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MAHR PROVISIONS AND THE CASE FOR SHARI'A ARBITRATION

INTRODUCTION

The global Muslim population is currently estimated at 1.8 billion people, comprising twenty-four percent of the total global population.¹ The United States alone is home to 3.45 million Muslim individuals.² Further, both global and national Muslim populations are predicted to grow rapidly over the next half-century.³ The Pew Research Foundation predicts that between 2015 and 2060, the global Muslim population will grow over twice as fast as the overall world population⁴ and that by 2050, the Muslim population in America will reach 8.1 million.⁵ These changes would make Muslims the second-largest religious group in the United States⁶ and the largest religious group in the world by the second half of this century.⁷

Yet, from a legal standpoint, American courts are still not familiar with many aspects of Islamic legal and cultural traditions. Nowhere is this more apparent than in the context of Islamic marriage. Marriage is a particularly complex area of family law because it is not singularly a civil matter, but instead a fusion of legal rules, religious practices, and socio-cultural expectations and norms.⁸ Judicial interpretations in United States courts of Islamic marriage contracts reflect this complexity.

In particular, U.S. courts struggle to interpret provisions within Islamic marriage contracts, called *mahr* provisions, which regulate the division of

1. PEW RESEARCH CTR., THE CHANGING GLOBAL RELIGIOUS LANDSCAPE 8 (Apr. 5, 2017), <http://assets.pewresearch.org/wp-content/uploads/sites/11/2017/04/07092755/FULL-REPORT-WITH-APPENDIXES-A-AND-B-APRIL-3.pdf> [<http://perma.cc/7PA9-33LK>]. This makes the Muslim population the second largest religious group in the world. *Id.* Only the global Christian population, measured at 2.3 billion people and comprising 31.2% of the total global population, is larger. *Id.* The third largest group is religious “nones” (those who are unaffiliated with any religion) with 1.2 billion people (16% of the global population) followed by Hindus with 1.1 billion people (15.1% of the global population). *Id.*

2. BESHEER MOHAMED, PEW RESEARCH CTR., NEW ESTIMATES SHOW U.S. MUSLIM POPULATION CONTINUES TO GROW (Jan. 3, 2018), <http://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/> [<http://perma.cc/2FNP-A2NJ>].

3. MICHAEL LIPKA & CONRAD HACKETT, PEW RESEARCH CTR., WHY MUSLIMS ARE THE WORLD'S FASTEST-GROWING RELIGIOUS GROUP (Apr. 6, 2017), <http://www.pewresearch.org/fact-tank/2017/04/06/why-muslims-are-the-worlds-fastest-growing-religious-group/> [<https://perma.cc/X4D8-5GN5>]; MOHAMED, *supra* note 2.

4. LIPKA & HACKETT, *supra* note 3.

5. MOHAMED, *supra* note 2.

6. *Id.*

7. LIPKA & HACKETT, *supra* note 3.

8. See Ann Lacquer Estin, *Unofficial Family Law, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT* 92, 93 (Joel A. Nichols ed., 2012).

property in the case of certain types of divorce.⁹ This confusion is due in large part to a misunderstanding of the context and function of the *mahr*, leading courts to either invalidate these provisions blanketly or otherwise improperly treat *mahr* agreements as prenuptial contracts.¹⁰ Another common issue presents itself when parties seek enforcement of a *mahr* agreement that was part of a divorce obtained outside of the United States, specifically when the divorce was achieved through the unilateral method of *talaq*.¹¹ Cases demonstrate a multitude of court outcomes, often inconsistent with one another.¹² What results is unreliable holdings, unclear precedent, a disregard for party intentions, and, ultimately, a perverse incentive for either husband or wife (and sometimes both) to seek opportunistic enrichment in a court with little knowledge of the cultural and religious context of these agreements.¹³

This Note suggests that the solution to this chaos is not simply to instruct American judges on the intricacies of Islamic law and marriages (although that certainly would not worsen the issue). Instead, a pluralist approach to Islamic marriages should be adopted, similar to the stance courts have taken on Jewish legal arbitration tribunals.¹⁴ Under this regime, Islamic arbitrators would serve as an alternative to civil courts in resolving conflicts involving *mahr* agreements, under the oversight of secular law.¹⁵ This approach would not only ensure protection of basic rights, but would also encourage self-regulation by the religious arbitral body to conform to fundamental civil family law principles of due process and equal protection.¹⁶ Finally, it would recognize and validate that there is more than one conception of marriage and divorce within American society.¹⁷

I. ISLAMIC MARRIAGE AND *MAHR* AGREEMENTS

In order to properly situate *mahr* agreements within their cultural context, it is important to understand some basic aspects of Islamic law and the functioning of Islamic marriages.¹⁸

9. See discussion *infra* Part II.

10. See *infra* Section II.A.

11. See *infra* Section III.D.

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Section IV.A.

15. *Id.*

16. See *infra* Part IV.B.

17. See *infra* Part IV.C.

18. Despite the use of the phrases “Islamic law” and “Islamic marriage” in this Note, modern Islamic states are far from homogenous. While some amount of generalization is necessary for the sake of analysis of the role of *mahr* agreements, I do not intend to suggest that these generalizations hold true in every Islamic marriage.

To begin, it is helpful to note a key difference between the importance of religious law in Islam as compared to Christianity. As a religious practice, Christianity is focused on “doctrinal conformity,” that is, that its followers have a particular faith or set of beliefs.¹⁹ Thus, “to be a Christian is in large part about holding a particular set of beliefs about God, Jesus Christ, and salvation.”²⁰ Islam and Judaism, on the other hand, additionally focus on “behavioral conformity”²¹ or, as one author put it, “personal observance.”²² This includes the fundamental idea that followers of the religion strive to engage in “a mode of religious living.”²³ The emphasis thus lies not only in faith or religious theory, but in daily acts and practices.²⁴ This idea of religious living in Islam is embodied in the concept of *shari'a*, which, translated literally, means “a path to water.”²⁵ Although *shari'a* is often thought of in the United States as “Islamic law,” it more accurately “refers to the primary way in which humans should relate themselves to God.”²⁶ *Shari'a* is operationalized into law by a body of legal theory known as the *fiqh*.²⁷ The *fiqh* was created by classical Islamic legal theorists as they set out to interpret the Quran, the sacred text of Islam believed to have been dictated directly to Mohammad by God.²⁸ The *fiqh* governs most aspects of civil law in Islamic countries, including family law and marriages.²⁹ Though there are variations within Muslim countries, in many, “the formal municipal law closely follows the *fiqh* on matters of marriage and family.”³⁰

This strong tie between modern municipal law and the *fiqh* on domestic matters is paralleled by strong support of traditional Islamic family law by

19. See Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 UTAH L. REV. 287, 295 & n.39 (2011).

20. *Id.* at 295.

21. *Id.* at 295 n.39.

22. Mustafa Akyol, *Sharia's Winding Path into Modernity*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/opinion/sharia-s-winding-path-into-modernity.html>.

23. Oman, *supra* note 19, at 295 n.39.

24. *Id.* at 295 & n.39.

25. *Id.* at 296.

26. *Id.*

27. *Id.* at 296.

28. *Id.* at 299. This is reflected in the finding of a 2013 Pew Research Foundation survey which found “that most Muslims believe sharia is the revealed word of God rather than a body of law developed by men based on the word of God.” PEW RESEARCH CTR., THE WORLD'S MUSLIMS: RELIGION, POLITICS AND SOCIETY 41 (Apr. 30, 2013), <http://assets.pewresearch.org/wp-content/uploads/sites/11/2013/04/worlds-muslims-religion-politics-society-full-report.pdf> [http://perma.cc/85KK-TBAC]. Though the distinction may be subtle it is an important nuance in understanding the Islamic religion.

29. See Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 192–93 (2002).

30. Oman, *supra* note 19, at 291. See also JAN MICHIEL OTTO, SHARIA AND NATIONAL LAW IN MUSLIM COUNTRIES 19 (2008) (noting that classical sharia has managed to retain influence in family and inheritance law).

Muslim populations worldwide.³¹ Though Muslims today are not equally comfortable with all aspects of the *fiqh*, most Muslims who believe that *shari'a* should be the law of the land support adhering to religious family law.³² Fewer, for example, support aspects of the *fiqh* relating to severe punishments for criminal acts, such as whippings or cutting off hands.³³

So what does marriage look like under Islamic law?³⁴ Unlike marriage in the Christian tradition which is considered a sacrament, or a “sign[] of grace,”³⁵ Islamic marriage is fundamentally a contractual arrangement.³⁶ There are several basic requirements to an Islamic marriage contract. First, there must be mutual agreement by the parties.³⁷ This often involves negotiations between the groom and the bride’s guardian, or *wali*, usually her father or another male relative.³⁸ As a safeguard to ensuring consent, many countries require at least one, or sometimes two witnesses to be present.³⁹ However, while the *fiqh* requires that the bride consent freely to the marriage and the marriage contract itself,⁴⁰ some authors suggest that, in reality, even with witnesses present, brides may not always have the option to withhold consent.⁴¹ Protesting a marriage agreement or terms within it may be viewed as disrespectful and could have serious social consequences for the bride, including ostracism from her family or, in

31. PEW RESEARCH CTR., *supra* note 28, at 15.

32. *Id.* at 50 (citing statistics that show “broad support for allowing religious judges to adjudicate domestic disputes,” including that in seventeen of twenty countries surveyed, at least half of population surveyed favored giving religious leaders and judges power to decide family disputes).

33. *Id.* at 15. For instance, among Muslims in Jordan who say *shari'a* should be the law of the land, 93% say that religious judges should decide domestic and property disputes while only 57% favor corporal punishment for crimes such as theft. *Id.* at 50–52. For an interesting perspective on why this might be, see Linda C. McClain, MARRIAGE PLURALISM IN THE UNITED STATES, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT *supra* note 8, at 309, 330–31 (“Calls to preserve religious or cultural autonomy often target the family and women’s roles as core features that must be preserved, even as other aspects of religion and culture adapt to modernization.”).

34. Again, with 1.8 billion practicing Muslims in the world and many schools of Islamic theology and law, Islamic marriages certainly do not all look the same. This discussion remains an overview of some common practices and themes.

35. Oman, *supra* note 19, at 300 (quoting CATECHISM OF THE CATHOLIC CHURCH 320 (2d ed. 2003)) (alteration in original).

36. Tracie R. Siddiqui, *Interpretation of Islamic Marriage Contracts by American Courts*, 41 FAM. L.Q. 639, 642 (2007).

37. Siddiqui, *supra* note 36, at 642.

38. Nathan B. Oman, *Bargaining in the Shadow of God’s Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579, 589 (2010). See also JAMAL J. NASIR, THE STATUS OF WOMEN UNDER ISLAMIC LAW AND MODERN ISLAMIC LEGISLATION 49–52 (3rd ed. 2009) (“The general consensus of opinion amongst jurists is that the woman, even of full legal capacity, and whether previously married or not, should not conduct her own marriage contract. Only the Hanafi school—one of the major Sunni Islamic schools of jurisprudence—]differ[s], requiring a guardian to conduct a marriage contract only if the woman is of no or limited legal capacity.”).

39. NASIR, *supra* note 38, at 31.

40. *Id.*

41. See, e.g., Blenkhorn, *supra* note 29, at 198.

extreme cases, risk of physical harm.⁴² These consequences do not stem from the tenets of religious Islamic law itself, but rather from the patriarchal cultural legacies that existed in most now-Muslim countries, often even before Islam was a predominant religion.⁴³

In addition to mutual consent, a second fundamental element of an Islamic marriage contract is the inclusion of a *mahr* agreement.⁴⁴ With its origins in the Quran itself, the *mahr*⁴⁵ is property given to the wife by the husband to indicate his willingness to marry as well as his respect for the bride.⁴⁶ Sometimes the *mahr* is compared to a “bride price” in the Western tradition; however, unlike the latter, the *mahr* is given directly to the wife, not to her father or family.⁴⁷ It can range from a symbolic token to a large sum of money, property, a portion of a business, or any other thing of value.⁴⁸ *Mahr* provisions are typically found within the marriage contract, which itself is often a standard one-page, fill-in-the-blank form provided by a government, an Islamic family court, or, as may be the case within the United States, a local Islamic foundation.⁴⁹ Parties write their names, addresses, and the amount of the *mahr*, but little else.⁵⁰ The agreement usually contains a boilerplate statement that Islamic law governs the contract, but generally does not indicate which of the many schools of Islamic law takes precedence.⁵¹

There are two parts of every *mahr* provision: a prompt (or advanced) *mahr*, given at the time the marriage takes place, and a postponed (or deferred) *mahr*, which the wife receives if the marriage ends by either the

42. *Id.* at 220.

43. See generally CHRISTINA JONES-PAULY & ABIR DAJANI TUQAN, WOMEN UNDER ISLAM: GENDER, JUSTICE AND THE POLITICS OF ISLAMIC LAW (2011); *Women in Pre-Islamic Arabia*, MUSLIM WOMEN'S LEAGUE (Sept. 1995), <http://www.mwusa.org/topics/history/herstory.html> [<http://perma.cc/2VGT-5LPS>].

44. Blenkhorn, *supra* note 29, at 199. See also Chelsea A. Sizemore, Comment, *Enforcing Islamic Mahr Agreements: The American Judge's Interpretational Dilemma*, 18 GEO. MASON L. REV. 1085, 1087 (2011).

45. Also referred to as a *nikah*, *saddaq*, or, in English, dower. Blenkhorn, *supra* note 29, at 212; Siddiqui, *supra* note 36, at 639.

46. Sizemore, *supra* note 44, at 1087.

47. Siddiqui, *supra* note 36, at 643 & n.1.

48. Blenkhorn, *supra* note 29, at 199–200.

49. *Id.* at 211. See Appendix for an example of a typical Islamic marriage certificate that includes a *mahr* provision. The example in the Appendix comes from the Islamic Foundation of Greater St. Louis, a non-profit serving the local St. Louis Islamic community. *About Us*, ISLAMIC FOUND. OF GREATER ST. LOUIS, INC., <https://islamstl.org/about-us> [<https://perma.cc/W6TH-T2NU>] (last visited July 28, 2018).

50. Blenkhorn, *supra* note 29, at 211. See marriage certificate in Appendix, in which the *mahr* provision reads:

“(Saddaq) Advanced: _____ Postponed: _____ Total: _____”.

51. Blenkhorn, *supra* note 29, at 211. See marriage certificate in Appendix, which states that the bride and groom “of their own free will, agree to be united in marriage under the law of Islam as revealed to Prophet Muhammad, son of Abdullah and as contained in the Qur'an and Hadith.” This particular marriage certificate also states that “We, husband and wife, agree to raise our children as Muslim.”

death of the husband or divorce.⁵² The postponed *mahr*, in particular, serves an important social function and is given great weight in Islamic courts.⁵³

The purpose of the postponed *mahr* is rooted in the distinct differences in the position of men and women within Islamic society and law.⁵⁴ Though men and women are considered spiritually equal, they are traditionally thought to nonetheless bear different social responsibilities.⁵⁵ Men are traditionally seen as the providers of the family, and thus many women often do not work or have a means of independent income separate from their husbands.⁵⁶ Again, this patriarchal cultural legacy does not stem from the teachings of Islam itself but rather from the historical fact that Islam arose in the context of seventh century society and social mores.⁵⁷

Further, women and men have different rights in divorce, as is illustrated by the three methods of divorce under Islamic law. The first way to dissolve an Islamic marriage is through a process called *talaq*, which, until recently, has been the most common method of obtaining a divorce.⁵⁸ Through *talaq*, a husband can unilaterally and extra-judiciously divorce his wife by making a specific pronouncement or declaration of his desire to divorce.⁵⁹ Some religious sects and countries have additional requirements, such as that a witness be present⁶⁰ or that the pronouncement be certified by a judge.⁶¹ However, except for these rather limited procedural requirements, the right to *talaq* divorce is traditionally quite broad and may be exercised for any reason.⁶²

A woman, on the other hand, has no such right, and her only avenue for initiating divorce without her husband's consent is through a judicial process known as *tafriq*.⁶³ Through *tafriq*, a wife may petition a judge for the dissolution of her marriage on one of a number of limited grounds, including spousal abuse, abandonment, or the husband's imprisonment or

52. Sizemore, *supra* note 44, at 1087–88.

53. *Id.* at 1089.

54. See Blenkhorn, *supra* note 29, at 194.

55. *Id.*

56. Siddiqui, *supra* note 36, at 643. See also NASIR, *supra* note 38, at 33.

57. See JONES-PAULY, *supra* note 43, at 449.

58. NASIR, *supra* note 38, at 117. There is reason to believe this trend may be changing. Increasingly, the practice of *talaq* is disfavored by both Muslim and non-Muslim religious and civil leaders. Jeffrey Gettleman & Suhasini Raj, *India's Supreme Court Strikes Down 'Instant Divorce' for Muslims*, N.Y. TIMES (Aug. 22, 2017), https://www.nytimes.com/2017/08/22/world/asia/india-muslim-divorce-triple-talaq.html?_r=0. In a widely publicized example, the Supreme Court of India declared the practice of *talaq* unlawful in August 2017. *Id.*

59. Siddiqui, *supra* note 36, at 645.

60. NASIR, *supra* note 38, at 123–24.

61. *Id.* at 120, 134.

62. See Oman, *supra* note 19, at 304.

63. See NASIR, *supra* note 38, at 136.

impotency.⁶⁴ In many countries, by seeking *tafriq*, the wife forfeits her right to the postponed *mahr*.⁶⁵

The final way that an Islamic marriage may be dissolved is by mutual agreement, through a process known as *khula*. To effect *khula*, the wife must “literally pay[] her husband for her freedom.”⁶⁶ Most often this means forfeiting her postponed *mahr*,⁶⁷ however, there are other ways the wife may pay for *khula* divorce. In Syria, Morocco, Jordan, and Kuwait, for instance, an agreement by the wife to take custody of the children without requiring continuing maintenance from the husband is by law sufficient consideration.⁶⁸ Further, the wife may specifically include a provision in the marriage contract granting her the right to *khula* without forfeiting her *mahr*.⁶⁹ While this and other modifications to marriage contracts do occur, they are not the norm.⁷⁰ Thus, while divorce has traditionally been considered a “matter of right” for men in Islamic law, it is only available for women in specific circumstances and, even then, usually at the cost of forfeiting the *mahr* payment.⁷¹

In this way, a *mahr* provision of substantial financial value functions to counterbalance the husband’s right to *talaq* as well as his (often exclusive) ability to earn independent income so that in the event of *talaq* divorce or the death of the husband, the wife is left with a means of support.⁷² As a result, the *mahr* can and often does serve as a financial safeguard—a right of the wife should the marriage end without her control.⁷³ It could also be argued that a substantial *mahr* provides somewhat of an incentive for a wife to remain married to her husband, lest she risk losing her financial safeguard by initiating divorce. Additionally, the husband may be deterred from initiating *talaq* divorce by the obligation to pay the *mahr* and, thus, the *mahr* often serves the larger societal goal of keeping marriages intact.⁷⁴ Of course, this is premised on the idea that the *mahr* is of substantial financial value,

64. *Id.* Specific grounds may vary from state to state. For example, in Malaysia, a Muslim woman may seek *tafriq* divorce if her husband has been imprisoned for three years, is suffering from leprosy, or has failed to consummate the marriage within four months. *Id.*

65. Oman, *supra* note 19, at 318 n.222.

66. NASIR, *supra* note 38, at 129.

67. *Id.* at 130; Sizemore, *supra* note 44, at 1088.

68. NASIR, *supra* note 38, at 130.

69. Estin, *supra* note 8, at 107.

70. *Id.*

71. See NASIR, *supra* note 38, at 117.

72. Oman, *supra* note 19, at 302; Bleckhorn, *supra* note 29, at 202; Sizemore, *supra* note 44, at 1088.

73. Bleckhorn, *supra* note 29, at 202; Siddiqui, *supra* note 36, at 644.

74. Sizemore, *supra* note 44, at 1099; Brian H. Bix, *Marriage Agreements and Religion*, 2016 U. ILL. L. REV. 1665, 1668 (2016).

which, in reality, is not always the case.⁷⁵ Thus, the function of the *mahr* depends on what the couple seeks to get out of it. The *mahr* ultimately provides a means for negotiating an arrangement that ideally matches the financial needs of the woman in the relationship-to-be.

Because of this important, albeit complex social function, *mahr* agreements are given great weight in Islamic courts.⁷⁶ A husband cannot reduce the amount of the *mahr* and faces imprisonment if he does not comply with the contract as written.⁷⁷ If the husband dies, the *mahr* is the most important debt in his estate and is paid before all other debts.⁷⁸

Despite the great weight given to *mahr* agreements in Islamic courts, United States courts have no consistent method of interpreting *mahr* agreements in divorces initiated in the United States.⁷⁹ This confusion is due in large part to a misunderstanding of the context and function of the *mahr*, leading courts to improperly treat *mahr* agreements as prenuptial contracts, barring equal distribution of property in divorces initiated in the United States.⁸⁰ A further interpretational issue arises when parties seek enforcement of a *mahr* agreement as part of a divorce obtained outside of the United States, specifically when the divorce was achieved through the unilateral method of *talaq*.⁸¹ Cases evince a wide range of court outcomes, as well as various roadblocks to enforcement of these provisions.⁸² This results in inconsistent holdings, unclear precedent, a disregard for party intentions, and, ultimately, a perverse incentive for either husband or wife to seek opportunistic enrichment.⁸³

II. INTERPRETATIONS OF MAHR AGREEMENTS IN U.S. COURTS

A. Enforcement of Mahr Agreements as Prenuptial Contracts

The majority of American courts that have addressed the issue have interpreted *mahr* agreements as prenuptial contracts, valid so long as they conform to requirements of contract law and the state's statutory standards for prenuptials.⁸⁴ Because they are entered into just prior to marriage and

75. See Blenkhorn, *supra* note 29, at 201 (noting that “the amount of the *mahr* is often too small to act as an effective constraint on the husband in divorcing his wife, and oftentimes women are pressured to illustrate their devotion to their husbands by forgiving the debt of the *mahr* altogether”).

76. Sizemore, *supra* note 44, at 1089.

77. *Id.*; Blenkhorn, *supra* note 29, at 201.

78. Sizemore, *supra* note 44, at 1089.

79. See Siddiqui, *supra* note 36, at 639. See also discussion *infra* Part II.

80. See *infra* Section II.A.

81. See *infra* Section III.D.

82. See *infra* Part II.

83. See *infra* Part III.

84. See *Akileh v. Elchahal*, 666 So. 2d 246 (Fla. Dist. Ct. App. 1996) (prenuptial, enforceable); *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978), (prenuptial, enforceable); *Ofer v.*

they specify what will happen in the event of the death of a spouse or divorce, *mahr* agreements in some ways look and feel like prenuptial contracts.⁸⁵ However, upon closer inspection, the two are quite distinct. At the most basic level, *mahr* provisions and prenuptial agreements differ in their relation to the marriage itself. In the United States, a premarital agreement is thought of as conceptually separate from the marriage and entering a prenuptial contract is neither essential to getting married, nor does it legally bring a couple closer to marriage.⁸⁶ On the other hand, signing an Islamic marriage contract, which contains a *mahr* agreement, is both an essential part of getting married and legally completes the marriage.⁸⁷

More substantively, in the United States, prenuptial contracts are defined as agreements entered into by two “individuals who intend to marry *which affirms, modifies, or waives a marital right or obligation.*”⁸⁸ Historically, prenuptial contracts were considered unenforceable by American courts.⁸⁹ In the 1970s, however, as states began to adopt no-fault divorce statutes, many also began to permit enforcement of prenuptial contracts within statutorily restricted parameters.⁹⁰ The Uniform Premarital Agreement Act (UPAA) was drafted in 1983 and has been adopted by twenty-six states and the District of Columbia.⁹¹ In addition to the ordinary contract requirements that the agreement be made voluntarily and that it not be unconscionable, the UPAA imposes the additional conditions that there must be adequate disclosure of assets and that both parties must be knowledgeable of the rights and privileges they are giving up—often meaning both parties must be represented by counsel.⁹² Reasons for these extra protections have to do

Sirota, 984 N.Y.S.2d 312 (N.Y. App. Div. 2014) (prenuptial, enforceable); S.B. v. W.A., 959 N.Y.S.2d 802 (N.Y. Sup. Ct. 2012) (prenuptial, enforceable); *see also In re Marriage of Shaban*, 105 Cal. Rptr.2d 863 (Ct. App. 2001) (prenuptial, unenforceable); *In re Marriage of Dajani*, 251 Cal. Rptr. 871 (Ct. App. 1988) (prenuptial, unenforceable); *In re Marriage of Iqbal*, 11 N.E.3d 1 (Ill. App. Ct. 2014) (prenuptial, unenforceable); Shaheen v. Khan, 142 So. 3d 257 (La. Ct. App. 2014) (prenuptial, unenforceable); Aleem v. Aleem, 947 A.2d 489 (Md. 2008) (prenuptial, unenforceable); Farag v. Farag, 772 N.Y.S.2d 368 (N.Y. App. Div. 2004) (prenuptial, unenforceable); O.Y. v A.G., 22 N.Y.S.3d 138 (Sup. Ct. 2015) (prenuptial, unenforceable); *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679 (Ohio Ct. App. July 10, 2008) (prenuptial, unenforceable); *Ahmad v. Ahmad*, 6th Dist. Lucas County No. L-00-1391, 2001 Ohio App. LEXIS 5303 (2001) (prenuptial, unenforceable).

85. *See* Bix, *supra* note 74, at 1668.

86. Oman, *supra* note 19, at 301.

87. *Id.*

88. UNIF. PREMARITAL AND MARITAL AGREEMENT ACT § 1(5) (2012) (emphasis added), http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf [<https://perma.cc/RA42-Z6DV>].

89. Bix, *supra* note 74, at 1668.

90. *Id.* at 1669.

91. Oman, *supra* note 19, at 321.

92. UNIF. PREMARITAL AGREEMENT ACT § 6 (UNIF. LAW COMM'N 1983), http://www.uniformlaws.org/shared/docs/premarital%20agreement/upaa_final_83.pdf [<https://perma.cc/LYV9-F465>]. *See, e.g., Ahmad v. Ahmad*, 2001 Ohio App. LEXIS 5303 at *11, *13–14 (Nov. 30, 2001) (construing a Jordanian *mahr* agreement of \$6,600 USD as a prenuptial contract and

with the “social script” constructed around why and how individuals enter into prenuptial contracts.⁹³ These contracts are entered into just before a couple marries, at a time when optimism levels are high and couples underestimate the chance of divorce, often creating a bargaining dynamic in which one party, particularly a wealthier or more knowledgeable spouse, is incentivized to take advantage of the other party.⁹⁴ Likewise, because of the marital property system in place in the United States, prenuptial contracts essentially eliminate a spouse’s right to communal or marital property and therefore substantially impact that spouse’s rights upon divorce.⁹⁵ Thus, the context is thought to call for additional safeguards.

However, this narrative does not translate to the context of *mahr* agreements.⁹⁶ Importantly, the couple entering into a *mahr* agreement does not intend to bargain away property rights.⁹⁷ This is because under the *fiqh* and Islamic law, there is no marital or community property system as there is in the United States.⁹⁸ All wealth and property that an individual brings into a marriage continues to belong solely to that individual during and after the marriage.⁹⁹ Thus, there is no equitable division of property upon divorce.

However, when interpreted as a prenuptial agreement by U.S. courts, the *mahr* agreement is held to preempt other equitable division of property in the divorce as a prenuptial in the United States does, and thus bars the wife from seeking maintenance or any share of marital property.¹⁰⁰ If enforced, absurd and inequitable results follow, especially when the *mahr* is a small or token amount and the marital assets are substantial. For example, in *Chaudry v. Chaudry*, the Superior Court of New Jersey upheld a divorce obtained in Pakistan through *talaq*, concluding that the postponed *mahr* of

yet holding the contract unenforceable because wife was not represented by counsel and there was no disclosure of husband’s assets, as required by Ohio law governing prenuptial agreements).

93. Oman, *supra* note 38, at 599.

94. *Id.*

95. See Bix, *supra* note 74, at 1668.

96. Oman, *supra* note 38, at 600.

97. *Id.* This has been recognized by the drafters of the UPAA and in 2012, they promulgated a new set of rules, the Uniform Premarital and Marital Agreements Act (UPMAA), which in part attempts to distinguish between premarital contracts and “agreements that [are] entered by couples about to marry but that [are] not intended to affect the parties’ existing legal rights and obligations upon divorce or death, e.g., Islamic marriage contracts, with their deferred Mahr payment provisions.” UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 2 cmt (Unif. Law Comm’n 2012), http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf [<https://perma.cc/RA42-Z6DV>]. However, despite this positive development, the new rules have only been adopted by Colorado and North Dakota. *Legislative Fact Sheet – Premarital and Marital Agreements Act*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Premarital%20and%20Marital%20Agreements%20Act> [<https://perma.cc/WG3E-9XUR>].

98. Oman, *supra* note 19, at 306.

99. *Id.*

100. Blenkhorn, *supra* note 29, at 206.

\$1,500 was a valid prenuptial contract.¹⁰¹ The court further held that, despite the husband's substantial income from his work as a doctor, the wife was "not entitled to equitable distribution by reason of the ante nuptial agreement [i.e., the *mahr* provision], which was negotiated on her behalf by her parents."¹⁰² The court's reasoning continued that "[the agreement] could have lawfully provided for giving her an interest in her husband's property, but it contained no such provision."¹⁰³ Thus, after fourteen years of marriage, substantial marital assets, and several children left in her custody, the wife received only her *mahr* of \$1,500.¹⁰⁴

On the other hand, interpretation of the *mahr* as a prenuptial contract can also be a windfall for the wife when it allows her to receive a substantial postponed *mahr*, even though marital assets are small. For example, in *Akileh v. Elchalal*, the Florida Court of Appeals interpreted a \$50,000 deferred *mahr* provision that was part of a thirteen-month Florida marriage as a prenuptial agreement and held that the agreement was valid despite the relatively small marital assets and the husband's personal belief that his wife forfeited the *mahr* if she initiated the divorce.¹⁰⁵

Regardless of whether the court enforces the *mahr* agreement as a prenuptial contract or strikes it down as unenforceable, and regardless of whether the husband or the wife benefits from this holding, the interpretation of *mahr* agreements as prenuptial agreements is fundamentally flawed. More than anything, the decisions resulting from this interpretation "show that when lower courts do not understand the precise nature of a religious provision, they often reach for a secular tool that bears very little resemblance to the religious article, resulting in interpretations that do not reflect the parties' intent."¹⁰⁶

B. Enforcement of Mahr Agreements as Basic Civil Contracts

Other courts have declined to interpret *mahr* agreements as specialized prenuptial contracts, but instead view them as basic civil contracts, leaving open the opportunity for both enforcement of the *mahr* agreement and

101. Chaudry v. Chaudry, 388 A.2d 1000, 1003 (N.J. Super. Ct. App. Div. 1978).

102. *Id.* at 1006.

103. *Id. Cf. In re Marriage of Shaban*, 105 Cal. Rptr.2d 863 (Ct. App. 2001) (husband argued, and court agreed, that \$30 *mahr* agreement was a prenuptial contract between husband and wife married for over seventeen years; court, however, held the prenuptial was not enforceable on grounds of vagueness).

104. Chaudry, 388 A.2d at 1006.

105. *Akileh v. Elchalal*, 666 So. 2d 246, 249 (Fla. Dist. Ct. App. 1996). In this case, the husband had given his new wife genital warts. *Id.* at 247. Though not stated explicitly by the court, perhaps this sympathetic fact scenario factored into its interpretation of the *mahr*, which was highly favorable to the wife. *See id.*

106. Shiva Falsafi, *Religion, Women, and the Holy Grail of Legal Pluralism*, 35 CARDOZO L. REV. 1881, 1884 (2014).

equitable distribution of property and alimony dispositions.¹⁰⁷ In *Odatalla v. Odatalla*, for example, a wife sought enforcement of a \$10,000 *mahr* agreement signed as part of her and her husband's New Jersey marriage in which the entire ceremony, including negotiation of the *mahr*, was recorded on film.¹⁰⁸ The Superior Court of New Jersey held that the *mahr* agreement was "nothing more and nothing less than a simple contract between two consenting adults."¹⁰⁹

Though this interpretation aligns with U.S. contract law, it too ignores the context of *mahr* agreements in Islamic marriages. Particularly in the cases of marriages entered abroad, but arguably in the case of marriages entered into in the United States as well, the parties' intent was likely not to enter into a basic civil contract made with U.S. civil law mandating equitable division of property in the background.¹¹⁰ Instead, their conception of the *mahr* was likely informed by their understanding of the treatment of marriage within the Islamic religious and legal tradition, particularly laws designating the different types of divorce and property distribution.¹¹¹ Simply upholding all *mahr* agreements that appear to meet basic contract requirements creates an incentive for the wife to benefit both from secular marital property laws and Islamic traditions created in a system that does not recognize marital property at all. In other words, blanket enforcement of *mahr* under simple contract law in some ways may be equally as problematic as designating them prenuptial contracts.

III. ISSUES OF ENFORCEMENT OF MAHR AGREEMENTS IN U.S. COURTS

A. *Void for Vagueness*

Whether the *mahr* is interpreted as a basic civil contract or a prenuptial agreement, it may be unenforceable on grounds of vagueness for violating either the statute of frauds or contract certainty requirements.¹¹² If issues of interpretation of terms arise, courts will allow parol evidence to shed light on the intentions of the parties, however, not to the extent that the contract itself becomes the "product" of parol evidence.¹¹³ *Mahr* agreements rarely

107. See, e.g., *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985); *Lashgari v. Lashgari*, 496 A.2d 491, 493, 496 (Conn. 1985) (referring to *mahr* as part of basic contract and acknowledging issue in case is "claim in contract for damages").

108. *Odatalla v. Odatalla*, 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002).

109. *Id.*

110. See *supra* notes 97–99 and accompanying text.

111. See *supra* notes 58–71, 95–98 and accompanying text.

112. Siddiqui, *supra* note 36, at 652–53.

113. See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 (Ct. App. 2001) (upholding exclusion of parol evidence offered by husband to show that since the *mahr* was made in accordance with "Islamic Law" it was intended to preclude all equitable division of property because "[a]n

define the terms that they use, creating further interpretational issues.¹¹⁴ Courts vary in the level of vagueness they will allow, and in their acceptance of parol evidence. For example, in *Odatalla v. Odatalla*, the Superior Court of New Jersey rejected a husband's argument that the *mahr* provision containing the word "postponed" next to the amount of the *mahr* was too vague and held that parol evidence was admissible to explain the meaning of the term "postponed."¹¹⁵ However, in *In re Marriage of Obaidi v. Qayoum*, the Washington Court of Appeals came to the opposite conclusion, holding a *mahr* agreement that read "Long term marriage portion: 20,000.00 Dollars" void for vagueness because there was "no term explaining why or when the \$20,000 would be paid."¹¹⁶

B. Void as Against Basic Contract Principles

Whether interpreted as a prenuptial agreement or a basic contract, courts routinely hold that the *mahr* agreement must conform to principles of public policy.¹¹⁷ If the terms of the *mahr* agreement are so one-sided as to be unconscionable, or there is evidence that one party has not freely contracted and thus there was no true meeting of minds, a court may find the *mahr* unenforceable as against public policy.¹¹⁸ For example, in *In re Marriage of Iqbal*, the Appellate Court of Illinois held that a post-nuptial agreement entered into by a husband and wife was unenforceable because it violated public policy by designating a specified arbiter with the power to determine custody of the couple's children without the obligation to act in the best interests of the children, and it favored the husband so strongly as to be substantively unconscionable.¹¹⁹ Courts have also struck down *mahr* agreements when there is evidence of duress¹²⁰ or coercion.¹²¹

agreement whose only substantive term in any language is that the marriage has been made in accordance with 'Islamic Law' is hopelessly uncertain as to its terms and conditions"); *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388 (N.Y. Sup. Ct. July 10, 1995) (finding *mahr* that awarded wife half of husband's "possessions" unenforceable, in part because the term "possessions" was too vague).

114. See Appendix for an example of a typical *mahr* agreement and terms used within.

115. *Odatalla*, 810 A.2d at 98.

116. *In re Marriage of Obaidi*, 226 P.3d 787, 791 (Wash. Ct. App. 2010).

117. Blenkhorn, *supra* note 29, at 225–26.

118. *Id. See, e.g., Ahmad v. Ahmad*, 2001 Ohio App. LEXIS 5303 at *14 (Nov. 30, 2001) (affirming lower court holding that divorce violated Ohio public policy because it was "devoid of notice and opportunity to be heard").

119. *In re Marriage of Iqbal*, 11 N.E.3d 1 (Ill. App. Ct. 2014).

120. See *In re Marriage of Obaidi*, 226 P.3d at 791 (*mahr* held void in part because husband did not know about the *mahr* until fifteen minutes before signing and the *mahr* was in farsi which husband did not read or write).

121. *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, at *6 (Ohio Ct. App. July 10, 2008) (invalidating *mahr* and finding a presumption of overreaching or coercion because the *mahr* agreement was presented to the husband for the first time on the day of the wedding ceremony).

C. *Mahr Agreements and First Amendment Entanglement Issues: Neutral Principles of Law Doctrine*

A potential constitutional constraint on the enforcement of *mahr* agreements that courts have grappled with is the Establishment Clause, which mandates that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹²² In *Jones v. Wolf*, the Supreme Court held that “neutral principles of law” may be applied to resolve issues arising in a religious context so long as there is no fundamental issue of religious practice or doctrinal controversy involved.¹²³ In 1983, the highest court of New York applied *Jones* in the context of a Jewish marriage contract in *Avitzur v. Avitzur*, holding that the secular terms of the contract were enforceable without reference to any religious principle.¹²⁴ The court noted, “[t]he fact that the agreement was entered into as part of a religious ceremony does not render it unenforceable.”¹²⁵ Despite arguments that Islamic marriage contracts are purely religious documents, many courts have held in the vein of *Avitzur* that enforcement of secular terms of an Islamic marriage contract does not violate the “neutral principles of law” doctrine.¹²⁶

However, when key issues in the case turn on a court deciding between various schools of Islamic religious doctrine, some courts have found that enforcement or interpretation of the contract violates constitutional limits. For example, in *In re Marriage of Obaidi*, the Court of Appeals of Washington found that the trial court erred in analyzing whether the wife had done anything to forfeit her *mahr* under Islamic law before holding that she was entitled to payment of the *mahr*.¹²⁷ The court of appeals reasoned, “[a]pplying the neutral principles of contract law, we can resolve this case by using these neutral principles of law, not Islamic beliefs or policies.”¹²⁸

However, at least one commentator has argued that reference to Islamic law to determine the meaning of a *mahr* agreement does not violate the

122. U.S. CONST. amend. I.

123. *Jones v. Wolf*, 443 U.S. 595, 597 (1979).

124. *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983).

125. *Id.* at 139.

126. *See, e.g.*, *Odatalla v. Odatalla*, 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002) (“If this Court can apply ‘neutral principles of law’ to the enforcement of a Mahr Agreement, though religious in appearance, then the Mahr Agreement survives any constitutional implications.”); *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985) (holding that a deferred *mahr* agreement of \$5,000 conformed to the requirements of New York contract law and, thus, the agreement’s secular terms were enforceable as a contractual obligation, even though it was entered into as part of a religious ceremony).

127. *In re Marriage of Obaidi*, 226 P.3d 787 (Wash. Ct. App. 2010). *But see* *Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316 (N.J. Super. Ct. App. Div. June 17, 2010) (holding that the wife must refund her prompt *mahr* payment because, under Islamic law, she was at fault in precipitating the divorce and was thus not entitled to the *mahr*).

128. *In re Marriage of Obaidi*, 226 P.3d at 790.

neutral principals of law doctrine.¹²⁹ Instead, the author compares the application by courts of particular aspects of Islamic law to the application of foreign law under choice of law principles.¹³⁰ The author notes, “[s]o long as [they are] being asked to construe the meaning of the mahr as a matter of social fact courts do not violate [the neutral principles of law] doctrine, even if in determining social fact they must look to the fiqh.”¹³¹

D. Enforcement of Mahr Agreements in Divorces Obtained Abroad: Issues of International Comity

A related issue arises when courts are asked to enforce *mahr* agreements that are part of divorces obtained abroad. Faced with this scenario, American courts must determine whether the agreement should be upheld on grounds of international comity under choice of law principles.¹³² Here, as well, courts diverge. When the foreign divorce has upheld the payment of a *mahr* that appears relatively fair to both parties, courts are more likely to enforce the foreign divorce.¹³³ In these instances, courts generally explain their reasoning by stating that the mahr does not contravene any public policy. For example, as the court in *Odatalla* noted, “the *Mahr* Agreement continues a custom and tradition that is unique to a certain segment of our current society and is not at war with any public morals.”¹³⁴ However, where the foreign divorce was obtained through *talaq*, courts are reticent to enforce an unfavorable *mahr* agreement as a prenuptial contract that bars equitable division of property.¹³⁵ Courts here use strong language reflecting a public policy standpoint. For example, the court in *Soleimani* criticized the decision in *Chaudry*, noting “flawed reasoning was utilized in [*Chaudry*] to

129. Oman, *supra* note 19, at 324–27.

130. *Id.* at 326.

131. *Id.*

132. *See, e.g.*, S.B. v. W.A., 959 N.Y.S.2d 802 (Sup. Ct. 2012), *aff’d sub nom.* Badawi v. Wael Munir Alesawy, 24 N.Y.S.3d 683 (App. Div. 2016).

133. *See id.* (upholding a divorce obtained in the United Arab Emirates granting wife \$250,000 *mahr*, custody, and other alimony upon “considerations of international comity” because no strong public policy would be violated by the recognition, entry, or enforcement of the foreign judgment upholding the *mahr* agreement).

134. *Odatalla v. Odatalla*, 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002).

135. *See, e.g.*, Aleem v. Aleem, 947 A.2d 489 (Md. 2008) (foreign divorce decree not upheld where parties lived in Maryland for twenty years and husband performed *talaq* divorce at Pakistani consulate); *Tarikonda v. Pinjari*, No. 287403, 2009 WL 930007 (Mich. Ct. App. Apr. 7, 2009) (foreign divorce decree not upheld where husband travelled to India to perform *talaq* divorce and wife filed for divorce in Michigan); *Farag v. Farag*, 772 N.Y.S.2d 368 (App. Div. 2004) (foreign divorce decree not upheld where husband travelled to Egypt without wife’s knowledge to secure divorce decree); *Ahmad v. Ahmad*, 2001 Ohio App. LEXIS 5303 (Ct. App. Nov. 30, 2001) (foreign divorce decree not upheld where parties lived in U.S. but husband travelled to Jordan to perform *talaq* divorce). *But see* *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978) (foreign divorce decree upheld where parties had lived in New Jersey but relocated to Pakistan and husband obtained divorce in Pakistan through *talaq*).

justify upholding a premarital contract derived from Pakistani law, on choice of law grounds, rather than on public policy grounds.”¹³⁶ The result, the court continued, “was judicial adoption of Pakistani law that inherently accords women no marital property rights.”¹³⁷

IV. POSSIBLE SOLUTION: ESTABLISHMENT OF ISLAMIC ARBITRATION TRIBUNALS IN THE UNITED STATES

A. *A Pluralist Perspective: Jewish Beth Din Courts as an Example for Islamic Organizations to Emulate*

As the above discussion indicates, specific circumstances surrounding the litigation of *mahr* agreements in U.S. courts are extremely varied, as are judicial treatments of them.¹³⁸ The cases result in inconsistent holdings, creating unclear precedent that both undercuts the true intentions of the parties and creates incentives for both parties to bend the law in their favor.

At the same time, the number of cases involving *mahr* agreements has risen since the early 2000s and this trend shows few signs of stopping.¹³⁹ Commentators have offered various suggestions for judges to correct these interpretational issues, from enforcing all *mahr* agreements as basic contracts,¹⁴⁰ to refusing to enforce any *mahr* agreement to encourage the Muslim community to write clearer, more specific marriage contracts.¹⁴¹ However, these solutions all start from the common misconception that in the United States, marriage and divorce, and hence the interpretation of *mahr* agreements, are within the exclusive jurisdiction of family law and the civil courts.¹⁴² Yet, when a marriage contract that does not fit neatly within the boundaries of American civil law reaches the courts, it becomes clear that the “uniform application of a single set of laws” may not always be the best approach.¹⁴³ As one commentator notes, it is also neither “historically mandated”¹⁴⁴ nor ubiquitous within “the international community.”¹⁴⁵ Perhaps better, more consistent outcomes can be achieved by “acknowledg[ing] that there are multiple sources of normative ordering in

136. *Soleimani v. Soleimani*, No. 11CV4668, 2012 WL 3729939, ¶ 29 (Kan. Dist. Ct. Aug. 28, 2012).

137. *Id.*

138. *See supra* Part II.

139. Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in *WOMEN’S RIGHTS & ISLAMIC FAMILY LAW* 207 (Lynn Welchman ed., 2009).

140. Oman, *supra* note 19, at 334; Siddiqui, *supra* note 36, at 658.

141. Sizemore, *supra* note 44, at 1106–08.

142. Joel A. Nichols, *Multi-Tiered Marriage: Reconsidering the Boundaries of Civil Law and Religion*, in *MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT* *supra* note 8, at 11, 15–16.

143. *Id.* at 13.

144. *Id.* at 13, 15–19.

145. *Id.* at 13, 32–58.

every society”¹⁴⁶ and embracing a view of legal pluralism, which recognizes that every society has both an official legal system but also what is termed “unofficial law.”¹⁴⁷ Within the family law context, unofficial law includes formal religious tribunals as well as religious rules and customs, all of which have an effect on individuals and the way they live and order their lives, even if they do not have the weight of binding legal authority.¹⁴⁸

The reality, as the *mahr* cases show, is that legal pluralism already exists.¹⁴⁹ Family law is becoming more global and judges are already grappling with the rules and ordering of unofficial law within their courtrooms.¹⁵⁰ Not only does the cultural reality of the United States demand pluralism within its conception of marriage and divorce, but there is also strong precedent for this set by the Jewish community within the United States through their use of arbitration clauses and rabbinical tribunals.¹⁵¹

Founded in 1960, Beth Din of America (BDA) is “a sprawling network of Jewish law courts that function as arbitration panels” with the goal of serving a Jewish community in America that seeks to live in accordance with both religious and secular law.¹⁵² In 1996, after years of being viewed with skepticism by civil courts and receiving fairly regular reversals on their rulings, BDA sought to transform itself by bringing itself into compliance with the Federal Arbitration Act and creating an arbitration process that civil courts would recognize as legitimate.¹⁵³ BDA made various internal changes, including issuing standardized procedural rules, providing an internal appellate process, developing choice-of-law procedure to accommodate religious and secular law where possible, and employing Jewish scholars as well as arbitrators, lawyers, and other professionals who were experts in secular law.¹⁵⁴ As a result of these changes, the BDA has received widespread and nearly unanimous acceptance among American civil courts.¹⁵⁵ Since these reforms were implemented, not one BDA decision has been overturned.¹⁵⁶ The success of BDA in America, as one commentator noted, has been fundamental in “establish[ing] a framework

146. McClain, *supra* note 33, at 309.

147. *Id.* at 310.

148. *Id.* See also Estin, *supra* note 8, at 95–97.

149. McClain, *supra* note 33, at 309.

150. *Id.*

151. 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 (2012-2013); See also *infra* notes 153–159 and accompanying text.

152. Broyde, *supra* note 151, at 288.

153. *Id.*

154. *Id.* at 288–89.

155. *Id.* at 288.

156. *Id.*

for interaction between secular and religious courts.”¹⁵⁷ A “new model has emerged in which religious courts or clergy function as arbitrators to resolve marriage and divorce disputes. After arbitration, one member of the couple may bring the settlement or judgment to a secular court for enforcement as an arbitration award.”¹⁵⁸

The model that BDA used to establish itself as a legitimate authority, both for its own Jewish community and for civil courts, should be emulated by those seeking to interpret and enforce Islamic marriage contracts, including the *mahr* provisions within them, in a manner consistent with Islamic culture, law, and religious practices. Not only would this allow the Islamic community to establish its own practices within the parameters of secular law in the United States, but it would also help to promote acceptance and a more nuanced understanding of Islamic family law among judges within United States courts, and, hopefully, in turn, within American society more broadly.

B. Concerns about a Pluralist Approach

Despite the successful precedent set by the BDA and the promise this approach holds for American Muslims, there are still serious concerns to be considered before civil courts cede jurisdiction to religious arbitrators. On a practical level, the current political and social moment presents a particularly challenging environment for the ideal discussed above. Since 2010, some 201 anti-Sharia law bills have been introduced in forty-three states and fourteen have been enacted.¹⁵⁹ In 2017 alone, fourteen states introduced such bills, with Texas and Arkansas being the most recent states to enact bills into legislation.¹⁶⁰ Anti-Sharia laws are not explicitly labelled as such, and they do not actually change the law in any real way (the United States Constitution already does what they purport to do).¹⁶¹ However, the movement has created a climate in which Muslims and Islamic law in particular are viewed with, at best, suspicion and, at worst, fear and hatred.¹⁶²

Beyond these practical issues, however, lie legitimate concerns that ceding authority could undercut values that currently exist within American civil family law.¹⁶³ For example, there is a concern that civil law principles

157. Estin, *supra* note 8, at 106.

158. *Id.*

159. *Anti-Sharia Law Bills in the United States*, S. POVERTY LAW CTR. (Feb. 5, 2018), <https://www.splcenter.org/hatewatch/2017/08/08/anti-sharia-law-bills-united-states>.

160. *Id.*

161. *Id.* See *supra* discussion of Establishment Clause jurisprudence in Section III.C.

162. S. POVERTY LAW CENTER, *supra* note 159.

163. McClain, *supra* note 33, at 311.

of no-fault divorce would not be respected, that the idea of marriage as an equal partnership premised on gender-neutral and reciprocal rights and obligations would be diminished.¹⁶⁴ In this vein, feminist commentators have raised concerns that adoption of a pluralist system would inadequately protect the rights of women.¹⁶⁵ As one author noted, a “system that relegates religious women to the primary or exclusive jurisdiction of religious tribunals is not likely to facilitate [] dissent [that contests the most patriarchal interpretations of religious and family law], by contrast to a jurisdictional model that attempts to secure women’s rights both as members of religious communities and as citizens.”¹⁶⁶

However, it is important to note that the current system already provides analogous ways to opt out of certain protective rules in the marital context and engage, instead, in private ordering.¹⁶⁷ In some ways, the proposition to allow individuals to privately resolve disputes somewhat out of the purview of the court is not novel. One example that has already been discussed in this Note is the prenuptial contract.¹⁶⁸ Despite the civil court system’s early suspicion towards, and invalidation of, prenuptial contracts, once appropriate protections were put in place that guaranteed informed choice in the process, courts began to view these as valid and enforceable contracts.¹⁶⁹ Instead of denying the need for prenuptial agreements altogether, the law has taken a realistic approach that acknowledges that individuals want and have a legitimate need to enter into these contracts.¹⁷⁰ By adding safeguards that protect the individuals and ensure basic rights, the system accommodates this type of private ordering and encourages freedom of choice.

A similar approach should be taken with Islamic marriage contracts by allowing Islamic tribunals to arbitrate marriage disputes when the parties so desire. Allowing decisions made by Islamic arbitration tribunals to carry binding weight—so long as the tribunal itself is in compliance with Federal Arbitration Act and meets other appropriate standards—in no way precludes the civil family law system from exercising jurisdiction over these issues. On the contrary, “arbitration is not a parallel system, but a method of alternative dispute resolution that is subject to judicial oversight, and is thus subordinate to the court system.”¹⁷¹

164. *Id.*

165. *Id.*; see also Estin, *supra* note 8, at 93.

166. McClain, *supra* note 33, at 331.

167. *Id.* at 312.

168. See *supra* notes 87–94 and accompanying text.

169. *Id.*

170. *Id.*

171. MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION, (2004), <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesum>

Still, other commentators reject the analogy of religious arbitration as private ordering akin to freedom of contract.¹⁷² They argue that there is more pressure, particularly for women, in religious matters than in financial matters.¹⁷³ One author notes, “a liberal model that recognizes agency by allowing choice, even incorrect ones, puts a high premium on fostering informed choice.”¹⁷⁴ Though this is true, it ignores the capability of courts to continue to require that a baseline of basic rights be protected. Further, additional requirements that help ensure informed choice can be put into place that go beyond what is currently required.¹⁷⁵

This criticism also ignores the reality that even without official Islamic arbitrators that are recognized by civil courts, Islamic individuals in the United States already participate in this private ordering and so-called unofficial law. Research suggests that “members of [Islamic] communities generally follow official marriage and divorce laws in order to have their family status recognized by the state, but that they also utilize unofficial law mediated by ecclesiastical courts, rabbinic tribunals, or Muslim dispute resolution centers.”¹⁷⁶ These arbitral decisions are currently not given the weight of official enforcement, but they are also not subject to any safeguards, oversight, or protection.¹⁷⁷ Reports have surfaced of arbitrary, sexist opinions from unregulated arbitrators, particularly in Britain, which boasts a large Muslim population and several Islamic arbitration tribunals with varying levels of transparency and legitimacy.¹⁷⁸ A complete rejection

mary.html#content [hereinafter *Boyd Report*] [<https://perma.cc/6PVQ-BB8X>]. The above quoted report by Marion Boyd, former attorney general of Canada, presents interesting insight into this issue. The report was undertaken in 2003 after a retired Ontario lawyer, Syed Mumtaz Ali, announced the foundation of the Islamic Institute of Civil Justice to arbitrate disputes under Islamic family law. McClain, *supra* note 33, at 332 (citing *Boyd Report*, *supra* note 171, at 3). This was, at the time, allowed under Canada’s Arbitration Act of 1991. *Id.* at 331. In response to widely publicized public alarm, Boyd was instructed by the Minister Responsible for Women’s Issues “to explore the use of private arbitration to resolve family and inheritance cases, and the impact that using arbitrations may have on vulnerable peoples.” *Id.* at 332. The finished report provides useful insights to both sides of the debate and has been used to inform the policy analysis here. Ultimately, the Canadian legislature amended the Arbitration Act to foreclose all religious tribunals from family arbitrating, shutting the doors on the many religious arbitration organizations operating in the country at that time. *Id.* at 333.

172. McClain, *supra* note 33, at 337.

173. *Id.* This is not an illusory fear. The Boyd Report noted above contains testimony from several Canadian Muslim women about the real and often intense pressure to participate in such arbitration tribunals. See *Boyd Report*, *supra* note 171, at 39–55.

174. McClain, *supra* note 33, at 338.

175. See *supra* notes 169–170 and accompanying text.

176. Estin, *supra* note 8, at 96.

177. Michael C. Grossman, *Is This Arbitration: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 179 (2007) (characterizing currently available Imam-led arbitration in the U.S. as “informal, closed and secret, and lack[ing] uniform rules and procedures”).

178. Homa Khaleeli, *Inside Britain’s Sharia Councils: Hardline and Anti-Women – or a Dignified Way to Divorce?*, GUARDIAN (Mar. 1, 2017), <https://www.theguardian.com/law/2017/mar/01/inside-britains-sharia-councils-hardline-and-anti-women-or-a-dignified-way-to-divorce> [<https://perma.cc/MV>

of any pluralist system, then, in some ways provides less protection for individuals who might be vulnerable to community pressure to participate in “unofficial” arbitration forums.¹⁷⁹ In other words, a complete rejection of any concept of shared jurisdiction “may instead thrust these tribunals underground where no state regulation, coordination, or legal recourse is made available to those who may need it most.”¹⁸⁰

C. *Benefits of a Pluralist Approach*

One benefit of permitting some interaction between civil courts and Islamic arbitration tribunals is that it allows for greater oversight to ensure protection of basic rights. As the example of BDA suggests, embracing a pluralist scheme also encourages self-regulation by the religious arbitral body itself to come into conformity with the standards of U.S. civil law, including standardized procedural rules, fair appellate processes, and fundamental rights of due process and equal protection under the law.¹⁸¹ This, in turn, incentivizes religious arbitrators to become familiar with tenets of American civil law and cultivates a “dual-system fluency.”¹⁸² Over time, this may lead to new interpretations of religious and cultural norms and a plurality of practices even within these traditions.¹⁸³ If such a system were employed in Islamic law matters, not only would American judges become more familiar and comfortable with basic tenets of Islamic law, but so too would Islamic arbitrators with American law.

On a more basic level, a pluralist approach to Islamic arbitration would validate and recognize that there is “more than one conception of marriage and divorce” within American society.¹⁸⁴ In America, there is a pervasive notion that our system of civil law is culturally and religiously neutral.¹⁸⁵ Of course, the reality is that this is far from the truth.¹⁸⁶ Recognition that our official family law is not culturally neutral is fundamental to creating a society in which diversity of culture, beliefs, and marriage and divorce practices are allowed to exist.

L4-8JJV]; Jean Mackenzie & Adam Eley, *The UK Women Seeking Divorce Through Sharia Councils*, BBC NEWS (July 11, 2016), <http://www.bbc.com/news/uk-36587665> [https://perma.cc/WCV3-4MVF]; Frances Perraudin, *Muslim Women ‘Used as Political Footballs in Sharia Court Debate*, GUARDIAN (Nov. 1, 2016), <https://www.theguardian.com/law/2016/nov/01/muslim-women-used-as-political-football-in-sharia-court-debate> [https://perma.cc/U384-QFE9].

179. McClain, *supra* note 33, at 343.

180. *Id.*

181. See discussion *supra* Section IV.A.

182. Broyde, *supra* note 151, at 300.

183. Estin, *supra* note 8, at 118.

184. Nichols, *supra* note 142, at 13.

185. McClain, *supra* note 33, at 317.

186. *Id.*

CONCLUSION

When it comes to *mahr* agreements within Islamic marriage contracts, it is easy to see how such a pluralist system would create both more consistent results and results more in line with parties' intentions and religious beliefs. Instead of investing time grappling with varying and unfamiliar Islamic religious practices, courts would play an oversight role, ensuring the protection of the fundamental rights central to our civil system of law. In turn, this would empower the American Muslim community to determine its own course through self-regulation and to align itself with core tenets of American civil law. Finally, this system would help end the pervasive and misplaced fear of the Islamic religion and foster a more nuanced understanding of Islamic family law within American society.

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APPENDIX

The Islamic Foundation of Greater St. Louis
517 Weidman Road, Manchester, MO 63011
Certificate of Marriage

I, _____, Imam/Director of Religious Affairs, of the
Islamic Foundation of Greater St. Louis do hereby certify that:

(a) Brother/Groom _____ of _____
and _____ of _____
(b) Sister/Bride _____ of _____

have declared and affirmed before me:
That in the case of each of them no legal impediment exists as to his or her right to enter into the state of marriage, and, That each and both, of their own free will, agree to be united in marriage under the law of Islam as revealed by Prophet Muhammad, son of Abdullah and as contained in the Quran and Hadith. (II) In view of the above declarations made before me, in the presence of the witnesses named hereinafter, the Imam of the Islamic Foundation of Greater St. Louis, do hereby confirm that the parties named in Part (a) and (b) above, have been united by me in matrimony as husband and wife.

(Saddiq) Advancer: _____ Postponed: _____ Total: _____
We, husband and wife, agree to enter our children's Marriage

Signature of Husband _____ Signature of Witness _____
Residence _____
Signature of Wife _____ Signature of Witness _____
Residence _____
Signature of Official _____

Done in St. Louis, Missouri
On _____ day of _____ 14 _____ /A.H.
_____ day of _____ 20 _____ /A.C.

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