Bismillah Ar-Rahman Ar-Rahim

Islamic Dispute Resolution

in the Shade of the American Court House

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Introduction

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ
وَحَكَمًا مِّنْ أَهْلِهَا إِن يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ
اللَّهَ كَانَ عَلِيمًا خَبِيرًا ﴿٣٥﴾

4: 35. If ye fear a breach
Between them twain,
Appoint (two) arbiters,
One from his family,
And the other from hers;
If they wish for peace,
God will cause
Their reconciliation:
For God hath full knowledge,
And is acquainted
With all things.

Islam means peace, coming from the root, s-l-m, meaning to cease hostilities, and the Hijri calendar, from which all Muslims determine time, began with an agreement to resolve a dispute. The tribes of Medina, the Aws and Khasraj, had been embroiled in a feud. The entire town was engulfed in retaliatory killing. [1] Finally, some men from both tribes decided to seek the aid of a man they had heard about – they called him "Al-Amin", the trustworthy. He was known to be able to resolve the most difficult of disputes. His name was Muhammad. And around 620 AD, the men of Medina and the Prophet Muhammad, met at a place called al-Aqaba and with a handshake, made the first agreement to arbitrate in Islam. [2] The settlement agreement reached

[1] Abdullah Alwi Haji Hassan, Sales and Contract in Early Islamic Commericial Law, 179 (Kitab Bawan, 1997).
[2] Saifur Rahman al-Mubarakapuri, Al-Raheeq Al-Maktoom, (trans. Issam Diab), http://www.witness-pioneer.org/vil/Books/SM_tsn/ch3s1.html#Hope%20inspiring%20Breezes%20from%20the%20Madinese; http://www.witness-

by the all of the parties of Medina is known as the Dustur al- Medina or the Constitution of Medina. Art 42 even contains an arbitration clause in case of dispute. It reads, "[i]f any dispute or controversy likely to cause trouble should arise it must be referred to God and to Muhammad the apostle of God. God accepts what is nearest to piety and goodness in this document. " [3]

Effective dispute resolution has become engrained in Islamic culture. Muslims have long enjoyed several methods of resolving their disputes. From informal sulh by family elders to formal Shariah and secular courts, Muslims throughout the ages since the time of the Prophet (SAW) have resolved their business disputes, divorced their spouses, established their rights to an inheritance and redressed their grievances. However, the modern world presents Muslims with a dilemma. Many of us live in non-Muslims states or in states that have secular legal systems. The fabled Dar al-Islam and Dar al-Harb no longer exist. So how do we resolve our disputes today?

This paper will look at issues, problems and possibilities for the use of Islamic dispute resolution within the American legal system. First, we will compare the nature of Islamic dispute resolution with that of Western models. Second, we will explore the possibilities of integrating Islamic dispute resolution into the American legal system, paying particular attention to issues, problems and conflicts that might arise between the American and the Islamic systems. Third, we will look at some concrete methods for ensuring enforceability of Islamic Arbitration Awards in American courts.

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pioneer.org/vil/Books/SM_tsn/ch3s4.html#The%20Second%20%E2%80%98Aqabah%20Pledge, (visited 11/25/2009).

[3] The Medina Charter, http://www.constitution.org/cons/medina/con_medina.htm, (citing A. Guillaume, The Life of Muhammad — A Translation of Ishaq's Sirat Rasul Allah, 231-233 (Oxford University Press, 1955).)

A Culture of Conflict Resolution

Islamic Justice

The M*aqaasid al-Shariah* or operative principles of Islam lay the foundation for dispute resolution by first setting forth a basic social contract between God and humanity. God or Allah is the Creator and Preserver of a Trust - Universe; Mankind is His Khalifah or Trustee, entrusted with the care and maintenance of that Trust.

يَـٰدَاوُۥدُ إِنَّا جَعَلْنَـٰكَ خَلِيفَةً فِى ٱلْأَرْضِ فَٱحْكُم بَيْنَ ٱلنَّاسِ بِٱلْحَقِّ
وَلَا تَتَّبِعِ ٱلْهَوَىٰ فَيُضِلَّكَ عَن سَبِيلِ ٱللَّهِ ۚ إِنَّ ٱلَّذِينَ يَضِلُّونَ عَن سَبِيلِ
ٱللَّهِ لَهُمْ عَذَابٌ شَدِيدٌۢ بِمَا نَسُوا۟ يَوْمَ ٱلْحِسَابِ ﴿٢٦﴾

> O David! We did indeed make thee a vicegerent on earth: so judge thou between men in truth (and justice): Nor follow thou the lusts (of thy heart), for they will mislead thee from the Path of Allah. for those who wander astray from the Path of Allah, is a Penalty Grievous, for that they forget the Day of Account.[4]

As part of this covenantal agreement, God agrees to provide for our sustenance and to guide us as to how to carry out our obligations, and we agree to follow that guidance. That guidance is the Shariah – the Law.

"Shariah" stems from a root word meaning "path to a water hole." [5] Evoking the time worn, ever beckoning, inviting coolness of an oasis in the parched dessert of Arabia, the Shariah

[4] Quran 38:26
[5] Bernard G. Weis, The Spirit of Islamic Law, 17 (University of Georgia, 1998).

is the well-spring of a comprehensive way of life. [6] The concept of the Shariah is comprehensive and includes the "totality of the divine characterization of human acts."[7] These characterizations are five in number: "obligatory" (*wajib* or *fard*), "recommended" (*mandub* or *mustahabb*), "permissible" or "neutral" (*mubah*), "disapproved" (*makruh*) and "forbidden" (*haram*). Based upon these five values, any human act may be characterized as either "valid" (*sahih*) or "invalid" (*batil*).[8]

In the Islamic legal system, the Law is the word of Allah (SWT).[9] Because the law was "legislated" by Allah (SWT) at the time of the revelation of the Qur'an to the Prophet Muhammad (SAW), the law itself is immutable.[10] This legislation is found in the Qur'an, the verbatim speech of Allah revealed to the Prophet Muhammad in Arabic and transmitted by continuous testimony,[11] and in the *Sunnah* of the Prophet.[12] The *Sunnah* of the Prophet is the sum total of his actions, sayings, tacit approvals and physical and moral characteristics.[13] This "*Sunnah*" or "normative practice," "example," or "established course of conduct," is recorded in accounts and narratives called *ahadith*. (*hadith* sing.)[14]

The primacy of both the Qur'an and the *Sunnah* as sources of law is established by Allah. He says is the Qur'an;

[6] *Id*.
[7] I*d*. at 18.
[8] *Id*. at 21.
[9] *Id*.
[10] *Id*.
[11] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, 16 (The Islamic Text Society, 2003).
[12] N.J.Coulson, A History of Islam, 76 (Edinburgh University Press, 1964).
[13] Kamali, *supra* at 58.
[14] *Id*. at.61.

هُوَ ٱلَّذِى بَعَثَ فِى ٱلْأُمِّيِّـۧنَ رَسُولًا مِّنْهُمْ يَتْلُوا۟ عَلَيْهِمْ ءَايَـٰتِهِۦ وَيُزَكِّيهِمْ
وَيُعَلِّمُهُمُ ٱلْكِتَـٰبَ وَٱلْحِكْمَةَ وَإِن كَانُوا۟ مِن قَبْلُ لَفِى ضَلَـٰلٍ مُّبِينٍ ﴿٢﴾

It is He Who has sent amongst the Unlettered an apostle from among themselves, to rehearse o them His Signs, to sanctify them, and to instruct them in Scripture and Wisdom,- although they had been, before, in manifest error. [15]

The scholars of Islam agree that "*al kitab*" means the Qur'an, and "*al hikmah*" refers to the *Sunnah*. [16]

It then falls upon the Muslims to discover that law,[17] and that adventure of discovery began in the time of the Prophet himself. When the Prophet (SAW) sent Mu'adh ibn Jabal to be the judge of the people of Yemen, the Prophet asked Mu'adh upon what he would base his judicial decisions. Mu'adh replied that he would refer first to the Qur'an, then to the *Sunnah* of the Messenger of Allah (the Prophet), and if the answer to the issue could not be found between them, then he would use *ijtehad*. [18]

As this hadith indicates, the Qur'an and the *Sunnah* are the primary binding sources of law, but what if they are not clear, or *qa'ti*? A *qa'ti* or definitive text, such as "The adulterer,

[15] *Id.* at 59. (quoting *al-Jumu'ah* (62:2)) This is a transliteration of the original Arabic found in the text. This ayat may be translated as; "He it is that sends unto the unlettered ones, messengers from among themselves, expounding to them the His signs and purifying them, and teaching them the Book and the Wisdom." (Transliteration and translation by the author). Arabic text from Hypertext Quran website: The Holy Quran, English Text by A. Yusuf Ali , http://www.sacred-texts.com/isl/quran/index.htm, (last visited 11/25/2009).

[16] *Id.*
[17] *Id.*
[18] *Id.* Although the Dr. Hashim Kamili mentions only the Qur'an and the *Sunnah*, the hadith that he quotes specifically mentions, "Qal: fain lam yakun sunnata rasul allah? Qal: ijtahidu raaiy wa la aalu."

whether a man or a woman, flog them each a hundred stripes," has one meaning. [19] However, Qur'anic verses and hadith may also be *zanni* or speculative. These passages require interpretation; they require *ijtehad* or "diligence and rational effort". [20]

The science of *fiqh* (*usool al fiqh),* or Islamic jurisprudence, developed as a means of exercising *ijtehad* by interpreting the speculative or ambiguous passages and thereby enabling the extraction of the law from the sources.[21] "*Fiqh*" comes from an Arabic root meaning "understanding,"[22] and over the course of Islamic history the scholars of Islam developed interpretive methodologies and jurisprudential rules of to aid them in their task of understanding. Interestingly, unlike American or European law, these methodologies developed independently from governmental or judicial practice. Professor Coulson notes;

> Islamic jurisprudence had in fact been essentially idealistic from the outset. Law had not grown out of the practice of the courts or the remedies therein available – as Roman law had developed from the *actio* or English Common Law from the writ- but had originated as the academic formulation of a scheme alternative to that practice…[23]

Thus, the authority of the law did not stem from any earthy sovereign, and was vested in the will of Allah, alone.

The four major schools of Sunni Muslim thought, the Hanafi, Maliki, Shafi'I and Hanbali schools, developed out of this *iktilaf* or diversity of methodologies. [24] Local conditions as well as preferences for certain rational methods over others resulted in variations among each

[19] *Id*. at 28.
[20] *Id.*
[21] Coulson, *supra* at 76.
[22] *Id.* at 75.
[23] *Id.* at 82.
[24] *Id.* at 86.

school's compendium of collected legal opinions and extracted rules. [25] For example, the Hanafi School, exponents of *ra'y* or rational opinion, take a more formalistic approach to interpretation. On the other hand, the Maliki School, which relies more on *ahadith* and the practice of the people of Medina, takes a more moralistic approach.[26] This can result in different interpretations of the same rule. The Qur'an legislates that if a man divorces a woman three times, then he cannot marry her again until she has married another man and then divorces that man. [27] The Hanafi School, in keeping with its formalism, looks only to the acts of the parties, while the Maliki School inquires into the intent of the parties.[28] If it appears the intent of the marriage to the other man was only to make the woman legal to the first husband again, then they will repudiate the marriage. The Hanafi School only looks to see if the marriage in question met the legal requirements, the letter of the law, while the Maliki School moves beyond the letter to discover the spirit of the law.

The spirit of the law, in turn, is embodied in the *maqaasid* or objectives of the Shariah law. Although the idea of the *maqaasid al-Shariah* or objectives of the Shariah law goes back to as early as Abd al-Malik al-Juwayni (d. 478H/1185CE),[29] the scholar most associated with its development was the great Andalusian scholar, Abu Ishaq Ibrahim ibn Musa al-Shaatibii (d.790H/1388CE).[30] In his book, *al-Muwaafaqaat*, he expounded on the concept of *maslahah* or compelling public interest, and then introduced the concept of the *maqaasid* or overarching objectives of the Shariah as a means of balancing the interests, both public and private, to achieve the more just result. As we noted above, *maslahah* is compelling public interest, the

[25] See *Id.* at 86 -102 and Weis, *supra* at 9-16.
[26] Coulson, *supra* at 98-100.
[27] *Id*. at 100.
[28] *Id*.
[29] Jasser Auda, Maqasid As-Shariah as Philosophy of Islamic Law, 2 (International Institute of Islamic Thought, 2008) .
[30] Muhammad Khalid Masud, Shatibi's Philosophy of Islamic Law, (Islamic Research Institute, Islamabad 1995) 2.

maqaasid provide the criteria for balancing that public interest with all the other interests present in any given situation.

The traditional exposition of the *maqaasid* includes three basic levels; *daruraat* (necessities), *hajiyaat* (needs), and *tahsiniyyaat* (things that make life more beautiful). Like Maslow's needs, the *daruraat* are essential for human life itself and include nurturing of faith, nurturing of life, nurturing of property, nurturing of *aql* or reason, and nurturing of lineage and honor.[31] Modern lists have also included justice, human rights and freedom.[32] The *hajiyaat* or needs include those things which are not essential for human life, but nonetheless, are compelling in nature. These include buying and selling, renting, partnerships, and sharecropping, as well as other similar transactions.[33] Finally, *tahsiniyyaat* contribute to noble character traits and encourage good deeds.[34] These might correspond to Maslow's classification of those needs which encourage self-actualization. [35]

While the *maqaasid,* as classically approached, seem to focus on the individual, the modern approach has been to balance these individual-based *maqaasid* with the public or social based *maslahah*. The influential scholar, Ibn Taymiyyah added *al-maqaasid al-'aliyyah* or higher objectives and *al-maqaasid al-kulliyyah* or universal objectives. [36] The Tunisian scholar and modern reviver of the *maqaasid*, Ibn Ashur, emphasized the social component. "The preservation of these universals pertains to the individual members of the Ummah (Muslim community) and, even more importantly, to the Ummah as a whole. Hence, each of these

[31] Jasser Auda, *supra* at 3-4.
[32] *Id.* at 5. The author provides an excellent discussion of the contributions of modern thinkers such as Ibn Ashur, Rashid Rida, Taha al-Alwani, and Imam al-Qaradawi to *maqaasid* theory.
[33] Gamal Eldin Attia, Towards Realization of the Higher Intents of Islamic Law: Maqasid al-Shariah: A Functional Approach, 80 (International Institute of Islamic Thought, Herndon 2007).
[34] *Id*. at 81.
[35] Jasser Auda, *supra* at 3-4.
[36] Attia, *supra* at 79.

maqasid has one aspect that pertains to individuals and another that pertains to the Muslim community."[37] The aim is for the well-being and integrity of the individual, the collective and the civilization.[38]

Given these principles, the purpose of the Shariah is to achieve a balanced or just society, composed of balanced and just individuals.

وَكَذَٰلِكَ جَعَلْنَٰكُمْ أُمَّةً وَسَطًا لِّتَكُونُوا۟ شُهَدَآءَ عَلَى ٱلنَّاسِ
وَيَكُونَ ٱلرَّسُولُ عَلَيْكُمْ شَهِيدًا

Thus, have We made of you an Ummat justly balanced, that ye might be witnesses over the nations, and the Messenger a witness over yourselves. [39]

Over and over, Allah calls humanity to act justly.

وَأَوْفُوا۟ ٱلْكَيْلَ إِذَا كِلْتُمْ وَزِنُوا۟ بِٱلْقِسْطَاسِ ٱلْمُسْتَقِيمِ ۚ ذَٰلِكَ خَيْرٌ وَأَحْسَنُ
تَأْوِيلًا ﴿٣٥﴾

Give full measure when ye measure, and weigh with a balance that is straight: that is the most fitting and the most advantageous in the final determination. [40]

وَٱلَّذِينَ إِذَآ أَنفَقُوا۟ لَمْ يُسْرِفُوا۟ وَلَمْ يَقْتُرُوا۟ وَكَانَ بَيْنَ ذَٰلِكَ قَوَامًا ﴿٦٧﴾

Those who, when they spend, are not extravagant and not niggardly, but hold a just (balance) between those (extremes) [41]

[37] *Id.* at 81.
[38] *Id.* at 82.
[39] Quran, 2:143
[40] Quran 17:35

وَلَا تَقْرَبُوا۟ مَالَ ٱلْيَتِيمِ إِلَّا بِٱلَّتِى هِىَ أَحْسَنُ حَتَّىٰ يَبْلُغَ أَشُدَّهُۥ ۖ وَأَوْفُوا۟
ٱلْكَيْلَ وَٱلْمِيزَانَ بِٱلْقِسْطِ ۖ لَا نُكَلِّفُ نَفْسًا إِلَّا وُسْعَهَا ۖ وَإِذَا قُلْتُمْ فَٱعْدِلُوا۟
وَلَوْ كَانَ ذَا قُرْبَىٰ ۖ وَبِعَهْدِ ٱللَّهِ أَوْفُوا۟ ۚ ذَٰلِكُمْ وَصَّىٰكُم بِهِۦ لَعَلَّكُمْ
تَذَكَّرُونَ ﴿١٥٢﴾

And come not nigh to the orphan's property, except to improve it, until he attain the age of full strength; give measure and weight with (full) justice;- no burden do We place on any soul, but that which it can bear;- whenever ye speak, speak justly, even if a near relative is concerned; and fulfil the covenant of God: thus doth He command you, that ye may remember.[42]

All of these admonitions are given to engender a just society, one where people behave justly toward one another, and thereby avoid conflict. The root of conflict is *fitnah* or injustice.

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوا۟ لَا تَأْكُلُوٓا۟ أَمْوَٰلَكُم بَيْنَكُم بِٱلْبَٰطِلِ إِلَّآ أَن
تَكُونَ تِجَٰرَةً عَن تَرَاضٍ مِّنكُمْ ۚ وَلَا تَقْتُلُوٓا۟ أَنفُسَكُمْ ۚ إِنَّ ٱللَّهَ كَانَ بِكُمْ
رَحِيمًا ﴿٢٩﴾

وَمَن يَفْعَلْ ذَٰلِكَ عُدْوَٰنًا وَظُلْمًا فَسَوْفَ نُصْلِيهِ نَارًا ۚ وَكَانَ ذَٰلِكَ عَلَى
ٱللَّهِ يَسِيرًا ﴿٣٠﴾

[41] Quran 25:67
[42] Quran 6:152

> O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily God hath been to you Most Merciful!
> If any do that in rancour and injustice,- soon shall We cast them into the Fire: And easy it is for God.

And when ever people fall into dispute, Muslims are commanded to seek a just resolution.

وَإِن طَآئِفَتَانِ مِنَ ٱلْمُؤْمِنِينَ ٱقْتَتَلُواْ فَأَصْلِحُواْ بَيْنَهُمَا ۖ فَإِنۢ بَغَتْ إِحْدَىٰهُمَا
عَلَى ٱلْأُخْرَىٰ فَقَٰتِلُواْ ٱلَّتِى تَبْغِى حَتَّىٰ تَفِىٓءَ إِلَىٰٓ أَمْرِ ٱللَّهِ ۚ فَإِن فَآءَتْ
فَأَصْلِحُواْ بَيْنَهُمَا بِٱلْعَدْلِ وَأَقْسِطُوٓاْ ۖ إِنَّ ٱللَّهَ يُحِبُّ ٱلْمُقْسِطِينَ ﴿٩﴾

If two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies then make peace between them with justice and be fair: for Allah loves those who are fair (and just).[43]

Upon this legal foundation, the Muslim world has built a culture of dispute resolution designed to foster a sense of fairness and justice. Historically, Islamic dispute resolution has encompassed formal courts and informal gatherings. Each has a role to play and each is still highly valued today.

Patterns of Islamic Conflict Resolution

Umar ibn Khattab, the second Amir al-Mumineen [44], felt that "disputes should be avoided and an amicable settlement ought to be brought about (by the authority), because the unmistakable or decisive judgment would give rise to rancours or malevolences (*al-dagha'in)*

[43] Quran 49:9
[44] Amir al-Mumineen was the term used early in Muslim history for the leader of all the Muslims. Later this office developed into the hereditary Khalif or Caliph. The Khalifate ended with the demise of the Ottoman Empire.

among people." [45] Decisive judgments or *qada* are only mandatory in cases involving *huquq al-Allah* or the Rights of God, especially in the case of the *hudud,* such as punishments for crimes like murder, theft and *hirabah*. In such cases, only God, has the authority to decide the judgment [46] – the state courts being His proxy on earth.

Tempting though it might be to "translate" the forms that dispute resolution may take in the world herein compared into Western modes of dispute resolution, Islamic resolution forms are not the same as those of the West. Although we will explore the American legal framework more closely later, for now some terminological definitions are in order. While *qada* could properly be compared to American adjudication, as we shall see, familiar Western labels such as negotiation, mediation, arbitration and adjudication do not really fully capture Islamic terms such as *sulh*, *wasitah,* and *tahkim.*.

Negotiation is "[b]ack-and-forth communication designed to reach an agreement." [47] The process is the least formal and generally does not involve the use of neutral parties. Often negotiations only involve the parties to the dispute sitting across the table from one another and discussing the matter. Negotiations are used in a wide variety of situations from a simple sales contracts to peace talks between long time bitter enemies.

Mediation has been defined as a voluntary "process in which a neutral intervener assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and, based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns." [48] Much has been made of the voluntary nature of mediation. However, the settlement reached through mediation is binding upon the parties who

[45] Hassan, *supra* at 180.
[46] *Id*.
[47] Program On Negotiation, Glossary, Harvard Law School, (http://www.pon.harvard.edu/glossary/#section-N, last accessed 10/2/2010).
[48] James Alfini et al, Mediation Theory and Practice, 1 (Lexis/Nexis, 2006).

reach it. The mediation process is voluntary, but the resulting agreement, more or less a contract, is enforceable, even though it was entered into voluntarily. Mediation is a voluntary process with a binding result.

Arbitration has been characterized as a voluntary private, "informal trial procedure for the adjudication of disputes. … [that] yields binding determinations…" [49] The parties to an arbitration confer authority upon a neutral individual or group of individuals to decide their affair. The arbitrator or arbitral panel, typically of three arbitrators, then hears the arguments of the parties and reviews any pertinent evidence before reaching a binding decision called an "arbitral award." The arbitral award is irrevocable and generally may not be appealed. While voluntarily initiated, the process becomes binding upon the parties and hence, the decision is also binding.

Adjudication in formal courts, or what Umar (RA) referred to as decisive judgments or *qada*, is the most binding form of resolution. Adjudication or litigation typically involves a neutral decision maker, either a judge or jury, who hears evidence and renders a binding decision in a forum either provided for by or mandated by the state. Because of the involvement of the state, the initiation of the process is binding, the process is binding and the resulting decision is binding.

Al-Sulh, Wasitah, and *Tahkim*: Traditions in Islam

The Prophet Muhammad (SAW) is reported to have said, "An amicable settlement (*al-sulh*) is permissible between Muslims." [50] Allah also supports amicable settlements.

[49] Thomas E. Carbonneau, Arbitration, 10 (Thomson/West, 2007).
[50] Hassan, *supra* at 179.

وَإِنِ ٱمۡرَأَةٌ خَافَتۡ مِنۢ بَعۡلِهَا نُشُوزًا أَوۡ إِعۡرَاضٗا فَلَا جُنَاحَ عَلَيۡهِمَآ أَن
يُصۡلِحَا بَيۡنَهُمَا صُلۡحٗاۚ وَٱلصُّلۡحُ خَيۡرٞۗ وَأُحۡضِرَتِ ٱلۡأَنفُسُ ٱلشُّحَّۚ وَإِن
تُحۡسِنُواْ وَتَتَّقُواْ فَإِنَّ ٱللَّهَ كَانَ بِمَا تَعۡمَلُونَ خَبِيرٗا ﴿١٢٨﴾

> If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed. But if ye do good and practice (sic) self-restraint, God is well-acquainted with all that ye do.[51]

Al-sulh or *musalaha* literally means "settlement" or "reconciliation." [52] It is a contract to terminate or avert a dispute between parties. Each of the contracting parties or *muta'aqidun* is a peacemaker or *musaalih*. The consideration for settlement is the *musaalah alayh*. The *musaalah an* or subject matter of the *sulh* may be anything arising from the *huquq al 'ibad* or rights of fellow human beings. Such private claims include tort claims, family law claims, inheritance, and property rights. [53] In pre-Islamic times, the people of Makkah (Mecca) almost came to war over certain rights. Some of them demanded *sulh* on the condition that one tribe be given the right to provide water to pilgrims and to collect taxes; and the other should have access to the Ka'abah, and the house of assembly.[54] This *sulh* resulted in delineating the rights and duties of the Bani Hashim and the Bani Umayyah.

The ritual of *sulh* begins with calling upon a delegation of neutrals or *muslih* to resolve the dispute. These *muslih* are usually village elders, notables, and local *zaim* (tribal chiefs). They call a *hudna* or truce between the disputants and meet with them not to judge or punish, but

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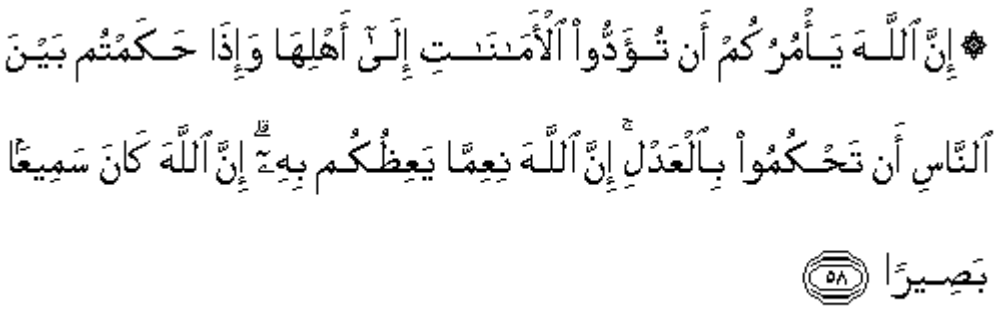
[51] Quran 4:128.
[52] George E. Irani, *Islamic Mediation Techniques for Middle East Conflicts*, 3 Middle East Review of International Affairs, 1, 12 No.2 (June 1999).
[53] Hassan, *supra* at 178.
[54] *Id.* Ka'abah is the first house of worship built on earth by Abraham and his son Ismael. It is a 60 ft. high, cube shaped building made of stone located in the city of Makkah (Mecca) in Saudi Arabia.

preserve the good names of both parties and reaffirm relationships. "The sulh ritual is not a zero-sum game."[55] The ritual ends with a ceremony comprised of four major parts; the act of reconciliation (*musalah*), the shaking of hands (*musafaha)* under the supervision of the *muslih*, the drinking of *qahwa* (Arabic coffee), and the sharing of a meal hosted by the family of the offender (*mumalaha*).[56]

Tahkim, a term which has often been translated as "arbitration," involves a neutral decision-maker and leads to a binding decision.



> God doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice: Verily how excellent is the teaching which He giveth you! For God is He Who heareth and seeth all things.[57]

Tahkim stems from the Arabic root, h-k-m, signifying authority. In a general sense, it refers to a person authorized to dispose of rights, settle disputes by suggesting solutions, and to issue binding decisions. What sets it apart for official *qada* or judgment by a *qadi* or judge, is that the parties, not the state, authorize the arbitrator. His authority is derived from the parties through their voluntary consent.[58] What sets it apart from *sulh* is that the arbitrator's role is to be a judge, to make a decision, while the *muslih* is more a facilitator of reconciliation.

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[55] Irani, *supra* at 13.
[56] *Id.*
[57] Quran 4:58.
[58] Zeyad Alquraishi, *Arbitration Under Islamic Sharia*, 1 Transnational Dispute Management, issue #01, (February 2004) at 2of 9, http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_63.htm.

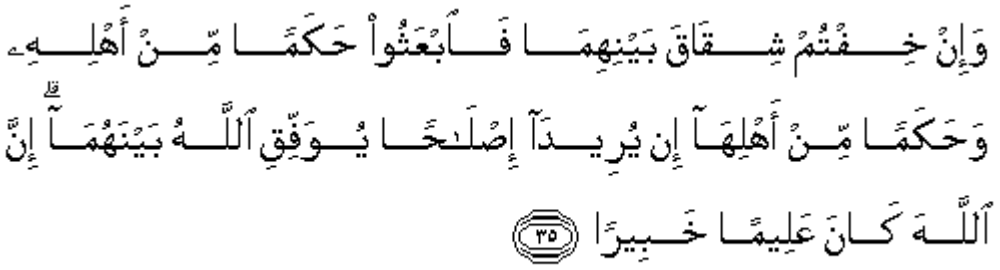
All of that said, *tahkim* can take two forms. [59] One resembles the hybrid Western "med-arb" format in that the arbitrator's "judgment" is designed to reconcile the parties. For example, the Prophet was called upon by Safwan ibn Mu'attal to arbitrate a dispute he had with Hassan ibn Thabit, who had composed some satirical poems that Safwan found defamatory. Safwan had retaliated by hitting Hassan on the hand. The Prophet arbitrated the dispute and ordered Hassan to acknowledge the poems and Safwan the act of hitting.[60] Here the two acts are criminal by nature under Shariah law. Striking a person is subject to the law of Qisas – an eye for an eye – and would normally require like retaliation. On the other hand, Hassan has slandered Safwan, which is also a serious crime, punishable by a number of lashes. An official court would have been required to punish each for his individual crime. The Prophet, as arbitrator, was not so limited and appears to have found that the two crimes cancelled each other out.

The other form of *tahkim* bears more of a resemblance to formal *qada* or judgments, the only difference being the source of authority; private versus the public authority of the state courts. Sometimes this form is called w*asitah* or "intervention," a term stemming from a root meaning "balance." *Wasitah* is a fairly confusing term in that it is sometimes used to refer to a system of favoritism or nepotism, as well as being translated sometimes as "mediation." In this form of dispute resolution, the parties are less involved in the process. Here the parties each appoint a person to represent them. It is unfortunate that some have called these representatives "arbitrators;" a better word might be "agents" or "brokers." In fact, the representatives negotiate

[59] Both Alquraisi and Faisal Kutty both mention a debate over whether *tahkim* is more than conciliation. The question seems to revolve around whether *tahkim* is binding. Alquraishi seems to feel that *tahkim* has two forms, one binding and one non-binding. However, the confusion more likely stems from confusing *sulh* with *tahkim.* Although the two terms seem to used almost interchangeably at times, the difference lies in the role of the neutral third party. In *sulh*, he is given authority only to facilitate; in *tahkim* he is given authority to reach a binding decision. *Sulh* results in a contract between the parties reached with the aid of the neutral. *Tahkim* results in an award by the arbitrator. The contract between the parties is to abide by the decision of the arbitrator, and that decision might be primarily reconciliatory or involve application of substantive law.

[60] Hassan, *supra* at 179.

a settlement between themselves, outside the presence and without the direct input of the parties. Their negotiated settlement then becomes binding on the parties to the dispute. Allah (SWT) mentions in the Qur'an:



> If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their reconciliation: For God hath full knowledge, and is acquainted with all things.[61]

A classic example of such a *tahkim* arbitration is the case between Ali ibn Abi Talib, the son in law of the Prophet, and Mu'awiyyah ibn Abi Sufyan. In their dispute over who should be the Amir or leader of the Muslims, they agreed to appoint two arbitrators. The written *tahkim* agreement stated the arbitrator's names, the time limit for making the award, the applicable law, and the place of issue of the award.[62] And the judgments of the arbitrator are as binding as those of any court, unless there were to involve a "flagrant injustice."[63]

The *tahkim* "arbitrators," like the *muslih* in *sulh*, are also leaders in the community, however, Shariah law requires they have more exacting qualifications, similar to those of a *qadi* or judge. [64] They should be the age of majority, wise, free, and considered truthful and

[61] Quran 4:35
[62] Alquraishi, *supra* at 3 of 9.
[63] Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 Loy. L.A. Int'l. Comp. L. Rev. 565, 596-598, (2006).
[64] *Id.* at 606.

trustworthy.[65] Whether they need be Muslims is not apparent from the Qur'an or Sunnah, but knowledge of Shariah is implied.[66]

The America Legal Tradition

Although the United States of America won its independence from the British Crown 234 years ago, America's legal system did not. The British Kings and later Parliament passed decrees and laws to be enforced through out the British realm. It then fell upon the courts to interpret and enforce these laws. Unlike the code-based "civil law" tradition found in other European nations, English judges began to rely upon the opinions of their fellow jurists and established a legal system that gave preferential weight to the previous judicial decisions. Any judicial decision must be based on the law and on the precedent set by previous judges, and that new decision, in turn, has binding weight on future decisions. This precedent-based system is referred to as "common law." American jurisprudent inherited this tradition of judge-made common law.[67]

American jurisprudence also inherited another feature of the English courts; it is adversarial. Whether the case be criminal involving violations of the laws of the state, or "civil" involving disputes between private individual, American cases pit one party against another and only one can win. Each side presents its evidences, calls witnesses, argues positions and tries to influence a judge or jury to rule in its favor. Americans prefer this method of dispute resolution,

[65] *Id.* at note 295. Kutty mentions that the arbitrator should be capable of being a witness. In Arabic, this is referred to as being "adl." An "adl" person is one who is known to be truthful and trustworthy, and who, therefore, is qualified to be a witness at trial.
[66] *Id.* at 606.
[67] The Free Dictionary by Farlex, (http://legal-dictionary.thefreedictionary.com/Common+law; last accessed 9/25/2010).

or at least they claim to do so. For American, justice is served by being able to tell one's side of the story, no matter what the result.

At the heart of American justice lies this idea of having one's "day in court," and critical to this concept is the institution of the jury. The United States Constitution states in the Sixth Amendment that,

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[68]

This has been interpreted to mean that any criminal accused has the right to a trial by a jury of his or her peers, and any civil accused has the right to request such a jury. One does not really get one's "day in court" unless one is able to tell his or her side of the story to his or her peers in the community. Americans feels justice is found in presenting ones case to ordinary citizens like themselves; a representative sampling of the local community the majority of whom must agree on a decision. Even if the loser feels the judgment is not fair, he will at least feel he had a chance to tell his side of the story. And the winner rests assured that his position is supported by the opinions, values and norms of the majority of people in his locale.

The Systems of American Courts

The American legal system is not monolithic. There are in fact fifty one (51) systems of public law and an infinite number of private laws in the United States. The Constitution of the United States establishes a Federal court system in the Article III. Section I states, "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as

[68] United States Constitution, Sixth Amendment (http://www.usconstitution.net/const.html#Am6 ; last accessed 9/26/2010).

the Congress may from time to time ordain and establish." [69] Federal District Courts form the bottom of an adjudication pyramid, and are the "trial" courts or courts of original jurisdiction within the federal system. The judges or juries of the Federal District Courts decide guilt or innocence in criminal cases, and responsibility and liability in civil ones. Each state has at least one Federal District Court,

The next step is an appeal. Appeals are first heard in the United States Circuit Courts of Appeal. Each Circuit hears cases from several states. For example, the 2nd Circuit hears cases from New York, Connecticut and Vermont. The Circuit Courts of Appeals have the option to uphold a district court decision, overturn a decision, or remand it back to the district court for reconsideration. The Circuit Courts do not hear any new evidence and do not conduct trials. They look only at issues involving Constitution rights, misapplication or misinterpretation of law and precedent, and abuse of judicial discretion. If an appellant fails in the Circuit Courts, he may petition to have his case considered by the United States Supreme Court. The Supreme Court is not required to hear cases, and will only chose to do so if the case involves important Constitutional issues.

State court systems resemble the Federal system in that they generally have a trial court and two levels of appellate courts. Beyond that, each state is sovereign and the laws and courts of each state vary widely. For example, in most state, the Supreme Court is the highest appellate court, but in New York, the Supreme Court is the trial court and the Court of Appeals is the highest court.

And to add to the confusion, a plethora of county, municipal and local courts exists. Traffic courts handle traffic fines; justice of the peace courts handle marriages, small claims

[69] U.S. Constitution, Art. III, Section 1

courts handle civil disputes under a certain dollar amount. The list is almost infinite. Faced with this legal labyrinth, many have sought a way out.

Of Courts and Conflict Resolution

For most of American history, the state and federal courts have provided Americans with their primary method of dispute resolution. However, with the dramatic increase in population and affluence after WWII, the courts became clogged with litigation. Crime was on the rise, but so were business, marriage, divorce, inheritance and every arena in which people might fall into dispute. Cases could take years to crawl through the court system. Many began to turn to alternatives.

Early American forays into alternative dispute resolution centered on labor disputes. As early as 1887, the Commerce Act set up a voluntary process for the resolution of labor disputes within the railroad industry. In 1925, the Congress passed the Federal Arbitration Act, which governs resolution of disputes in commerce. [70] Following WWII, communities also began to experiment with mediation. The Federal Mediation and Conciliation Service (FMCS) was created to mediate disputes between the labor unions and management. [71] Over the years, a broad spectrum of alternative has developed. From informal negotiations between the parties themselves, to community-based forums such as the Community Relations Service created by the U.S. Department of Justice under the 1964 Civil Rights Act to resolve racial tensions, to the Night Prosecutor's Programs in Ohio, to the Arbitration as an Alternative programs of the

[70] The Global Arbitration Mediation Association, Inc, (http://www.gama.com/HTML/history.html; accessed 9/26/2010).
[71] James J. Alfini, *supra* at 1.

American Arbitration Association, programs span the gamut between informal gatherings to formal court-like proceedings. [72]

Today, many states have ADR Commissions or various forms of state or court sponsored arbitration or mediation programs. For example, the Arkansas ADR Commission certifies mediators for court annexed programs[73]; the Northern Virginia Mediation Service does the same in Virginia.[74] Although many states have preferred mediation, with its voluntary character, New York has preferred to use arbitration for divorce and legal malpractice disputes.[75]

Throughout all of these developments, immigrant communities and religious groups have utilized informal mediation by elders and church leaders. Religions with legal traditions of their own have provided extra judicial forums for grievance redress. Jewish communities use *Beth Din* or "Get" courts to resolve divorce disputes within that religion's community.[76] Amish communities use negotiation to resolve disputes both within and without their Christian religious societies. [77] Islamic Arbitration may be a newcomer to the dispute resolution scene in America, but it certainly should seem no stranger.

All religious-based legal systems, including Jewish *Halakhah* and Islamic Shariah, recognize a higher legal authority than that of the state. Allah or God is the source of Divine Law. America may claim that it is "one nation under God," but the First Amendment of the Constitution guarantees that the State will not establish a religion. All citizens have freedom of religion and freedom from the imposition of any particular religion. The question then becomes

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[72] James Alfini, *supra* at 8-11; *See also*, Mark D. Bennet and Scott Hughes, The Art of Mediation, NITA 2005 at 5-8.
[73] Arkansas Judiciary website, http://courts.arkansas.gov/adr/.
[74]The Northern Virginia Mediation Service website, http://www.nvms.us/.
[75]The New York Civil Practice Law and Rules (CPLR), Art. 75, http://www.proffriedman.com/files/CPLR-FAA_Agreement.htm.
[76] Beth Din of America website, http://www.bethdin.org/.
[77] Miller, Wayne F. 2007. "Negotiating with Modernity: Amish Dispute Resolution." *Ohio State Journal on Dispute Resolution* 22(2):477-526, http://www.peacefulsocieties.org/NAR07/070927amis.html ; accessed 9/26/2010.

how to successfully integrate a religious legal system into this secular framework to create an alternative that meets the principles, needs and concerns of both.

Islamic Dispute Resolution in the Shade of the American Court House

The Challenge of Cross Cultural Dispute Resolution

Muslims dislike official methods of dispute resolution for one basic reason; the focus on law and rights tends to overlook that all-important concept of "face." Referred to as *ha*yy in Arabic, face defines a person and his place in the social fabric. Face is essential to self-esteem and communal esteem. And it is quantitative; you can earn it, lose it, give it, and have it taken away. Inappropriate displays of anger, frustrations or aggression can lead to shame for both sides. [78]

Because Muslims desire more face-conserving or even enhancing forms of resolution, they favor process over product. What makes *sulh* and *tahkim* better than a court decision is that, being voluntary and more or less private, they preserve relationships, foster communal feelings, and raise individual respect.

The problem is that many Muslims are wary of Western models. As George Irani puts it, "Conflict resolution is viewed by many as a false Western panacea, a program imposed from outside and thus insensitive to indigenous problems, needs, and political processes."[79] At a conference on conflict resolution held in Lebanon, participants felt uncomfortable, even suspicious of Western theories and techniques. Born of the labor movement, American

[78] Graham and Lam, *supra* at 9.
[79] Irani, *supra* at 1.

mediation with it is programmed, institutional relationships, seemed ill-equipped to deal with unprogrammed, informal and random social relationships.[80] Each culture defines conflict and how to manage it. However, how a culture solves its intra-cultural disputes does not delimit how it should solve its inter-cultural ones. [81]

The process of designing a suitable dispute resolution system starts with recognizing culture. Culture "refers to the socially transmitted values, beliefs, and symbols that are more or less shared by members of a social group, and by means of which members interpret and make meaningful their experience and behavior (including the behavior of other)."[82] For example, knowing that Muslims don't like the color red and that Chinese love it is not enough. Understanding that Muslims dislike the color red because it represents hell-fire, evil, heat, tension and war, and that wearing clothes of that color is therefore prohibited in some madhaahib; and understanding that to the Chinese, red is an auspicious color signifying good fortune and prosperity – like a ripe delicious fruit; is more important. As Jayne Seminare Docherty has pointed out, instead of focusing on that is "wrong" with the other culture, we need to focus on "true knowledge to which we adhere totally."[83] Both sides need to apply the same scrutiny to their own culture as they do that of the other party. And we need to look deeper, beyond the form to the function – to "get beneath positions to interests." [84] No one likes tension and conflict, and all of us like ease and prosperity. So how do we bridge the gap between our perceptions?

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[80] *Id*, at 4.
[81] Elizabeth Weldon and Karen A. Jehn, *Conflict Management in US-Chinese Joint Ventures: an Analytical Framework*, at 91.
[82] Jayne Seminare Docherty, *Culture and Negotiation: Symmetrical Anthropology for Negotiators*, 87 Marq. L. Rev. 711, 714 - 717(2004).
[83] *Id.*
[84] *Id.*

Cross cultural dispute resolution is a challenge, but bridging the divide is possible with a methodology of respect. Harold Abramson suggests a method that is premised on a respect for cultural pluralism including: 1. Developing a conceptual framework for identifying cultural characteristics that aids the neutral party, whether mediator or arbitrator, in grasping the meaning of cultural behavior and how it is different from universal "human behavior, 2. Understanding one's own culture, 3. Understanding other cultures, 4. Respect and retention of an open mind and non-judgmental attitude, and 5. Bridging cultural gaps.[85] He advocates that cross-cultural neutrals first understand their own cultural practices. Successful cross – cultural mediation requires self-awareness. He suggests reading articles by author of another culture about one's own. [86] Mediators and arbitrators should also research the other culture thoroughly. Some cultural practices may been seen as violating one's own laws or even International law, however, it is important to pursue the cultural explanations behind practices to uncover insights that may lead one to understand the wisdom of that particular practice within that particular culture. Abramson uses the example of Islamic marriage and divorce law and the issue of *mahr*. *Mahr* is money paid to the bride in exchange for the marriage. Some might find this repugnant as it appears to be a form of arranging a marriage for payment, a practice condemned by the UN and CEDAW (Convention on the Elimination of Discrimination Against Women). However, in reality, the money is paid to the woman directly and ensures her money for support as well as ensuring equity and equivalency of rights and duties between the spouses.[87]

So now we understand the two cultures, but we still have to bridge the cultural gaps, and that may, in fact, be the most difficult part, because it is here that the mediator or arbitrator may

[85] Harold Abramson, *Selecting Mediators and Representing Clients in Cross-Cultural Disputes*, 7 Cardozo J. conflict Resol. 253, 257-259, (2006).
[86] Harold Abramson, *Crossing Borders into New Ethical Territory: Ethical Challenges When Mediating Cross-Culturally*, 49 S. Tex. L. Rev. 921, 927 (Summer 2008).
[87] *Id.* at 929-930.

confront difficult ethical issues. What may be acceptable and preferable in one culture may be repugnant in another. [88] For example, Islam prohibits *riba* or usury on loans or transactions involving payments over time. Many International trade agreements and arbitral body rules require interest on damages. Obviously, no Muslim mediator or arbitrator could be involved in such an agreement. It is here that thorough research really pays off, for the successful mediator can only break cultural impasses when she understands the meaning of cultural behavior and how it is distinguished from universal "human behavior."

Universals are a lot like interests and cultural expressions, more like positions. How closely these are linked together in the mind of a person, can indicate how far a person is willing to compromise on a cultural position. Sometimes just understanding the nature of the impasse is all a skilled mediator needs to move the parties toward a mutually agreeable resolution. After all, we all understand values and those unwritten boundaries we cannot cross. The fact that we are not willing to cross them can actually lead people to respect each other more. Trust is built on knowing we are each ethical men and women.

Therefore, in designing an Islamic Alternative Dispute Resolution model, we need to keep two things in mind; first the methods of dispute resolution of which Muslims are comfortable, and second, finding ways to integrate these into an American legal framework. Whether we refer to this method as Islamic Arbitration or Islamic Alternative Dispute Resolution, the preferred method should be flexible, allow for the parties to have their say before the neutral as well as before each other, allow for parties to mediate their disputes as much as possible, and only arbitrate those issues upon which the parties cannot reach agreement. In short, a hybrid "med-arb" approach, would more closely meet the expectations of Muslim parties as to what constitutes justice. However, in order to integrate such a system into the American legal

[88] *Id.* at 931-933.

framework, certain procedural requirements should be met. All Islamic Arbitrations should begin with an Arbitration Agreement, also called an Agreement to Arbitrate or Binding Arbitration Agreement. While Arbitration Clauses may be included in contracts, once a dispute arises the parties should sign an Arbitration Agreement as well. We will discuss these in more detail below, inshallah.

Finally, the Islamic Arbitrator must prepare an Arbitral Award that is enforceable in American court. In order to do be enforceable, the Award should be in a format with which American judges are familiar. Careful attention should be paid to the reasoning behind the Award, and the Award should clearly state what the parties are expected to do.

Overcoming Legal Roadblocks to Islamic Arbitration in America

Both Muslims and Americans can agree on one thing: we prefer to resolve our disputes in a just and peaceful manner that gives us sense that we have been treated with dignity and respect. We also understand that in order for dispute resolution to be successful, agreements must be carried out. A resolution is not binding unless there is a means to compel compliance, a means of enforcement. Enforcement is only possible if someone or some institution is granted the authority to compel others to act or impose sanctions if they do not. In other words, enforcement requires police powers.

In the United States, the both the federal government and state and local governments have police powers. Private citizens, Muslims and non-Muslims alike, can enforce agreements they have made between and amongst each other by filing a case in the appropriate court seeking various remedies. The challenge for Muslims seeking resolution under binding Islamic Arbitration is to demonstrate to the court that it has the legal authority to enforce the Arbitration

Award, given the fact that it is based on another system of law outside the U.S. Constitutional framework.

Early Americans acknowledged Islam's legal contributions to the world. On the façade of the Supreme Court building, the sculptor, Adolph A. Weinman, included Prophet Muhammad among eighteen of Mankind's great lawgivers. While the Qur'an specifically prohibits any graven images and Muslim, therefore, detest any depiction on any prophet, the message that our Founding Fathers were trying to convey is that Islamic Law – the Shariah – is one of the world's great attempts to hold back the forces of chaos and provide for a "written law as a force for stability in human affairs." [89]

However, now some anti-Islamic groups have embarked on a legislative campaign against Islam and Shariah law, and they have had some successes.

> Oklahoma is poised to become the first state in the nation to ban state judges from relying on Islamic law known as Sharia when deciding cases. The ban is a cornerstone of a "Save our State" amendment to the Oklahoma constitution that was recently approved by the Legislature. The amendment — which also would forbid judges from using international laws as a basis for decisions — will now be put before Oklahoma's voters in November. Approval is expected. Oklahoma has few Muslims – only 30,000 out of a population of 3.7 million. The prospect of sharia being applied there seems remote. But a chief architect of the measure, Republican State Rep. Rex Duncan, calls the proposed ban a necessary "preemptive strike" against Islamic law coming to the state.[90]

Fear-mongering their way across the country, Islamophobes are capitalizing on Samuel P. Huntington's "Clash of Civilizations" theories and the concerns of many over anything foreign or migratory. "Save our State" means in reality, "Save us from Immigrants." Attacks on

[89] Joan Biskupic, *Great Figures Gaze Upon the Court*, The Daily Republic, March 11, 1998, (http://www.dailyrepublican.com/sup_crt_frieze.html, last accessed 9/27/2010).
[90] Joel Siegel, "Islamic Sharia Law to be banned in, ah, Oklahoma," (abcnews.go.com, http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-sharia-laws-apply/story?id=10908521 last accessed on 9/15/2010.

Hispanic are often justified by claiming that anti-immigrant groups are just seeking to enforce our laws against illegal immigration. But what about legal immigrants, how do we protect ourselves from them? Easy, make them criminals. Criminalizing Islam by characterizing it as a dangerous ideology would allow for: outlawing Shariah in the US; thorough screening of all Muslims seeking government service; preventing Muslim service men and women from serving in "Muslim" areas, with a few exceptions; seizing banks and financial institutions; seizing assets in the US; monitoring mosques and closing some; deporting of all foreign "Jihadists" and prosecuting American citizens who "support" them; profiling all Muslim travelers and making them prove the legitimacy of their travel plans; and closing all borders.[91]

Anti-Islamists began their campaign in New York with opposition to the Cordoba Initiative, a project to build an Islamic outreach center in Manhattan, two blocks from 9/11's Ground Zero. Anti-Islamists have focused on two Islamic institutions; the mosque and Shariah. Activists for groups like Veterans Against Jihadists claim they are not against Islam or Muslims. They seek only to ban mosques, whose purpose, they claim, is to impose Shariah Law across America. They argue that courts and local governments should only uphold U.S. Constitutional Law. Their arguments bear a striking similarity to Parallel System of Law arguments used by anti-Islamic activists in Europe and Canada. [92] Such argument are ultimately doomed to fail in the United States because America does not have just one system of law, and because American law itself supports the freedom to resolve disputes outside of the formal court system.

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[91] Veterans Against Jihadism website: *Our Platform/Where We Stand,* (http://www.vajonline.org/About_Us.html, last accessed 9/26/2010).

[92] In Canada, opponents of Shariah courts won the day arguing that Canada should only have one system of law. Hence, all other courts, including existing Jewish courts, were banned. Eileen F. Toplansky, *Shariah Law in Canada and Britian*, American Thinker, 8/8/2010, (http://www.americanthinker.com/2010/08/sharia_law_in_canada_and_brita.html, last accessed 10/1/2010).

Ensuring Enforcement of Islamic Arbitration Agreements and Awards

In order to determine if Islamic Arbitration Agreements or Arbitral Awards would be enforceable in American courts, we must examine the general legal regime under which all Alternative Dispute Resolution is valid.

The Constitution of the United States guarantees many freedoms, including freedom of religion (First Amendment), freedom of speech (First Amendment), and the right to freedom of contract. Article 1, Section 10 states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.[93]

What this means is that the state, including any court, has the duty to enforce any contract made between consenting parties, unless there is some compelling state interest in not doing so. This fundament right to contract freely forms the basis for the enforcement of both mediated settlement agreements and arbitral awards.

Several landmark Supreme Court cases have utilized the freedom of contract to uphold arbitration agreements. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, the Court held that as long as the parties consent and are not coerced, the they are "generally free to structure their arbitration agreements as they see fit…"[94] Thus parties can write their own rules of arbitration, including their choice of applicable law – even Shariah law. Several other cases have affirmed this basic position. [95]

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[93] U.S. Constitution, Art 1, §10.
[94] *Volt v. Board of Trustees*, 489 U.S. 468 (1989).
[95] *Mastrobuono v. Shearson Lehman Hutton, Inc*, 514 U.S. 52 (1995); *First Options of Chicago, Inc v. Kaplan*, 514 U.S. 938 (1995); *Howsam v. Dean Witter Reynolds, Inc*, 537 U.S. 79 (2002) and *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

Besides the Constitution and contract law, statutory laws also support enforcement of alternative resolutions. As we have previously mentioned, many states have ADR commissions or laws pertaining to court-annexed mediation programs. These laws vary widely, but generally all of them allow for court enforcement of settlement agreements by either allowing judges to incorporate or to merge agreements. Incorporation allows the parties to pursue contract remedies such as breach of contract, damages and restitution; while merger into a court order allows the court to use contempt powers to even jail non-compliant parties.

However, when it comes to arbitral awards, the Federal Arbitration Act governs enforcement nationwide. The United States Arbitration Act, 9 U.S.C. §§ 1-16, enacted February 12, 1925 reflects an almost irrebuttable presumption in favor of arbitration. It consists of three chapters. Chapters Two and Three incorporate the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Arbitration Convention. Both of these international conventions allow for the enforcement of international arbitration awards. Domestic awards, such as those made under Islamic Arbitration, are enforceable under Chapter One.

The FAA makes arbitration agreements "valid, irrevocable and enforceable."[96] Under the provisions of the FAA, federal courts have the authority to enforce binding arbitration agreements and arbitral awards. Section One defines the scope of the FAA's application to include any action that might be linked in some fashion to interstate commerce. The Supreme Court found in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) that the FAA preempts state law under the Commerce Clause of the U.S. Constitution, and therefore, the FAA has become a national law of arbitration.[97] Although the FAA is de facto national law, many states also have

[96] Thomas E. Carbonneau, Arbitration, Thomson/West, 2007 at 68. *See* Federal Arbitration Act, § 2.
[97] Id. at 57.

arbitration acts. Because the FAA only authorizes federal courts to enforce arbitration awards, such state laws are necessary to enforce arbitration agreements in state courts.

The Federal Arbitration Act and state acts based upon her also grant broad subpoena powers to arbitrators. Section Seven gives arbitrators the power to gather evidence. The Section reads, "[t]he arbitrators … may summon … any person…."[98] The Circuit Courts are split as to whether that subpoena power extends to non-parties.[99]

For an Islamic Arbitration Award to be enforceable in an American court, it must pass the two checks imposed by the FAA on enforcement of arbitral decisions; defenses to enforcement and the doctrine of contractual inarbitrability. Once the arbitrators have rendered an award, the parties have one year to apply for a judicial order confirming the award.[100] The other party may then raise one or more of four statutory defenses including; 1. illegitimacy in the arbitral proceedings, 2. undue means or coercion, 3. lack of due process or fairness, and 4. overreaching or ruling on matters ultra vires.[101] Courts may vacate an award as well as resubmit the matter to the original arbitrators. In fact, based on the general policy in favor of arbitration, courts seldom vacate awards based on these defenses.

However, one area of concern is non-disclosure of conflicts of interest by arbitrators. Failure to disclose conflicts can render an Award void. Arbitrators must disclose any possible contact or connection to any of the parties, even if it seems remote, and obtain a waiver and consent form from all the parties to the arbitration. The AAA offers a disclosure form that can be adapted for use in Islamic Arbitration.

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[98] Id. at 75.

[99] *See Hay Group, Inc. v. E.B.S. Acquisitions Corp.*, 360 F.3d 404, (3d Cir. 2004) stating that arbitrator's authority did not extend to compelling non-parties to comply with pre-hearing discovery requests. *But see*, *Stolt-Nielsen S.A. v. Celanese AG,* 430 F.3d 567 (2d Cir. 2005) which held that courts should not restrain the arbitrator's power to issue subpoenas under the FAA.

[100] Thomas E. Carbonneau, Arbitration, at 76.

[101] Id. at 78-79.

Because defenses to enforcement seldom bear any fruit, losing parties to arbitration often resort to collateral attack based on the doctrine of contractual inarbitrability. Enforcement, as we have seen, depends on the authority of the court or neutral decision maker to hear a case and bind the participants. This authority is called jurisdiction. Under the FAA, once a dispute is properly under the jurisdiction of an arbitrator, the courts may not interfere. However, a dispute cannot proceed to arbitration unless the arbitrator has both subject matter and personal jurisdiction. Subject matter jurisdiction is the power to hear a particular type of case. For example, in many Muslim states, secular courts hear criminal cases, while Shariah courts hear cases involving family matters like divorce and inheritance. The second form of jurisdiction is personal jurisdiction or power over the persons party to the dispute. When parties sign arbitration agreements, either as part of a contract or as a separate contract after a dispute has developed, they establish both the subject matter and personal jurisdiction of the arbitrators.

The FAA §3 allows courts to engage in an inquiry into two issues affecting the threshold issue of arbitrability; 1. whether the contract or agreement to arbitrate is valid (a §2 question) and 2. whether the question in dispute is referable to arbitration (a §3 question). Two doctrines play great roles in resolving the first issue; the Doctrine of Separability and Kompetenz-Kompetenz. The Separability Doctrine allows courts to separate out arbitration clauses from other parts of a contract, permitting the enforcement of the arbitration agreement even where the main contract is voidable. The doctrine of Kompetenz – Kompetenz holds that a tribunal always has jurisdiction to decide if it has jurisdiction. These two doctrines, finding support through case law in *Kaplan* and *Howsam*, allow arbitrators to decide the threshold issues of the validity of the arbitration clause.[102]

[102] Id. at 13.

The *Howsam* case also restricted the court's ability to inquire into whether the question in dispute was referable to arbitration. The Court, relying on an expectation of the parties analysis, stated that court review of the question of arbitrability only arises where "contracting parties would likely have expected a court to decide the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate."[103] Only if the question to be arbitrated was clearly one affecting public policy would a court rule that it was inarbitratable; however, even disputes involving statutory law have been the subject of arbitration.[104]

Given the general policy favoring arbitration, one might expect that arbitration under Shariah law as a choice of law would be well received. Moreover, other religions also have made similar cross-cultural efforts. The Beth Din of America offers "Rabbinical court adjudication of commercial, communal and matrimonial conflicts."[105] *Dayanim* or Jewish legal scholars sit as arbitrators and decide cases according to Jewish *Halakhah* law. Parties sign a binding arbitration agreement which meets the requirements of American law, making the Beth Din rulings legally binding.[106]

However, there is at least one roadblock facing Islamic Arbitration – determinations of inarbitrability based on public policy. For example, under Islamic inheritance law, the Fara'id, a wife is entitle to a specified share of one quarter of the tarik or estate if there are no children; if there are children, then she is entitled to one eighth. Under American law, most states protect the

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[103] Id. at 41-42, quoting, *Howsam,* 537 U.S. 79 (2002).
[104] *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc*, 490 U.S. 477 (1989) where the Court found that nothing in the FAA prohibited statutory disputes from being submitted to arbitration. ERISA, Title VII, FLSA, Antitrust and Bankruptcy issues have all been found to have been properly submitted to arbitration.
[105] Beth Din of America website, (http://www.bethdin.org/ last accessed 10/4/2010).
[106] Id. at http://www.bethdin.org/arbitration-mediation.asp, (last accessed on 10/4/2010).

rights of a spouse to a portion of his or her spouse's estate through "elective share" laws. Such laws allow a spouse to elect whether to take the share given them in a will or to take the statutorial share, usually 1/3 of the estate. Thus, it is quite possible that an arbitral award of 1/8 of the tarik could be overturned if the wife does not specifically agree to this amount and waive her statutory elective share.

Issues of child custody and visitation also invoke the public policy scrutiny of the courts. American courts use a "best interest of the child" standard" in custody and visitation determinations." They will be unlikely to allow agreements to stand without some form of judicial review. In such cases, mediation and court annexed mediation agreements are a better option to ensure enforceability in American courts.

Drafting Enforceable Arbitration Agreements and Arbitral Awards

Islamic Arbitration of disputes offers a spiritually and financially satisfying method for resolving disputes within the North American Muslim community. In the effort to produce enforceable awards, parties and Islamic arbitrators need to draft effective and enforceable arbitration agreements and arbitral awards.

Since one of the threshold issues affecting arbitrability is the validity of the arbitration clause, parties need to ensure that their contracts containing arbitration clauses or their binding arbitration agreements contain certain features. If the arbitration clause is part of a contract, then it should at minimum contain the following language:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by an Islamic Arbitrator certified by the Assembly of Muslim Jurists in America, in accordance with Islamic Shariah law as determined according to the methodology of the _____ School of Islamic Jurisprudence.

Parties should also consider adding the number of arbitrators, such as one or three; the place of arbitration, and the language in which the arbitration is to be conducted.

If the arbitration agreement is made after the dispute has arisen, then the parties should include far more detail. In such a case, the parties should prepare "Terms of Engagement" that specify the issue to be decided, plea the jurisdiction or authority of the arbitrators over both the subject matter and the parties, state the names of the arbitrators, state the procedural rules to be followed, provide any evidentiary rules, name the law to be applied – in this case Shariah law of a particular methodology, provide provisions for compensation of the arbitrators, and include information on the division of costs. Parties should also sign confidentiality agreements, either as part of the "Terms of Engagement" or as separate agreements, in order to ensure the privacy of the proceedings.

One way in which parties can ensure reasonable certainty of having a valid agreement to arbitrate is to follow the rules set forth by one of the major arbitration organizations. The American Arbitration Association, the International Chamber of Commerce, IICPR (International Institute for Conflict Prevention and Resolution, and UNCITRAL (United Nations Commission on International Trade Law) all have published rules for arbitration that take all salient issues into consideration. These rules can provide procedural default rules that can be quite helpful in addressing where arbitration should take place, how arbitrators should be appointed, how an appointment can be challenged or replaced, how preparatory conferences and hearing sessions should be conducted and other "housekeeping" matters. At the very least, these rules can help parties learn what their own agreements will need to address. In short, arbitration clauses or agreements should be as detailed as possible so that disputes over procedural details do not derail otherwise productive processes.

Arbitrators also need to write their awards with an eye toward enforceability. Awards should follow a certain format and address certain issues. The closer that an award resembles a legal brief or court order, the more comfortable a judge will feel. Awards should contain the following outline:

- Style of the case: For example: Ahmad Ibn Hanbal v. Abu Hanifah
- Procedural Style
    - The Parties
        - Claimant – name and title
        - Respondent – name and title
    - Arbitral Panel or Single Arbitrator – name
    - Counsel – if any
    - Jurisdiction
        - subject matter arbitrability
        - in personum (personal) jurisdiction – generally will be by the agreement of the parties
    - Arbitration Agreement – the arbitration clause or attach the binding agreement to arbitrate
    - Place of Arbitration
    - Governing Law
        - substantive law – Shariah
        - procedural – either agreed upon by parties or using arbitral body rules
    - Language
- Recitation of the Facts

- Rulings and Orders
    - any interim orders on jurisdiction, procedure or to protect property.
- Final Award
    - undisputed facts
    - disputed facts
    - legal issues to be resolved
    - legal analysis including citations to Qur'an and Sunnah or other legal authority.
    - disposition
- Costs
- Signed this _____ day of _____
    - signatures of the arbitrators

Conclusion

Islamic societies have long enjoyed a wide variety of means for resolving disputes. The very meaning of Islam speaks of reconciliation and peaceful resolution of disputes. Islamic Arbitration offers Muslims a familiar and effective means of addressing a wide variety of issues from business contract disputes to divorce and child custody and support. And unlike adjudication in Western courts, arbitration is confidential and private. Arbitration under Shariah law is already used effectively in the International business arena, and England now has Shariah courts under the Arbitration Act.

While current political trends may be cause for concern, the general acceptance of Shariah-based judgments is well supported by American contract and arbitration law. However, in order to ensure enforceability, Muslim jurists will need to develop procedural rules similar to those used by the Beth Din courts or by the AAA and other arbitral bodies that provide concrete guidance in conducting arbitrations, and drafting Arbitration Agreements and Arbitral Awards. One suggestion would be to set up an agency within AMJA to certify arbitrators and mediators, and propagate such procedural rules.

Only a handful of jurists here in the United States practice Islamic Arbitration, however, the need for qualified arbitrators and mediators is so great that the services of these jurists are constantly in demand. Considering that American courts welcome community-based alternative dispute resolution, with careful attention to salient legal issues, Islamic Arbitration can make a valuable contribution to the "multi-door courthouse" and its promise of equal access to justice envisioned by many American legal scholars and judges.