THE PILLARS OF SUCCESSFUL RELIGIOUS ARBITRATION: MODELS FOR AMERICAN ISLAMIC ARBITRATION BASED ON THE BETH DIN OF AMERICA AND MUSLIM ARBITRATION TRIBUNAL EXPERIENCE

*Michael J. Broyde, Ira Bedzow, & Shlomo C. Pill**

ABSTRACT

As the Muslim community in America embarks upon a quest to develop and refine its own religious court system, it should regard the Beth Din of America precedent as a useful navigation tool for how to establish a religious court in the United States. The community should similarly look to the Muslim Arbitration Tribunal in the United Kingdom for precedent on how to establish a Muslim court in a Western democracy. Accordingly, this paper will examine the modifications made by these two religious courts so that they could work within the secular legal system, as well as provide ways that the Muslim-American community may learn from them.

I. INTRODUCTION

Private dispute resolution has long been an accepted legitimate alternative to formal adjudication in Islamic religio-legal practice,[1] and the history of Islamic law[2] includes a rich tradition of dispute resolution through a variety of formal and informal methods.[3] The Qur'an and Hadith include numerous references to the importance of human judgment, in accordance with Islamic religio-legal norms, as a means to resolve

* Michael J. Broyde is a law professor at Emory University. Ira Bedzow is a PhD student in Religion at Emory University and Shlomo C. Pill is an SJD student at Emory University School of Law.

1. For one example, *see* G.R. HAWTING, THE FIRST DYNASTY OF ISLAM: THE UMAYYAD CALIPHATE A.D. 661–750 24-33 (2d. ed. 2000).
2. As used in this article, the term "Islamic law" refers to *fiqh*, the sacred religious law of Islam as developed by the main schools of Islamic religio-legal jurisprudence, and not to the state law of Muslim-majority countries, which while often informed in some respects by religious law principles and concepts more closely tracks the substance and organization of various European legal codes which were imposed on Muslim populations during the colonial era.
3. *See, e.g.*, KNUT S. VIKOR, BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW 168–221 (2005).

disputes,[4] and *fiqh* books of practical religio-legal rules include extensive discussions on adjudicatory procedures and judicial methodology.[5] For Muslims, traditional, religiously-sanctioned methods of dispute resolution include *sulh*, negotiated settlement;[6] *takhim*, binding arbitration;[7] *qada*, formal adjudication in which a judge, or *qadi*, decides cases by determining the relevant facts of the case and applying Islamic legal norms articulated by *muftis*, or scholar-jurists who clarify points of religious law in response to questions posed by litigants or judges; and adjudication in state-run *mazalim* and *shurta* courts that apply public policy based rules under the jurisprudential rubric of *siyasa-shariya*, or Islam-inspired societal constitution and regulation.[8]

Today, observant Muslims living in the United States face the challenge of developing effective and respectable religious courts as a means of fulfilling their obligation to abide by Islamic law while living in a Western, secular political, social, and legal context. On the one hand, Muslims have a religious duty to live in accordance with Islamic legal norms, which in turn necessitates the ability to order relationships and resolve disputes through religiously acceptable dispute resolution procedures rather than through the secular judicial system.[9] On the other hand, the American Muslim community's ability to fulfill this religious imperative faces some significant obstacles. First, while historically, and in some places even today, Islamic law tribunals could enforce their own decisions, Islamic courts in the United States cannot independently implement their rulings, but must rely on the good will of disputing parties to

4. *See, e.g.*, Qur'an 4:35 (Abdel Haleem, trans. 2010) ("If you [believers] fear that a couple may break up, appoint one arbiter from his family and one from hers."); *id.* at 4:105 ("We have sent down the Scripture to you [Prophet] with the truth so that you can judge between people in accordance with what God has shown you."); *id.* at 38:26 ("David, We have given you mastery over the land. Judge fairly between people."); *id.* at 49:9-10 ("If two groups of the believers fight, you [believers] should try to reconcile them . . . make a just and even-handed reconciliation between the two of them: God loves those who are even-handed. The believers are brothers, so make peace between your two brothers and be mindful of God, so that you may be given mercy.").
5. *See, e.g.*, AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER: A CLASSIC MANUAL OF ISLAMIC SACRED LAW 624–38 (Nuh Ha Mim Keller trans., Amana Publications rev. ed. 1997).
6. MARC GOPIN, HOLY WAR, HOLY PEACE: HOW RELIGION CAN BRING PEACE TO THE MIDDLE EAST 135–143 (2002).
7. Ahmed S. Moussalli, *An Islamic Model for Political Conflict Resolution: Takhim (Arbitration), in* PEACE AND CONFLICT RESOLUTION IN ISLAM: PRECEPT AND PRACTICE (Abdul A. Said ed., 2001).
8. *See* 8 FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA, 173 (2000).
9. *See* IMAM KHASSAF, *Adab al-Qadi*: Islamic Legal and Judicial System 1-2 (Munir Ahamad Mughal, trans., 2004); *see also* MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 57 (2004), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf (quoting September 10, 2004 submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada, ". . .when differences of opinion or disputes arise between them, these should be resolved by a process of mediation, conciliation and arbitration within themselves in conformity with the Islamic concepts of unity, brotherhood, justice, tolerance and goodwill").

abide by their decisions. Second, while American law maintains a legal framework that provides a means of making private arbitration rulings enforceable by the state, at present Islamic law arbitral tribunals often fail to operate within this legal framework, and thus lose the benefit of having their rulings enforced by American courts. Also, to the extent that Islamic tribunals do operate within the formal arbitration guidelines established under American law, secular judges often remain wary of enforcing their decisions because they perceive Islamic arbitration as foreign, discriminatory, arbitrary, "informal, closed, and secret."[10] Finally, significant segments of American society maintain general distrust of Islamic law and courts, as evidenced by periodic popular outcries when American courts uphold Islamic arbitral awards and by recent attempts in some states to prohibit courts from applying or enforcing Shari'a law.[11] Such apprehensions about "creeping Sharia,"[12] and the impending "Islamization of America"[13] makes it politically difficult for Islamic arbitration to gain the respect it needs for its arbitral awards to be regularly and routinely upheld and enforced by American courts.[14] If American Muslims decide to cultivate more respectable and efficacious religious law arbitration processes in the United States, they will have to look towards developing institutions that both conform to the formal legal requirements of the American arbitration framework, as well as engender understanding of and respect for Islamic law in the American legal-political community and in American society more generally.

There have been some efforts by American Muslims to accomplish these ends,[15] but much remains to be done. In particular, a more systematic consideration of the factors that contribute to religious arbitration tribunals' gaining the acceptance of secular courts may be warranted. In this respect, American Muslims seeking to develop Islamic dispute resolution processes that will be respected by American courts might benefit by learning from the experience of the religiously observant American Jewish community, which has successfully built its own arbitration insti-

10. Michael C. Grossman, *Is this Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 179 (2007).

11. Abed Awad, *The True Story of Sharia in American Courts*, THE NATION, June 13, 2012, *available at* http://www.thenation.com/article/168378/true-story-sharia-american-courts#.

12. Mathew Schmitz, *Fears of 'Creeping Sharia,'* NATIONAL REVIEW (June 13, 2012), *available at* http://www.nationalreview.com/articles/302280/fears-creeping-sharia-matthew-schmitz.

13. PAMELA GELLER, STOP THE ISLAMIZATION OF AMERICA: A PRACTICAL GUIDE TO THE RESISTANCE (2011).

14. While American courts do regularly enforce the provisions of Islamic marriage agreements as valid, legally binding contracts in civil divorce proceedings, *see* Awad, *supra* note 11, judges are far more apprehensive about respecting and enforcing the outcomes of Islamic religious arbitrations, which the law provides may be voided for a variety of reasons linked to the propriety of the arbitral process and the consistency of the award with public policy.

15. *See, e.g.*, http://www.amjaonline.org/en/our-services/international-convention/19-imams-conference/47-islamic-arbitration-guidelines-and-procedures (collection of papers delivered at the 2010 Imam's Conference of the American Muslim Jurists Association entitled "Islamic Arbitration: Guidelines and Procedures").

tutions based on Jewish law.[16] Like Islam, Judaism is a faith tradition grounded in the observance legal norms based on God's revealed will, and like Muslims, Jews are obligated to resolve their disputes in religious courts,[17] called *batei din*,[18] which adjudicate commercial disputes, divorce and family matters, and other issues contemplated and regulated by *halakha*, or Jewish religious law.

For some time, *batei din* struggled to find their footing in the American legal system. Initially, secular courts were uncomfortable upholding and enforcing arbitral decisions issued in accordance with what they viewed as foreign, inaccessible substantive and procedural law.[19] One of the country's most prominent rabbinic courts, the Beth Din of America (BDA), was founded in 1960 to provide a more effective adjudicative forum for American Jews committed to living in accordance with *halakha* in a secular American legal and social context. Today, the BDA provides a sprawling network of Jewish law courts that function as fully legal arbitration panels that offer observant Jewish litigants access to a religious law-compliant adjudicatory forum marked by the characteristic expedience and affordability of arbitration. Over time, and by adopting a host of prudent measures designed to improve the transparency, consistency, equity, and professionalism of its arbitral process, the BDA has gained widespread acceptance among America's secular courts, which are comfortable enforcing its arbitral decisions, and which to date have never overturned a BDA-issued arbitration award.[20]

A similar phenomenon has occurred in the United Kingdom with respect to Islamic law arbitration. While Muslim religious courts have functioned in the United Kingdom for decades, resolving matters under Islamic family and personal law, as well as some commercial disputes, these informal "Shari'a Councils" did not follow any set procedural rules

16. Like the usage of the term "Islamic law," references to "Jewish law" in this article connote *halakha*, the religio-legal norms and methods based on the Torah, and developed in the Talmud and subsequent works by recognized religious law scholars, decisors, and jurists, rather than the secular laws of the State of Israel, which draw on traditional religious law concepts and principles but are quite different from normative *halakha*.
17. For a discussion of Jews' religious duty to resolve disputes in religious rather than secular courts, *see* Yaakov Feit, *The Prohibition Against Going to Secular Courts*, 1 J. BETH DIN AM. 30 (2012).
18. *Beth din* or *bet din* (pl. *batei din*) translates literally to "house of judgment." For an overview of the *beit din* system, *see* MENACHEM ELON, THE PRINCIPLES OF JEWISH LAW 561–65 (2007). For a broader review of the evolution of Jewish Law court, *see* Michael J. Broyde *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent*, 57 N.Y.L. SCH. L. REV. 287 (2012–13).
19. *See* Ginnie Fried, *The Collision of Church and State: A Primer to Beth Din* Arbitrarion and the New York Secular Courts, 31 FORDHAM URB. L. J. 633 (2004).
20. *See, e.g.*, Paul Berger, *In Victory for "Chained" Wives, Court Upholds Orthodox Prenuptial Agreement*, THE JEWISH DAILY FORWARD (February 8, 2013), *available at* http://forward.com/articles/170721/in-victory-for-chained-wives-court-upholds-o/?p=all (noting that with respect to the religious prenuptial agreement developed by the BDA, the presiding judge "appeared to treat the Orthodox [BDA] prenup in the same routine way he would treat any other any [sic] secular prenuptial contract").

or operate within any secular legal framework.[21] Consequently, the decisions of these early Islamic tribunals were not legally enforceable, and litigants had to rely solely on the goodwill of the parties to adhere to the religious court's decisions. The Muslim Arbitration Tribunal (MAT) was established in 2007 to provide British Muslims with a more effective alternative for resolving disputes in accordance with Islamic law, drawing on, among other things, the BDA's experiences.[22] In 2008, the British government formally recognized the MAT's network of Shari'a courts, ensuring that their decisions would be enforced by the secular courts.[23]

As the American Muslim community continues to develop and refine its own religious courts as effective forums for resolving disputes in accordance with Islamic law, it may wish to consider the BDA experience as a useful navigation tool for how to establish a system of respectable religious courts in the United States. Likewise, American Muslims might look to the MAT's experience in the United Kingdom for precedent on how to structure Islamic religious courts whose work will be respected and whose decisions will be enforced by the secular legal system. Specifically, American Muslims may note six pillars on which the BDA and MAT have constructed their religious arbitration processes, which have allowed them to garner respect and endorsement from the secular courts: (1) publishing legally sophisticated rules of procedure; (2) developing an internal appellate process; (3) exhibiting respect for both religious and secular legal norms; (4) acknowledging common commercial customs and equitable standards; (5) utilizing arbitrators with broad professional expertise in both religious and secular disciplines; and (5) taking an active role in governing and representing their constituent religious communities.

Before examining the ways in which adopting these principles has contributed to the acceptance of the BDA and MAT by secular courts, and prior to offering suggestions for how American Muslims might implement similar measures, this article will first provide some context for this discussion by briefly reviewing the relevant legal frameworks for religious law arbitration, the histories of both the BDA and MAT, and the general state of Islamic religious arbitration in the United States.[24]

II. THE ADR FRAMEWORK AND RELIGIOUS ARBITRATION

This Part provides some background information necessary to fully appreciate the significance of the pillars of religious arbitration successfully adopted and adapted by the BDA and MAT. It begins by offering an overview of the general contours of American arbitration law, focusing on how the alternative dispute resolution framework created by Ameri-

21. For a discussion of the structure and procedures of these Shari'a Councils, *see* John R. Bowen, *How Could English Courts Recognize Shariah?*, 7 U. ST. THOMAS L.J. 411, 418–21 (2010).

22. *See* Bilal M. Choksi, Comment, *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, 812 (2012) (arguing "[In establishing the MAT], Shaykh Siddiqi followed the Jewish example of the Beit Din rabbinical court.").

23. *Id.* at 812–13.

24. *See infra* Part II.

can law provides religious disputants with an opportunity to structure tribunals capable of issuing legally binding rulings in accordance with religious law norms. Next, this part briefly discusses the histories of the BDA and MAT, tracing their development into arbitration organizations whose processes and rulings are respected and enforced by secular court systems in their respective countries. Finally, this Part considers the current state of Islamic arbitration in the United States, setting the stage for the suggested measures that American Muslims might choose to take in order to build more effective and respected Islamic arbitration processes.

A. Arbitration and the Secular Legal System

Arbitration is a form of alternative dispute resolution (ADR) in which parties submit their case to an impartial third-party for a binding resolution, called an award.[25] Arbitration offers disputants a number of advantages over formal litigation, including informal procedures, privacy, economy, amicability, and speed and efficiency.[26] Arbitration also enables parties to come to authoritative resolutions of their disputes in accordance with standards they prefer to those offered by the law, which may fail to adequately reflect the parties' expectations or to satisfactorily protect their interests.[27] Western legal systems were for some time hostile to ADR forums operating apart from the state-sponsored justice system and resolving conflicts in accordance with substantive and procedural values different from those embraced by the law.[28] Yet over the past century, courts and legislatures have increasingly recognized the benefits of arbitration and other forms of ADR. The United States and the United Kingdom, like many other countries, have created legal frameworks for recognizing the legal validity and enforceability of arbitral awards, and consequently arbitration has grown into a central feature of the ADR universe.

In the United States, the Federal Arbitration Act (FAA), and State-specific arbitration rules often based on the Uniform Arbitration Act, create a legal framework in which private arbitration can operate with the support of the official court system.[29] The FAA protects the integrity of arbitration by ensuring that courts will enforce awards, which gives the

25. *See, e.g.*, THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 1-2 (2d. ed. 2007).
26. *See* PIETER SANDERS, QUO VADIS ARBITRATION?: SIXTY YEARS OF ARBITRATION PRACTICE 2-7 (1999).
27. *See* Richard Allan Horning, *Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (in Toto): Article 46*, 9 AM. REV. INT'L ARB. 155, 156–57 (1998).
28. *See* STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 12–13 (2002).
29. *See* 9 U.S.C. §§ 1–16 (2012). Prior to Congress' enacting the Federal Arbitration Act, courts were often hostile to alternative dispute resolution, including arbitration. *See* Meacham v. Jamestown, F. & C.R. Co., 105 N.E. 653, 655 (N.Y. 1914) (Cardozo, J., concurring) (arguing that courts should not enforce contracts that grant jurisdiction to resolve disputes to private arbitrators rather than regular courts). Congress passed the Act to combat this hostility. *See* H.R. REP. NO. 68-96, at 1-2 (1924); Mitsubishi Motors Corp. v. Sler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 n.14 (1985); Southland Corp. v. Keating, 465 U.S. 1, 13 (1984) (citing H.R. REP. NO. 68-96, at 1–2 (1924)) ("The need for the [Federal Arbitration Act] arises from . . . the jealousy of

arbitration process a derivative power of enforcement, transforming it from a form of dispute resolution whose efficacy is contingent on disputants' goodwill into one that is ultimately backed by government enforcement powers.[30] This legal framework is premised on courts' power to enforce binding contracts.[31] If disputants agree to arbitrate rather than litigate a conflict, and commit themselves to abide by the decision reached by their designated arbitration forum, then a court can enforce that contract by requiring recalcitrant parties to arbitrate the case in accordance with the terms of the arbitration agreement and to abide by the arbitrator's ruling.[32]

Under the FAA, a court may vacate an arbitration award under a variety of circumstances. A court may refuse to enforce an award issued not pursuant to a valid arbitration agreement between the parties, as when no agreement to arbitrate exists, or when one was obtained through fraud or duress.[33] Similarly, a court may vacate an award if it is the product of fraud,[34] bias,[35] or corruption,[36] or was the result of misconduct by the arbitrators that violated the rights of any party to the arbitration.[37] A judge may also refuse to enforce an award if the arbitrators acted in excess of the powers granted to them under the parties' arbitration agreement.[38] Finally, while courts are generally not permitted to question the substance of an arbitration award, the FAA does allow courts to vacate arbitral rulings that are contrary to public policy, and some courts have held that an award may be vacated if its substance amounts to manifest disregard for the law.[39]

In the United Kingdom, binding arbitration takes place under the aegis of the Arbitration Act of 1996.[40] Like its American counterpart, the Act is premised on the notion that "parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."[41] Under the Act, courts must respect parties' contracts, and enforce awards issued by an arbitral tribunal pursuant to a

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the English courts for their own jurisdiction . . . This jealousy survived . . . and was adopted by the American courts.").

30. *See* IAN R. MACNEIL, ET. AL., FEDERAL ARBITRATION LAW, §§ 38.1.1, 38.2 (Supp. 1995).
31. See Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 69–70 (2005).
32. *See* Volt Info. Scis. v. Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) ("[T]he federal policy [under the FAA] is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.").
33. *See* Federal Arbitration Act, 9 U.S.C. §10(a) (2002).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *See* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1254–58 (2011); Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 508 n.74 (2013); *see generally* Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157, 163–64 (2012).
40. The Arbitration Act of 1996, *available at* http://www.legislation.gov.uk/ukpga/1996/23/contents.
41. *Id.* § 6 (b).

valid arbitration agreement.[42] Like its American counterpart, the Act is premised on the notion that "parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."[43] Under the Act, courts must respect parties' contracts, and enforce awards issued by an arbitral tribunal pursuant to a valid arbitration agreement.[44] The Act allows courts to refuse to enforce arbitration awards under circumstances constituting "serious irregularity."[45] These conditions include, among others, a tribunal's failure to conduct the arbitration pursuant to a valid agreement and arbitrators' failure to insure procedural protections relating to impartiality and fairness required under the Act.[46] When a reviewing court finds such irregularities, the Act permits it to remit the award to the arbitral tribunal for reconsideration, set aside the award, or decline to enforce the arbitral decision.[47]

This legal arbitration framework provides one important means of empowering individuals and communities in the United States and England to conduct their internal affairs in accordance with their religious commitments.[48] Law-based faith traditions like Islam and Judaism expect their adherents to order their lives and resolve conflicts in accordance with their respective religious law norms, which necessitates their members turning to religious tribunals presided over by religious law scholars and jurists as the preferred dispute resolution forum.[49] The secular legal framework for recognizing and enforcing arbitration awards facilitates efficacious arbitration within religious communities by insuring that parties to such proceedings can employ the coercive powers of the judicial system to enforce awards issued by arbitral tribunals applying religious law instead of their being forced to rely solely on the goodwill of the losing disputant to abide by the tribunal's ruling. In order to enjoy the benefits of this secular legal framework for enforcing arbitration awards, arbitration tribunals applying religious legal norms must take steps to insure that their decisions comply with the standards set by that framework and earn the respect of secular courts.

B. Jewish Arbitration and the Beth Din of America

The BDA was originally founded in 1960 as part of the Rabbinical Council of America (RCA), one of the principal organizations of tradition-

42. *Id.* § 30(1).
43. *Id.* § 6(b).
44. *Id.* § 30(1).
45. *Id.* § 68(1)–(2).
46. *Id.* § 33.
47. *Id.* § 68(3).
48. *See generally* Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501 (2012).
49. *See* Feit, *supra* note 17, at 41 (discussing the Jewish law obligation for Jews to resolve disputes in rabbinic courts); Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent* 25 J. L. & REL. 379, 385 (2009–2010) (noting that the need for a religious forum for the resolution of disputes can be urgent for Muslims looking to closely observe Shari'a).

ally-observant rabbis in the United States.[50] While the BDA is now a fifty year old organization, its true metamorphosis into an effective arbitration venue respected by American courts began only in 1996, when the BDA became autonomous from its parent organization, the RCA.[51] In the fifteen years since the BDA gained autonomy from the RCA, an independent board of directors has worked with the BDA's rabbinic leaders to craft an arbitration process that secular courts are comfortable upholding. This entailed creating an arbitral practice that operates within the legal framework established by American arbitration laws. The BDA directors also went beyond merely satisfying technical legal requirements and strove to earn secular court confidence in the legal character of arbitration tribunals applying Jewish law as well as in the professional competence of their rabbinic arbitrators.[52] While the BDA's transformation into a respected arbitration organization required internal reformulations and adaptations of the default *halakhic* procedures traditionally employed by *batei din*, these changes did not entail substantive alterations of Jewish law not permitted by the *halakhic* system itself.[53] The BDA gained judicial acceptance by presenting Jewish law and dispute resolution in a way that drew upon language, categories, and principles that were familiar to the secular legal establishment, allowing the latter to take confidence in the BDA process's transparency, legal sophistication, and fairness.[54]

These measures, discussed more fully below,[55] illustrate the steps the BDA took in order to gain the respect of the broader legal community and insure that its rulings would be enforced by secular courts. While the sum total of these efforts has significantly altered the appearance of traditional *beit din* practice, each individual measure was undertaken with substantial support in earlier *halakhic* precedents. By building on these permissible but innovative approaches to *beit din* practice, the BDA successfully navigates the complex relationship between secular and religious law in the United States, and is able to offer Jews an efficacious adjudicatory forum consonant with both Jewish and American law.

C. Islamic Arbitration in Britain and the Muslim Arbitration Tribunal

The MAT was established in 2007 to provide British Muslims with the opportunity to effectively resolve disputes in accordance with Islamic legal norms.[56] While Islamic courts have existed in the United Kingdom for many decades, both under the institutional umbrella of the Islamic Shari'a Council and as privately sponsored tribunals presided over by local religious scholars, these forums did not follow formal, transparent procedures

50. *See Organization and Affiliations*, BETH DIN OF AMERICA, www.bethdin.org/organization-affiliations.asp (last visited Feb. 4, 2014).
51. *Id.*
52. *See* Broyde, *supra* note 18, at 288.
53. For an overview of traditional *beit din* processes see 1 Emanuel B. Quint, A RESTATEMENT OF RABBINIC CIVIL LAW (1990).
54. *See* Broyde, *supra* note 18, at 288.
55. *See infra* Part III.
56. *See* Maria Reiss, Note, *The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should be Non-Binding*, 26 ARIZ. J. INT'L & COMP. L. 739, 768 (2009).

or operate within any secular legal framework. As a result, the decisions of these early Islamic tribunals were not legally enforceable, and litigants had to rely on the willingness of the disputants to adhere to tribunals' decisions.[57] To remedy this, Sheikh Faiz Siddiqi, a barrister and the founding principle of Hijaz College, and Shamim Qureshi, a practicing Muslim and English District Judge, founded the MAT to provide British Muslims with a more effective means of dispute resolution in accordance with Islamic law.[58]

The MAT operates pursuant to Section 1 of the Arbitration Act of 1996, which provides that "parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."[59] Like the BDA, the MAT developed innovative processes in order to insure that its arbitrations would conform to the formal requirements of the Arbitration Act and to garner the respect of British courts and make judges more comfortable enforcing MAT rulings. Some of these measures represented significant departures from the *fiqh*-based procedural rules of traditional Islamic adjudication,[60] as well as from traditional *tahkim* processes, which are far less formal than MAT proceedings.[61] Muslim scholars have observed, however, that Islamic law can be understood to provide ample room for such procedural innovations as a means of enabling Islamic tribunals to operate effectively in a non-Muslim political and legal context.[62] By building on viable avenues for innovation in Islamic law, the MAT, like the BDA, has crafted an arbitration process that gives British Muslims the opportunity for effective dispute resolution services consistent with both British and Islamic law.

D. The State of Islamic Arbitration in the United States

There are approximately 2.6 million religiously observant Muslims in the United States today, up from about one million in the year 2000.[63] The

57. *See* Choksi, *supra* note 22, at 811.
58. *Id.* at 812–13.
59. *See* Arbitration Act of 1996 § 1(1).
60. For a discussion on traditional procedures in Islamic adjudication *see* Wael B. Hallaq, Shari'a: Theory, Practice, Transformations 342–54 (2009); Knut S. Vikor, Between God and Sultan: A History of Islamic Law 168–221 (2005); Abdur Rahim, The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafii and Hanbali Schools 364–82 (1911).
61. For a review of the traditional *takhim* process, *see* MOHAMED M. KESHAVJEE, ISLAM, SHARIA AND ALTERNATIVE DISPUTE RESOLUTION: MECHANISMS FOR LEGAL REDRESS IN THE MUSLIM COMMUNITY 67–69 (2013).
62. *See, e.g.*, TABA JABIR AL-ALWANI, ISSUES IN CONTEMPORARY ISLAMIC THOUGHT 202 (2005) ("Shari'a does not provide for a specific procedural system, but leaves such details to the *ijtihad* and understanding of those responsible for ensuring that justice is done."). *See generally id.* at 196–225; TAHA JABIR AL-ALWANI, TOWARDS A FIQH FOR MINORITIES: SOME BASIC REFLECTIONS (Anas S. Shaikh-Ali & Shiraz Khan eds., 2003) (developing a framework for a renewal of *ijtihad*, or direct engagement and interpretation of the primary sources of Islamic law, in order to develop religious law doctrines that take into account the conditions and realities of life for Muslims living in non-Muslim political and legal contexts).
63. *See* Meghan Neal, *Number of Muslims in the U.S. Doubles since 9/11*, N.Y. DAILY NEWS (May 3, 2012), http://www.nydailynews.com/news/national/number-muslims-u-s-doubles-9-11-article-1.1071895. These figures are based on numbers of people

number of mosques, and other Islamic institutions in the U.S. has also grown, with over 2,100 congregations reported.[64] At present, Muslims who regularly attend mosque services are found in nearly 600 counties throughout the United States.[65]

The recent dramatic growth of the Muslim population in America has been accompanied by an increase in the need for Islamic arbitration to resolve Muslims' financial disputes, family conflicts, and marriage and divorce issues, all of which are governed by traditional *fiqh*. Islam has no official church and no institutional or organizational religious hierarchy that ties together the diverse Muslim communities throughout the United States. Instead, each congregation, and indeed, each individual, practices Islam in accordance with the religious and legal teachings of his or her chosen leaders.[66] Consequently, Islamic dispute resolution practices differ widely between communities and individual adjudicators, and there is little systematic understanding of the precise state of Islamic arbitration in the United States today on the macro or micro level.[67]

The few studies examining Islamic court practices in Canada and England may be taken as a general indication of the diversity among tribunals in the United States.[68] One 2004 study, sponsored by the Canadian Attorney General's office, solicited information about internal dispute resolution procedures from a variety of faith groups, and sheds light on the arbitral procedures of one Sunni Muslim congregation, the Masjid El-Noor in Toronto.[69] A typical arbitration tribunal at the Masjid El-Noor consists of three members – the Imam, one man, and one woman – selected from the mosque's mediation board, which includes the Imam and six other members equally divided between men and women. Most board members are professionals who use their expertise to help resolve cases between members of their religious community.[70] The Masjid El-Noor arbitral board deals primarily with family matters, though it occasionally resolves commercial conflicts as well, employing a continuum of negotiation, mediation, and arbitration to resolve conflicts.[71] The study

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who self-identify as Muslim, and who regularly attend religious worship services. *Id.*

64. *Id.*

65. *See* U.S. MEMBERSHIP REPORT: RELIGIOUS TRADITIONS (2010), http://www.thearda.com/rcms2010/r/u/rcms2010_99_US_name_2010.asp.

66. *See generally* FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 1–25 (Ruud Peters & Bernard Weiss eds., 2000).

67. For some indication of the diversity of Islamic religious court practices in connection with family law matters, *see* Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States* 181–83, *in* WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM (Lynn Welchman ed., 2004).

68. Of course, the MAT, with its centralized organizational authority and its willingness to conduct religious arbitration proceedings in a variety of cities through England, has lent some measure of macro-level systemization to the Islamic dispute resolution scene in the U.K.

69. *See* MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 59–68 (2004), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf.

70. *Id.* at 60.

71. *Id.* at 61.

notes, however, that Canadian Muslims report that Islamic arbitration practices differ widely from tribunal to tribunal, are often not as transparent, consent-based, or well-structured as those of the Masjid El-Noor, and that some Islamic courts in Canada flout state, civil, and criminal law with impunity.[72]

The state of Islamic courts in the United Kingdom further illustrates the diversity – and sometimes heavily-veiled practices – of Islamic dispute resolution processes. While today the MAT provides a network of relatively formal and transparent arbitral tribunals for British Muslims,[73] it is not the only available forum for Islamic dispute resolution. The Islamic Shari'a Council (ISC)[74] is a network of Islamic law decision-makers who operate outside the British arbitration framework, and resolve family and civil disputes in accordance with Islamic law. The ISC follows more traditional *fiqh* procedures than the MAT, offering fewer accommodations to English substantive and procedural laws.[75] Similar services are offered by other Islamic tribunals in England, including the Muslim Law Shariah Council,[76] as well as an extensive number of unconnected private Islamic law decisors who issue rulings to their followers using the procedural and substantive standards of their own respective schools of Islamic law.[77] Islamic dispute resolution processes are likely even more diverse and hidden from the public eye in the United States than they are in England or Canada.[78]

Islamic arbitration is regarded with some suspicion by many Americans, as well as by segments of the Unites States' political and legal communities as well. These feelings of distrust result from uncertainty about much of what actually takes place in Islamic arbitrations in the United States, coupled with popular misunderstandings about the nature of Islamic law, and from Islamaphobia fueled by a number of very vocal groups.[79] In 2010, Oklahoma passed a state constitutional amendment

72. *See id*; *see also* 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, 519–23 (2006–07).
73. *See supra* Part II.C.
74. *See* THE ISLAMIC SHARI'A COUNCIL, http://www.islamic-sharia.org/.
75. See Christopher R. Lepore, *Asserting State Sovereignty over National Communities of Islam in the United States and Britain: Sharia Courts as a Tool of Muslim Accommodation and Integration*, 11 WASH. U. GLOBAL STUD. L. REV. 669, 682–85 (2012); *see also* Edna Fernandes, *Sharia Law UK: Mail on Sunday Gets Exclusive Access to a British Muslim Court*, MAIL ONLINE (July 4, 2009), http://www.dailymail.co.uk/news/article-1197478/Sharia-law-UK—How-Islam-dispensing-justice-side-British-courts.html.
76. *See* THE ISLAMIC SHARI'A COUNCIL, http://www.shariahcouncil.org/.
77. *See* Jonathan Wynne-Jones, *Sharia: A Law unto Itself?*, THE TELEGRAPH (August 7, 2011), http://www.telegraph.co.uk/news/uknews/law-and-order/8686504/Sharia-a-law-unto-itself.html.
78. *See* Qamar-ul Huda, *The Diversity of Muslims in the United States: Views as Americans* (United States Inst. of Peace, Special Report 159, Feb. 2006), *available at* http://www.usip.org/sites/default/files/sr159.pdf (last visited Dec. 2, 2013); Christopher R. Lepore, *Asserting State Sovereignty over National Communities of Islam in the United States and Britain: Sharia Courts as a Tool of Muslim Accommodation and Integration*, 11 WASH. U. GLOBAL STUD. L. REV. 669, 685–86 (2012).
79. *See generally* WAJAHAT ALI ET AL., FEAR, INC.: THE ROOTS OF THE ISLAMOPHOBIA NETWORK IN AMERICA (2011), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf.

prohibiting state courts from recognizing or applying "Shari'a law."[80] While this law was quickly enjoined and ultimately struck down by a Federal court on First Amendment grounds,[81] more than a dozen other states are working to pass similar legislation with the hope that more careful drafting may enable such laws to pass constitutional muster.[82] A number of advocacy groups, through print, internet, and advertising media, are attempting to discredit Islamic law and dispute resolution in America.[83] Canada has taken similar steps. The province of Ontario amended its arbitration laws in 2006 so as to effectively ban Islamic and other forms of arbitration that issue awards based on religious law norms.[84] England has been one of the Western countries most accommodating to Islamic religious dispute resolution, having incorporated MAT arbitral processes within the ambit of its own arbitration laws.[85] Nevertheless, some British lawmakers and public commentators have urged that limits be placed on Islamic arbitration, and that such processes be more rigorously scrutinized by secular authorities, and have proposed legislation to that effect.[86]

In recent years, some Muslim organizations have taken steps to better systematize and regulate Islamic dispute resolution processes in the United States. In 2010, the Assembly of Muslim Jurists of America (AMJA) considered the state of Islamic arbitration in the United States at its annual Imams Conference.[87] There, Islamic law scholars, as well as a Muslim attorney, presented papers on the theory and practice of Islamic dispute resolution, and on proposed improvements to Islamic arbitration practices in the American legal and social context. The Tabah Foundation, an Islamic law think tank based in Abu Dhabi, has also published a working paper that outlines a general framework for how Muslims living in Western countries might develop more effective and consistent dispute resolution processes consistent with Islamic law.[88]

III. The Pillars of Respectable and Effective Religious Arbitration

The experiences of the BDA and the MAT indicate that arbitration institutions that decide cases based on religious law can gain the respect of secular courts by structuring their arbitration processes around six princi-

80. *See* Awad v. Ziriax, 670 F.3d 111 (10th Cir. 2012).
81. *Id.* at 119.
82. *See* John Witte, Jr. & Joel A. Nichols, *Who Governs the Family?: Marriage as a New Test Case of Overlapping Jurisdictions*, 4 FAULKNER L. REV. 321, 331-32 (2013).
83. *See, e.g.*, GELLER, *supra* note 13 (warning of the creeping encroachment towards introducing Islamic law into the United States); ATLAS SHRUGS, http://atlasshrugs2000.typepad.com; JIHAD WATCH, http://www.jihadwatch.org.
84. *See* Choksi, *supra* note 22, at 791.
85. *Id.* at 810–18.
86. See Amy S. Fancher, Note and Comment, *Policies, Frameworks, and Concerns Regarding Shari'a Tribunals in the United States – Are They Kosher?*, 24 REGENT U. L. REV. 459, 483–85 (2011).
87. TMO Stringer, *Imams' Conference Held in Houston*, THE MUSLIM OBSERVER (Oct. 21, 2010), http://muslimmedianetwork.com/mmn/?p=7103.
88. MUSA FURBER, ALTERNATIVE DISPUTE RESOLUTION: ARBITRATION & MEDIATIONS IN NON-MUSLIM REGIONS (Tabah Foundation, Tabah Analytic Brief No. 11, 2011), *available at* http://www.tabahfoundation.org/research/pdfs/Tabah_Research_ab_en_011.pdf.

ples. These "pillars" serve a dual purpose. First, they insure that state judicial apparatuses will have the legal power to enforce the arbitral awards issued by tribunals that resolve conflicts in accordance with religio-legal norms by insuring that the institutions' practices meet the formal requirements set by secular arbitration law framework. Second, these measures help insure that the arbitration awards based on religio-legal norms not only *can* be enforced, but that they *will* be enforced by engendering mutual respect between legal authorities in the religious and secular spheres, and by promoting judicial familiarity and comfort with religion-based arbitral processes.

The legal viability of the BDA and the MAT arbitration processes have come to rest on six main pillars of the reconstituted Jewish and Islamic arbitration processes. First, the BDA and the MAT developed formal, sophisticated rules of procedure that protect parties' rights to due process. Second, both organizations endorsed appellate processes that promote transparency and accountability in their respective arbitral proceedings. Third, the BDA and the MAT exhibited respect for the secular legal systems in which they operate by respecting the ultimate legal authority of the state and concomitantly limiting their jurisdiction to resolve certain kinds of cases, and by according primacy to parties' choice of law provisions in arbitration agreements. Fourth, these arbitral tribunals embraced common commercial customs and principles of equity in order to give effect to the reasonable expectations of disputants and to craft remedies consonant with a broader, less parochial sense of fairness and justice. Fifth, the BDA and the MAT demonstrated dual system fluency by employing arbitrators familiar with both their respective religio-legal and state law norms, and by utilizing the expertise of religiously observant professionals familiar with factual issues raised by particular cases. Sixth, both the BDA and the MAT took active roles in governing and guiding their respective religious communities, and in representing the interests and concerns of their coreligionists to the broader society.

A. Publication of Formal, Sophisticated Rules of Procedure

By developing and publishing formal rules of procedure that constitute and govern their arbitration processes, the BDA and MAT gained the respect and acceptance of secular legal authorities. The American legal system places great importance on procedural fairness in both formal adjudicatory and ADR contexts. Indeed, while courts generally cannot refuse to enforce an arbitration award because a reviewing judge disagrees with the substance of the arbitral ruling, they can vacate arbitral awards for a variety of procedural irregularities and injustices in the arbitral process.[89] Thus, when faced with motions to confirm arbitration awards and processes based on religio-legal norms, where the substantive fairness of the arbitral tribunal's application of its own religious norms may not be

89. *See supra* Part II.A.

apparent to the court, a judge can nevertheless take confidence that "[p]rocedural rules of arbitration protect vulnerable parties."[90]

Caryn Wolfe has identified several procedural protections that, if embraced by arbitration tribunals, result in American courts being willing to enforce their awards. Such protections include the entitlement of parties to adequate notice that arbitration proceedings are underway, the right to representation by an attorney, the duty of arbitrators to disclose facts relating to their impartiality, and the inability of parties to agree to unreasonable restrictions on these basic protections.[91] If arbitration tribunals fail to formally provide for and protect these procedural safeguards, Wolfe argues, courts will regularly refuse to enforce their awards.[92]

Recognizing courts' concern for procedural fairness, the BDA in America, and the MAT in England adopted and published detailed procedural rules. Rather than attempting to justify the substance of each award by trying to explain to secular courts the religio-legal norms upon which their awards are based, these institutions have crafted rules and procedures that clearly explain what litigants can expect of the arbitration process: adequate notice, opportunities for discovery, standards for the admissibility of evidence, methods for challenging the impartiality of the arbitrators, and so on.[93] Therefore, when a court is asked to enforce a BDA or an MAT award, it need not rely on the historical traditions and religio-legal corpuses of Judaism or Islam; instead a secular judge can take confidence in the knowledge that these arbitral processes incorporate familiar important procedural guarantees.[94] In addition to these rules providing formal protections to parties appearing before BDA and MAT tribunals, the structure and detailed nature of these rules comfort secular judges. Jewish and Islamic courts traditionally maintained fairly complex procedural standards. The BDA and the MAT gained the confidence of secular courts by reformulating these traditional rules using language and structure that is familiar to secular judges. Written in lawyers' English, and organized along lines similar to the procedural codes used by secular courts, the Rules and Procedures of the Beth Din of America and the Procedure Rules of the Muslim Arbitration Tribunal outline an arbitration process that is largely recognizable to judges entrenched in American or British civil procedure. Additionally, both organizations have added new procedures that do not contradict their respective religio-legal norms when such protections are considered absolutely necessary by prevailing state law. The development of formal rules of procedure by the BDA and the MAT has thus been more a departure from traditional forms than an abrogation of the substance of each organizations respective religio-legal rules.

90. Caryn Litt Wolfe, *Faith Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and their Interaction with Secular Courts*, 75 FORD. L. REV. 427, 458 (2006).
91. *Id.* at 458–59.
92. *Id.* at 459.
93. *See infra* notes 93–125 and accompanying text.
94. See Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1260–64 (2011).

Consistent with basic principles of fairness and due process in the arbitration context, as well as with traditional Jewish law, the BDA's rules provide that no party can be subject to arbitration in the BDA against his or her will. A dispute can come before the BDA in only one of two circumstances: Either the case arises from a contract or other prior dealing subject to a valid arbitration clause in which the parties agreed to resolve their disagreement through the BDA arbitral process, or one party requests BDA arbitration after a dispute has arisen and obtains the opposing party's agreement through the execution of a legal arbitration agreement.[95] If a party declines to arbitrate before the BDA in violation of a previously executed arbitration agreement, the BDA will extend permission, required under Jewish law, to the other party to proceed to a secular court for the enforcement of a default judgment.[96] Alternatively, the BDA might issue a *seruv*, which is a Jewish legal document publicizing the recalcitrant party's refusal to appear as a means of bringing to bear social pressure with the hope of convincing the disputant to arbitrate.[97] If the parties did not previously sign a valid BDA arbitration agreement, a disputant has no obligation to appear before the BDA, despite the other party's request that he do so, provided that the refusing party is willing to resolve the dispute through some other means sanctioned by Jewish law, such as in another *beit din*, or by using a third-party mediator.[98] Only if a Jewish disputant refuses to appear in *any* appropriate forum might the BDA issue a *seruv* against that party in an effort to convince him to resolve the dispute through means sanctioned by Jewish law consistent with his religious obligations.[99] Consonant with both American and Jewish law, however, under no circumstances will the BDA arbitrate a dispute unless both parties agree to do so.

Upon the commencement of arbitral proceedings, the BDA rules provide that the Av Beth Din (literally "The Head of the Beth Din"; the Chief Justice at the head of the BDA hierarchy) shall designate arbitrators from the BDA's list of approved arbiters to hear the case.[100] Again, consistent with Jewish law and secular law due process requirements, the rules provide that the parties shall be given notice of the identities of the designated arbiters, and that either party, may seek to remove an arbitrator for bias or interest.[101] Additionally, the rules impose an obligation on each arbiter to disclose any interest he may have in a case, irrespective of whether his impartiality is challenged by a party.[102]

95. *See* BETH DIN OF AMERICA, RULES AND PROCEDURES § 2 (2013), *available at* http://www.bethdin.org/docs/PDF2-Rules_and_Procedures.pdf. The BDA offers a standardized arbitration agreement that ensures compliance with both statutory requirements and Jewish law. *See* BETH DIN OF AMERICA, STANDARD BINDING ARBITRATION AGREEMENT, *available at* http://www.bethdin.org/forms-publications.asp.
96. *See* BETH DIN OF AMERICA, RULES AND PROCEDURES § 2(i) (2013), *available at* http://www.bethdin.org/docs/PDF2-Rules_and_Procedures.pdf.
97. *Id.*
98. *Id.* § 2(b)–(f).
99. *Id.* § 2(i).
100. *Id.* § 5.
101. *Id.* § 6(a).
102. *Id.* § 6(b).

Once the arbiters have been chosen and the action commences, parties experience a process very similar to that of a secular court, but that is consistent with normative *halakha*. Parties may hold a preliminary conference during which they create a schedule for discovery, stipulate to undisputed facts, and identify documentary evidence to be produced and witnesses to be called.[103] The actual arbitration hearing consists of opening statements, followed by each party's presenting its claims and evidence.[104] Before closing the hearing, the arbiters must specifically inquire whether either party has anything to add, and they may close the proceedings only upon negative responses by each party.[105] Under the rules, the BDA arbitration panel must issue a ruling within three months after closing the hearings on a case; the award, which much be agreed upon by at least a majority of the arbiters, must be made in writing and in English, and must be personally served on the parties.[106]

The BDA rules also include clear procedures for taking evidence.[107] Parties may present any evidence they wish, including documents, witnesses, or affidavits, but the arbiters retain the authority to determine the relevance and materiality of evidence offered.[108] Importantly, the rules state that evidence may only be taken in the presence of the entire arbitration panel and both parties, and that any ex parte communications between arbiters and parties or arbiters and witnesses is strictly prohibited.[109] In order to protect the integrity of the BDA arbitration process, any communications a party or witness wishes to convey to an arbiter outside of a formal hearing must first be directed to the Av Beth Din, who determines whether or not to transfer the information to the arbitrator.[110]

BDA rules further require the Av Beth Din to arrange for the electronic recording of all arbitration proceedings unless both parties waive their right to such a record.[111] Additionally, at the request of any party, the Av Beth Din must arrange for the preparation of a written transcript from those electronic records.[112] While normative Jewish law does not provide for the transcription of court proceedings, it does not prohibit it either.[113] The BDA adopted this sensible practice in order to gain the respect of secular legal authorities, but also as a reasonable way of insuring a more honest and transparent arbitration process. These English language records serve as an inducement for BDA arbiters to conduct proceedings with the utmost integrity, and also enable reviewing courts to assess whether BDA arbitrations do in fact comport with the procedural protec-

103. *Id.* § 8.
104. *Id.* § 16(a).
105. *Id.* § 22(a).
106. *Id.* § 26–27.
107. *See generally id.* §. 18–19.
108. *Id.* § 18(a).
109. *See id* §§ 18(c), 25(a).
110. *Id.* § 25(a).
111. *Id.* § 10(a).
112. *Id.*
113. *See* Shulchan Aruch: Choshen Mishpat 13:2–3, 19:2.

tions provided for in the BDA rules. The very existence and availability of such records help engender judicial confidence in the BDA.[114]

The BDA rules offer a number of other procedural protections that insure that the basic requirements of American due process are preserved, thus insuring that judges will have the legal authority and personal desire to enforce BDA awards. These provisions include the right of each party to be represented by counsel,[115] their right to an adversarial hearing before the tribunal before an award is rendered,[116] and their right to adequate notice of the time and place of each significant stage in the proceedings.[117] Also, the BDA rules provide that all proceedings must be conducted in English, unless all the parties and arbitrators agree to use another language, and that each party has the right to use an interpreter or other aid to remedy a language barrier or other obstacle that may prevent that party from fully understanding the proceedings.[118]

The MAT, like the BDA, has adopted a variety of legally sophisticated procedural protections designed to insure fairness in a way that puts secular court judges at ease, yet which also remain within the bounds of procedural mechanisms made available to Muslim arbitrators by Islamic law. Consistent with traditional Islamic adjudicatory practices,[119] and in accordance with secular arbitration laws,[120] the MAT will not proceed on a matter until both parties have signed a legally valid arbitration agreement, which commits them to abiding by the MAT's ultimate decision, and provides an adequate basis for enforcement of any award issued by the MAT in a British court.[121] Once an arbitration agreement is in place, a plaintiff can commence MAT proceedings by submitting a formal request asking the MAT to hear the case.[122] This written filing must state the plaintiff's claims and arguments in support of those claims, the names of opposing parties, contact information for all the parties, and, if possible, a list the documents and witnesses the plaintiff anticipates using as evidence in any arbitration hearing.[123] The rules provide that the MAT then serves notice on the defendant on behalf of the plaintiff, providing the defendant with information about the plaintiff's claims and evidence,

114. *See* Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent* 57 N.Y. LAW REV. 287, 291 (2012–13); *see also, e.g.*, Lang v. Levi, 16 A.3d 980 (Md. Ct. Spec. App. 2011) (citing and deferring heavily to the BDA's Rules and Procedures); Tal Tours (1996) Inc. v. Goldstein, No. 5510-05, 2005 WL 2514967 (N.Y. Sup. Ct. Nassau Cnty. Oct. 7, 2005) (citing and deferring heavily to the BDA's Rules and Procedures).

115. *See* BETH DIN OF AMERICA, *supra* note 96, § 12.

116. *Id.* § 16–17.

117. *Id.* § 9.

118. *Id.* § 11.

119. *See* KESHAVJEE, *supra* note 61, at 67–68.

120. *See supra* Part II.A.

121. *See* Mona Rafeeq, Comment, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice*, 28 WISC. INT'L L.J. 108, 125 (2010).

122. *See* MUSLIM ARBITRATION TRIBUNAL, PROCEDURE RULES OF THE MUSLIM ARBITRATION TRIBUNAL §2(1) (2010), *available at* http://www.matribunal.com/procedure_rules.html.

123. *Id.* §2(1)–(4).

thereby permitting the defendant an opportunity to prepare an adequate response.[124]

The MAT rules expressly provide for several key procedural protections considered indispensable by English law to a fair adjudication. Thus, the MAT rules require the tribunal to give all parties adequate notice of all hearings,[125] permit litigants to be represented by attorneys,[126] and provide each party with an adequate opportunity to be heard by presenting claims and evidence and by rebutting the arguments and proofs offered by opposing parties.[127] The MAT rules further provide standards for taking evidence; while parties may present oral or documentary evidence in support of their cases, the tribunal is prohibited from considering any evidence that is not made available to all parties to the arbitration.[128] The MAT rules also work to gain the respect from the secular courts by providing that every arbitration tribunal must consist of at least one Islamic law scholar and one barrister or solicitor of England or Wales, thus ensuring that the arbitration process is conducted in accordance with both British ADR law and Islamic *fiqh*.[129]

B. Development of an Internal Appellate Process

The BDA engendered greater judicial confidence in the fairness of its arbitration process by instituting a system of internal appellate review of awards issued by BDA arbiters. Over its long history, the BDA came to realize that absent a form of internal review, courts asked to enforce BDA awards were much more likely to take an active role in reviewing the underlying arbitration for factual and procedural errors on the part of the arbitrators, as well as for the basic substantive fairness of the award. Because one of the chief goals of Jewish arbitration is for disputants to fully and finally resolve their conflict in accordance with Jewish law articulated by a *beit din* rather than secular law upheld by a state court, the BDA included an appellate procedure in its arbitration process. This internal review thus provided a dual benefit: it helped keep the resolution of disputes within the *beit din* system by making it less likely that courts would overturn arbitral awards that had already been through one round of appellate review within the arbitration system itself, and it also helped promote judicial confidence in the BDA's competence by lending its arbitration process a more "legalistic" appearance.

The BDA's procedural rules permit any party to file a written petition for review and modification of an award within twenty days of the party's receiving the *beit din's* ruling.[130] As with other filings, copies of the petition must be served on all other parties to the original arbitration; and those parties may file a written objection to the requested modification of the award within ten days of being served with the petition for

124. *Id.* §3(1).
125. *Id.* §12.
126. *Id.* §13(1)-(2).
127. *Id.* §17.
128. *Id.* §14(1)-(6).
129. *Id.* §10(1).
130. *See* BETH DIN OF AMERICA, *supra* note 96, § 31(a).

modification.[131] The rules provide five grounds for which the BDA may modify an award: (1) an error in the mathematical calculation of the award; (2) a mistaken description of a person, place, or thing in the award; (3) the award's addressing an issue not submitted to the BDA for arbitration, provided such can be corrected without affecting the merits of the remainder of the award; (4) any other imperfection in the award that does not affect the merits of the decision; and (5) the Av Beth Din's determination that the award is manifestly contrary to Jewish law.[132] These grounds for modification, and the standard of review employed, are comparable to secular court appellate processes.[133] The BDA's internal appeals procedure thus gives secular courts confidence in the integrity and legality of BDA awards, even if the unfamiliarity and inaccessibility of the Jewish law rules on which those awards are based might otherwise make judges wary of enforcing them.

Traditionally, Jewish law did not provide a formal right of appeal. The Talmud specifies that "one *beit din* cannot review the judgment of its fellow *beit din*."[134] Thus, the adjudication of a dispute was limited to the *beit din* of first instance, and parties were bound to abide by that tribunal's decision; no court was formally empowered to review, modify, or reverse the original ruling on a case.[135] Nevertheless, in practice, some organized *beit din* systems established a hierarchy of courts within their own limited geographical jurisdiction, and provided for the possibility of appeals from local court rulings to more expert regional *batei din*.[136] In light of this historical Jewish law precedent and the pressing need to establish the credibility of Jewish religious arbitration tribunals in the United States, the BDA adopted internal appellate procedures, which contributed to courts' willingness to regularly uphold BDA awards.

Because decentralization is an internally important feature of Islamic law,[137] the traditional Islamic adjudication process also did not include a formal right of appeal. Traditionally, the Islamic judicial system was not formally hierarchical,[138] and the decision of any *qadi* was considered final and binding. The MAT, unlike the BDA, has chosen not to break with this traditional practice, and does not include an internal appellate procedure. Nevertheless, acknowledging that its arbitration process operates within the legal framework created by British law, MAT rules expressly acknowledge that a party may apply for judicial review of its arbitral

131. *Id.* § 31(b).

132. *Id.* § 31(a).

133. For a discussion of normative Jewish law standards of review for error by a *beit din*, *see* SHULCHAN ARUCH: CHOSHEN MISHPAT 25; 1 EMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW, 169–72 (1990).

134. Babylonian Talmud, Bava Basra 138b.

135. *See, e.g.*, R. Moses Isserles, Darkei Moshe, *Choshen Mishpat* 25:1.

136. *See* J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS 17–45 (1995); J. David Bleich, *The Appeal Process in the Jewish Legal System*, 28 TRADITION 94 (1993).

137. *Cf.* MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 257 (3d ed. 2003).

138. *Cf.* TAHA JABIR AL-ALAWI, TOWARDS A FIQH FOR MINORITIES: SOME BASIC REFLECTIONS xiii-xiv (2003).

awards.[139] In this respect, the MAT follows in the footsteps of some Islamic arbitration panels in Ontario, which, before being banned under a 2006 law, did not provide for internal appellate processes, but expressly permitted parties to appeal a tribunal's award to a Canadian court.[140] While an internal appellate procedure might give courts greater confidence in the procedural fairness of the MAT arbitration process, the lack of for internal review has apparently not negated the MAT's legal credibility in the eyes of English judges, nor has it led to British courts refusing to enforce MAT awards.

C. Respect for Both Religious and Secular Legal Norms

To induce secular courts to respect and enforce their awards, arbitration tribunals that base their awards on religio-legal norms need to demonstrate respect for the laws of the secular justice system in which they operate. This entails accepting and responding correctly to several realities attendant to arbitrating within a secular legal context. Arbitral tribunals must accept that secular courts will be powerless to enforce their awards unless satisfy the minimal technical requirements set by the secular law arbitration framework. This framework establishes that the jurisdiction of an arbitration tribunal is premised on the voluntary agreement between disputants to submit their case to that tribunal and to abide by its decision.[141] Thus, arbitral courts applying religio-legal norms should only act pursuant to a valid arbitration agreement. Also, because jurisdiction to arbitrate is premised on the voluntary agreement of the parties to arbitrate, arbitral tribunals must accept the contractual choice of the parties as to the substantive and procedural rules that will govern the arbitration. If arbitration tribunals fail to follow these requirements, secular courts will lack the jurisdiction to enforce their awards, no matter how much judges may want to do so. Moreover, arbitration tribunals must accept that the secular laws under which they operate impose jurisdictional limits on their ability to handle certain kinds of cases. Typically, in Western countries only state courts can grant civil divorces,[142] and thus arbitral tribunals need to appreciate that their granting or arranging a religious divorce between disputing spouses does not suffice to dissolve the parties' civil marriage in the eyes of the state.[143] Similarly, secular law usually claims exclusive jurisdiction over criminal matters and monopolizes the use of force, prohibiting private law institutions from imposing corporeal sanctions upon even those subjects willing to suffer such punishments.[144] Arbitral tribunals that apply religio-legal norms, there-

139. *See* MUSLIM ARBITRATION TRIBUNAL, *supra* note 122, §23.
140. See Brown, *supra* note 72, at 522.
141. *See supra* Part II.A.
142. *See* Ann Laquer Estin, *Unofficial Family Law,* 94 IOWA L. REV. 449, 463 (2009) ("civil divorce belongs to the state").
143. *Id.* at 463–65.
144. *See* David Wolitz, *Criminal Jurisdiction and the Nation-State: Toward a Bounded Pluralism,* 91 OR. L. REV. 725, 730–31 (2013); John Witte, Jr., *The Future of Muslim Family Law in Western Democracies*, *in* SHARIA IN THE WEST? 287 (Rex Ahdar & Nicholas Aroney eds., 2010) (noting "only the state and no other social or private unit can hold the coercive power of the sword").

fore, must not attempt to adjudicate claims of criminal conduct covered by secular criminal law nor impose corporeal sanctions even when their own religio-legal commitments instruct that they do so.

The BDA has accepted these realities. The BDA scrupulously abides by the legal arbitration framework established by the FAA and by state arbitration rules in order to insure that secular courts will have the legal authority to enforce its awards. The BDA thus only conducts arbitrates disputes pursuant to valid arbitration agreements, and utilizes an arbitration process that protects the due process rights disputants basic, such as rights to equal treatment, counsel, notice, and to an opportunity to present evidence and be heard by unbiased arbitrators.[145] Importantly, the BDA remained and remains fully committed to Jewish law, and was not willing to abrogate Jewish law by respecting secular law standards in order to gain legitimacy in the eyes of state court judges. Instead, the BDA embraced due process requirements largely by implementing what are in any case basic requirements for valid adjudication under Jewish law, albeit using forms and language that make it apparent to secular judges that secular arbitration law is being respected.[146]

Similarly, the MAT conducts its own arbitration processes in accordance with the legal requirements of British arbitration law to insure that secular courts will have the legal authority to enforce their awards. In respecting these secular law standards, the MAT does not see itself as disregarding traditional *fiqh* procedures, but as building on Islamic law's normative adjudicatory framework in light of contemporary views about what procedures best protect litigants and insure just outcomes. [147]

A practical recognition of the secular legal context in which it operates required the BDA to admit certain jurisdictional barriers not contemplated by Jewish law itself. Because the state claims exclusive authority over at least some spheres, arbitration – whether based on religio-legal or other norms – will come up lacking with respect to some kinds of disputes, and arbitral tribunals cannot therefore provide an effective substitute for secular court action. In some cases, religious litigants will be forced to resolve their disputes in secular courts because they are the only forums capable of addressing the issues presented or providing the relief sought.[148] Such jurisdictional limits are perhaps most pronounced in the realm of family law, where, for example, no amount of arbitration will permit a religious divorce to serve in lieu of a couple's obtaining a civil divorce.[149] The BDA accepts this proposition as an unavoidable necessity, and therefore requires couples seeking a Jewish divorce from the *beit din* to also obtain a civil divorce from a secular court.[150] Indeed, at the conclusion of a Jewish divorce proceeding, the BDA issues each former spouse a

145. *See supra* Part III.A.

146. *Id.*

147. *See supra* notes 60–61 and sources cited therein. R

148. *See* Broyde, *supra* note 18, at 296.

149. *See* MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW 32 (2001).

150. *See* Broyde, *supra* note 18, at 296.

document stating that the couple has received a Jewish divorce, and that each is "free to marry provided that s/he is also civilly divorced."[151]

Like the BDA, the MAT has evidenced its respect for the secular legal environment in which it functions by admitting certain limitations on its own ability to act based on the requirements of British law. Thus, the MAT affirms that "[w]e believe in the co-existence of both English law and personal religious laws. We believe that the law of the land in which we live is binding upon each citizen . . . Sharia does however have its place in this society where it is our personal and religious law." [152] Similarly, the Islamic Sharia Council, a preeminent source of Islamic legal authority for British Muslims, and an institution heavily involved in the facilitation of Islamic divorces, maintains that a couple must first document its receipt of a civil divorce from English judicial authorities before the Council will begin religious divorce proceedings.[153]

Arbitral tribunals that operate in accordance with religio-legal norms in a Western legal context must also respect secular law jurisdictional bars on the resolution of the resolution of criminal matters or meting out corporal punishment, even when such measure are warranted or required by the their respective religious laws.[154] In the United States, as well as other Western countries, the state has exclusive jurisdiction to adjudicate alleged criminal offenses and enjoys a complete monopoly on the use of violence.[155] Thus, the BDA admits no arbitral power to resolve claims covered by secular criminal codes, even though such claims and remedies may be contemplated by *halakha*. Similarly, while the MAT will exercise arbitral jurisdiction over civil and personal matters and resolve such cases in accordance with Islamic law, it will not adjudicate claims of criminal misconduct or apply corporal punishments prescribed by Islamic law for certain offenses. Importantly, in respecting secular legal requirements by refusing to resolve criminal cases or impose corporal sanctions for violations of Jewish or Islamic law, neither the BDA nor the MAT is acting contrary to its own religio-legal norms. *Halakha* obligates Jews to respect the laws of their host countries provided such laws do not mandate clear and active violations of Jewish law,[156] and Islamic law precludes Muslim jurists from judging criminal matters or imposing corporal punishments

151. LOUIS JACOBS, THE JEWISH RELIGION: A COMPANION 132–33, 188 (1995).
152. *Values and Equalities of MAT*, MUSLIM ARBITRATION TRIBUNAL (2010), http://www.matribunal.com/values.html.
153. *See* Application to File an Islamic Divorce (Dissolution/Khula/Talaq), *available at* http://www.islamic-sharia.org/resources/khula_application.pdf1.
154. *See* Fried, *supra* note 19, at 649 (*quoting* Rakoszynski v. Rakoszynski, 663 N.Y.S. 2d 957, 961 (Sup. Ct. 1997) ("While the parties may elect to arbitrate their differences in a religious tribunal, the tribunal cannot abrogate to itself exclusive jurisdiction over all civil and criminal matters involving the parties.").
155. *See* Witte, *supra* note 144, at 9 (noting that "only the state and no other social or private unit can hold the coercive power of the sword").
156. *See generally* LEO LANDMAN, JEWISH LAW IN THE DIASPORA; CONFRONTATION AND ACCOMMODATION: A STUDY OF THE DEVELOPMENT, COMPOSITION AND FUNCTION OF THE CONCEPT OF DINA D'MALKHUTA DINA—THE LAW OF THE KINGDOM (THE STATE) IS THE LAW (1968); *see also* R. Avraham Dov Kahane Shapiro, *Teshuvot D'var Avrohom*, no. 1:1 (3) (ruling that criminal matters are within province of governmental authority and beyond legitimate beit din jurisdiction).

for religious offenses in the absence of their being appointed to do so by the prevailing political authorities.[157] Thus, respect for the secular legal system need not require religious courts to compromise their ecclesiastical legal obligations.

Additionally, operating within the context of a secular legal system means that arbitration panels that enforce religio-legal norms must accept that religious principles will not excuse religious parties from criminal and other forms of liability under the relevant secular legal system.[158] As Professor John Witte, the Director of the Center for the Study of Law and Religion at Emory University, observes, "[e]ven the most devout religious believer has no claim to exemptions from criminal laws against actions like polygamy, child marriage, female genital mutilation, or corporal discipline of wives, even if their . . . particular religious community commands it."[159] In order to garner the respect of the secular justice system by genuinely respecting secular law, arbitration institutions must educate their communities on the necessity of adhering to general legal norms. The MAT has also taken an active role in this respect, particularly

157. *See, e.g.*, AL-MISRI, *supra* note 5, at 638.

158. S.D. v. M.J.R., 2 A.3d 412 (N.J. Super. Ct. App. Div., 2010), a recent New Jersey case that evoked nation-wide criticism of Islamic law and the relationship between Muslim religious norms and the American justice system, illustrates this reality, and the importance of Islamic arbitral courts' teaching their communities about the importance of following American law, even when it prohibits acts that may be permitted under religious law. The case involved domestic violence charges against a Muslim husband for allegedly beating his nineteen year old wife. At trial, the judge heard testimony from the couples' imam, who explained that under Islamic religious law a wife has a duty to accede to her husband's sexual demands. In light of this evidence, the court acquitted the husband of the charges. *Id.* at 417–18. The trial judge reasoned that while the husband had engaged in multiple instances of non-consensual sexual intercourse with his wife, his personal religious commitment to Islam and his consequent honest belief that he has a legal right to sex with his wife precluded him from having the requisite intent to be culpable for the charged offense. *Id.* at 427–28. While the trial judge's decision was ultimately overturned by a New Jersey appellate court, which held that the husband's religious beliefs could not excuse him from State criminal laws, *Id.* at 442, the case sparked a deluge of critical commentary regarding the incompatibility of Islamic law operating in an American legal context, *see, e.g.*, Donna Leinwand, *More States Enter Debate on Sharia Law*, USA TODAY (Dec. 9, 2010, 10:29 AM), http://www.usatoday.com/news/nation/2010-12-09-shariaban09_ST_N.htm; Maxim Lott, *Advocates of Anti-Shariah Measures Alarmed by Judge's Ruling*, FOX NEWS (Aug. 5, 2010), http://www.foxnews.com/us/2010/08/05/advocates-anti-shariah-measures-alarmed-judges-ruling/, and has since served as a banner for opponents of Islamic religious arbitration and of Islamic religious practice, *see, e.g.*, Robert Spencer, *Sharia in New Jersey: Muslim husband rapes wife, judge sees no sexual assault because Islam forbids wives to refuse sex*, JIHAD WATCH (July 24, 2010, 6:20 AM), http://www.jihadwatch.org/2010/07/sharia-in-new-jersey-muslim-husband-rapes-wife-judge-sees-no-sexual-assault-because-husbands-religio.html; *see also* Jeffrey Breinholt, *Courtroom Jihad and the Defense "I am a Muslim,"* INT'L ASSESSMENT AND STRATEGY CENTER (Oct. 29 2007), http://www.strategycenter.net/research/pubID.172/pub_detail.asp. This case and the popular responses to it highlight the importance of religious arbitration institutions taking an active role in educating their communities on the need to respect and adhere to American law as a means of garnering the respect and understand of the American public generally, and of the American legal-political community in particular.

159. *See* Witte, *supra* note 144.

in the realm of "forced marriages." Some British Muslims compel their daughters to enter into arranged marriages, often to men still living in their countries of origin, particularly Pakistan.[160] Such arrangements are illegal under British law, as well as under most Islamic law traditions.[161] The MAT has engaged in an initiative to educate the Muslim community about this issue in order to protect young women from being subject to such marriages.[162]

The BDA procedural rules also accommodate choice of law provisions in arbitration agreements in accordance with the demands of the secular law arbitration framework. Under secular arbitration law, the power and jurisdiction of an arbitration tribunal is created and defined by the arbitration agreement entered into by the parties.[163] Thus, if an arbitration agreement selects a particular arbitration tribunal to resolve a dispute, and also chooses a particular body of substantive law as the set of norms that will regulate that tribunal's decision, the arbitral panel's authority is limited to issuing an award based on the selected body of substantive norms.[164] Early on, the BDA recognized that there would be cases in which parties who selected the BDA to resolve their dispute but also agreed that the case should be resolved in accordance with substantive norms other than those provided by Jewish law.[165] In such instances, the BDA would not issue an award based on Jewish law since doing so would overstep the limited jurisdiction granted to it by the parties' arbitration agreement, and would prevent secular courts from enforcing the award. The BDA rules thus include a provision that honors choice of law provisions to the greatest extent permitted by Jewish law.[166] Because Jewish

160. *See* MUSLIM ARBITRATION TRIBUNAL,: LIBERATION FROM FORCED MARRIAGES, *available at* http://www.matribunal.com/downloads/MAT%20Forced%20Marriage%20Report.pdf; Choksi, *supra* note 22, at 818–23.

161. *See* MUSLIM ARBITRATION TRIBUNAL, *supra* note 160, at 44 ("[A]rranged marriages have some grounding in Islamic Law, but forced or coerced marriages have no foundations in Islamic Law and shall be nullified under the edicts of Islamic tenets.").

162. *See generally id.*; *see also* Helen Jordan, *Series: Need to Know, Episode: Forced Marriages*, YOUTUBE (June 8, 2012), http://www.youtube.com/watch?v=O0SNg2s4WaU (footage includes Shaykh Faiz Siddiqi of the MAT discussing the organization's efforts to combat forced marriages).

163. *See supra* Part II.A.

164. See Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 67–69 (2005).

165. Indeed, such cases have been contemplated by Jewish legal scholars throughout history, who often dealt with actual cases presenting such issues by ordering a beit din to resolve disputes in accordance with substantive rules other than those provided by halakha. *See, e.g.*, Babylonian Talmud, Bava Metzia 83a ("What is the rule concerning one who hires workers and orders them to arrive at work early or to stay late? In a location where the custom is to not come early or stay late, the employer is not allowed to compel them [to do so] . . . All such terms are governed by local custom."); R. Joseph Kolon, Responsa Maharik, no. 102 and R. Samuel di Medina, Responsa Maharashdam, no. 108.

166. *See* BETH DIN OF AMERICA, *supra* note 96, § 3(d):
In situations where the parties to a dispute explicitly adopt a "choice of law" clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish law.

law permits general freedom of contract, and maintains that the financial (non-ritual) relationships of parties are governed by their voluntary contractual agreements, substantive Jewish law norms notwithstanding,[167] in practice, this means that the BDA will virtually always abide by litigants' choice of law provisions, at least with respect to commercial matters.

D. Acknowledgement of Commercial Customs and General Equity

BDA experience points to the importance of crafting arbitral awards that are consistent with the common commercial practices and standards that often reflect the reasonable expectations of disputants, and which incorporate commonly accepted notions of equity. Over time, the BDA found that many Jews do not conduct their business dealings in accordance with *halachic* default rules; common commercial customs often play an important role in business relationships. Because litigants often construct business relationships on the basis of expectations created by customary industry practices, the BDA decided to acknowledge, and wherever possible uphold, common commercial practices in its arbitral awards.[168] Accordingly, the BDA added the following language to its Rules and Procedures:

> One of the purposes of the Beth Din of America is to provide a forum where adherents of Jewish law can seek to have their disputes resolved in a manner consistent with the rules of Jewish law (halacha) and with the recognition that many individuals conduct commercial transactions in accordance with the commercial standards of the secular society. . . .[169]

Upholding commercial customs is not required by the American arbitration framework, and failure to do so would not affect the technical enforceability of BDA decisions. Yet, commercial standards do often govern litigants' commercial dealings and their expected resolution of commercial disputes. Failing to resolve commercial disputes in accordance with the relevant commercial customs might therefore result in a legally sound award but nevertheless leave the parties dissatisfied. In all likelihood, the losing party in such a case would walk away displeased, believing that he or she should have won, and the winning party would rejoice in its immediate success, but know better than to bring further disputes before the BDA for fear of not having such good fortune in the future. In a short time, word-of-mouth would result in people avoiding the BDA arbitration process, undermining the ability of the BDA to be an effective and trustworthy forum for Jewish disputants to resolve conflicts in accordance with their religious obligations.[170]

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167. On the *halakhic* permissibility of Jewish parties choosing to resolve a dispute in a *beit din* in accordance with secular substantive law rather than *halakha*, *see* Feit, *supra* note 17, at 41, and especially sources cited *id.* at n.34.
168. American law, too, places significant stock in upholding commercial customs that presumably form the basis of parties' agreements. *See, e.g.*, U.C.C. § 1-205(5) ("An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.")
169. BETH DIN OF AMERICA, *supra* note 96 ("preamble" to Rules and Procedures).
170. *See* Broyde, *supra* note 18, at 297–99.

Notably, recourse to commercial standards as a basis for arbitral rulings by the BDA does not entail any departure from *halacha*; indeed, Jewish law often incorporates common business customs into its rules of decision in commercial cases.[171] This legal principle, called *minhag hasochrim* ("the custom of merchants"), creates the presumption that businessmen informally and implicitly rely on established commercial practices in negotiating their agreements, and that such terms are legally binding under the principle that Jewish law upholds private contracts in monetary matters that do not undermine any ritual law.[172] Commercial customs are held to be *a fortiori* binding on parties when contracts and other business documents are written in compliance with the regulations that determine common practice.[173]

The BDA has also learned from experience that when it resolves cases in accordance with Jewish law, it is best to inject principles of general equity and fairness into the decision making process as a means of developing solutions that, at least nominally, satisfy all parties. Traditionally, *batei din* decided cases in strict accordance with Jewish law, assuming that by submitting their dispute to a *beit din* the parties were signaling their exclusive preference for a ruling based purely on Jewish law (*din*) rather than a compromise-based solution formulated with regard for the applicable Jewish law principles (*p'shara krova l'din*).[174] When a case is decided according to *din*, the party that proves his or her case by a preponderance of the evidence will recover 100% of the amount in dispute. A case decided according to *p'shara krova l'din*, by contrast, may result in recovery of a lesser amount, depending on the relative equities of the parties' claims.[175]

The opportunity to creatively craft equitable solutions to disputes is often considered one of the prime reasons for pursuing arbitration instead of adjudication.[176] By resolving disputes with an eye towards equity, then, arbitration tribunals help insure that all parties to a dispute, and not just the "winner," walk away from the arbitration experience nominally satisfied with the results and willing to return when they find

171. Elon, *supra* note 18, at 913–20.

172. *See* BABYLONIAN TALMUD, KIDDUSHIN 19b (ruling that "one who makes a stipulation contrary to the law of the Torah, his stipulation is void," and that "every stipulation one makes with respect to money stands."); Elon, *supra* note 18, at 880–887.

173. For an in depth analysis of this concept, *see* Steven H. Resnicoff, *Bankruptcy: A Viable Halachic Option?*, *available at* http://www.jlaw.com/Articles/bankruptcy.html (last visited Dec. 2, 2013).

174. Traditionally, Jewish arbitration was conducted in accordance with *din*, Jewish law. Today, the Rules and Procedures of the Beth Din specify that cases will be decided in accordance either with *pshara* (a compromise in which dayanim consider the issue in according with Jewish law principles) or *p'shara krova l'din* (compromise or settlement related to Jewish law). BETH DIN OF AMERICA, *supra* note 96, § 3. Under the latter framework, dayanim are more flexible to consider the parties' relative equities and to craft an appropriate remedy, whereas awards decided in strict accordance with *din* are necessarily a zero-sum game.

175. *See generally* 2 R. JACOB BACK REISCHER, RESPONSA SHEVUS YAAKOV §144 (*quoted in* R. AVRAHAM ZVI EISENSTADT, PISCHEI TESHUVA, *Choshen Mishpat* 12:2).

176. See Rafeeq, *supra* note 121, at 115.; Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis* 37 GA. L. REV. 123, 160–65 (2002).

themselves embroiled in a litigious conflict. For these reasons, as well for technical *halachic* considerations,[177] the BDA decided that it would commit itself only to resolving disputes in a manner "*consistent*" with the rules of Jewish law, rather than in *accordance* with Jewish law.[178] The BDA thus decides cases under the rubric of *p'shara krova l'din* (Jewish law filtered through common commercial practice, customs and equity).[179]

As in the case of the BDA's reliance on common commercial customs, its decision to rule based on *peshara kerova l'din* is not intended merely as a means to further some practical purpose or curry favor with litigants or American judges. P'*shara krova l'din* is a well-established principle of Jewish law adjudication whose foundation may be traced back to legal codes written in the Middle Ages.[180] In fact, some *halachic* scholars consider this approach preferable in some respects to a procedural posture grounded in *din* because they it presumptuous for Jewish judges to purport to reach certain decisions that correctly track God's law.[181] Thus, by deciding to rely on *p'shara kerova l'din* in an effort to reach equitable decisions based

177. *See generally* SHULCHAN ARUCH: CHOSHEN MISHPAT §12 (discussing the benefits of judges resolving cases based on compromise and equity rather than in accordance with the strict letter of the law).

178. *See* Beth Din of America, *supra* note 96 ("preamble" to Rules and Procedures).

179. Footnote to § 3(b) of Rules and Procedures of the Beth Din of America helps define this term as:

> Compromise or settlement related to Jewish law principles (*p'shara krova l'din*) is a process in which the relative equities of the party's claims are considered in determining the award. For example, in Jewish law (din), the party that proves the "truthfulness" of its case "more likely than not," as well as proving the Jewish law basis for its entitlement, is qualified to recover 100% of the amount sought, whereas in compromise or settlement related to Jewish law principles (*p'shara krova l'din*) such a party would not necessarily recover 100% of the amount sought, depending on that party's conduct throughout the matter under dispute. So too, in a case where neither party proves the "truthfulness" of its case "more likely than not," or does not prove the Jewish law basis for its entitlement, Jewish law (din) would not provide for an award, whereas compromise or settlement related to Jewish law principles (*p'shara krova l'din*) could provide for an award in that case.
>
> Remedies also might be different. In a case governed by the principles of compromise or settlement related to Jewish law principles (*p'shara krova l'din*) an award could require a public apology, or other remedies not required in Jewish law (din). Even in a case decided under the compromise or settlement related to Jewish law principles (*p'shara krova l'din*) it is quite possible that one litigant will triumph completely and be fully vindicated.
>
> Among the factors not considered in compromise or settlement related to Jewish law principles (*p'shara krova l'din*) in a financial dispute are: levels of religiosity, relative wealth of the parties, or gender.
>
> Compromise (*p'shara*) alone shall not be subject to these restrictions.
>
> It is the policy of the Beth Din of America to encourage the parties to adjudicate matters in accordance with compromise or settlement related to Jewish law principles (*p'shara krova l'din*).
>
> In those cases in which Jewish law mandates that compromise (*p'shara*) alone provide the basis for the resolution of the dispute, no explicit acceptance of such shall be required.

180. *See* R. Avraham Zvi Eisenstadt, Pitchei Teshuva, *Choshen Mishpat* § 12:3-4.

181. *See, e.g.*, Sefer Mitzvos Hagadol, POSITIVE COMMANDMENT *177* (*quoted in* R. Yoel Sirkes, Bayis Chadash, *Choshen Mishpat* 12:6) ("Thank God, that our biblical jurisdiction to rule in matters of monetary law has been abolished, for since we are have neither the depth or breadth of knowledge, we should not accept upon ourselves to

on Jewish law principles, the BDA decided to prefer one permitted mode of Jewish law dispute resolution to another because it would be more effective at securing the BDA's goals under the conditions in which it operates.

The MAT, too, has embraced common commercial customs and equitable principles in its arbitration process, both to satisfy litigants and to gain the respect of British courts. Thus, MAT rules of procedure provide that "[i]n arriving at its decision, the Tribunal shall take into account the Laws of England and Wales and the recognized Schools of Islamic Sacred Law."[182] The MAT's rules of decision thus include both Islamic and British standards, and it applies both, where appropriate, in order to arrive at effective legal solutions. The MAT's approach follows in the footsteps of the ISC, which holds itself not bound to apply the established rules of any particular *madhhab* through *taqlid*,[183] but instead decides cases using *takhayyur*, a Islamic jurisprudential doctrine that urges jurists to rely on any of the traditional schools of Islamic law, or on marginal minority opinions about the law in order to achieve compelling solutions in particular cases.[184] Additionally, the MAT and other Islamic arbitral tribunals have, according to Ihsan Yilmaz, been employing a sort of "neo-*ijtihad*," which enables Muslim jurists to issue rulings based on direct engagement with primary sources of *fiqh*, the Qur'an and *hadith*, in light of contemporary conditions in the United Kingdom, instead of relying on the rules of law already established by the various schools of Islamic law.[185] This approach enables the MAT to incorporate accepted standards of equity and commercial customs into its decisions in a way that is consistent with both the substance and the broader methodological concerns of Islamic jurisprudence.[186]

E. Reliance on Arbitrators with Broad Dual-System Expertise

The BDA's fifteen years of experience with arbitration in the American legal context has shown that, in the United States, an arbitration tribunal's success rests in large part on its ability to navigate not only its own sub-

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rule in accordance with the law of the Torah, and thereby save ourselves from punishment were we to err.").

182. MUSLIM ARBITRATION TRIBUNAL, *supra* note 122, § 8(2).

183. Taqlid (literally, "imitation") refers to a method of Islamic legal decision making in which the jurist relies on the rules of law contained in the principle codified works of his respective *madhab*, rather than by directly engaging and interpreting the Quran and Hadith, the principle primary sources of Islamic law norms. *See* KAMALI, *supra* note 137, at 493–94, 501–03 (2003).

184. *See* Ihsan Yilmaz, *Law as Chameleon: The Question of Incorporation of Muslim Personal Law into the English Law*, 21 JOURNAL OF MUSLIM MINORITY AFFAIRS 304 (2001).

185. *See* Ihsan Yilmaz, *Muslim Alternative Dispute Resolution and Neo-Ijtihad in England*, 2 ALTERNATIVES: TURKISH J. OF INT'L REL. 117, 119–20 (2003). For more extensive discussions on neo-*ijtihad*, and the possibility of deriving Islamic religious law rulings directly from primary source interpretation in light of contemporary conditions for Muslim communities in the West, *see generally* TAHA J. ALWANI, TOWARDS A FIQH FOR MINORITIES: SOME BASIC REFLECTIONS (2003); Shammai Fishman, *Fiqh al-Aqaliyyat: A Legal Theory for Muslim Minorities in* RESEARCH MONOGRAPHS ON THE MUSLIM WORLD (Hudson Institute, Ser. No. 1, Paper No. 2, 2006) *available at* http://www.futureofmuslimworld.com/docLib/20061018_MonographFishman2.pdf.

186. *See* Rafeeq, *supra* note 121, at 124–125.

stantive and procedural norms, but also those of the secular legal systems in which they operate. Secular judges are more receptive to enforcing arbitral decisions that rely exclusively on religio-legal norms if the awards are couched in American legal terminology, and reference familiar legal categories and doctrines that parallel religious norms. Also, t he BDA has discovered that arbitration opinions that evidence that arbitrators understand secular law are afforded greater deference by secular court judges, and that arbiters with formal education in secular law are considered more credible by judges. Additionally, the BDA's experience has shown that in order to correctly resolve cases in accordance with commercial customs or choices of law made by the parties, arbitral panels must often include professionals familiar with both Jewish law and the practices and standards of the parties' respective lines of work. Religious arbitration institutions, therefore, must not only talk the talk by couching decisions based on religious law in American "legalese," but also walk the walk by actually issuing awards that preserve parties' contractual agreements and reasonable commercial expectations. To gain the confidence and respect of secular courts, arbitration tribunals that apply religio-legal norms must therefore produce and utilize bilingual arbitrators fluent in American law, professional practices, and the laws of their respective religions.

Providing litigants with access to such a fluid framework requires more than a willingness to acknowledge outside legal systems. Traversing the gap between Jewish law and secular law demands the cultivation and participation of arbitrators who are American lawyers – and skilled lawyers at that. Today, the BDA almost never presides over a case without the arbitral panel having at least one well-trained lawyer who is comfortable with both American and Jewish law.[187]

Legal training, however, is only one of many professional backgrounds necessary to cultivate a pool of skilled arbitrators. As noted in the previous section, the success of the BDA's commercial arbitration practice relies in large part on its willingness to honor common commercial customs when doing so does not conflict with *halakha* or secular law. Unlike secular laws, trade customs are rarely memorialized in writing and are, therefore, not readily discernible to outside observers. Accordingly, in addition to religious and legal scholars, the BDA often employs *dayanim*, or judges, who in addition to their rabbinic work are also engaged in various trades and are familiar with the commercial practices of those fields.[188] As *beit din* arbitrators, these rabbi-professionals provide other arbitrators on the same panel with a proper grasp of the factual issues raised by different cases. Thus, a BDA's panel for a construction dispute might include a Jewish contractor; the panel for a dental malpractice case will include a Jewish dentist or doctor, and so on; and the panel

187. 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. *See Partial Listing of Dayanim*, Beth Din of America, http://www.bethdin.org/Dayanim.asp (last visited Nov. 23, 2011).

188. *See Staff Biographies,* BETH DIN OF AMERICA, http://www.bethdin.org/staff-bio.asp.

for a child custody case may consist of two rabbi-lawyers and one Jewish child psychologist. Beyond providing a level of institutional expertise that contributes to substantively sound arbitration awards, this dual-system fluency contributes to the perceived legitimacy of those decisions. As a result of this approach, no BDA award has ever been overturned by a secular court;[189] this is true even with respect to family law arbitration awards, which secular courts typically review with particular vigor.[190]

As in the case of the BDA, the MAT's success has been due in part to its ability to procure dual-trained individuals to head its tribunals. The MAT's founder, Hazrat Allama Pir Faiz-ul-Aqtab Siddiqi, is a British Muslim scholar, and a barrister; he is also the principal of the Hijaz College, a British Muslim school that combines traditional Islamic education with the British National Curriculum. It also offers students the opportunity to receive an LLB degree, which qualifies graduates for the Bar-at-Law Finals and the Solicitors Law Society Legal Practitioners Course.[191] Another MAT presiding judge, Shamim Qureshi, is also a judge in Wolverhampton Magistrates Court.[192]

While some MAT arbiter's are dual-system fluent themselves, MAT rules further insure that every MAT arbitration panel is competent in both British and Islamic law by providing that every tribunal shall consist of a minimum of one scholar of Islamic law and one solicitor or barrister of England and Wales.[193] The MAT also requires all of its arbiters to be trained in a number of subjects related to dispute resolution, such as how to deal with adversarial parties, proper court behavior, and effective writing.[194] This training is meant to parallel the expertise that secular legal education provides British judges.[195] While traditionally Islamic courts consisted on only a single judge, the MAT's reliance on multiple judges with complementary fields of expertise is not entirely unprecedented in Islamic law. Muslim judges, or *qadis*, have always been expected to be fully competent in a wide range of judicial skills, and have been directed to be aware of their own limitations and to consult experts whenever necessary.[196] In the early twentieth century, Bediuzzaman Said Nursi argued

189. This proposition acknowledges that one BDA-issued award has been overturned by a trial court, but was restored on appeal. *See, e.g.*, Matter of Brisman v. Hebrew Academy of the Five Towns & Rockaway, 887 N.Y.S.2d 414 (N.Y. App. Div. 2008) (vacating an award of the Beth Din of America), *rev'd*, 895 N.Y.S.2d 482 (2010) (restoring the award).

190. *See, e.g.*, Glauber v. Glauber, 192 A.D.2d. 94, 97 (N.Y. App. Div. 1993) (finding that "the court must always make its own independent review and findings" in child custody cases, despite an arbitration award addressing the issue); *see also* Fawzy v. Fawzy, 199 N.J. 456 (2009) (finding a NJ constitutional right to child custody arbitration).

191. *See About Us*, HIJAZ COLLEGE, http://www.hijazcollege.com/about.php; *LLB Law and BA Islamic Law*, HIJAZ COLLEGE, http://www.hijazcollege.com/llb-law.php.

192. *See* Robert Barr, *The Lord Cheif [sic] Justice – Press Release*, MUSLIM ARBITRATION TRIBUNAL, http://www.matribunal.com/initiative_lcj_matsupport.html.

193. *See* MUSLIM ARBITRATION TRIBUNAL, *supra* note 122, § 10(1).

194. *See* Rafeeq, *supra* note 121, at 126.

195. *Id.*

196. *See generally* Ghulam Murtaza Azad, *Qualifications of a Qadi* 23 ISLAMIC STUD. 249 (1984).

that individual judges were no longer effective due to the complexities of the modern era, and that committees of jurists could better face the challenges of adjudicating conflicts arising out of modern conditions.[197] More recently, Fetullah Gülen, a Turkish scholar whose work focuses on Islam and Islamic law in the modern era, argued strongly for the use of *ijtihad* committees consisting of scholars from different disciplines and with different areas of expertise, reasoning that it is no longer possible for individuals to be master all subjects.[198]

F. Assumption of an Active Role in Internal Communal Governance and External Communal Representation

Secular court recognition of the legitimacy of religious arbitral tribunals presupposes a broad tolerance of legal pluralism, albeit one that accepts the ultimate functional supremacy of one system over all others. Thus, while the American legal system, and American society more generally, is usually accepting of a plurality of private law systems, arbitral awards will be accepted by state judges only when, to use a *halakhic* aphorism, they stand within the "four cubits of the (secular) law."[199] Moreover, in working to gain the respect of secular legal system, it is important for litigants that use faith-based arbitration to be seen as integrated, participating members of the broader secular society so that courts do not view such arbitral tribunals as promoting isolation and factionalism.[200] Arbitration organizations that enforce religio-legal norms must therefore create a system of joint governance in conjunction with secular legal authorities, demonstrating that those who use such tribunals, as well as the tribunals themselves "jointly belong to more than one community, and will accordingly bear rights and obligations that derive from more than one source of legal authority."[201] Membership in more than one community, however, entails more than merely formally recognizing the legal authority of multiple legal systems;[202] it also entails becoming a genuine participant in multiple social communities.[203] Since 9/11, many attempts have been made to prevent arbitration in accordance with Islamic law due to a pervasive fear of Muslim religious fundamentalism.[204] These measures demonstrate that the level of legal and social legitimacy possessed by faith-based arbitral tribunals is often commensurate with how effective they are at internally governing their respective constituent com-

197. *See* YILMAZ, *supra* note 185, at 135 n.3.
198. *See* IHSAN YILMAZ, MUSLIM LAWS, POLITICS, AND SOCIETY IN MODERN NATION STATES: DYNAMIC LEGAL PLURALISMS IN ENGLAND, TURKEY, AND PAKISTAN 176 (2005).
199. Babylonian Talmud, Berachos 8a.
200. Cf. Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1237 (2011).
201. AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 13, n.12 (2001).
202. *See supra* Part III.C.
203. Joel A. Nichols, *Religion, Marriage, and Pluralism*, 25 EMORY INT'L L. REV. 967, 970–71 (2011).
204. *See* Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012) (challenging that a proposed amendment to the Oklahoma Constitution forbidding courts from considering Sharia law violates the First Amendment).

munities and with their ability to successfully represent their communities to the broader society.

For this reason, the BDA transformed itself from being just one forum for Jewish law arbitration among a relatively disjointed network of independent *batei din* operating in America into one America's preeminent rabbinic authorities. By taking an active role as a source of *halakhic* rulings and adjudications, the BDA became an important building block to the creation of an internally cohesive and coherent *halakhic* community in America. The BDA is now viewed by many *halakha*-observant Jews, as well as by external – including governmental – organizations as a dependable and just arbiter whose opinions are regularly upheld by secular courts. As a result of its reputation for resolving disputes in a manner that is predictable, professional, and uncompromisingly adheres to *halakha*, the BDA is frequently called upon to play a larger role than the sum of its individual arbitrations. Today, the organization performs an important stabilizing function within the Jewish community, and also performs represents and advocates for that community within the larger society.[205]

The Jewish community as a whole periodically calls upon the BDA to perform broader functions that go well beyond its narrow role as an arbitration tribunal. In 2007, for example, the BDA played a prominent role in a nationwide revision and regulation of the process for conversion to Judaism.[206] Previously, conversions to Judaism were conducted by individual rabbis on a case-by-case basis, often based on varying *halakhic* standards.[207] The disorganization of that ad hoc conversion process rendered the system susceptible to inconsistency and fraud.[208] As a result, the Jewish community turned to the BDA and the Rabbinical Council of America to address this issue. Together, these two organizations developed uniform *halakhic* standards to govern the conversion process in the United States,[209] and created a network of authorized *batei din* that agreed to follow these procedures and continue to work closely with the BDA to insure compliance.[210] *Batei din* outside this network continue to follow

205. *See* Broyde, *supra* note 52, at 301.

206. *See RCA and Israeli Chief Rabbinate Announce Historic Conversion Agreement*, Rabbinical Council of America, http://www.rabbis.org/news/article.cfm?id=100905 (last visited Nov. 23, 2011).

207. *See* Michael J. Broyde, *Something Old, Something New: Reflections on Conversion in America*, ORTHODOX CONVERSION TO JUDAISM , http://www.judaismconversion.org/Something_Old,_Something_New.html ("[H]istorically, conversion matters in the United States have been in the hands of local synagogue rabbis, who performed conversions when, in their judgment, a conversion was called for."); *id.* ("[R]abbis adopted halachic standards for conversion that were very diverse.").

208. *Id.* ("[T]he lack of a unified system led to allegations of fraud, corruption and abuse, as less-than-reputable rabbis (it was alleged) would perform conversions in return for illicit payments.").

209. *See Geirus Policies and Standards Governing the Network of Regional Batei Din for Conversion* (Apr. 20, 2007), http://www.judaismconversion.org/GPS_Policies_and_Procedures.html.

210. *See* Bary Freundel, *The Real Story Behind the National Network of Conversion Courts*, http://www.judaismconversion.org/The_Real_Story_Behind_the_New_National_Network.html, ("[The RCA conversion standards] puts in place a network of re-

their own conversion practices,[211] and are certainly free to do so within the *halakhic* system, but for many Jews the BDA's work has lent a degree of predictability and consistency to this important process, and allows them to rely on the BDA's expertise and professionalism in determining which conversions to accept as legally effective.[212]

Many organizations outside the Jewish community have come to recognize the BDA's prominence as a leading rabbinic authority and representative of the observant Jewish community in America. Following the September 11 attacks on the World Trade Center towers, the city of New York found itself in a quandary with respect to its Jewish community. Among the suspected victims of the attacks were several observant Jews whose deaths could not be confirmed with the certainty required by Jewish law. Without proper evidentiary support to confirm these individuals' whereabouts at the time of the attacks, the victims' wives faced a fate known as *iggun*:[213] they would be unable to remarry absent incontrovertible evidence that their husbands were among the dead.[214] In the months following the tragedy, the BDA worked closely with the New York Medical Examiner's Office to locate and identify fingerprints, dental records, and DNA from the wreckage, in the hopes of compiling sufficient evidence to make a definitive ruling regarding the missing under *halakha*. Not only did the medical examiner's office supply the BDA with daily updates by fax, but members of the BDA were also granted personal access to the office's files.[215] Even representatives of *USA Today* met with members of the BDA to compare notes on the attacks.[216] In the end, the cooperation between the BDA and these other organizations enabled the resolution of each case.

Similarly, the MAT has taken an active role in the internal governance and external representation of the British Muslim community.[217] Although informal Shari'a courts already existed in the United Kingdom,

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gional conversion courts (or "batei din") throughout North America to supervise the welcoming of new converts. This network consists of pre-existing rabbinical courts for conversion, as well as newly created ones where and as needed.").

211. *Id.* ("The new structure does not preclude members of the RCA from doing conversions outside the system. Individual rabbis can act autonomously if that is their choice. However, the system will take no responsibility for independent conversions.").

212. *See* Broyde, *supra* note 18, at 301 ("[R]abbis around the globe would be assured that conversions done through these centrally organized rabbinical courts would not adopting understandings of Jewish law that fall outside the range of normative accepted halacha. Finally, converts could be confident that their conversions would be universally accepted precisely because they could be certain that the halachic standards used were normative.").

213. Literally, "chained."

214. *See* Yona Reiss, *The Resolution of the World Trade Center* Agunot *Cases by the Beth Din of America: A Personal Retrospective*, *in* Contending with Catastrophe: Jewish Perspectives on September 11th 14–15 (Michael Broyde ed., 2011).

215. *Id.* at 22.

216. *Id.* at 21.

217. *See* Choksi, *supra* note 22, at 828 ("[T]he MAT plays an active role in educating the Muslim and broader British community about the true nature of Shari'a law by dispelling myths that evolve through the conflation of religious law with cultural customs.").

the MAT was established to respond to the growing need, felt by many British Muslims, for a more formal, structured approach to religious arbitration that could be incorporated into the British legal system.[218] In addition to serving as a dispute resolution forum, the MAT has taken an active role in developing religio-legal standards for British Muslims by instructing them about what Shari'a might require in an Anglo context. For example, the MAT has become a leader in the field of dealing with the issue of forced arranged marriages between British Muslim citizens and spouses in Muslim-majority countries like Pakistan.[219] To alleviate this problem, the MAT suggested that British Muslims who want to bring a foreign spouse into the country first provide testimony before a panel of Muslim judges to establish that the arrangement is truly consensual.[220] The MAT also continues to work to educate the Muslim community that forced marriages are a cultural rather than religious phenomenon that violates Islamic law.[221] Most recently, in July, 2013, the MAT assumed an internal religious and communal leadership role by undertaking an investigation in response to reports of the contamination of some meat certified as halal with pork. The MAT published its findings so as to offer British Muslims guidance and ideas for future improvements to halal certification.[222]

The MAT also serves as an effective representative of the British Muslim community by portraying Islamic law as a sophisticated, nuanced, effective, and contemporaneously relevant religious legal system to the British government and public. Sadakat Kadri, a well-known barrister and author of the book, *Heaven on Earth: A Journey Through Shari'a Law from the Deserts of Ancient Arabia to the Streets of the Modern Muslim World*,[223] has argued that Islamic courts like the MAT are good for the British Muslim community, since they put Shari'a on a transparent, public footing and make it more widely accessible to those who want it.[224] As a result of the MAT's efforts, British society has begun to accept Islamic arbitration, despite initial Islamaphobia. In 2010, the MAT reported a 15% rise in the number of non-Muslims using Shari'a arbitration courts in commercial cases.[225]

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218. *Id.* at 816.
219. *Id.* at 819–23.
220. *See* MUSLIM ARBITRATION TRIBUNAL, *supra* note 160, at 13. .
221. *Id.* at 26.
222. *See* MUSLIM ARBITRATION TRIBUNAL,FINDINGS OF A PUBLIC COMMUNITY INQUIRY (July 8, 2013), *available at* http://www.matribunal.com/downloads/MAT%20Public%20Declaration.pdf.
223. Sadakat Kadri, Heaven on Earth: A Journey Through Shari'a Law from the Deserts of Ancient Arabia to the Streets of the Modern Muslim World (2013).
224. David Shariatmadari, *Sharia Law Compatible with human rights, argues leading barrister*, THE GUARDIAN (Jan. 15, 2012), http://www.guardian.co.uk/world/2012/jan/16/sharia-law-compatible-human-rights.
225. Afua Hirsch, *Fears Over Non-Muslim's Use of Islamic Law to Resolve Disputes*, THE GUARDIAN (Mar. 14, 2010), http://www.guardian.co.uk/uk/2010/mar/14/non-muslims-sharia-law-uk.

IV. SUGGESTIONS FOR ISLAMIC LAW ARBITRAL INSTITUTIONS IN THE UNITED STATES

The six pillars of effective religious arbitration in a secular legal context offer observant Muslims living in the United States a roadmap for how they might construct their own arbitration institutions in a manner that will both satisfy the formal requirements of American arbitration law and also promote understanding of and respect for Islamic dispute resolution processes. By developing procedural models that enable established Islamic arbitration organizations to function in accordance with the legal requirements of the American arbitration framework, American Muslims will make it legally possible for secular courts to enforce awards issued by Islamic arbitral tribunals. However, the satisfaction of legal formalities, although necessary, is not sufficient to insure viable and efficacious Islamic arbitration for American Muslims. Muslims – like any community that seeks to develop effective internal ADR – must ensure that American courts are not only legally capable, but also willing to enforce Islamic arbitral awards.[226] In order to develop arbitral institutions on par with the BDA and MAT, Muslim in the United States might therefore pursue a broader program for demonstrating that Islamic dispute resolution is not only technically legal, but also fair, professional, judi-

226. The fact that a court has the formal power to enforce an arbitral award under the relevant state laws does not mean it will be willing to do so absent an understanding of and respecting for the arbitral process at issue. If this is true for ordinary ADR processes, it is doubly so with respect to arbitrations based on religio-legal norms. This is illustrated by the contrast between two recent cases in which American courts considered the enforceability of Jewish and Islamic religious marriage contracts. In one case, *Soleimani v. Soleimani* (Kan. Dist. Ct., Johnson Cty., No. 11CV4668, Aug. 28, 2012), http://www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf, a Kansas court refused to uphold a *mahr* agreement when issuing a divorce decree to a Muslim couple. Although the court was empowered to enforce the couple's Islamic religious marriage contract – even under the State's now infamous prohibition on State courts applying religious law, *see* Kan. Sess. Laws, Chap. 136, p. 1089–90 (2012)—the trial judge declined to do so for a variety of reasons related to *mahr* agreements violating the State's public policy. *See generally* Eugene Volokh, *Court Refuses to Enforce Islamic Premarital Agreement that Promised Wife $677,000 in the Event of Divorce*, THE VOLOKH CONSPIRACY (Sept. 10, 2012, 8:19 AM), http://www.volokh.com/2012/09/10/court-refuses-to-enforce-islamic-premarital-agreement-that-promised-wife-677000-in-the-event-of-divorce/. In *Light v. Light*, 2012 Conn Super. LEXIS 2967 (Dec. 6, 1012), a Connecticut judge chose to enforce a religious prenuptial agreement developed for Jewish couples by the BDA. Notably, despite First Amendment arguments put forward by the husband, the judge in *Light* deigned to treat the religious document as any other legally binding contract. *See* Paul Berger, *In Victory for "Chained" Wives, Court Upholds Orthodox Prenuptial Agreement*, THE JEWISH DAILY FORWARD (Feb. 8, 2013), http://forward.com/articles/170721/in-victory-for-chained-wives-court-upholds-o/?p=all. These cases illustrate – if only anecdotally – the importance of not only making sure that religious acts, whether contractual agreements or arbitral awards, are technically enforceable, but also of creating an environment in which the presiding judge feels comfortable enforcing that religious act because, absent such comfort, judges are likely to find some technical deficiency or broad "public policy" incompatibility that provide them with a way to avoid enforcement. *Cf.* Michael A. Helfand, *Religion's Wise Embrace of Commerce*, FIRST THINGS (Feb. 7, 2012), http://www.firstthings.com/onthesquare/2013/02/religionrsquos-wise-embrace-of-commerce.

cious, and respectful, as well as being respectable. The BDA and MAT experience shows that this goal may be achieved by following the six pillar model outlined above. Importantly, the development of these kinds of arbitration processes need not require Muslims to reject their deep commitment to Islamic law. With expertise, creativity, and ingenuity, Islamic jurists interested in using the six-pillar model will be able to develop arbitral systems that conform to the requirements of American law while remaining firmly committed to Islamic religio-legal ideals. Thus, with respect to the practical implementation of the suggestions offered here, the authors respectfully defer to the judgment of qualified Islamic law decisors, and merely recommend those measures which, based on the BDA's experience, we think would facilitate the full acceptance of Islamic arbitration by American courts.

In a recent brief that addresses the issue of Islamic dispute resolution in non-Muslim countries, Sheikh Musa Furber suggested that Islamic dispute resolution for Muslims living in Western countries might proceed along either of two legal approaches.[227] One approach would be for American Muslims to resolve conflicts through *qada*, a litigious adjudicatory process in which disputants offer claims and evidence before a *qadi* (official, communally-appointed judge) who issues a final, binding verdict based on his own assessment of the facts and evidence and the applicable rules of Islamic law. Alternatively, Islamic dispute resolution in non-Muslim countries might proceed through *tahkim*, a less formalistic arbitral process in which disputants select third-party decision makers and commit themselves to adhere to the arbitrators' *hukm*, or ruling issued in accordance with Islamic legal norms. [228] Both *qada* and *tahkim* largely rely on the same default rules of procedure and evidence. [229]

The chief distinction between *qada* and *tahkim* relates to the source of authority in the respective decision-making processes. *Qada* is grounded in public authority, and the power of the *qadi* to resolve a case derives from his appointed by the Imam or Caliph, or by the community over which he has jurisdiction. *Tahkim*, however, is based on private authority, the power of a *hakam*, or arbitrator, to issue binding decisions derives from the consent of the disputants who voluntarily appoint him to resolve a specific conflict.[230]

These different sources of adjudicatory authority suggest that *tahkim* rather than *qada* may be a more appropriate approach for American Mus-

227. *See* FURBER, *supra* note 88.

228. *See* AL-MISRI, *supra* note 5, at 624 ("It is permissible for two parties to select a third party to judge between them if he is competent for judgeship . . . It is obligatory for them to accept his decision on their case."); SHEIKH BURHANUDDIN ABI AL HASAN ALI MARGHINANI, THE HIDAYA: COMMENTARY ON THE ISLAMIC LAWS 752 (Charles Hamilton, trans., Zahra Baintner, ed., 2005) ("If two persons appoint an arbitrator, and express their satisfaction with the award pronounced by him, such award is valid; because as these two person [sic] have a power with respect to themselves, they consequently possess a right to appoint an arbitrator between them, and his award is therefore binding upon them.").

229. See MAHDI ZAHRAA & NORA A. HAK, Tahkim, (Arbitration) in Islamic Law within the Context of Family Disputes, 20 ISLAMIC L.Q. 2, 3 (2006).

230. *Id.*

lims to develop dispute resolution processes within the arbitration framework created by American law. *Qada* would entail the appointment of Muslim judges by discrete Muslim communities, and the case-by-case agreement by disputants to allow such communal authorities to resolve their conflicts. However, appointing communal judges, and insuring their continued support by the community would require a degree of communal organization and consensus that would be difficult to obtain and even harder to sustain, particularly in light of the internal diversity of American Muslim communities.[231] Also, the development of established, formal communal courts within the Muslim community might only appear to confirm popular suspicions that Muslims in America seek to set up a parallel society in which Islamic courts will impose *Shari'a* law on unwilling subjects.[232] This would likely undermine attempts to promote understanding and respect for Islamic law in American courts, and would leave Muslims in the United States in no better a position than before. It may even result in Muslims losing ground in the battle for social acceptance in the American public sphere.[233]

Islamic dispute resolution institutions modeled on the *tahkim* framework would largely avoid these difficulties. Disputants could choose to rely on the services of any arbitration tribunal that meets their needs in terms of location, the nature of the dispute, the character and expertise of the arbiters, and the *madhhab*, or school of Islamic jurisprudence, the tribunal follows. Organizations offering *tahkim* would not need to wait for elusive communal endorsement, nor be concerned about maintaining communal support beyond properly resolving individual cases. Also, a system of independent arbitration organizations offering dispute resolution services to American Muslims on voluntary basis would be unlikely to create the impression of a parallel justice system.[234]

Islamic arbitration organizations can satisfy American arbitration law requirements and earn the respect of American judges by developing and publishing sophisticated rules of procedure to regulate their dispute resolution processes, and to provide litigants with a clear indication of what they may expect from Islamic proceedings. American law rests heavily on guarantees of procedural due process, and courts will likely not feel comfortable upholding the decisions of Islamic arbitrators unless their tribunals adopt and implement certain procedural safeguards. To develop formal, legalistic rules of procedure, Islamic arbitral tribunals might

231. *See* Fancher, *supra* note 86, at 479-80 (observing that the diversity within Islam due to the several different schools of law has resulted in some British Muslims opposing established religious courts out of concern that they will impose the *fiqh* of one *madhab* on Muslims who adhere to another *madhab*).

232. *Id.* at 459, 483 (noting that Islamic religious tribunals' styling themselves as courts with inherent authority has resulted in criticism, suspicion, and backlash in Britain).

233. *Id.* at 481–83.

234. *Tahkim* may also be a useful avenue for pursuing effective Islamic arbitration in the United States because the framework for *tahkim* in traditional *fiqh* is, like arbitration in American law, based largely on disputants agreement to submit their case to a third party arbiter, and is also heartily endorsed by all schools of Islamic jurisprudence, albeit with some minor disagreements as to some related issues. *See* Rafeeq, *supra* note 121, at 121–22.

restate traditional Islamic procedural rules in legalistic English familiar to American judges, and publish codes of Islamic procedural law that mimic the structure and format, if not the content, of American procedural codes. In this respect, Muslims could help the American legal community better understand the legal nature of Islamic arbitration by altering the form, but not the substance, of procedural *fiqh*, thereby helping American judges feel more comfortable enforcing the results of that process.

Translating traditional Islamic procedural law into terms and formats familiar to American lawyers will not be sufficient, however. To empower courts to enforce their awards, Islamic arbitration tribunals will have to respect the procedural requirements imposed by the FAA, which include basic due process rights to notice, representation by counsel, and the right to a fair and impartial hearing. While arbitrators possessing adequate dual system fluency may find that traditional *tahkim* practices will satisfy some of these requirements, they may not fulfill them all.[235] If so, Islamic jurists in the United States might consider whether various devices of Islamic jurisprudence (*usul-al-fiqh*) might justify procedural changes to traditional *tahkim* in order to satisfy the demands of American arbitration law. For example, Muslim jurists might consider the possibility that *darurah* (need and the prevention of harm) or *maslahah* (the functional ends served by Islamic legal rules) might justify the use of alternative procedural rules consonant with American legal requirements under the principle of *istisan* (the articulation of exceptions from existing legal norms). Alternatively, jurists might consider whether the jurisprudential principle that *urf* (generally accepted customary practice) can be a source of law might permit the adoption of procedural rules considered normative in the West, as well in many Muslim-majority countries, but not included as part of traditional Islamic procedural *fiqh*.[236] Here, American Muslims might choose to follow the example of the MAT, which demonstrates how learned Islamic jurists can develop sophisticated, legalistic procedural rules consonant with Western law standards.

Islamic dispute resolution tribunals in the United States should also accept that if they want their rulings upheld by American courts, they cannot operate in a vacuum. If American Muslims want judges to respect their Islamic arbitration processes, those processes must in turn demonstrate respect for American law and the American legal system. Islamic arbitration processes must also offer due consideration for prevailing

235. One commonly raised concern about the incompatibility of Islamic law norms with legal requirements of the American arbitration framework includes gender inequalities related to the disparate weight given to the testimony of male and female witnesses, and their respective rights to appear before an Islamic tribunal.

236. For a brief but poignant treatment of the possibility of using *istisan* premised on *darurah*, *maslahah*, or custom to override normative *fiqh* even absent textual support in the Qur'an or *hadith* for such alternative rulings *see generally* MOHAMMAD HASHIM KAMALI, EQUITY AND FAIRNESS IN ISLAM 36–44 (2005). *See also id*. at 7 (discussing the possibility of *istisan* serving as a basis for permitting changes to traditional Islamic rules of evidence recognizing only oral testimony in light of the modern evidentiary possibilities created by film, sound recording, and DNA, fingerprint, and other laboratory testing for physical evidence).

commercial customs and principles of equity and fairness, which may be used to temper the strict requirements of normative *fiqh*.

In the eyes of American courts, Muslim litigants that come before Islamic arbitral tribunals, as well as the Muslim arbitrators themselves, are subject to American law. Thus, if Islamic arbitrat tribunals want their awards upheld by American courts, they will have to accept jurisdictional limitations imposed by American law, which may preclude them from resolving some kinds of cases or offering certain kinds of remedies, even if such matters are within the jurisdictional competence of traditional Islamic courts. Use the *tahkim* model as the paradigm for Islamic dispute resolution in the United States may help alleviate some of these jurisdictional tensions. While Islamic law generally authorizes disputants to select third-party arbitrators to resolve disputes, it also prohibits arbitrators from deciding cases involving offenses against God, the so-called *hudud* crimes that necessitate corporal punishment. Muslim arbitrators in the United States might thus avoid incurring a religious obligation to perform judicial functions prohibited by American law by constituting arbitral tribunals as a form of *tahkim* rather than *qada*.

Respect for the exclusive jurisdiction of the secular justice system to address criminal offenses and impose criminal penalties is also likely unproblematic from the perspective of traditional *fiqh*. In American law, criminal proceedings and punishments are premised on the prosecution of offenses against society by the public itself. Islamic law, by contrast, does not contemplate the notion of offenses against the public, or the prosecution of a claim by any collective body. Instead, traditionally, Islamic courts only resolved private actions between individuals, and left public law matters like the prosecution of criminal offenses against society to the *siyasa-shari'a* courts and laws of Muslim rulers. Thus, American Muslim jurists can likely find ways to constitute formal, institutionalized arbitration tribunals to enforce most aspects of Islamic law between Muslims while also respecting the exclusive jurisdiction of state authorities over criminal matters. Furthermore, as some prominent organizations that issue *fatwas* for Muslims living in America have noted, Muslims have a religious duty to abide by the laws of the country they live in, especially when those laws do not directly contradict their religious duties.[237] Consequently, Muslim arbitrators may avoid resolving criminal matters by respecting their religious duty to abide by American law, which prohibits non-state actors from exercising criminal jurisdiction. This is particularly so in light of the fact that it is many jurists maintain that Islamic courts constituted in Western countries do not have an absolute religious duty under Islamic law to exercise jurisdiction over even *hudud* offenses.

Unlike *halakha*, Islamic law does not embrace custom (*urf*) as a formal source of law.[238] American Muslims would thus not likely be able to follow the path taken by the BDA of incorporating prevailing commercial practices into its arbitral rulings on the grounds that such customs them-

237. *See, e.g.*, *Plural Marriage in the U.S.*, ASSEMBLY OF MUSLIMS JURISTS OF AMERICA (Sept. 6, 2010), *available at http://www.amjaonline.org/fatwa-82452/info*.

238. *See generally* Gideon Libson, Jewish and Islamic Law: A Comparative Study of Custom during the Geonic Period (2003).

selves constitute the substance of religio-legal norms. However, Islamic law does recognize that commercial customs may establish the implicit terms under which parties engage in a wide range of commercial relationships: "What is known among merchants is as if stipulated among them."[239] Islamic law thus incorporates the common expectations and practices prevalent in a particular place at a particular time into all matters of interpersonal relationships, especially with respect to commerce.[240] Islamic arbitral tribunals might thus use the concept of *urf* in order to respect common commercial customs, which often form the foundation of disputants' relationships and condition their expectations. Incorporating prevailing commercial customs into their decisions will also help Islamic arbitral tribunals earn the respect of the secular courts as the latter will come to recognize Islamic ADR as familiarly legalistic dispute resolution process.

Islamic legal history further suggests that Muslim arbitrators in the United States could decide to employ equitable solutions in cases where rulings in strict compliance with normative *fiqh* would be viewed as unfair by American courts. One example may be taken from Islamic inheritance law, one area of Islamic law that has faced considerable public criticism in the West.[241] Normative rules dictate that the uterine brothers of a deceased female take one-third of her estate while germane brothers have only a residuary interest in whatever remains of the estate after all other heirs receive their respective portions. In one case, however, the Calpiph Umar ibn Khattab ruled that both uterine and germane brothers should take a collective third of the estate as an equitable measure.[242] While this rule was adopted by some Islamic *madhhabs* and rejected by others, it, along with other examples,[243] suggests that Islamic jurists in the United Stated might find ways to temper the strict application of normative rules in order to achieve results that are more equitable to the parties, and that seem more just to American judges.

American Muslims seeking to create Islamic arbitration panels whose awards will be upheld by American courts may want to cultivate a group of arbitrators trained in both traditional *fiqh* and American law. The BDA found that arbitration awards based on religio-legal norms invoke more cursory review by American judges when they are arrived at and written by arbitrators with secular legal training. Judges tend to assume that arbitral awards written that use familiar legal terminology and reasoning are reasonable and legally sound, even when such forms are mere win-

239. THE MEDJELLE OF OTTOMAN CIVIL LAW, Art. 44 (W.E. Gringby trans., London, Stevens and Sons 1895); *see also id.* at Art. 33 ("What is accepted custom is like a stipulated condition."); *see generally* KAMALI, *supra* note 137, 369–83 (2003).

240. See Gideon Libson, *On the Development of Custom as a Source of Law in Islamic Law*, 4 ISLAMIC L. & SOC'Y 131, 152–54 (1997).

241. See, e.g., Reiss, *supra* note 56, at 756–58 (2009).

242. *See* KAMALI, *supra* note 236, at 44 (2005).

243. *See, e.g. id*. at 61 (relating that the Caliph Uthman equitably permitted a divorced woman to inherit her deceased husband despite the normal rule that a divorce cuts off a wife's right to inherit because in that case the husband divorced his wife while on his deathbed as a means of preventing her from taking a share in his estate after his death).

dow dressing for rulings grounded in unfamiliar religio-legal rules.[244] Accordingly, Islamic arbitration tribunals would benefit from the professional expertise of Muslim lawyers trained at recognized American law schools. Not only will American judges come to trust the arbitral decisions issued by fellow members of the bar, but the presence of Muslim lawyers on Islamic arbitration panels will assist Islamic tribunals in navigating the American legal field, and help "normalize" Islamic law within the secular legal community. American Muslims might also find it useful to follow the BDA and MAT by employing arbiters who are both Islamic jurists and trained lawyers. The Muslim community in the United States might take a special interest in sending students of traditional *fiqh* who want to work as Islamic arbitrators to study in American law schools, or in helping Muslim attorneys pursue rigorous *fiqh* training. Additionally, like the BDA and the MAT, Islamic arbitral organizations may want to cultivate a cadre of observant Muslim trained in various professions and trades, and encourage such individuals to take an active role in the Islamic arbitration process. Muslim doctors, accountants, finance experts, psychologists, construction workers, merchants, and laborers might function as arbitrators alongside Islamic jurists and trained lawyers, serve "court witnesses" for established Islamic tribunals, and provide reliable, non-adversarial expert testimony in order to insure that Muslim arbitrators make decisions with a complete picture of all the relevant facts and after having addressed all the issues raised by particular cases. Reliance on such experts has ample precedent in traditional Islamic dispute resolution, and Sheikh Taha Jabir al-Alwani has argued that reliance on experts is essential if Muslim jurists are to reach correct decisions when applying normative *fiqh* to American contexts.[245]

The BDA's experience shows that there must be more than just formal juridical rapprochement between Shari'a and American law if the Muslim-American community is to establish arbitration tribunals that can work in harmony with the American legal system. Muslim-Americans will also have to show that their hyphenated identity is not a contradiction. Muslims must insure that Americans do not view Islam as a threat to American culture, but rather as a religion that should be protected under the First Amendment. The need for Muslim-American's to "prove" themselves to be non-threatening, contributing members of American society is not unique to the Muslim experience. Many religious communities, including Jews, were seen as a threat when they first tried to establish themselves on American soil, and Muslim-Americans can learn from their religious compatriots' experiences in this area as well. For example, Catholic-Americans were for a long time forced to bear the anti-Catholic biases of many Protestant Americans,[246] and Mormons,

244. *See* Broyde, *supra* note 18, at 295.

245. *See generally* TAHA JABIR AL-ALWANI, TOWARDS A FIQH FOR MINORITIES: SOME BASIC REFLECTIONS (Ashur M. Shams, trans., 2003).

246. Philip Jenkins, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE 23 (2003).

though part of American society, are still subject to significant prejudice and in some cases mockery.[247]

The Fiqh Council of North America, an important organization of American Islamic law scholars that issues *fatwas* on many matters of concern to Muslims living in the United States, has taken measures to legitimate Muslims and Islam in American society by demonstrating that Muslims are religiously obligated to be good citizens. For example, the Council has confirmed for the American Muslim community that "Islamic teachings require respect of the laws of the land where Muslims live as minorities, including the Constitution and the Bill of Rights, so long as there is no conflict with Muslims' obligation for obedience to God. We do not see any such conflict with the U.S. Constitution and Bill of Rights."[248]

V. CONCLUSION

In terms of the gaining acceptance in the eyes of the American legal and social community, there is a difference between the path taken by the Jewish community and the ones that the Muslim community might pursue. This difference is due to the disparate historical backgrounds of the two minority groups. The Jewish community transitioned from being a minority in one country (or countries) to being a minority in another. Therefore, it was able to utilize the tools it had already developed to acclimate to its new surroundings. Culturally and juridically, Jews had already accepted the position of being a Diaspora population even before they landed on American soil. Muslim-Americans, on the other hand, like the Catholic and Mormon communities, have had to adjust to being a minority in American society after spending centuries as the controlling, majority population in the areas they inhabited. This difference is not only one of degree, in the sense that, due to their Diasporic experience, Jews were able to quickly integrate themselves into American society. Rather, the manner in which Jewish and Muslim inclusion into the American mainstream becomes possible is different given their different social and cultural backgrounds.

The Muslim-American community may wish to acknowledge that though it is similar to the Jewish community in terms of sharing a religio-legal foundation, the Jewish-American community may not be a good model for the purpose of social integration. A better model may be found in the Muslim-British community, which has had to deal with the specific issue of how to transition from being a part of a majority or controlling population to being a minority one.

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247. J. Spencer Fluhman, *Why We Fear Mormons*, N.Y. TIMES, June 3, 2012, at A25, *available at* http://www.nytimes.com/2012/06/04/opinion/anti-mormonism-past-and-present.html.

248. Muzammil Siddiqi, *Being Faithful Muslims and Loyal Americans,* FIQH COUNCIL OF NORTH AMERICA, http://fiqhcouncil.org/node/10; *see also* Marshall Breger, *Why Jews Can't Criticize Sharia Law*, MOMENT MAG.,1Jan./Feb. 2012, at 18 ("Muslim jurists have always drawn on sharia to mandate that fellow Muslims obey the laws of the land in matters that sharia does not prohibit.").

Religious liberty is ingrained into the American legal and cultural psyche by the First Amendment, which prohibits both the proscription of religion (i.e. any action that unduly burdens a person's conscience, restricts his or her religious expression and activity, discriminates against religion, or undermines the autonomy of religious bodies), as well as prescriptions of religion (i.e. any action that coerces a person's conscience, mandates religious expression and activity, discriminates in favor of a religion, or improperly allies with a religious body).[249] The First Amendment, however, does not protect religions that are seen to threaten American society.[250] Particularly in this day in age, Islam has a long list of detractors. If the Muslim-American community wishes to effectively establish Islamic arbitration courts in America, it might first and foremost address its social and cultural notoriety before it considers the juridical sacrifices it must make. This does not mean that Muslim-Americans must totally assimilate or abandon their identities; rather, it means demonstrating that there is no inconsistency between loyalty to America and loyalty to Islam. The Muslim spirit, the product of the Islamic religion and experiences, must be seen as essentially modern and essentially American.

249. Witte, *supra* note 144, at 289.

250. There is a long history of the tension between protecting religious liberty and protecting the American ethos. For a colonial example where the religion that threatened America was Catholicism, *id.* at 74.