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ASSERTING STATE SOVEREIGNTY OVER NATIONAL COMMUNITIES OF ISLAM IN THE UNITED STATES AND BRITAIN: SHARIA COURTS AS A TOOL OF MUSLIM ACCOMMODATION AND INTEGRATION

I. INTRODUCTION

Britain has recently conferred legal validity to decisions made by courts that apply sharia law, the Islamic religious code, under the 1996 Arbitration Act.¹ According to Sheikh Faiz-ul-Aqtab Siddiqi, a legal advisor to the Muslim Arbitration Tribunal, the Act allows for consenting Muslims to obtain judgments based on sharia law through arbitration, a form of alternative dispute resolution.² Arbitration, as provided for by the Act, enables parties embroiled in a civil dispute to have their case heard by an impartial tribunal without the costs of litigation.³ Moreover, the Act gives the full force of law to decisions made in this manner for all parties who agree to arbitrate under its provisions.⁴ Thus, decisions made by sharia courts are binding, just as any other private arbitration is under British law.

1. See, e.g., Dan Bell, *The View From Inside a Sharia Court*, BBC NEWS (Feb. 11, 2008), http://news.bbc.co.uk/2/hi/uk_news/7238890.stm; Matthew Hickley, *Islamic Sharia Courts in Britain Are Now Legally Binding*, MAIL ONLINE (Sept. 15, 2008), <http://www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html>; Richard Edwards, *Sharia Courts Operating in Britain*, THE TELEGRAPH (Sept. 14, 2008), <http://www.telegraph.co.uk/news/uknews/2957428/Sharia-law-courts-operating-in-Britain.html>.

2. More specifically, according to Siddiqi, “We realized that under the Arbitration Act we can make rulings which can be enforced by county and high courts. The act allows disputes to be resolved using alternatives like tribunals. This method is called alternative dispute resolution, which for Muslims is what the sharia courts are.” Abul Taher, *Revealed: UK’s First Official Sharia Courts*, THE TIMES (Sept. 14, 2008), <http://www.timesonline.co.uk/tol/comment/faith/article4749183.ece>.

3. As pertinent here, the Arbitration Act provides:

1. The provisions of this Part are founded on the following principles, and shall be construed accordingly—

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters governed by this Part the court should not intervene except as provided by this [Act].

Arbitration Act, 1996, c.23, § 1 (Eng.).

4. See generally MUSLIM ARBITRATION TRIBUNAL, <http://www.matribunal.com/index.html> (last visited Apr. 5, 2012) (describing the Muslim Arbitration Tribunal’s use of the Arbitration Act to render enforceable judgments based on sharia law).

This practice has been the subject of controversy in Britain and throughout the West,⁵ as critics question whether applying sharia law in formal legal settings fundamentally compromises core democratic values.⁶ As such, when several prominent Britons publicly supported the courts, they drove the British media into a furor.⁷ Accordingly, one commentator characterized the resulting debate surrounding the practice as split between those who see the courts as a helpful way to grant an immigrant community legal equality and opponents who caution against the dangers that the anti-democratic tendencies of sharia law pose to Western society.⁸

Similarly, in the United States, the fear of the invasion of sharia law into domestic courts has infiltrated the national political discourse. For example, voters in Oklahoma, where only .004% of the population is Muslim, recently approved a ballot measure supported by mainstream politicians banning the use of sharia law in state courts by an overwhelming majority.⁹ Indeed, some U.S. citizens have expressed further concern that “the United States stands to become another England

5. In Ontario, Canada, sharia courts have been banned outright. *See, e.g.*, Kerry Gillespie & Rob Ferguson, *New Law to Ban Religious Tribunals*, TORONTO STAR, Nov. 15, 2005, at A9.

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

7. When Chief Justice of Britain, Lord Chief Justice Nicholas Phillips, voiced his support for these courts, he was widely criticized in the British media. Phillips’s exact words on the matter were:

[T]here is no reason why Shari’a principles, or any other religious code, should not be the basis for mediation or other forms of alternative dispute resolution [with the understanding] . . . that any sanctions for a failure to comply with the agreed terms of mediation would be drawn from the Laws of England and Wales.

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 (2009). Moreover, Rowan Williams, the Archbishop of Canterbury, drew fire for commenting on the necessity of “crafting a just and constructive relationship between Islamic law and the statutory law of the United Kingdom.” Kim Murphy, *Islamic Law Finds a Role in Britain*, L.A. TIMES (June 20, 2008), <http://articles.latimes.com/2008/jun/20/world/fg-sharia20>.

8. John Bowen describes the fault-lines of the debate as such:

Do the tribunals provide a useful model for legally recognizing the equal standing of an immigrant community? Or do they threaten the integrity of law and democracy, and promise—as some argue—the unequal treatment of women in that community?

John R. Bowen, *Private Arrangements: Recognizing Sharia in England*, BOSTON REVIEW (Mar./Apr. 2009), <http://bostonreview.net/BR34.2/bowen.php>.

9. That ban was passed on November 3, 2010, and seventy percent of voters supported it. Andy Barr, *Oklahoma Bans Sharia Law*, POLITICO (Nov. 3, 2010), <http://www.politico.com/news/stories/1110/44630.html>. Moreover, Newt Gingrich, former Speaker of the United States House of Representatives and 2012 presidential candidate, lent vocal support to the ban. In particular, Gingrich observed: “We should have a federal law that says under no circumstances in any jurisdiction in the United States will Sharia [law] be used in any court to apply to any judgment made about American law.” *Id.*

or France, a place where Muslims are balkanized and ultimately threaten to impose sharia.”¹⁰

Nevertheless, the United States has never explicitly barred religious law from consideration in either private arbitration or domestic law proceedings. In fact, observant Jews arbitrate cases in rabbinical courts, and Christian arbitrations have appeared before federal courts.¹¹ Although Muslims have yet to seek out religious arbitrations on any significant scale, sharia law courts have emerged, rendering decisions enforced by domestic courts of the United States.¹² Accordingly, a discussion of whether sharia courts constitute an effective policy that is consonant with democratic values could be useful to America’s leaders.

This Note enters that discourse by considering whether the United States should follow Britain’s example by explicitly sanctioning sharia courts for private arbitrations. Moreover, it looks more broadly to the role, if any, that sharia law should have in domestic courts across the country. In doing so, it argues the United States should learn from Britain’s example because, with proper procedural safeguards, parties could use sharia courts in limited circumstances as an effective tool in alternative dispute resolution. Perhaps more importantly, it further suggests that sharia courts could offer a useful mechanism for the United States to manage the challenges posed by transnational Islam.

To that end, Part II explores substantive areas of sharia law, including divorce, child custody, and inheritance. Part III details the social, political and historical context for the rise of sharia courts in Britain. Part IV discusses the structure of the organizations that run sharia courts in Britain. Part V develops context for the application of ecclesiastical law in the United States. Accounting for the context developed in Part V, Part VI applies lessons learned from the British example to determine the form sharia courts should ultimately take in the United States if legislators were to embrace them. Finally, Part VII concludes by arguing that, with proper safeguards, sharia courts can be a mutually beneficial policy for both the United States and American Muslims.

10. Bowen, *supra* note 8.

11. *See, e.g.*, *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1111–13 (D. Colo. 1999) (analyzing Christian arbitration panel under FAA); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 359–64 (D.C. Cir. 2005) (applying D.C. UAA to synagogue).

12. *See, e.g.*, *Jabri v. Qaddura*, 108 S.W.3d 404 (Tex. App. 2003) (ordering Islamic arbitration to determine the enforceability of a marriage contract).

II. SHARIA LAW

To best understand the controversy related to sharia courts, it is first necessary to get a sense of some of the basic tenets of sharia law.¹³ Divorce, child custody, and inheritance constitute three of the main and most controversial dispute areas handled by sharia courts in Britain.¹⁴ As such, a better understanding of these specific areas illustrates the conflicts between sharia law and democratic values pertinent to this Note.

Sharia law is the religious code of Islam; however, it is far from a neat, unitary set of laws. Rather, sharia law is woven together from five different sources: “the *Quran*, *Sunna* (“tradition”), *qiyas* (“analogy”), *igma* (“consensus among Muslim scholars”), and *ijtihad* (“independent juristic reasoning”).¹⁵ The *Quran*, or the written record of Allah’s word, is the primary source of sharia law. Since the *Quran* “offers primarily ethical guidelines, not codified legal instructions [T]he other sources are used to supplement what the *Quran* does not directly set forth.”¹⁶ Men and women have different rights, remedies, and privileges under sharia law.¹⁷ Sharia law also varies significantly according to the practices of the many different sects of Islam.¹⁸ Nevertheless, some basic generalizations can be made about the principles of sharia law applied in British mediations and

13. Most broadly, “Shari’a law is a collection of Islamic principles by which Muslim societies abide. In Arabic, sharia literally means ‘a way to a watering place,’ and thus a path to be followed.” Reiss, *supra* note 7, at 742. Accordingly, more than any readily discernible set of laws, sharia constitutes a way of life.

More relevant to the controversial practices at issue in this Note, arbitration has a specific and unique history in Islam. To that end, according to American University of Beirut professors Ahmad S. Moussali and Mona Rafeeq, “the language of the Qur’an encourages arbitration of private conflicts.” Mona Rafeeq, *Rethinking Islamic Law Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 WIS. INT’L L.J. 108, 113 (2010). In fact, prior to Muhammad’s well-known activities as a prophet, his reputation was based on being “an honest and wise arbiter among the non-Muslim, Arab tribes.” *Id.* Indeed, this style of reputation followed even after he became a prophet, as “he usually settled conflicting viewpoints by asking the opposing parties to explain their interpretations of the Qur’an, and then he either confirmed or denied the validity of their perspectives.” *Id.* Muhammad also served as an arbiter between Muslims and non-Muslim communities. *Id.* Thus, arbitration as a style of conflict resolution is firmly rooted in Muslim history and tradition. As such, arbitration is consonant with principles encoded in sharia and, therefore, constitutes an intersection between sharia and the law of western democracies.

14. Reiss, *supra* note 7, at 742.

15. *Id.*

16. *Id.*

17. *Id.*

18. See, e.g., Amira Mashhour, *Islamic Law and Gender Equality—Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 575 (2005) (describing the differences between divorce rules for women between different sects in Islam).

arbitrations. The most prominent differences in the treatment of men and women occur in the family arena, including how husbands and wives may divorce, child custody, and inheritance.

A. *Divorce*

1. *Men's Procedures for Divorce*

While divorce is generally discouraged in Islam, several procedures exist for divorce under sharia law. Under those procedures, as in most other aspects of sharia law, husbands' rights differ from wives' rights. Specifically, men may divorce through a process called "talaq," which is traditionally enacted when a husband announces his wish to divorce his wife during her period of menstruation, while remaining sexually abstinent for a period of a month.¹⁹ The husband repeats this procedure three times before a marriage is officially dissolved under Islamic law.²⁰ Alternatively, though eschewed by most forms of mainstream Islam, some men may divorce their wives by simply pronouncing, "I divorce you" three times consecutively.²¹

2. *Women's Procedures for Divorce*

There are four ways that Muslim women can divorce their husbands under sharia law. First, they may employ "delegated talaq," a procedure which wives and husbands must secure by contract prior to marriage that allows both men and women to divorce unilaterally.²² Second, a wife may exercise a "khul," wherein "she must give something for her freedom—usually her dowry. After a wife requests a khul, the husband is not permitted to reconcile without her consent."²³ Third, a wife may also obtain a divorce through judicial intervention, *e.g.*, for "maltreatment and harm . . . refusal or inability to maintain the marriage, desertion or absence for more than one year, and physical or mental defect that would make a continuation of the marriage harmful to the wife."²⁴ Fourth, a wife is

19. *Id.* at 748.

20. *Id.*

21. *Id.* at 749.

22. *Id.*

23. Reiss, *supra* note 7, at 750.

24. Mashour, *supra* note 18, at 575.

vested with the right to divorce if her husband has in some way breached agreed-upon terms of the marital contract.²⁵

B. Child Custody

Under sharia law, a father retains the ultimate right to custody over his children. To that end, up until a designated age, children remain with their mother, at which point they are transferred to the father. That structure exists because, under sharia law, the father is “the ‘natural guardian’ of his children with the paternal grandfather as second-in-line to guardianship.”²⁶ Accordingly, legal guardianship is passed down “along the father’s bloodline where neither the father nor the paternal grandfather is able to take custody of the child.”²⁷ However, while ultimate legal guardianship is reserved for the father, immediate physical custody is often granted to the mother following a divorce.²⁸ The mother typically retains physical custody of the child “until the child reaches the age of custodial transfer.”²⁹ Inevitably, therefore, a transfer of custody must take place under these principles. And, consistent with many of the gender disparities under sharia law, the predetermined age for transferring the custody of boys and girls differs: for boys, the transfer usually occurs in the range of from 7 to 9 years-old; for girls, that range is less definite, as it can “extend anywhere from puberty to womanhood.”³⁰

C. Inheritance

When an inheritance dispute arising under sharia involves a man and a woman, the basic governing principle is that a man receives twice the amount of a share of an inheritance as a woman within the same social class under a system of “fixed shares.”³¹ Of course, more specific guidelines apply to the circumstances of different familial configurations.³² This law depends solely on gender, not the relation or role of the woman to the deceased individual whose will is in question.

25. *Id.*

26. *Id.* at 753–54.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 754.

31. *Id.* at 756.

32. These inheritance rules likely predate the Quran, tracing back to ancient practices in the Arabian Peninsula. *Id.*

III. CONTEXT FOR SHARIA COURTS IN BRITAIN

A. *Democratic Values in Britain*

Sharia courts have been controversial in Britain due to the obvious problems sharia law poses to women's equality and democratic values. Given the private nature of the arbitrations, the courts operate outside of the public view and free from meaningful independent oversight. This structure, though common in arbitrations, leads critics to worry that sharia courts will render unfair judgments enforced by intimidation on parties who have not truly consented to the court's jurisdiction. Along those lines, some feel the sharia courts have inadequate protections for women and children caught in abusive relationships.³³ Critics also worry about the British government enforcing fatwas, or religious decrees.³⁴

Proponents of the courts make several arguments focused on religious liberty. To that end, parties involved in a dispute must consent to the jurisdiction of the sharia court, as the Act provides for parties to have disputes resolved in the tribunal of their choice.³⁵ Parties also have broad discretion to set the terms of arbitration.³⁶ Moreover, many women, despite being treated unequally under sharia law, seek out imams, Islamic spiritual leaders, for guidance on religious matters, as they care deeply about complying with sharia law.³⁷ Given the transnational nature of many of the marriages in question, sharia courts often provide an important bridge between Britain and immigrants' home countries.³⁸ Finally, by

33. See Robin Fretwell Wilson, *supra* note 6, at 926 (arguing that the danger of applying sharia law in British courts stems from fundamental inequalities in the law for women, who would not be able to escape abusive relationships, and under-protection of children, who would suffer from living in such an environment); see also Andy McSmith, *The Big Question: How Do Britain's Sharia Courts Work, and Are They a Good Thing?*, THE INDEPENDENT (June 30, 2009), <http://www.independent.co.uk/news/uk/home-news/the-big-question-how-do-britains-sharia-courts-work-and-are-they-a-good-thing-1724486.html>.

34. See McSmith, *supra* note 32.

35. Arbitration Act, 1996, c.23 § 15(1) (Eng.).

36. See Rafeeq, *supra* note 13, at 127.

37. See Bowen, *supra* note 8 ("Women tend to accept the tribunals' formal decisions because, strategically, religious divorces are important. But most then turn to the civil courts to obtain rulings on child custody and divorce settlements.").

38. John Bowen describes the need to bridge transnational marriages in the following manner:

About one half of British South Asian Muslims have transnational marriages, and many find difficulties in English civil courts if their marriages lead to divorce. Pakistan does not accept all English grounds for divorce, and England sometimes refuses to acknowledge Pakistani divorces (in particular where the husband has pronounced a unilateral divorce, the *talaq*).

Bowen, *supra* note 8.

some accounts, religious equality necessitates recognizing the legitimacy of the courts: the Jewish orthodox community has engaged in religious arbitration for over 100 years in Britain.³⁹

B. Historical and Social Context for Sharia Courts in Britain

Britain has a long historical relationship with Islam through imperial conquests on the Indian subcontinent. Although a very small number of Muslim immigrants appeared in Britain as early as the mid-to-late nineteenth century, most Muslim immigrants came to fill the labor void following World War II.⁴⁰ At the time, however, British officials had no reason to suspect that a majority of this influx would fail to repatriate and subsequently remain in Britain because most immigrants came with the intent of returning.⁴¹ Accordingly, Muslim immigrants “thought of themselves as transient residents, and they regarded marriage and divorce as matters to be handled in the community overseas, with little or no involvement from the English courts.”⁴² Britain thus had a liberal immigration policy that afforded all subjects in the British Empire the rights of “entry and settlement” in Britain.⁴³ After many of these once-temporary Muslim laborers settled into the country, Britain placed limits on immigration.⁴⁴ Nonetheless, the British government still allowed immigrant families to reunite.⁴⁵ Yet, since many immigrants feared that the government might impose even more restrictive immigration policies in the future, most brought their families to Britain.⁴⁶ As a result, the immigrant population of ethnic minorities in Britain “expanded rapidly from the 1970s on, growing from an estimated 1 million in 1968 to 3 million in 1991.”⁴⁷ Of these ethnic minorities, as of 2010, approximately 2.87 million were Muslims residing in Scotland, England, and Wales.⁴⁸

39. See Fretwell Wilson, *supra* note 6, at 927.

40. JOEL S. FETZER & J. CHRISTOPHER SOPER, MUSLIMS AND THE STATE IN BRITAIN, FRANCE, AND GERMANY 27 (2005).

41. *Id.*

42. Bowen, *supra* note 8.

43. FETZER & SOPER, *supra* note 40, at 28 (quoting Christian Joppke, *Why Liberal States Accept Unwanted Immigrants*, 50(2) WORLD POLITICS 266–93, 288 (1998)).

44. *Id.* at 28–29.

45. *Id.*

46. *Id.* at 29.

47. *Id.*

48. Damian Thompson, *Muslim Population Has Grown from 1.65 Million to 2.87 Million Since 2001, Say Researchers. What Does This Mean for Liberal Britain?*, THE TELEGRAPH (Dec. 28, 2010), <http://blogs.telegraph.co.uk/news/damianthompson/100069830/the-muslim-population-has-grown-from-1-65-million-to-2-87-million-since-2001-say-researchers-what-does-this-mean-for-liberal-britain/>.

Britain's Muslims come primarily from Southern Asia, specifically Pakistan, India, and Bangladesh.⁴⁹

Accordingly, since the 1960s and 1970s, the British government has engaged in an active campaign to integrate Muslim immigrants into the broader national community, while allowing them to maintain aspects of their cultural identity. For example, throughout the 1960s and 1970s, "the British government provided aid to local ethnic associations, which became the primary bases for effectuating Muslim demands about schooling, halal foods, and other religious practices. Muslims learned to resolve problems 'in the community.'"⁵⁰ Many of those local organizations were united under one broader national organization when the Muslim Council of Britain ("MCB") was established in 1997.⁵¹ The MCB has since become the most prominent voice of Muslims in Britain, serving as an intermediary between the Muslim population at large and the British government.⁵²

49. FETZER & SOPER, *supra* note 40, at 29.

50. Bowen, *supra* note 8, at 2.

51. *See generally Muslim Council of Britain—Its History, Structure and Workings*, THE MUSLIM COUNCIL OF BRITAIN, http://www.mcb.org.uk/downloads/MCB_achievements.pdf (last visited Apr. 5, 2012) (explaining the history behind and inner workings of the Muslim Council of Britain).

52. The Muslim Council of Britain is organized around six "aims and objectives." The organizational constitution enumerates them as such:

- (i) To promote cooperation, consensus and unity on Muslim affairs in the UK.
- (ii) To encourage and strengthen all existing efforts being made for the benefit of the Muslim community.
- (iii) To work for a more enlightened appreciation of Islam and Muslims in the wider society.
- (iv) To establish a position for the Muslim community within British society that is fair and based on due rights.
- (v) To work for the eradication of disadvantages and forms of discrimination faced by Muslims.
- (vi) To foster better community relations and work for the good of society as a whole.

Aims and Objectives, THE MUSLIM COUNCIL OF BRITAIN, <http://www.mcb.org.uk/aim.php> (last visited Apr. 5, 2012).

In practice, the Council applies these guiding principles, in accordance with Islamic scripture, laws, and norms, to several areas of public advocacy. *See* Konrad Pedziwiatr, *Creating New Discursive Arenas and Influencing Policies of the State: The Muslim Council of Britain*, 54(2) SOC. COMPASS 267, 272 (2007). Most importantly, the Council surveys and then characterizes Muslims' political interests. *See Research and Documentation: Projects*, THE MUSLIM COUNCIL OF BRITAIN, http://www.mcb.org.uk/comm_details.php?heading_id=14&com_id=2 (last visited June 1, 2012). Through discourse with the British government, the MCB not only advances particular policy issues but also ensures that Muslims engage meaningfully in the political process. *See* Pedziwiatr, *supra*, at 268. As a result, the British government has recognized the Council as the foremost representative of British Muslims. Furthermore, the Council also represents Muslim culture and viewpoints to the British media. *See id.* at 273. This strategy of public image management consists of presenting Islam in a way that seeks to mitigate popular currents of Islamophobia and present a unified Muslim voice on important public issues. *See id.* Often, the Council's messages focus around the theme of mainstream Islam's respect for and espousal of peace and justice. *See id.* According to Konrad Pedziwiatr, "The

The MCB's rise has been mutually beneficial for the British government and the organization itself. On the one hand, as issues affecting Muslims have become more important, the MCB has opportunistically brokered its political power for a heightened status with the British government.⁵³ At the same time, the British government has

MCB argues its position not with reference to the Sharia or Qur'an, which would not appeal to the majority of non-Muslim readers, but usually with references to principles such as human rights, international law and the will of the international community." *Id.*

Since there are roughly 250 Islamic institutions, which include "mosques, education and charitable institutions, women and youth organizations and professional bodies," *id.* at 271, affiliated with the MCB, the presentation of a unified Islamic voice, either in the media or politics, is extremely difficult. More specifically:

The differences between conservative and progressive, the first and second generation activists, as well as between the Deobandis, Salafis, Brelwis and others, all come into play not only at times when the organization decides to respond to major international events such as the military interventions in Afghanistan or in Iraq but also when addressing national issues which include *inter alia* religious extremism, anti-Semitism or homophobia within the Muslim population.

Melanie Phillips, *After the Rushdie Affair, Islam in Britain Became Fused with an Agenda of Murder*, THE OBSERVER (May 28, 2006), <http://www.guardian.co.uk/commentisfree/2006/may/28/religion.islam>. These differences have not proven impossible to overcome; however, they are an important aspect of the organizational mode of operation. Moreover, one-third to one-half of its member organizations belongs to reformist Islam, suggesting at least some internal coherence. See Sean McLoughlin, *The State, 'New' Muslim Leaderships and Islam as a 'Resource' for Public Engagement in Britain*, in EUROPEAN MUSLIMS AND THE SECULAR STATE 55, 55-69 (Jocelyne Cesari et al. eds., 2005). In addition to these political and media responsibilities, the Council also raises money for Islamic charities, provides guidelines to help Muslims deal with the challenges of western life, and compiles research and statistics to aid scholars of Islam. *Id.* Thus, the responsibilities of the MCB, like the organization itself, are broad and all encompassing.

With that said, the MCB occupies a tenuous place in Britain's public sphere, divided between its mission to represent the interests of a minority population and its desire to maintain the favor of the British government. Some Muslims, for instance, have accused it of being of being a bourgeois organization that has acted as a kind of mouthpiece for the British government's official stance on Islamic affairs. See *id.* at 60. Conversely, the British government has accused it of compliance with condoning radicalism. See *id.* at 61. For example, the MCB's "'failure' to support the war in Afghanistan in late 2001 . . . resulted in the government publicly questioning the very 'authority' it had taken a key role in ascribing." *Id.* Thus, the MCB is constantly walking a fine line between remaining faithful to their constituency's interests and beliefs and maintaining their favorable relationship with the British government. See *id.* (explaining that "all minority leaderships must strike a balance between strategies of accommodation and protest").

53. Sean McLoughlin noted the opportunistic nature of the MCB's rise to prominence, commenting:

Perhaps fortuitously, the MCB's consolidation of a 'new' professionalized, and media-friendly, Muslim representative body coincided with the election of New Labour. As we have seen, the party has been committed to an important role for faith in the more general project of civic renewal. However, as the elections of 1992 and 1997 have shown, it was also no longer in a position to take the votes of Muslims for granted. In any case, having received a positive response to its initial enquires, the MCB soon found itself invited to regular meetings and receptions at the Home Office and Foreign and Commonwealth Office, even representing the latter as a part of delegations to Muslim countries.

McLoughlin, *supra* note 52, at 61.

taken advantage of the rise of the MCB to incorporate a cohesive Muslim voice in its process of policy formation.⁵⁴

Unsurprisingly, the MCB has helped to shape the discussion of Muslim arbitration in Britain through its support.⁵⁵ Similar to many of the important issues facing Muslims in Britain, the MCB's support was critical to the British government's acceptance of sharia courts. Additionally, as will be discussed below, the organizations that run sharia courts have come to resemble the MCB and other state-instituted organizations for Muslim integration throughout Europe in that these organizations represent the efforts to reconcile British ideals with Muslim values. These compromises have been essential to successfully integrating Muslims into Western democracies.

C. Policies in the Greater Western European States

There have been similarities among the policy responses of western European states to the difficulties posed by accommodating Muslim immigrants.⁵⁶ These solutions have had similar positive consequences for minority integration.⁵⁷ Specifically, western European countries have developed ties with Muslim religious authorities in a broader attempt to nationalize Islamic religious communities through the creation of representative governmental organizations.⁵⁸ Rather than being "overrun by the unplanned or undesired mass settlement of Muslims," western European states, as demonstrated by the trends of their assertive policies of integration, have assumed an active role in managing the discrepancies between the individual and group identities of Islamic citizens.⁵⁹

54. *Id.*

55. On that point, Inayat Bunglawala, assistant secretary-general of the Muslim Council of Britain, said, "The MCB supports these tribunals. If the Jewish courts are allowed to flourish, so must the sharia ones." TaHER, *supra* note 2.

56. "Western Europe" here refers to the highly developed democracies in the western portion of Europe, including the United Kingdom, Ireland, France, Germany, Italy, Spain, the Netherlands, Portugal, Denmark, Norway, Sweden, Finland, Greece, Switzerland, Belgium, and Austria.

57. See generally Jonathan Laurence, *Managing Transnational Islam: Muslims and the State in Western Europe*, in IMMIGRATION AND THE TRANSFORMATION OF EUROPE (Craig A. Parsons & Timothy M. Smeeding eds., 2009) (arguing that, despite widespread pessimism about the challenges posed by Muslim immigrants, western European states have taken similar constructive steps toward integrating these populations). Emblematic of a growing line of scholarship in this area, Laurence argues, "European nation-states have reasserted their sovereign prerogative to manage the transnational threats associated with their citizens' religious membership." *Id.* at 252.

58. *Id.* at 254–55.

59. *Id.* at 252.

While no other European country has authorized sharia courts, and the British government has not co-opted the Muslim Arbitration Tribunal or the Islamic Sharia Council in the same way it did the MCB, sharia courts promise the same benefits of state-supported Islamic organizations throughout Europe. Specifically, by legitimizing organizations that apply sharia in arbitrations, which arose in a fashion similar to the MCB, Britain can ensure that a moderate form of sharia law is promoted throughout the country. At the same time, government officials can use sharia courts to build closer ties to leaders in the Muslim community. Such a policy, therefore, would accommodate Muslim spiritual needs, while asserting state sovereignty over a diverse, transnational religion. A closer look at the organizations that run the sharia courts provides insight into the nuances of this approach.

IV. BRITISH COURTS THAT APPLY SHARIA LAW

A. *Muslim Arbitration Tribunal*⁶⁰

Studies have speculated that up to eighty-five courts apply sharia law in Britain.⁶¹ Chief among those are the courts organized under the umbrella of the Muslim Arbitration Tribunal (“MAT”), which render binding decisions under the 1996 Arbitration Act.⁶² According to MAT, the overarching objective of the organization is to decide cases “in accordance with Qur’anic Injunctions and Prophetic Practice as determined by the recognised Schools of Islamic Sacred Law . . . as fairly, quickly and efficiently as possible . . .”⁶³ Moreover, MAT recognizes that, in certain circumstances, “members of the Tribunal have responsibility for ensuring this in the interests of the parties to the proceedings and in the

60. See THE MUSLIM ARBITRATION TRIBUNAL, *supra* note 4. The Muslim Arbitration Tribunal describes its mission and purpose as such:

The Muslim Arbitration Tribunal (“MAT”) was established in 2007 to provide a viable alternative for the Muslim community seeking to resolve disputes in accordance with Islamic Sacred Law and without having to resort to costly and time consuming litigation. The establishment of MAT is an important and significant step towards providing the Muslim community with a real opportunity to self determine disputes in accordance with Islamic Sacred Law.

Id.

61. See Denis MacEoin and David G. Green, *Sharia Law or One Law for All* 69 (2009), available at <http://www.civitas.org.uk/pdf/ShariaLawOrOneLawForAll.pdf>.

62. See Arbitration Act, 1996, c.23, § 46 (Eng.).

63. MUSLIM ARB. TRIB. R., 1(1), available at http://www.matribunal.com/procedure_rules.html (last visited Apr. 5, 2012).

wider public interest.”⁶⁴ To request a hearing before a court in MAT, interested parties must submit a written request, which, among other requirements, must set forth the “grounds” and “reasons in support of those grounds” for a case.⁶⁵ Parties must also include whether they have authorized representation, a document and witness list, as well as any previous decisions relevant to the matter at hand.⁶⁶ Parties may withdraw either “orally, at a hearing . . .” or “at any time, by filing written notice with the Tribunal.”⁶⁷ Tribunals that hear the cases must consist, at a minimum, of a “Scholar of Islamic Sacred Law” and a “Solicitor or Barrister of England and Wales.”⁶⁸ In rendering a decision, the Tribunal “may consider but not be bound by any previous decision of the Tribunal,” while “tak[ing] into account the Laws of England and Wales and the recognised Schools of Islamic Sacred Law.”⁶⁹ There is no system for appeals within MAT, but parties may seek judicial review from Britain’s High Court.⁷⁰ Accordingly, by incorporating representatives from both

64. MUSLIM ARB. TRIB. R. 2(1).

65. MUSLIM ARB. TRIB. R. 2(1)(e)-(d).

66. MUSLIM ARB. TRIB. R. 2(1)(c),(f).

67. MUSLIM ARB. TRIB. R. 4(1). For reference, the procedure for bringing a case before the Muslim Arbitration Tribunal follows as such:

2(1). The request for hearing must be in writing and must -

(a) be addressed to the Tribunal;
 (b) state the name and address of the applicant and respondent;
 (c) state whether the applicant has authorised a representative to act for him in the case and, if so, give the representative’s name and address;
 (d) set out the grounds for the case;
 (e) give reasons in support of those grounds; and
 (f) so far as reasonably practicable, list any documents and the name and address of any witnesses which the applicant intends to rely upon as evidence in support of the case.

(2) The request for hearing must if applicable be accompanied by a copy of any relevant decisions against which the applicant is aggrieved.

(3) The request for hearing must be signed by the applicant or his representative, and dated.

(4) If a request for hearing is signed by the applicant’s representative, the representative must certify in the request for hearing that he has completed it in accordance with the applicant’s instructions.

MUSLIM ARB. TRIB. R. 2.

68. MUSLIM ARB. TRIB. R. 10(1).

69. MUSLIM ARB. TRIB. R. 1.

70. MUSLIM ARB. TRIB. R. 23. The MAT also provides the following internal safeguards for errors in procedures under the rules listed:

21 (1) Where, before the Tribunal has determined a case or application, there has been an error of procedure such as a failure to comply with a rule -

1. subject to these Rules, the error does not invalidate any step taken in the proceedings, unless the Tribunal so orders; and

2. the Tribunal may make any order, or take any other step, that it considers appropriate to remedy the error.

British and Islamic law, adhering strictly to the requirements of the Act, and offering the opportunity for some judicial review, MAT adjudicates disputes in a way that legitimately harmonizes British and Islamic legal traditions. At the same time, the organization has relatively formal and detailed procedural guidelines for establishing jurisdiction. Thus, like the MCB, MAT offers the British government an opportunity, through an organization that serves as an intermediary, to pursue a cohesive national policy with respect to Muslim immigrants.

B. Arbitration and the Islamic Sharia Council

Contrary to the rulings handed down by MAT, decisions rendered by the Islamic-Sharia Council (“ISC”)⁷¹ have no binding authority under the Arbitration Act.⁷² Rather, the ISC provides mediation services, which offer

1. (2) In particular, any determination made in a case or application under these Rules shall be valid notwithstanding that the determination was not made or served, within the time period specified in these Rules.

MUSLIM ARB. TRIB. R. 21. If such an error is found through the internal appeals process, the following procedures are employed to correct such an error:

Correction[s] of [Error] or Correction of orders and determinations

22 (1) The Tribunal may at any time amend an order, notice of decision or determination to correct a clerical error or other accidental slip or omission.

(2) Where an order, notice of decision or determination is amended under this rule, the Tribunal must serve an amended version on the party or parties on whom it served the original.

MUSLIM ARB. TRIB. R. 22. Thus, while the potential for error and subsequent injustice is acknowledged, the internal appeals process employed by MAT leaves a significant amount of discretion to the Tribunal, without clearly defining important rights.

71. The Islamic Sharia Council describes its mission as such:

The Council considers itself to be a stabilising influence within the UK Muslim community. Outside of Muslim countries, Islamic institutions are essential for the survival of Muslim communities. Other establishments such as mosques, schools, universities and banks preserve the Muslim identity of a community and create a protective environment for young and old alike.

Historically, Muslim organisations have urged the legislative authorities in the UK, to factor the Islamic viewpoint into all aspects of the legislative process, not least in the field of family law: the response to this call has been surprising indeed. The answer has been clear and unequivocal: one country—one law. Given that what was traditionally known as, ‘the Christian perspective’ in the UK has been essentially annexed from all legal and legislative processes, it almost seems inappropriate to expect that the perspective of yet another religion—Islam—be factored into the discussion.

About Us, ISLAMIC SHARIA COUNCIL, http://www.islamic-sharia.org/index.php?option=com_content&task=view&id=13&Itemid=28 (last visited Apr. 5, 2012).

72. *How the ISC Works: Validity of the Council’s Divorce Certificate*, ISLAMIC SHARIA COUNCIL, <http://www.islamic-sharia.org/how-it-works/how-the-isc-works-6.html> (last visited Apr. 5, 2012).

A divorce decision issued by the Council nullifies an Islamic marriage to which it applies only and has no bearing on the status of any coexistent civil contract (one which is recognised

parties a non-binding view of sharia law on divorces and other civil disputes.⁷³

The ISC's procedural rules are less formal and equality-conscious than those in the courts organized by the MAT. More specifically, for divorces, the ISC offers application forms on its website for men and women.⁷⁴ For men, the form must be accompanied by a document detailing the reasons the party in question is seeking a divorce.⁷⁵ Women are subsequently notified by letter and given 30 days to respond. Men are then given a "talaq nama"—a document that makes the Islamic divorce official—which they must sign in front of two witnesses.⁷⁶ Finally, the ISC mails two copies of the divorce certificate: one with the dowry enclosed to the woman and a second to the man.⁷⁷

The procedure is different, and far more onerous, for women seeking a divorce. Like men, women must submit an application, along with a document detailing the reasons they are seeking divorce.⁷⁸ The ISC then sends up to three letters to the man, which he can respond to in the allotted time.⁷⁹ If the man fails to respond to these three requests, the proceedings move forward without him.⁸⁰ If he responds, however, the ISC conducts a joint meeting between the parties.⁸¹ At that point, an ISC representative

as legally binding under UK Law); for a civil divorce, applicants are advised to refer to the UK legal system for assistance in this area.

Id.

73. *Id.*

74. *Id.*

75. *How the ISC Works: Men Seeking Divorce*, ISLAMIC SHARIA COUNCIL, <http://www.islamic-sharia.org/how-it-works/how-the-isc-works-2.html> (last visited Apr. 5, 2012).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* John Bowen describes the process of the typical Council meetings as follows:

Mediations may begin in a home or mosque, at the request of the husband or wife or family members, or at the Council office. The religious scholar will hear the dispute and probably encourage the couple to resolve their differences. If the dispute leads to divorce, the mediator will suggest arrangements for child-care, the disposition of the bridal gift (*mahr*), and support for the wife and the children—all according to his interpretation of sharia. Sometimes the couple signs an agreement based on the scholar's recommendations.

Once a month a handful of the scholars affiliated with the Council meet in a room next to the large Regents Park Mosque in Central London. They review case files, and, when they have enough information, grant divorces. The assembled scholars come from Pakistan, Bangladesh, and Palestine. They also rely on colleagues from Somalia, Sudan, and elsewhere to interview petitioners in their own languages. Among themselves, the scholars deliberate in English, Arabic, and sometimes Urdu, depending on who is sitting at the table.

interviews the man and the woman separately and prepares a report.⁸² Following the report, the case is presented before a panel, which decides whether to issue an Islamic divorce.⁸³

In addition to the mediation sessions described above, the ISC also issues fatwas in response to emails and postings online.⁸⁴ These fatwas offer Muslims across Britain guidance on their religious questions, covering a wide array of subjects and sometimes striking a disturbing tenor.⁸⁵ The ISC offers fatwas on child custody and inheritance issues but

Each of these cases presents its own complicated history, but many involve transnational journeys and pleas by women to receive religious divorces from their absent or wayward husbands.

Bowen, *supra* note 8. Thus, given the transnational nature of many of the marriages involved in these proceedings, private mediations adjudicated under sharia law offer a necessary service to newly arrived immigrant women. Without such services, these women would be left without a divorce that would have any meaning in their country of origin. *See, e.g.*, Kristine Uhm, Overview of Shari'a and Prevalent Customs in Islamic Societies: Divorce and Child Custody, California State Bar, 2004 Winter Education Section Education Institute/ International Law/ Family Law Workshop on International Custody Abduction, Non-Hague, Islamic Countries (Jan. 2004), <http://www.lawmoose.com/Documents/UmHaniarticle.pdf>, at 10 (explaining that countries that in most countries that follow sharia law, courts do not recognize foreign or secular divorces). Providing these services therefore allows immigrant women to start over and build a new life in a democratic country. They are, in effect, a mechanism of transition. Accordingly, it is difficult to imagine totally depriving a woman of this option, even if less desirable aspects of sharia law are applied in a democratic context.

82. *See Family Inheritance*, ISLAMIC SHARIA COUNCIL, <http://www.islamic-sharia.org/family-inheritance> (last visited June 1, 2012); *Children*, ISLAMIC SHARIA COUNCIL, <http://www.islamic-sharia.org/children> (last visited June 1, 2012).

83. *Id.*

84. *Id.*

85. Some of the fatwas on the website merely give routine instructions on how to pray and live in accordance with Muslim law; others, however, seemingly promote viewpoints inconsistent with democratic values. For example, in response to a woman's inquiries about dating a Christian, the ISC observed in its response noted that Islam had legitimacy over the women's rights movement because it has a much longer tradition of "elevat[ing]" women as "human being[s]." *Fatwa*, ISLAMIC SHARIA COUNCIL, <http://www.islamic-sharia.org/general/want-to-leave-islam-and-marry-a-christian-2.html> (last visited Apr. 5, 2012). Thus, the rhetoric of the organizations adjudicating disputes under Islamic law is a difficulty faced by democracies that choose to recognize them. Moreover, the ISC often issues fatwas without reference to the Quran, or any other text, and which are hastily and unprofessionally written. *See About Us*, ISLAMIC SHARIA COUNCIL, *supra* note 71. As such, an additional concern that governments must face is the professionalism of the organizations they choose to recognize. *Id.*

MAT, on the other hand, in its "values and equalities," sets forth an entirely different set of priorities more consonant with the type of message that most democracies would be comfortable supporting:

We understand that some people will be concerned about taking a case to MAT thinking it may be just a group of Imams sitting in a mosque. Will they be biased against women? Will they understand young people? Will they understand contemporary problems in modern Britain? The short answer is we will have young qualified people, male and female, sitting as members of the Arbitration Tribunal. They are not scholars or lawyers from abroad but from here. In order to promote harmony, we intend to provide female lawyers to sit as the legally qualified member as often as possible. There will be no race or sex discrimination in this organisation!

does not detail a process as it does with divorce.⁸⁶

Thus, unlike MAT, the ISC neither incorporates perspectives from British domestic law nor seeks to comply with any of its requirements. Moreover, the relatively informal procedures and lack of a right of appeal that are in place heavily favor men over women. Similarly, the fatwas issued by the ISC reflect the organization's misogynistic and informal tendencies.

V. ISLAM AND RELIGION IN AMERICAN LAW

The relationship between Islam and America is conspicuously different than the dynamic in Britain, as the United States has fewer historical ties to the Muslim world and a relatively smaller Muslim population. To that end, as commentators have pointed out, difficulties have arisen in trying to quantify the number of Muslims in America "because the U.S. Census Bureau does not collect information based on religion."⁸⁷ As a result, there have been significant discrepancies between the various studies that have collected data. Some estimates have been lower than one might expect: in 2007, the Pew Research Center only accounted for approximately 2.35 million Muslims in the United States.⁸⁸ However, "religious and interfaith groups, and the mainstream news media, often cite a higher figure of 6 million American Muslims."⁸⁹ Similar to most western democracies, the number of Muslims in America appears to be increasing.

Islamic groups are much more diverse, both in terms of their missions and memberships, and much less unified in the United States than in

We believe in the co-existence of both English law and personal religious laws. We believe that the law of the land in which we live is binding upon each citizen, and we are not attempting to impose Shariah upon anyone. Shariah does however have its place in this society where it is our personal and religious law. What a great achievement it will be if we can produce a result to the satisfaction of both English and Islamic law!

Values and Equalities of MAT, MUSLIM ARB. TRIB., <http://www.matribunal.com/values.html> (last visited Apr. 30, 2012). As such, at least in the British case, a correlation exists between the formality of the organization, that is, the extent to which it is organized and the power it is granted to adjudicate disputes, and the professionalism of the organization. That professionalism translates into an organizational mission more in sync with democratic goals and values. This trade-off is a potential point of dispute between those who prefer mediation instead of a binding arbitration because a tradeoff is involved: on the one hand, binding arbitrations give the government more control over the organization, its message, and its direction; on the other hand, mediations offer a significant forum for Muslim viewpoints without giving them the binding force of law.

86. *How the ISC Works: Women Seeking Divorce*, ISLAMIC SHARIA COUNCIL, <http://www.islamic-sharia.org/how-it-works/how-the-isc-works-2.html> (last visited Apr. 5, 2012).

87. Rafeeq, *supra* note 13, at 112.

88. *Id.*

89. *Id.*

Britain.⁹⁰ A streamlined umbrella organization, such as the MCB in Britain, does not exist in the United States; the largest organization is the Islamic Society of North America (“ISNA”).⁹¹ Within ISNA, the Fiqh Council issues fatwas to provide guidance on everyday life for American Muslims, but the organization does not adjudicate personal disputes.⁹² One reason for the limited scope of the organization may be that American Muslims neither view themselves as outsiders like many European Muslims, nor do they see any significant conflict between Islam and democratic values.⁹³ At the same time, while most Americans view Muslims positively, there is still a significant percentage of Americans that distrust Islam.⁹⁴ Thus, the need for immigrant accommodation and integration is substantially different in the United States than in Britain and Europe.

Moreover, like in Britain, it is common in the United States to use alternative forms of dispute resolution to settle legal disputes.⁹⁵ Indeed, “arbitration is the second most commonly used form of alternative dispute resolution, after mediation.”⁹⁶ The Federal Arbitration Act (“FAA”) “defines the parameters of arbitration tribunals’ operation in America, as well as the extent to which courts may intervene in arbitration.”⁹⁷ Parties contract for arbitration and may “select one or more neutral, qualified arbitrators to hear the dispute and then agree to be bound by whatever decision is rendered.”⁹⁸ Under the FAA, courts may stay a proceeding for an issue referable to arbitration or compel arbitration; the unsuccessful party in a court-compelled arbitration may, however, appeal a court’s decision in limited circumstances.⁹⁹ Courts encourage arbitration because

90. Qamar-ul Huda, *The Diversity of Muslims in the United States: Views as Americans*, 159 THE U.S. INST. OF PEACE SPECIAL REPORT 1 (Feb. 2006), available at <http://www.usip.org/files/resources/sr159.pdf>.

91. *Id.* at 6.

92. *History of the Fiqh Council*, THE FIQH COUNCIL, <http://www.fiqhcouncil.org/node/6> (last visited Apr. 5, 2012).

93. Huda, *supra* note 90 at 1.

94. *See id.*

95. Rafeeq, *supra* note 13, at 114.

96. *Id.*

97. *Id.*

98. *Id.*

99. Section 3 of the U.S. Federal Arbitration Act (“FAA”) sets the specific circumstances in which a court may stay a proceeding for an issue that is referable to arbitration. With its broad language, this provision demonstrates the favored nature of arbitration in U.S. courts. 9 U.S.C. § 3 (2006). Likewise, § 4 of the FAA also demonstrates the favored status of enforcing agreements to arbitrate in U.S. courts because the statute lays out the exact procedure for presenting an arbitration agreement before a judge or jury. *Id.* § 4. That safeguard is important in this context

of its cost-effective nature and because oversight mechanisms exist under the FAA to ensure a just and equitable outcome.

Though rare, some tribunals apply sharia and other religious law in America during private arbitrations.¹⁰⁰ Generally, the tribunals that have heard such cases are not organized in any official way and are conducted in secret.¹⁰¹ Instead, much of the litigation in domestic religious courts involving religious tribunals has involved Christianity and Judaism.¹⁰² There have been, at times, constitutional concerns raised by allowing judicial enforcement of the awards doled out by religious tribunals.¹⁰³

The Supreme Court has addressed some of the broader concerns of critics in the United States concerning the relationship between religion

because it ensures that fair arbitration agreements will be enforced, while unfair ones will not. *Id.* Section 16 of the FAA allows for appeals from both § 3 and § 4. *Id.* § 16.

In order to vacate an award, a party would have to bring suit in federal court to challenge its validity. After vacating an award, a “court may, in its discretion, direct a rehearing” if the contracted timeline for arbitrating has run out. *Id.* § 10(a). There are limited grounds upon which an arbitration award can be overturned, all of which are listed in the FAA. *See id.* § 10(a)(1)-(4).

Specifically, § 10 of the FAA enumerates the circumstances under which a U.S. district court can issue an order vacating an arbitration award. *Id.* § 10. The first instance of this is “where the award was produced by corruption, fraud, or undue means.” *Id.* § 10(a)(1). This general fraud-related provision is written in the passive voice, thus covering the corrupt conduct of any party. *See id.* § 10. The next provision focuses on the same concerns, but with specific attention to arbitrators. *See id.* § 10(a)(2). Accordingly, this part of the statute provides latitude to invalidate an award “where there was evident partiality or corruption in the arbitrators.” *Id.*

The next grouping of provisions focuses on procedural defects. To that end, awards can be overturned when an arbitrator engages in “misconduct in refusing to postpone a hearing, upon sufficient cause shown,” “refusing to hear evidence pertinent and material to the controversy,” or “any other misbehavior” compromising the rights of the parties involved. *Id.* § 10(a)(3). These of procedural errors could include a refusal to consider important evidence or create a fair timeline for the proceedings. Along these same lines, courts can vacate awards “where the arbitrators exceeded their powers, or so imperfectly executed them” such that a final award “upon the subject matter submitted” was not rendered. *Id.* § 10(a)(4). An example of the grounds to vacate described in this portion of the provision would include a ruling that did not focus on the key issues in arbitration.

100. *See* Abdul Wahid Sheikh Osman, *Islamic Arbitration Courts in America & Canada?*, HIRAAN ONLINE (2005), http://www.hiraan.com/op/eng/2005/dec/Prof_Abdulwahid211205.htm.

101. *Id.*

102. In the United States, “[b]oth federal and state courts enforce religious tribunal decisions under the Federal Arbitration Act or under state statutes modeled on the Uniform Arbitration Act.” Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review and Due Process*, 107 COLUM. L. REV. 169 (2007); *see also* 9 U.S.C. §§ 1–16 (2000) (allowing parties discretion to determine the terms of their arbitrations under federal law); Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J. L. & RELIGION 379, 381–82 (2009). (detailing the enforcement of awards rendered by Jewish Beth Din courts and Islamic courts in the U.S.). *But see* Charles P. Trumbell, Note, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609 (2006) (arguing that the First Amendment proscribes courts’ abilities to enforce contracts with Islamic terms or law).

103. *See* Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 653–54 (2004) (noting tension between Establishment Clause and enforcement of Jewish Beth Din awards).

and law. Specifically, the Court has commented at length on the ways in which the Free Exercise Clause of the First Amendment limits religious freedom. In doing so, the Court delineated the difference between the dual freedoms enshrined in the Clause: the freedom to believe, which is absolute, and the freedom to act, which is limited.¹⁰⁴

Moreover, the distinction between the freedom to act and the freedom to believe has circumscribed the application of sharia law in domestic courts. This limiting principle recently came into focus in a New Jersey state court when a judge refused to issue a final restraining order against a Muslim man, as requested by his wife for protection from assault and sexual assault, after he claimed that his view of marriage, due to his religion, permitted him to have nonconsensual sex with his wife.

That ruling was swiftly overturned on appeal, however, in *S.D. v. M.J.R.*¹⁰⁵ The appellate court, in its decision, criticized the trial court's abuse of discretion as such: "We are also concerned that the judge's view of the facts of the matter may have been colored by his perception that, although defendant's sexual acts violated applicable criminal statutes, they were culturally acceptable and thus not actionable—a view that we have soundly rejected."¹⁰⁶ Thus, ultimately, the limitations to the freedom to act in the Supreme Court's precedent and domestic law would prevent sharia law from complete incorporation into American case law. As such, the

104. The Court has elaborated on that distinction in *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940), and *Emp't Div., Dep't. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 885 (1963), amongst other cases. In *Cantwell*, the Court explained:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

310 U.S. 296, 303–04 (1940). Moreover, in *Smith*, it further elaborated:

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself"—contradicts both constitutional tradition and common sense.

494 U.S. 872, 885 (1963).

105. *S.D. v. M.J.R.*, 2 A.3d 412 (N.J. Super. 2010)

106. *Id.* at 427.

proper procedural safeguards exist to allow sharia law in a limited, private context.

VI. APPLYING LESSONS LEARNED FROM BRITISH LAW TO AMERICAN LAW

If the United States were to implement the British system of sharia courts, it could build on the structure already in place by coordinating with ISNA and the Fiqh Council. Such an initiative, however, should take into account the benefits and drawbacks of MAT and the ISC.

Drawing from MAT, the United States could create courts with more legitimacy by ensuring adequate procedural safeguards, protecting disputants' rights, and incorporating perspectives from domestic law.¹⁰⁷ The United States could build on the example set by MAT by ensuring greater transparency in sharia courts—perhaps by requiring sharia courts to keep detailed, formalized records of their opinions. Though uncommon for private arbitrations, this safeguard could account for the potential dangers that applying sharia in a democracy poses by ensuring the preservation of contentious issues for appellate review.

Along those lines, while the FAA allows for some court oversight, such limited review might not protect against some of the anti-democratic aspects of sharia. To that end, the United States might consider combining

107. Even in MAT, which, as mentioned, is the most formally structured organization for sharia arbitrations, it is at best unclear how to access the records of any given proceeding. To that end, the Tribunal's rules governing the admission of the public to a proceeding are very broad, and operate under the assumption of privacy. The provision, found within MAT's procedural rules, is listed below:

Admission of public to hearings

17 (1) Subject to the following provisions of this rule, every hearing before the Tribunal must be held in private unless the parties agree to a public hearing.

(2) The Tribunal may of its own motion exclude any or all members of the public from any hearing or part of a hearing if it is necessary—

- (a) in the interests of public order or national security;
- (b) to protect the private life of a party or the interests of a minor; or
- (c) to achieve the overriding objective.

(3) The Tribunal may also exclude any or all members of the public from any hearing or part of a hearing to ensure that publicity does not prejudice the interests of justice, but only if and to the extent that it is strictly necessary to do so.

MUSLIM ARB. TRIB. R. 17, available at http://www.matribunal.com/procedure_rules.html. As such, not only do the parties in question have to agree to a public arbitration for any outsider to have access, but the Tribunal also reserves broad discretion to restrict access. This lack of transparency hampers the ability of the British government to create any meaningful oversight, which not only creates the appearance of injustice but also increases the likelihood of it. Also along those lines, more open arbitrations could lead to a better appeals process, which would be a necessary mechanism to rectify any potential injustices.

the formalized procedural safeguards of MAT with the non-binding, mediation format of the ISC. A rights-driven format would be necessary to avoid some of the extremism, inequality, and unprofessionalism that have crept into proceedings held and fatwas issued by the ISC. Furthermore, the non-binding nature of such decisions would protect disputants' ability to opt-out if treated unfairly.

If, however, sharia arbitrations were sanctioned, stronger oversight would be needed so that sharia courts render decisions consistent with democratic norms. To that end, the United States would need to expand parties' explicit rights to appeal the final orders of the sharia court to civil courts so as to ensure that it does not infringe upon its citizens' rights and liberties. Moreover, by establishing stronger appellate review of sharia arbitrations, the United States could ensure that parties do not contract their rights away to unconscionable ends. The United States could also limit the application of sharia law in binding arbitrations to divorces, rendering the less democratic aspects of sharia law unenforceable.¹⁰⁸

A. *Sharia Courts' Potential As a Tool For Islamic Integration in America*

As discussed earlier, Britain has demonstrated the possibility of incorporating aspects of religious law into its legal system as a potential tool for the integration of Muslim immigrants. In this way, sharia courts may not only be useful for Muslim immigrants but also for the democratic countries in which they settle, as democracies have an interest in discouraging and regulating the presence of the anti-democratic aspects of some sects of Islam.¹⁰⁹ As such, while the specific characteristics of the British legal and political system may lend itself to the particular form of sharia courts discussed in this Note, the British inclination toward compromising law and religion can still be useful in other contexts.

Sharia courts in America might be thought of as an assertive attempt by a western democracy to nationalize its Islamic communities and exercise greater control over their integration. To be sure, as a country of

108. For example, the law of inheritance, which, as discussed *supra* Part II.B, automatically provides for a man to receive twice the amount of a female. Moreover, as also discussed *supra* Part II.C, child custody strongly favors men and does not account for the rights of the child. As such, binding arbitrations should exclude both these areas of law because each area would not only violate the guarantee of equal protection of the law under the U.S. Constitution but would also result in undesirable outcomes. U.S. CONST. amend. XIV, § 2.

109. On this point, John Bowen, commenting on the English relationship with Islam, observed: "The English pathway may become a model for others not in its substance, which may fit only England, but in the reasonable fashion in which public figures attempt a compromise among competing political values." Bowen, *supra* note 8.

immigrants, the United States is different than the more traditionally homogenous European states. Nonetheless, the United States is not immune to the challenges that transnational Islam poses to Europe because, like European countries, America is a democracy with similar goals and values. Moreover, like European countries, the United States has an interest in promoting mainstream versions of Islam to American Muslims to the exclusion of anti-democratic aspects of some sects of the religion. As such, America could benefit from following the British example of actively working to reconcile Islam with democracy.¹¹⁰ Accordingly, the implementation of private sharia courts could have the positive effect of creating stronger ties between the government and the Muslim community, which, in turn, could curb radicalism and calm fears of non-immigrants.

VII. CONCLUSION

Many western democracies have struggled with ways to integrate Muslim minorities while allowing them to preserve valued aspects of their culture. Allowing Muslims to maintain a sense of their cultural identity is essential to an effective integration strategy. At the same time, Islam is a diverse, decentralized religion, and it is difficult to characterize in a unitary way. This lack of hierarchical organization leaves room, through sharia courts, for states to promote moderate forms of the religion through their integration policies.

Although no western country has gone as far as Britain has by recognizing the validity of sharia courts, it might be beneficial for the United States to take a more formalized approach to recognizing sharia courts in some limited contexts. Yet, whatever form the sharia courts might ultimately take, the United States would need to put in place rights-

110. Yet the larger concern still remains as to whether Islam and democracy are even fundamentally compatible. Other studies examine the nature of Islam in relation to this question. Within this approach, some scholars contend that the diverse, de-centralized, structure of Islam results in the near impossibility of creating representative bodies within the governmental structures of church-state relations. See, e.g., Anthony J. Gill & Stephen Pfaff, *Will a Million Muslims March: Muslim Interest Organizations and Political Integration in Europe*, 39 COMP. POL. STUD. 803 (2006). In addition, secular critics of Islam contend that the religious values of Islam are antithetical to democracy. See Ayaan Hirsi-Ali, *Muslim Women are the Key to Change*, SUNDAY TIMES (Oct. 29, 2006), <http://www.aei.org/article/25067>. Conversely, Jytte Klausen's research suggests that a majority of Muslim leaders favor integration into the West. JYTTE KLAUSEN, *THE ISLAMIC CHALLENGE: POLITICS AND RELIGION IN WESTERN EUROPE* 87 (2005). In fact, she found that most believe Islam is compatible with western values. See *id.* at 87. Subsequently, she argues that, although the rise of the Muslim minority represents challenges in many ways, it is not above the scope of normal political solutions. *Id.* at 211.

driven safeguards, which include: (1) adequate procedures governing fairness, transparency, and consent; (2) expanding the mechanisms available for appellate review of arbitrations or limiting sharia courts to non-binding mediations; and (3) providing strong regulatory oversight of the courts' professional quality.

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