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Taking Religion Out of Civil Divorce

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Taking Religion Out of Civil Divorce

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INTRODUCTION

In the United States, the question of the role of Islamic religious tribunals² in relationship to family law matters is an emerging one. While scholars have explored the validity and enforceability of Religious Tribunal Awards (“RTAs”) under state and federal arbitration law generally,³ few have focused exclusively on such awards related to family law issues.⁴ The role of RTAs in relationship to issues related to divorce and child custody raise important policy questions related to gender equality, personal autonomy and religious freedom and, thus, demanding that courts and legislators confront the complex issue of how to protect Muslim religious freedom⁵ without sacrificing the basic tenants of gender equality which have evolved over time in the United States.

The tension is most obvious in cases of divorce in which the parties are Muslim and have obtained a RTA relating to divorce and seek to enforce or invalidate the award. This scenario raises important questions related to gender equality, freedom of religion and state action. This paper explores these tensions and proposes a legal framework to resolve them.

² The observations in this article apply equally to any religious arbitration tribunal, not just Islamic religious tribunals. Thus, awards rendered by Jewish religious tribunals and Christian religious tribunals are included in any reference to religious tribunal divorce awards; however, this paper focuses primarily upon Islamic tribunal divorce awards due to the recent struggles encountered by Canada and Britain and other nations in resolving how best to treat such awards and given the recent spate of anti-Islamic law legislation proposed across the United States.

³ See e.g. Michael Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011); Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made By Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & RELIGION 379 (2009-10); Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Traditional American Notions of Justice?*, 28 WIS. INT’L L.J. (2010); Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COL. L. REV. 169 (2007); Charles Trumbell, *A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609 (2006); Caryn Litt Wolfe, *Faith-based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction With Secular Courts*, 75 FORDHAM L. REV. 427 (2006).

⁴ See e.g. Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 WM. & MARY BILL RTS. J. 925 (2010); Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEOR. INQUIRIES L. 573 (2008).

⁵ In writing about this topic, I have struggled to follow the cautionary warning of Leila Ahmed, “In the context of the contemporary structure of global power, then, we need a feminism that is vigilantly self-critical and aware of its historical and political situatedness if we are to avoid becoming unwitting collaborators in racist ideologies whose costs to humanity have been no less brutal than the costs of sexism.” LEILA AHMED, *WOMEN AND GENDER IN ISLAM HISTORICAL ROOTS OF A MODERN DEBATE* 247 (1992).

Family law scholars have cautioned states to proceed circumspectly before ceding authority over family law matters to religious tribunals.⁶ Even in instances in which a woman “opts out of a jurisdiction’s generally applicable norms to precommit’ to their own ethical conception of the good” states retain oversight in matters related to divorce.⁷ Canada, Great Britain, the Federal Democratic Republic of Ethiopia and Pakistan have each been called upon to respond to the challenges presented by Islamic religious tribunals operating independently of civil courts, with each resolving the validity afforded to such awards based upon the respective controlling law and cultural norms.

The intersection between Sharia Law and U.S. family law is most likely to arise in two ways.⁸ First, one party may seek specific enforcement of an Islamic religious tribunal family law award in a U.S. civil court under an applicable federal or state arbitration act. Secondly, a party may seek to rely upon a family law ruling of a religious tribunal as an affirmative defense to bar the other spouse’s claim to civil relief under state law. Both scenarios, different sides of the same coin, present serious policy and constitutional issues that suggest enforcement should be denied on the basis of the First Amendment entanglement precedent, Fourteenth Amendment state action precedent and public policy concerns.

This paper is divided into six parts. The first part examines the tension between cultural autonomy and gender equality when members of a Muslim minority population seek to enforce religious awards related to family law matters in civil courts. The second part examines how several countries have dealt with this challenge. The third part examines existing U.S. precedent regarding judicial enforcement of religious tribunal awards related specifically to divorce. The fourth part examines the existing scholarship discussing the policy concerns raised by RTAs. The fifth part examines the constitutional issues a U.S. court confronts when a party seeks to enforce or invalidate a religious tribunal award. The final part of this paper proposes a legal framework to address RTAs.

I. U.S. CONSTITUTIONAL CONCEPTS CREATE TENSION BETWEEN RELIGIOUS FREEDOM AND GENDER EQUALITY

Religious tribunals pose a significant challenge to the ideals of multiculturalism⁹ and tolerance in a diverse society. One scholar explores

⁶ Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 WM. & MARY BILL RTS. J. 925, 952 (2010).

⁷ *Id.* at 946.

⁸ Issues related to Islamic Family Law might also arise in the case of the validity of marriages and divorces under religious law.

⁹ For the purposes of this paper, I am adopting the following definition of multiculturalism: “A claim, made in the context of basically liberal democracies, that minority cultures or ways of life are not sufficiently protected by the practice of insuring the individual rights of their members, and as a consequence these should also be protected through special group rights or privileges.” SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN* 10-11 (1999). Thus, I am addressing whether the

the distinction between old multiculturalism and new multiculturalism.¹⁰ The old approach focused on how best to incorporate the “meaning embedded in the symbols, language and history” ... “into the liberal nation state’s pantheon.”¹¹ New multiculturalism seeks, “not to promote inclusion, but to create separate communities, each with its own set of rules and practices to promote the community’s core shared values.”¹²

Democratic principles are strained when insular minorities seek to exercise self-governance according to religious law as one aspect of their autonomy.¹³ The tension becomes almost unbearable when the rules of the minority culture violate the civil rights of members of the minority culture itself.¹⁴ Thus, affording independence to a minority culture within the U.S. may allow that culture to use the pressures of conformity and belonging to limit exit options of those members who do not enjoy equal participatory rights within the minority culture. This tension is illustrated by examining the uneasy relationship between multiculturalism and feminism and, then, comparing U.S. divorce law to Islamic divorce law with a focus upon the disparate treatment of wives and mothers under the latter approach.

A. Gender Equality Challenges Multiculturalism

Susan Moller Okin comments that there is “likely to be considerable tension” between feminism and multiculturalism.¹⁵ In her essay, “*Is Multiculturalism Bad for Women*,” she traces the patriarchal roots of sexism to the “founding myths of antiquity, Christianity, Judaism and Islam.”¹⁶ She recalls the archetypal tales: women are born from men, men are seduced by women, women bear children, men sacrifice them.¹⁷ From these traditions, a patriarchal society emerged and spread. Okin identifies persistent examples of patriarchal customs, including clitoridectomy, polygamy, the marriage of children before they reach the age of consent, and rules requiring a rape victim to marry her rapist.¹⁸ According to Okin,

Muslim community within the U.S. enjoys a group right to reject U.S. divorce law and opt to have economic and other issues resolved under Sharia law by an Islamic religious tribunal. With respect to custody determinations, this question has been resolved through litigation ruling that a court retains jurisdiction to determine custody under applying the best interests of the child standard. This paper argues that the custody exception should be extended to include all divorce issues decided by any religious tribunal applying religious law. *Id.* at 10.

¹⁰ Michael Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1274 (2011).

¹¹ *Id.*

¹² *Id.* at 1277.

¹³ *Id.* at 1276.

¹⁴ *Id.* at 1278.

¹⁵ Okin, *supra* note 9 at 10.

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 13-4.

¹⁸ *Id.*

many of these traditions are gender-biased and force women into social and economic subservience. Thus, when a minority culture seeks to avoid assimilation and demands the right to remain separate and apart from the laws of the state, it threatens the very foundations of a society valuing equality without regard to gender.

Okin's essay triggered a series of responses. In an essay entitled "Liberal Complacencies," Will Kymlicka distinguishes between two types of group rights. One type restricts members of the minority group from challenging, changing or abandoning the group and characterizes these rights as internal restrictions.¹⁹ These types of restrictions are intolerable in a liberal society according to Kymlicka. In contrast, some group rights protect minority cultures from economic and political subjugation by the majority culture. He writes, "Group rights are permissible if they help promote justice between ethno-cultural groups, but are impermissible if they create or exacerbate gender inequalities within the group."²⁰ Thus, Kymlicka embraces multiculturalism only to the extent that diverse ethno-cultural groups embrace gender equality.

In another responsive essay, Bhikhu Parekh, while agreeing in principle with Okin's substantive conclusions,²¹ suggests that Okin's critique of Islam because it rejects "certain fundamental liberal values" is itself patriarchal in that it exerts majoritarian power over a minority population, thus forcing the choices of a liberal secular society upon members of a minority theocratic group, further depriving them of their own autonomy and choice in a very illiberal manner. "To insist that they must abide by our fundamentals is to expose ourselves to the same charge of fundamentalism that we make against them, and to rely solely upon our coercive power to get our way."²² Thus, Parekh posits that secular liberalism, with its focus upon individual fundamental rights, is simply one cultural approach to organize human life, as is the theocratic approach of Islam. Parekh questions whether liberals can, in good conscience, assert a "monopoly on the moral good."²³ Thus, Parekh suggests that liberal feminism should evolve to "provide a framework of thought and action in which different cultures can cooperatively explore their differences and create a rich and lively community based on their respective insights."²⁴

While Parekh's critique is thoughtful, and the ideals of communication, tolerance and greater understanding between Muslims and feminists may be achieved eventually, legal issues as to the interrelationship of Islamic law and the otherwise applicable state and federal family law rules will

¹⁹ *Id.* at 31.

²⁰ *Id.*

²¹ *Id.* at 70.

²² *Id.* at 72.

²³ *Id.* at 74.

²⁴ *Id.* at 74-5.

arise with more regularity as the Muslim population within the U.S. increases.²⁵ Thus, a practical legal response is needed.

The tension between feminism and Islam is exacerbated by the lack of division between civil law and religious law that characterizes Islam.²⁶ Thus, the feminist demand for gender equality under civil law is confounded by the gender discrimination embodied in Sharia law.²⁷

B. Islamic Family Law Reflects Gender Inequality

An examination of the disparate treatment of men and women under Sharia law reveals a tradition of “gender bias” that “forces women into social and economic subservience.”²⁸ Sharia law determines the rights of married men and women who divorce and treats individuals differently based solely upon stereotypes associated with gender differences, a type of distinction deemed unconstitutional by the Supreme Court when embodied in state and federal laws.²⁹ This section identifies examples of when Sharia law treats married men and women differently based upon gender.

The Prophet Muhammad was born in Mecca³⁰ in the year of 570 or 571 A.D.³¹ and lived on the Arabian Peninsula.³² Islam described itself as a monotheistic faith in the tradition of Judaism and Christianity.³³ Muhammad enjoyed a prophetic heritage³⁴ and received the final revelation³⁵ from God, between 610 and 632 A.D.,³⁶ in the form of the Quran which serves as the foundation of Islamic law.³⁷ Muslims view Muhammad as the last of the line of Old and New Testament prophets

²⁵ According to a 2011 report issued by the PEW Charitable Trust, “If current trends continue, the Muslim population in the United States is projected to more than double in the next 20 years, from 2.6 million in 2010 to 6.2 million in 2030.” See <http://www.pewforum.org/future-of-the-global-muslim-population-regional-americas.aspx#4>

²⁶ Marilyn Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* 29 (December 2004). See also Farrah Ahmed and Senwung Luk, *Religious Arbitration: A Study of Legal Safeguards*, 77 (3) *ARBITRATION* 290 (2011) (exploring safeguards available to states to protect vulnerable parties who participate in religious arbitration).

²⁷ See *infra* notes xx-xx and accompanying text for an explanation of Sharia law as it relates to marriage and divorce.

²⁸ *Orr v. Orr*, 440 U.S. at 268 (1979).

²⁹ *Orr*, 440 U.S. at 280-81 (citing *Craig v. Boren*, 429 U.S. 190, 204 (1976); *Reed v. Reed*, 404 U.S. 71, 76 (1971)). The Court stated that “[w] here, as here, the State’s compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.”

³⁰ RAJ BHALA, *UNDERSTANDING ISLAMIC LAW* 8 (2011)

³¹ *Id.* at 4.

³² *Id.* at 5.

³³ L. Ahmed, *supra* note 5, at 36.

³⁴ *Id.* at 9.

³⁵ *Id.*

³⁶ *Id.* at 34.

³⁷ *Id.* at 15.

including Adam, Noah, Abraham, Moses and Christ.³⁸ Islam viewed pre-Islamic history as barbarian and refers to this period as “The Age of Ignorance.”³⁹

Following the death of Mohammed, a successor was chosen and the religion continued to spread and flourish. The law of Islam developed through application of the Quran and reference to the Sunnah, or practices and words of the prophet.⁴⁰ If the matter presented a matter upon which both were silent, the Caliphs and qadi’s exercised some discretion in implementing the Sacred Law.⁴¹

Sharia, meaning “the way” or “path to the water source” regulates conduct both public and private.⁴² The vast majority of the Muslim population identify themselves as Sunnis. Within this group, there are four schools ranging in opinion as to how best to interpret the Quran.⁴³ Sharia law, derived directly from the Quran,⁴⁴ formed, “the cornerstone of the rule of law, no matter what form of government existed.”⁴⁵

Until the mid-800s individual scholars exercised the right to analyze and resolve legal issues independently. By 900, Islamic scholars concurred that, “all essential questions had been thoroughly discussed and finally settled” and all future analysis must be “confined to explanation, application, and at the most, interpretation of the doctrine as it had been laid down once and for all.”⁴⁶ Thus began “the closing of the gate” of independent reasoning by Muslim scholars, thus freezing the source of all Islamic law based upon laws in existence as of 900.

At the time the Quran was received by Mohammed, it improved the position of women by establishing her legal personhood and granting her the economic rights of dower and inheritance.⁴⁷ However, following the closing of the gate, the law was effectively frozen in time and could not evolve to address social and technological changes. Like other sacred texts, Quranic values can be identified to advance both the equality of women and men and women’s subservience to men.

This minimalistic background demonstrates that Islam incorporates civil law as a part of religious law. There is no civil side to Islam. There is no concept of separation of church and state. According to Islam, “the individual state is irreconcilable and incompatible with Sharia. According

³⁸ JOHN L. ESPOSITO AND NATANYA J. DELONG-BAS, *WOMEN IN MUSLIM FAMILY LAW* 12 (2001).

³⁹ L. Ahmed, *supra* note 5, at 37. (Bhala writes, “Consequently, Christians and Jews “are people of the book” or “ahl al kitab” and the Quran refers to them as such. They are to be respected ... But the earlier revelations to them were insufficient, perhaps even incomplete.”) Bhala, *supra* note 31, at 18.

⁴⁰ Bhala, *supra* note 31, at 158.

⁴¹ *Id.* at 157.

⁴² *Id.* at 388.

⁴³ *Id.*

⁴⁴ Esposito and DeLong-Bas, *supra* note 39, at 131.

⁴⁵ Bahala, *supra* note 31, at 159.

⁴⁶ JOSEPH SCHACT, *AN INTRODUCTION TO ISLAMIC LAW* 71 (1964)

⁴⁷ Esposito and DeLong-Bas, *supra* note 39, at 133.

to traditional Islamic theory, the world is divided not by borders and territories of the sovereign but by territorial acceptance of Islam.”⁴⁸

With this background in mind, Islamic family law concepts take on an importance that is unfamiliar to many. Marriage is a contract between the groom and his bride or her representative.⁴⁹ A woman’s right to rescind the contract, while recognized by law, is likely to depend upon her financial status and ability to support herself.⁵⁰ The contract, or mahr, requires the groom to make a nuptial gift to the wife.⁵¹ Upon marriage the wife is entitled to support from her husband and her husband may forbid his wife from leaving the home or seeing her relatives.⁵² Disobedience during the marriage may forfeit a wife’s right to support.⁵³ Islam permits a man to marry as many as four women at one time.⁵⁴ While women must marry a Muslim, under some schools, a man may marry a non-Muslim, so long as she is Christian or Jewish.⁵⁵

A divorce may be granted according to the terms of the mahr, by returning the nuptial gift, or by establishing on of the following five grounds: 1) repudiation, 2) oath of abstention, 3) separation, 4) unchastity or 5) apostasy.⁵⁶ Theoretically, repudiation is available to both spouses. Abstention is available only to the husband. Separation by seeking court order is available to either party. Unchastity is a grounds available only to the husband. The marriage is automatically terminated if either party rejects Islam, or becomes an apostate.⁵⁷

Unlike U.S. law, Islam does not recognize marital property or community property. Each party owns his or assets individually, according to the title scheme recognized in the United States until the advent of divorce reform.⁵⁸ The Wife is entitled to keep her mahr and it is the only

⁴⁸ Meghan E. Tepas, *A Look at Traditional Islam’s General Discord with a Permanent System of Global Cooperation*, 16 IND. J. GLOBAL LEGAL STUD. 681 (2009).

⁴⁹ Bahala *Id.* at 867.

⁵⁰ *Id.* at 874.

⁵¹ *Id.* at 867. The legal validity and enforceability of a mahr as a premarital agreement is beyond the scope of this article. See generally Chelsea A. Sizemore, *Enforcing Islamic Mahr Agreements: The American Interpretational Dilemma*, 18 GEO. MASON L. REV. 1085 (2011); Nathan B. Oman, *Bargaining in the Shadow of God’s Law: Islamic Mahr*, 45 WAKE FOREST L. REV. 579 (2010).

⁵² BHALA, *supra* note 31, at 867. In addition to Islamic RTAs related to custody, any award related to the support of subsequent wife, absent the entry of a valid divorce decree, based upon the religious precepts of polygamy is arguably void as against public policy.

⁵³ *Id.* at 867.

⁵⁴ *Id.* at 890.

⁵⁵ *Id.* at 896.

⁵⁶ *Id.* at 878.

⁵⁷ *Id.* at 878-9. (Perhaps there is an exception for marriages between a Muslim man and a Christian or Jewish woman).

⁵⁸ Reva B. Segal, *The Modernization of Marital Status: Adjudicating Wives’ Rights to Earning*, 1860-1930, 82 GEO. L. J. 2127 (1993-4); Divorce reform statutes

contribution that her husband will be obligated under classic Sharia law⁵⁹ to make to her in the form of property distribution.⁶⁰

Unlike U.S. law, a wife's right to maintenance following separation is highly contingent.⁶¹ A poor husband is not obligated to pay any support. There is no obligation to pay if the wife is a minor. A woman who performs the Hajj without her husband forfeits her right to maintenance.⁶² The period that support is due is quite limited and is based upon identifying the paternity of a child if the wife is pregnant at the time of separation.⁶³

Unlike U.S. law,⁶⁴ child custody rules are expressly gendered. The father alone bears the financial obligation to maintain the child until the child reaches adulthood. Although the mother has no similar obligation of maintenance, she does enjoy a right to care for her young children. Typically, this means that she has custody of her son until he reaches the age of between 7 and 9. Custody of a daughter extends longer, until the daughter reaches maturity or marries. Throughout the period of childhood, the father is the legal guardian of his children to the exclusion of the mother. A mother may forfeit her limited custody rights in four ways: 1) apostasy, 2) remarrying outside a limited group of men, 3) abusing the child, or 4) moving far away from the father without his permission.⁶⁵ Additionally, not only is the underlying law sexist, the application of the law by the tribunal also differs from the civil approach in the United States. The religious tribunal is not concerned with uniformity or precedent, but rather with reaching the result that God would reach under the same circumstances.⁶⁶ Likewise, procedural rules limit the wife's right to testify and it is given only one-half of the weight afforded to the husband's testimony.⁶⁷

⁵⁹ *But see* JULIE MCFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA, 189 (2012) ("Some imams are clear that the classical view of spousal support is simply outdated. . . . Aware that the traditional principles no longer reflect the economic and social reality of the place of women in the family and workplace. . . many imams are searching for more appropriate alternatives.")

⁶⁰ Bhala, *supra* note 31, at 916.

⁶¹ Esposito and DeLong-Bas, *supra* note 39, at 25-26.

⁶² *Id.* at 919-21.

⁶³ Esposito and DeLong-Bas, *supra* note 39, at 25-26.

⁶⁴ Under U.S. law, custody is determined under the best interests of the child standard. Xx.

⁶⁵ Bhala, *supra* note 31, at 997-98.

⁶⁶ Charles P. Trumbell, *Islamic Arbitration : A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 633 (2006) (noting that Sharia law "draws no distinction between the religious and the secular, between the legal, ethical, and moral questions, or between the public and private aspects of a Muslim's life." *Id.* at 633 (quoting n. 126). *Id.* at 634. Moreover, Sharia law lacks definitive rulings and the goal is to draw as nearly as possible to "God's true evaluation of each particular event." *Id.* at 632.

⁶⁷ Kristin J. Miller, *Human Rights of Women in Iran: The Universalist Approach and the Relativist Approach*, 10 EMORY INT'L L. REV. 779, 796 (1996) ("A second example of human rights abuses against women under the Islamic Penal Code is the Code's valuation

While there can be no monolithic restatement of Islamic law, given its tradition of individual interpretation, regional differences, and situational focus, the forgoing survey identifies numerous specific examples of the disparate treatment of marrying and divorcing women in relationship to men. These distinctions have prompted some Muslim women to advocate for reform in the name of gender equality.⁶⁸ These examples of facial disparity are troubling because of the Islamic focus on the received word and the decision to reject reinterpretation of the law in light of modernization.

The Quaranic values, while progressive when introduced in the Sixth Century, are unhelpful, absent modern interpretation taking into account the need to reach a just a fair result under contemporary conditions,⁶⁹ to Muslim married women who live in the U.S. If married womens' economic rights are based entirely upon Sharia law, it is as if the clock has been turned back almost twelve-hundred years. Women worked tirelessly to eliminate the facially discriminatory statutes and the common law disparate treatment of women in the event of divorce, particularly with respect to the absence of community or marital property⁷⁰ and the fault bar to maintenance.⁷¹

Clearly, when state civil courts are called upon to recognize and enforce arbitration awards rendered by religious tribunals, applying Sharia law, these courts face a dilemma: can the court honor the democratic

of a woman's worth as only half that of a man's. For example, a woman's testimony in court is given half the weight of a man's testimony.”).

⁶⁸ Nilanjana S. Roy, *Muslim Women in India Seek Gender Equality in Marriage* (N.Y. Times The Female Factor April 24, 2012)

(<http://www.nytimes.com/2012/04/25/world/asia/25iht-letter25.html?pagewanted=all>).

⁶⁹ Esposito and DeLong-Bas, *supra* note xx, at 157.

⁷⁰See Richard H. Chused, *Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1361 (1983). The first wave of reform advancing women's rights was embodied in the Married Women's Property Acts which were individually adopted by the several states beginning in the Nineteenth century. According to Richard Chused: “In fact, the acts were passed in at least three waves, beginning in 1835, and each wave arose for somewhat different reasons. The first group of statutes, passed almost entirely in the 1840's, dealt primarily with freeing married women's estates from the debts of their husbands. By and large these statutes left untouched the traditional marital estate and coverture rules. The second wave of legislation, the most frequently discussed, established separate estates for married women. These statutes appeared over a long period of time beginning in the 1840's and ending after the Civil War. The third set of statutes took the important step of protecting women's earnings from the institution of coverture. These laws generally did not appear until after the Civil War, although Massachusetts enacted an early statute in 1855.” *Id.* Following this reform, divorce became available on the basis of fault and property was divided by title. In the 1970s, no fault divorce reform was introduced and marital property was defined as all property acquired by the parties during the marriage without regard to title.

⁷¹ While alimony had traditionally been available only to wives, in *Orr v. Orr*, 440 U.S. at 268 (1979), the Supreme Court invalidated the sex-based classification obligating only husbands to pay alimony to wives and demanded the state undertake individualized hearings to determine need and ability to pay without regard to sex.

commitment to multiculturalism without undermining its constitutional duty to reject state-sponsored sexism.

II. INTERNATIONAL RESPONSE TO SHARIA COURT AWARDS

In addressing the interrelationship between religious law and civil law, Mohammed Abdo suggests that countries seeking to resolve tension between a majority civil law approach and the interests of a theocratic minority seeking to follow religious law and remain insulated from civil law have four choices: 1) neutrality accompanied by exemption, 2) absorption by incorporating different rules for different ethnic cultures, 3) recognize customary religious law, but only so long as it does not violate constitutional standards, or 4) reject religious and cultural norms.⁷² Perhaps a fifth option might include maintaining the division between private religious freedom and civil state law, without rejecting or denigrating the Islamic religion and culture.

This section examines the experience of several countries, each of which is facing the issue of how the state should interact with religious tribunals. While RTAS are rarely reviewed by courts in the United States, the experience of Canada and Britain suggests that, as the Muslim population within the United States grows, this population is likely to resort to Islamic Religious Tribunals to resolve issues related to divorce. Both Canada and of Great Britain have confronted this reality and have reached similar legal responses. This section next examines the approaches of Ethiopia a country attempting to maintain a dual legal system in which civil and religious courts operate in a parallel manner and Pakistan, a democracy incorporating religious law. Finally this section examines the reactionary legislation, some pending and some enacted, dealing Islamic law.

This section highlights the uneasy coexistence of civil and religious tribunals in countries with sizeable Muslim populations.

A. Western Responses

1. Canada

Most Canadian provinces have passed legislation affording recognition to arbitration awards, including awards related to family law matters, except for Quebec and Ontario.⁷³ In 2005, Ontario undertook an investigation regarding the use of Sharia in family law matters under the auspices of the Islamic Institute of Civil Justice and in accordance with the

⁷² Mohammed Abdo, *Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia*, 5 MIZAN LAW REV. 72, 73 (2011).

⁷³ Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 534 (2012).

Canadian Arbitration Act (“CAA”).⁷⁴ The Islamic Institute cited the Orthodox Jewish populations use of the Beth Din in the same manner in support of its approach.⁷⁵ The original report authored by former Attorney General Marilyn Boyd, while recognizing the gender inequalities under Sharia law, recommended that private arbitration religious tribunals, including Islamic religious tribunals, be included among the tribunals legally permitted.⁷⁶

Boyd’s recommendation, based upon her in depth research during the summer of 2004 during which she identified the stakeholders involved and met with them in order to prepare her recommendation.⁷⁷ She also reviewed the correspondence from individuals and groups setting forth a wide variety of opinions and viewpoints.⁷⁸ Opponents of permitting Muslim tribunals to decide family law issues argued that these rights could not be arbitrated under the act, and even if the scope of the CAA embraced family law disputes, the Muslim rules relating to divorce were gendered and sexist, thus violating the rights contained in sections 2, 7, and 15 of the Canadian Charter of Rights and Freedoms as enunciated by the Supreme Court of Canada with respect to any differential treatment not specifically set out in the Constitution Act, 1867.⁷⁹

Proponents of religious arbitration focused on the importance of personal autonomy and choice envisioned under the CAA as ensuring alternative dispute resolution. In addition to favorable submissions from proponents of Jewish and Christian faith-based arbitration, Boyd received a submission from the Ismaili National Conciliation and Arbitration Board for Canada (“CAB”), “the most sophisticated and organized structure in the Muslim community,” embraces the following policy goals in its preamble to the “Rules of Arbitration” governing the Board:

...when differences of opinion or disputes arise between them, these should be resolved by a process of mediation, conciliation and arbitration within themselves in conformity with the Islamic concepts of unity, Ismaili National Conciliation tolerance and goodwill.⁸⁰

⁷⁴ See e.g. Marilyn Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* 29 (December 2004). See also Farrah Ahmed and Senwung Luk, *Religious Arbitration: A Study of Legal Safeguards*, 77 (3) *ARBITRATION* 290 (2011) (exploring safeguards available to states to protect vulnerable parties who participate in religious arbitration); Bilal M. Choksi, *Religious Arbitration in Ontario—Making the Case Based on the British Example of the Muslim Arbitration Tribunal*, 33 *U. PA. J. INT’L L.* 791 (2012); (arguing in favor of recognition); Arsani Williams, *An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England*, *STANFORD JOURNAL OF INTERNATIONAL RELATIONS* (Spring 2010) (arguing against recognition).

⁷⁵ Boyd, *supra* note 75, at 41.

⁷⁶ *Id.*

⁷⁷ Boyd, *supra* note 75, at 29.

⁷⁸ Boyd, *supra* note 78, at 29.

⁷⁹ *Id.*

⁸⁰ *Id.* at 57.

This group reported that between 1998 and 2003, it handled 769 cases with a success rate of 69%.⁸¹

Boyd concluded that she found no “evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues.”⁸² Therefore, she recommended the continued use of religious arbitration to resolve family law matters.⁸³ However, she did make a detailed recommendation setting forth in excess of forty steps the government should take to address concerns raised by the various stakeholders.⁸⁴ For example, she recommended changes to the CAA to insure knowing and voluntary participation in the arbitration process,⁸⁵ expanding the court’s oversight of the arbitration agreement to mirror the court’s oversight of other domestic contracts,⁸⁶ and creating a domestic violence screening process.⁸⁷

Her recommendation was controversial and no further action on the matter was taken until Ontario Premier Dalton McGuinty refused to afford state recognition to any arbitration award entered by a religious tribunal, thus proclaiming one law for all Ontarians on September 11, 2005.⁸⁸ Formal legislation was later passed in support of this declaration on February 14, 2006.⁸⁹

2. Great Britain’s Experience

Great Britain recognizes the Anglican Church as the official church of England, while according to all citizens religious choice and the right to be free from religious persecution and securing these rights through a civil judicial system.⁹⁰ On February 7, 2008, during an interview with the BBC, Dr. Rowan Willams, the former Archbishop of Canterbury caused political controversy.⁹¹ According to the BBC, Dr. Rowan said, “...he believed the adoption of some Sharia law in the UK seemed "unavoidable."⁹² He further commented that “adopting parts of Islamic Sharia law could help

⁸¹ *Id.* at 59

⁸² *Id.* at 133.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 135.

⁸⁶ *Id.* at 134.

⁸⁷ *Id.* at 136.

⁸⁸ *Id.* at 41-2.

⁸⁹ Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 534 (2012).

⁹⁰ Gillian Douglas, Norman Doe, *Sophie Gilliat-Ray, Russell Sandberg and Asma Khan, Social Cohesion and Civil Law: Marriage- Divorce and Religious Courts* (Report of a Research Study funded by the AHRC, Cardiff University, June 2011) (hereinafter Cardiff Report) at 7-8 (available at <http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf>).

⁹¹ <http://news.bbc.co.uk/2/hi/7233335.stm>

⁹² *Id.*

social cohesion. For example, Muslims could choose to have marital disputes or financial matters dealt with in a Sharia court.”⁹³ His comments caused Gordon Brown's spokesman to state that the prime minister "believes that British laws should be based on British values."⁹⁴ These comments were perhaps triggered due to reports that Islamic religious tribunals were operating independently of the judicial system in Great Britain. In 2009, one survey suggested that approximately 85 Islamic tribunals were operating in Great Britain.⁹⁵

In 2011, a study examining the role of religious tribunals in Great Britain was released by researchers associated with the Cardiff University. The study entitled, “Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts”⁹⁶ reviewed the role of the Beth Din, the Sharia Council and the National Tribunal for Wales, each a religious body offering private dispute resolution services to parties according to Jewish, Muslim and Christian tenants. The report focused on the relationship between the religious tribunals and the civil courts with respect to matters related to marriage and divorce. The authors concluded that:

None of the tribunals studied has a “legal status” in the sense of “recognition” by the state. They derive their authority from their religious affiliation, not from the state, and that authority extends only to those who choose to submit to them. However, as far as marriage/divorce is concerned, they are not “arbitrators.” Their authority to rule on the validity/termination of a marriage does not derive from the parties “agreement to submit their dispute to them (indeed, there may be no dispute) in the same way as an arbitration clause in a contract (for which the Beth Din and some Sharia tribunals would also qualify to rule on civil disputes).” Rather, adherents to the particular faith must make use of the religious tribunal if they are to obtain sanction to remarry within their faith.⁹⁷

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ <http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html>

⁹⁶ Cardiff Report, *supra* note 90, at Law: Marriage, Divorce and Religious Courts” available at <http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf>.

⁹⁷ *Id.* at 44.

The authors stressed that the tribunals served a religious purpose only. The tribunals in each instance encouraged the parties to have ancillary matters, including custody support and asset division, determined by a civil court.⁹⁸

Limited Role in Relation to the ‘Ancillaries’

“Ancillary” matters are those relating to the consequences of the ending of the marriage in relation to arrangements for the parties’ children, or money and property. The National Tribunal has no role in relation to dealing with such consequences. Under Jewish law, it is possible for the parties to agree at the time of the marriage a) that they will agree to a get and b) that they will ask the Beth Din to resolve any ancillary disputes. Such agreements would not amount to binding arbitration contracts, since the jurisdiction of the civil courts on such matters **may not be ousted** by the parties’ agreement (Matrimonial Causes Act 1973, s 34; Children Act 1989 s 10) and in such cases, they are advised to seek a consent order in the family courts. The Sharia Council similarly advises parties to make use of the civil courts to resolve disputes, in recognition that it cannot give legally binding rulings. However, it may advise the parties on what should be done with mahr (dower).⁹⁹

Each religious authority expressly acknowledged that it lacked authority to render legally enforceable family law orders in light of the controlling law limiting jurisdiction over family law matters to civil courts and prohibiting arbitration of such matters.¹⁰⁰ Additionally, one observer of the process wrote,

“... several women had reluctantly agreed to attend the meetings and felt that they had little choice but to do so if they were to be issued with a divorce certificate. Of the ten women I observed in these sessions a staggering four had informed the religious scholar that they were party to civil injunctions issued against their husbands on the grounds of violence and threatening behavior. Thus, despite the availability of an alternative forum to determine divorce disputes through the IRT, the process may be infused with

⁹⁸ *Id.* at 49.

⁹⁹ *Id.* at 47.

¹⁰⁰ *Id.* citing Matrimonial Causes Act 1973, s 34; Children Act 1989 s 10.

“subliminal and covert forms of power and coercion thus rendering the parties unequal and the process unfair.”¹⁰¹

The Cardiff Report authors concluded, “None of the tribunals has any legal status afforded to them by the state or the civil law, and their rulings and determinations in relation to marital status have no civil recognition either. They derive their authority from their religious affiliation, not from the state, and that authority extends only to those who choose to submit to them.”¹⁰² However, under the Arbitration Act of 1996, MRT awards entered according to valid arbitration agreements are entitled to recognition and enforcement in British courts.¹⁰³ However, the parties are not permitted to transfer jurisdiction over ancillary issues related to divorce from the civil courts to a religious tribunal.¹⁰⁴

Thus, in both Canada and Great Britain, the role of an Islamic religious tribunal is limited in scope and extends only to religious matters. Islamic RTAs in Canada are not subject to civil enforcement. In Great Britain, RTAs dealing with ancillary issues related to divorce remain within the sole jurisdiction of the civil court.¹⁰⁵

¹⁰¹ *Id.* Sec. 5. See also Urfan Khaliq, *The Accommodation and Regulation of Islam and Muslim Practices in English Law*, 6 (31) ECC. L.J. 332 (2002) (noting that a substantial number of British Muslims enjoy access to an unrecognized and unregulated quasi-judicial system to resolve family law matters).

¹⁰² Cardiff Repot, *supra* note xx, at 47-8.

¹⁰³ On June 7, 2011, Baroness Cox introduced a new bill in the House of Lords to outlaw the use of Sharia law in Great Britain if it conflicts with English law. Thus, like Canada, Great Britain is considering legislation prohibiting the religious arbitration of family law related matters. “The aim of the Bill, which was introduced to the House of Lords last year, is to make arbitration services in the UK subject to equality laws and to bar any arbitration where parties are of unequal standing; for example, it would disallow arbitration providers placing greater weight on the testimony of one party over another, as is the case with sharia law where a wife’s word is worth only half of her husband’s.” http://4freedoms.ning.com/group/women/forum/topics/one-law-for-all-progress-reports?commentId=3766518%3AComment%3A103203&xg_source=activity&groupId=3766518%3AGroup%3A318

¹⁰⁴ *Id.* “Such agreements would not amount to binding arbitration contracts, since the jurisdiction of the civil courts on such matters may not be ousted by the parties” agreement (Matrimonial Causes Act 1973, s 34; Children Act 1989 §10) and in such cases, they are advised to seek a consent order in the family courts.” Section 34 provides, “If a maintenance agreement includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, then (a) that provision shall be void...” This section further defines “maintenance agreements” to include any provision dealing with financial arrangements. *Id.* Financial arrangements “means provisions governing the rights and liabilities towards one another when living separately of the parties to a marriage (including a marriage which has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the family.” *Id.*

¹⁰⁵ Matrimonial Causes Act 1973, s 34; Children Act 1989 §10.

B. North African and South Asian Responses

1. Federal Democratic Republic of Ethiopia's Experience

In contrast to the unitary legal systems existing in Canada and the United Kingdom, some countries have implemented a plural legal system, recognizing both civil courts employing state law and minority ethnic courts operating according to Islamic law. For example, the Federal Democratic Republic of Ethiopia ("FDRE") has approximately 28 million Muslims, living as a minority population, and comprising approximately 34% of its population.¹⁰⁶ The FDRE adopted a new constitution in 1995 identifying a variety of fundamental rights and human rights and provides, "the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status."

The FDRE balanced its constitutional guarantees of equality among citizens¹⁰⁷ and religious pluralism by passing the 1999 Sharia Courts Proclamation¹⁰⁸ allowing Sharia Courts to finally determine personal status according to Islamic religious precepts.¹⁰⁹ The FDRE Constitution is silent regarding whether the Constitution preempts contradictory Sharia law.¹¹⁰ Sharia Courts apply laws that are gender biased.¹¹¹ Appellate review by the House of Federation was limited to procedural questions related to consent and or whether the Sharia Courts have exceeded their mandated jurisdiction.¹¹² Thus, the FDRE treats final decisions of the Sharia Courts as outside of the human rights protections in the Constitution and beyond its supremacy clause.¹¹³ Thus, the FDRE is pursuing a course of cultural pluralism by allowing the ethnic minority Muslim population to reject assimilation.

2. Pakistan's Experience

Pakistan has a Muslim majority of 96.4% with an estimated Muslim population of over 177,000,000.¹¹⁴ Despite the potential for internal contradiction, the Pakistan Constitution incorporates both Islamic

¹⁰⁶ *See*

<http://www.pewforum.org/newassets/images/reports/Muslimpopulation/Muslimpopulation.pdf>

¹⁰⁷ Mohammed Abdo, *Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia*, 5 MIZAN LAW REV. 72, 73 (2011).

¹⁰⁸ Abdo, *supra* note 106, at 73.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 92.

¹¹¹ *Id.* at 96-7.

¹¹² *Id.* at 100

¹¹³ *Id.* at 104

¹¹⁴ These estimates are based upon the figures reported by the Pew Research Center report of *The Future of the Global Muslim Population*, as of 27 January 2011 available at http://en.wikipedia.org/wiki/List_of_countries_by_Muslim_population

law and gender equality guarantees.¹¹⁵ Pakistani Sharia courts have worked to resolve the tension between the guarantees of gender equality and the sexist divorce rules associated with Islam. In an attempt to ameliorate the divorce inequity, Pakistani courts have reinvigorated the concept of “khula” to grant to women a no fault unilateral divorce right.¹¹⁶ Formerly, this divorce approach had been interpreted to require mutual consent; nevertheless, the Pakistani Supreme Court adopted this modification of the traditional interpretation of khula.¹¹⁷ One condition of the khula is the return of dower to the husband.¹¹⁸ Thus, Pakistan’s civil courts struggle to liberalize the divorce rights of women while adhering to the Koran. Thus, gender equality reform could conceivably come from civil changes to the Sharia framework from within and over time.¹¹⁹

C. US State Legislators Propose and Pass Laws to Block Judicial Consideration of Sharia Law

Recently, some state legislators have introduced legislation to prohibit the judiciary from considering “foreign law” or laws from outside of the U.S.¹²⁰ For example, on May 26, 2012, Kansas governor Sam Brownback signed a law making it illegal for a court or an arbitration panel to apply

¹¹⁵ Karin Carmit Yefet, *The Constitution and Female Initiated Divorce in Pakistan: Western Liberalism In Islamic Garb*, 34 HARV. J. L. & GENDER 553 (2011).

¹¹⁶ *Id.* at 586.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 589. One problem with this approach is that by requiring the return of the mahr to permit divorce, the wife forfeits her right to keep the original amount of the mahr and to demand payment of the delayed mahr, if any. *Id.* Saudi Arabia is structured as a theocracy controlled by Islamic law. The process empowers the qadi to resolve the matter based upon conscience and guided by the will of Allah. Thus, the qadi’s ruling is by definition subjective, rather than objective, applicable only to the parties involved and has no precedential value. Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609 (2006).

¹²⁰ *See, e.g.*, S. 62, 2011 Leg., Reg. Sess. (Ala. 2011); H.R. 88, 27th Leg., 1st Sess. (Alaska 2011); H.R. 2064, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011); S. 1294, 2011 Leg., Reg. Sess. (Fla. 2011); H.R. 45, 2011-2012 Leg., Reg. Sess. (Ga. 2011); S.J. Res. 16, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); H.R.J. Res. 14, 84th Gen. Assemb., Reg. Sess. (Iowa 2011); H.R. 2087, 2011 Leg. (Kan. 2011); Leg. Doc. 1076, 125th Leg., 1st Reg. Sess. (Me. 2011); H.R. 301, 2011 Leg., Reg. Sess. (Miss. 2011); S. 308, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); Leg. 647, 102d Leg. 1st Sess. (Neb. 2011); Assemb. 3496, 214th Leg., 2010-2011 Legis. Sess. (N.J. 2010); S.J. Res. 18, 2011 Leg., Reg. Sess. (N.M. 2011); H.R. 640, 2011-2012 Leg., 2011 Sess. (N.C. 2011); H.R. 1552, 2011 Leg., Reg. Sess. (Okla. 2011); H.R. 3490, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011); S. 201, 86th Legis. Assemb., 2011 Sess. (S.D. 2011); H.R. 911, 82d Leg., 1st Called Sess. (Tex. 2011); H.R.J. Res. 8, 2011 Leg., 2011 Gen. Sess. (Wyo. 2011).

religious law that violates constitutional rights under the state and federal laws.¹²¹ The law expressly provides:

Sec. 3. Any court, *arbitration*, tribunal or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if [it].... *bases its rulings or decisions in the matter at issue in whole or in part on any foreign law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions*, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage.¹²² (emphasis added).

Without expressly addressing the issues raised by the application of Sharia law to resolve family law-related disputes, the law clearly forbids judicial enforcement of such an award. This statute has not been constitutionally challenged to date.

In another example, Oklahoma recently passed this constitutional amendment by voter ballot:

State and Municipal courts], when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States **provided the law of the other state does not include Sharia Law**, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. **Specifically, the courts shall not consider international law or Sharia Law.** The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.¹²³ (Emphasis added).

¹²¹ http://www.huffingtonpost.com/2012/05/25/kansas-governor-signs-bil_n_1547145.html.

¹²² H.R. 640, 2011-2012 Leg., 2011 Sess. (N.C. 2011); H.R. 1552, 2011 Leg., Reg. Sess. (Okla. 2011).

¹²³ H.R.J. Res. 1056, 52nd Leg., 2d Sess. (as enrolled May 25, 2010), *available at* <https://www.sos.ok.gov/documents/questions /755.pdf> (outlining the complete text of the legislative resolution).

Before the law could be enlisted by the Oklahoma Legislature, Muneer Awad filed a lawsuit in the Western District of Oklahoma seeking to enjoin the implementation of the law on First Amendment grounds.¹²⁴ Awad argued that the statute violated the First Amendment because it singled out the Muslim legal framework of Sharia for negative and disparate treatment in violation of the Establishment Clause of the Fourteenth Amendment. The district court granted the injunction and the defendant appealed.

Awad successfully argued that the proposed Oklahoma statute violated the United States Constitution. He argued that the First Amendment provides in part that “Congress shall make no law respecting an establishment of religion.”¹²⁵ Like other First Amendment provisions, the Establishment Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment.¹²⁶ In determining whether the plaintiff had established that his petition was likely to succeed on the merits, the court applied the *Larson* test and affirmed the district court’s grant of injunctive relief on January 10, 2012.¹²⁷ With the injunction in place, the constitutionality of this law is now pending on the merits in federal district court.

Given the strong language of the Tenth Circuit, it is unlikely that the other pending or recently enacted legislation singling out Sharia law as invalid and unenforceable will satisfy constitutional review.¹²⁸ In addition to establishment concerns, such legislation also raises free exercise concerns to the extent the legislation impermissibly interferes with the individual’s right to practice his or her religion. The government may regulate conduct related to religious belief only if the legislation is a “valid and neutral law of general applicability.”¹²⁹ Thus to the extent the law is deemed to be motivated out of hostility rather than a legitimate governmental interest, it will be deemed unconstitutional.

Not only does such legislation single out the law of one minority religious group for disparate treatment,¹³⁰ this legislation harkens back to other examples of immoral legislation presenting to courts important opportunities to correct majoritarian discriminatory impulses, which

¹²⁴ Awad v. Ziriaux, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010), *aff’d*, 670 F.3d 1111 (2012).

¹²⁵ U.S. Const. amend. I.

¹²⁶ Cantwell v. Connecticut, 310 U.S. 296 (1940).

¹²⁷ Awad v. Ziriaux, 2012 WL 50636 (10th Cir. 2012).

¹²⁸ States that have or are considering pending legislation expressly identifying and barring judicial application of Sharia law include: Tennessee, Iowa, Missouri, and New Mexico. Asma T. Uddin, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363, 372 (2012).

¹²⁹ Employment Div., Oregon Dep’t of Human Resources v. Smith, 494 U.S. 872, 879 (1990) (internal quotes omitted).

¹³⁰ Some scholars have characterized the discrimination against Muslims as Islamophobia. Asma T. Uddin, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363 (2012).

opportunities, if missed, could result in an opinion reflecting “serious moral error.”¹³¹ It reveals an anti-Islamic stereotype that fails to distinguish between religious tenants and civil law. Such legislation hopelessly blurs the line between individual religious freedom and political persecution. Thus, a more refined and thoughtful approach to the role of Islamic law and Islamic religious tribunals is demanded to remain true to the fundamental guiding principles of our constitution including religious toleration and principles of equal protection.

The Oklahoma legislation and other attempts to identify and marginalize Sharia law reflect the deep anti-Islamic bias that exists in the U.S. Thus, in addressing the relationship between religious tribunals and the civil courts, it is vital to guard against animus and preserve the individual’s right to free exercise. Such legislation is far too blunt an instrument to deal with the policy issues raised by Islamic Religious Tribunal Awards related to divorce. There may be times when parties wish to have a religious tribunal award subject to judicial enforcement and this type of contract should be recognized and enforced. However, in matters of family law, Sharia law reflects a degree of gender bias that renders any determination thereunder subject to public policy and constitutional vulnerability.¹³²

The foregoing survey examined five approaches to RTAs in relationship to the State. In Canada, the role of religious tribunals has been limited to religious matters only and no recognition is afforded even to arbitrated awards. In Great Britain, Islamic RTAs may be enforceable under the 1996 Arbitration Act related to marital status and mahr only, with all ancillary matters subject to judicial determination and oversight. In FDRE, the state recognizes the right to opt out of the civil court and to resolve matter through religious tribunals despite the existence of a constitutional guarantee against sex discrimination. In Pakistan, some civil courts, applying Sharia law, are working to eliminate gender bias through judicial reform. The question facing the United States is how best to treat the family law rulings of religious tribunals given the experience of other secular, pluralistic and theocratic legal systems abroad.

III. Faith-based Arbitration in the US

The U.S. Constitution expressly rejects theocracy and demands a strict neutrality from government to permit individual worship without state

¹³¹Michael A. Olivas, *Governing Badly: Theory and Practice of Bad Ideas in College Decision Making*, 87 IND. L.J. 951, 953 (2012) (... Richard Delgado and Jean Stefancic examined a series of legal decisions that they consider to be “serious moral errors,” “embarrassingly inhumane decisions,” and “moral abominations.” Such cases include now-discredited decisions in racial matters, Indian law, Chinese immigration, Japanese internment, women’s suffrage, forced sterilization, and gay rights.”).

¹³² See *infra* xx-xx.

interference and to prohibit state sponsorship. Thus, religious law is construed solely by religious tribunals and is irrelevant in civil court.¹³³ Thus, religious law is to be applied by religious tribunals and to be treated as entirely separate from matters of civil law.

A. *Federal and State Arbitration*

However, one way in which the rulings of religious tribunals might come before a civil court is through the Federal Arbitration Act¹³⁴ and its state counter-parts.¹³⁵ These arbitration rules set forth the minimum procedural requirements necessary to ensure the validity and enforceability of arbitration awards.¹³⁶ The federal statute is silent as to the choice of law that will control disputes, presumably because this is a matter left to the parties.

The largest commercial arbitration association in the U.S. is the American Arbitration Association.¹³⁷ The AAA posts its procedural rules on line.¹³⁸ These rules also are silent as to choice of law. Typically, standard commercial contracts that contain a provision mandating arbitration will also contain a choice of law provision designating the state or federal law that will apply. In addition to choice of law concerns, the arbitration process results in a final ruling that cannot be appealed and may be overruled by a civil court on very limited grounds set forth by state and federal arbitration statutes.

Arbitration of civil issues in religious tribunals raises serious questions about the voluntariness of the arbitration agreement, the choice of law, the procedure that will be followed and the validity and enforceability of any religious tribunal awards based upon religious law due to free exercise and entanglement concerns. These concerns are reflected in legislation considered, but not enacted by the United States Senate in 2009. This legislation was entitled the “Arbitration Fairness Act of 2009. This legislation, sponsored by Senator Russ Feingold and others, identified a variety of abuses under the existing act: (1) arbitration, as envisioned by Congress, was for parties with fairly equal bargaining power, not between powerful, sophisticated merchants and their substantially less powerful customers and employees who must accept non-negotiable arbitration agreements if they want to either purchase goods or work; (2) the repeat

¹³³ Michael G. Weisberg, *Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments*, 25 U. MICH. J.L. REF. 955 (1992) (“The First amendment prohibits civil courts from intruding into religious societies’ internal affairs and the Establishment Clause limits religious authority over secular issues. To meet the requirements of both religion clauses, civil courts must refuse to rule on wholly internal, wholly religious issues, but must defend parties’ secular rights.”).

¹³⁴ FED. ARB. ACT, 7 U.S.C. Sec. 1 *et. seq.* (2012).

¹³⁵ *See supra* note xx.

¹³⁶ FED. ARB. ACT, 7 U.S.C. Sec.xx (2012).

¹³⁷ *See* http://www.adr.org/aaa_mission.

¹³⁸ *See* <http://www.adr.org/sp.asp?id=22440#R1>

player aspect of arbitration is biased in favor of corporate defendants; (3) because of limited judicial review and no reversal for a mere misinterpretation of the law, “arbitration undermines the development of public law for civil rights and consumer rights”; (4) there is a lack of transparency in private arbitration proceedings, which are not open to public review; and (5) some arbitration agreements contain provisions that strip consumers and employers of class action and other remedies. Thus, some members of Congress also recognize the need for arbitration reform.¹³⁹

Arbitration of family law matters raises similar concerns. Women lack equal bargaining power because the controlling law denies equal protection to women. Additionally, it undermines the evolution of gender equality rights because it shields matters of important public policy from judicial review.

Following the enactment of the FAA, a drafting committee finalized the Uniform Arbitration Act.¹⁴⁰ In the comments, the application of the public policy exception is expressly discussed.¹⁴¹ The Uniform Act, like its federal counterpart, lacks a public policy grounds for vacatur.¹⁴² Nevertheless, a public policy grounds for vacatur has been recognized by federal¹⁴³ and state courts.¹⁴⁴

¹³⁹ Arbitration Fairness Act of 2009, S. 931, 111th (2009).

¹⁴⁰ Jurisdictions adopting the 1959 version of the UAA include Alaska, Arizona, Arkansas, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Wyoming. Jurisdictions adopting the 2000 Act include: Colorado, District of Columbia, Hawaii, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. Thus, 37 states and the District of Columbia have enacted a state arbitration act. See U.L.A. Arbitration Acts of 1959 and 2000.

¹⁴¹ In comment 23 the drafting committee “considered the advisability of adding two new subsections to Section 23(a) sanctioning vacatur of awards that result from a “manifest disregard of the law” or for an award that violates “public policy.” Neither of these two standards is presently codified in the FAA or in any of the state arbitration acts. However, all of the federal circuit courts of appeals have embraced one or both of these standards in commercial arbitration cases. See Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 734 (1996).” U.L.A. ARB. §23 (2012).

¹⁴² U.L.A. ARB. §23 (2012).

¹⁴³ See e.g. *Seymore v. Blue Cross*, 988 F.2d 1020 (10th Cir.1993); *Paine Webber, Inc. v. Argon*, 49 F.3d 347 (8th Cir. 1980).

¹⁴⁴ *Faherty v. Faherty*, 97 N.J. 99, 477 A.2d 1257 (1984) (refusing to defer to arbitrator’s award affecting child support because of the court’s “non-delegable, special supervisory function in [the] area of child support” that warrants de novo review whenever an arbitrator’s award of child support could adversely affect the substantial best interests of the child); *Rakoszynski v. Rakoszynski*, 663 N.Y.S.2d 957 (App. Div. 1997) (concluding that child support is subject to arbitration but child custody and visitation is not); *Miller v. Miller*, 423 Pa. Super. 162, 172, 620 A.2d 1161 (1993) (stating that court not bound by arbitrator’s child custody determination but court must ascertain whether arbitral award is “adverse to the best interests of the children”).

The United States has had some experience with religious arbitration arising from determinations made by the Beth Din according to Jewish law,¹⁴⁵ by the Christian Coalition Council according to the precepts associated with Christianity,¹⁴⁶ and by Islamic Religious Tribunals according to Islamic law.¹⁴⁷

B. Religious Arbitration in the U.S.

1. Jewish Arbitration of Family Law Issues

The Beth Din has been operating for over 4000 years.¹⁴⁸ For religious reasons, modern Judaic schools maintain that, “[a] central principle of halacha is that disputes between Jews should be adjudicated in duly-constituted rabbinical courts.”¹⁴⁹ Jewish law incorporates patriarchal laws that are gendered.¹⁵⁰ The jurisdiction of the Beth Din extends to divorce.¹⁵¹ A Kethuba may require the parties to consult the Beth Din in the event of marital strife.¹⁵² In one instance the Beth Din included a clause in its award that conditioned the husband’s obligation to give the get upon wife’s agreement not to seek civil court involvement. The clause was deemed unenforceable because it¹⁵³ chilled wife’s right to pursue civil relief, including the adjudication of custody and child support.¹⁵⁴ In

¹⁴⁵ See infra notes xx-xx and accompanying text.

¹⁴⁶ See infra notes xx-xx and accompanying text.

¹⁴⁷ See infra notes xx-xx and accompanying text.

¹⁴⁸ Ginnine Fried, *The Collision of Church and State: A Primer to the Beth Din Arbitration and the New York Secular Courts*, 31 *FORDHAM URB. L.J.* 633, 634 (2004).

¹⁴⁹ *Id.* at 637 (citing Dov Bressler, *Arbitration and the Courts in Jewish Law*, 9 *J. HALACHA & CONTEMP. SOC’Y* 105, 109 (1985)).

¹⁵⁰ Adam H. Koblenz, *Jewish Women Under Siege: The Fight for Survival on the Frontlines of Love and the Law*, 9 *UNIV. M.D. L.J. RACE, REL. AND CLASS* 259, 263-70 (2009)(discussing gender disparity created by traditional Jewish law in the context of domestic violence).

¹⁵¹ *Id.* at 638.

¹⁵² For example, one kethuba was translated as follows: “The parties declared their “desire to * * * live in accordance with the Jewish law of marriage throughout [their] lifetime” and further agreed as follows: “[W]e, the bride and bridegroom * * * hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.” *Avitzur v. Avitzur*, 58 *N.Y.2d* 108, 112, 446 *N.E.2d* 136 (1983). Notably absent from the Kethuba is any language expressly waiving divorce rights arising under civil law.

¹⁵³ See *Mr. S.W. v. Ms. T.W.*, *N.Y. L.J.*, July 14, 1995 at 26 (denying motion to stay wife from litigating in court without her first obtaining permission to litigate from religious arbitrator).

¹⁵⁴ *Id.*

another case, *Hirsch v. Hirsch*, the court refused to enforce a Beth Din award of child support, custody and property based upon public policy grounds.¹⁵⁵ The court held, “The remaining provisions of the award addressed issues, inter alia, of marital property, separate property, maintenance, and educational costs for the children, which are intertwined with the issues of the husband's child support obligation and the disposition of the marital residence. Accordingly, under the circumstances of this case, the New York Supreme Court properly vacated the entire award.”¹⁵⁶ Thus, civil courts apply special procedural rules to Beth Din awards to insure voluntariness. Typically, child custody¹⁵⁷ and child support¹⁵⁸ awards are unenforceable as a matter of public policy and subject to de novo review. This is because the former determination is based upon a best interests determination and remains subject to the court’s review and the latter must be determined in accordance with state promulgated child support guidelines.

2. Christian Arbitration of Family Law Issues

While the Beth Din has been successfully arbitrating matters in the U.S. for decades and applying halacha law,¹⁵⁹ the arrival of Christian religious arbitration is more recent. Peacemakers Ministries was founded

¹⁵⁵ *Hirsch*, 4 A.D.3d 451 (N.Y. App. Div. ,4th Div. 2004). (See, *Glauber v. Glauber*, 192 A.D.2d 94, 600 N.Y.S.2d 740; see also *Segal v. Segal*, 278 N.J. Super. 218, 650 A.2d 996 (1994) (although settlement agreement reached before a Beth Din was not per se invalid, because it was one-sided and obtained in exchange for granting wife a Jewish divorce, it was unenforceable as a product of duress); *Golding v. Golding*, 176 A.D.2d 20, 581 N.Y.S.2d 4 (N.Y.App.Div.1992) (even if separation agreement was the product of rabbinical arbitration, the court was still required to examine its substance and procedure by which it was adopted so as to ascertain that there was no fraud, duress or overreaching); *Lieberman v. Lieberman*, 149 Misc.2d 983, 566 N.Y.S.2d 490 (N.Y.Sup.1991) (absent duress, religious arbitrators did not exceed their authority in entering award which not only granted religious divorce, but decided matters of custody, visitation and economics); *In re Marriage of Gavend*, 781 P.2d 161 (Colo.App.1989) that property matters may not be arbitrated in a dissolution action if either party has been coerced into participating in such arbitration).

¹⁵⁶ *Id.* at 453.

¹⁵⁷ See *Schechter v. Schechter*, 63 A.D.3d 817, 881 N.Y.S.2d 151 N.Y.A.D. 2 Dept.,2009.; (Holding custody and visitation suits are not subject to arbitration (citing *Hirsch v. Hirsch*, 4 A.D.3d 451, 774 N.Y.S.2d 48; *Hom v. Hom*, 270 A.D.2d 391, 704 N.Y.S.2d 885; *Cohen v. Cohen*, 195 A.D.2d 586, 600 N.Y.S.2d 996)).

¹⁵⁸ *In re Marriage of Popack*, 998 P.2d 464 (Colo. App. 2000) (court rejected historical authority for confirmation of child support awards made through an arbitration process, which does not employ the principles established under current state law due to the strong public policy of this state set forth in that statute).

¹⁵⁹ Halacha, “though implying a legal order and often used to denote “Jewish religious law,” suggests a broader range of ideas than those included in legal rules. A more literal translation of “halacha” would evoke a “path” of life; to inhabit the halacha, by definition, to live in it.” Samuel J. Levine, *Halacha and Aggaada: Translating Robert Cover’s Nomos and Narrative*, 1998 UTAH L. REV. 465, 484 (1998).

in 1982 and is the largest Christian dispute resolution in the country.¹⁶⁰ This group offers Christian conciliation to individuals interested in resolving their disputes outside of court according to biblical principles.¹⁶¹¹⁶² If mediation fails, the parties are channeled into arbitration.¹⁶³ Christian conciliation cannot be used to resolve issues dedicated solely to the civil courts, such as child custody and child support.¹⁶⁴ Perhaps this exclusion should be extended to include all issues related to divorce, including divorce and property distribution.

The U.S. constitutional principles under the Establishment Clause,¹⁶⁵ along with the broad rules associated with arbitration, have insulated religious tribunals from judicial oversight.¹⁶⁶

Canon law deals largely with church matters and is silent as to private law, in contrast to Islamic law which sets forth detailed economic rights and obligations between divorcing parties based upon a Seventh Century understanding of matrimonial rights and obligations.¹⁶⁷ Thus, any determination of divorce related issues is subject to more general precepts under Matthew 18:15-20 dealing with resolving disputes within the

¹⁶⁰ Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to "Ordinary"ADR*, 29 CUMB. L. REV. 583, 585-89 (1998-99).

¹⁶¹ Wolfe, *supra* note 46, at 39. An example of an arbitration clause designating Christian arbitration follows:

The parties to this agreement are Christians and believe that the Bible commands them to make every effort to live at peace and to resolve disputes with each other in private or within the Christian church (see Matthew 18:15-20; Corinthians 6:1-8). Therefore, the parties agree that any claim or dispute arising from or related to this agreement shall be settled by biblically based mediation and, if necessary, legally binding arbitration in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Ministries. Margaret G. Tebo, *Dispute Resolution Clauses Keep the Faith Many Clients Asking for Mediation Under Christian Principles*, Private Dispute Resolution Services, <http://www.private-disputeresolutionservices.com/christianmediation.html> (last visited Jan. 3).

¹⁶² Mark L. Movesson, *Fiqh and Canons: Reflections on Islamic and Christian Jurisprudence*, 40 SETON HALL L. REV. 861, 876 (2010) (“Canon law, by contrast, has a much more limited compass. It deals overwhelmingly with matters of church administration rather than personal behavior and moral judgment.”).

¹⁶³ *Id.*

¹⁶⁴ Wolfe, *supra* note xx, at 439.

¹⁶⁵ See *infra* notes xx-xx and accompanying text.

¹⁶⁶ Matthew F. Steffey, *Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement, and Church Autonomy*, 75 MARQ. L. REV. 903, 973 (1992) (“The Establishment Clause disables government from resolving religious questions, and thereby leaves a zone where religious organizations retain autonomy. The Establishment Clause renders nearly all decisions as to a church’s creed, governance, or discipline nonjusticiable. Similarly, the Establishment Clause can forbid offensive regulatory supervision by administrative officials. At a minimum, government may not enforce regulations when to do so would require administrative resolution of religious issues and mandate extensive, ongoing oversight. (citations omitted).”)

¹⁶⁷ Esposito and DeLong-Bas, *supra* note xx at 45-46.

Christian community¹⁶⁸ and under Corinthians 6:1-8,¹⁶⁹ promoting settlement of differences; concepts far more general than those applicable upon divorce under Sharia law which is quite specific as to custody, property and support rights in the event of divorce.¹⁷⁰

In the only case seeking enforcement of a Christian Conciliation Arbitration award dealing with family law matters, the Pennsylvania Supreme Court reviewed the validity and enforceability of a custody award entered by a Christian Arbitration Group. Mother asked to enforce it and father asked to have the award treated as unenforceable. The Supreme Court remanded the issue of the enforceability of a child custody determination to the trial court to determine if the award was in the best interests of the child. Thus, illustrating the principle that custody awards remain subject to judicial oversight and approval.¹⁷¹ It appears that few appellate courts have been called upon to determine the validity and enforceability of arbitration awards entered according to specific passages in the Christian Bible.

3. *Islamic Arbitration of Family Law Issues in the United States*

Religious arbitration in the United States has not been limited to Jewish and Christian tribunals. Research revealed one case dealing with Islamic religious arbitration of family law issues decided by courts in Texas.¹⁷² In 2003, the Court of Appeals of Texas enforced an arbitration agreement providing,

The Parties agree to arbitrate all existing issues among them in the above mentioned Cause Numbers in the appropriate District Court, which includes the Divorce Case, the child custody of the [sic] Noor Qaddura and Farah Qaddura, the determination of each party's responsibilities and duties according to the Islamic rules of law by Texas Islamic Court.¹⁷³

The agreement was signed on September 25, 2002,¹⁷⁴ well after the filing of the parties' divorce decree on October 19, 1999¹⁷⁵ and the trial court's grant of partial summary judgment favoring the husband.¹⁷⁶

¹⁶⁸ Matthew 18:15-20, Bible, New Testament, King James Version.

¹⁶⁹ Corinthians 6:1-8, Bible, New Testament, King James Version.

¹⁷⁰ See *infra* notes xx-xx and accompanying text.

¹⁷¹ Miller v. Miller, 620 A.2d 1161 (Pa. Super. 1993).

¹⁷² Jabri v. Qaddura, 108 S.W.3d 404 (2003).

¹⁷³ *Id.* at 408.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 407.

¹⁷⁶ *Id.*

Subsequently, the parties disagreed regarding the scope of the issues to be determined through arbitration.¹⁷⁷ Wife argued that the agreement was to arbitrate all issues related to the divorce, while husband argued that the issues previously determined by the trial court's grant of summary judgment remained to be determined.¹⁷⁸ The trial court decided that because the parties disagreed regarding the scope of the agreement, it was invalid and unenforceable, presumably due to the lack of evidence of a meeting of the minds.¹⁷⁹

On appeal, the Texas Court of Appeals reversed on the grounds that the agreement was not ambiguous and clearly reflected the intent of the parties to submit all the marital issues raised by all of the pleadings filed up until that date to arbitration. Thus, all that we can conclude is that Texas courts may uphold arbitration agreements to present family law issues to Islamic religious tribunals.¹⁸⁰ The Texas court did not address the appropriate standard of review to apply in cases seeking enforcement of such an award. Although no civil court in the United States has addressed the enforceability of an Islamic religious tribunal related to divorce rights, this issue is likely to arise in the future as the Islamic population grows and Islamic religious tribunals become more numerous.

Some imams prefer to operate in a parallel system and remain unconcerned regarding civil enforcement. In fact, the availability of adjudication under civil law may in fact afford to imams the ability to promote a fair and just result¹⁸¹ by bargaining "in the shadow of civil law." Thus, maintaining complete separation between the civil and religious sides of divorce may promote the goals of both civil and religious institutions.

Like Judaism and Christianity, Islam reflects patriarchal rules.¹⁸² Thus, to the extent that applying Jewish or Christian principles to resolve disputes through arbitration results in gender disparity, the same concerns as those raised by Islamic Religious Tribunals arise and equity demands consistent treatment.¹⁸³ Simply calling upon the courts to make a determination regarding gender equality raises entanglement issues and precludes judicial involvement. Thus, the subsequent analysis applies to any RTA regarding rights in the event of a divorce presented to a U.S. civil court for enforcement.

¹⁷⁷ *Id.* at 408.

¹⁷⁸ *Id.* at 409.

¹⁷⁹ *Id.* at 410.

¹⁸⁰ *Id.* at 412. Nevertheless, the arbitration never took place. In the related case of *Interests of N.Q. and F.Q., Children*, 2010 WL 28134259 2010 WL 28134259 p. 1 (Tex. Civ. App. 2010)(On February 10, 2004, husband filed a motion to set aside the arbitration agreement which the trial court granted.)

¹⁸¹ Macfarlane, *supra* note 60 at 216.

¹⁸² Lynn Marie Kohm, *Christianity, Feminism, and the Paradox of Female Happiness*, 17 *TRIN. L. REV.* 191 (2011) (discussing the successes and failures of religious Christianity regarding gender equality).

¹⁸³ Canada resolved this issue by refusing to enforce at civil law any faith based arbitration awards. Cite needed.

IV. POLICY CONCERNS RELATED TO RELIGIOUS TRIBUNAL ARBITRATION AWARDS

As previously mentioned, the “New Multiculturalism” debate revolves around the degree to which the state is obligated to accommodate minority practices that conflict with state law. In his recent article, Michael Helfand uses the term “new multiculturalism”¹⁸⁴ to explore the question of whether the civil courts within the U.S. should recognize and enforce RTAs.¹⁸⁵ He focuses specifically on the enforceability of arbitration awards issued by religious tribunals under religious law.¹⁸⁶ According to Helfand, these tribunals afford to religious adherents “a law-like autonomy that has been withheld under public law.”¹⁸⁷ Helfand’s article explores in detail the special concerns raised by enforcing Islamic Tribunal awards resolving family-law related disputes. Clearly, the public’s substantial interest in promoting gender neutral divorce rules is strained by the potential that the controlling religious law embodies tenants of male hegemony.

A. Policy Arguments Supporting Judicial Review of RTAs

Instead of forbidding enforcement of RTAs, Helfand suggests a robust application of the public policy and conscionability doctrines.¹⁸⁸ In part, this approach requires the court to determine whether both parties participated in the arbitration process voluntarily to ensure the fairness of the process. In order to insure that both parties voluntarily and knowingly agreed to arbitration, the court must examine the circumstances surrounding the contract to arbitrate. Determining the question of voluntariness of the agreement to arbitrate requires special attention to the religious and cultural consequences growing out of the decision not to arbitrate within the religious tribunal.¹⁸⁹ Such a decision might incur shunning by the other members of the religious community, if not excommunication, known as apostasy. Therefore, it may in fact be impossible to secure truly volitional participation in the process.¹⁹⁰

With regard to the public policy exception, under some, but not all arbitration rules, Helfand observes that courts can vacate arbitration awards that violate substantive public policy.¹⁹¹ Helfand uses the example

¹⁸⁴ Michael Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1233 (2011).

¹⁸⁵ *Id.* at 1235.

¹⁸⁶ *Id.* at 1236.

¹⁸⁷ *Id.* at 1237.

¹⁸⁸ *Id.* at 1241.

¹⁸⁹ Helfund, *supra* note xx, at 1287. This inquiry alone raises entanglement concerns. See *infra* notes xx-xx and accompanying text.

¹⁹⁰ Truly voluntary waiver is difficult to determine.

¹⁹¹ Helfand, *supra* note 3, at 1254. This basis for vacatur is not expressly included in the FAA or the UAA; however, it has been expressly incorporated as part of some state arbitration statutes and remains a common law defense. *Id.* at 1258.

of Jewish religious laws that prohibit certain types of competitive business practices, including the principle of “Hasagath Gevul” which “prohibits an individual from opening a second business identical to an existing business in such close proximity in that doing so would lead to the financial ruin of the existing business.” This protection may undermine existing fair competition laws. Thus, arbitration awards enforcing “Hasagath Gevul” undermine public policy favoring free competition and are arguably unenforceable.¹⁹² Likewise, in RTAs based upon facially discriminatory rules in relationship to the divorce rights of men and women, the court will, in every instance, face a public policy dilemma: undermine free exercise principles or undermine gender equality precepts.

In addition to substantive law concerns, Helfand also acknowledges procedural public policy concerns may form a basis to set aside arbitration awards, particularly when the religious procedural rules do not “necessarily advance standard conceptions of equity.”¹⁹³ This inequity arises with respect to gender-biased rules regarding the admissibility of evidence.¹⁹⁴ Specifically, some religious tribunals may bar the testimony of female witnesses.¹⁹⁵ Others may afford lesser weight to it.¹⁹⁶ Thus, existing provisions of the AAA offer some protection against religious arbitration awards that violate public policy in the U.S. However, there is no guarantee that a RT will adhere to AAA procedural rules. This concern is relevant in relationship to the Islamic rules affording disparate weight to the testimony of men and women.¹⁹⁷

According to Helfand, a final public policy ground of vacatur arises when the state refuses to enforce religious arbitration awards that undermine special statutory protections afforded to parties impacted by the award.¹⁹⁸ For example, Helfand notes that courts will not enforce custody or child support awards based upon the court’s special interest in protecting the best interests of the child.¹⁹⁹ Arguably, the court’s special interest in promoting gender equality affords to courts a similar basis to deny enforceability of RTAs related to divorce grounds, support, alimony and property division.²⁰⁰

In addition to public policy, courts might also rely upon unconscionability to set aside an arbitration award. Courts typically require evidence of both procedural and substantive unconscionability

¹⁹² *Id.* at 1259-60.

¹⁹³ *Id.* at 1267.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1268.

¹⁹⁶ Kristin J. Miller, *Human Rights of Women in Iran: The Universalist Approach and the Relativist Approach*, 10 EMORY INT’L L. REV. 779, 796 (1996) (“A second example of human rights abuses against women under the Islamic Penal Code is the Code’s valuation of a woman’s worth as only half that of a man’s. For example, a woman’s testimony in court is given half the weight of a man’s testimony.”).

¹⁹⁷ *Id.*

¹⁹⁸ Helfand, *supra* note 3 at 1293.

¹⁹⁹ *Id.* at 1293.

²⁰⁰ *See infra* xx-xx.

before setting aside an arbitration award.²⁰¹ Helfand notes that the unconscionability doctrine has been applied more readily by courts in relationship to arbitration awards than in other contract cases.²⁰²

Helfand concludes that robust use of public policy exceptions and substantive and procedural due process defenses to monitor the fairness of religious arbitration awards is the best way “to protect the fortifications around individual liberties, “while remaining sensitive to the religious and cultural differences that inhabit the public square.”²⁰³ While this approach may be successful in many instances, arguably, the gender disparity at the root of Jewish, Christian and Islamic religious law permeates the foundation of any forthcoming award in relationship to family law matters, compromising the award in every instance.

In reviewing the relative success of the Beth Din in arbitrating family disputes within the FAA framework, another scholar, Lee Anne Bambach, suggests that any religious arbitration tribunal follow four guidelines to protect the enforceability of its awards. These guidelines include: 1) the agreement to arbitrate must be voluntary, 2) the tribunal must follow basic written procedures, 3) these ground rules must be followed, and 4) the award may not be irrational or contrary to public policy.²⁰⁴ Bambach’s approach is subject to the same critique: in matters of divorce grounds and economic awards of property, support and alimony, the gendered religious precepts favoring man render the award contrary to the U.S. constitutionally guaranteed right to gender equality.

B. Policy Concerns Related to Judicial Review of RTA

One public policy goal underlying U.S. divorce law is to achieve a fair and just economic resolution between the parties following divorce. This policy was achieved through substantial divorce reform over the past two-hundred years, reform which was designed to eliminate gender discrimination embodied in our divorce laws. Thus, our existing divorce law is designed to value both economic and non-economic contributions to the marital estate and divides marital property without regard to title based upon this principle.

The state may not lend enforcement power to purely private agreements that violate fundamental rights. In this instance, the gender imbalance that characterizes the Islamic law related to marriage and divorce violates public policy and renders any award predicated upon

²⁰¹ *Id.* at 1297.

²⁰² *Id.* at 1295.

²⁰³ *Id.* at 1305. Helfand notes that not all public policy arguments justify non-enforcement, only those in which the third-party interests outweigh the interest of the first party seeking enforcement. *Id.* at 1258.

¹⁶¹ Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made By Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & RELIGION 379, 406-410 (2009-10) (Bambach seems to include unconscionability within the definition of a public policy defense).

these rules inherently flawed and unenforceable in state court. In fact, the Equal Protection clause of the Constitution demands non-recognition with regard to enforcement or recognition. These policy concerns related to gender equality outweigh policy concerns related to multiculturalism and legal pluralism. Thus, U.S. civil courts should refuse to enforce RTAs related to marriage dissolution.

When parties seek court enforcement of divorce rights based on patriarchal rules, the private party seeking state enforcement stands in the precarious position of relying upon the power of the state to enforce a gender-biased, and thus illegal award, an award that violates both the laws and the aspirations of this country. This is even more apparent in divorce cases because the state is a third party to the proceeding.²⁰⁵ As long as both parties are willing to adhere to a private and gender-biased agreement, there is arguably sufficient freedom of religion to permit them to do so; however, when either seeks state support to achieve this goal, the state must deny relief on the basis of public policy.²⁰⁶

Although public policy and procedural fairness safeguards are available to the courts when they are called upon to enforce RTAs, when such awards deal specifically with matters related to dissolution of marriage and custody, additional constitutional issues are raised because of the substantive rights at issue related to free exercise, establishment and gender equality. In addition to policy concerns, religious arbitration of divorce issues raises compelling policy concerns.

VI. CONSTITUTIONAL CONCERNS ARISE WHEN CIVIL COURTS ENFORCE ISLAMIC RELIGIOUS TRIBUNAL AWARDS

In addition to policy concerns, religious arbitration of divorce and custody issues raises constitutional concerns. The relationship between the church and state is dictated by the First Amendment to the Constitution. The concept of separation between church and state can be traced to the

²⁰⁵ See e.g. *Vandervort v. Vandervort*, 134 P.3d 892 (Okla. App. Ct. 2005).

²⁰⁶ *Transparent Value, L.L.C. v. Johnson*, 93 A.D.3d 599 (N.Y. App. Div. 2012) (when court is asked to vacate arbitral award on public policy grounds, focus of inquiry is on result, the award itself, and where final result creates explicit conflict with other laws and their attendant policy concerns, court will vacate award) *Weiner v. Commerce Ins. Co.*, 78 Mass. App. Ct. 563 (2011) (arbitration may not award relief of a nature which offends public policy, or which directs or requires a result contrary to express statutory provision); *Robinson v. Robinson*, 778 So.2d 1105 (La. 2001)(choice of state law that unfairly benefits one spouse over another, absent some significant connection to that state, is not just, and more importantly, against the public policy of Louisiana); *Bear Stearns & Co. Inc. v. International Capital & Management Co. LLC*, 2011 N.Y. Slip Op. 21211 N.Y. Sup., 2011; (court may vacate an arbitration award if it finds that the award violates public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's power); *Goldberger v. Gansburg*, 2011 N.Y. Slip Op. 05273 N.Y. App. Div. 2. Dept., 2011 (arbitration award may be vacated, inter alia, on the ground that it is clearly violative of a strong public policy or otherwise transcends the limits of the contract of which the agreement to arbitrate is but a part).

writings of John Locke, described as “one of the most influential Enlightenment philosophers.”²⁰⁷ While Locke could not have anticipated the passage of the FAA and state counterparts to relieve the over-burdened court system, nor could he have anticipated the rise in the number of divorces or the use of religious tribunals to arbitrate dissolution proceedings, the principles set forth in *A Letter Regarding Religious Toleration*²⁰⁸ are particularly applicable.

In writing about religious toleration, John Locke eloquently described the ideal relationship between church and state as follows:

“I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just law that lie between the one and the other. If this not be done, there can be no end put to the controversies that will always be arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men’s souls, and on the other, side, a care for the commonwealth...”²⁰⁹

In distinguishing between matters of civil concern and of religious concern, Locke observed:

Civil interests I call life, liberty, health and the indolence of body; and the possession of outward things, such as money, lands, furniture and the like. It is the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all people in general, and to every one of ... the just possession of things belonging to this life. ..²¹⁰

Locke suggests that the most important distinction between civil and religious law is the civil enforcement power of the state, a power unavailable to enforce religious mandates:

Now that the whole jurisdiction of the magistrate reaches only to these civil concerns, and that all civil power, right and dominion is bounded and confined to the only care of promoting these things; and that neither can nor ought in any

²⁰⁷ Stephen Menendenian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, 54 *St. Louis Univ. Law Journal* 1035, 1051 (2010).

²⁰⁸ John Locke, *A Letter Concerning Toleration* (1689) (Translated by William Popple) available at <http://www.constitution.org/jl/tolerati.htm>.

²⁰⁹ John Locke, *A Letter Concerning Toleration* (1689) (Translated by William Popple) available at <http://www.constitution.org/jl/tolerati.htm>.

²¹⁰ *Id.*

manner to be extended to the salvation of souls,
these following considerations of souls...²¹¹

Clearly, according to Locke, religion deals in the realm of saving souls while the state deals with protecting the people's right to be life, liberty and property in the temporal world. Although dated and subject to a variety of criticisms, including a limited definition of tolerance,²¹² Locke's essay, nevertheless, offers a clear demarcation of the role of religion in a secular society as opposed to a theocracy that predates the existing Supreme Court precedent attempting to identify and enforce the concept of separation of church and state set forth in the First Amendment.

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." (Emphasis added).²¹³ This clause secures religious freedom by restricting the government's ability to pass legislation interfering with the individual's right to free exercise or establishing a state religion. Through these restrictions protecting the individual's rights and limiting the state's legislative power, the First Amendment to the Constitution provides the controlling within which all state statutes must operate to survive constitutional attack.

If religious law is defined to address matters of the soul, and civil law to address matters related to life, liberty and property, then economic issues related to divorce are rights of civil origin and must be resolved according to the applicable rules of law. Arguably, Sharia law and civil divorce laws are entirely separate and independent, and civil courts and religious courts share entirely separate and independent jurisdiction. Thus, religious tribunals should not be approved as state sanctioned arbitrators in order to preserve the division between church rules and civil law. However, Islamic Tribunals remain vital to afford to adherents access to a religious divorce in order to finalize the divorce in the eyes of God.²¹⁴

When confronted by any family law issue involving the intersection of Islamic family law and civil family law, a U.S. court must clearly identify the constitutional limitations imposed upon state actors under the First

²¹¹ *Id.*

²¹² For example, Locke's plea for toleration excludes atheists and Catholics. See e.g. Mark Goldie, Locke on Religious Toleration available at http://oll.libertyfund.org/index.php?option=com_content&task=view&id=1584&Itemid=288 ("Given the powerful nature of Locke's case for religious tolerance, it comes as a shock that, near the close of the *Letter*, he excludes atheists and Catholics from toleration. There is no gainsaying that he rejects the possibility of tolerating atheists, whom he claims have no motive for keeping rules, since they lack fear of divine punishment. 'Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist.'" *Id.*)

²¹³ FIRST AMENDMENT, U.S. CONSTITUTION

²¹⁴ Macfarlane, *supra* note XX at 145 "The use of Islamic divorce as complimentary to rather than as a substitute for legal divorce ... challenges the widespread public misconception that North American Muslims who seek a religious divorce are choosing it 'over' state divorce."

Amendment and the Fourteenth Amendment. This section summarizes the existing legal understanding of the constitutional right to free exercise and government neutrality, and further explores the concept of state action in relationship to gender equality.

A. *Free Exercise*

The Free Exercise Clause of the First Amendment has been applied to the states through the Fourteenth Amendment²¹⁵ and provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” (Emphasis added).²¹⁶ In determining the scope of the constitutional protection surrounding the free exercise of religion, the Supreme Court has held that, a law that is “neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”²¹⁷ The elements of neutrality and general applicability are interrelated.²¹⁸ One scholar has noted that the failure to satisfy one requirement is a likely indication that the other has not been satisfied.²¹⁹ A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.²²⁰ Absent a compelling state interest,²²¹ there can be no law prohibiting parties from voluntarily seeking counsel and advice from religious tribunals regarding divorce. However, the establishment clause and other policy arguments arguably prohibit civil enforcement of RTAs.

B. *Establishment Concerns*

The Constitution also expressly provides, “Congress shall make no law establishing religion.” In construing the intent of the drafters to properly apply the First Amendment, scholars take a variety of different positions. Some argue the founders intended a strict wall of separation between church and state. Others conclude that they intended to create a standard of neutrality:

The *Everson* Court was correct in concluding that the founding fathers intended the first amendment to require separation between church and state. The more difficult question, however, is

²¹⁵ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

²¹⁶ US Constitution

²¹⁷ *Employment Div., Dept. of Human Resources of Ore. v. Smith*, *supra*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

²²¹ Recently, state statutes barring the consideration of foreign law have been proposed and at least one declared unconstitutional as a violation of First Amendment religious freedoms. See *infra* notes xx-xx and accompanying text.

whether the framers intended separation to be an end, or instead, merely a means to some other desired goal such as neutrality. The answer is significant because in today's modern society, in which the administrative state touches the lives of its citizens in numerous and diverse ways, separation has become an obstacle to the achievement of neutrality. Consequently, an establishment doctrine premised on the goal of separation is by its nature fundamentally ill-suited to achieve the ultimate goal of neutrality.²²²

Arguably, the neutrality test reflects the balance between free exercise and necessary government regulation captured in the language of the Constitution.²²³

Neutrality is determined first by examining the text of the statute at issue. At a minimum, the law must not be facially discriminatory.²²⁴ A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context. The Supreme Court has observed, “the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' ”²²⁵ The *Lemon* Court adopted a three prong test that has been reformulated over the years, but never overruled. The Court observed that:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect

²²²Christopher S. Nesbit, *County of Allegheny v. ACLU: Justice O'Connor's Endorsement Test*, 68 N. C. L. REV. 590, 608-9 (1990).

²²³ See, e.g., *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 22 (1990); *Cantwell v. Connecticut*, 310 U.S. 296, 303,(1940) (plurality opinion); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 106–107 (1968); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963); *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15–16 (1947).

²²⁴ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). For example, in *Lukumi*, the petitioners argued unsuccessfully that the statutory references to “sacrifice” and “ritual” are religious in nature. See also *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 22; *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), 6, 248, 110 S.Ct. 2356, 2370–71, 110 L.Ed.2d 191 (1990) (plurality opinion); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389, 105 S.Ct. 3216, 3225–26, 87 L.Ed.2d 267 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489–90, 86 L.Ed.2d 29 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 106–107, 89 S.Ct. 266, 271–72, 21 L.Ed.2d 228 (1968); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963); *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15–16, 67 S.Ct. 504, 511–12, 91 L.Ed. 711 (1947).

²²⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 (1968); finally, the statute must not foster ‘an excessive government entanglement with religion.’²²⁶

This test, known as the *Lemon* test is often described as the purpose and effect test. While federal and state arbitration statutes are secular in purpose and neutral in application, when the arbitration panel is composed of religious scholars applying religious law, the third prong of *Lemon* is implicated if the parties seek judicial enforcement of a religious ruling. Thus, a facially neutral arbitration statute may, nevertheless, raise entanglement concerns when religious tribunals apply religious law to resolve matters of civil dispute.

In contrast to the strict division between church and state, some jurists argue that the establishment clause was never “intended to erect ‘a wall of separation between church and State,’ ” but rather to promote neutrality.²²⁷ Some scholars have concluded that neutrality is the most rational approach²²⁸ given the complexity of society and the expansion of government.²²⁹

For example, Justice O'Connor described the First Amendment as requiring neutrality, rather than strict separation. She observed,

Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by non-adherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to non-adherents that they are

²²⁶ *Id.* at 615.

²²⁷ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

²²⁸ Christopher S. Nesbit, *County of Allegheny v. ACLU: Justice O'Connor's Endorsement Test*, 68 N. C. L. REV. 590, 608-9 (1990). Nesbit concludes, “In today's complex and modern world, it is virtually impossible to prevent interaction between government and religion. During post-revolutionary times the level of government activity was minimal; government was therefore less likely to interfere with religion. Additionally, colonial America was a Protestant nation. Today, however, there are dozens of religious denominations, many regularly interacting with their communities. Consequently they are more likely to come into contact with the government. Unlike separation, neutrality does not require, or even encourage, total government noninvolvement. As a practical matter, then, in modern society neutrality provides a sounder foundation upon which to formulate an establishment doctrine.”

outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.²³⁰

Justice O'Connor suggested an "endorsement test," in which the court must first determine whether the government intended to "convey a message of endorsement or disapproval of religion" and then "determine whether the government actually conveyed this message." She characterized the endorsement test as a clarification of the *Lemon*²³¹ test; however, one scholar has suggested that Justice O'Connor gave the theory a "stronger independent status" in *Wallace v. Jaffree*.²³²

According to her interpretation, the establishment clause does not require separation, but merely requires the government to remain neutral towards religious organizations. Government endorsement of one religious organization over another, or *of religion over no religion*, violates the principle of neutrality and is unconstitutional. The crucial question is not whether the government activity in question has achieved the proper degree of separation, but instead, whether it sends a message of endorsement.

According to the *Wallace* Court, "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."²³³

Arguably, the simple act of reviewing a RTA in the context of an enforcement action or an action to set aside the RTA, the court violates a law of "morality and property" which infringes "personal rights."²³⁴ Thus, the principle of neutrality is compromised and entanglement occurs whenever a civil court is called upon to review a RTA. If enforced, it is as if the state has endorsed the religious law underlying the RTA and if set aside, it is an affirmation. In essence, entanglement concerns arise at the moment the issue is presented to the civil court for determination. The contours of religious freedom exist within a democratic framework imposing constitutional duties and limitations upon individuals and the

²³⁰ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

²³¹ *Id.* at 691 (Justice O'Connor claimed that "[t]he proper inquiry under the purpose prong of *Lemon* . . . is whether government intends to convey a message of endorsement or disapproval of religion.")

²³² Matthew W. Foster, *The Parsonage Allowance Exclusion: Past, Present, and Future*, 44 VAND. L. REV. 149, 170 (1991).

²³³ *Watson v. Jones*, 80 U.S. 679, 728 (1871).

²³⁴ *Id.*

state. The judiciary polices this boundary and is prohibited from taking any position regarding religious law and religious rulings.

C. Religious Question Concerns

In addition to entanglement concerns, the Religious Question Doctrine raises concerns regarding institutional competence.²³⁵ In *Wallace*,²³⁶ the Supreme Court held:

It is can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less not to be supposed that the judges of the civil courts so.²³⁷

When courts are called upon to enforce arbitration awards based upon religious doctrine, determining matters of procedural fairness and public policy requires civil courts to examine issues of underlying religious law and, thus falls outside of the expertise and competency of a civil court.²³⁸

D. State Action Concerns

Following the successful growth of commercial arbitration, religious groups have sought formal recognition to arbitrate civil disputes in religious tribunals. This transfer of civil family law determinations to religious tribunals raises difficult legal questions that are not at issue in private commercial contractual disputes resolved according to civil law chosen by agreement of the parties. This state is an interested third party to all marriage contract and acts in its *parens patriae* role in custody disputes.

This public interest and state involvement manifests itself through the historical evolution of U.S. family law. The transition of state law from a title regime to either a community property regime or an equitable distribution regime reflects the state's interest in recognizing and valuing

²³⁵ See Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 132 (“The Court has developed a religion clause analogue to the political question doctrine that disposes of many of these cases.”); Jared A. Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 499-500 (2005) (“Like the political question doctrine, the prohibition on judicial inquiry into religious questions is understood to be a justiciability doctrine....”).

²³⁶ *Watson*, 80 U.S. at 729. See also *Milivojevich*, 426 U.S. at 709 (“To permit civil courts to probe... religious law would violate the First Amendment....” (quoting *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring))); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 447 (1969) (“[C]ivil courts [have] no role in determining ecclesiastical questions.”).

²³⁷ *Watson*, 80 U.S. at 729.

²³⁸ *But see* Grossman, *supra* note 3, at 208 arguing in favor of a limited application of the religious question doctrine to permit judicial review of religious arbitration awards.

the non-economic contributions of both spouses to the acquisition of property during the marriage. Additionally, all states now reject fault grounds as the only basis of divorce, thus ushering in the no-fault divorce approach available in every state.²³⁹ With respect to the duty to pay support and alimony, marital misconduct is irrelevant in some states and remains one of a variety of factors in other states.²⁴⁰

Thus, the reintroduction of male hegemony and fault into divorce proceedings through a RTA based upon gender-biased religious law undermines the important state interest in eliminating gender discrimination and affords to parties the opportunity to reinstate fault into the divorce process.²⁴¹ So long as entry into the arbitration process satisfies voluntariness requirements and other procedural protections,²⁴² then mutual cooperation to implement the arbitrated award poses no legal threat to state family law precepts and policy. However, if either party deviates from the award and one party seeks judicial recognition and enforcement of the award, then serious state action concerns arise. This part argues that if a civil court enforces a RTA, the court engages in illegal state action due to our constitutional commitment to gender equality.

Except with respect to the Thirteenth Amendment, the Constitution prohibits the federal and state government and its agents from depriving the individual of the rights protected by the Constitution.²⁴³ Any arm of the state, including the judiciary, may engage in state action. For example, the state action doctrine was applied to a private racially restrictive contract in *Shelley v. Kraemer*.²⁴⁴ In these companion cases, the Supreme

²³⁹ Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 223-34 (2010).

²⁴⁰ Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 312 (1997) (“Even among jurisdictions that have adopted “pure” no-fault, some have retained consideration of fault in property division and alimony. (Of seventeen state courts that considered whether fault should be a factor in property division and alimony, eleven held it permissible and only six rejected it out-right. *See, Fault as a Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce*, 86 A.L.R.3d 1116.)).

²⁴¹ Premarital agreement executed pursuant to the UPAA are comparable to RTAs because both results may reject the state default rules controlling dissolution, such as equitable distribution of property, support and alimony. While this analogy is reasonable, it is important to note that states do not recognize as controlling any agreements related to child custody or support as matter within the scope of a premarital agreement. Additionally, all states impose procedural protections and many also incorporate substantive protections to insure the validity and enforceability of premarital agreements, restrictions lacking in the religious arbitration context.

²⁴² *See infra* notes xx-xx and accompanying text.

²⁴³ *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (“[T]he action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment....”).

²⁴⁴ *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

Court refused to enforce racially restrictive covenants on the basis that to do would violate the Fourteenth Amendment equal protection clause. While Congress has failed to pass the ERA, the basis of state divorce reform is expressly based upon the desire of eliminating gender bias from the divorce process.²⁴⁵ Thus, enforcing an arbitrated religious agreement decided by an entity that employs sexist laws raises difficult state action questions that have not been addressed by courts enforcing such awards in the past.

In *Shelley*²⁴⁶ court refused to allow the white neighbors to use the enforcement power of the court, the magisterial power of civil law, to perpetrate racial discrimination, the same principal demands that civil courts refuse to enforce gender-biased religious tribunal awards that would be considered unconstitutional if issued by a U.S. court. Although, *Shelley* has been limited to its facts by subsequent courts,²⁴⁷ the deprivation of the civil right of gender equality represented in a private award and presented to the court for enforcement is a close approximation of the *Shelley* facts, substituting gender discrimination in place of racial discrimination.

Several courts have ruled generally that the mere enforcement of an arbitration award does not constitute state action; however, none have expressly addressed the argument that enforcing a RTA dealing with family law issues and based upon gender-biased religious rules constitutes unconstitutional state action.²⁴⁸ Research revealed one case in which a federal court addressed the question of whether the absence of women from the arbitration panel poisoned the award.²⁴⁹ The petitioner filed an action alleging denial of equal protection based upon the following facts:

It filed the claim with the American Arbitration Association's Chicago office, which responded by sending the parties a list of 15 arbitrators taken from the Association's roster for "Large and Complex Commercial Cases." The list contained 14 men and one woman. Pursuant to the Association's rules, the parties were asked to strike the names of any of the persons on the list whom they did not want to have on the arbitration panel and to rank the remaining ones. One of the names struck by Argenbright was that of the woman on the list (whom Smith had listed as her first choice), and as a result a panel of three male arbitrators was selected-whereupon Smith brought this suit in federal district court

²⁴⁵ See e.g. *Orr*, 440 U.S. at 280-81.

²⁴⁶ *Shelley*, 334 U.S. at xx.

²⁴⁷ Sarah Rudolph Cole, *Arbitration and State Action*, 2005 B.Y.U.L. REV. 1, 11 (2005).

²⁴⁸ *Parks v. "Mr. Ford,"* 556 F.2d 132, 156 (3d Cir.1977) (concurring opinion). See also Grossman, *supra* note 3 at xx.

²⁴⁹ *Smith v. American Arbitration Ass'n, Inc.*, 233 F.3d 502 (7th Cir. 2000).

against Argenbright and the Association, complaining primarily that the lack of gender diversity of the list, coupled with Argenbright's action in excluding the only woman on it, was a breach of contract.

Judge Posner rejected the assertion that the federal court's enforcement of an arbitration award, even if tainted by procedural gender bias, constitutes state action, rather he characterized the court's enforcement powers in relationship to arbitration as enforcing private contracts between individuals. The *Smith* case can be distinguished in two determinative ways. First, the gender-bias complained of was identified as a procedural injustice, rather than a substantive violation based upon facially discriminatory rules. Additionally, the complaint pending before the court requested relief from the obligation to arbitrate, rather than relief from an unconstitutional award. Thus, *Smith*²⁵⁰ is inapposite to the issue explored in this paper.

While dismissing the plaintiff's theory of recovery, Judge Posner recognized that state action can arise in private arbitration contracts when to do so delegates state governmental powers to the individual. "The fact that the courts enforce these contracts (to arbitrate), just as they enforce other contracts, does not convert the contracts into state or federal action and so bring the equal protection clause into play. ... This is not *Shelley v. Kraemer*²⁵¹ or *Marsh v. Alabama*,²⁵² cases in which the enforcement of private contracts had the effect of establishing private governments exercising governmental power under delegation from the state."²⁵³ In religious tribunal arbitrations of family law matters, the Posner test is satisfied. By enforcing the private arbitration award, the court lends the power of the state to enforce the ruling of a parallel "private government" founded upon gender-biased laws, laws that would be deemed invalid and unenforceable under the Constitution. This argument becomes even more compelling because the state encourages parties to seek arbitration of family disputes, thus relieving the docket. The arbitrator takes on a formerly public function, another basis for finding state action.²⁵⁴ Finally, when parties seek judicial support to enforce financial obligations between the parties, state action is clear.²⁵⁵

Another approach is to apply the equal protection state action doctrine and refuse to enforce arbitration agreements when the parties lack equal bargaining positions.²⁵⁶ This argument becomes compelling when

²⁵⁰ *Smith*, 233 F.3d at 502 .

²⁵¹ *Shelley*, 334 U.S. at 1.

²⁵² *Marsh v. Alabama*, 326 U.S. 501 (1946).

²⁵³ *Smith*, 233 F.3d 502.

²⁵⁴ Sarah Rudolph Cole, *Arbitration and State Action*, 2005 B.Y.U.L. REV. 1, 46 (2005).

²⁵⁵ *Id.* at 16.

²⁵⁶ Larry J. Pittman, *Mandatory Arbitration: Due Process and Other Constitutional Concerns*, 39 CAP. U. L. REV. 853 (2011). *But see* Sarah Rudolph Cole, *Arbitration and*

the procedural and substantive rules that the religious arbitrator is relying upon are facially discriminatory. Thus, the inequity is both procedural and substantive in nature. Thus, without regard to voluntariness and principles of bargaining equality, the simple act of enforcing RTA family awards based upon gender-biased rules clearly constitutes state action and violates the Equal Protection Clause of the Fourteenth Amendment. Thus, the request to enforce a RTA related to family law places civil courts in the untenable position of violating constitutionally mandated precepts of neutrality and gender equality in order to honor freedom of contract precepts.

VI. CONCLUSION PROPOSED RESPONSE TO ISLAMIC RELIGIOUS TRIBUNALS DECIDING FAMILY LAW MATTERS IN THE U.S.

The foregoing discussion reveals the complexity of RTA in relationship to divorce issues. The role of religious tribunals in divorce matters demands careful legal analysis and a considered response. From a legal perspective, basic tenants of Islamic dissolution law, as currently interpreted,²⁵⁷ violate the precepts of gender equality. Most clearly, the presumption of father custody after the child is beyond tender years, the adherence to a title regime of property, and the fault bar to alimony are all vestiges of gender discrimination that traditionally characterized the U.S. approach to family dissolution for many years until divorce reform began to take shape in the 1830s and culminated in the no fault approach popularized in the 1970's. Thus, maintaining a clear delineation between civil and religious law in the United States is understandably important to protect the advances toward gender equality that have been achieved in the U.S. as it works toward achieving a balance of shared power and equality in family relationships.

On the other hand, the values of religious tolerance and inclusion constitute an important foundation of our American society. Legislation targeting Sharia law for discriminatory treatment raises concerns regarding animus and persecution. Thus, legislators and policy makers face a post-modern dilemma: how should a democratic and secular society incorporate members of Islam who embrace a religious law as controlling in matters of personal law, including marriage and divorce.

It seems a minority group right to apply gendered and sexist law to divorce issues must accede to the majority constitutional commitment to

State Action, 2005 B.Y.U.L. REV. 1, 46 (2005) (arguing that state enforcement of arbitration awards arising out of contracts to arbitrate does not and should not constitute state action).

²⁵⁷ There are efforts underway advocating an interpretation of Islamic law based upon equality of men and women according to the Koran. See Boyd, *supra* note xx at p. xx; L. Ahmed, *supra* note xx at xx.

gender equality. Supreme Court precedent rejects sexist stereotyping by the state, always a third party to marriage and dissolution claims. The reasons are inter-related and self-reinforcing. Under the First Amendment, the court should not become involved in interpreting and enforcing religious law.

In marital dissolution cases, even in arbitration, procedural fairness review based upon civil law is required, thus providing the first reason that religious arbitration awards relating to family dissolution matters should be treated as invalid and unenforceable. The requisite standard of judicial review is constitutionally barred under both the entanglement precedent and the religious question doctrine. The second reason is related to the first. If a court entertained a public policy challenge, it would be obligated to undertake a substantive review of the underlying religious law and it would find that the gender-bias reflected in the dissolution rules would render any award based upon such principles invalid as a matter of public policy. The state action doctrine, likewise, prohibits the court from becoming an agent of state-sanctioned gender bias.

Without regard to religious affiliation, courts do not treat religious arbitration awards dealing with child custody²⁵⁸ or child support²⁵⁹ as binding, but rather retain best interests jurisdiction. For the reasons discussed below, this approach should be extended to all matters related to marriage dissolution submitted to religious tribunals for determination

Thus, state legislatures should draft and pass legislation providing exclusive jurisdiction over all dissolution and custody matters to civil courts to be resolved according to applicable state and federal family dissolution and substantive and procedural rules. Until such legislation is passed, in order to avoid the constitutional and policy concerns discussed above, courts should deny enforcement to RTAs in all matters related to divorce, including grounds, property division and alimony and support, recognizing that child support and custody already fall within the exclusive jurisdiction of state courts. Alternative dispute resolution programs reviewed and approved by the court could continue to provide relief to the over-flowing docket.

Perhaps the tension between feminism and multiculturalism demands an analysis beyond the post-modern framework to value both gender equality and the right of religious minorities to worship freely. This framework prefers the value of secular rule and separation of church and state over the individual's fundamental right to private religious worship, which is best secured by the neutral secular state. Thus, because religious freedom interests conflict with constitutional rules demanding that the state adhere to rules regarding state neutrality and gender equality, the conflict should be resolved in favor of a broad non-enforcement rule applicable to all RTAs. Such a rule protects the secular state from religious entanglement, furthers the important policy of securing gender

²⁵⁸ See *infra* notes xx-xx and accompanying text.

²⁵⁹ See *infra* notes xx-xx and accompanying text.

equality, and respects the private individual's right of religious freedom. The state in partnership with the people must guard against the return of women in the U.S. to a position of social and economic subservience.