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The Future of Sharia Law in American Arbitration

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NOTE

The Future of Sharia Law in American Arbitration

ABSTRACT

A rising tide of Islamophobia in the United States has led, in recent years, to state-level efforts to prohibit the application of Sharia law in American courts. While these bans have been largely unsuccessful as legislation—the U.S. Tenth Circuit Court of Appeals has even declared one such ban unconstitutional—the growing uneasiness among Americans regarding the application of Sharia law persists. Similar tensions have been addressed in Canada and the United Kingdom through reform of the application of Sharia law in alternative dispute resolution (ADR) mechanisms. By taking a critical look at the American ADR system through the lens of Canadian and British reforms, a mode of reconciling religious arbitration with egalitarian values, and concerns, can emerge.

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I. INTRODUCTION

After the events of September 11th 2001, Americans have become increasingly uncomfortable with the concept of Sharia law. Fear of the application of Sharia law within the United States has predominately

manifested in efforts to ban Sharia within the American court system. Given the growing American belief in the potentially catalytic effects of the January 9, 2015 attacks on the Parisian magazine, *Charlie Hebdo*,¹ and taking into account the experience of Canada and the United Kingdom, it is likely that this fear will take on a new target: the less-formal methods of alternative dispute resolution (ADR) where the influence of Sharia often finds an outlet.

As an often cheaper, and faster, version of dispute resolution than that provided in court, arbitration is an increasingly popular version of ADR. In addition to being perceived as more efficient than in-court dispute resolution, arbitration also provides parties with the ability to choose what law and procedures will apply to their dispute. The parties set out such matters in either a specific arbitration agreement or an arbitration clause in a broader agreement. Issues sometimes arise, especially in Western countries, when parties to these agreements choose to designate religious precepts as the law by which their dispute will be settled. Given religious precepts provide for different rights and duties than do secular laws, concerns center around whether some parties, especially women and children, are disadvantaged by the application of such precepts in arbitral decisions. These concerns, when coupled with rising levels of Islamophobia in Western countries, have recently produced a pronounced backlash against the application of Sharia law in arbitral processes, especially in family law matters.

In Ontario, Canada, one such backlash arose as the result of the creation of the Islamic Institute of Civil Justice and its professed intention to set up a Sharia arbitration tribunal.² The uproar resulted largely from women and children's rights advocacy groups and resulted in the Family Statute Law Amendment Act.³ This Act, while viewed by many as having created a substantial ban, actually provides a sort of middle ground approach, allowing arbitration of family law matters so long as the award is in accordance with Ontario law.⁴

By contrast, the United Kingdom is viewed as the most permissive home to Sharia arbitration among Western countries. This is, however, a misplaced designation given that the UK's Arbitration Act of 1996 prohibits arbitration of all except civil law matters. This excludes all

1. See *Charlie Hebdo Attack: Three Days of Terror*, BBC (Jan. 14, 2015, 5:55 PM), <http://www.bbc.com/news/world-europe-30708237> [<http://perma.cc/4LUW-DVK9>] (archived Jan. 27, 2015).

2. See Trevor C.W. Farrow, *Re-Framing the Sharia Arbitration Debate*, 15 CONST. F. 79, 79–80 (2006).

3. See Natasha Bakht, *Religious Arbitration in Canada: Protecting Women by Protecting Them from Religion*, 19 CAN. J. WOMEN & L. 119, 130 (2007) (contextualizing the formation of the No Religious Arbitration Coalition and noting its “succe[ss] in convincing the government of the dangers of religious arbitration”); Farrow, *supra* note 2, at 80 (noting that the Ontario Premier’s intent to end religious arbitration “ultimately led to the . . . enactment of Ontario’s *Family Statute Law Amendment Act*).

4. See Bakht, *supra* note 3, at 129.

family law as well as criminal disputes.⁵ Thus, UK law actually attempts to keep a tighter reign on religious arbitral tribunals than Canadian. A great “moral panic” accompanied the consideration of further legal powers being ascribed to Sharia tribunals.⁶ This rising suspicion of Sharia Law has caused English legislators to take a closer look and some now fear that family law might actually be considered arbitrable under the 1996 Act, despite tradition to the contrary, and now propose a more direct ban via the so-called “Equality” Bill, which would cement the ban on all consideration of family law matters in arbitration.⁷

By examining the debates and modes of dealing with Sharia law as applied in ADR in both Canada and the UK, one can gain a better understanding of options open to the United States and modes of heading off an attack on Sharia ADR in America. The fears that led to the proposals to ban Sharia law in America are significantly similar to the sort of fears and concerns that surrounded Sharia reform in Canada and the UK. In order to anticipate and prevent an attack on ADR—a vital element of the American legal system—it is important to understand the threat and consider possible solutions.

The United States can learn from the Canadian and British examples in order to preserve the application of Sharia law within the ADR community in a manner that best protects against rights violations. Part II of this Note explains the basis of Sharia Law. Part III seeks to explain the background of the concern over the application of Sharia law in the United States. Part IV and Part V explore how Canada and the United Kingdom have dealt with similar concerns directed at ADR mechanisms. Part VI concludes.

II. SHARIA LAW

Sharia law, in its broadest sense, fuses “divine dictates, customary law, and clerical analogy” to produce civil and criminal laws, religious

5. See Farrah Ahmed & Jane Calderwood Norton, *Religious Tribunals, Religious Freedom, and Concern for Vulnerable Women*, 24 CHILD & FAM. L. Q. 363, 368 (2012).

6. See Marie Egan Provins, *Constructing an Islamic Institute of Civil Justice that Encourages Women's Rights*, 27(3) LOY. L.A. INT'L & COMP. L. REV. 515, 515–16 (noting the concerns many Canadians voiced over the Islamic Institute for Civil Justice); cf. Rebecca E. Maret, Note, *Mind the Gap: the Equality Bill and Sharia Arbitration in the United Kingdom*, 36 B.C. INT'L & COMP. L. REV. 255, 266–67 (2013) (explaining that controversy grew as Britons expressed concern that Sharia arbitrations resulted in gender discrimination against Muslim women).

7. See Ahmed & Norton, *supra* note 5, at 369 (noting that the Equality Bill “proposes to amend the Act to clarify that any matter which is within the jurisdiction of the family courts cannot be the subject of arbitration proceedings” (footnote omitted)).

mandates, and codes of personal conduct.⁸ As a result of this broad scope, some even assert that “Sharia law” is a misnomer, given Sharia is primarily a description of societal aspirations that only become binding when a governing authority adopts them as law.⁹ In this way, it provides a significant basis for the national law in Saudi Arabia, Yemen, Kuwait, United Arab Emirates, and Bahrain.¹⁰ Sharia is derived from four recognized sources.¹¹ The two principle sources of Sharia are the Qur’an and the *sunna*.¹² These are followed, in order of importance, by the *ijma* and *the qiyas*. There is also a somewhat controversial potential fifth source of Sharia in the *ijtihad*.

The Qur’an—the Islamic holy book that provides the central point of reference for followers of the Islamic faith—is of instrumental value in interpreting the other three sources of Sharia.¹³ While it does not contain a legal code as such, it is the central source for Islamic law because of the specific legal commands that are found within its otherwise moral, religious, and devotional content.¹⁴ In fact, approximately 350 of the 6,235 verses of the Qur’an are said to contain legal instructions—“ayat al-ahkam”—although this number varies depending on the interpreting scholar.¹⁵ Ayat al-ahkam provide the basis for Islamic “inheritance, marriage, divorce, commercial transactions, and criminal law.”¹⁶

The second most important source of Sharia law is the *sunna*, which are the “collected tales of the life and actions of Muhammad.”¹⁷ Such high importance is allotted to the *sunna* because the Qur’an itself states not only that Muslims are “to [o]bey God and [Muhammad],” but that Muhammad himself provided an “excellent pattern (of conduct).”¹⁸ The acts, teachings, and sayings of Muhammad are preserved in reports, referred to as *Hadith*, which were compiled into

8. Jeremy Grunert, *How Do You Solve a Problem Like Sharia? Awad v. Ziriax and the Question of Sharia Law in America*, 40 PEPP. L. REV. 695, 704 (2013).

9. *See id.*

10. *See Sarah M. Fallon, Justice for All: American Muslims, Sharia Law, and Maintaining Comity with American Jurisprudence*, 36 B.C. INT’L & COMP. L. REV. 153, 166 (2013).

11. *See Grunert, supra note 8, at 705.*

12. *See id.*

13. *See id.* at 705–06.

14. *See id.*

15. *See id.* at 706 (citing MOHAMMAD HASHIM KAMALI, SHARI’AH LAW: AN INTRODUCTION 20 (2008)); *see also* D. Andrew Yost, *A Waterspring in the Desert: Advancing Human Rights within Sharia Tribunals*, 35 SUFFOLK TRANSNAT’L L. REV. 101, 105 (2011) (commenting that differences in interpretation are due to the fact that the Qur’an “represents a process of revelation where prior verses may have been later abrogated in favor of subsequent revelations, and because the revelations themselves ceased after Muhammad’s death, the Islamic community continues to interpret the meaning of the Qur’an” (emphasis omitted)).

16. Grunert, *supra* note 8, at 706.

17. *Id.* at 705–07.

18. *Id.* at 707 (quoting THE MEANING OF THE HOLY QUR’AN 3:32, 33:21 (‘Abdullah Yusuf ‘Ali trans., 11th ed. 2009)).

the *sunna* during the early years of Islam by Islamic religious scholars.¹⁹

The third source of Sharia is the *ijma*, which refers to consensus. This consensus may occur among religious scholars, or “ulama.”²⁰ Under some interpretations, the consensus necessary for the *ijma* must be among the entire Muslim community.²¹ Whether a scholarly, or public consensus, the *ijma* provides the authoritative source for determining the morality of acts not specifically covered in the Qur’an.²² If consensus is reached, this is considered to be a “miraculous sign proving the infallibility of the community’s decision.”²³ The authority for the *ijma* is based on a belief that Muhammad once said, “the Muslim community would ‘never agree upon an error.’”²⁴

Qiyas is the fourth source of Sharia. *Qiyas* fills in gaps where the Muslim community cannot reach consensus.²⁵ As with the *ijma*, *qiyas* are a tool for interpreting the “morality of actions . . . not directly addressed in the Qur’an.”²⁶ Yet, rather than being based upon mass consensus, the *qiyas* relies upon “a form of clerical analogy,” involving comparing the action at issue to similar circumstances addressed in holy texts or that have been the subject of past clerical rulings.²⁷

Finally, there is also a potential, though somewhat controversial, fifth source of Sharia.²⁸ This is the *ijtihad*, which involves the use of “individual juristic reasoning” to interpret Sharia.²⁹ While Islamic religious scholars prohibited use of *ijtihad* to interpret Sharia in the 10th Century, it has remained a key source of interpretation for certain branches of Islam.³⁰ The use of *ijtihad* is still debated today.³¹ These four, sometimes five, sources of Sharia interpretation provide guidance by which Sharia courts reach judicial decisions.³² As a result, Sharia courts frequently produce varied interpretations of “justice” for any given situation.³³ Further, multiple “extra-Sharia” factors also typically influence the legal philosophy of Islamic courts, including

19. *See id.*

20. *See id.* at 707–08.

21. *See id.* at 707.

22. *See id.*

23. *Id.*

24. *Id.* (quoting NOËL J. COULSON, A HISTORY OF ISLAMIC LAW 77 (1994)).

25. *See id.*

26. *Id.*

27. *Id.* at 707–08.

28. *See id.* at 708.

29. Yost, *supra* note 15, at 105.

30. *See* Grunert, *supra* note 8, at 708–09.

31. *See id.*

32. Yost, *supra* note 15, at 106 (emphasis omitted).

33. *See id.* (citing Maria Reiss, *The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions Should Be Non-Binding*, 26 ARIZ. J. INT’L & COMP. L. 739, 743 (2009) (recognizing legal pluralism in Islamic law)).

geographic location, state involvement, and the views of the *ulama* involved in the hearing.³⁴

In addition to multiple sources of Sharia, which are generally agreed on by most Muslims, there are differing schools of Islam, each of which interprets the content of Sharia law in different ways.³⁵ As mentioned above, there are two main branches of Islam—Shia and Sunni. The split occurred following the death of Muhammad and was due to a disagreement over who should be chosen as leader—a *caliph*—in Muhammad’s place.³⁶ Followers of Sunni Islam focus specifically on the actions of Muhammad, trying to model their lives after tales of his character, while those who follow Shia Islam focus more on structures of authority and follow the belief that “the leader of the faith be chosen from among Muhammad’s descendants.”³⁷ Shia Islam recognizes a central legal authority, while Sunni Islam does not.³⁸ Rather than focusing on the actions of Muhammad alone, the followers of Sunni Islam consider a number of authorities (*muftis*) in order to determine the proper action.³⁹

Out of the same schism that resulted in the development of the Sunni and Shia branches of Islam, also arose five influential schools of thought relating to Islamic jurisprudence: the Hanafi, the Maliki, the Shafi’i, the Hanbali, and the Jafari.⁴⁰ The Hanafi School “emphasize[s] the use of *qiyas* to [interpret] Sharia in instances where the Qur’an [and the] *sunna*” are unclear and where *ijma* does not exist.⁴¹ The Maliki School utilizes the four most prominent sources of Sharia, and adds another source not utilized by any other school—the customs and traditions of the people of Medina.”⁴² Followers of the Maliki School recognize Medina as “the second holiest city in Islam,” after Mecca.⁴³ The Shafi’i School, keeps to the traditional four sources with emphasis on the Qur’an and the *sunna*.⁴⁴ The Hanbali School, which is recognized as the most conservative, focuses almost solely upon the

34. *Id.* at 106.

35. *See* Grunert, *supra* note 8, at 709–10.

36. *Id.* at 709.

37. Fallon, *supra* note 10, at 156, 158–59 (footnote omitted).

38. *Id.* at 159 (noting that this process involves determining within which category of “Sharia values” an action falls, whether it is “required, recommended, indifferent, disapproved, or forbidden”) (citing Jonathan E. Brockopp, *Sharia*, in 2 ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD 618, 618 (Richard C. Martin ed., 2004)).

39. *See id.* (citing Brockopp, *supra* note 38, at 618).

40. *See* Grunert, *supra* note 8, at 710 (explaining that each school is “named after the Islamic Scholar whose system of thought and interpretation established its basic theological and interpretive methodologies”) (citing Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 1, 24 (Hisham M. Ramadan ed., 2006)).

41. *Id.*

42. *See id.*

43. *See id.*

44. *See id.*

Qur'an and the *sunna*.⁴⁵ The Jafari School, popular among Shiites—or followers of Shia Islam—recognizes the typical four sources, but also allows the use of the fifth, the *ijtihad*.⁴⁶

Western Sharia courts typically serve as a sort of parallel legal system that nevertheless remains subject to the constitution of the state in which they reside.⁴⁷ In such situations, these courts are made up of a panel of judges educated in Sharia, the binding effect of whose decisions depends upon the state in which the court presides.⁴⁸ Generally while the rulings of such courts are binding in the Middle East, they are not in the West.⁴⁹ The only exception to this is typically “when litigants have freely agreed to the court’s jurisdiction.”⁵⁰ For example, apart from the Muslim Arbitration Tribunal (MAT), there also exists in England the Islamic Sharia Council.⁵¹ This Sharia court operates independently and without oversight; yet, its decisions are not given binding authority. The Islamic Sharia Council only presides over arbitration disputes based on agreements in which both parties have agreed to be governed by Sharia law.⁵²

III. ADR AND SHARIA LAW IN THE UNITED STATES

A. Arbitration in the United States

The decisions of individuals to solve disputes via arbitration are recognized in the United States on the basis of contract law principles. The freedom to make arbitration agreements is derived from the “freedom to contract” that is protected by the Fourteenth Amendment.⁵³ Such agreements are respected, under American common law, by the court system so long as the agreement is not tainted by “fraud, duress, incompetence, [or] unconscionability,” or is incompatible with public policy.⁵⁴ This means that such agreements are enforceable even if the outcome of the arbitration is contrary to what it would have been had a U.S. court decided the matter, so long

45. See *id.* at 711.

46. See *id.*

47. Cf. *id.* at 725 (explaining that, in the United States, “religious beliefs cannot trump secular . . . law”); Kimberly Karseboom, Note, *Sharia Law and America: The Constitutionality of Prohibiting the Consideration of Sharia Law in American Courts*, 10 GEO. J.L. & PUB. POL’Y 663, 665–66 (2012).

48. See Yost, *supra* note 15, at 107.

49. See *id.*

50. *Id.*

51. See Karseboom, *supra* note 47, at 665.

52. See Ahmed & Norton, *supra* note 5, at 367–68, 372.

53. See Katherine A. Sanoja, Note, *The Impact of “Anti-Sharia” Legislation on Arbitration and Why Judge Nielsen in Florida Got It Right*, 8 FIU L. REV. 181, 187 (2012).

54. See *id.* at 188.

as it is not inherently unfair or in contravention of a state statute or constitution.⁵⁵

In addition to recognition under the common law of contracts, arbitrations are also given significant weight in American courts through the Federal Arbitration Act (FAA) and corresponding state laws based upon the Revised Uniform Arbitration Act (RUAA).⁵⁶ Both the FAA and the RUAA combine to make decisions by religious arbitrators binding upon American judges.⁵⁷ As emphasized in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, the Supreme Court has adopted what is now a long-standing liberal policy toward arbitrations, “mandating that arbitration clauses be read broadly.”⁵⁸ State approaches via the RUAA have largely echoed this policy, and the FAA has been recognized as “preempt[ing] all conflicting state laws limiting access to arbitration or refusing to enforce arbitration agreements voluntarily entered into by the parties.”⁵⁹ This means that Sharia law bans, in so far as they may affect the recognition by state courts of arbitration awards made by religious tribunals, are likely invalid because the FAA preempts such obstacles to arbitration.⁶⁰

American courts, via what is known as the abstention doctrine, have avoided involvement in reviewing intrafaith disputes that are based on religious doctrine.⁶¹ While this doctrine was somewhat loosened by the neutral-principles-of-law approach adopted by the Supreme Court in *Jones v. Wolf*, which “allows judges to decide cases where the underlying dispute can be resolved through the application of secular legal principles,” American judges have nevertheless tended to steer clear of religious disputes.⁶² Some commentators have credited this approach as having led to increased use of religious arbitration as a substitute for judicial involvement.⁶³

Religious arbitrations in the United States are subject to two main safeguards. First, particularly egregious violations of rights via such

55. See *id.* at 188–89.

56. See Evan M. Lowry, *Where Angels Fear to Tread: Islamic Arbitration in Probate and Family Law, a Practical Perspective*, 46 SUFFOLK U. L. REV. 159, 159–60 (2013).

57. See *id.*

58. See *id.* at 163 & n.34 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, n.27 (1983)).

59. Robert L. McFarland, *Are Religious Arbitration Panels Incompatible with Law? Examining “Overlapping Jurisdictions” in Private Law*, 4 FAULKNER L. REV. 367, 373 (2013) (footnote omitted).

60. See *id.* at 373–74.

61. See Lowry, *supra* note 56, at 161–62 (noting the doctrine was established by the Supreme Court in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1968), and *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976)).

62. See *id.* at 162.

63. See *id.* at 163.

arbitrations may be addressed through secular criminal law.⁶⁴ Second, American courts, when exercising their review function, may refuse to enforce the award.⁶⁵ Yet, review of arbitration awards in the United States is limited. The party contesting the award has the burden of showing that the arbitration is invalid due to fraud, duress, incompetence, or unconscionability, that there existed misconduct or bias on the part of the arbitrator, or that the award is incompatible with public policy.⁶⁶

B. Bans on Sharia Law in the United States and Potential Fears Regarding ADR

Muslim-Americans only “make up less than one percent of the [United States] population.”⁶⁷ In 2011, the Pew Research Center estimated that Muslims living in the United States numbered approximately 2.75 million.⁶⁸ “Each year approximately [80,000] to [90,000] Muslims immigrate to the United States.”⁶⁹ Of those currently living in the United States, 81 percent are American citizens, and 70 percent of those citizens were born in another country.⁷⁰ According to a study conducted by the Pew Research Center, the 69 percent of Muslim-Americans who consider religion to be “very important” is almost exactly that of the 70 percent of Christian-Americans who share the same view.⁷¹ Additionally, both Muslim-Americans and Christian-Americans have similar rates of religious service attendance.⁷² Possibly most important, Muslim-Americans demonstrate the highest level of integration among all major religious groups currently residing in the United States, meaning the Muslim-American population keeps itself less secluded from the general populace than do other religious groups in the United States.⁷³ Compared to Protestant-Americans, Catholic-Americans, and Jewish-Americans, Muslim-Americans generally demonstrate more acceptance toward members of other

64. See McFarland, *supra* note 59, at 375, 382.

65. See *id.* at 382.

66. See Lowry, *supra* note 56, at 164–65.

67. Fallon, *supra* note 10, at 154.

68. *Id.* at 155.

69. *Id.* at 156.

70. *Id.* (pointing out that this is a particularly striking figure given that “only forty-seven percent of all foreign-born immigrants to the United States” have attained citizenship).

71. *Id.* at 157 (citing PEW RESEARCH CTR., MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM 25 (2011), available at <http://www.people-press.org/files/legacy-pdf/Muslim-American-Report.pdf> [<http://perma.cc/FQM7-D6K8>] (archived Feb. 16, 2015)).

72. See *id.* (“[F]orty-seven percent of Muslims and forty-five percent of Christians report attending worship services at least weekly.” (footnote omitted)).

73. See *id.* (citing Bruce Warshal, *Sharia Law and Anti-Islam Animus*, AM. MUSLIM (Jan. 26, 2012), <http://theamericanmuslim.org/tamphp/features/articles/sharia-law-and-anti-islam-animus> [<http://perma.cc/VA5E-XSNQ>] (archived Mar. 24, 2015)).

religions.⁷⁴ In fact, 96 percent of leaders in Muslim-American mosques “believe that Muslims ought to be ‘involve[d] in American society.’”⁷⁵ These mosque leaders “do not envision” that Islam should take the form of “a community isolated from the American society.”⁷⁶ Generally speaking, Muslim-Americans are secular and moderate in terms of their views with respect to many of the issues—like women’s rights—that have divided Muslims and Christians around the world. Contrary to the views of some Americans, Muslim-Americans have been described as “decidedly American in their outlook, values, and attitudes.”⁷⁷

In terms of religious affiliation, 65 percent of Muslim-Americans follow Sunni Islam, and 11 percent follow Shia.⁷⁸ The sect of Sunni Islam recognizes the Prophet Muhammad, Islam’s founder, as its sole leader.⁷⁹ Sunni Muslims strive to “follow[] the traditions and character of Muhammad.”⁸⁰ The sect of Shia Islam, instead looks to one of Muhammad’s early descendants as its leader.⁸¹ The remaining 24 percent of Muslims living in the United States either follow Sufism, or have no specific branch affiliation.⁸² Sufism differs from Sunni and Shia Islam in that it focuses on “striving for closeness to God through mysticism.”⁸³

Muslim-Americans have a long historical presence. Approximately 10 percent of slaves in the Americas were Muslims brought from West Africa.⁸⁴ The majority of these early Muslim-Americans in America had converted to Christianity by the close of the Civil War.⁸⁵ Between 1875 and World War II, there was another rise in the Muslim-American population: in search of economic opportunity, many immigrated to the United States from the Middle East.⁸⁶ During the 1920s and 1930s, significant numbers of African Americans

74. *Id.* (footnote omitted)

75. *Id.* (quoting Ihsan Bagby, *The Mosque and the American Public Square*, in *MUSLIMS’ PLACE IN THE AMERICAN PUBLIC SQUARE* 323, 325 (Zahid H. Bukhari, Sulayman S. Nyang, Mumtaz Ahmad & John L. Esposito eds., 2004)).

76. *See id.* (quoting Bagby, *supra* note 75, at 325).

77. *Id.* at 158 (quoting PEW RESEARCH CTR., *MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 1* (2007)) (“Muslim Americans . . . [are] largely assimilated, happy with their lives, and moderate with respect to many of the issues that have divided Muslims and Westerners around the world. . . . [T]hey are decidedly American in their outlook, values, and attitudes.” (footnote omitted)).

78. *Id.* at 156.

79. *See id.*

80. *Id.*

81. *See id.* (“Shia Islam . . . mandates that the leader of the faith be chosen from among Muhammad’s descendants.” (footnote omitted)).

82. *See id.*

83. *Id.*

84. *Id.* at 157 (citing Edward E. Curtis, IV, *United States, Islam*, in 2 *ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD* 707, 707 (Richard C. Martin ed., 2004)).

85. *See id.*

86. *See id.*

converted to Islam.⁸⁷ Finally, a new immigration law instituted in 1965 resulted in a major influx of Muslim immigrants from Asia, Africa, Europe, and Central and South America.⁸⁸

“Islamophobia” may be defined “as an ‘exaggerated fear, hatred, and hostility toward Islam and Muslims’” bolstered by negative stereotypes, which may result in not only bias and discrimination, but also may prevent Muslims from being full political and social participants in American life.⁸⁹ While many directly correlate the rise of so-called Islamophobia with the September 11th, 2001 attacks,⁹⁰ others date its origins back to a deep-seated European-Christian bias against Muslims that was exacerbated by increasing racial tensions in 19th century America.⁹¹

One commentator has sketched a series of triggering events that occurred prior to September 11.⁹² The “first triggering event” is the Cold War. During the Cold War, the United States began its now long-standing support of Israel in conflicts with surrounding Muslim countries backed by Soviet Russia.⁹³ This stance caused many Americans to begin viewing Muslims as enemies of the U.S..⁹⁴ This is further demonstrated by the oil embargo instituted by the Organization of the Petroleum Exporting Countries (OPEC) in 1973 to protest U.S. backing of Israel.⁹⁵ The second set of triggering events are as follows: the 1979 Iran hostage crisis, the civil war that ravaged Lebanon in 1979, the 1991 Persian Gulf War, as well as the 2003 Iraq War.⁹⁶

As the most recent triggering event, the September 11 terrorist attacks marked the first time that the American populace had been directly confronted with the very radical ideology of violent, jihadist Islam, as interpreted by al-Qaeda.⁹⁷ Al-Qaeda professed this to be the “true face” of Islam, and while many commentators at the time (from politicians to news reporters) emphasized that this was actually an ideology in opposition to Islam’s peaceful nature, others implied that violence is an inherent component of Islam and many of its followers intended “Islamization” of America.⁹⁸ This was a pivotal shift in the

87. *See id.*

88. *See id.*

89. Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, FIRST AMEND. L. REV. 363, 365 (2012).

90. *See* Grunert, *supra* note 8, at 697; *see also* Uddin & Pantzer, *supra* note 89, at 363 (arguing that since September 11, 2001, American Muslims have “continue[d] to be surrounded by a climate of fear and distrust”).

91. Fallon, *supra* note 10, at 160 (citing Curtis, *supra* note 84, at 710).

92. *See id.* at 160–61.

93. *See id.* at 160.

94. *See id.* at 160–61.

95. *See id.* at 161.

96. *Id.*

97. *See* Grunert, *supra* note 8, at 697.

98. *Id.*

attitude of many Americans toward Muslims and their religion. The September 11th attacks led to a rise in discrimination against Muslims and fear of their faith.⁹⁹ A proposal to build an Islamic center near Ground Zero aggravated such sentiments.¹⁰⁰

This movement toward fear and discrimination against Muslim-Americans has been further exacerbated by a variety of anti-Muslim organizations that have proliferated in the United States since September 11th. The Stop Islamization of America organization focuses its efforts on spreading a conspiracy theory that Muslim-Americans intend “to take over America and deprive Americans of [their constitutional rights].”¹⁰¹ The Center for Security Policy (CSP)—another, similar, fear-mongering organization—echoes this theme.¹⁰² CSP recently issued a “report” called “Sharia: The Threat to America,” which has been used by them to promote anti-Islam sentiment and fear.¹⁰³ These organizations, and others like them, attempt to portray Islam as inherently violent and Muslims as motivated by a desire to dominate the United States and all non-Muslims.¹⁰⁴ These “misinformation experts” hope to create a new definition of Sharia, one that depicts it as a “totalitarian ideology” or “legal-political-military doctrine” focused on ending Western civilization.¹⁰⁵ Surprisingly, these groups have had great success over the past decade in organizing themselves and disseminating their views, mainly by utilizing grassroots organizations to spread their views to a broader audience.¹⁰⁶

Collectively, anti-Muslim groups have succeeded in promoting their message in at least twenty-three states.¹⁰⁷ They do so utilizing a variety of communication techniques, including books and reports, websites, blogs and even speeches.¹⁰⁸ Smaller, more localized anti-Islam grassroots organizations, and even some right-leaning religious groups, have taken up these materials as “propaganda for their constituency.”¹⁰⁹

The movement has moreover succeeded in influencing politicians’ talking points.¹¹⁰ Newt Gingrich, the former Speaker of the United States House of Representatives, and former candidate for the Republican Party presidential nomination, once described Sharia law

99. Fallon, *supra* note 10, at 161 (footnote omitted).

100. *Id.*

101. Uddin & Pantzer, *supra* note 89, at 363 (citing WAJAHAT ALI ET AL., CTR. FOR AM. PROGRESS, FEAR, INC.: THE ROOTS OF THE ISLAMOPHOBIA NETWORK IN AMERICA 9 (2011), <http://www.americanprogress.org/issues/2011/08/pdf/islamophobia.pdf>).

102. *See id.* at 363–64.

103. *See id.*

104. *See id.* at 365.

105. *Id.*

106. *See id.*

107. *See id.* at 366.

108. *Id.*

109. *Id.*

110. *See id.*

as “a ‘mortal threat to the survival of freedom in the United States and in the world as we know it.’”¹¹¹ During a debate held in the course of the 2012 presidential race, Mitt Romney stated, “[w]e’re not going to have Sharia[] law applied in U.S. courts. That’s never going to happen.”¹¹²

All of this has culminated in a worldview the pits Islam against the West and causes many to believe that the West is in need of protection.¹¹³ This view has led further to a fear that Sharia law will somehow “infiltrate” American law, which, in turn, has resulted in a movement to ban consideration of Sharia law in the American court system.¹¹⁴

During the last few years, more than two-dozen state legislatures have considered bills proposing a ban of Sharia law from their courtrooms.¹¹⁵ David Yerushalmi’s model law is the basis for most of these bans.¹¹⁶ Yerushalmi is a New York lawyer and is known as “[o]ne of the most outspoken advocates of the anti-Sharia movement.”¹¹⁷ Yerushalmi started a group called Society for Americans for National Existence in January 2006.¹¹⁸ He posted his first “model law,” on the Americans for National Existence’s website.¹¹⁹ The law sought to make observing Islam a crime comparable to sedition, charged as a felony and punished by up to 20 years in prison.¹²⁰ In the summer of 2009, Yerushalmi began writing what he referred to as “American Laws for American Courts.”¹²¹ These “American Laws” included a model law that was intended to prohibit “state judges from considering foreign laws,” namely Sharia law, or rulings that Yerushalmi presumed would “violate constitutional rights in the United States.”¹²²

The motivation behind Sharia law bans is the idea that American courts apply Sharia law and that this is wrong and potentially a threat, but “it is [actually] unclear how many state cases have [even] taken

111. Grunert, *supra* note 8, at 696 (quoting Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. TIMES, Dec. 21, 2011, at A22, available at <http://www.nytimes.com/2011/12/22/us/politics/in-shariah-gingrich-sees-mortal-threat-to-us.html?pagewanted=all>).

112. Fallon, *supra* note 10, at 162 (quoting Shane, *supra* note 111, at A22) (internal quotation marks omitted).

113. See Uddin & Pantzer, *supra* note 89, at 366.

114. See Fallon, *supra* note 10, at 161; Uddin & Pantzer, *supra* note 89, at 367.

115. See Fallon, *supra* note 10, at 162.

116. See *id.* at 161.

117. *Id.*

118. See Uddin & Pantzer, *supra* note 89, at 367 (citing Andrea Elliot, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES, July 31, 2011, <http://www.nytimes.com/2011/07/31/us/31shariah.html> [<http://perma.cc/B6A7-6FQJ>] (archived Mar. 24, 2015)).

119. See *id.*

120. *Id.*

121. *Id.*

122. *Id.*

Sharia [law] into account.”¹²³ For example, in an expansive study of Sharia in America, Sarah M. Fallon compares cases in which Sharia law has been taken into consideration to cases that have involved judges taking Jewish law into consideration.¹²⁴ These cases are mainly only those “relat[ing] to divorce and custody proceedings or commercial litigation.”¹²⁵

The case to which most proponents of Sharia law bans point is *S.D. v. M.J.R.*, which is a New Jersey case from 2010.¹²⁶ In *S.D. v. M.J.R.*, a woman alleged that her husband raped her repeatedly.¹²⁷ The trial court rejected her claim, emphasizing that the man was following his Muslim beliefs as regard certain spousal duties that she, as his wife, was required to perform.¹²⁸ The trial court judge thought that the religious beliefs of the husband with respect to “the roles of husbands and wives negated the criminal intent [that was] necessary” for a sexual assault conviction.¹²⁹ Nevertheless, the appellate court firmly rejected this view, and the decision was reversed.¹³⁰ This case thus only goes to exemplify the fact that, in the few cases in which American law and real or perceived Sharia laws conflict, American law prevails.¹³¹ This coincides with the argument made by Fallon, that the principle of comity, involving “voluntary recognition” given by the courts of one state “to the executive, legislative, and judicial acts of another [state],” prevents the application of foreign law in situations were it might override state law or constitutional rights.¹³²

Despite these protective mechanisms, many states have nevertheless attempted to institute such bans. These bans have ranged widely in breadth. Some create a general ban on the application of international law. Others specifically outlaw all organizations that follow an Islamic school of thought.¹³³ These bans can be separated into three general categories.¹³⁴ The first category includes those bills that particularly point to Sharia law as both “treasonous” and “anti-American.”¹³⁵ The second category includes those bills that simply take in Sharia law as one of multiple systems of law such bills aim to outlaw, systems that those proposing the bills “believe[] are at odds

123. Fallon, *supra* note 10, at 162 (footnote omitted).

124. *See id.*

125. *Id.* (footnote omitted).

126. *See* Grunert, *supra* note 8, at 726 & n.192.

127. *See* *S.D. v. M.J.R.*, 2 A.3d 412, 414–18 (N.J. Super. Ct. App. Div. 2010); Karseboom, *supra* note 47, at 673.

128. *See* *S.D. v. M.J.R.*, 2 A.3d at 422.

129. *See* Grunert, *supra* note 8, at 726.

130. *See id.*

131. *Cf. id.*

132. *See* Fallon, *supra* note 10, at 165, 171.

133. *See* Uddin & Pantzer, *supra* note 89, at 370.

134. *See id.* at 372.

135. *Id.*

with the American legal system.”¹³⁶ Finally, the third category includes bills that create a broad and general ban of international laws.¹³⁷

A major case out of Oklahoma slowed the adoption of anti-Sharia bills. The Oklahoma “Save Our State Amendment,” which fell within the first category of such bans, was successfully contested in the case *Awad v. Ziriox*.¹³⁸ A Muslim citizen of Oklahoma challenged this ban shortly after its adoption. Muneer Awad argued that the ban violated the First Amendment of the United States Constitution.¹³⁹ The Federal District Court for the Western District of Oklahoma held the ban did violate the Establishment Clause of the First Amendment.¹⁴⁰ In August 2013, the Tenth Circuit Court of Appeals affirmed the District Court’s holding.¹⁴¹

Even though the ruling in *Awad v. Ziriox* seems to have significantly chilled the fervor to enact bills banning Sharia law from American courtrooms, the push for such bans is nevertheless indicative of substantial underlying fears and concerns regarding the application of Sharia law in the United States. Such fears and concerns signify a great societal distrust that could easily lead to further challenges to Sharia law in the United States, even its application outside of the courtroom in arbitration.

As regards women, the primary fear is that they may be “‘pressured or coerced into participation, or deprived of rights which would be guaranteed had the matter proceeded under the jurisdiction of civil courts.’”¹⁴² This risk is particularly high in ADR proceedings related to divorce, which, as will be explained below, are matters most often addressed by Muslim religious councils.¹⁴³

Muslim women whose marriage was solely religious are most vulnerable to any inequalities that may exist in the application of Sharia, including the view held by some Muslims “‘that the evidence of a man is worth more than the evidence of a woman,’” that women have inferior property rights, and other similar bases for unequal treatment.¹⁴⁴ There are three possible permutations of a Muslim marriage: 1) a “nikah,” or a Muslim marriage contract without a civil

136. See *id.* at 373.

137. These bills are sometimes referred to as “foreign or international law bills.” See *id.* at 374.

138. See *id.* at 375; see also *Awad v. Ziriox*, 670 F.3d 1111, 1132 (10th Cir. 2013).

139. See Grunert, *supra* note 8, at 699.

140. See *Awad v. Ziriox*, 966 F. Supp. 2d 1198, 1204 (W.D. Okla. 2013); *Awad v. Ziriox*, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010).

141. See *Awad*, 670 F.3d at 1132.

142. Maret, *supra* note 6, at 267 (quoting Nicholas Pengelley, *Faith-Based Arbitration in Ontario*, 9 VINDOBONA J. INT’L COM. L. & ARB. 111, 112 (2005)) (utilizing the quote to describe the same concern for Muslim women in the UK context).

143. See *infra* Part VI.

144. Maret, *supra* note 6, at 269 (quoting Arbitration and Mediation Services (Equality) Bill (2013) H.L. Bill [20] cl. 3(2)(a) (U.K.)).

marriage; 2) both a *nikah* and a civil marriage carried out separately, and 3) a dual ceremony that results in both a religious and civil union.¹⁴⁵ While the latter two permutations may be addressed by the American court system, the first can only be dissolved by the decree of an Islamic council. In the UK, requests for dissolution of *nikah*-only marriages form the majority of cases addressed by the Sharia councils.¹⁴⁶ In such a situation, Muslim women have no recourse to state courts and thus no way of actualizing rights guaranteed by the state. Yet, in the United States, there is an increasing desire among Muslim-American communities and mosques to require *imams* to have proof of a valid civil marriage before performing a *nikah*.¹⁴⁷ This is definitely a step in the right direction as regards the preservation of women's rights of equality under American law, but until it is widespread, this issue must still be taken into account.

Muslim women are similarly left with few options outside of Sharia Law in the issue of the "mahr." A "mahr"—typically included as an element of the Muslim marriage contract—provides for the "payment of goods or valuable property made by the husband to the wife."¹⁴⁸ In common practice, the husband gives only a small portion of the mahr to the wife at the time of marriage, and then the remainder is given at either the time of divorce or the husband's death.¹⁴⁹ Problems arise in the American context when women seek to have the mahr enforced upon divorce. Courts frequently treat the mahr as a prenuptial agreement, but this can create disadvantages where a state court finds the mahr to preclude other recovery by the wife, including alimony or property division, or where courts find it unenforceable due to a failure to meet state statutory requirements, such as consultation of counsel or assets disclosure prior to its creation.¹⁵⁰ There is some trend in Muslim communities in the U.S. to make the mahr more compatible with Western law, and so more easily enforced in American courts, and to have imams declare the mahr to be an irrevocable gift; this practice still results in great potential disadvantage for Muslim women in American courts.¹⁵¹ As a result, these women are more likely to turn only to Sharia councils for enforcement, and thus risk inequalities under the application of Sharia. Also, given the appeals process, detailed above, where the resolution of a mahr conflict is

145. See Shaheen Sadar Ali, *Authority and Authenticity: Sharia Councils, Muslim Women's Rights, and the English Courts*, 25 CHILD & FAM. L. Q. 113, 118 (2013).

146. See *id.*

147. See *id.* at 119 (noting that no such trend exists in the UK).

148. Lowry, *supra* note 56, at 167.

149. *Id.*

150. See *id.* at 167–69 (describing such results in the New Jersey case *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 2014) and the Washington case *In re Marriage of Obaidi & Qayoum*, 226 P.3d 787 (Wash. Ct. App. 2010)).

151. See *id.* at 169 (noting the "disparate impact" suffered by women from judicial interpretation of mahr agreements); see also Ali, *supra* note 145, at 119.

conducted via arbitration, it is unlikely that any woman dissatisfied by the decision of the Sharia council will be successful in challenging it.

Also ancillary to the divorce, is the issue of child custody: varying standards create uncertainty for potential litigants and, as a result, may, like the above issues, lead women to seek Sharia arbitration instead. Under Sharia, the presumption, after the child reaches age nine, is in favor of the father, without consideration of the child's interests.¹⁵² This is an even more complicated issue than the previous two because states have taken a wide variety of approaches in how they deal with child custody matters, and particularly how they treat arbitration in this area.¹⁵³ Some have wholly refused to recognize arbitration awards in child custody disputes, while others have treated child custody arbitration decisions as "voidable" if found not to be in the best interests of the child.¹⁵⁴ The Supreme Court has adopted a middle position that involves recognizing the award unless "harm to the child" results.¹⁵⁵ The "harm to the child" standard is thus much less likely to result in the setting aside of an award than the approach which looks to the best interests of the child. Arbitration of child custody also poses an issue as regards the voluntary consent element necessary to arbitrate any dispute under the FAA and RUAA, because the child's rights are at stake, yet the child, of course, cannot provide voluntary consent to arbitration. There are no current safeguards in place to help ensure that parents consider the child's interest when entering an arbitration agreement.

Wills based on Sharia generally follow inheritance guidelines that do not treat men and women with an equal hand. Sharia inheritance traditions involve providing for the surviving spouse, but with a much higher proportion of the inheritance going to the children of the union than under American law, with the male children receiving twice what the female children receive.¹⁵⁶ By contrast, American law provides the surviving spouse with a statutory one-third share of the inheritance where there are children, one-half where there are not.¹⁵⁷ Due to these major differences, Muslims, especially men, have an incentive to try to include an arbitration clause in their wills. Yet, this, like disputes over child custody, creates an issue as regards voluntary consent. Because heirs would not have given their consent to such a clause, it is unlikely that any state would enforce an arbitration award on matters of

152. See Lowry, *supra* note 56, at 170 (explaining that, according to the *Hanafi* school, "the mother retains the right to custody over a boy until he is seven and a girl until she reaches age nine" (footnote omitted)).

153. See Lowry, *supra* note 56, at 171-73 (providing a sampling of different approaches states take on this issue).

154. See *id.*

155. See *id.* at 171-72 (describing the approach taken in the case *Troxel v. Granville*, 530 U.S. 57 (2000)).

156. See *id.* at 174-75.

157. See *id.* at 174.

inheritance.¹⁵⁸ Nevertheless, because the review process for arbitration awards is difficult, and may be intimidating to those disadvantaged by the Sharia system who may not have sufficient knowledge or access to information on the topic and who may also be pressured by their communities or family to keep the dispute within the Islamic council, there is a real risk that such awards may go unchallenged without recourse to American courts.

IV. THE CANADIAN RESPONSE TO SHARIA ARBITRATION

Until the creation of the Islamic Institute of Civil Justice (IICJ) in 2003, many forms of religious ADR for family law disputes were commonplace in Canada.¹⁵⁹ This was done under the authority granted by the 1991 Arbitration Act.¹⁶⁰ Like the Federal Arbitration Act in the United States, the Canadian Arbitration Act permitted parties to arbitration “to resolve their civil disputes using the legal framework of their choice.”¹⁶¹ Canadian courts, also like courts in the United States, typically declined to intervene with these religious arbitrations insofar as the disputes concerned religious doctrine.¹⁶² Canadian courts only became involved where individual civil, property, or constitutional rights were at issue.¹⁶³ Such mediations, negotiations, and arbitrations went largely unnoticed by the Canadian public until the 2003 creation of IICJ.¹⁶⁴ The IICJ, closely following its creation, made known an intention to establish a Muslim judicial tribunal, a “Darul-Qada.”¹⁶⁵ The IICJ intended the Darul-Qada to serve as a Sharia arbitration tribunal in Ontario.¹⁶⁶

The main concern raised by Ontario citizens regarding the IICJ was that the application of Sharia law in the binding context of an arbitration might lead to the creation of a parallel legal system in Ontario, one which would not recognize the same equality values as the Ontario system, and so could result in disadvantages for vulnerable

158. See *id.* at 175.

159. See Bakht, *supra* note 3, at 120 (“Jewish arbitrations have been functioning in this manner for many years without controversy.”); Farrow, *supra* note 2, at 79 (“In Ontario, Jews, Christians, Muslims, and others have engaged in religious-based dispute resolution processes for years.” (footnote omitted)).

160. See Bakht, *supra* note 3, at 120.

161. *Id.*

162. *Id.* at 127.

163. *Id.*

164. See *id.* at 120 (explaining that religious arbitrations occurred without notice until 2003 “when a group of Muslims announced their intention to create [religious] tribunals”); Farrow, *supra* note 2, at 79 (discussing the start of the public debate about the use of Sharia law in Canada).

165. See Farrow, *supra* note 2, at 79.

166. See *id.*

members of Ontario society, namely Muslim women and children.¹⁶⁷ In part, this was because the status quo at the time did not provide for any review of such processes aside from forms of review that depended upon party initiative in bringing the matter before a court.¹⁶⁸ Due to the fact that much of the concern regarding vulnerable individuals was based upon ideas of persons having a dearth of information on their rights under Ontario law or being disproportionately affected by community and family pressures in choosing arbitration, the status quo approach to review would likely be inadequate to serve the needs of these individuals.¹⁶⁹

In response to the concerns of citizens opposed to the IICJ, the Ontario government gave former Ontario Attorney General Marion Boyd a mandate to research the operation of religious tribunals in the realm of arbitration in June 2004.¹⁷⁰ This mandate required Boyd to determine whether concerns, particularly those related to the disadvantaging of vulnerable individuals, were well-founded, and how the Ontario government could best deal with them in this situation.¹⁷¹

Boyd did not find religious arbitrations to be inherently at odds with the rights of vulnerable individuals, but she did find that any concerns would be best addressed through additional safeguards. Broadly, Boyd recommended that the government modify the process established by the 1991 Arbitration Act in such a manner as to enhance all current “checks and balances” instead of relying on party-initiative to start review processes after a harm is already done.¹⁷² Boyd released a report including her findings and recommendations in December 2004. In this report, Boyd recommended family law arbitrations continue, but only as modified by increased government regulation of such arbitrations.¹⁷³

Boyd advanced such changes as obliging parties to meet certain “threshold requirements” prior to arbitration, including mandating that parties to an arbitration agreement be given “independent legal advice” before making the agreement.¹⁷⁴ She also recommended that “escape opportunities” be made available after the arbitration agreement was finalized, but before commencement of the arbitral process, that review for “compliance with Ontario Law” be made

167. See Bakht, *supra* note 3, at 121–22 (describing the “sharia debate” that went on for many weeks).

168. See Shelley McGill, *Religious Tribunals and the Ontario Arbitration Act, 1991: The Catalyst for Change*, 20 J.L. & SOC. POL’Y 53, 56–57 (2005) (noting the difficulty in obtaining judicial review of arbitration awards).

169. See *id.* at 56–57.

170. See Farrow, *supra* note 2, at 79.

171. See *id.*

172. See McGill, *supra* note 168, at 55–56.

173. See *id.* at 56.

174. *Id.*

mandatory, or that such mandatory review be applied in all situations where a person seeks to have an arbitration award enforced via Ontario Court provisions.¹⁷⁵ Boyd also recommended stronger regulation of the arbitrators than of the arbitration award, including requiring membership in professional organizations with codes of conduct and the submission of annual statistical reports of appeals and complaints.¹⁷⁶ This is, in part, because she intended that arbitrators serve an additional screening function regarding parties to the arbitration, examining each for signs of unequal power and/or domestic violence.¹⁷⁷ The arbitrator would then be required to “certify” that the parties entered into arbitration voluntarily and with full information.¹⁷⁸ Boyd also recommended instituting a public campaign to inform Ontario citizens of the Arbitration Act, family law and immigration law issues, general legal rights and obligations, and other forms of dispute resolution.¹⁷⁹

In spite of Boyd’s research, the Canadian government adopted a position “that allowing Sharia ‘to get a foothold in Canada’ would seriously jeopardize Canadian values.”¹⁸⁰ Despite the substantial research done by Boyd leading to the above recommendations, the Ontario government announced on September 11, 2005 that the use of Sharia law in arbitrations of family law disputes would be banned.¹⁸¹ This position was made official in February 2006 via the enactment of the Family Statute Law Amendment Act, which amends both the Arbitration Act and the Family Law Act.¹⁸² This was largely the result of the massive lobbying and public awareness tactics of feminists and women’s organizations that were strongly opposed to the idea of Sharia arbitration.¹⁸³

175. *Id.*

176. *Id.* at 62, 64 (“In this context (multiculturalism) I believe it is important to seek solutions that attempt not only to respect the rights of minority groups in the larger cultural and political context of Ontarian society, but also to ensure that individuals within that minority, as citizens of this province, are able to exercise their rights as individuals with the greatest of ease and with minimal cultural and personal risk.” (footnote omitted) (quoting MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 94 (2004)).

177. *See id.* at 63–64.

178. *See id.* at 64 (theorizing that such a requirement might create a “new and undetermined liability issue” for arbitrators).

179. *See* Provins, *supra* note 6, at 524–25.

180. Bakht, *supra* note 3, at 130–31.

181. *See id.* at 121–23.

182. *See id.* at 140; Farrow, *supra* note 2, at 80.

183. *See* Bakht, *supra* note 3, at 130 (“In June 2005, the No Religious Arbitration Coalition was formed. This coalition comprised over 100 organizations and individuals brought together by the Canadian Council of Muslim Women to actively oppose the use of religious laws in family law arbitration in Ontario.” (footnote omitted)). This coalition was formed around the belief that Muslim women’s rights would be repressed by the operation of religious law. *See id.* at 120–21.

This ban can be seen as actually creating a new harm to exactly those members whom the government seeks to protect.¹⁸⁴ The Ontario government may wish to protect women who might not be expressing a voluntary choice in choosing arbitration due to faith, community, and family pressures.¹⁸⁵ Its current stance on religious arbitration may nevertheless further disadvantage these women.¹⁸⁶ The ban is considered by some to be excessively paternalistic in that it is preventing well-educated, well-informed women from making a free choice to have a dispute settled according to their faith.¹⁸⁷ Such an interpretation of the ban leads to criticism of it as a religiously discriminatory measure.¹⁸⁸ There is also the possibility that disputes will continue to be settled extra-judicially according to Sharia law but without the protections that state involvement could provide.¹⁸⁹

Nevertheless, while these concerns seem most pressing on the surface, there is some indication that they are not truly warranted, given the actual wording of the Family Statute Law Amendment Act. Section 2.2(1) states:

When a decision about a matter described in clause (a) of the definition of 'family arbitration' in section 1 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction,

the process is not a family arbitration; and

the decision is not a family arbitration award and has no legal effect.¹⁹⁰

The Family Statute Law Amendment Act does not in fact create a blanket prohibition of all religious arbitrations.¹⁹¹ In fact, one commentator has suggested that the state could never fully prohibit or adequately police "the practice of faith-based dispute resolution" given its private nature.¹⁹² Thus, the Family Statute Law Amendment Act actually reflects the demands made by more moderate women's organizations, for example: the Women's Legal Education and Action Fund (LEAF)'s suggestion that arbitrations concerning family law matters be allowed to include religious precepts, "but only to the extent

184. See McGill, *supra* note 168, at 57–59.

185. See *id.* at 58.

186. See *id.* at 57–58.

187. See *id.* at 58; see also Provins, *supra* note 6, at 525 (illustrating how the Muslim religion can be interpreted to require practicing Muslims to resolve their disputes according to Sharia in order to fulfill their duties under Islam).

188. See McGill, *supra* note 168, at 57, 59.

189. See Provins, *supra* note 6, at 539–40 (stating that, even though secular law may restrict some aspects of religious law, it provides an outlet that would otherwise be closed in a completely secular court system).

190. Family Statute Law Amendment Act, 2006, S.O. 2006, c. 1 (Can.).

191. See Farrow, *supra* note 2, at 81 (pointing out that a ban on tribunals that are not in accordance with Canadian law does not ban all religious tribunals).

192. See *id.*

that they do not conflict with Ontario family law.”¹⁹³ As a result, the Family Statute Law Amendment Act can be seen as occupying a middle ground between a complete ban on the application of all religious precepts in arbitration and complete recognition of all such applications. Instead the Family Statute Law Amendment Act manages to still accommodate those, including women, who wish to have their disputes settled according to Islamic principles, while still protecting them from violations of their statutorily guaranteed rights.¹⁹⁴ This is because the Family Statute Law Amendment Act still allows individuals to settle their disputes “on any basis that they please,” so long as that basis is mutually agreed upon (though such decisions will not automatically be deemed binding).¹⁹⁵ Moreover, religious arbitrators may still issue decisions that will be deemed binding by Canadian courts by simply providing that the outcomes of their decisions conform with Canadian family law.¹⁹⁶ Therefore, while many have termed the Family Statute Law Amendment Act as a complete ban of religious arbitration, it is, in fact, something more of a middle approach, providing a sort of “balance between religious freedom and equality.”¹⁹⁷

While concerns remain regarding the fact that the amendments do nothing to provide any of the other additional safeguards proposed by Boyd, including the provision of public education and independent legal advice, some believe it nevertheless paves the way for internal change within the Islamic community—possibly catalyzing interpretive change that will bring Sharia law closer to a position favoring equality of women.¹⁹⁸

V. THE UNITED KINGDOM RESPONSE TO SHARIA ARBITRATION

The United Kingdom’s approach to Sharia arbitration has been characterized as one of, if not actually the most, accommodating

193. Bakht, *supra* note 3, at 129–30 (quoting WOMEN’S LEGAL EDUCATION AND ACTION FUND (LEAF), SUBMISSION TO MARION BOYD IN RELATION TO HER REVIEW OF THE ARBITRATION ACT (2004)) (noting also that LEAF later changed its position to conform with the desire of other feminist groups to ban all religious precepts from arbitration even if they do not conflict with Ontario law).

194. *See id.* at 133–34.

195. *See id.* at 141–42.

196. *See id.*

197. *Id.* at 143.

198. *See id.* (expressing hope that accommodation of Islamic law could “create a ‘third space’ for Muslim women”); *see also* Ali, *supra* note 145, at 122–23 (outlining an approach to Muslim law that accounts for the “plural identities for Muslims living in non-Muslim jurisdictions and mutual relationships between Muslim and non-Muslim communities”).

positions.¹⁹⁹ Yet, such praise—or such censure depending upon the position of the critic—is misleading. The UK, in actuality, restricts the application of Sharia to family law matters more stringently than even Canada.

Islamic councils—courts, albeit ones without statutory authority—have been allowed to develop in the UK. Councils are allowed as a result of the view “that they are manifestations of the Muslim diaspora’s need for forums adjudicating on Islamic law.”²⁰⁰ The system of councils has endured public criticism since its inception in the 1970s. The greatest criticism arose after a the Archbishop of Canterbury gave a speech in February 2008 in which he proposed greater legal recognition of the decisions of these tribunals.²⁰¹ Public concern following the Archbishop’s speech, similar to the sort of concerns that sparked Sharia law bans in the United States, prompted the UK government’s Arts and Humanities Research Council to commission Cardiff Law School to research the family law-related activities of Sharia councils.²⁰² The resulting report provided a detailed overview of the exact legal position occupied by these councils. In recent years, approximately eighty-five Sharia councils have operated within the UK. The British government does not oversee the administration of these councils, but the councils do not lack oversight. Thirteen of the eighty-five estimated councils are under the administration of the Islamic Sharia Council, the largest council in the UK.²⁰³ The publicly active Muslim Arbitration Tribunal (MAT) oversees many of the others.²⁰⁴

Family law-related disputes are a major part of the work and purpose of these councils. These councils are considered “unofficial, extra-legal” bodies that engage in providing advice on matters of religious interpretation and practice, resolving disputes via ADR mechanisms, and providing expert opinions for British courts “on Muslim family law and other matters.”²⁰⁵ “[Ninety-five percent] of the

199. Cf. 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, 669, 680 (2012) (“Britain has recently conferred legal validity to decisions made by courts that apply sharia law . . .”).

200. Ali, *supra* note 145, at 113.

201. See Ahmed & Norton, *supra* note 5, at 364–65.

202. See *id.* at 365.

203. GILLIAN DOUGLAS ET AL., SOCIAL COHESION AND CIVIL LAW: MARRIAGE, DIVORCE AND RELIGIOUS COURTS 28 (2011); see also Maret, *supra* note 6, at 255 (“[A]t least eighty-five Islamic law councils or tribunals currently operate throughout the United Kingdom.” (footnote omitted)).

204. See DOUGLAS ET AL., *supra* note 203, at 28; Maret, *supra* note 6, at 263 (framing MAT’s creation in 2007).

205. See Ali, *supra* note 145, at 126 (footnote omitted).

case load for Sharia councils [in the UK] encompasses women seeking [Muslim] divorce.”²⁰⁶

There are two main ways in which decisions of religious councils are recognized in the UK. First, the doctrine of “consensual compact,” which “recognises that the rules and structures of voluntary associations are binding on assenting members,” provides support for English courts’ policy of non-interference as regards the decisions of such councils pertaining to religious practices, interpretations of religious texts, etc.²⁰⁷ Second, courts may recognize a religious council’s decision based on the UK’s Arbitration Act of 1996.²⁰⁸

As mentioned above, religious councils are not statutory tribunals, but they may still serve as arbitral tribunals for the resolution of civil disputes under the Arbitration Act of 1996.²⁰⁹ Arbitral decisions are enforceable under the Arbitration Act of 1996 so long as the parties to the arbitration had a valid arbitration agreement setting out all terms of the arbitration prior to its occurrence, and the agreement is not “considered by the courts to be unreasonable or contrary to public policy.”²¹⁰ As of 2012, only one Sharia council was recognized by the state as operating under the Arbitration Act of 1996: the MAT.²¹¹ Further, the Arbitration Act of 1996 only grants authority to decide civil disputes, which excludes, in the UK, criminal law disputes and the resolution of family law disputes from the realm of arbitration.²¹² It is also worth noting that the Arbitration Act of 1996 provides immunity for arbitrators as it relates to any of their actions or omissions occurring during the arbitration unless those acts or omissions are shown to have been in bad faith.²¹³

Some commentary suggests that the Arbitration Act may in fact actually apply to family law disputes, but simply has yet to be recognized by courts as doing so.²¹⁴ This position is given additional support by the proposal of the Arbitration and Mediation (Equality) Services Bill in 2011, which is intended to amend the Arbitration Act to clarify that the Act gives no authority to arbitrate any matter within the jurisdiction of family courts.²¹⁵ The Equality Bill particularly aims to protect victims of domestic abuse and to further support equality

206. *Id.* at 114.

207. DOUGLAS ET AL., *supra* note 203, at 10, 16.

208. *See id.* at 16.

209. *See* Ahmed & Norton, *supra* note 5, at 368.

210. *Id.* (footnote omitted); *see also* DOUGLAS ET AL., *supra* note 203, at 16–18 (setting out the limits placed on arbitrations by the Arbitration Act 1996); Maret, *supra* note 6, at 262–63.

211. *See* Ahmed & Norton, *supra* note 5, at 368 (noting that the Muslim Arbitration Tribunal is the “only . . . sharia council [that] currently operates under the [Arbitration] Act”).

212. *See id.*

213. *See* Maret, *supra* note 6, at 263.

214. *See* Ahmed & Norton, *supra* note 5, at 369.

215. *See id.*

under the law of arbitration and mediation.²¹⁶ The Bill even includes a provision that would impose a maximum five-year jail sentence on anyone claiming religious councils have jurisdiction over family law disputes or criminal matters.²¹⁷

The Equality Bill demonstrates the widely held concern in the UK that Islamic religious councils are involved in family and criminal law matters to a degree that undermines the equal rights established by the European Charter of Human Rights (ECHR) and UK legislation.²¹⁸ This concern is based in the belief that, due to a general lack of state oversight, religious councils have increasingly arbitrated matters beyond just commercial disputes contemplated by the Arbitration Act.²¹⁹ Under the Arbitration Act, appeal is only possible if all parties agree to it or the court gives particular leave, and, as a result, is rarely utilized.²²⁰ Furthermore, the Arbitration Act of 1996 provides arbitrators with broad immunity.²²¹ This is the exact opposite of one of Boyd's main recommendations for the Ontario government.²²²

Thus, contrary to popular viewpoint, it would seem that the approach of the UK to Sharia arbitration of family law disputes is actually stricter than that of Ontario, which allows arbitration, even of family law matters, so long as the outcome is not contrary to Canadian law.

VI. COMBATING THE DANGERS TO ARBITRATION UNDER SHARIA LAW IN THE UNITED STATES

Because the United States actually gives much more autonomy than either Ontario or the UK to religious arbitration tribunals by allowing religious tribunals to arbitrate all matters except criminal law according to their own precepts, the dangers and concerns addressed by those states potentially pose an even greater risk in the United States. As recognized in the UK and Canada, the most pressing dangers of Sharia law as applied in family law matters via arbitration are those facing members of the Muslim community who have the least power: women and children.

In attempting to prevent and alleviate some of the harms and inconsistencies, it must be kept in mind that doing so runs the risk of

216. *Maret, supra* note 6, at 256.

217. *See id.* (asserting that this "would effectively force Islamic arbitration councils 'to acknowledge the primacy of English law'" (footnote omitted)).

218. *See id.* at 272-73 (describing the English Equality Act 2006 and Equality Act 2010).

219. *See id.* at 267.

220. *See id.* at 267-68.

221. *See id.* at 263.

222. *See McGill, supra* note 168, at 64 (analyzing Boyd's recommendation to regulate the profession by "supervising the quality of the arbitrator").

infringing upon Muslim religious freedom, as guaranteed by the First Amendment.²²³ Particularly, it should be recognized that many individuals turn to religious councils in order to fulfill faith-based commitments. The fourth sura of the Quran—"the An-Nisa"—states practicing Muslims should refer differences among themselves to "Allaah and His Messenger," which has been interpreted as iterating an obligation on the part of faithful Muslims to have their disputes settled by Islamic councils.²²⁴ In fact, increasing numbers of Muslim-Americans are said to be seeking such dispute resolution as an "act of faithful piety."²²⁵ The possibility that some practicing Muslim-American women may wish, with full information and freedom of decision, to refer their disputes to an Islamic council as an expression of religious piety, should therefore not be discounted. Attempts to preserve women's rights should not unduly interfere with their freedom to make this decision. It should also be recognized that, in some instances, a woman might benefit more by the application of Sharia law to a dispute than American law.²²⁶ While safeguards may be warranted, freedom of choice in such matters should be preserved.

Potentially the easiest, and the most direct, mode of dealing with rights-based concerns would be adopting a complete ban on religious arbitration in family law matters, as is proposed by the Equality Bill in the United Kingdom.²²⁷ Doing so would ensure that all parties in such disputes are given the equal protection of their individual rights under American law. Yet, such a course of action would greatly undermine the religious freedom of those seeking to resolve disputes as a matter of piety. Unless the ban were accompanied by a significant enforcement mechanism, there is the possibility that religious arbitration on family law matters would continue without state oversight, despite the legislature's desire that it should not.²²⁸ Such a ban would most likely simply result in religious dispute resolution mechanisms going further underground, making it even more difficult for the state to ensure that vulnerable individuals are adequately protected. Also, a ban of this type would affect not only Muslim-Americans, but also American Christians and Jews who settle disputes

223. See U.S. CONST. amend. I.

224. McFarland, *supra* note 59, at 379.

225. *Id.* at 380 (citing Asifa Quraishi-Landes, *Rumors of the Sharia Threat Are Greatly Exaggerated: What American Judges Really Do with Islamic Family Law in Their Courtrooms*, 57 N.Y.L. SCH. L. REV. 245, 253-54 (2012-2013)).

226. See Quraishi-Landes, *supra* note 225, at 253-54 (highlighting *fiqh* provisions that particularly benefit women, such as those recognizing women's property rights and compensability of their housework).

227. See Ahmed & Norton, *supra* note 5, at 369 (characterizing the Bill as proposing "to clarify that any matter which is within the jurisdiction of the family courts cannot be the subject of arbitration proceedings").

228. See, e.g., Farrow, *supra* note 2, at 81 (noting the difficulty of enforcing an outright ban).

through religious tribunals. Therefore, large lobbying efforts and much opposition to a full ban could be expected.

Another possibility is adopting the approach of the Ontario government. While the Ontario approach has received much criticism by those who believe it to truly be a full ban of all Sharia arbitration, it is actually a more open approach than the current position of the UK.²²⁹ Rather than completely banning all religious arbitration in the realm of family law, American states might instead choose to create legislation that would render unenforceable all arbitration awards that are found to be contrary to American civil law upon review. Such a goal could also be forwarded at the federal level through an amendment to the FAA. Yet, as with the previous option, this would still undermine the freedom of choice of those seeking religious dispute resolution as an expression of their piety in that by preventing enforcement of any particular provision of a tribunal decision that differs from American law might render a significant portion of religious tribunal decisions nonbinding. This would be particularly unfortunate in those areas where the rights of vulnerable individuals are actually better protected by their religious precepts than by American law. Nevertheless, these instances may be few compared to those where protection under civil law would be advantageous. Also, the same risk as mentioned above regarding inability to fully enforce such a policy is present here as well.

Either hard-lined stance seems to come with major drawbacks in terms of enforcement and encroachment into the realm of protected religious exercise. A potentially better method would be a more multifaceted approach that is particularly tailored to exactly those concerns that are most pressing, while leaving areas of core religious freedom untouched. Such an approach would likely resemble that proposed by Boyd during the Ontario debate.²³⁰

The threshold requirement advocated by Boyd, which requires that each party to a religious arbitration receive independent legal counsel prior to consenting to an arbitration agreement, and also prior to commencing the arbitral process itself, would greatly help to ensure that individuals are made aware of their rights under American law and so are better able to make an informed decision with the disadvantage of possible ignorance somewhat lifted.²³¹ This would particularly be the case where those who provide the independent legal advice are not only experts in American law, but also experts in Sharia law, and so better able to help their clients weigh potential options and outcomes in each venue. While such experts may be few in number today, it is likely that the rise in the Muslim-American population and its further integration into American society will result in such experts becoming less rare; thus, making this a more viable option.

229. See *supra* Parts III–IV.

230. See *supra* Part V.

231. See McGill, *supra* note 168, at 56.

Boyd's recommendation regarding a public education campaign could be helpful in the United States as well.²³² Receiving the advice of independent legal counsel could be cost-prohibitive to some, and it is debatable that states (or even the tribunals themselves) would be willing to take on the costs. Therefore, it is of particular importance to ensure that those entering into agreements for religious arbitration have their own education and information to fall back upon.²³³ Conducting public campaigns to educate minorities, especially recent immigrants, on their rights under American law, particularly family and immigration law and how alternative dispute resolution mechanisms work in the United States, would doubtless be of great value. While there is some risk that such a campaign would seem patronizing, there are many ways in which it could be inoffensively provided through immigration authorities, settlement organizations, and the like.²³⁴ The benefits could be expected to outweigh the potential slight.

Boyd also recommended providing for "escape opportunities" that would arise after the arbitration agreement was created but before the start of arbitration proceedings.²³⁵ One such escape opportunity could be embodied by the requirement that the parties receive independent legal advice, for the second time, prior to the commencement of the arbitration, coupled with the ability to void the agreement. While this approach would be capable of providing additional protections for those who might change their minds during the interim, it nevertheless runs contrary to principles of common law contracts because it would create a high degree of uncertainty in any arbitration agreement. As a result, this particular recommendation is not here advocated.

Mandatory review based on enforcement is also of limited utility in this context. Already such review is provided in the American system. What might be more helpful would be the establishment of a uniform standard of review, particularly in the area of child custody matters. A "voidable" approach, as described above, could easily be expanded to take in the entirety of the family law context by basing it upon the realization of individual rights guaranteed by civil law.²³⁶ Such an approach would run the same risks as that adopted by the

232. See Provins, *supra* note 6, at 524–25 (listing public outreach as a core aspect of the Boyd recommendations).

233. See Shelley McGill, *Family Arbitration: One Step Forward, Two Steps Back*, 21 J.L. & SOC. POL'Y 49, 57 (2007) (discussing the heightened costs associated with the changes in the Family Statute Law Amendment Act).

234. For example, this information could easily be added to information given by U.S. Citizenship and Immigration Services upon application of citizenship. See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, WELCOME TO THE UNITED STATES: A GUIDE FOR NEW IMMIGRANTS (2012), available at <http://www.uscis.gov/sites/default/files/files/nativedocuments/M-617.pdf> [<http://perma.cc/569J-6V9D>] (archived Feb. 17, 2015).

235. McGill, *supra* note 168, at 56.

236. See Lowry, *supra* note 56, at 171–72, 178–79 (analyzing voidability in the context of child custody cases).

Ontario government.²³⁷ As a result, a lesser standard for voidability—a “gross violation of rights standard”—might be more appropriate.

Stronger regulation of arbitrators could lead to significant positive results in this area. Requiring annual reports from religious arbitrators, which would include statistics related to appeals and complaints, could allow the state a mode of controlling the quality of arbitrations without formal review.²³⁸ This would provide soft pressure, rather than the hard pressure of review. Because it would be required annually, it would in no way be undermined by individual decisions and unequal information, both of which undermine the review process. Included in this recommendation, Boyd also advocated for requiring arbitrators to certify that parties before them are not subject to domestic violence or unequal power, both of which could undercut voluntariness.²³⁹

As described above, a certification requirement of this type could create new liability issues, which could undermine the function of an arbitrator. Thus, instead of requiring a certification as such, it is advocated here that religious arbitrators (or arbitrators generally, in order to avoid potential accusations of discrimination) undergo required training that would help them not only to identify power imbalances and the signs of domestic abuse, but to learn ways of diminishing the effects of such factors on the arbitration process. This could then be coupled with a mechanism by which arbitrators who identify power imbalance or domestic abuse may refer the parties to counseling or recommend additional legal advice for the disadvantaged party as regards additional options, especially review processes.

Further, apart from positive recommendations such as these, there is a recognized potential in the Muslim religion for evolution through creation of new *fiqh*. It is thus posited by a variety of commentators that Islam may gradually bridge the gap between Western individual rights and Sharia all on its own, due to pressures from within rather than from without.²⁴⁰ In fact, this is deemed by some to be particularly mandated within the Muslim religion through the doctrine of *fiqh al-aqalliyyat*, which establishes that Muslim minorities residing in non-Muslim states deserve and have the right to adapt a “special new legal discipline” that addresses their unique

237. See *supra* Part V.

238. See McGill, *supra* note 168, at 64–66.

239. See *id.* at 62–64.

240. See, e.g., Ali, *supra* note 145, at 123 (discussing contemporary *fiqh*); Quraishi-Landes, *supra* note 225, at 255 (asserting that as the American Muslim community grows, it creates “homegrown Islamic scholars” who begin to bridge the gap between American law and Sharia law); Jemma Wilson, Note, *The Sharia Debate in Britain: Sharia Councils and the Oppression of Muslim Women*, 1 ABERDEEN STUDENT L. REV. 46, 63 (2010) (describing such trends as occurring via a process known as “transformative accommodation”).

situation, promoting religious needs that may not be identical to those of Muslims living in Muslim states.²⁴¹

Taking a more open approach as here advocated, which is less intrusive and more easily adapted to changes in Muslim practice would help to encourage, rather than hinder, such evolution, and might itself be reinforced by it.

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241. See Ali, *supra* note 145, at 123.

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