RETHINKING ISLAMIC LAW ARBITRATION TRIBUNALS: ARE THEY COMPATIBLE WITH TRADITIONAL AMERICAN NOTIONS OF JUSTICE?

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INTRODUCTION

In February 2008, the Archbishop of Canterbury Rowan Williams suggested in a speech at the Royal Courts of Justice in London that British Muslims who would like to avail themselves of Islamic law-based arbitration courts[1] should be permitted to do so.[2] Williams said, ". . .While there is no dispute about our common allegiance to the law of the land, that law still recognizes that religious communities form the consciences of believers and has not pressed for universal compliance with aspects of civil law where conscientious matters are in question. However, there are signs that this cannot necessarily be taken quite so

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1 Some journalists and other commentators refer to these arbitration tribunals as "courts." *See, e.g.,* Colin Randall, *UK Muslims Make Case for* Sharia *Law*, THE NATIONAL, Nov. 28, 2009; *Religious Courts and Civil Law* (NPR Talk of the Nation Feb. 18, 2008); Dieter Grimm, *Religion and Constitutional Adjudication: Conflicts Between General Laws and Religious Norms*, 30 CARDOZO L. REV. 2369, 2377, 2381 (2009); Noah Feldman, *Why Shariah*, N.Y. TIMES, Mar. 16, 2008; *Defining the Limits of Exceptionalism*, THE ECONOMIST, Feb. 14, 2008; Dipesh Gadher, Abul Taher & Christopher Morgan, *An Unholy Mix of Law and Religion*, THE SUNDAY TIMES, Feb. 10, 2008; Doug Sanders, *Ignore the Archbishop: Religion Should Stay a Private Matter*, GLOBE & MAIL, Feb. 9, 2008. I believe this term is misleading as it implies that arbitration entities are on equal footing with civil law courts, whereas in both the United States and the United Kingdom, they are in some circumstances still subject to the jurisdiction of the mainstream judicial system. *See, e.g.,* Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2007). This paper will refer to the Islamic law-based entities as "arbitration tribunals" or "arbitration panels." The word "court" will only be used to refer to the countries' secular civil or common law system.

2 *See* Rowan Williams, Archbishop of Canterbury, Civil and Religious Law in England: A Religious Perspective, Lecture at the Royal Courts of Justice (Feb. 7, 2008), *available at* http://archbishopofcanterbury.org/1575.

easily for granted as the assumptions of our society become more secular."[3]

Both individuals in the United Kingdom and abroad reacted strongly to Williams' remarks. His colleagues in the Church of England, journalists from both national and international newspapers, and advocates of a strict separation between church and state accused the Archbishop of undermining the "Christian law" on which the country was based.[4] Some columnists and newspapers argued that religion had been and should always be a private affair.[5] Some noted that religious tribunals were already in use in Britain, pointing to the Beth Din, Jewish courts that resolve issues as diverse as divorce and business affairs.[6]

Only a year later, a debate involving sharia[7] arose in the United States.[8] In April 2009, conservative groups and news media reported that Harold Koh, then Yale Law School dean and President Barack Obama's choice for legal counsel to the U.S. State Department, stated in a 2007 speech to the Yale Club of Greenwich that there was no reason sharia could not be applied to cases in the American court system.[9] *The New York Post*, which first reported on the story, later published a letter from an organizer of the 2007 lecture, which stated that reports of such remarks were "totally fictitious and inaccurate."[10] The commentators who defended Koh focused on his prior service in both Democratic and Republican presidential administrations, his legal views, and a similar response from conservative groups towards another nominee to legal counsel for the Department of Justice.[11]

The debate over Koh's purported remarks in the United States was strikingly different from that after Williams' comments in Britain.

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[3] Rowan Williams, Archbishop of Canterbury, Presidential Address to the Opening of General Synod (Feb. 11, 2008), *available at* http://archbishopofcanterbury.org/1583ms, *supra* note 2.

[4] Doug Saunders, *Ignore the Archbishop – Religion Should Stay a Private Matter*, GLOBE & MAIL, Feb. 9, 2008, at F3, *available at* 2008 WLNR 2523576; H.D.S. Greenway, *Coping with Religion in a Secular State*, WINNIPEG FREE PRESS, May 27, 2008, *available at* http://www.winnipegfreepress.com/historic/32872834.html.

[5] Saunders, *supra* note 4.

[6] Nick Tarry, *Religious Courts Already in Use*, BBC NEWS, Feb. 7, 2008, http://news.bbc.co.UK/2/hi/UK_news/7233040.stm.

[7] The concept of sharia is explained in Part II. However, it should be noted here that the term "sharia" is often used interchangeably with "Islamic law," but in reality, they are not the same. Feldman, *supra* note 1.

[8] Dahlia Lithwick, *And Then They Came for Koh . . .*, SLATE, Apr. 1, 2009, http://www.slate.com/id/2215142/.

[9] *Id.*

[10] *Id.*

[11] *Id.*

For instance, the response to Koh's supposed statements arrived two years later, in the face of his potential appointment to a key position in the federal government. By contrast, the response to Williams' comments was immediate. By attempting to debunk what they saw as right-wing scare tactics against an Obama appointee, Koh's defenders either did not address sharia at all or treated those "absurd sharia claims with all the unseriousness they warrant."[12] Americans continue to view the idea that Islamic law should be encouraged in the United States with suspicion and fear.

Thus, a meaningful debate about sharia has not occurred in the United States. Considering the growing numbers of the American Muslim population,[13] and the fact that other Western countries have struggled with this very issue, [14] it is inevitable that sharia will remain a hotly debated subject.

On one hand, non-Muslim citizens of Western countries feel uncomfortable with the idea that different laws should be applied to certain segments of the population,[15] contravening the notion of "one nation, one law."[16] On the other hand, the democratic nature of both the

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[12] *Id.*

[13] In 2001, Islam was the second largest religion in the United Kingdom, with about 2.8% of the population. *Muslims in Europe: Country Guide*, BBC NEWS, Dec. 23, 2005, http://news.bbc.co.UK/2/hi/europe/4385768.stm#UK. The United States' demographics for Muslims are more difficult to estimate, but guesses range from 2.35 million to six million. PEW RESEARCH CENTER, MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 3 (2007); Andrea Elliott, *More Muslims Arrive in U.S., After 9/11 Dip*, N.Y. TIMES, Sept. 10, 2006.

[14] An example of one such extensive debate occurred in Ontario, Canada in 2003-2005. *See* Donald Brown, *A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-Based Arbitration*, 32 N.C.J. INT'L L. & COM. REG. 495 (2007); Jehan Aslam, Note, *Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship*, 38 N.Y.U.J. INT'L L. & POL. 841 (2006); Trevor C. W. Farrow, *Re-Framing the Sharia Arbitration Debate*, 15 CONST, FORUM CONSTITUTIONNEL 79 (2006); Bryant Kerry Gillespie & Rob Ferguson, *New Law to Ban Religious Tribunals; Divorce Won't be Settled by Sharia; Same Rule for all Ontarians*, TORONTO STAR, Nov.16, 2005, *available at* 2005 WLNR 18486744; Anver Emon, Editorial, *A Mistake to Ban Sharia*, THE GLOBE & MAIL, Sep. 13, 2005, at A21, *available at* 2005 WLNR 14376394; MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION (2004); For an examination of the Islamic law debate in Ontario with reference to legal pluralism and historical Muslim societies, *see* Anver Emon, *Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation* (University of Toronto Legal Studies Series, Research Paper No. 947149, 2006), *available at* http://ssrn.com/abstract=947149.

[15] This concept is known as personal law. *See* Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influence from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L L. 135, 166-67 (2007); Jeffrey A. Redding, *Slicing the American Pie: Federalism and Personal Law*, 40 N.Y.U. J. INT'L L. & POL. 941, 955 n.41 (2008).

[16] Innes Bowen, *The End of One Law for All?*, BBC NEWS, Nov. 28, 2006,

United Kingdom and the United States promotes freedom of religion.[17] As long as religious law does not replace a given country's secular judicial system, Muslims should be allowed and encouraged to develop their own jurisprudence on the application of law to a specific set of matters consistent with the principles of that system.

This note examines the current situation and argues that Islamic law arbitration tribunals can be implemented in the United States in a manner that will further both American and Islamic ideals of justice. Arbitration tribunals using Islamic law have a place as an alternative, but not a replacement, to the United States' secular judicial system. The example of the Muslim Arbitration Tribunal in the United Kingdom, statutory schemes and case law from both the U.K. and the U.S., and comparisons of Islamic legal principles with American values demonstrate that arbitration tribunals based on new interpretations of sharia can have significant and appropriate roles in furthering the goals of arbitration.

In Part I, this note examines the American Muslim community and the historical preference for arbitration over litigation in Islamic societies. It also provides a general description of arbitration, and considers the benefits and drawbacks of arbitration. Part II explores the general concepts of Islamic law, describes Islamic theories of arbitration, and examines views of justice rooted in the Qur'an and Islamic jurisprudence. Part III briefly outlines the United Kingdom's Arbitration Act and then describes the operation of the Muslim Arbitration Tribunal in Great Britain. In Part IV, this note discusses the United States' Federal Arbitration Act as well as case law to demonstrate that secular courts' decisions based on neutral principles of law can be compatible with decisions reached through an application of Islamic legal principles. This part will also discuss American notions of justice that make such congruent results possible. Finally, in Part V, this note argues that

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http://news.bbc.co.UK/2/hi/UK_news/magazine/6190080.stm.

[17] *See* U.S. CONST. amend. I, § 1; U.S. CONST. amend. XIV, § 1. In the United Kingdom, laws such as the Act of Settlement 1701, which limits the succession of the throne to Protestants and provides that the monarch must be a member of the Church of England, mandate mix of church and state. The Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, §§ 1-3 (Eng.). Nevertheless, the United Kingdom is a signing member of the European Convention on Human Rights (ECHR), and in 1998, passed the Human Rights Law to incorporate the provisions of this convention into UK law. Peter Cumper, *The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief*, 21 EMORY INT'L L. REV. 13, 16-17 (2007). The Human Rights Law included the incorporation of Article 9 of the ECHR, which permits changes to one's religion or beliefs, and rights to worship, teaching, practice, and observance of religion. *Id.*

arbitration tribunals using new interpretations of sharia can be effectively implemented, provided that they are appropriately restricted.

I. CONTEXT FOR ISLAMIC LAW ARBITRATION

A. MUSLIMS IN AMERICA

It is not easy to estimate the number of Muslims in America because the U.S. Census Bureau does not collect information based on religion.[18] As a result, estimations range wildly. In 2007, for example, the Pew Research Center cited a relatively low figure of approximately 2.35 million Muslims in the United States.[19] Religious and interfaith groups, and the mainstream news media, often cite a higher figure of 6 million American Muslims.[20] What is certain is that the group is steadily growing.[21]

The Pew Center report found many similarities between American Muslims and their non-Muslim counterparts.[22] The majority of U.S. Muslims say that their faith plays a "very important" role in their lives,[23] and the Pew report notes that the pattern of commitment to religion among Muslims closely resembles the religiosity model for American Christians as well as for the overall population.[24] 63 percent of American Muslims say they see no conflict between their religion and life in a modern society.[25] Finally, 48 percent of U.S. Muslims with varying levels of religious commitment say their community should

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[18] U.S. Census Bureau, Religion, http://www.census.gov/prod/www/religion.htm (last visited Feb. 26, 2009).

[19] PEW RESEARCH CENTER, *supra* note 13. Although the Pew Center used U.S. Census Bureau data in addition to its own survey results, the authors noted the limitations of their study. *Id*.

[20] Elliott, *supra* note 13.

[21] The largest source of new American Muslims is immigration. PEW RESEARCH CENTER, *supra* note 13, at 15. In 2005, almost 96,000 people from predominantly Muslim countries became lawful U.S. permanent residents. This number was greater than the count for any year in the twenty-year-period prior to 2005. Elliott, *supra* note 13. One-fifth of the remaining third of U.S. Muslims who are native-born are also second-generation Americans. PEW RESEARCH CENTER, *supra* note 13, at 15. Besides Muslim immigrants and native-born Muslims, American converts to Islam are a third significant source of growth. Of the U.S. Muslim community, converts comprise nearly 23 percent, and an overwhelming majority – 91 percent - was born in the United States. *Id.* at 22.

[22] *See generally* PEW RESEARCH CENTER, *supra* note 13, at 17-18.

[23] *Id.* at 21.

[24] *Id.* at 24, 27.

[25] *Id.* at 32.

adopt some American customs, but also remain distinct from mainstream society in other ways.[26]

These demographics suggest that the lives of most American Muslims differ very little from their non-Muslim counterparts. However, many feel torn between full participation in American society and preserving their practice of Islam. Islamic law-based arbitration tribunals would provide an opportunity for these American Muslims to solve disputes in accordance with tenets of their faith while also maintaining accordance with American ideals.

B. HISTORY OF ISLAMIC ARBITRATION

The preference for alternative dispute resolution, as opposed to litigation, is evident from the history of arbitration as practiced in Islamic societies for centuries.[27] In the Arabian Peninsula, the birthplace of Islam, arbitration dates back to the pre-Islamic period.[28] Traditionally, the least expensive and most popular apparatus for resolving disputes among tribes in the peninsula was arbitration.[29]

After the arrival of Islam, arbitration continued to have a central role. As American University of Beirut professor Ahmad S. Moussali has noted, the language of the Qur'an encourages arbitration of private conflicts.[30] Before becoming a prophet, Muhammad was known as an honest and wise arbiter among the non-Muslim, Arab tribes.[31] After he became a prophet, he usually settled conflicting viewpoints by asking the opposing parties to explain their interpretations of the Qur'an, and then he either confirmed or denied the validity of their perspectives.[32] He also acted as an arbitrator between the Muslim community and non-Muslim

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[26] *Id.* at 33.

[27] Mohammed 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).

[28] Ahmed S. Moussalli, *An Islamic Model for Political Conflict Resolution:* Takhim *(Arbitration)*, *in* PEACE AND CONFLICT RESOLUTION IN ISLAM: PRECEPT AND PRACTICE, *supra* note 27, at 144-45.

[29] *Id.* at 145.

[30] *Id.* at 153 ("And if ye fear a breach between them twain (the man and the wife), appoint an arbiter [*hakam*] from his folk and an arbiter from her folk. If they desire amendment, Allah will make them one mind. Lo! Allah is ever knowing, Aware." (quoting Qur'an 4:35)).

[31] *Id.* at 148.

[32] *Id.* at 155.

peoples, as well as a mediator for Jewish tribes, for whom he applied Jewish law.[33]

After Muhammad's death, power shifted to the *ummah*, or worldwide Muslim community.[34] Political successors were named, but no leader assumed the religious authority that Muhammad enjoyed.[35] Though the elite could and often did attempt to articulate certain doctrines, these only became acceptable once a majority of the *ummah* expressed consent.[36]

Just as the majority of Muslims accepted this process of evaluating legal principles, they also allowed for the continuation of arbitration.[37] Arbitration is applied today in predominantly Muslim countries as well as those with minority Muslim populations across practice areas including family law, commerce, and tribal affairs.[38]

C. ARBITRATION IN GENERAL, AND ITS PROS AND CONS

In the United States, arbitration is the second most commonly used form of alternative dispute resolution, after mediation.[39] Arbitration among parties is instituted by a contractual agreement.[40] The parties select one or more neutral, qualified arbitrators to hear the dispute and then agree to be bound by whatever decision is rendered.[41] The arbitrators examine available evidence and testimony, and then make conclusions based upon legal principles specified in the arbitration agreement.[42]

The Federal Arbitration Act (FAA) defines the parameters of arbitration tribunals' operation in America, as well as the extent to which courts may intervene in arbitration.[43] This statute is discussed in further detail later in this note.

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[33] *Id.* at 149-54.
[34] *Id.* at 155.
[35] *Id.* at 155-56.
[36] *Id.*
[37] *Id.* at 160.
[38] *Id.* at 145.
[39] ABRAHAM P. ORDOVER ET AL., ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION 9 (2002).
[40] *Id.* at 11.
[41] *Id.*
[42] JOHN W. COOLEY, THE ARBITRATOR'S HANDBOOK 18-19 (2d ed. 2005).
[43] *See generally* Federal Arbitration Act, *supra* note 1.

There are a number of benefits to arbitration as an alternative to litigation. First, arbitration is private.[44] Unless parties agree otherwise in an arbitration agreement or choose later to appeal to a court, all documents, testimony, and other aspects of the case are confidential.[45] For parties who fear embarrassment or disapproval, or for those who simply do not want sensitive information to be disclosed, arbitration allows resolution of disputes without publicity.

Second, arbitration gives parties a significant amount of control over the proceedings. For instance, they can select one or more neutral arbiters to hear their dispute.[46] Parties may desire experts or specialists in a certain area of law to decide their dispute, or they may be more comfortable with decisionmakers who are familiar with their customs, traditions, or values.[47] This is particularly important in faith-based arbitration, where the arbitrators are likely to be better equipped to deal with certain religious issues that judges may not understand or be allowed to adjudicate.[48] Selection of such specialized arbitrators may also allow parties to receive tailor-made awards, or decisions, to their disputes.[49] Besides the choice of arbitrators, parties can control aspects of the proceedings as well. In arbitration agreements, parties can specify certain procedural changes to the operation of the tribunal, set the level of formality of discussion, and most notably, oblige arbitrators to follow their choice of law.[50]

Third, because parties can exert control and because proceedings tend to be less formal than in court trials, arbitration often creates a low-stress atmosphere for dispute resolution.[51] Lawyer representation is recommended but not required,[52] and arbitration is not as adversarial as judicial settings tend to be.[53] Arbitration, in comparison to litigation, can be also relatively cost-effective.[54] The length of the proceedings will vary

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[44] ORDOVER, *supra* note 39, at 144; COOLEY, *supra* note 42, at 5.

[45] ORDOVER, *supra* note 39, at 148.

[46] *Id*. at 140.

[47] COOLEY, *supra* note 42, at 5; Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 441 (2006).

[48] Wolfe, *supra* note 47, at 441.

[49] ORDOVER, *supra* note 39, at 146; COOLEY, *supra* note 42, at 6.

[50] ORDOVER, *supra* note 39, at 146; COOLEY, *supra* note 42, at 6.

[51] ORDOVER, *supra* note 39, at 101-02.

[52] COOLEY, *supra* note 42, at 5.

[53] ORDOVER, *supra* note 39, at 121.

[54] *Id.* at 12; COOLEY, *supra* note 42, at 6.

with the parties' actions and the problem's nature, but drawn-out litigation costs are often greater than fees associated with arbitration.[55]

Finally, awards arising out of arbitration can be binding or nonbinding on the parties, according to the arbitration agreement.[56] Federal and state statutes both allow arbitration parties to appeal to courts.[57] The arbitrators' decision may be binding on the parties and enforceable by courts,[58] thus providing a final resolution to the parties' dispute.

There are also a few disadvantages to arbitration. These include a lack of supervision or accountability of arbitrators, a relaxation of evidentiary rules, decreased opportunities for thorough discovery, insufficient or nonexistent explanations of arbitrators' reasoning in decisions, and limited protections for vulnerable parties.[59] Proper controls on tribunals will alleviate some of these concerns, and protect parties who wish to engage in arbitration.

II. OVERVIEW OF ISLAMIC LEGAL CONCEPTS

A. WHAT IS ISLAMIC LAW?

The heated debate surrounding Islamic law-based arbitration tribunals often arises from the widely misunderstood term sharia. An explanation of this word as well as other concepts related to Islamic law will provide a starting point for the argument that arbitration tribunals can be compatible with American values.

The word sharia is often used in a context quite different from its original meaning. Generally, sharia has been used to refer to Islamic law, or the entire system of jurisprudence associated with Islam.[60] Traditionally, however, sharia refers to the source material of Islamic

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[55] COOLEY, *supra* note 42, at 6.

[56] ORDOVER, *supra* note 39, at 11-12; COOLEY, *supra* note 42, at 5.

[57] *See, e.g.,* Federal Arbitration Act, 9 U.S.C. §§ 4, 16 (2007); Uniform Arbitration Act, § 28 (2000).

[58] *Id*. Two situations in which courts may intervene in the arbitration process are when questions arise as to the validity of the arbitration agreement or to the fairness of the arbitration award. Wolfe, *supra* note 47, at 442.

[59] COOLEY, *supra* note 42, at 6; Wolfe, *supra* note 47, at 460.

[60] Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, *in* UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 1, 3 (Hisham M. Ramadan ed., 2006).

law, [61] not the entire system of law itself. The word literally means "the pathway," "path to be followed," or "clear way to be followed".[62]

Sharia comes from two different sources. The most important source is the Qur'an, the holy book for Muslims.[63] The Qur'an contains what Muslims believe are revelations from Allah, or God, to Muhammad, whom Muslims believe was the final prophet who brought the message of Islam.[64] The Qur'an, recorded in Arabic, is not itself a code of law.[65] Even though it contains specific injunctions on topics such as ethics, domestic relations, and commerce, the Qur'an serves as the basis for Islamic legal principles and supports the methodologies employed in the process of creating jurisprudence, or *fiqh*.[66] Because the sharia is based in part on the Qur'an, which Muslims believe to be the word of God,[67] it "depends for its legitimacy on the conviction that it represents the mind of God."[68]

The second source of sharia is the *sunnah*, or the traditions of Muhammad.[69] These traditions include Muhammad's words, his actions, his tacit approval of actions performed by others in his presence, and descriptions of his personality and demeanor.[70] These sunnah were collected in formal, verbalized reports called *ahadith*, or *hadith* in the singular.[71] Unlike the Qur'an, there are several different ahadith.[72] But six acclaimed collections, known as "The Six Books," have been recognized by scholars as the most authentic.[73] All ahadith are compared to the Qur'an, and where there are discrepancies, the Qur'an prevails.[74]

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61 *Id.* at 4.
62 *Id*.
63 *Id*.
64 *Id*. at 11.
65 *Id*.
66 *Id.*
67 *See* Liaquat Ali Khan, *The Immutability of Divine Texts*, 2008 B.Y.U.L. REV. 807, 816.
68 Williams, *supra* note 2.
69 Abdal-Haqq, *supra* note 60, at 4, 12.
70 *Id.* at 12.
71 *Id*.
72 *Id*.
73 *Id*.
74 *Id.* at 13.

B. FIQH AND ITS HISTORY

As writers and commentators tend to use sharia and Islamic law interchangeably, another term that is also confused with these terms is the word *fiqh*.[75] An understanding of the differences between sharia and fiqh is integral to comprehending the ways in which Islamic law can have an impact on arbitration tribunals. Fiqh denotes the body of Islamic jurisprudence produced from *ijtihad*, or the process of interpreting and applying the sharia to real or hypothetical situations to provide practical rules for Muslims to follow.[76] Fiqh literally means "intelligence" but also implies "comprehension." It is most effectively translated as "the true understanding of what is intended."[77]

Islamic jurisprudence, as embodied in fiqh, has four main methods, known as *usul-ul-fiqh*: 1) orders from the Qur'an and principles based on interpretations of it, 2) application of principles from Muhammad's ahadith, 3) *ijma*, or the consensus of opinion among Muhammad's companions or the contemporary community of scholars, and 4) *qiyas*, or reasoning by analogy.[78] Several other methodologies of fiqh exist, including consideration of the public interest, presumption of continuity, and local custom.[79] Traditionally, trained religious scholars, not the state, had the authority to interpret and articulate legal principles from the sources of sharia.[80]

Due to differences in opinion among trained religious scholars, schools of jurisprudence developed through a confluence of the need for principles validating the interpretation of law from revelation and the application of law to new problems and questions. Originally, there were at least nineteen different schools of jurisprudence, but five major

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[75] Because the terms "sharia", "fiqh", and "Islamic law" have significantly different meanings, this note will not use the terms interchangeably. "Islamic law" will refer to the entire system of sharia and fiqh that corresponds to the religion of Islam.

[76] Abdal-Haqq, *supra* note 60, at 4. The term "fiqh" can also refer to certain methodologies aimed towards producing interpretations of sharia. *Id.* at 5. Fiqh literally means "intelligence" but also implies "comprehension". *Id.* at 6. It is most effectively translated as "the true understanding of what is intended. A. Bilal Philips, *The Evolution of Fiqh* 100 (3d ed. 1992) (1988) (quoted in Abdal-Haqq, *supra* note 60, at 6).

[77] A. Bilal Philips, *The Evolution of Fiqh 100* (3d ed. 1992) (1988) (quoted in Abdal-Haqq, *supra* note 60, at 6).

[78] Abdal-Haqq, *supra* note 60, at 5-6.

[79] *Id.* at 18-19.

[80] Ruud Peters, *The Enforcement of God's Law: The* Shari'ah *in the Present World of Islam*, *in* COMPARATIVE PERSPECTIVES ON SHARI'AH IN NIGERIA 107, 110 (Philip Ostien et. al. eds., 2005).

schools – the four Sunni schools of Hanafi, Maliki, Shafii, and Hanbali, and the Shia school of Jafari – survive to this day.[81] While the schools applied the fiqh methodologies without intrusion by the state, the schools did consider communities and institutions in their legal analyses.[82] Though all of the listed schools place the most emphasis on the Qur'an followed by the sunnah, the order of priority of other roots of jurisprudence differs.[83] Thus, books of fiqh do not provide firm rules on a variety of topics, as Western legal codes often do.[84] Instead, they showcase a scholarly discussion of multiple, often contradictory, views.[85]

The schools' centuries-long survival is not a result of official government support, as few predominantly Muslim countries have governments solely founded on Islamic law.[86] Rather, legal systems in these countries either acknowledge certain principles or combine Islamic law with European law, inherited from their mostly French and British colonizers.[87] Prior to colonization, many predominantly Muslim countries did not have codes of law.[88] Western colonizers introduced both the concept of law as an extension of the will of the state, as well as codification.[89] Post-colonization, Muslim governments codified Islamic law of their own accord as a means of reforming and modernizing

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[81] Abdal-Haqq, *supra* note 60, at 24-25.

[82] *See* Abdullahi Ahmed An-Na'im, *The Future of* Shari'ah *and the Debate in Northern Nigeria*, *in* COMPARATIVE PERSPECTIVES ON SHARI'AH IN NIGERIA 327, 333 (Philip Ostien et. al. eds., 2005).

[83] Abdal-Haqq, *supra* note 60, at 26-29. The main distinction between the Maliki and Hanafi schools on the one hand, and the Shafiis and Hanbalis on the other hand, is their recognition of additional sources of law besides the four roots listed above. For instance, flexibility of legal analysis is integral to the Hanafi method of *istihsan*, or preference for a certain jurist's interpretation, and to the Maliki school's consideration of the public interest, known as *istislah*. For more discussion on differences among the schools of law, *see* N.J. COULSON, A HISTORY OF ISLAMIC LAW 86-102 (1964).

[84] Peters, *supra* note 80, at 112.

[85] *Id*.

[86] Abdal-Haqq, *supra* note 60, at 25. Saudi Arabia, Sudan, and Iran are the exceptions – they recognize sharia as official law. *Id*. For more information about the particular case of Sudan, which was under partial colonial rule by the British, *see generally* Cliff Thompson, *The Sources of Law in the New Nations of Africa: A Case Study from the Republic of the Sudan*, 1966 WIS. L. REV. 1146 (1966).

[87] Abdal-Haqq, *supra* note 60, at 25.

[88] Peters, *supra* note 80, at 113.

[89] *Id*. Drawing on their common law tradition, the British applied local law within the strictures of British administrators and courts. These institutions would, in effect, overrule practices they deemed as abhorrent on a case-by-case basis. As a result, the British changed local laws gradually, rather than through codification. *Id*. at n.5.

existing law after its exposure to and influence from Western ideas that the state should determine the law of the land.[90]

Unlike the conflicting and shifting nature of books of fiqh, codification imposed clear-cut rules on areas of the law in these predominantly Muslim countries.[91] The question then became, how would these predominantly Muslim countries, either under the direction of colonizing powers or of their own volition, codify jurisprudence without one clear legal or religious authority? Choices had to be made, not only among different schools of fiqh, but also among varying opinions within the same school.[92] The result is that the legal codes of many predominantly Muslim countries, which purportedly are based on Islamic law, are but an "impoverished, reduced version" of fiqh.[93] Because choices had to be made to accept one view on each individual issue, the richness of the scholarly debate on those issues is lost in much of the codified versions of fiqh in predominantly Muslim countries.

Although codification has in many cases resulted in poor substitutes for fiqh, hope remains that new generations of trained religious scholars will recognize the need for reform. There is a particular need for these interpretations so that American Muslims can reconcile Islamic law with American societal traditions. The founders of the schools of fiqh recognized that interpretations of sharia could vary based on the context of the community as well as on new problems needing solutions.[94]

Cordoba University President and past Chairman of the Fiqh Council of North America, Taha Jabir Al-Awani, posits that "fiqh for minorities" will result in such new interpretations for Muslims living in Western countries.[95] Al-Awani defines this idea as follows, "'Fiqh for minorities' is a specific discipline which takes into account the relationship between the religious ruling and the conditions of the community and the location where it exists. It is a fiqh that applies to a

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[90] *Id.* at 115.

[91] *Id.* at 116-17. For instance, there was a range of liberal, moderate, and conservative Hanafi perspectives on the issue of a woman's decision to marry of her own volition, and varying governments picked different standards to codify. *Id*. at 117.

[92] *Id*. at 117.

[93] *Id.* at 118.

[94] An-Na'im, *supra* note 82.

[95] TAHA JABIR AL-AWANI, TOWARDS A FIQH FOR MINORITIES: SOME BASIC REFLECTIONS 6 (The International Institute of Islamic Thought ed., 2003).

specific group of people living under particular conditions with special needs that may not be appropriate for other communities."[96]

This special type of fiqh is not meant to give Muslim minorities privileges unavailable to Muslim majorities, Al-Awani notes, but instead aims to ensure that such Muslim minorities can adequately embody and apply Islamic values in the countries where they live.[97] Such practices have already been implemented to some extent in South Asian Muslim enclaves in Britain.[98] Known as *angrezi shariat*, this jurisprudence developed as a result of South Asian Muslims incorporating the requirements of British law into traditional law.[99]

Such is the situation Muslims in the United States face. Formulations of new interpretations of sharia are thus needed, both within and outside the scope of arbitration panels based on Islamic legal principles.[100]

C. SULH AND ARBITRATION

Sulh, or amicable settlement, is a different process than arbitration but is important to understanding the Islamic viewpoint on dispute resolution. The goal of sulh is to end conflict and encourage peace among both individuals and the community.[101] It differs from

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[96] *Id.* at 3.

[97] *Id.* at 3-4. For an interesting example of *fiqh* created by a community living under unique circumstances, see general discussions of Andalusian Spain and the Mudejars. Prior to expulsion of the Muslims from the Iberian Peninsula in the seventeenth century, Islamic law was modified to fit a number of new situations that arose for Muslims who were, for the first time, living under Christian rule. *See generally* L.P. Harvey, *The Political, Social and Cultural History of the Moriscos*, *in* THE LEGACY OF MUSLIM SPAIN 201 (Salma Khadra Jayyusi ed., 1992); ROBERT I. BURNS, ISLAM UNDER THE CRUSADERS 118 (1973).

[98] DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 74-77 (3d ed. 1998).

[99] *Id.* at 75, 77; Werner Menski, *Muslim Law in Britain*, 62 J. ASIAN & AFRICAN ST. 127, 140-43, 151-54 (2001).

[100] For more discussion in this area, *see generally* WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL-UL-FIQH 213-14, 221-53 (1997); Yasir Billoo, *Change and Authority in Islamic Law: The Islamic Law of Inheritance in Modern Muslim States*, 84 U. DET. MERCY L. REV. 637, 644-45 (2007); Amna Arshad, *Ijtihad as a Tool for Islamic Legal Reform: Advancing Women's Rights in Morocco*, 16 KAN. J. L. & PUB. POL'Y 129, 134-35 (2007); Nazeem Goolam, *Ijtihad and Its Significance for Islamic Legal Interpretation*, 2006 MICH. ST. L. REV. 1443, 1464-67 (2006); Ali Khan, *The Reopening of the Islamic Code: The Second Era of Ijtihad*, 1 U. ST. THOMAS L.J. 341 (2003); M. Cherif Bassiouni & Gamal M. Badr, *The Shariah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 138-47, 159-78 (2002).

[101] George E. Irani & Nathan C. Funk, *Rituals of Reconciliation: Arab-Islamic Perspectives*, *in* PEACE AND CONFLICT RESOLUTION IN ISLAM: PRECEPT AND PRACTICE 169, 182 (Said, et. al. eds., 2001).

Islamic theories of arbitration in three respects: 1) conciliation in sulh may be reached with or without the involvement of other parties, 2) the agreement of sulh is not binding before a court, and 3) sulh cannot be used to address future disputes, but only those that have already occurred.[102] However, because the goal of arbitration is to ensure disputes are settled fairly and amicably, sulh has been combined with arbitration for all intents and purposes.[103]

The four Sunni schools of Islamic law not only readily accept arbitration and sulh as admirable means of dispute resolution, but they also tend to encourage the same framework laid out by statutory authorities of the United Kingdom and the United States. For example, the Maliki School advances the idea that an arbitration award is binding on the involved parties unless a judge rules that it is unjust.[104] The scholars in the Hanafi School emphasize the contractual nature of agreements to submit disputes for arbitration, and advise that they should thus be enforced like other contracts.[105]

There are also conflicting viewpoints among the schools.[106] Despite these incongruous viewpoints, however, the opinions of each of the schools give credence to the idea that arbitration is an effective means of settling disputes and also exemplify similarities to the United States and the United Kingdom, which discuss the same issues in their statutes and case law pertaining to arbitration.

D. JUSTICE ACCORDING TO THE QUR'AN AND ISLAMIC LAW

There are numerous mentions of *adl*, or justice, in the Qur'an, and all schools of fiqh seek to uphold the principles outlined in this holy

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[102] Aseel Al-Ramahi, *Sulh: A Crucial Part of Islamic Arbitration* 12 (London Sch. of Econ., Working Paper No. 08-45, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153659#.

[103] *Id.* at 13.

[104] *Id.* at 15.

[105] *Id.*

[106] Mainly, the schools conflict on whether the arbitrator should enjoy the same authority as a judge. While the Shafi school states that the arbiter is of a lesser position to the judge because the arbiter can be removed by the parties any time before an award is delivered, the Hanibali school holds that the decision of the arbitrator will be binding like a court judgment, and thus requires the arbitrator to have the same credentials as a judge. *Id*. The philosophies of the Maliki and Hanafi schools are less clear about the status of arbitrators in relation to judges. While arbiters in the Maliki school cannot be replaced, their decisions may be overturned by judges who declare the outcome unjust. In the Hanafi school, scholars argue about whether arbitrators duties resemble those of judges or conciliators. *Id*.

book. Some brief examples of these values will provide a context for later comparisons to American notions of justice.

One of the most frequently cited verses in the Qur'an is found in its fifth chapter. According to Abdullah Yusuf Ali's English translation of this verse, it states, "O ye who believe! Stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to Piety: and fear Allah. . ."[107]

By comparing justice to piety, or faithfulness, this verse elevates justice to a high position. Another verse in an earlier chapter elaborates on this basic principle, "O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do."[108] This verse reiterates the command to do justice, and also notes that justice must be carried out even when it contravenes the desires or interests of the doer.

Muhammad Razi noted in his *Encyclopaedia of Islamic Jurisprudence* that the ideal of justice in Islam is set up by the holy book.[109] The Qur'an states, "And the Firmament has He raised high, and He has set up the Balance (of Justice), in order that ye may not transgress (due) balance. So establish weight with justice and fall not short in the balance."[110]

Razi explains that these verses mean that human beings should act justly toward one another and should obey the principles of Islam.[111] Razi also notes that justice is not only a command for Muslims, but also an attribute of God.[112] In these terms, another reading of the verse is possible, suggesting that the "Balance of Justice" is that which is used by God to judge the actions of human beings.

Both the values identified by Western jurisprudence and the methodology of Western statutory interpretation are similar to those

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[107] THE HOLY QUR-AN: TEXT, TRANSLATION & COMMENTARY 5:8 (Abdullah Yusuf Ali trans., Sh. Muhammad Ashraf 1981).

[108] *Id.* at 4:135.

[109] 3 ENCYCLOPAEDIA OF ISLAMIC JURISPRUDENCE 121-22 (Muhammad Razi ed., Anmol 2007).

[110] THE HOLY QUR'AN, *supra* note 107, at 55:7-9.

[111] ENCYCLOPAEDIA OF ISLAMIC JURISPRUDENCE, *supra* note 109, at 122.

[112] *Id.*

inherent in Islamic law.[113] For example, judges retain a certain amount of discretion in interpreting statutes, precedents, and customs, allowing the judge to extend law to new problems and situations.[114] However, the judges are restricted by standards that require them to do justice.[115] Further, those serving as arbiters in Islamic law-based arbitration tribunals in the United States would retain some discretion but would also be restricted by Islamic and Western notions of justice.

III. ARBITRATION IN THE UNITED KINGDOM

A. THE MUSLIM ARBITRATION TRIBUNAL IN THE UNITED KINGDOM

Not only do Islamic legal principles match American theories of jurisprudence, but also existing models of Islamic law-based arbitration tribunals in the United Kingdom show that such methods of dispute resolution are also possible in the United States.

One example of such a tribunal is the Islamic Sharia Council, which was founded in 1980[116] and still operates today.[117] More recently, the Muslim Arbitration Tribunal (MAT), housed in the Hijaz College Islamic University in Nuneaton, Britain, was formed in 2007.[118] Although it is a single tribunal, it can travel anywhere in the country to accommodate the parties.[119]

Shamim Qureshi, a MAT representative, states that given instances of ignorant or insensitive treatment on the part of judges and other arbitrators to the religious or cultural values of parties, the general intention of the tribunal is to provide arbitrators who understand the problems of Muslim parties.[120] Qureshi further states that MAT sees no conflict between Islamic values and Western notions of justice.[121] MAT's website also elaborates on the objectives of the tribunal, noting that

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[113] *See id.* at 95.

[114] *See* K.D. Ewing, *A Theory of Democratic Adjudication: Towards a Representative, Accountable, and Independent Judiciary*, 38 ALBERTA L. REV. 708, 710-13 (2000).

[115] ENCYCLOPAEDIA OF ISLAMIC JURISPRUDENCE, *supra* note 109, at 95.

[116] PEARL & MENSKI, *supra* note 98, at 78.

[117] *See* Islamic Sharia Council, http://www.islamic-sharia.org (last visited Oct. 21, 2009).

[118] *Shariah Court Out to Supplement English Law*, BIRMINGHAM POST, Sept. 9, 2008, at News 6.

[119] E-mail from Shamim Qureshi, Presiding Judge, Muslim Arbitration Tribunal, to Mona Rafeeq, Law Student, University of Wisconsin Law School (Jan. 5, 2009, 20:11:23 CST) (on file with author).

[120] *Id*.

[121] *Id*.

proceedings are settled in accordance specifically with Qur'anic commands and practice as determined by recognized Islamic schools.[122] MAT's objectives also mirror the general aims of other arbitration tribunals in that they seek to settle disputes as fairly, quickly, and efficiently as possible.[123] Finally, MAT's procedural rules also state that where appropriate, arbiters should ensure that these objectives are met in the interests of the parties as well as in the wider public interest of the community.[124]

Interested parties often find out about MAT's services by word of mouth, as the tribunal does not advertise.[125] The process begins when a party applies to MAT and submits a formal request for hearing the dispute.[126] This request includes the names of all parties and party representatives involved, their contact information and signatures, claims, arguments, copies of relevant decisions, and, so far as practicable, lists of documents or names and contact information of witnesses that the applicant party hopes to use as evidence supporting its case.[127]

MAT then serves notice on behalf of the first party on any respondent parties involved in the dispute.[128] Both or all parties then must sign a written arbitration agreement binding them to the decision when reached.[129] Qureshi states that preparations for hearings are often conducted by telephone or e-mail.[130] Qureshi notes that the process of arbitrating disputes depends on the type of dispute.[131]

Qureshi also notes that MAT adopted the Hanafi School, the same school adhered to by Qureshi and co-founder Sheikh Faiz Siddiqi.[132] However, MAT will hear disputes among parties, which follow other schools of Islamic law.[133] In these arbitrations, MAT applies

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[122] MUSLIM ARBITRATION TRIBUNAL, PROCEDURE RULES OF MUSLIM ARBITRATION TRIBUNAL § 1(1) (2008), *available at* http://www.matribunal.com/procedure_rules.html (last visited Nov. 5, 2009).

[123] *See id.* § 1(2).

[124] *Id.* § 1(3).

[125] Qureshi, *supra* note 119.

[126] PROCEDURE RULES OF MUSLIM ARBITRATION TRIBUNAL, *supra* note 122, § 2.

[127] *Id.*

[128] Qureshi, *supra* note 119.

[129] *Id.*

[130] *Id.*

[131] *Id.* A small dispute can be heard within a few days or weeks whereas a divorce may take a couple of months and larger disputes will usually take longer. *Id.*

[132] *Id.*

[133] *Id*.

the parties' school of law.[134] As Qureshi explains, MAT does not usually encounter problems with conflicts among differing schools' interpretations of evidentiary and witness rules and other procedural questions because while it applies Islamic legal principles to the facts of individual situations, English procedural law is employed in hearing the dispute.[135]

In addition to the requirements that the U.K.'s Arbitration Act provides for arbiters, MAT expects its arbiters to have additional qualifications. There are two levels of qualification for arbitrators: legal members and Islamic scholars.[136] A legal member is required to have at a minimum three years of post-degree experience.[137] An Islamic scholar, Qureshi stated, should be deemed worthy enough to be a scholar in the community's eyes, in terms of both religious study and experience.[138] MAT requires its scholars to undergo sponsored training on subjects such as dealing with parties, behavior in court, and writing judgments.[139] According to Qureshi, these trainings often parallel the training most British judges receive in the secular legal system in the U.K.[140]

During each hearing, one legal member and one Islamic scholar sit together as the arbitrators of the dispute so that the Islamic scholar can advise the legal member on the Islamic legal principles at work in the case.[141] Decisions during the hearing must be unanimous – the legal member and the Islamic scholar must at all times agree with each other to reach a binding decision.[142] In addition to discussing the nuances of a particular fact situation, the two arbitrators may also refer to fiqh texts, which provide guidance on applying Islamic legal principles to different situations.[143] If the losing party refuses to comply after the arbitrators reach a decision, the other party may seek enforcement through the civil legal system.[144] Thus, MAT is able to provide arbitration based on Islamic law while also allowing recourse to the judicial system.

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *See id.*
[143] *Id.* Qureshi cited *Al-Hidayat* as an example of such a book. *Id.*
[144] *Id.* (citing Arbitration Act, 1996, c. 23 (Eng.)).

B. THE ARBITRATION ACT OF THE UNITED KINGDOM

The MAT, like other arbitration tribunals, is an important tool that can be used as an alternative to a country's judicial system. To allow parties to resolve disputes in a manner consistent with secular law, the United Kingdom has passed an arbitration act to outline the scope, responsibilities, and limitations of such tribunals.[145] As the U.K.'s Arbitration Act of 1996 notes, the object of arbitration is to give the parties an opportunity to obtain a fair resolution of their disputes and to eliminate unnecessary delays or expense.[146] This Act guarantees the parties' freedom to agree on how their disputes should be resolved, subject to public interest safeguards, and states that in matters involving an arbitration agreement, a court[147] cannot intervene unless such intervention would be covered by a provision in the Act.[148]

In addition to these objectives, the Act contains measures for establishing arbitration tribunals that allow for choice of law.[149] These provisions ensure that faith-based tribunals have a legal status within the judicial system framework. For example, according to Part 1 of the Act relating to arbitration agreements, the parties may include a clause in their agreements requiring them to be bound by laws other than those of England, Scotland, or Wales.[150] For these provisions to apply, all parties must agree and consent to the choice of law, and this accord must be represented in the arbitration agreement.[151] The implication for faith-based tribunals is that their status would be valid based upon this choice of law.

However, arbitration tribunals are subject to certain restrictions imposed by the courts. For example, a court may refuse an application to stay legal proceedings brought against a party for a matter that is the subject of an arbitration agreement unless it is convinced that the agreement is valid.[152] Further, the court has the power, on application from one or more of the parties, to remove an arbitrator on grounds of

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[145] *See generally,* Arbitration Act, 1996, c. 23 (Eng.); BRUCE HARRIS, RWAN PLANTEROSE & JONATHAN TECKS, THE ARBITRATION ACT 1996: A COMMENTARY (4th ed. 2007).

[146] Arbitration Act, 1996, c. 23, § 1(a) (Eng.).

[147] The term "court" in the context of the Arbitration Act of 1996 refers to either the High Court or a county court. *Id*. pt. IV, § 105(1).

[148] *Id.* § 1(b)-(c).

[149] *See id.* §§ 4, 46.

[150] Arbitration Act, 1996, c. 23, § 4(4)-(5).

[151] *Id.* § 4(5).

[152] *Id.* § 9(4).

bias, lack of qualifications or physical or mental capacity, or a refusal or failure to conduct proceedings properly.[153]

A court also has power in certain situations to decide questions of law or affect the magnitude of awards.[154] A court may determine a question of law which it finds "substantially affects the rights of one or more of the parties" upon application from a party involved in the arbitration proceedings and upon the agreement of all parties or the arbitration tribunal.[155] A court may also issue orders confirming, varying, or setting aside awards granted by the tribunal, after one party makes an application to the court.[156]

While this is not an exhaustive list of the ways in which a court can oversee and regulate arbitration tribunals in the U.K.,[157] it demonstrates that courts can keep arbitration panels in check. The restrictions on Islamic law-based arbitration suggested later in this note, if implemented, would assuage concerns that Islamic law-based arbitration tribunals will overreach their authority or produce results inconsistent with secular notions of justice. However, the basic provisions of U.K.'s Arbitration Act should first and foremost be enforced by the courts so that the arbitration panels operate in conformance with the Act. Only then will these panels adequately protect against the concerns leveled against them.

IV. ARBITRATION IN THE UNITED STATES

A. THE UNITED STATES FEDERAL ARBITRATION ACT

The MAT and the U.K. Arbitration Act validate the claim that Islamic law-based arbitration tribunals are feasible and allowable under the supervision of the U.K.'s secular court systems. Likewise, U.S. statutes, such as the Federal Arbitration Act (FAA),[158] and case law demonstrate America's tolerance of faith-based arbitration tribunals.

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[153] *Id.* § 24(1)(a)-(d). When removing an arbitrator, the court may also make decisions as to his entitlement, if any, to fees or expenses. The court may issue an order requiring a party to comply with a peremptory order from the tribunal, provided that any arbitral processes have been exhausted. *Id*. §§ 24(4), 42(1), (3).

[154] *Id.* §§ 66-68.

[155] *Id.* § 45(1)-(2). With the agreement of the parties involved, the court may also extend time limits for any matters in arbitration proceedings. *Id*. § 79(1).

[156] Arbitration Act, 1996, c. 23, § 67(3).

[157] *See id.* §§ 9-12, 19, 24, 42-45, 66-71, 77, 79, 92, 105.

[158] Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006).

Section 3 of the FAA states that when a suit is brought in a U.S. district court regarding an issue that is referable to arbitration and a written and valid agreement has been made to arbitrate the issue, the court shall, on application of one of the parties, stay the trial until arbitration has occurred according to the terms of the agreement.[159] This provision demonstrates a preference in U.S. law for dispute resolution through arbitration rather than through the courts.

Several other provisions in the FAA are pertinent to this discussion. For example, Section 4 outlines the procedural steps required for parties to apply to courts to compel arbitration.[160] The movant must provide five days' notice in writing to the defaulting party in accordance with the Federal Rules of Civil Procedure.[161] The court then holds a hearing in the district in which the petition is filed, and if satisfied that the making of the agreement or the failure to comply is not in dispute, the court should then order the parties to proceed with arbitration.[162] However, if one of these issues is in dispute, the court should proceed to trial.[163]

Section 5 also reveals deference to arbitration. It states that if the written agreement among the parties provides a method of choosing arbitrators, such method should be followed.[164] On the other hand, if no method is specified in the agreement, then either party may apply to the court to designate an arbitrator, arbitrators, or umpire.[165] The appointed person(s) must then act with the same effect as if they had been specifically named in the agreement.[166]

Sections 9 through 12 address the topic of arbitration awards and the extent of involvement by the formal judicial system in arbitration remedies. If an agreement states that a specified court may enter judgment on the award after arbitration, within one year of the date on which the award is made, any party can apply to the court to confirm the award.[167] A court must grant such an application unless the award is

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[159] *Id.* § 3.
[160] *Id.* § 4.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] Federal Arbitration Act, 9 U.S.C. § 5.
[165] *Id.*
[166] *Id.*
[167] *Id.* § 9. There are also opportunities for application when no court is specified. *Id*.

vacated, modified, or corrected under conditions listed in Sections 10 and 11 of the FAA.[168]

Finally, Section 16 allows appeals of certain orders, interlocutory orders, or final decisions.[169] This section also outlines situations in which parties may not appeal.[170]

B. *JABRI*: A COURT APPROPRIATELY DEFERS TO THE NATIONAL PREFERENCE FOR ARBITRATION

Although some FAA provisions mention United States district courts, the Act has been construed through case law to apply to the states as well. In *Southland Corp. v. Keating*, the U.S. Supreme Court held that state law provisions which require judicial considerations of claims are invalid because they conflict with both the FAA and the U.S. Constitution's Supremacy Clause.[171] It also reiterated that the enactment of the FAA represents a federal policy giving preference to arbitration.[172]

The *Jabri v. Qaddura* decision demonstrates how the FAA and state statutes work to uphold the national preference for arbitration and limit court involvement to situations in which it is necessary.[173] In this case, Rola Qaddura and Jamal Qaddura were married in September 1993, after signing an "Islamic Society of Arlington Islamic Marriage Certificate."[174] Six years later, Rola filed for divorce, seeking custody of the couple's two children, child support, division of the parties' estate, and enforcement of provisions in the marriage certificate, which had granted the bride half the value of a house as a "dowry."[175] Jamal responded by filing a counterclaim alleging that the marriage certificate was unenforceable because, as he argued, Rola had induced its execution by fraud.[176]

After the trial court granted only partial summary judgment for Jamal in 2001, finding that the Islamic marriage certificate was neither enforceable under Texas law nor a valid premarital agreement under the

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[168] *Id.* § 9-11. Conditions under which awards may be vacated, modified, or corrected are specified in the Act. *See id.* §§ 10(a)(1)-(4), 10(b), 11(a)-(c), 12.
[169] *Id.* § 16(a).
[170] *Id.* § 16(b).
[171] *See* Southland Corp. v. Keating, 465 U.S. 1, 2 (1984).
[172] *Id.*
[173] *See* Jabri v. Qaddura, 108 S.W.3d 404 (Tex. App. 2003).
[174] *Id.* at 406.
[175] *Id.* at 407.
[176] *Id.*

Texas Family Code, the parties turned to the Texas Islamic Court in 2002.[177] Rola, Jamal, Rola's parents, and Jamal's brother, as well as each of the parties' respective attorneys signed an "Arbitration Agreement."[178] The parties agreed to arbitrate their dispute in regard to "the determination of each party's responsibilities and duties according to the Islamic rules of law by [the] Texas Islamic Court."[179] The agreement also allowed the parties to suggest arbitrators for the panel to hear their dispute, though these nominations were subject to the rules of the Texas Islamic Court.[180] Further, the agreement included a provision that the decision of the arbitration panel would be binding, with no party taking legal action afterwards.[181]

The parties and their attorneys also signed a "Stipulations and Agreements Covering Arbitration" document, in which they once again agreed to be bound by the rules of the Texas Islamic Court.[182] When a dispute arose over the scope of the issues that would be arbitrated, Rola filed a motion in court seeking to stay litigation and enforce arbitration through the Texas Islamic Court.[183]

The trial court decided that the parties had disagreed on the scope of the arbitration agreement and held it to be invalid.[184] It denied Rola's motion to stay litigation whereupon Rola and her parents appealed.[185] The Texas appeals court examined the language of the Texas General Arbitration Act and analyzed the Arbitration Agreement signed by the parties.[186]

After noting state and federal laws' preference for arbitration proceedings and the presumption in Texas law that arbitration agreements are valid, the Texas appeals court held that the trial court had abused its discretion.[187] The Arbitration Agreement was valid and enforceable and covered all existing issues, including those that were the subject of the trial court's partial summary judgment ruling.[188]

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[177] *Id.*
[178] *Id.* at 407-8.
[179] *Id.* at 408.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at 408-9.
[184] *Id.* at 409.
[185] *Id.*
[186] *Id.* at 412.
[187] *Id.* at 404-5, 413.
[188] *Id.* at 413-14.

Interestingly, even though the arbitration tribunal involved was the Texas Islamic Court, which applied principles of Islamic law, the Texas appeals court did not consider the validity of the application of Islamic law. Rather, there was an investigation as to whether the arbitration agreement conformed to the procedural standards of Texas state law, which then led to the described result. The Texas appeals court's analysis was appropriate. Questions of the "rightness" of Islamic law should not be included in court decisions examining arbitration agreements or appeals of arbitration awards because of freedom of religion and Establishment Clause concerns. Rather, courts may intervene if there is some contravention of fundamental principles of justice.

C. *ODATALLA*: COMPATIBILITY OF SECULAR COURTS AND ISLAMIC LEGAL PRINCIPLES

Jabri demonstrates how interested parties can seek arbitration of their disputes under Islamic law and that courts should defer to the federal preference for arbitration in appropriate instances. Consideration of a second case, *Odatalla v. Odatalla*,[189] shows that results from the application of Islamic legal principles can be congruent with those from a court trial.

In 1996, plaintiff wife Houida and defendant husband Zuhair were married in an Islamic ceremony held at the home of Houida's parents in New Jersey.[190] Before the actual ceremony took place, the parties and their families negotiated the terms of the *mahr*, or dower.[191] The imam prepared the marriage license and included the specified amount for the mahr in the license.[192] The Mahr Agreement stated that Zuhair would give Houida one golden coin as a part of the ceremony, and the second half of the mahr, an amount of $10,000, would be postponed.[193] After the bride, groom, and their witnesses had signed the license, the religious ceremony continued.[194]

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[189] Odatalla v. Odatalla, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002).
[190] *Id.* at 95.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*

Upon filing for divorce, Houida's central claim was for specific performance of payment of the second half of the Mahr Agreement.[195] Zuhair opposed enforcement of the agreement, arguing that the First Amendment's Establishment Clause prohibits the court from reviewing the Mahr Agreement based on Islamic law.[196] He alternatively argued that the agreement was not a valid contract under New Jersey law.[197]

Regarding Zuhair's constitutional challenge, the New Jersey Supreme Court relied on the U.S. Supreme Court's decision in *Jones v. Wolf*, which upheld Georgia's "neutral principles of law" analysis in interpreting state statutes regarding church property.[198] The New Jersey court outlined a set of conditions that must be met for enforcement of the Mahr Agreement to be proper.[199] First, the court must determine whether there are "neutral principles of law" that can be applied to decide whether enforcement is possible.[200] It is imperative that the court should not attempt to interpret or apply religious doctrine.[201]

The second step is to then apply those "neutral principles of law" to the facts to render a result that complies with state standards.[202] In this case, the New Jersey court determined that a Mahr Agreement negotiated during an Islamic marriage ceremony is no different from any other contract to pay money.[203] Therefore, the court applied contract law.[204]

In applying these principles, the court addressed Zuhair's second argument. He contended that the use of the word "postponed" in reference to the amount of $10,000 was vague.[205] However, the court noted that the language is similar to that in a promissory demand note[206] and therefore, found the Mahr Agreement valid and enforceable under state law.[207]

Application of basic Islamic legal principles to the facts of *Odatalla v. Odatalla* also yields enforcement of the Mahr Agreement,

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[195] *See id.* at 95.
[196] *Id.*
[197] *Id*.
[198] Jones v. Wolf, 443 U.S. 595 (1979).
[199] *Odatalla*, 810 A.2d at 95-98.
[200] *Id*. at 95.
[201] *Id.* at 95-96.
[202] *Id.* at 97.
[203] *Id.*
[204] *Id.*
[205] *Id.* at 98.
[206] See *id.* at 97-98.
[207] *Id*. at 98.

even when varying interpretations of the different Islamic schools are taken into account. In Islam, a marriage agreement, and any part therein, is treated like any other contract.[208] A contract is formed when one party makes a proposal to take some action and the other party accepts it, the parties have the same intent, and the purpose of the agreement is to produce some legal result.[209] Schools differ on the presence of witnesses. For instance, the Hanafi School requires that a proposal and acceptance are witnessed by two qualified observers, whereas the Maliki School states that witnesses are required only for publicity of the marriage.[210]

Zuhair and Houida agreed to and signed the marriage license containing the Mahr Agreement voluntarily.[211] This suggests that the parties had an agreement of the minds as required by Islamic law.[212] The *Odatalla* court described the circumstances surrounding Houida and Zuhair's ceremony, noting that witnesses from each of the families were present and provided their signatures for the marriage license.[213] Regardless of whether the Hanafi or Maliki interpretation is applied here, the requirement for witnesses is met. The agreement therefore was a valid, enforceable contract.

Apart from an application of Islamic contract law, enforcement of the Mahr Agreement is also clearly warranted from legal principles specifically related to dower. Under these principles, mahr is not a form of consideration as a matter of the contract of marriage, but rather is a responsibility the husband must undertake as a measure of respect for the wife.[214] All of the Sunni schools[215] agree that the wife is entitled to the whole amount of any deferred mahr once either of two events occurs: 1) the consummation of marriage, or 2) the death of either husband or wife before consummation.[216] The Shia schools[217] agree with this opinion, but add that if the husband dies before consummation of the marriage and

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[208] ABDUR RAHIM, THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE ACCORDING TO THE HANAFI, MALIKI, SHAFI'I AND HANBALLI SCHOOLS 328 (1958).

[209] *Id.* at 282.

[210] *Id.* at 328-29.

[211] *Odatalla*, 810 A.2d at 95.

[212] RAHIM, *supra* note 208, at 282.

[213] *Id*. at 328-29.

[214] *Id*. at 334.

[215] The Hanafi, Maliki, Hanbali, and Shafii schools of law are the four leading Sunni schools. Abdal-Haqq, *supra* note 60, at 24-25.

[216] JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 89 (Kluwer Law International 3d ed. 2002).

[217] The Jafari school is the most well known of the Shia schools of law. Abdal-Haqq, *supra* note 60, at 24-25.

has not specified an amount in the marriage contract, no mahr is due to the wife.[218]

The *Odatalla* opinion did not specify whether the marriage had been consummated, but Houida and Zuhair were married for at least six years between the time when the ceremony was conducted in 1996 and the case was decided in 2002.[219] If consummation was assumed, then the Mahr Agreement was enforceable because Houida was entitled to the entire deferred amount of the mahr. Thus, under either Islamic contract law or mahr law, an Islamic law-based arbitration tribunal would reach the same result that the *Odatalla* court did.

Some observers may argue that if the results are indeed similar, parties should submit their disputes to the courts. This is a valid point, but parties who wish to avail themselves of Islamic law-based tribunals should be able to do so because arbitration still would offer advantages that litigation could not. For instance, parties may desire to keep any discussion about consummation private. The confidential setting of the arbitration tribunal would allow them to do so. Further, the arbitrators of an Islamic law-based tribunal would apply principles of contract law and mahr on their first hearing of the case. Not all courts that have encountered this issue have taken the path of the New Jersey Supreme Court and regarded the mahr agreement as a contract.[220] To appeal a trial court's ruling would increase costs of litigation and prolong resolution of the case. Therefore, Islamic law-based arbitration tribunals remain a feasible alternative to litigation.

D. AMERICAN NOTIONS OF JUSTICE

This note has so far explored statutory constraints on the procedure of arbitration tribunals, considered the MAT as a workable example of how such tribunals could operate, described circumstances in which court intervention is allowable, and analyzed a fact pattern to

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[218] NASIR, *supra* note 216.

[219] *See Odatalla,* 810 A.2d 93.

[220] *See, e.g., In re* Marriage of Dajani, 251 Cal. Rptr. 871 (Cal. Ct. App. 1988). *See also* Azizah Y. al-Hibri, Speech at the Minaret of Freedom Banquet: The Muslim Marriage Contract in American Courts (May 20, 2000), http://www.karamah.org/articles_marriage_contract.htm (last visited Oct. 14, 2009). Emily L. Thompson & F. Soniya Yunus, Note & Comment, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 WIS. INT'L L.J. 361 (2007); Lindsey E. Blenkhom, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189 (2002).

demonstrate that Islamic legal principles used in an arbitration tribunal can produce the same results a secular court system could provide. One final word is needed to explain that American notions of justice also support the existence of arbitration tribunals such as those based on new interpretations of Islamic law.

Justice is not an easy concept to define, but Justice Learned Hand provided a helpful explanation when he said, "Justice, I think, is the tolerable accommodation of the conflicting interests of society, and I don't believe there is any royal road to attain such accommodations concretely."[221] Hand therefore equates justice to recognizing different points of view, and suggests that litigation is not the only means of protecting people's beliefs. Islamic law-based arbitration tribunals are an illustration of these concepts.

Accommodating multiple viewpoints is essential to the concept of a pluralistic, American society. Judge Selser, in the majority opinion in *Odatalla*, compares the American community today with that which existed during the eighteenth century, when the Constitution was adopted.[222] The challenges for today's American community, Selser suggests, are not the same as those that Americans faced in 1787.[223] Rather than fear of a state-sponsored church or religion, today's challenge is determining the applicability of law in an increasingly diverse community.[224]

Supreme Court Justice William Brennan, Jr. wrote, "We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and needs."[225]

Brennan's words echo Muslim scholars' calls for new legal interpretations. Both American and Islamic jurisprudence therefore place high value on the adaptability of doctrine to new places and new times. This emphasis on flexibility is an additional indication of the

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[221] Phillip Hamburger, *The Great Judge*, LIFE, Nov. 4, 1946 at 117, 122-23.

[222] *Odatalla*, 810 A.2d at 96.

[223] *Id.*

[224] *Id.*

[225] William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification,* 27 S. TEX. L. REV. 433, 438 (1986).

compatibility between Islamic legal principles and American notions of justice and the law.

V. CONCLUSION

A. RECOMMENDATIONS

As this note has discussed, there are several ways in which Islamic law-based arbitration tribunals are compatible with American notions of justice. Restrictions on the tribunals' jurisdiction as well as other limitations will provide additional protection for vulnerable parties and protect against some the drawbacks of the arbitration.

First, new interpretations of Islamic law that develop a "fiqh for minorities"[226] are needed so that arbitration tribunals can base their decisions on principles that are directly applicable to American nuances of traditional disputes. Scholars who cultivate new interpretations should be aware of and recognize the differing points of view among the schools of law. However, they should also construe the opinions in a manner consistent with the FAA and state arbitration codes, as well as general principles of justice.

Second, arbitration tribunals should be restricted to resolution of civil matters, such as contract, commerce, mahr, and possibly other family issues. Criminal cases should remain under the purview of the secular court system, and parties should retain their right to appeal or seek court intervention in civil disputes.

Third, because of the desirability of keeping Islamic law-based arbitration decisions in harmony with secular federal and state law, arbitration tribunals should appoint at least two arbitrators to each dispute. Arbitrators should be schooled in both the Islamic sciences of jurisprudence and hold a law degree or have some substantial experience with the secular legal system. The likelihood of a number of qualified arbitrators being available immediately is slim, so these expectations may be postponed as a long-term goal until arbitrators can adequately meet these high qualifications. In the meantime, the MAT provides a good example of how two people, each having expertise in either the secular judicial system or Islamic jurisprudence, can work together to understand and then decide disputes.[227] Such a system of qualification for

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[226] AL-AWANI, *supra* note 95.

[227] *See generally*, Qureshi, *supra* note 119.

judges will allow parties to seek arbitration of their disputes now and also help transition to a more rigorous system of qualification in the long run.

One concern that critics of Islamic law-based arbitration tribunals often raise is the possibility that certain parties may not be fully protected in arbitration proceedings.[228] The fundamental protection for parties engaging in arbitration is judicial intervention during the proceedings or afterward. The American Muslim community should be educated about its right to appeal arbitrator decisions to secular courts through literature and workshops available in different languages. Parties should be encouraged to seek outside legal advice and to hire representation. Arbitrators should also inform parties of their legal rights before they agree to arbitrate.

Courts' purview should be restricted to procedural review, to take care that they do not intervene to declare Islamic legal interpretations invalid or attempt interpretations themselves. Legislatures may add additional restrictions on tribunals to those already granted under the FAA and state arbitration codes to increase accountability of arbitrators. They may also consider coordinating the FAA with existing statutes like the Violence Against Women Act or the Child Abuse Prevention and Treatment Act so that arbitrators hearing disputes of particularly sensitive matters are further instructed on their role and the parties' ability to receive court assistance in case of unjust results.

American Muslims who wish to litigate their disputes rather than seek arbitration of them are free to do so. Establishment of Islamic law-based tribunals by no means requires all American Muslims to use them. Rather, they would serve as acceptable alternatives to litigation for those who prefer arbitration.[229]

Finally, records should be maintained so as to provide documentation if court intervention is necessary and to ensure that parties understand all aspects of the arbitration. To this end, arbitration agreements should be written in English and in any other language necessary to make them understandable to all involved parties. Copies of the agreement must be provided to each of the parties. The arbitration agreement should specify how the arbitrator will manage the

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[228] Wolfe, *supra* note 47, at 460.

[229] For a discussion of potential consequences of compelled arbitration – which this author does not support in the Islamic law arbitration context – *see* 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 (1997).

proceedings, and explicitly note any modifications that the parties request. Similarly, arbitration awards should be written in a language understandable to all as well as in English. The awards should include explanations of the arbitrators' decisions, and also briefly note any options available to a losing party at the close of arbitration. Any other relevant documents should also be retained. Arbitration tribunal organizers may find the example of the long-running Jewish Beth Din tribunals instructive in setting up procedural standards.[230] As per the nature of arbitration, all records should remain confidential unless required to be disclosed in a court.

These steps, if taken, will ensure that Islamic law-based arbitration tribunals serve their purpose of providing a forum to interested American Muslims to resolve disputes in accordance with tenets of their faith. At the same time, such steps will effectively limit tribunals to guarantee the safety of the parties and harmonize Islamic legal principles with American principles.

B. ISSUES FOR FUTURE CONSIDERATION

Although Islamic law-based arbitration tribunals should be actively pursued, it is important to note that they cannot be implemented immediately. There are several difficult issues that must be resolved prior to the realization of fully operating and serviceable arbitration tribunals. Qualified scholars must be available to develop new interpretations of Islamic law, especially in conjunction with American legal principles.

It is entirely possible that only a small percentage of the American Muslim community will find Islamic law-based arbitration tribunals desirable, especially because the idea of creating new interpretations may be seen as controversial. But arbitrators must render decisions compatible with American notions of justice to be sustained on appeal. Therefore, tension may arise among American Muslims and lead to dissatisfaction with any system of arbitration. Because there is no supervisory authority in Islamic law, dissolution of this tension may be difficult to settle.

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[230] *See generally* Beth Din of America, http://www.bethdin.org/; Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633 (2004).