councils by offering commercial arbitration in addition to marital mediation, whereas other Muslim mediation services focus solely on marital matters, operate more informally, and do not follow the procedural rules of the Arbitration Act of 1996.⁷⁹ These informal Sharia councils remain a popular option for mediating marital disputes.⁸⁰ Unlike the Sharia councils, the vast majority of MAT’s workload is commercial arbitration, with only 10% of MAT’s workload involving family matters. This focus on commercial arbitration likely derives from the enforceability of commercial arbitration that MAT provides, unlike mediation of family matters, which are largely unenforceable.⁸¹

It has focused its efforts on “offer[ing] the Muslim community a real and true opportunity to settle disputes in accordance with Islamic Sacred Law with the knowledge that the outcome as determined by MAT will be binding and enforceable.”⁸² One way that the Muslim Arbitration Tribunal is able to achieve this is through its approach to

75. *History*, MUSLIM ARB. TRIB., <http://www.matribunal.com/history.php> [<https://perma.cc/NJ34-QZHH>].

76. BROYDE, *supra* note 11, at 179.

77. *Id.*

78. *Id.* at 181.

79. *Why MAT?*, *supra* note 72; *Muslim Arbitration Tribunal (MAT)*, IN BRIEF, <https://www.inbrief.co.uk/preparing-for-trial/muslim-arbitration-tribunal/> [<https://perma.cc/H55W-UMZ2>].

80. SECRETARY OF STATE FOR THE HOME DEPARTMENT, THE INDEPENDENT REVIEW INTO THE APPLICATION OF SHARIA LAW IN ENGLAND AND WALES, 2018, Cm. 9560, at 11 (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPGF_Report_into_Sharia_Law_in_the_UK_WEB.pdf [<https://perma.cc/P3ZU-L9FZ>].

81. *Id.*

82. *Why MAT?*, *supra* note 72.

Islamic law. This approach utilizes classical Sunni Islamic legal schools of thought with the methodology of *takhayyur*, which allows judges to draw on opinions from any of the four schools.⁸³ Due to MAT's popularity and focus on enforceability, it serves as a case study for how an American Muslim arbitral body might "settle disputes in accordance with Islamic Sacred Law," in such a way that is also enforceable under the FAA and beneficial to Muslims and non-Muslims alike.⁸⁴ Although politicians typically describe Islamic law as a fixed set of rules, the reality is that Islamic law, like most legal traditions, is a dynamic phenomenon.⁸⁵ Existing Islamic mediation and arbitration tribunals in the United Kingdom reflect this dynamism in their interpretation and application of Islamic law. Like the *Beth Din* in the United States, these tribunals draw from a broad range of sources and opinions, demonstrating cognizance of the context of time and place of the application of religious law.

D. American Muslims—A Unique Demographic

The debate on Islamic arbitration among academics has mostly focused on the UK context where Muslim mediation and arbitration has undergone significantly more development than in the US. Yet, there are reasons why the United States may be a better forum for Muslim arbitration than in the UK. The United States' Muslim population differs in significant ways from most other Muslim populations globally, due to a number of factors, including: "significant conversion to Islam among African Americans, bifurcated immigration laws drawing both middle-class and working-class immigrants, and geographic dispersion within the United States"⁸⁶ On average, American Muslims are better educated, integrated, and diverse than

83. BROYDE, *supra* note 11, at 183.

84. In 2010, the MAT reported a 15% rise in the number of non-Muslims using sharia arbitrations in commercial cases. See Afua Hirsch, *Fears Over Non-Muslim's Use of Islamic Law to Resolve Disputes*, GUARDIAN (Mar. 14, 2010), <https://www.theguardian.com/uk/2010/mar/14/non-muslims-sharia-law-uk> [https://perma.cc/CQ55-5BV3].

85. See Emon, *supra* note 7, at 421; see also John L. Esposito, *America's Muslims: Issues of Identity, Religious Diversity, and Pluralism*, in DEMOCRACY AND THE NEW RELIGIOUS PLURALISM 133, 146 (Thomas Banchoff ed., 2007) (describing the dynamic nature of Islamic law, "which enables it to be reinterpreted and reformed to respond to multiple and diverse situations").

86. Eman Abdelhadi, *Religiosity and Muslim Women's Employment in the United States*, 3 SOCIUS: SOC. RES. FOR A DYNAMIC WORLD 1, 2 (2017).

British Muslims, which reduces concerns that Islamic arbitration may negatively affect vulnerable parties.⁸⁷

One important difference between American Muslims and British Muslims is their ethnic and cultural backgrounds. Within the United States, “[n]o single country accounts for more than 15% of adult Muslim immigrants to the United States.”⁸⁸ Within the United States, there is significantly greater diversity in the ethnic heritage of Muslims compared to British Muslims. The demographics of American Muslims are as follows:

A plurality (41%) are white, a category that includes those who describe their race as Arab, Middle Eastern, Persian/Iranian or a variety of other ways About three-in-ten are Asian (28%), including those from South Asia, and one-fifth are black (20%). Fewer are Hispanic (8%), and an additional 3% identify with another race or with multiple races.⁸⁹

In contrast, in the UK, “74% of Muslims are from an Asian ethnic background (Pakistani - 43%, Bangladeshi - 16%, Indian - 8%, Other Asian 6%).”⁹⁰ In terms of specific country representations, Black Muslim Americans are a majority-minority, as they represent the majority-minority of all American Muslims.⁹¹ These cultural differences play an important role in regard to the relationship between Muslims and Islamic law. As will be discussed in more depth below, Muslims’ interpretations of religious law often closely parallel their cultural backgrounds, such that in the United States there is a much broader diversity of interpretations of religious law than in the United Kingdom, which is mostly South Asian and thus mostly adherent to the Hanafi doctrinal school.⁹²

87. Ewen MacAskill, *US Muslims More Assimilated than British*, *GUARDIAN* (May 23, 2007), <https://www.theguardian.com/world/2007/may/23/usa.midterms2006> [<https://perma.cc/PQS6-X9SH>].

88. BESHEER MOHAMED ET AL., PEW RESEARCH CENTER, U.S. MUSLIMS CONCERNED ABOUT THEIR PLACE IN SOCIETY, BUT CONTINUE TO BELIEVE IN THE AMERICAN DREAM 32 (July 26, 2017), <http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/> [<https://perma.cc/7T82-CZAZ>].

89. *Id.* at 35.

90. *UK Muslim Demographics*, *TELEGRAPH* (Feb. 4, 2011, 9:02 PM), <http://www.telegraph.co.uk/news/wikileaks-files/london-wikileaks/8304838/UK-MUSLIM-DEMOGRAPHICS-C-RE8-02527.html> [<https://perma.cc/8X4N-XM5F>].

91. See MOHAMED ET AL., *supra* note 88, at 37.

92. See *infra* text accompanying notes 179–184.

Additionally, surveys of American Muslims indicate a strong affiliation with American identity and adherence to the rule of law.⁹³ In sum, these demographics of American Muslims position American Muslim communities well to develop an indigenous legal culture dictated by the community needs and not by the legal standards of foreign countries.

When it comes to national identity, American Muslims strongly identify as American with 92% “say[ing] they are proud to be American”,⁹⁴ whereas in the UK, “70% of Muslims [give] their national identity as British, English, Scottish, or Welsh.”⁹⁵ American Muslims, including recent immigrants, are likely to express pride in their American identity with “[n]ine-in-ten U.S. Muslims agree[ing] either completely (66%) or mostly (26%) with the statement ‘I am proud to be an American.’”⁹⁶

American Muslim women are on average better educated than their counterparts in the UK, with American Muslim women having attained the highest rates of education of Muslim women in the world.⁹⁷ Education levels are important to religious arbitration, given that critics are concerned about the detrimental impact religious arbitration may have on Muslim women.⁹⁸ American Muslim women’s education and socio-economic positions indicate that they are more likely to be savvy of their rights and options under civil law. They are also more likely to have the economic resources necessary to obtain legal counsel.⁹⁹

In sum, these demographics of American Muslims position American Muslim communities well to develop an indigenous legal culture dictated by the community needs and not by the legal standards of foreign countries.

Although American media and politicians often present Islamic law as a fixed set of rules, the reality is that Islamic law, like most legal

93. See generally PEW RESEARCH CENTER, *Identity, Assimilation and Community*, in U.S. MUSLIMS CONCERNED ABOUT THEIR PLACE IN SOCIETY, BUT CONTINUE TO BELIEVE IN THE AMERICAN DREAM (2017), <http://www.pewforum.org/2017/07/26/identity-assimilation-and-community/> [<https://perma.cc/VXW2-7D2F>].

94. *Id.* at 50.

95. *UK Muslim Demographics*, *supra* note 90, at 3.

96. MOHAMED ET AL., *supra* note 88, at 51.

97. Conrad Hackett & Dalia Fahmy, *Education of Muslim Women Is Limited by Economic Conditions, Not Religion*, PEW RES. CTR. (June 12, 2018), <http://www.pewresearch.org/fact-tank/2018/06/12/education-of-muslim-women-is-limited-by-economic-conditions-not-religion/> [<https://perma.cc/D3AX-6HRR>].

98. Korteweg & Selby, *supra* note 36, at 22.

99. See Hackett & Fahmy, *supra* note 97.

traditions, is a dynamic phenomenon.¹⁰⁰ Existing Islamic mediation and arbitration tribunals in the United Kingdom reflect this dynamism in their interpretation and application of Islamic law.¹⁰¹ Like the application of Jewish law via the *Beth Din* in the United States, these tribunals draw from a broad range of sources and opinions, demonstrating cognizance of the context of time and place of the application of religious law.¹⁰² Organizations like the MAT have also built upon the *Beth Din* precedent through establishing dual system fluency in their arbitration panels.¹⁰³

E. The Development of Islamic Institutions as a Path to Dual System Fluency

Recent institutional developments in the American Muslim community make sophisticated American Muslim arbitration tribunals that can interpret and apply Islamic law in the modern context a viable prospect, as these institutions provide the educational resources necessary for the development of American Muslims with dual system fluency. Although American Muslim interest in formalized religious arbitration has been around for at least the past 20 years, Muslims have not had the institutional resources necessary for the development of sophisticated American Muslim arbitration tribunals.

In 1998, the Council of Masajid of the United States issued a resolution “to establish a national network of Islamic arbitration councils in 30 cities and towns across the country to deal specifically with family law issues.”¹⁰⁴ Although this resolution ultimately did not come to fruition, the topic has resurfaced several times. For instance, the article *Community-Based Arbitration as a Vehicle for Implementing Islamic Law in the United States*,¹⁰⁵ published in 1996, and the article *The Role of the Muslim Lawyer in Establishing Islamic Community Life*,¹⁰⁶ published in 1998, lay out some of the initial groundwork

100. See Emon, *supra* note 7, at 421; see also Esposito, *supra* note 85, at 146, (describing the dynamic nature of Islamic law, “which enable it to be reinterpreted and reformed to respond to multiple and diverse situations”).

101. See *supra* Section I.C.

102. See *supra* text accompanying notes 76–78.

103. See BROYDE, *supra* note 11, at 179–84.

104. Lee Ann Bambach, “That Ye Judge with Justice” Faith-Based Arbitration by Muslims in an American Context 205 (2014) (unpublished Ph.D. dissertation, Emory University) (on file with author) (citing Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origins and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 79 (2002)).

105. Irshad Abdal-Haqq & Qadir Abdal-Haqq, *Community Based Arbitration as a Vehicle for Implementing Islamic Law in the United States*, 1. J. ISLAMIC L. 61 (1996).

106. Irshad Abdal-Haqq, *The Role of the Muslim Lawyer in Establishing Islamic Community Life*, 3 J. ISLAMIC L. 105 (1998).

necessary for the establishment of American Muslim tribunals.¹⁰⁷ Likewise, National Association of American Muslim Lawyers (NAML) held several panels in the 1990s on the creation of American Muslim Tribunals.¹⁰⁸ While these proposals also failed to lead to the development of American Muslim ADR tribunals, prominent scholars have continued to call for their creation. In 2001, prominent American Muslim religious leader and academic Sherman A. Jackson stated at a conference at Harvard University that “the need for it is urgent especially in family law, and that the advantages outweigh its drawbacks.”¹⁰⁹

The need for American Muslim arbitration resurfaced in 2008 at the Assembly of Muslim Jurists of America (AMJA) annual conference.¹¹⁰ The conference’s theme that year was “Islamic Arbitration Guidelines and Procedures.”¹¹¹ Two of the presentations and papers that year “concentrated specifically on how to establish a system of Muslim dispute resolution in the United States that would be rooted in traditional Islamic jurisprudence, but also harmonize[s] with U.S. law and public policy.”¹¹² These articles display a keen awareness of the legal system in which American Muslim arbitration would be operating in, and in particular, the subject matter restrictions on American arbitration. They noted that this is not an issue from an Islamic law perspective, as Islamic law entails the same subject matter restrictions as American law on arbitration, i.e. “criminal matters

107. Bambach, *supra* note 104, at 206.

108. See *NAML National Conferences*, NATIONAL ASSOCIATION OF MUSLIM LAWYERS, <http://naml.info/Conferences> [<https://perma.cc/X2UN-FJQ8>].

109. Bambach, *supra* note 104, at 207 (quoting Aida Othman, “And Sulh is Best”: Amicable Settlement and Dispute Resolution in Islamic Law 304 (May 27, 2005) (unpublished Ph.D. thesis, Harvard University) (citing Sherman A. Jackson, panelist, *The Feasibility of Muslim Courts/Tribunal in the United States*, Islam in American Conference: Domestic Challenges, International Concerns and Historical Legacies (student-run conference, Harvard University, Mar. 9–11, 2001)).

110. See generally *AMJA Islamic Arbitration Guidelines and Procedures*, The Seventh Conference of the Assembly of Muslim Jurists in America (2010) <http://www.amjaonline.org/en/declarations/20-declarations/105-decisions-and-recommendations-of-amja-seventh-annual-convention-kuwait> [<https://perma.cc/2JMJ-MCWC>].

111. *Id.*

112. Bambach, *supra* note 104, at 207 (citing MOHAMAD ADAM EL-SHEIKH, *JUDICIAL ARBITRATION AMONG MUSLIMS IN THE WEST* (translated title) (2010), http://www.amjaonline.org/en/academic-research/cat_view/6-islamic-arbitration-guidelines-and-procedures-2010 [<https://perma.cc/GPZ8-ZU6D>]; M. ALI SADIQI, *ISLAMIC DISPUTE RESOLUTION IN THE SHADE OF THE AMERICAN COURT HOUSE* (2010), http://www.amjaonline.org/en/academic-research/cat_view/6-islamic-arbitration-guidelines-and-procedures-2010 [<https://perma.cc/GPZ8-ZU6D>]).

cannot be arbitrated and are reserved for the state, which alone has the power and authority to enforce punishment.”¹¹³

Despite the proposals presented at the AMJA, the development of a formal American Muslim arbitration system has not progressed.¹¹⁴ That said, an informal version of Islamic arbitration in the United States does exist, with 84% of masjids providing marital counseling.¹¹⁵ Most often Islamic ADR is *ad hoc* with little consistency or coordination “between organizations and individuals offering such services.”¹¹⁶

Although 84% of masjids currently offer marital counseling, mosques face multiple challenges masjids face in offering ADR. First, there is a shortage of imams compared to the Muslim population in the United States.¹¹⁷ Furthermore, the majority of imams in the United States work on a part-time or volunteer basis with only 44% working as full-time salaried imams.¹¹⁸ Moreover, Muslims often disregard arbitrators’ decisions “because they doubt the tribunals’ authority and feel that they can simply ignore the arbitrator’s decisions without repercussion.”¹¹⁹ As a result, “Muslim faith-based ADR systems generally . . . must rely on individuals’ good will and community pressure for enforcement of arbitration decisions.”¹²⁰ Second, local imams, lacking expertise in American law, typically mediate these disputes.¹²¹ As noted by other scholars, “dual-system fluency” plays an important role in the success of religious arbitration bodies that seek to apply religious law within a secular legal system.¹²² “Dual-system” fluency describes the incorporation of people on an arbitration panel “who are fluent in more than one legal system and more than one cultural reality.”¹²³ Current Muslim faith based ADR systems generally lack this dual-system fluency.¹²⁴

113. *Id.* at 208 (citing El-Sheikh, *supra* 112, at 6).

114. *Id.* at 212.

115. BAGBY, *supra* note 2, at 10; *see also* Quraishi & Syeed-Miller, *supra* note 15, at 182.

116. Bambach, *supra* note 104, at 212.

117. *All Things Considered, as Islam Grows, U.S. Imams in Short Supply*, NPR (Feb. 10, 2013, 3:29 PM), <https://www.npr.org/2013/02/10/171629187/as-islam-grows-u-s-imams-in-short-supply> [<https://perma.cc/6EHR-FKYV>].

118. Ruth Graham, *America Needs More Imams*, SLATE (Dec. 17, 2015, 3:03 PM), <https://slate.com/human-interest/2015/12/if-the-u-s-wants-to-combat-muslim-extremism-it-needs-more-imams.html> [<https://perma.cc/SD5Z-9P38>].

119. Bambach, *supra* note 104, at 211 (citing El-Sheikh, *supra* 112, at 20–21).

120. *Id.* at 286.

121. *See* BROYDE, *supra* note 11, at 19–20, 221–22.

122. *Id.* at 163–64; *see also* Bambach, *supra* note 104, at 286.

123. BROYDE, *supra* note 11, at 163.

124. Bambach, *supra* note 104, at 330–31.

These imams may not always fully understand the cultural and legal context in which they are operating, as the majority of them more recently hail from countries outside the United States. Overall, 66% of imams in the United States are foreign born.¹²⁵ The statistics regarding full-time paid imams are even more striking. Of the imams who are paid full-time, 92% are from another country.¹²⁶ Almost half the foreign-born imams (47%) came to the United States after 2000.¹²⁷ Furthermore, the vast majority of imams, including those born in the United States, attain their Islamic education outside of the United States, “with only 6% receiving formal degrees in Islam from U.S. institutions.”¹²⁸

This in no way suggests all foreign-born imams fail to understand the American cultural context or are unable to take the American context into account when applying Islamic law. There are imams born outside the United States who do so and do so very well. For instance, Imam Mohamed Magid is a Sudanese-born American imam who serves as the imam of All Dulles Area Muslim Society, ADAMS, a large set of mosques outside of Washington, D.C.¹²⁹ He is deeply engaged in the leadership of the American Muslim community¹³⁰ and regularly speaks on issues specifically facing Muslims living in America.¹³¹ At the same time, the American Muslim community has increasingly recognized the need for imams who are acculturated to the U.S. and for the importance of American based Islamic education.¹³² The American Muslim community has historically been unable to meet these needs due to a lack of institutional development.¹³³

In recent years, the American Muslim community has increasingly developed institutions to meet these needs.¹³⁴ These institutions include

125. BAGBY, *supra* note 2, at 14.

126. IHSAN BAGBY, ISLAMIC SOC’Y OF N. AM., NATIONAL NEEDS ASSESSMENT OF MOSQUES ASSOCIATED WITH ISNA & NAIT 20 (2013).

127. BAGBY, *supra* note 2, at 14.

128. Bambach, *supra* note 104, at 331 (citing Bagby, *supra* note 2, at 14).

129. See, e.g., *Imam Mohammed Magid*, HUFFINGTON POST, <https://www.huffingtonpost.com/author/imam-mohamed-magid> [<https://perma.cc/7LBM-75K5>].

130. ISLAMIC SOC’Y OF N. AM., *Imam Magid*, <http://www.isna.net/imam-magid/> [<https://perma.cc/NAY4-A6XU>]. He was formerly the President of the Islamic Society of North America, the largest Muslim organization in the United States.

131. *Id.*; see also *Imam Mohammed Magid*, *supra* note 129.

132. See Bambach, *supra* note 104, at 237–38.

133. See *id.* at 210–11.

134. Similar organizations such as the American Islamic College and the International Institute of Islamic Thought were created in the 1980s. See *History*, AM. ISLAMIC C., <https://aicusa.edu/about/history/>; see also *About Us*, INT’L INST. ISLAMIC THOUGHT, <https://iit.org/en/about-us/> [<https://perma.cc/ZP3S-5D8R>]. However, in the last ten years Muslims have refocused their efforts to build such institutions.

Zaytuna College, the first American accredited Muslim undergraduate college, founded in the United States in 2008 and accredited in 2015.¹³⁵ Zaytuna's mission is to "educate and prepare morally committed professional, intellectual, and spiritual leaders who are grounded in the Islamic scholarly tradition and conversant with the cultural currents and critical ideas shaping modern society."¹³⁶ This mission statement specifically acknowledges the aim of creating leaders who are well versed in Islamic scholarship and can navigate the exigencies of modern life. Furthermore, according to Zaytuna's website, the overarching objectives of Islamic law, *maqasid asshairah*, "provide a foundational vision for . . . the mission of the College."¹³⁷ Zaytuna's undergraduate training includes six courses on Islamic law.¹³⁸ Two of the courses are focused on the laws surrounding an individual's worship, such as fasting and pilgrimage.¹³⁹ The other four courses directly relate to skills that could be applied in a mediation or arbitration context, covering topics such as Islamic jurisprudence, family law, inheritance, and commercial law.¹⁴⁰

In August 2018, Zaytuna also began offering an accredited master's degree in Islamic texts.¹⁴¹ In Zaytuna's announcement of the accreditation of its master's program, it stated that "[t]he achievement represents a major milestone . . . for a renewed meeting of Islamic and Western streams of scholarship, which have a long history of enriching one another."¹⁴² Like the undergraduate program the master's program is aimed at training leaders with fluency in Islamic and western scholarship. The master's program offers several concentrations, including Islamic law, and within each specialization "there is a comparative track that . . . allow[s] . . . student[s] to study texts in the European tradition that parallel the Islamic texts in their ideas and

135. See *Mission*, ZAYTUNA C. <https://zaytuna.edu/mission> [<https://perma.cc/XY6G-CSWC>]; see also Aja Frost, *Zaytuna Becomes First Accredited Muslim College in the U.S.*, USA TODAY (Mar. 18, 2015, 2:15 PM), <https://www.usatoday.com/story/college/2015/03/18/zaytuna-becomes-first-accredited-muslim-college-in-the-us/37401387/> [<https://perma.cc/H7Q8-AQP9>].

136. *Mission*, *supra* note 135.

137. *Academics*, ZAYTUNA C., <https://zaytuna.edu/our-academics> [<https://perma.cc/T65J-FH73>] (last visited Aug. 18, 2018).

138. *Bachelor's Degree*, ZAYTUNA C., <https://zaytuna.edu/our-academics/undergraduate-bachelors-degree#curriculum> [<https://perma.cc/9TXK-6B3N>].

139. *Id.*

140. *Id.*

141. *Zaytuna College's New Master's Degree in Islamic Texts*, ZAYTUNA C. (Aug. 16, 2018), <https://zaytuna.edu/news/zaytuna-colleges-new-masters-degree-in-islamic-texts> [<https://perma.cc/UWF5-AW44>].

142. *Id.*

methods.”¹⁴³ This program directly aims to create the type of dual-system fluency needed for the creation of a successful American Muslim Arbitration system.

Several other important institutions have also been developed recently to provide training for indigenous training of American Muslim leaders. These include The Islamic Seminary of America,¹⁴⁴ Boston Islamic Seminary,¹⁴⁵ Bayan Claremont,¹⁴⁶ the Islamic Chaplaincy Program at Hartford Seminary,¹⁴⁷ and Bayyinah.¹⁴⁸ Most recently, in 2016, several major American Muslim leaders created The Islamic Seminary of America. This seminary emerged from a meeting of American Muslim leadership that identified three critical needs of the American Muslim community:

- (1) Capacity- building for the education, training and development of home-grown Muslim leadership within the USA.
- (2) Competency standards for people currently serving as Islamic leaders in a variety of capacities in entities within and outside the American Muslim Community.
- (3) Credentialing through processes that represent authentic Islamic principles and best practices for US human services delivery.¹⁴⁹

A major accomplishment of the Islamic Seminary of America (ISA) has been a joint partnership with Southern Methodist University (SMU) in Dallas, Texas.¹⁵⁰ In addition to offering continuing education courses on the SMU campus, ISA and SMU offer a joint Master of Liberal Studies with a concentration in Islamic Studies.¹⁵¹ Other ISA

143. *Zaytuna College Plans to Offer Master Of Arts Degree in Islamic Texts*, ZAYTUNA C. (Jan. 19, 2018), <https://zaytuna.edu/news/zaytuna-college-to-offer-master-of-arts-degree-in-islamic-texts> [https://perma.cc/8MG9-BSC6].

144. *About Us*, ISLAMIC SEMINARY AM., <http://www.islamicseminary.us/about-us/> [https://perma.cc/7ZBD-FBE2].

145. *About Us*, BOS. ISLAMIC SEMINARY, <https://www.bostonislamicseminary.org/aboutus/> [https://perma.cc/6DLQ-PFFH].

146. BAYAN CLAREMONT, <http://www.bayanclaremont.org> [https://perma.cc/P3TZ-LJ33].

147. *Islamic Chaplaincy*, HARTFORD SEMINARY, <https://www.hartsem.edu/macdonald-center/islamic-chaplaincy/> [https://perma.cc/8R6C-53XQ].

148. *About*, BAYYINAH, <https://bayyinah.com> [https://perma.cc/AH6Y-JQKW].

149. *About Us*, ISLAMIC SEMINARY AM., *supra* note 144.

150. *Islamic Seminary of America (ISA)*, ISLAMIC RES. & INFO. CTR. (Sept. 29, 2017), <http://www.irc.org/tabid/99/articleType/ArticleView/articleId/1194/Islamic-Seminary-of-America-ISA.aspx> [https://perma.cc/Z9ED-8Y3G].

151. *Id.*

programming has included a training for American Muslim chaplains and imams at Yale Divinity School in March 2018 titled “Islam, Ethics, and the American Context.”¹⁵² Also in 2018, ISA sponsored the creation of the *Journal of Islamic Faith and Practice*, an Indiana University publication.¹⁵³ This publication is particularly focused on the “modern American context” in understanding Islamic faith and practice.¹⁵⁴

Similarly, the Boston Islamic Seminary is focused on the development of American Muslim leadership that is “firmly grounded in the Islamic tradition, yet intimately familiar with Western traditions and institutions”¹⁵⁵ The BIS website recognizes that the American Muslim community is at a particular point in development that requires more religious leaders with “intellectual, spiritual, and practical training to serve” Muslims in the American context.¹⁵⁶ It further recognizes that while the American Muslim community has witnessed growth and institutional development in past decades, “there remain difficult and perplexing moral, intellectual, socioeconomic, and civic challenges that impede a more fruitful and God-conscious lived reality for Muslims in America.”¹⁵⁷ According to BIS, “[a]t the heart of these challenges lies the lack of a native American Muslim leadership . . . that is firmly grounded in the Islamic tradition, yet intimately familiar with Western traditions and institutions”¹⁵⁸

While many of the graduates of these institutions will likely pursue careers as imams, they may also follow the example of the Beth Din of America and serve dual roles in their communities as imams and arbitrators. With the creation of these institutions, the upcoming generation of Muslim American leadership will likely possess the dual-system fluency needed for the successful creation of enforceable American Muslim Arbitration that will meet the legal needs of American Muslims with religio-legal solutions that adapt Islamic law to the exigencies of American life.

152. CONFERENCE PROGRAM, THE 8TH ANNUAL NATIONAL SHURA AND IN-SERVICE TRAINING FOR CHAPLAINS AND IMAMS AND OTHER SERVICE PROVIDERS TO THE MUSLIM COMMUNITY 3, <https://associationofmuslimchaplains.org/wp-content/uploads/2018/04/shura-1439-program-FINAL.pdf> [<https://perma.cc/TCA8-HWFB>].

153. *Id.* at 6.

154. *Id.* at 18.

155. *Muslim Religious Leadership in America*, BOS. ISLAMIC SEMINARY, <https://www.bostonislamicseminary.org/muslim-religious-leadership-in-america/> [<https://perma.cc/4AB5-XRJY>].

156. *About Us*, BOS. ISLAMIC SEMINARY, *supra* note 145.

157. *Id.*

158. *Muslim Religious Leadership in America*, BOS. ISLAMIC SEMINARY, *supra* note 155.

F. Islamic Law Primer

The development of these institutions also represents a larger trend within the American Muslim community to create its own indigenous legal and financial foundation.¹⁵⁹ This is an important departure from the tendencies of the American Muslim community in the 1980s and 1990s.¹⁶⁰ Since the 1960's Saudi Arabia has led an effort to influence Islamic law globally, including in the United States.¹⁶¹ They have pursued this effort through a variety of mechanisms. One such mechanism is the extensive funding of religious legal education internationally.¹⁶² Such funding includes sponsoring students in Saudi religious institutions and the creation of institutions promoting Saudi religious theology.¹⁶³

This has impacted the modern development of Islamic law globally.¹⁶⁴ In secular jurisdictions, like the United States, Islamic law is most often applied in the informal context of consultations and ADR with imams in masjids.¹⁶⁵ These consultations may result in a fatwa (religious legal opinion) that is determined by the imams' understanding and application of Islamic law. In instances where the imam identifies with a Salafi or Wahhabi theology, this can limit the diversity of opinion that would otherwise be present within Islamic law.¹⁶⁶

It is important to understand the challenges these interpretations of Islamic law pose for the application of Islamic law globally. This lack of diversity of opinion has led to less flexibility within the law, which has made the application of Islamic law within a secular context more

159. *Interview: Maher Hathout*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/saudi/interviews/hathout.html> [https://perma.cc/Y4LA-GBQS].

160. *Id.*

161. *Id.*

162. Scott Shane, *Saudis and Extremism: 'Both the Antagonists and the Firefighters'*, N.Y. TIMES (Aug. 25, 2016), <https://www.nytimes.com/2016/08/26/world/middleeast/saudi-arabia-islam.html> [https://perma.cc/7E8W-3PMM].

163. *Id.* (quoting a U.S. State Department study that was never released for fear of angering the Saudis as stating: "In many places . . . the largess includes 'a Saudi-funded school with a Wahhabist faculty (educated in a Saudi-funded Wahhabist University), attached to a mosque with a Wahhabist imam, and ultimately controlled by an international Wahhabist educational body.'").

164. *See* Shane, *supra* note 162.

165. Bambach, *supra* note 104, at 351.

166. Fareed Zakaria, *Saudi Arabia: The Devil We Know*, WASH. POST (Apr. 21, 2016), https://www.washingtonpost.com/opinions/saudi-arabia-the-devil-we-know/2016/04/21/2109ecf6-07fd-11e6-b283-e79d81c63c1b_story.html [https://perma.cc/3X6B-WPGP] ("The globalized Wahhabism [of Saudi Arabia] has destroyed much of the diversity within Islam, snuffing out liberal and pluralistic interpretations of the religion in favor of an arid, intolerant one.").

complicated. British Muslim ADR entities, as well as the Israeli Shariah courts, have used the flexibility provided by a diversity of opinions within Islamic law as a means of adapting the law to the exigencies of secular contexts.¹⁶⁷ American Muslim Arbitration could serve as an important forum for the continued development of diverse interpretations of Islamic law that meet the needs of Muslims living in modern contexts.

The United States is uniquely positioned as a secular country that promotes freedom of religion to provide a legal environment in which the development of Islamic law can flourish. There is no danger in the United States of the state co-opting religious laws for its own purposes, as is the case of many Muslim majority countries. The American Muslim community is the most diverse Muslim community on earth in terms of cultural and religious background.¹⁶⁸ All major jurisprudential denominations of Islamic law are represented, unlike most Muslim-majority countries, and equally importantly there is freedom for robust differences of opinion on the correct application of Islamic law.

Unfortunately, public opinion in the United States tends to conflate all of Islamic law with the particular practices of a few Muslim-majority countries, such as Iran and Saudi Arabia, and non-state actors such as ISSI and Al-Qaeda. American public opinion of Islamic law has tended to focus on the application of Islamic law of these countries and non-state actors especially in regard to women's rights. Legal restrictions on women, such as the Saudi prohibition on women driving (which was only lifted recently on June 24, 2018),¹⁶⁹ and strict dress codes for women loom large in the public eye.¹⁷⁰ Additionally, the public also likely equates Islamic law with the strict interpretations Islamic criminal law enforced in places like Iran and Saudi Arabia, entailing corporal punishment and evoking images of public stoning and cutting off of hands.

As noted earlier, the proposal for judicially enforceable Islamic arbitration in Ontario was met with fierce opposition from all sides, including some Canadian Muslims. The opposition was likely motivated

167. See Benhalim, *supra* note 13.

168. DALIA MOGAHED & YOUSEFF CHOUHOUD, INST. FOR SOC. POL'Y AND UNDERSTANDING, AMERICAN MUSLIM POLL 2017: MUSLIMS AT THE CROSSROADS, <https://www.ispu.org/wp-content/uploads/2017/03/American-Muslim-Poll-2017-Report.pdf> [<https://perma.cc/PDT6-SV59>].

169. Sarah Sirgany & Laura Smith-Spark, *Landmark Day for Saudi Women as Kingdom's Controversial Driving Ban Ends*, CNN (June 24, 2018), <https://www.cnn.com/2018/06/23/middleeast/saudi-women-driving-ban-lifts-intl/index.html> [<https://perma.cc/S74J-DFZL>].

170. S.B. Riyadh, *Saudi Arabia's Dress Code for Women*, ECONOMIST (Jan. 28, 2015), <https://www.economist.com/the-economist-explains/2015/01/28/saudi-arabias-dress-code-for-women> [<https://perma.cc/UC5P-8Z4A>].

in part due to concerns that the Islamic law applied in Islamic arbitration would mirror the application of Islamic law found Saudi Arabia or Iran. The opposition was also likely motivated by concerns that communal pressures would limit Ontario Muslims' ability to choose civil court. Statements the initiative's founder, Syed Mumtaz Ali, made likely contributed to these concerns. In announcing the initiative, he indicated that "'good Muslims' would be expected to subject their family disputes to resolution by the Sharia arbitration mechanism, rather than the state's civil court system and its secular family law."¹⁷¹

This statement is perhaps the most troubling aspect of the announcement, which otherwise indicated that "the decisions of [its] Sharia tribunal would be judicially enforceable like other arbitral awards"¹⁷² and would comply with Ontario's Arbitration Act of 1991.¹⁷³ Religious arbitration itself was nothing new to Ontario. Jewish and Christian tribunals were already regularly operating in Ontario¹⁷⁴ Indeed, arbitration law in Ontario had remained the same since 1992 and courts considered the arbitral awards of these tribunals as enforceable.¹⁷⁵ The two biggest differences between the existing religious tribunals and the Islamic tribunal was the public announcement of Islamic arbitration specifically and an indication that the tribunal would create coercive communal compulsion to resolve disputes via the Sharia tribunal and forgo rights that might otherwise be afforded litigants, especially women, in civil court.

Another potential issue with the Ontario Sharia proposal was the lack of clarity regarding what was actually meant by "Sharia law." Indeed, Islamic law is a rich area of the law with multiple jurisprudential traditions. Calling for the enforcement of "Sharia" is about as clear as stating that a court will apply Western law. In the modern era, this is further complicated by Salafi movements, which call for a jurisprudential approach that largely disregards over 1400 years of jurisprudence and corresponding legal methodology, instead adopting a textual literalism approach to the Quran and Hadith, akin to Biblical literalism.¹⁷⁶ These differences can have significant implications for the

171. Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT'L. L. 231, 241 (2011).

172. *Id.* at 240.

173. *Id.*

174. *Id.* at 241.

175. *Id.*

176. Robert Fisk, *In the Age of Islamic Literalism We Should Remember the Egyptian Scholar Who Fought Back*, INDEPENDENT (May 30, 2017), <https://www.independent.co.uk/voices/nasr-abu-zeid-quran-literal-isis-wahhabism-remember-a7762991.html> [<https://perma.cc/3PDD-3ENA>].

expectations of litigants, expectations litigants may not even realize that they have.

To better understand the importance and potential operation of American Muslim Arbitration, clarification is needed about the actual law that such arbitration bodies might enforce. Sharia or Islamic law is perhaps the most misunderstood legal tradition in the United States today. These misconceptions include the belief that Islamic law is fixed and regressive, unable to adapt to the exigencies of modern life. Other misconceptions include the belief that the laws of places like Saudi Arabia and Iran accurately and fully represent Islamic law.

To the average American, the discrete area of law referred to as the *hudud* are representative of all of Islamic law. These are laws that within the classical Islamic legal tradition invoke corporal punishment of varying degrees. This association is understandable given the application of the *hudud* by groups like Boko Haram and ISIS, who do so strictly and frequently, without any of the ameliorative measured in classical Islamic law. As a result, the *hudud* are “often imagined to be the harbinger and flagship of Islamic law.”¹⁷⁷ Within the classical tradition Muslim jurists “greatly circumscrib[ed] the application of the *hudud* penalties through a variety of doctrinal and procedural hurdles.”¹⁷⁸ Furthermore, as discussed in Part II, given the subject matter limitations on arbitration within Islamic law, as well as the limitations on the application of the *hudud* more generally, American Muslim Arbitration would be barred from adjudicating criminal matters under both Islamic and American law.

Sharia law is often used to refer to the laws followed by Muslims throughout the world. However, this usage does not accurately reflect the meaning of Sharia within Muslim jurisprudence, theology, and philosophy. Sharia can more broadly be understood as divine will itself. Within traditional Islamic law, scholars understood that they would never know whether they correctly interpreted and applied the Sharia, as this knowledge in actuality belongs to God alone. They recognized that theirs was a human endeavor and the nomenclature reflected that. Scholars’ attempts to interpret the Sharia are called *fiqh* and the term is used to differentiate between God’s actual divine will and the human attempt to understand it.¹⁷⁹ Linguistically the root of the word *fiqh* refers

177. KHALED ABOU EL FADL, REASONING WITH GOD: RECLAIMING SHARI’AH IN THE MODERN AGE at 1 (2017).

178. *Id.* at *li.* According to Abou El Fadl, “repentance, forgiveness, and doubt acted to prevent the application of the *hudud*.” *Id.* Furthermore, Muslim jurists relied on the “Prophet Muhammad’s injunction, which was adapted into a legal maxim, [which] commanded that any doubt must serve to suspend the application of the *hudud*.” *Id.*

179. Noah Tesch & Editors of Encyclopædia Britannica, *Fiqh*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/fiqh> [<https://perma.cc/9TJS-EF6L>].

to understanding and comprehension, whereas the root of the word Sharia refers to a watering place, i.e. a source of knowledge.¹⁸⁰ For the purposes of this Article, the term “Islamic law” is used to refer to *fiqh* and the term Sharia will be used in reference to divine knowledge and in reference to the official title of courts, i.e. the Sharia Court of Israel.

Islamic law today is broadly found within five denominations of jurisprudence,¹⁸¹ *madhahib* (or schools of thought), the four Sunni denominations—Maliki, Shafii, Hanafi, and Hanbali, and the Shia Jafari denomination.¹⁸² Litigants’ expectations of Islamic law are generally colored by the jurisprudential denomination in which they have been immersed. For Muslim immigrants this is often dictated by geographic origin. For instance, the majority of Muslims in South Asia follow the Hanafi legal school and the majority of Muslims in North Africa (with the exception of Egypt) follow the Maliki legal school.¹⁸³ Muslims from these regions may have never encountered Muslims following other legal schools prior to immigration and may assume *incorrectly* that the legal rulings of their particular school are the only possible legal opinions on a matter. For example, there are differences of opinion within the traditional legal schools as to whether a woman can serve as a judge.¹⁸⁴ Furthermore, intra-denominational differences exist that result in majority and minority opinions among historical and contemporary scholars of a particular denomination that can lend flexibility to the application of Islamic law.

180. *Id.*; Noel James Coulson, Shariah, ENCYCLOPEDIA BRITANNICA (Jan. 5, 2019), <https://www.britannica.com/topic/Shariah> [https://perma.cc/FX7W-PTRL].

181. Other minority denominations of jurisprudence also exist, such as the Zaydi and Isma’ili denominations. Arun Prasad, *What Are the Major Similarities and Differences in the Different Sects of Islam?*, INTERFAITH LEADERSHIP COUNCIL METROPOLITAN DET. (May 22, 2018), <http://www.detroitinterfaithcouncil.com/what-are-the-major-similarities-and-differences-in-the-different-sects-of-islam/> [https://perma.cc/7EBZ-ZLWV]. There have also been calls for the revival of the Mu’tazila denomination, which was known for its reliance on reason and rationalism. *Mu’tazili*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/Mu%27tazili> [https://perma.cc/WT79-RRL2].

182. Throughout Islamic history many schools of jurisprudence have existed, with at least nineteen schools existing in the historical record. However, due to various historical circumstances the five major schools dominate almost all of Islamic law today. See Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional Notions of Justice?*, 28 WIS. INT’L. L.J. 108, 118–19 (2010).

183. *North Africa, Islam in* OXFORD ISLAMIC STUD. ONLINE, <http://www.oxfordislamicstudies.com/article/opr/t125/e1771> [https://perma.cc/UDN3-BXN5]; Christie S. Warren, *The Hanafi School*, OXFORD BIBLIOGRAPHIES (May 28, 2013), <http://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0082.xml> [https://perma.cc/D5WJ-TAYZ].

184. See NIK NORIANI NIK BADLISHAH & YASMIN MASISI, WOMEN AS JUDGES (2002).

These differences are further intensified between Shias and Sunnis. While it is certainly conceivable, and potentially beneficial, for a single Muslim tribunal to handle both Sunni and Shia matters, it would need a pool of arbitrators that include experts in specific Sunni legal schools and specific Shia legal schools. Such a tribunal could perhaps contribute to fostering discourse between Shia and Sunni scholars, which due to political conflicts has become stifled in the modern era. Historically, Sunni and Shia Islamic law scholars have studied from one another,¹⁸⁵ and the United States could serve as a particularly fertile environment for such exchanges to occur again, given the lack of historical and political conflict between Sunnis and Shias in the United States. Social practices of Muslims in Michigan, the largest Arab population in the United States, suggests that such an endeavor could be especially successful.¹⁸⁶

1. THE IMPACT OF CODIFICATION AND COLONIZATION ON ISLAMIC LAW

Beyond the Sunni-Shia divide and denominational differences within Islamic law, Islamic law was further complicated by its codification in the European colonial era. Codification of Islamic law was both a colonial endeavor colonial powers imposed upon Muslims and an internal Muslim movement towards modernization, which at the time meant following the European trend of codification. Although the specific movements for codification occurred over a two-hundred-year period, what they all share “is that they [were] influenced by the European idea of codification and the legalistic methods associated with it.”¹⁸⁷ “This was a radical change from a case law to a statute law, putting Islamic law in danger of losing the flexibility typical of case law.”¹⁸⁸ Prior to codification, classical Islamic law “is by its very nature a common law system of jurisprudence.”¹⁸⁹ Islamic law created under

185. For example, Imam Jafar Saadiq is the eponym of the Shia Jafari school and taught Imam Malik and Imam Abu Hanifa, the respective eponyms of the Sunni Maliki and Hanafi denominations.

186. From my time living in Michigan, near Dearborn, I learned that within Michigan there is a substantial population of Muslims who identify themselves as both Sunni and Shia or “SuShi”, and typically are the children of a Sunni and a Shia parent. I am unaware of any studies that have been conducted about this population.

187. Richard Potz, *Islamic Law and the Transfer of European Law*, EUR. HIST. ONLINE (Nov. 21, 2011), <http://ieg-ego.eu/en/threads/europe-and-the-world/european-overseas-rule/richard-potz-islamic-law-and-the-transfer-of-european-law> [<https://perma.cc/7BFQ-CCKN>].

188. *Id.*

189. Kristina Benson, *The Moroccan Personal Status Law and the Invention of Identity: A Case Study on the Relationship Between Islam, Women, and the State*, UCLA J. ISLAMIC & NEAR E.L., 2012–13, at 1, 3.

the colonial and post-colonial framework lacks the inherent flexibility that was an integral feature to the body of law. While codified Islamic law certainly invokes the same texts as classical Islamic law, namely the Qu'ran and hadith, the relationship to those sources to the doctrine is fundamentally changed, insofar as the legal methodology differs significantly.¹⁹⁰

European colonialism also impacted Islamic law within Muslim majority countries by limiting the jurisdiction of Islamic courts to family law. This jurisdictional limitation on Islamic law courts is the reality of many Islamic law courts globally, including in Muslim majority countries.¹⁹¹ The colonial period saw the creation of so called “personal status laws.”¹⁹² For instance, in Morocco, the French during their occupation,

avoided interference in domains that they deemed of little relevance to their hegemony. Thus, they created a dual system of governance: the French system, which controlled commercial life and penal law, and Shari'a law, which was more or less left to native control and rendered applicable solely to marriage and family.¹⁹³

These personal status laws, and in particular their codification, has had a profound impact on women. According to Professor Amira Sonbol, “[t]he impact of personal status laws cannot be underestimated in regards to women, work, and participation in public life, the economy, or political system. As a totality, personal status laws confine women within predetermined patriarchal parameters, and give them only limited freedom of choice outside parental and husband approval.”¹⁹⁴

During the colonial and post-colonial periods throughout Muslim-majority countries, the qualities of classical Islamic law of being “highly localized, flexible, and dynamic . . . [were] seen as antithetical to the

190. Furthermore, the broader lists of sources are often also lacking in codification. For instance, like the majority of the schools, “the Maliki school explicitly endorses the use of analogical reasoning (*qiyas*), opinion (*r'ay*), and public interest (*istislah*) as possible sources of law, giving rise to laws that constantly change along with evolving perceptions of (for example) the ‘public interest’ or ‘justice.’” *Id.* at 3–4.

191. This change began in the Ottoman Empire and includes former Ottoman lands such as Egypt and Lebanon. It also includes countries such as India and Morocco. *See* BOWEN, *supra* note 35, at 51–54 (describing the development of Muslim Personal Law and Islamic courts in India under colonial rule).

192. “Personal status laws” typically refer to laws relating to family matters, such as marriage, divorce, custody, and inheritance. *Id.* at 53.

193. Benson, *supra* note 189, at 3 (citing WAEL B. HALLAQ, *SHARIA: THEORY, PRACTICE, TRANSFORMATIONS* 438 (2009)).

194. AMIRA EL-AZHARY SONBOL, *WOMEN OF JORDAN: ISLAM, LABOR, & THE LAW* 183 (2003).

modern legal system, which by its nature requires a centralized government capable of providing a sole legitimate source of coercive authority.”¹⁹⁵ For instance during the classical period of Islamic law, Imam Malik, the eponym of the Maliki denomination, “twice refused requests from ruling Caliphs to make his treatise on *fiqh* (Islamic jurisprudence) into state law. He did so on the grounds that Muslims had a duty not to obey such laws if they found them ‘incorrect’ or inconsistent with what their consciences might dictate.”¹⁹⁶ During this period, Islamic courts often ceased operating independently of the state.¹⁹⁷ This is in strong opposition to the trend of many modern Muslim majority governments to fully embody strong state enforcement of religious law, which is primarily a post-colonial phenomenon.¹⁹⁸

Per classical Islamic law, “the caliph had paramount responsibility to fulfill the divine injunction to ‘command the right and prohibit the wrong.’”¹⁹⁹ However, while the caliph had this responsibility he was required “to delegate responsibility to scholarly judges, who would apply God’s law as they interpreted it.”²⁰⁰ The caliph had the power to “promote or fire them as he wished, but he could not dictate legal results: judicial authority came from the caliph, but the law came from the scholars.”²⁰¹ American Muslim Arbitration would more closely align with notions of the appropriate relationship between the state and the enforcement of Islamic law within classical Islamic law itself, as the state would not dictate the application of Islamic law to the arbitrators.

The codification of Islamic law and the appropriation of Islamic courts by the state have limited the development of Islamic law in the modern era, derailing Islamic law from the classical tradition that provided greater diversity of opinion and customization to the particular circumstances of litigants.²⁰² The same series of events that led to the codification of Islamic law and the narrowing of the jurisdiction of Islamic law to “personal status,” also led to the disappearance of commercial law from most the Muslim majority world, with “the one

195. Benson, *supra* note 189, at 4.

196. *Id.*

197. *Id.*

198. *Id.*

199. Noah Feldman, *Why Shariah?*, N.Y. TIMES MAG. (Mar. 16, 2008) (quoting NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 28 (2008)), <https://www.nytimes.com/2008/03/16/magazine/16Shariah-t.html?mtrref=undefined&gwh=CBF6EE34C4FEED26D07B80F881206999&gwt=pay> [<https://perma.cc/HMN7-2PHS>].

200. *Id.*

201. *Id.*

202. Benson, *supra* note 189, at 3.

exception being, for a considerable period, the Arabian peninsula and, more recently, Saudi Arabia alone.”²⁰³

2. COMMERCIAL ISLAMIC LAW IN THE MODERN ERA

The idea that a Muslim need be especially concerned with adhering to religious law in matters of marriage and divorce but not other areas of religious law is alien to classical Islamic law. Indeed, classical Islamic law did not categorize Islamic law in the same way as the legal western tradition, i.e. contract, family law, etc. Rather, the “principal divisions were *akhlaq* (morals), *ibada* (religious observance) and *mu’amalat* (transactions)”²⁰⁴ Scholars did differentiate between “commercial and non-commercial transactions to some extent,” however, this differentiation “did not have anything like the same nature or significance as the Western divide.”²⁰⁵ Broadly speaking, how a Muslim handles his or her marriage and divorce carries no more weight or significance than how a Muslims handles his or her business affairs.²⁰⁶ Likewise, classical scholars of Islamic jurisprudence devoted significant attention to both areas of the law.²⁰⁷ Although commercial Islamic law has in large part disappeared due to historical circumstance, that does not mean that Muslims do not recognize the religious need to align their business affairs with religious law.

In the modern era, the one area of commercial law that has drawn attention is Islamic finance.²⁰⁸ To some extent this is attributable to two factors: (1) the dominance of capitalism as a global financial structure and the pivotal function interest occupies in capitalism, and (2) the strong prohibition against usury within classical Islamic law.²⁰⁹ As Muslim-majority countries have entered the global market in more significant ways, they have found the need to negotiate limitations Islamic law imposes on financial transactions with the demands of the global market. What has ensued is the creation of legal acrobatics to avoid the technical usage of usury, while meeting the demands of the global market for returns on investments.²¹⁰

The application of Islamic finance can be found in a wide range of contexts. Oil rich nations have contributed significantly to the

203. Nicholas HD Foster, *Islamic Commercial Law: An Overview (I)*, INDRET, Oct. 2006, at 1, 7, http://www.indret.com/pdf/384_en.pdf.

204. *Id.* at 4–5.

205. *Id.*

206. *See id.* at 3.

207. *Id.* at 4–5.

208. *Id.* at 8.

209. Mahmoud A. El-Gamal, “Interest” and the Paradox of Contemporary Islamic Law and Finance, 27 FORDHAM INT’L L.J. 108, 108–09 (2003).

210. *Id.* at 109.

development of Islamic finance in the modern era through requirements to have usury-free investment contracts with their country.²¹¹ Islamic finance is also utilized on a much more personal level. For instance, Muslims in the United States may utilize an Islamic financial institution to purchase a home.²¹² Due to the consistently strong prohibition on usury and the pervasiveness of interest in most financial systems globally, the issue has caught the attention of Muslims worldwide.²¹³

That said, under Islamic law usury is by no means the only issue that a Muslim should take into consideration in business transactions. Partnership structures, contract terms (including issues of unconscionability), etc., all play an important role in classical Islamic legal scholarship.²¹⁴ The corpus of what could be considered commercial law within Islamic law originated out of the immense amount of trade in which Muslims historically engaged in.²¹⁵ The Muslim majority world involved major trade routes that promoted “favorable economic environment.”²¹⁶ This led to the development of industry, the import and export of goods and widely circulated currencies.²¹⁷ With these economic developments came legal developments to meet the economic needs. Commercial law was specifically developed out of interactions with non-Muslims and adapted to circumstances. Most “jurists developed a system which, it seems . . . served the needs of participants well.”²¹⁸ American Muslim Arbitration could contribute to the development of Islamic law for a broad range of commercial matters with global application. Given the nature of commercial disputes, the enforceability of American Muslim Arbitration would be a critical element for litigants. Although most Muslim ADR in Europe and North America has focused on family matters, American Muslim Arbitration could also make important contributions to the application of Islamic law to commercial matters in the modern era.

II. HOW AMERICAN MUSLIM ARBITRATION CAN EXIST

The United States’ legal environment is particularly favorable for the development of American Muslim Arbitration tribunals for a

211. *Id.* at 112.

212. Kyle Gaffaney, Student Article, *Buying a Home Can Be Difficult for Muslims in the United States*, 21 LOY. CONSUMER L. REV. 557, 573–74 (2009).

213. See El-Gamal, *supra* note 209, at 125–26.

214. Hussein Hassan, *Contracts in Islamic Law: The Principles of Commutative Justice and Liberty*, 13 J. ISLAMIC STUD. 257, 258 n.6 (2002).

215. Foster, *supra* note 185, at 5–6.

216. *Id.* at 6.

217. *Id.* (quoting Eliahu Ashtor, *Banking Instruments Between the Muslim East and the Christian West*, 1 J. EUR. ECON. HIST. 553, 558 (1972)).

218. *Id.*

number of legal and historical reasons. First, the United States has a long history of supporting religious arbitration, dating back to the pre-colonial era.²¹⁹ Second, the Federal Arbitration Act permits and supports the use of arbitration, including religious arbitration. Third, Islamic law has a long history of arbitration and promotes its use.

A. History of Religious Arbitration in the United States

To many living in Western liberal democracies, the very notion of the American legal system providing legal sanction to a Sharia court seems contrary America's ideological foundation. Yet, since its founding, the United States has long had religious tribunals that operate legally and whose decisions are enforceable by a state court. The United States has a long history of permitting and fostering religious arbitration as part of its vision for legal pluralism. This commitment to allowing religious courts a place in America's legal framework originates out of our colonial history. Although scholars have predominantly explored Jewish Arbitration in the United States, Christian communities also widely use arbitration both today and in the colonial period.²²⁰

In the United States, religious courts operate mostly in the form of arbitration. A common feature of religious arbitration is that arbitrators are often leaders in their respective religious communities, i.e. ministers, rabbis, etc.²²¹ While these arbitration decisions are typically enforceable in civil court, the state is generally prohibited from substantive review of the decisions.²²² For the purposes of this Article, religious arbitration in the United States will be defined as "a voluntary dispute resolution process, conducted according to religious principles . . . [which] often serves as a substitute for proceedings in civil court."²²³

Within the American system, the structure of religious courts as "opt-in" tribunals facilitates freedom of religion for those citizens for whom religious expression includes complying with religious law via religious courts. The balance between freedom of and freedom from religion within the American legal system reflects the historical desires and realities of the colonial period. Preservation of religious pluralism was an objective of the country's founders, creating a federation of

219. See Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 509–14 (2012).

220. *Id.*

221. See BROYDE, *supra* note 11, at 165 n.117 ("The most recently published partial list of Beth Din arbitrators names twenty-six dayanim. Of those individuals, twenty-one are rabbis and nine are lawyers. However, seven of the lawyer- dayanim are also ordained rabbis.").

222. Walter, *supra* note 219, at 521–22.

223. *Id.* at 503–04.

states with a variety of established churches, some of which were state sanctioned.

The U.S. historical experience with religious courts and the state departs significantly from its European, English, and Canadian cousins, although all reflect the Enlightenment ideals regarding freedom of thought and religion. Within the American experience there was “competition between state- and church-sponsored dispute resolution,” as well as areas in which no “civil alternatives” existed to the “church dispute resolution.”²²⁴ For instance, in France the “church claimed subject matter jurisdiction over matters of faith, such as heresy and blasphemy; it also dealt with family law and marriage, and claimed a wide jurisdiction over disputes that had a ‘mixed’ religious and secular character, such as contracts made under oath.”²²⁵ Likewise, in England, prior to the Reformation, “the church still exercised jurisdiction over what we would today regard as quintessentially secular contract law.”²²⁶ The intersection between the church courts and the common-law courts was so intertwined in England that up until the fourteenth century, “church courts had adopted the practice of hearing appeals from the common-law courts.”²²⁷ The American experience also differed significantly from the neighboring Canadian experience wherein English and French immigrants respectively sought to establish the Church of England and Roman Catholic Church as the religion of the land.²²⁸

Within the American colonial experience, a plurality of churches were established in the colonies. These churches often served as the initial courts, which led to the development of a culture of utilizing alternative dispute resolution.²²⁹ For instance, in 1635 a Boston colonial community required that “no congregation members could litigate unless there had been a prior effort at arbitration.”²³⁰ Both religious conviction and necessity promoted a culture of utilizing alternative dispute resolution. Christian colonists often looked to the Bible to support church-based dispute resolution. In particular, Christians looked to biblical passages describing how St. Paul exhorted the believers to settle disputes among themselves urging them not to take cases to the courts of the unbelievers.²³¹

224. *Id.* at 509.

225. *Id.* at 508 (citing ALBERT RIGAUDIÉRE, *HISTOIRE DU DROIT ET DES INSTITUTIONS DANS LA FRANCE MÉDIÉVALE ET MODERNE* 359 (4th ed. 2010)).

226. *Id.* at 506.

227. *Id.*

228. *Id.* at 509–10.

229. *Id.* at 510–11.

230. *Id.* (citing JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 23 (1983)).

231. *Id.* at 511 (citing 1 *Corinthians* 6:6).

During this period, “[t]he civil courts functioned as a ‘back-up’” to the church courts “when civil power was needed—for example, to arrest persons and attach property.”²³² “The parallel jurisdiction of the civil and church courts is a feature of modern-day arbitration, and it is not surprising that the other characteristics that we often associate with modern arbitration—speed, informality and inexpensiveness—were present in religious arbitration before American independence.”²³³

In the post-Revolutionary era, religious arbitration lost its general popularity among American Christians with a number of notable exceptions within certain religious communities, including Utopian and Mormon communities.²³⁴ The American Jewish community is perhaps the most well-known religious community that popularly utilizes religious arbitration. Religious arbitration within the American Jewish community has taken on a number of different forms, including the pre-World War I *Kehillah* tribunals and the creation of different arbitral bodies for the Ultra-Orthodox, Orthodox, and Conservative communities.²³⁵ Of particular significance to the lasting success of American Jewish arbitration was the “passage of the Municipal Court Act of 1915, which made their judgments legally binding.”²³⁶ Other jurisdictions passed similar laws in the early twentieth century, making Jewish arbitration viable in multiple jurisdictions.²³⁷

The historic and contemporary popularity of religious arbitration within minority and offshoot religious communities reflects the religious requirements of those communities to comply with religious law. Within the American constitutional context, this use of religious arbitration can be understood as critical piece of the legal framework to support freedom of religion. The enforcement of these arbitrations ensures that religious peoples have freedom *of* religion, rather than simply freedom *from* religion. Concurrently, the arbitration system is structured as an “opt-in” system ensuring freedom from religion for those who either are not religiously affiliated or who do not agree with the predominate interpretation or application of religious law within their particular religious community.

B. Religious Arbitration Under the FAA

In the United States today, religious arbitration tribunals like their secular counterparts operate under the Federal Arbitration Act (FAA).

232. *Id.*

233. *Id.*

234. *Id.* at 512.

235. *See id.* at 514.

236. *Id.*

237. *See id.*

The FAA states the permissibility of agreements to settle disputes via arbitration:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²³⁸

The FAA's definition of "commerce" further clarifies the above:

"commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation²³⁹

These provisions "reflect the law's long-held preference for courts honoring private agreements between parties."²⁴⁰ Section 5 of the FAA, also indicates the preference for honoring parties' agreements. Section 5 provides: "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed"²⁴¹ Other sections outline other elements of the arbitration process, such as the means by which parties can have an arbitration agreement enforced and an arbitration award confirmed.²⁴²

Although existing American Muslim arbitration is limited, courts have addressed the issue in at least one case. A 2003 Texas Court of Appeals case, *Jabri v. Qaddura*,²⁴³ ruled on "motions to stay litigation and compel arbitration under the Texas General Arbitration Act."²⁴⁴ The case involved a messy divorce in which five parties (the wife and husband, the wife's parents, and the husband's brother) eventually

238. 9 U.S.C. § 2 (2012).

239. 9 U.S.C. § 1 (2012).

240. BROYDE, *supra* note 11, at 116.

241. 9 U.S.C. § 5 (2012).

242. *See* 9 U.S.C. §§ 4, 9 (2012).

243. 108 S.W.3d 404 (Tex. App. 2003).

244. *Id.* at 413.

became involved in various suits related to the divorce.²⁴⁵ On September 25, 2002, after all the suits had been filed, all five parties signed an arbitration agreement, agreeing to “submit all claims and disputes among them to arbitration by the [Texas Islamic Court].”²⁴⁶ The agreement stated that the parties agreed that the “determination of each party’s responsibilities and duties” would be “according to the Islamic rules of law by Texas Islamic Court” and listed the agreed-upon arbitrators.²⁴⁷ The arbitration agreement also stipulated that “the Ruling of the Texas Islamic Court . . . is Binding, and Final, and no party will take an appeal or future legal action of any matter afterwards.”²⁴⁸

In deciding the case, the appellate court treated the agreement to arbitrate as a typical contract and did not question the validity of the application of Islamic law by the Texas Islamic Court.²⁴⁹ The question before the court hinged on whether a “meeting of the minds” had been reached on the agreement to arbitrate.²⁵⁰ The court stated that its “primary goal in construing a written contract is to ascertain and give effect to the intent of the parties as expressed in the instrument.”²⁵¹ It used the following standard: “If a written contract is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law.”²⁵² Based on the clear language of the arbitration agreement, which listed “with specificity the exact cause numbers, case styles, and names of the trial courts,”²⁵³ the court reversed the trial court’s order and determined that “the Arbitration Agreement signed by the parties [was] valid and enforceable.”²⁵⁴ At least in this instance, the court treated an agreement to arbitrate in an Islamic arbitration tribunal as it

245. *Id.* at 407.

246. *Id.* at 407–08.

247. *Id.* at 408.

248. *Id.*

249. *See id.* at 410–13.

250. *Id.* at 411.

251. *Id.*

252. *Id.*

253. *Id.* at 412 (emphasis omitted). The basis for this in Islamic Law is based upon the following statement of the Prophet Muhammad: “It is necessary upon a Muslim to listen to and obey the ruler, as long as one is not ordered to carry out a sin. If he is commanded to commit a sin, then there is no adherence and obedience.” Sahih al-Bukhari, no. 2796 & Sunan Tirmidhi. Furthermore, scholars have interpreted this to indicate that Muslims are obliged to abstain from non-obligatory acts that would otherwise be permissible under Islamic law, such as polygamy, if the laws the country in which a Muslim is living prohibit such an act. Engy Abdelkader, *American Muslim Sister-Wives? Polygamy in the American Muslim Community*, HUFFPOST (Dec. 17, 2011 9:44AM), https://www.huffpost.com/entry/american-muslim-sisterwiv_b_1001163 [https://perma.cc/6BQJ-QE33].

254. *Jabri*, 108 S.W.3d at 413.

would any other arbitration agreement, not even raising the question of the arbitration tribunal's application of Islamic law.

C. Arbitration Under Islamic Law

Likewise, Islamic law encourages out-of-court dispute resolution and obliges Muslims to obey the law of the land, provided the law does not require them to commit a sin, i.e. a law prohibiting Muslims from attending religious services on Friday.²⁵⁵ Under Islamic Law, arbitration or *tahkim*²⁵⁶ is a well-established method for resolving disputes with support in all four recognized sources of the Sharia: Quran, Sunna (the behavior and statements of the Prophet Muhammad), *ijma'* (scholars' consensus of opinion), *qiyas* (reasoning by analogy).²⁵⁷ The actual practice can be found in example of the Prophet Muhammad and the early caliphs.²⁵⁸ The method pre-dates Islam and was well-established in pre-Islamic Arabia.²⁵⁹ All major schools of jurisprudence in both Sunni and Shia Islam accept *tahkim* as a legitimate means of resolving disputes, although they differ in some jurisdictional and procedural requirements.²⁶⁰

Scholars primarily rely on the Quranic verse 4:35, which describes the processes of resolving spousal dissent, as justification for the permissibility of arbitration.²⁶¹ Verse 4:35 states: "And if you fear dissension between the two of them (spouses), then send an arbitrator from his family and an arbitrator from her family, and if they both want peaceful justice, God will cause reconciliation between the two of

255. See Yasir Qadhi, *God's Law and Man-Made Laws: Muslims Living in Secular Democracies*, MUSLIM MATTERS (Mar. 1, 2010), <https://muslimmatters.org/2010/03/01/gods-law-and-man-made-laws-muslims-living-in-secular-democracies/> [https://perma.cc/BW8D-NKUE].

256. Tahkim refers to the "action of making an appeal to arbitration by someone involved with another in a conflict or in some affair of a conflicting nature by mutual agreement" Moktar Djebli, *Tahkim*, in *ENCYCLOPEDIA OF ISLAM* (2d ed., Brill Online 2014). "Historically, the term tahkīm designated the arbitration which took place between the fourth caliph 'Alī b. Abī Tālib and the Umayyad Mu'āwīya b. Abī Sufyān [q.vv.] with the intention of effecting a solution to the grave conflict which had broken out between the two men." *Id.*

257. BOWEN, *supra* note 35, at 29.

258. Bambach, *supra* note 104, at 175.

259. Ahmed S. Moussalli, *An Islamic Model for Political Conflict Resolution: Tahkim (Arbitration)*, in *CONFLICT RESOLUTION IN THE ARAB WORLD* 44 (Paul Salem ed., 1997); Muhammed Abu-Nimer, *Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities*, in *PEACE AND CONFLICT RESOLUTION IN ISLAM: PRECEPT AND PRACTICE* 123, 128 (Abdul Aziz Said et al. eds., 2001).

260. Bambach, *supra* note 104, at 177.

261. *Id.*

them.”²⁶² Scholars also cite other verses of the Quran which enjoin believers to judge with fairness and justice.²⁶³

The practices of the Prophet Muhammad also serve as support for the legal permissibility of arbitration in Islamic law. The Prophet Muhammad famously served as an arbitrator and utilized arbitrators in resolving disputes. One of the most famous instances of his serving as an arbitrator was prior to his receiving divine revelation.²⁶⁴ He was well known in Mecca for his honesty and wisdom in settling disputes.²⁶⁵ In a dispute between Meccan clan leaders over privileges regarding the placement of the black stone in the Kaaba, the leaders asked him to settle the dispute and he did so successfully.²⁶⁶ During his prophethood he also served as an arbitrator between Muslim and non-Muslim community members.²⁶⁷ This role included serving as a mediator for Jewish tribes, in which he applied Jewish Law.²⁶⁸ He also participated in arbitration in a dispute with a Jewish tribe, the Banu Qurayza.²⁶⁹ In that dispute, the tribe accepted the Prophet Muhammad’s selection of an arbitrator and they agreed that customary law be applied.²⁷⁰

Given the support for *tahkim* in the Quran and the practices of the Prophet Muhammad, and its use by the early Caliphs and other Companions of the Prophet, it became well established in all jurisprudential denominations of Islamic law.²⁷¹ Debate exists among the jurisprudential denominations as to whether *tahkim* can be final and binding, although the modern trend in Muslim majority countries supports the idea of binding arbitration agreements.²⁷² Debate also exists as to whether parties may proactively agree to arbitrate prior to a dispute, although modern practice also supports some use of pre-dispute arbitration agreements.²⁷³ Even when binding, *tahkim* has a focus on reconciliation that is most akin to “a form of ADR commonly known in

262. Quran 4:35 (author’s own translation).

263. Bambach, *supra* note 104, at 177. Quran 4:58 states: “If you judge between people, then judge with justice.” Likewise, Quran 5:42 states: “If you judge, then judge between them with fairness.”

264. See Moussalli, *supra* note 259, at 49–50.

265. See *id.*; Rafeeq, *supra* note 182, at 113.

266. See Moussalli, *supra* note 259, at 49–50.

267. Rafeeq, *supra* note 182, at 113–14 (citing Moussalli, *supra* note 235, at 50–55).

268. *Id.*

269. Bambach, *supra* note 104, at 178.

270. *Id.*

271. *Id.* at 179–80.

272. *Id.* at 180.

273. George Khoukaz, Comment, *Sharia Law and International Commercial Arbitration: The Need for an Intra-Islamic Arbitral Institution*, 2017 J. DISP. RESOL. 181, 188.

the United States as med/arb.”²⁷⁴ “Med/arb has features of both mediation and arbitration”, starting as a mediation but transitioning to a binding arbitration if parties fail to reach a resolution.²⁷⁵ American Muslim arbitration tribunals that wish to operate under the FAA will be those that accept the position under Islamic law that arbitration can be final and binding. However, American Muslim arbitration tribunals may potentially develop their own standards as to whether they will arbitrate pre-dispute arbitration clauses.

Tahkim mirrors traditional American legal conceptions of arbitration in a number of ways: (1) arbitration follows from an agreement to arbitration, which is considered a contract and must follow contractual norms of validity; (2) pre-dispute arbitration clauses are generally permitted, provided they do not violate public policy; (3) an agreement to arbitration “must be voluntary and . . . through the mutual consent of both parties”; and (4) parties must have legal capacity to consent (primarily a question of age and mental capacity).²⁷⁶

Tahkim significantly departs from American arbitration law in regard to who may serve as an arbitrator, as there is a difference of opinion in the jurisprudential denominations as to whether a woman or a non-Muslim may serve as an arbitrator. All denominations agree that anyone who may serve as a judge may also serve as an arbitrator.²⁷⁷ A diversity of intra and inter denominations opinions exist on questions regarding whether a non-jurist may serve as an arbitrator. For instance, the Shafi denomination holds that in marital disputes a non-jurist may arbitrate.²⁷⁸ Likewise, the Hanafi denomination permits anyone to arbitrate who would qualify to serve as a witness.²⁷⁹ On the question of whether non-Muslims may arbitrate, Hanafis permit non-Muslims to arbitrate disputes that involve non-Muslims.²⁸⁰ On the question of women as arbitrators, the Hanafis permit women to serve in specific circumstances, such as “disputes involving property or issues directly relating to women.”²⁸¹ Notably, some Maliki and Zahiri²⁸² scholars permit women to serve as judges, and therefore they may serve as

274. Bambach, *supra* note 104, at 180–81.

275. Harvard Law Library, *Med-Arb/Arb-Med*, ALTERNATIVE DISP. RESOL. RES. (Sept. 7, 2018), <https://guides.library.harvard.edu/c.php?g=310591&p=2078484> [https://perma.cc/DB4L-TAK6].

276. Bambach, *supra* note 104, at 181–82.

277. *Id.* at 183, 187.

278. *Id.* at 184.

279. *Id.*

280. *Id.*

281. *Id.*

282. A formerly popular denomination that is now mostly extinct. See KHALED ABU EL FADL, SPEAKING IN GOD’S NAME: ISLAMIC LAW, AUTHORITY, AND WOMEN 10, 309 (2001).

arbitrators in some circumstances.²⁸³ This is a separate question in Islamic law from whether Muslim women may serve as imams²⁸⁴ and reflects trends in some Muslim majority countries over the past 50 years, such as Morocco, Tunisia, Algeria, Lebanon, and Syria, where women increasingly serve as judges.²⁸⁵

Given this precedent of women serving as judges, American Muslim arbitration tribunals could facilitate forum shopping where Muslims can determine for themselves the direction Islamic law should take on questions such as whether women and non-Muslims should serve in judicial capacities, as well as forum shopping based on doctrinal preferences.²⁸⁶ In particular, this could create opportunities for Muslim women to hold influential leadership positions. There is substantially more support for Muslim women to serve as judges or arbitrators than as imams. However, currently, imams resolve the vast majority of disputes, because no other Islamic institutional structures exist to supplant them.²⁸⁷ By formalizing adjudications through binding arbitration, American Muslim women would hold positions that help forge the path Islamic law will take in the modern era in cases that the American Muslim population will take seriously.²⁸⁸

III. WHY AMERICAN MUSLIM ARBITRATION SHOULD EXIST

The development of sophisticated and plural American Muslim arbitration tribunals would provide many benefits both domestically and

283. Bambach, *supra* note 104, at 184. The vast majority of Islamic scholars do not permit Muslim women to serve as imams, although a few minority opinions do exist. A brief summary of the debate can be found here: Junaid Jahangir, *7 Muslim Male Scholars Who Support Female Imams*, HUFFPOST (Apr. 27, 2017), https://www.huffingtonpost.ca/junaid-jahangir/7-muslim-male-scholars-wh_b_16244908.html [<https://perma.cc/VP4F-9TY8>].

284. Jahangir, *supra* note 283.

285. In 2017, the Israeli Shariah Court appointed its first woman to the court. Melanie Lidman, *Israel Appoints First Female Judge to Sharia Court*, THE TIMES OF ISR. (May 15, 2017), <https://www.timesofisrael.com/israel-appoints-first-female-judge-to-sharia-court/> [<https://perma.cc/X6GB-WST7>].

286. See Asifa Quraishi-Landes, Kamel Lecture at Yale Law School: Islamic Family Law in American Courts (February 13, 2018), <https://law.yale.edu/yls-today/yale-law-school-videos/asifa-quraishi-landes-islamic-family-law-american-courts> [<https://perma.cc/TYD6-9EL8>].

287. See Bambach, *supra* note 104, at 228–31.

288. The UK has at least one female arbitrator. She has been well-received and has championed women's rights. Amardeep Bassej, *The UK's First Female Sharia Judge: 'I Am Championing Women's Rights'*, HUFFPOST (Apr. 7, 2018), https://www.huffingtonpost.co.uk/2018/07/04/the-uks-first-female-sharia-judge-i-am-championing-womens-rights_a_23474394/?ncid=other_saredirect_m2afnz7mbfm&guccounter=1 [<https://perma.cc/G43A-VCM9>].

abroad. The benefits include those that traditional commercial arbitration promotes, such as court specialization and promotion of freedom of contract. It would also alleviate burdens on civil courts, especially around tensions between Establishment clause violations and freedom of contract. Furthermore, the tribunals could help resolve commercial disputes for contracts that include Islamic law or Sharia choice of law provisions. This is not to say that the creation of American Muslim arbitration tribunals is without concerns. To alleviate those concerns, the tribunals would need to be structured with internal safeguards, including limits on mandatory arbitration.

A. Benefits of American Muslim Arbitration

Religious arbitration poses many similar benefits to arbitration more generally. Religious arbitration also holds additional legal and societal benefits. The relevancy of religious traditions depends on the ability of those traditions to “offer compelling accounts of the world in which their adherents live and which they experience.”²⁸⁹ When religious adherents are forced to face and grapple with their social realities, “religions organically adapt to their environments in a way that keeps them relevant and vibrant, but also integrous and true to their roots and traditions.”²⁹⁰ These interactions with societal realities “produce[] subtle but unmistakable interpretative evolutions in religious thinking and practice. Dogmas and rituals deeply irreconcilable with societal norms and values are negotiated, cabined, and sometimes marginalized.”²⁹¹ Despite arguments that religious arbitration can lead to the siloing of religious communities and entrenchment of traditional interpretations, arbitration, due to its enforceability, may actually help foster engagement with societal realities.

In the absence of arbitration, members of religious communities still practice religious law but do so with little to no transparency and potentially limited engagement with the larger legal system. For instance, in the case of marriage individuals may forgo civil marriage entirely and marry exclusively via a religious ceremony, which may have no legal bearing in the large legal system.²⁹² They may choose to do so out of the fear that if they were to marry via a civil ceremony they

289. BROYDE, *supra* note 11, at 235.

290. *Id.*

291. *Id.*

292. For instance, this has been a major issue in England, up until August of 2018, when a UK judge recognized an Islamic marriage without a civil marriage in a divorce proceeding. Richard Perez-Pena, *U.K. Court Can Dissolve a Muslim Marriage, Judge Rules*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/world/Europe/uk-court-muslim-marriage-dissolve.html> [<https://perma.cc/JCL5-4PT4>].

would then need to divorce via civil courts, which may not align with their understanding of divorce under religious law.²⁹³ The semi-formal enforcement of Islamic law by imams can lead to the enforcement of religious laws that are out of sync with the socio-legal realities of religious adherents.

In addition to the social benefits, religious arbitration also serves to promote the freedom of contract, to “ensure that conflicts are resolved judiciously, and that [these] resolutions reflect as much as possible the understandings and expectations of the parties involved.”²⁹⁴ Unfortunately, in some instances where courts have attempted to apply Islamic law, the results can contravene the intentions and expectations of the parties to contract. For instance, courts have found that a *mahr*, a dowry payment from the husband to the wife sometimes enforceable upon divorce, was unenforceable due to the courts’ misinterpretation of Islamic law, thus depriving the wife of her expected monetary security in the event of divorce.²⁹⁵ The religious doctrine question, as currently understood, often limits courts from addressing any questions that are understood to involve religious matters.

Our legal system, and more specifically contract law, is “premised on the idea that individuals should as a matter of principle be able to enter into” whatever agreements they desire and that the parties to the contract will be able to reasonably rely on the legal system upholding their contracts.²⁹⁶ There are of course important caveats to this principle, which we as a society have determined to carve out of the freedom to contract, such that a contract cannot be used as a means to consent to a crime, nor as a means of enforcing criminal law.²⁹⁷ Likewise, courts may refuse to enforce a contract made under duress or in which a significant difference in bargaining power exists.²⁹⁸ Although these exceptions certainly exist, the law generally allows individuals to make their own contractual decisions.²⁹⁹

One of the foundational reasons for the promotion of the freedom of contract is the position that individuals are best situated to understand their own needs and desires and effectuate agreements to that effect. This foundation supports the idea that our legal system should allow individuals to choose religious arbitration as the appropriate forum for resolving their contractual disputes. According to Michael Brodye, former arbitrator on the Beth Din of America, “there is good reason to

293. Bambach, *supra* note 104, at 229–30.

294. BROYDE, *supra* note 11, at 242.

295. See Quraishi-Landes, *supra* note 286.

296. BROYDE, *supra* note 11, at 245.

297. *Id.*

298. *Id.*

299. *Id.*

assume that [parties select religious arbitration] precisely because religious arbitrators are more likely to understand critical subject-matter subtext of the underlying facts, conflict, and sought-after remedies, and will therefore craft better decisions.”³⁰⁰

Secular recognition and enforcement of religious law via arbitration might also lead to greater integration of religious minorities into society, contrary to popular beliefs about the implementation of Islamic law in American.³⁰¹ Religious arbitration can help religious individuals and communities envision themselves as part of the larger society and not develop a legal relationship oppositional to the secular legal system. Restrictions on religious freedom can result in community isolation and the “adoption of more puritan and extremist approaches to religious thought and practice.”³⁰²

Leaving Islamic law in the realm of civil courts also comes with a particular set of concerns that scholars such as Asifa Quraishi-Landes, Abed Awad, and Najeeba Syeed-Miller have addressed extensively.³⁰³ These include the general difficulty civil courts face with regards to the establishment clause and concerns specific to Islamic law. The primary issue is that civil court judges simply do not have (nor should they be expected to have) the extensive training necessary to understand Islamic law.³⁰⁴ As a result, when they attempt to do so, they often misinterpret Islamic law, which leads to results that contradict the intention of the parties to contract.³⁰⁵

B. Civil Courts & Islamic Law

While civil courts are generally precluded from looking at questions of religious law, courts do apply Islamic law in some cases. Although these cases do not always involve an establishment clause conflict, the courts’ understanding and application of Islamic law is not without problems. In these cases, courts usually rely on expert witnesses to explain the applicable Islamic law.³⁰⁶ However, the courts

300. *Id.*

301. *See* Benhalim, *supra* note 13.

302. BROYDE, *supra* note 11, at 256.

303. *See generally* Asifa Quraishi-Landes, *Rumors of the Sharia Threat Are Greatly Exaggerated: What American Judges Really Do with Islamic Family Law in Their Courtrooms*, 57 N.Y.L. SCH. L. REV. 245 (2012–13); Abed Awad, *Islamic Family Law in American Courts: A Rich, Diverse and Evolving Jurisprudence*, in *MUSLIM FAMILY LAW IN WESTERN COURTS* 168 (Eliza Giunchi ed., 2014); Quraishi & Syeed-Miller, *supra* note 15.

304. Quraishi-Landes, *supra* note 286.

305. *Id.*; *see Soleimani v. Soleimani*, No. 11CV4668, 2012 WL 3729939 (Dist. Ct. Kan. Aug. 28, 2012).

306. Quraishi-Landes, *supra* note 286.

often do not have the competency in Islamic law and culture to correctly apply the law.³⁰⁷ Furthermore, expert witnesses often present Islamic law as if it were a codified set of law that is fixed regardless of context.³⁰⁸ This understanding and application of Islamic law perpetuates the stagnation of Islamic law and prevents its appropriate development in the American context.³⁰⁹

These cases are also problematic from a doctrinal perspective. Courts' misunderstanding of Islamic law can lead, in some instances, to courts finding violations of public policy where none exists and presumptions about the lack of women's rights in Islamic law result in a woman being financially worse off than if Islamic law had been applied.³¹⁰ Of the published opinions available, they are usually state courts cases related to a divorce and involve contracts or foreign laws.³¹¹

One of the fundamental challenges of these cases is that courts do not understand the intricacies of Islamic marriage and divorce law, which differ in significant ways from American law.³¹² In Islamic law, marriage is fundamentally a contractual relationship.³¹³ Therefore, parties may include contract provisions that trigger in the event of termination of the marriage. This can impact the gender dynamics of Islamic law. For instance, Islamic law contains varieties of divorce: (1) *Talaq* (the husband's unilateral right to declare divorce with no judicial proceeding); (2) *Faskh* (a third-party judge issues a divorce); (3) *Khula* (negotiated divorce where the husband consents to divorce in exchange for payment); and (4) *Talaq-tawfeed* ("delegated divorce"—a wife-initiated divorce where the husband grants his consent to his wife initiating a *talaq* divorce as a term of the marriage contract).³¹⁴ This is further complicated by the concept of *mahr*. Although *mahr* is often translated as dowry it differs from a traditional dowry in several ways: (1) it is a payment from the husband to the wife, a portion of which may be deferred to divorce (if effectuated by *talaq*) and (2) it constitutes the consideration for an Islamic marriage contract.³¹⁵ Further permutations of these rules exist between the doctrinal schools and depending upon the grounds for the divorce, i.e. adultery, abuse, failure to pay a contractual provision, apostasy, etc.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*; see *Soleimani*, 2012 WL 3729939, at 2, 21, 33.

311. *Quraishi-Landes*, *supra* note 286.

312. *Id.*

313. See *Quraishi & Syeed-Miller*, *supra* note 15, at 184, 186.

314. *Quraishi-Landes*, *supra* note 286.

315. *Id.*

A 2012 Kansas Superior court case, *Soleimani v. Soleimani* highlights a number of the problems that occur when state courts address cases involving Islamic law.³¹⁶ The case involved a Muslim couple who had an Islamic marriage contract that included contractual provisions for a *mahr* payment of \$116,000 that occurred shortly prior to the marriage and a deferred *mahr* payment of \$677,000 in the event of *talaq* (husband initiated unilateral divorce).³¹⁷

The court refused to uphold the deferred *mahr* payment, even though Kansas law generally recognizes pre-nuptial agreements.³¹⁸ The court ruled that the provision was contrary to public policy because of Kansas’s no-fault divorce approach and the court interpreted the deferred *mahr* provision as encouraging the wife to divorce.³¹⁹ The Court seems to misunderstand the role of deferred *mahr* as a means of disincentivizing unilateral male divorce and protecting a wife in the event of *talaq*.

Other grounds the *Soleimani* court cited as reasons to not enforce the deferred *mahr* were the Establishment and Equal Protection Clause—reasoning that the agreement stemmed from a jurisdiction (Iran) that does not “separate church and state, and may, in fact, embed discrimination through religious doctrine.”³²⁰ It further stated that “[p]erpetuating such discrimination under the guise of judicial sensitivity to the Establishment Clause prohibitions would, in effect, abdicate the judiciary’s overall constitutional role to protect such fundamental rights.”³²¹ While the principle of *talaq* prima facie perpetuates unequal treatment of men and women, the actual contract provisions of the couple’s Islamic marriage contract would have led to a better financial outcome for the wife than the application of Kansas law.

This was further exacerbated by the court’s interpretation of Kansas’s anti-Sharia bill, House Substitute for Senate Bill No. 79, 2012 Kan. Less. Laws p. 1089, Section 4. The court stated that under this new law that if the premarital agreement “was the product of a legal system which is obnoxious to the equal rights based on gender, a court could not become a proxy to perpetuating such discrimination.”³²² In doing so, the court wrote of all of Islamic law as “obnoxious to the equal rights based on gender” based on the concept of *talaq*, without evaluating the contract’s provision to determine whether the wife’s equal

316. *Soleimani v. Soleimani*, No. 11CV4668, 2012 WL 3729939 (Dist. Ct. Kan. Aug. 28, 2012).

317. *Id.* at 1–2.

318. *Id.* at 35.

319. *Id.* at 29.

320. *Id.*

321. *Id.* at 30.

322. *Id.* at 31.

rights were in fact violated.³²³ As a result, rather than receiving the \$677,000 she expected to receive in the event of *talaq*, the court ordered the husband to pay a maintenance of \$692 to the wife for a 24-month period.³²⁴

Furthermore, the marriage contract also included other provisions to protect the wife in the event circumstances such as abuse and criminal behavior, granting her “half of the husband’s property” and right for her to seek divorce in such circumstances.³²⁵ The court simply stated that these other provisions could not “be interpreted but they incorporate Iranian and Islamic law.”³²⁶

Throughout the court’s opinion the court displayed misunderstandings of how Islamic law functions, which competing expert witnesses complicated.³²⁷ On the question of an establishment clause and equal rights violation, the court assumed that the application of Islamic law will result a violation of both regardless of actual contract provisions³²⁸ This case serves as an example of how an American Muslim arbitration tribunal might better uphold women’s equal rights and the intentions of the party to contract in the event of a Muslim divorce.

C. Commercial Implications

In addition to sharing many similarities with traditional commercial arbitration, religious arbitration also shares characteristics with other courts of specialization, such as military tribunals, bankruptcy courts, and Native American courts. The benefits of specialized courts include “a potential for promoting several significant democratic values, namely democratic deliberation, political pluralism, access to courts, transparency in the dispensation of judicial power, and more accurate judicial results in the aggregate.”³²⁹ These entities represent a tradeoff between a potential challenge to liberal democracy while concurrently promoting other liberal democratic values.³³⁰

The most significant overlap between religious arbitration and specialized courts is the issue of subject-matter specialization. Like religious arbitration, “[s]pecialized courts would relieve congested dockets of uniquely complicated or sensitive classes of cases, provide

323. *Id.* at 31, 33.

324. *Id.* at 21.

325. *Id.* at 15–16, n.7.

326. *Id.* at 15.

327. *See* Quraishi-Landes, *supra* note 286.

328. *Soleimani*, 2012 WL 3729939, at 29–31.

329. Aronson, *supra* note 171, at 234.

330. *Id.* at 235.

expertise in the institutionally tailored resolution of such cases, and offer legal uniformity.”³³¹

Sophisticated American Muslim arbitration tribunals could play an important role in offering specialized commercial arbitration, especially in dispute settlement of Islamic finance agreements and oil and gas transactions with Muslim-Majority countries. Commercial arbitration in an American Muslim tribunal would broadly fall into domestic and international categories. Domestic commercial arbitration would likely result from commercial disputes between Muslim parties, where they have either selected Islamic law as the governing law of their contract or mutually desire for Muslims to resolve their dispute. That said, there is some indication from the experience of the Muslim Arbitration Tribunal in the United Kingdom that non-Muslims may also seek to utilize Muslim arbitration.³³² This could arise either from circumstances where a Muslim and non-Muslim enter into a contractual relationship or where non-Muslim parties select a Muslim arbitration tribunal because they view it as advantageous in some way. For instance, non-Muslim parties may have selected an Islamic financing structure to their deal because they view it as a more secure means of financing or are looking to secure certain investors.

The development of sophisticated American Muslim arbitration tribunals could also play an important role in international arbitration. The application of Islamic law to an international arbitral proceeding may arise in instances where a company has either entered into a commercial transaction with a Muslim majority country, like Saudi Arabia, or has agreed to Islamic law as the governing law of a contract. One of the primary challenges facing companies that enter into an agreement with a Muslim majority country, especially in the Gulf, is that uncertainty exists as to whether the Muslim majority country will enforce an arbitral agreement. For instance, Saudi law will only uphold arbitral awards that do not prejudice Islamic law and “obliges award creditors to ‘verify that [the award] does not contain anything contrary to the provisions of the Islamic Sharia.’”³³³ It also requires that “sole and presiding arbitrators hold degrees in Sharia or in law.”³³⁴ As a result of these requirements, it is “often [] not clear that international

331. *Id.* at 250.

332. Bambach, *supra*, note 104, at 154–55.

333. Steven Finizio & Christopher Hewitt, *When International Arbitration Meets Sharia*, COMMERCIAL DISPUTE RESOLUTION, Mar.–Apr. 2013, at 50; Hirsch, *supra* note 84 (stating that as of 2010, the Muslim Arbitration Tribunal had witnessed a “15% rise in the number of non-Muslim using sharia arbitrations in commercial cases”).

334. Finizio & Howitt, *supra* note 333, at 51.

arbitration agreements will be respected or that arbitral awards will be enforced.”³³⁵

While Gulf countries have developed local arbitral institutions and modernized their rules to make “them more accessible to parties from outside the region . . . most local arbitral institutions have administered very few international cases involving parties from outside the Gulf; this too creates uncertainty about arbitrating in the region.”³³⁶ The development of commercial American Muslim tribunals could help resolve the uncertainty companies face when operating in Muslim-Majority countries. Through the appointment of arbitrators well-versed in American and Islamic law, the tribunal would be better suited to issue an award in compliance of both. This could help give companies confidence that U.S. courts and the courts of Muslim majority countries would uphold the award.

Harmonization of Islamic commercial law, especially, Islamic finance, has advanced in the last twenty years. Harmonization is particularly important in international business transactions, as it facilitates contractual predictability. Some harmonization in Islamic commercial law already exists as a result of the Shariah compliant movement. The movement focuses on designating companies as “*Shari’ah* complaint” based on a number of factors including, avoidance of prohibited financial transactions and prohibited products, such as alcohol, gambling, and weapons.³³⁷ Several sophisticated organizations exist that issue *Shari’ah* compliance certifications. For instance, some “public[ly]-traded companies are listed on indices such as the Dow Jones Islamic Index (“DJII”). In order to be included on this index, a company is screened to determine whether its activities are compatible”³³⁸ with the principles described above. The Dow Jones Islamic Index has its own “supervisory board that issues *fata’wa* [legal opinions] declaring the procedures for screening companies for *Shari’ah* compliance.”³³⁹ The Dow Jones Islamic Market, created in 1999, “was the world’s first global Shariah-compliant benchmark” and was designed to address difficulties “Muslim investors would otherwise face in constructing Islamic investment portfolios.”³⁴⁰

335. *Id.* at 49.

336. *Id.* at 50.

337. Susan C. Hascall, *Islamic Commercial Law and Social Justice: Shari’ah-Compliant Companies, Workers’ Rights and the Living Wage*, 88 ST. JOHN’S L. REV. 291, 300, 312 (2014).

338. *Id.* at 300.

339. *Id.*

340. *Dow Jones Islamic Market*, S&P DOW JONES INDICES (2019), <https://us.spindices.com/index-family/shariah/dow-jones-islamic-market> [<https://perma.cc/3RHV-TXJC>].

American Muslim arbitration tribunals could also serve an important role in the harmonization effort. Although multiple, diverse American Muslim tribunals would serve to best develop Islamic law in the United States, allowing Muslims to forum shop and help determine the direction of Islamic law in the modern era, harmonization could be an important feature in international commercial arbitration. In particular, regional tribunals specializing in specific areas of Islamic commercial law could serve to develop these areas of law in the modern era. I propose the creation of two regional tribunals: (1) a Muslim commercial arbitration tribunal in New York, specializing in Islamic finance disputes and (2) a tribunal in Houston, Texas, specializing in oil and gas disputes with Muslim-majority countries. These two locations would be particularly well suited to the development of these specialty arbitration tribunals, as both have large Muslim populations with active Muslim bar associations and well-established arbitration bodies already specializing in finance and energy, respectively. Both afford potential partnerships for the proposed Muslim tribunals.³⁴¹ Furthermore, the state courts of both jurisdictions have demonstrated deference to parties' decisions to arbitrate with the New York Court of Appeals stating: "New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration"³⁴² and the Texas Court of Appeals demonstrating that the application of Islamic Law does not preclude the enforceability of an arbitration agreement.³⁴³

D. Concerns with American Muslim Arbitration

Although sophisticated American Muslim arbitration tribunals could play an important role in commercial disputes, legitimate concerns exist to the creation of these tribunals, especially in the area of family law. Opponents of mandatory arbitration share much in common with opponents of religious arbitration. Both sets of opponents display concern with the potential loss of constitutional rights and access to courts that average litigants may face within arbitration. They also perceive a common set of fundamental flaws that scholars have identified: "lack of consent and lack of public scrutiny . . . [p]rinciples

341. For instance, McGowan Arbitration and Dispute Resolution has mediated over 300 oil and gas cases and arbitrated dozens of cases. *Oil & Gas/Energy Case Experience*, MCGOWAN ARB. & DISP. RES., <http://www.mcgowan-adr.com/energy-cases/> [https://perma.cc/C7FT-ZNMV].

342. *Enforceability of Arbitration Agreements and Finality of Awards*, N.Y. INT'L ARB. CTR., <https://nyiac.org/new-york/enforceability-finality/> [https://perma.cc/E6CT-7FMG].

343. *Jabri v. Qaddura*, 108 S.W.3d 404, 412–13 (Tex. App. 2003).

of justice require that disputants have access to a dispute resolution process that is transparent and open to public scrutiny.”³⁴⁴

Likewise, critics in both areas demonstrate particular concern for vulnerable populations. As one well-known article critiquing mandatory arbitration states:

As architecture, the arbitration law made by the Court is a shantytown. It fails to shelter those who most need shelter. And those it is intended to shelter are ill-housed. Under the law written by the Court, birds of prey will sup on workers, consumers, shippers, passengers, and franchisees; the protective police power of the federal government and especially of the state governments is weakened . . .³⁴⁵

In the context of religious arbitration, critics focus their concern on the vulnerability of women under religious law and within religious communities.

Adhesion contracts play an important role in both critiques. Critics of mandatory arbitration often focus on the role the Supreme Court has played in permitting “pre-dispute arbitration clauses—agreements to submit *future* disputes to binding arbitration—. . . into standard form contracts of adhesion.”³⁴⁶ The Supreme Court’s actions have been met with strong critics. One such critic describes the Court’s actions as follows:

The Supreme Court has created a monster. With the Court’s enthusiastic approval, pre-dispute arbitration clauses—agreements to submit *future* disputes to binding arbitration—have increasingly found their way into standard form contracts of adhesion . . . Given the Supreme Court’s blessing in the name of a “national policy favoring arbitration,” adhesive pre-dispute arbitration clauses should expand beyond their current strongholds in consumer contracts in health insurance, banking and securities investing to other areas of the economy and society . . . The doctrine of rigorous enforcement of adhesive pre-dispute arbitration clauses—what I call “compelled arbitration”—has given large firms the

344. Sternlight, *supra* note 21, at 1635.

345. *Id.* at 1632–33 (quoting Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401).

346. *Id.* at 1633 (quoting David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36–37).

power to displace the judiciary from its role in enforcing common law claims and statutory rights.³⁴⁷

Within religious arbitration, the issue of pre-dispute arbitration clauses arises within the context of Jewish and Muslim marriage contracts. Under Jewish and Islamic law, marriage is contractual and therefore effectuated via the signing of a contract with witnesses.³⁴⁸ Jewish and Muslim communities increasingly are including mandatory arbitration clauses within those contracts, as a means of asserting authority over recalcitrant husbands who may otherwise want to limit their wife's ability to religiously divorce.³⁴⁹

Even in instances where a pre-dispute arbitration clause has not been signed, critics of religious arbitration are often concerned with the lack of sophistication of certain parties (especially women), disparities in bargaining power (between men and women), and communal pressures to use religious forums.³⁵⁰ Such potential pressures question whether participation in religious arbitration is consensual.

At the crux of the critique of both religious and mandatory arbitration is the question of consent. Although “[a]rbitration is supposed to be based on the consent of the parties involved . . . there is evidence that individuals often do not comprehend the significance of arbitration clauses and how these clauses block access to courts.”³⁵¹ Critics of mandatory arbitration cite the “nonconsensual nature of mandatory consumer arbitration” as a problem in and of itself.³⁵² Likewise, critics of religious arbitration argue that men may use arbitration in divorce as a mean of depriving women the rights they

347. *Id.*

348. See Tracie Rogalin Siddiqui, *Interpretation of Islamic Marriage Contracts by American Courts*, 41 FAM. L.Q. 639, 642 (2007); Brian Sites, *Religious Documents and the Establishment Clause*, 42 U. MEM. L. REV. 1, 7, 36 (2011).

349. See Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 622–23, 641–45 (2006).

350. See Bilal M. Choksi, *Religious Arbitration in Ontario—Making the Case Based on the British Example of the Muslim Arbitration Tribunal*, 33 U. PA. J. INT’L L. 791, 802–06 (2012).

351. Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History Symposium*, 2016 J. DISP. RESOL. 115, 116 (citing CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY, REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), at § 1.4.2) (“Consumers are generally unaware of whether their credit card contracts include arbitration clauses. Consumers with such clauses in their agreements generally do not know whether they can sue in court of wrong believe that they can do so.”).

352. Sternlight, *supra* note 21, at 1648.

would otherwise enjoy in civil court, such as more equitable distribution of property and longer-term alimony support.³⁵³

In both instances, plaintiffs may be affected adversely not only via the diminishment in their recovery but also due to a potential lack of representation. In the case of mandatory consumer and employment arbitration, legal representation may be difficult to secure due to the reduced financial incentives for recovery. In the case of religious arbitration, critics sometimes argue that religious arbitration tribunals do not encourage women to pursue legal representation and instead to place their trust in the arbitration tribunal.³⁵⁴

Another critique of arbitration in the United States, mandatory, religious, and otherwise, is the difficulty in challenging an arbitration clause and awards. Successful challenges to arbitration clauses have typically “not been either constitutional or federal statutory arguments, but rather contractual and other common law attacks.”³⁵⁵ Thus, while critics of mandatory arbitration are concerned with the preservation of rights, a successful challenge may question the validity of the arbitration clause, claiming it “was invalid due to lack of consideration, that the clause did not cover the particular claim, that it was invalid due to fraud, or that the clause was unconscionable.”³⁵⁶

Furthermore, challenging arbitration clauses requires time and finances that vulnerable litigants may not possess, as the burden of proof falls upon the party challenging the validity of the clause.³⁵⁷ This is a problem in the context of religious arbitration as well, where the most vulnerable parties tend to be immigrant women with limited, independent financial resources and understanding of the American legal system.

Challenges to arbitration awards are also limited in regard to judicial review. Proponents of arbitration often cite the ability of litigants to challenge arbitration awards.³⁵⁸ Similarly, the Supreme Court “has frequently observed that state common law on unconscionability or fraud will play an important role in protecting consumers or others from

353. See, e.g., Marie Ashe & Anissa Hélie, *Realities of Religio-Legalism: Religious Courts and Women's Rights in Canada, the United Kingdom, and the United States*, 20 U.C. DAVIS J. INT'L L. & POL'Y, 139, 173 (2014).

354. Research indicates that this is not primarily the case. In fact, religious arbitration tribunals today typically encourage all parties to seek legal representation. See Daniel B. Sinclair, *Advocacy and Compassion in the Jewish Tradition*, 31 FORDHAM URB. L.J. 99, 101 (2003).

355. Sternlight, *supra* note 21, at 1644.

356. *Id.*

357. *Id.* at 1655–56 (citing *Green Tree Fin. Corp-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)).

358. See, e.g., Choksi, *supra* note 350, at 797–98.

unfair arbitration agreements.”³⁵⁹ However, critics of mandatory and religious arbitration lack confidence in the protections such judicial review actually provides.³⁶⁰

Given these potential problems with mandatory arbitration, critics of mandatory arbitration often call not for the eradication of arbitration generally, but rather propose that litigants agree to arbitration on a post-dispute basis.³⁶¹

On the other end of the spectrum are proponents of mandatory arbitration. These proponents recognize that some mandatory arbitration clauses may be problematic but criticize what they view as an unfair targeting of arbitration. They cite four main points in favor of mandatory arbitration:

- (1) contracts of adhesion are rampant throughout our economy and are no less appropriate with respect to procedural issues than they are for substantive matters;
- (2) employees and consumers gain better access to justice through arbitration than they would have through the legal system;
- (3) courts strike down those few mandatory arbitration clauses that overreach; and
- (4) it is not feasible to afford access to arbitration on a voluntary, postdispute basis because the company and the consumer or employee would never agree to take the same cases to arbitration, postdispute.³⁶²

Proponents of religious arbitration make similar points in favor of religious arbitration:

- (1) religious arbitration does not differ substantially from other forms of arbitration, as it operates under the Federal Arbitration Act and meets all of its procedural requirements;³⁶³
- (2) religious adherents gain better access to justice, as civil courts are rightly limited in their understanding of religious

359. Sternlight, *supra* note 21, at 1655.

360. Grossman, *supra* note 12.

361. Research indicates that this is not primarily the case. In fact, religious arbitration tribunals typically encourage all parties to seek legal representation. See Michael A. Hefland, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1367 (2011).

362. Sternlight, *supra* note 21, at 1653.

363. BROYDE, *supra* note 11, at 22.

law and do not have the resources to appropriately interpret and apply religious law,³⁶⁴

(3) judicial review serves as a safeguard against those few arbitration cases that might overstep the bounds of civil law and result in decisions that violate public policy or are unconscionable,³⁶⁵ and

(4) post-dispute agreements to arbitrate can create less just results, such as in the instances of the *agunah* under Jewish law, as recalcitrant husbands are unlikely to agree to go before a religious arbitration panel and post-dispute agreements would create the very problem pre-dispute commitments to arbitrate among Jewish couples are trying to avoid.³⁶⁶

At the same time, there are important differences between critics of mandatory arbitration and religious arbitration. The primary difference is that critics of mandatory arbitration strongly root their concerns in scenarios that the law permits. Critics of religious arbitration, especially Muslim arbitration, imagine scenarios of religious law far outside what the American legal system permits, such as the use of Muslim arbitration law to permit polygamy or spousal abuse.³⁶⁷ While critics of religious arbitration do have some legitimate concerns, such as those outlined above, they also imagine scenarios far outside the scope of American arbitration law. For instance, one of the primary concerns of critics of Muslim arbitration centers on the implementation of Islamic criminal law, particularly the *hudud* punishments, which include various corporal punishments.³⁶⁸ The fact that this is far beyond any conceivable jurisdictional scope of arbitration law and simply legally impermissible is ignored.

364. See Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3019, 3042 (2015).

365. *Id.* at 3043–45.

366. Aviva Vogelstein, *Is ADR the Solution? How ADR Gets Around the Get Controversy in Jewish Divorce*, 14 CARDOZO J. CONFLICT RESOL. 999, 1025–26 (2013).

367. See, e.g., Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 WM. & MARY BILL RTS. J. 925 (2010).

368. See MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION (Dec. 2004), <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html> [<https://perma.cc/E6WU-2N7G>]; Michael J. Broyde et al., *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience*, 30 HARV. J. ON RACIAL & ETHNIC JUST. 33 (2014).

CONCLUSION

Some of the concerns raised about the application of Islamic law, especially in regard to women, bear serious consideration for the American Muslim arbitration tribunals. Interpretations of Islamic law exist that can lead to unjust outcomes that contravene public policy. However, much like within Jewish communities a spectrum of beliefs exists regarding the adaptability of religious law to modern contexts. Sophisticated and plural American Muslim arbitration tribunals are needed so that the range of perspectives within Islamic law can gain salience in the American Muslim population through forum shopping and enforceable opinions that impact their lived reality. Without their creation, American Muslims will continue to have limited ability to contribute to the development of Islamic law and the application of Islamic law will have limited consideration of the exigencies of Muslim life in America.

There are certainly Muslims, men and women, within the United States who if given the choice will opt for the application of interpretations of Islamic law that will result in an unequal treatment of women in certain circumstances when compared to civil courts. In these circumstances, it is key to ensure that: (1) litigants are aware of the specific interpretations of Islamic law that will be applied in the arbitration; (2) litigants are completely aware of their civil options, and (3) litigants' choice to arbitrate is entirely voluntary. There will also be Muslims who, if given the choice, will opt for other solutions, including those that fall within the classical tradition and "progressive" approaches. The experience of Muslims in the United Kingdom supports this.

In response to the public outcry to the proposed Muslim arbitration tribunal in Ontario, Marion Boyd, from Attorney General and former Minister Responsible for Women's Issues, was tasked with compiling the public's concerns and providing recommendations to the government.³⁶⁹ This ultimately culminated in a report known as the "Boyd Report."³⁷⁰ The report recommended permitting religious arbitration to continue and proposed a set of rigorous guidelines to best address the concerns of all parties.³⁷¹ The report reflects a consensus among respondents to the best remedies to safeguard religious arbitration and permit its continued use and proposed future applications.³⁷²

369. Choksi, *supra* note 350, at 793–96.

370. *Id.* at 796.

371. BOYD, *supra* note 368.

372. *Id.*

Although the government decided to go against the Boyd report recommendations and instead ban all religious arbitration, the report provides detailed and beneficial guidelines.³⁷³ The report concludes that “tolerance and accommodation of minority groups who seek to engage in alternative dispute resolution must be balanced against a firm commitment to individual autonomy.”³⁷⁴

The report’s proposed recommendations are extensive and include a variety of contexts for its application including the following categories: legislative, regulatory, independent legal advice, public legal education, training and education for professionals, oversight and evaluation of arbitrations, community development, and policy development.³⁷⁵ Several of these recommendations are targeted at religious arbitration organizations themselves and were developed in the context of proposed Muslim arbitration.

Given the similarities between the American and Canadian legal systems, and the shared values regarding individual and religious freedom, American Muslim arbitration tribunals could incorporate many of the Boyd Report recommendations. Although some of the recommendations are legislative and regulatory in nature, American Muslim arbitration tribunals can self-regulate and internally implement these recommendations. While internal implementation would not involve the same level of governmental and judicial oversight, it would provide a solution to the legitimate concerns of critics of religious arbitration without relying on a lengthy, fraught, and uncertain legislative process. Furthermore, such internal regulation would help instill confidence in the general public and the Muslim population of the tribunals’ commitment to preserving individual freedom and acting in accordance with U.S. law.

If American Muslim arbitration tribunals follow the guidance of the Boyd Report and look to the lessons learned and best practices of Jewish arbitration in the United States and Muslim arbitration in the United Kingdom, American Muslim arbitration tribunals may serve to provide a powerful example to Muslims everywhere of how Islamic law can adapt to the exigencies of the modern world. The American common law system is particularly well suited for this development of Islamic law to occur, as the legal values of freedom of contract and freedom of religion create a forum where Islamic law may be applied without the limitations of codification and state interference prevalent in so many Muslim-majority countries. Furthermore, with the most diverse Muslim population of any country with the most highly educated Muslim women, the United States Muslim population brings the diversity of

373. Choksi, *supra* note 350, at 796.

374. *Id.*

375. *Id.*

perspectives needed for the development of Islamic law within arbitration tribunals to have truly global significance.