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Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent

57 N.Y.L. SCH. L. REV. 287 (2012–2013)

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I. INTRODUCTION

After a lengthy trial-and-error history, Jewish law in America has found a home in a well-defined and expansive system of Jewish law courts around the country referred to as *batei din*.¹ The Beth Din of America (BDA), one of the nation's most prominent rabbinic courts, was founded in 1960 to accommodate the portion of the Jewish community in America committed to living in accordance with both secular and religious law.² For some time, *batei din* struggled to find their footing within the American legal system. Secular courts were initially uncomfortable upholding and enforcing decisions issued in accordance with what was essentially foreign law.³ Today, however, the BDA provides a sprawling network of Jewish law courts that function as arbitration panels (and more), offering litigants access to a religious forum marked by the characteristic expedience and affordability of the arbitration process. More significantly, the BDA has gained widespread acceptance among America's secular courts, which, to date, have never overturned a BDA-issued decision. As the Muslim community in America embarks upon a quest to develop and refine its own religious court system, it should regard the BDA precedent as a useful navigation tool.

Although the BDA is now a fifty-year-old organization, its true metamorphosis as an arbitration panel began only in 1996 when it gained autonomy from the Rabbinical Council of America. In the fifteen years since, an independent board of directors has worked with the BDA's rabbinic leaders to craft an arbitration process that secular courts would feel comfortable upholding. While the BDA's transformation required some level of compromise within Jewish law itself, the adaptations necessary for judicial acceptance proved to be procedural. Broadly, this meant conforming to the tenets of the Federal Arbitration Act (FAA).⁴ More specifically, the BDA's viability came to rest on six pillars of the revised Jewish arbitration process: (1) the BDA issued and publicized detailed and standardized rules of procedure;⁵ (2) in addition to its arbitration services, the BDA developed an internal appellate process; (3) the BDA provided choice-of-law provisions to facilitate accommodation of both

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1. *Beth din or bet din* (pl. *batei din*) translates literally to "house of judgment." *Beth Din*, DICTIONARY.COM, <http://dictionary.reference.com/browse/beth+din?s=t> (last visited July 31, 2012).
 2. *About Us—Organization & Affiliation*, BETH DIN OF AM., <http://www.bethdin.org/organization-affiliations.asp> (last visited July 31, 2012).
 3. *See, e.g.*, *Fein v. Fein*, 610 N.Y.S.2d 1002 (Sup. Ct. Nassau Cnty. 1994) (vacating a *beth din*'s award due to an arbitrator's failure to disclose potential bias); *Kupperman v. Congregation Nusach Sfar of Bronx*, 240 N.Y.S.2d 315, 321–22 (Sup. Ct. Bronx Cnty. 1963) (declining to uphold a *beth din*'s decision regarding an employment contract between a rabbi and a synagogue, deferring instead to state civil law); *Meisels v. Uhr*, 547 N.Y.S.2d 502 (Sup. Ct. Kings Cnty. 1989) (vacating a *beth din* award and holding that "[t]he flawed manner of the Beth–Din arbitration proceeding which is the subject of this controversy requires such a nullification, and suggests that stricter observance to secular requirements be adhered to. In so doing, the rich tradition and effective utilization of this revered dispute resolution institution can be enhanced and strengthened so as to effectively co-exist within a modern society"), *aff'd*, 570 N.Y.S.2d 1007 (2d Dep't 1991), *rev'd*, 79 N.Y.2d 526 (1992).
 4. *See* Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2012).
 5. *The Rules and Procedures of the Beth Din of America*, BETH DIN OF AM., http://www.bethdin.org/docs/PDF2-Rules_and_Procedures.pdf (last visited July 31, 2012) [hereinafter *Beth Din Rules*].

Jewish and secular law where possible; (4) in addition to Jewish scholars, the BDA employed, as arbitrators, skilled lawyers and professionals who could provide expertise in the areas of secular law and contemporary commercial practices; (5) to ensure the effective resolution of commercial arbitrations, the BDA gleaned and abided by common commercial customs to the extent permitted by Jewish law; and (6) the BDA accepted that an aggregate of individual arbitrations gave rise to an active role in communal governance.

These six modifications demonstrated the innovation and adaptation required of Jewish law in its pursuit of judicial acceptance. While each is ultimately consistent with Jewish law, each also represents a departure from the traditional practice thereof. Thus, it follows that the adoption of such changes for Sharia law courts—and those courts' ultimate viability—rest on Sharia law's ability to adhere to the American arbitration system and to embrace American law more generally. Fifteen years of experience reveal these six modifications to be the building blocks of a successful interplay between religious and secular law. Accordingly, this paper will examine these modifications more closely as they relate to three overarching themes: procedural developments, dual-system fluency, and communal governance. Part II of this paper will address procedural developments in Jewish law by examining the Rules and Procedures of the BDA (the "Rules") and its appellate process. Part III will suggest that Sharia courts bridge the gap between religious and secular law by producing scholars who comfortably navigate both worlds and by embracing American law and commercial customs where appropriate through choice-of-law recognition. Part IV will address the role communal governance plays in the administration of Jewish law and suggest adaptations to Sharia law that will enable Sharia courts to take on a similar role in their own communities.

II. PROCEDURAL DEVELOPMENTS

The ultimate goal for Jewish law followers in pursuing the BDA's formation and growth, as it is for followers of Sharia law in developing their own religious court system, was to construct a religious tribunal whose decisions would be regularly upheld by secular courts. Aside from the general statutory grounds on which arbitration decisions may be vacated,⁶ courts consider the following in deciding whether to uphold a religious tribunal's decisions: "(1) the validity and scope of the arbitration agreement between the parties, (2) whether the arbitral proceedings observed proper procedures and due process, and (3) whether the resulting decision is

6. The FAA recognizes four grounds for vacatur: "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(1)–(4).

irrational or void as against public policy.”⁷ These criteria demonstrate the extent to which procedural guarantees of validity and fairness affect the viability of a religious tribunal in the eyes of its secular counterparts.

Scholar Caryn Wolfe noted of the relationship between faith-based arbitration and procedure that “[p]rocedural rules of arbitration protect vulnerable parties.”⁸ She identified the following as examples of the procedural safeguards that must be in place for a court to uphold a religious tribunal’s decisions: parties’ entitlement to adequate notice; parties’ entitlement to representation by an attorney; arbitrators’ obligation to disclose any information relevant to their impartiality; and parties’ inability to agree to the unreasonable restriction of their rights to notice and arbitrator disclosure or to waive the right to attorney representation.⁹ Without these procedural safeguards, Wolfe argues that courts will regularly invalidate a religious tribunal’s awards.¹⁰ Recognizing this secular focus on procedure and procedural fairness, the BDA adopted detailed rules and procedures that contributed tremendously to the eventual secular acceptance of BDA decisions. Sharia courts, however, are currently characterized by a lack of uniform rules and procedures, with proceedings described as “informal, closed and secret.”¹¹ The following sections examine the Rules and the appellate process the organization introduced to grant itself the opportunity to catch and correct mistakes internally before they are submitted to a secular court for review. Both of these procedural innovations may serve as a template for Sharia courts.

A. BDA Rules and Procedures

As an initial matter, litigants who come before a BDA are required to sign a binding arbitration agreement that provides a broad outline of the BDA’s arbitration procedures.¹² By signing this form, litigants agree to give the BDA’s resolution to their dispute legal consequence.¹³ More importantly, the form serves as a contract between litigants themselves and the BDA, imposing reciprocal obligations on each to conduct themselves in accordance with the Rules.

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7. Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & RELIGION 379, 390 (2010).
 8. 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, 458 (2006).
 9. *Id.*
 10. *Id.* at 459.
 11. Michael C. Grossman, *Is this Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 179 (2007).
 12. The BDA offers a suggested binding arbitration agreement that is standardized to ensure compliance with statutory requirements. See *Forms and Publications*, BETH DIN OF AM., <http://bethdin.org/forms-publications.asp> (last visited July 31, 2012). It is also available for marital matters. See *Prenup Forms*, THE PRENUP, <http://theprenup.org/prenupforms.html> (last visited July 31, 2012).
 13. Jewish law considers it a religious wrong to allow an individual to seek resolution of a dispute in a rabbinical court if the individual is likely not to abide by the court’s decision. In other words, litigants must not have the option to collect an award if they win and to ignore an award if they lose. Accordingly, the BDA abides by the FAA to ensure that awards are enforceable even outside the BDA’s jurisdiction.

The BDA's development of standardized rules and procedures was perhaps its most significant step toward judicial acceptance. Secular courts take a great deal of confidence not in the historical tradition of Jewish law or religious texts, but in the procedural guarantees encapsulated in the BDA's arbitration process. Accordingly, rather than explain the substance of Jewish law, the BDA crafted rules and procedures that explain what litigants can expect from the arbitration process itself: discovery, admissibility of evidence, how to challenge members of the arbitration panel due to bias, and so on. In addition to providing procedural predictability and consistency to litigants—who are provided a copy of the Rules at least seven days prior to their hearings and may access them at any time online—the structure and detailed nature of these rules comforted secular court judges.¹⁴ Written in “lawyers’ English,” the Rules lay out a formal arbitration process that is largely recognizable to reviewing judges entrenched in American civil procedure. For example, like civil litigation, the Rules prohibit ex parte communications between litigants and arbitrators,¹⁵ enable litigants’ representation by counsel,¹⁶ and establish a formal fee schedule in advance of arbitration.¹⁷

Initially, the Rules prescribe a hierarchy of authority topped by the *Av Beth Din* (Chief Justice), who supervises the organization and appoints *dayanim* (arbitrators) to hear disputes.¹⁸ *Dayanim* are either rabbis or religiously observant individuals involved in their respective professions. The former may arbitrate disputes alone, while the latter sit on three-person panels made available to litigants by agreement or designation by the *Av Beth Din*.¹⁹ Because the FAA designates “partiality or corruption in the arbitrators” as grounds for vacatur of arbitration decisions,²⁰ litigants are given advanced notice of their assigned *dayanim* and may object to the appointment of any individual *dayan* on the basis of potential bias.²¹

Litigants might come before the BDA in two circumstances: (1) they are parties to a contract with an arbitration provision that specifies the BDA as the designated arbitral forum or (2) a party to an existing dispute may indicate his preference for

14. See, e.g., *Lang v. Levi*, 16 A.3d 980 (Md. Ct. Spec. App. 2011) (citing and deferring heavily to the BDA's Rules and Procedures); *Tal Tours (1996) Inc. v. Goldstein*, No. 5510-05, 2005 WL 2514967 (Sup. Ct. Nassau Cnty. Oct. 7, 2005) (citing and deferring heavily to the BDA's Rules and Procedures).

15. *Beth Din Rules*, *supra* note 5, at § 25.

16. *Id.* at § 12(a).

17. *Id.* at § 34(a). The *Av Beth Din* predetermines a fee schedule for arbitration and other matters that come before the Beth Din and makes that schedule available at *Beth Din of Am. Fee Schedule*, BETH DIN OF AM., http://www.bethdin.org/docs/Filing_Fee_Schedule.pdf (last visited July 23, 2012).

18. *Beth Din Rules*, *supra* note 5, at §1(a)–(c).

19. Disputes involving an amount less than \$10,000 require mutual consent of the parties to empanel three *dayanim*. Disputes involving an amount in excess of \$10,000 may be heard by a three-*dayan* panel upon petition by either party or, in any case, at the direction of the *Av Beth Din*. *Id.* at § 5(a)–(b).

20. 9 U.S.C. § 10(a)(2).

21. Section 6(a) of the Rules allows litigants to challenge the appointment of a *dayan* if that “person is biased or has a financial or personal interest in the result of the arbitration or has any past or present relationship with the parties.” Litigants must exercise their right to challenge the appointment of *dayanim*, or that right is waived. *Beth Din Rules*, *supra* note 5, at § 6(a).

religious arbitration and invite the opposing party to resolve the matter before the BDA. In the first instance, failure to submit a dispute to the BDA can result in default judgment or (less frequently) in the issuance of a *shtar seruv*, a document publicizing the recalcitrant party's noncompliance and granting the compliant party permission to seek recourse in secular court.²² In the second instance, unless the parties had previously agreed to submit disputes to arbitration by the BDA, the opposing party is not obligated to accept this forum and may suggest an alternative. So long as the alternative is deemed a suitable forum under Jewish law (including another *beth din* or a mutually agreed upon third party), the BDA will simply withdraw.²³ If both parties agree to arbitrate their dispute before the BDA, they move on to the discovery phase.

Like civil litigants in secular court, litigants before the BDA are afforded an opportunity to exchange information prior to their hearings. Upon request by the parties or in the discretion of the *Av Beth Din*, litigants may engage in a prehearing conference at which they can make provisions for the exchange of relevant documents, stipulate to uncontested facts, and disclose a list of anticipated witnesses.²⁴ The Rules also preserve each party's right to adequate notice as to the time and place of the hearings²⁵ and to representation by counsel at any stage in the arbitration, including the pre-hearing conference.²⁶

Also mirroring the civil litigation process is the hearing itself, which is recorded and subsequently available for transcription.²⁷ Parties are permitted to open a hearing with a statement clarifying the relevant issues, after which the complaining party presents its claims, witnesses, and evidence.²⁸ The BDA permits and, in fact, demands that parties offer such evidence as each desires and that "the BDA may deem necessary to an understanding and determination of the dispute."²⁹ Should the BDA require additional testimony to supplement its understanding of a case, such testimony is sought in the presence of the parties and is subject to appropriate rebuttal.³⁰ Following the complaining party's presentation, the defending party has an opportunity to present its own defenses, witnesses, and evidence.³¹ Once a hearing has commenced, the parties and their

22. *Id.* at § 2(i).

23. *Id.* at § 2(f). If, on the other hand, the proposed arbitrator is deemed unsuitable according to Jewish law (e.g., a biased arbitrator hired by a landlord in a landlord/tenant dispute), the BDA will retain jurisdiction until a suitable option is proposed.

24. *Id.* at § 8(a).

25. Parties must be notified of the time and place of their hearings, in writing, at least eight days in advance. *Id.* at § 9(a).

26. *Id.* at § 12(a).

27. All hearings are recorded unless the parties waive this right. Parties may also request an official transcript of the recording, the cost of which is borne by them equally or otherwise by agreement. *Id.* at § 10(a).

28. *Id.* at § 16(a).

29. *Id.* at § 18(a).

30. *Id.*

31. *Id.* at § 16(a).

attorneys are not permitted to communicate with the *dayanim* other than to communicate through the Director of the BDA.³² When each party acknowledges that it has no further evidence or witnesses to present, the BDA declares proceedings closed.³³

From the closing of hearings, the BDA has three months to issue its award, which must be made by a majority of the panel or, if required by the parties' agreement, by the panel unanimously.³⁴ The award itself must be issued in writing—in English—and may be composed of “any remedy or relief that [the BDA] deems just and equitable and within the scope of the agreement of the parties.”³⁵ The BDA also recognizes the possibility that parties may settle their disputes independently prior to it issuing an award; in such cases, parties may request that the BDA set forth the terms of their settlement in lieu of an official award.³⁶ In any event, the BDA's award must be mailed or served personally on the parties and filed in accordance with the laws of the relevant jurisdiction.³⁷ Should a party believe the award was made in error, that party may petition the BDA to modify it within twenty days.³⁸ The following section discusses this appellate review process in greater detail.

B. Appeals Process

Traditionally, Jewish law did not offer an appellate process like the American secular court system. Arbitration was limited to a hearing, after which parties were bound by the *dayan's* decision. Over time, however, the BDA came to find that if it did not provide an internal mechanism by which parties could appeal perceived errors, secular judges would interject and substitute their own judgment. Because the ultimate goal for litigants submitting to a religious tribunal's jurisdiction (and for the tribunal itself) is to have matters resolved internally from start to finish, the BDA added an appellate process to its arbitration services.³⁹

The Rules now permit a party to petition the BDA for review of an award within twenty days from the award being delivered to the party.⁴⁰ Copies of such petitions must be served on all other parties to the arbitration, who then have ten days to object

32. *Id.* at § 25(a). The director serves a central role managing the BDA and has been a product of both elite rabbinical and law schools. The current director, Rabbi Weissmann, is a graduate of Columbia Law School, where he was a Harlan Fiske Stone scholar, and the previous director, Rabbi Reiss, was a graduate of Yale Law School and a senior editor of its law journal, and I was the director before that.

33. *Id.* at § 22(a).

34. *Id.* at § 26(a).

35. *Id.* at §§ 27(a)–28(a). For an example of a BDA award, see *infra* Appendix A.

36. *Id.* at § 29(a).

37. *Id.* at § 30(a).

38. *Id.* at § 31(a).

39. For a more in-depth discussion of the Jewish appeals process, see Rabbi J. David Bleich, *The Appeal Process in the Jewish Legal System*, TRADITION, Fall 1993, at 17.

40. *Beth Din Rules*, *supra* note 5, at § 31(a).

JEWISH LAW COURTS IN AMERICA

to the requested modification in writing.⁴¹ Once each side has had an opportunity to submit information relevant to its objection, the BDA may overturn or remand⁴² a prior decision on five grounds: (1) if there was an error in mathematical calculation; (2) if the award included a mistaken description of any person, thing, or property; (3) if the award addressed an issue not submitted to the BDA which could be corrected without affecting the merits of the remainder of the decision; (4) if the award was otherwise imperfect in a manner that does not affect the merits of the controversy; or (5) if the *Av Beth Din* determines that the award or a portion of the award was contrary to Jewish law.⁴³ An examination of these grounds for modification reveals that the scope of review available to the BDA on appeal is comparable to the standard of review afforded to secular appellate judges.⁴⁴

The BDA's appellate process is one of few among *batei din* in America and has been upheld by secular courts. Most recently, the Court of Special Appeals of Maryland affirmed the BDA's authority to review and modify the court's own decisions in *Lang v. Levi*.⁴⁵ *Lang* involved a Jewish couple that had been married in accordance with both secular and Jewish law.⁴⁶ The couple signed an arbitration agreement designating the BDA as the appointed arbitrator for any disputes arising from the dissolution of their religious prenuptial agreement.⁴⁷ This document further stipulated that the wife would be entitled to monetary compensation for each day between the couple's separation and the husband's granting her a religious divorce.⁴⁸ When the couple separated in 2005, they first negotiated their civil divorce before a secular court.⁴⁹ They later came before the BDA to arrange a religious divorce pursuant to their agreement, after which the wife was awarded \$10,200 in compensation for the time between their separation and Jewish divorce.⁵⁰ Both

41. *Id.* at § 31(b).

42. *See infra* Appendix B (providing a BDA decision remanded on appeal due to the discovery of a clerical error).

43. *Beth Din Rules*, *supra* note 5, at § 31(a).

44. The BDA's "Layman's Guide to Dinei Torah" explains the appellate process as follows: "Decisions are only overturned if the appellate judge reviewing the case finds a clear mistake in the original decision, but not merely if the judge would have decided differently himself." *Layman's Guide to Dinei Torah*, BETH DIN OF AM., http://www.bethdin.org/docs/PDF1-Layman's_Guide.pdf (last visited July 28, 2012). *Cf.* FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

45. 16 A.3d 980 (Md. Ct. Spec. App. 2011).

46. *Id.* at 982.

47. *Id.*

48. *Id.* This measure was included not as a form of spousal support, but rather to encourage the husband to grant his wife a timely divorce.

49. *Id.* at 982–83.

50. *Id.* at 983.

parties petitioned the BDA for modifications to the award, which the BDA eliminated entirely on appeal.⁵¹

Following the BDA's review, the wife sought vacatur of the BDA's revised award.⁵² The Circuit Court for Montgomery County, however, granted the husband's motion for summary judgment, finding that both parties had voluntarily submitted to the BDA's jurisdiction in what was ultimately a defensible award.⁵³ On appeal, the Court of Special Appeals of Maryland affirmed the lower court's decision finding that "the Beth Din appropriately exercised its authority within the confines of its own rules and procedures, which both [the husband and wife] agreed to be subject to under the arbitration agreement."⁵⁴ Specifically, the court acknowledged that the Rules "include the authority of the *Av Beth Din* to reverse the panel's decision."⁵⁵ Although the BDA's appeal relied in part on Jewish legal precedent, the court also affirmed the rationality of the BDA's decision because it reflected basic common law principles.⁵⁶ This observation illustrates the importance of a religious tribunal's familiarity with both religious and American secular law, a point that will be discussed at length in the following section.

III. DUAL-SYSTEM FLUENCY

Fifteen years of experience have shown that an American religious tribunal's viability rests in large part on its ability to navigate not only its own jurisprudence, but also the indigenous legal systems around it. As the court's holding in *Lang* demonstrated, secular judges are more receptive to religious arbitration when the decisions issued by such tribunals reference familiar legal doctrines amidst the foreign.⁵⁷ Essentially, this means that religious courts need to produce bilingual arbitrators, fluent in both American secular law and the laws of their respective religions. Furthermore, as arbitrators, these organizations must recognize that American litigants will frequently invoke American laws and commercial customs in the course of their dealings. Indeed, many litigants who come before the BDA do not adhere to Jewish law themselves, but, as previously mentioned, merely appear before the BDA in compliance with a binding arbitration agreement. Therefore, to

51. *Id.* at 983–84. The *Segav Av Beth Din* (second-in-command to and agent of the *Av Beth Din*) reasoned that the wife had had an opportunity to negotiate financial claims in the couple's secular court case, the husband had offered to engage in a religious divorce sooner, which the wife declined, and the wife's failing to demand the \$100 payments each week prior to the religious divorce effected a waiver of her right to such payments. *Id.*

52. *Id.* at 984.

53. *Id.* (“[F]inding that the parties submitted to the jurisdiction of the Beth Din . . . , that the Beth Din had the authority to interpret Jewish Law . . . , and that the Av Beth Din's decision was not an irrational decision.”) (internal quotation marks omitted).

54. *Id.* at 986.

55. *Id.* at 987.

56. *Id.* at 988.

57. *See id.*

JEWISH LAW COURTS IN AMERICA

appease secular courts and litigants, the BDA must not only talk the talk by issuing decisions in “legalese,” but also be prepared to walk the walk by issuing decisions in accordance with secular law.

Despite these steps toward legal compromise, a practical recognition of secular law also required the BDA—and will require Sharia courts—to admit to certain jurisdictional barriers. In some areas of law, faith-based arbitration will simply come up lacking. For instance, both Jewish and Sharia law prescribe the process for obtaining a religious divorce.⁵⁸ No amount of compromise in the arbitration process, however, will permit a religious divorce to serve in lieu of a couple’s obtaining a civil divorce. Thus, occasionally, co-existence between religious and secular laws requires more than choice-of-law clause recognition on the part of a religious court: it encompasses also an inherent choice of forum.

This realization is especially difficult because it forces a conclusion not contemplated by both Jewish and Sharia law. In some cases, litigants will be forced to resolve their issues in secular court because it is the only forum capable of granting a civil divorce, for example.⁵⁹ The BDA accepted this proposition as a necessity of American existence and, with respect to the above example, requires divorcing couples to obtain both a religious and civil divorce. Indeed, the document given at the conclusion of every Jewish divorce to the former couple states directly that:

This is to certify that [name of husband] divorced his wife [name of wife] on [day of week], the [day of Hebrew month] of [Hebrew month], [Jewish year], corresponding to the [day of month] of [month], [year] *c.e.* according to Orthodox Jewish law. [*Name of man/woman*] is free to marry provided that s/he is also civilly divorced.⁶⁰

Jewish law simply cannot grant a civil divorce and we recognize that our community is ill served without recognizing that fact and encouraging people to ensure that their civil status and religious status match when possible.

To improve their dual-system reconciliation, Sharia courts will need to follow suit in acknowledging certain areas in which religious law cannot be substituted for secular law. For the remaining areas in which the two regimes may be reconciled, Sharia courts will benefit immensely from a commitment to choice-of-law recognition and the cultivation of dual-trained arbitrators. The following sections will discuss the BDA’s development of each.

58. See JULIE MCFARLANE, *ISLAMIC DIVORCE IN NORTH AMERICA, A SHARI’A PATH IN A SECULAR SOCIETY* 34 (2012) (“Acknowledging that some marriages fail, the Qur’an sets out the basis for ending a union.”); M. MEIELZINER, *THE JEWISH LAW OF MARRIAGE AND DIVORCE IN ANCIENT AND MODERN TIMES AND ITS RELATION TO THE LAW OF THE STATE* (1881) (describing the process of divorce under Jewish law).

59. Both Jewish and Sharia law generally prohibit an observant individual from suing another follower of his religion in secular court. See Bambach, *supra* note 7 at 383–85.

60. LOUIS JACOBS, *THE JEWISH RELIGION: A COMPANION* 132–33, 188 (1995) (emphasis added).

A. Choice-of-Law Provisions

Traditionally, the *beth din* system decided matters in strict accordance with Jewish law, assuming that submission to religious arbitration signified litigants' exclusive preference for (1) religious over secular law and (2) pure Jewish law (*din*) over settlement/compromise in accordance with Jewish law principles (*p'shara krova l'din*).⁶¹ Over time, however, the BDA found that many Americans do not govern their transactions by Jewish law and that even among those who do, Jewish law will rarely govern alone—state laws or common commercial customs would often play some role in parties' dealings. And so it became clear that acknowledgement of those legal or customary systems was necessary to ensure the BDA's success in adjudicating disputes. Accordingly, the BDA added the following language to its Rules:

One of the purposes of the Beth Din of America is to provide a forum where adherents of Jewish law can seek to have their disputes resolved in a manner consistent with the rules of Jewish law (halacha) and with the recognition that many individuals conduct commercial transactions in accordance with the commercial standards of the secular society⁶²

In addition to the BDA's recognition of commercial standards, of particular note is its stated commitment to resolve disputes in a manner *consistent* with the rules of Jewish law rather than in *accordance* with the rules of Jewish law. Though a seemingly interchangeable word choice, this passage from the preamble to the Rules proved to be the document's most hotly contested during its drafting phase.⁶³ The commitment to resolve disputes in a manner consistent with Jewish law represented not only a linguistic shift, but also a significant procedural departure for the organization—from that point on, the BDA's default framework for religious arbitration would no longer be *din* (abstract Jewish law), but rather *p'shara krova l'din* (Jewish law filtered through common commercial practice, customs, and equity).⁶⁴ Of course, the decision to use *p'shara krova*

61. Kellie Johnston, Gus Camelino & Roger Rizzo, *A Return to 'Traditional' Dispute Resolution: An Examination of Religious Dispute Resolution Systems*, CANADIAN FORUM ON CIV. JUST. (Jan. 10, 2001), <http://cfcj-fcjc.org/clearinghouse/drpapers/traditional.htm>. Traditionally, Jewish arbitration was conducted in accordance with *din*, Jewish law. Today, the Rules specify that cases will be decided in accordance either with *p'shara* (a compromise in which *dayanim* consider the issue in according with Jewish law principles) or *p'shara krova l'din* (compromise or settlement related to Jewish law). *Beth Din Rules*, *supra* note 5, at § 3. Under the latter framework, *dayanim* are more flexible to consider the parties' relative equities and to craft an appropriate remedy, whereas awards decided in strict accordance with *din* are necessarily a zero-sum game. *Id.* at § 3 n.1.

62. *Beth Din Rules*, *supra* note 5, at pmbl.

63. *Id.*

64. *See supra* text accompanying note 61. The footnote to the Rules defines *p'shara krova l'din*:

Compromise or settlement related to Jewish law principles (*p'shara krova l'din*) is a process in which the relative equities of the party's claims are considered in determining the award. For example, in Jewish law (*din*), the party that proves the "truthfulness" of its case "more likely than not," as well as proving the Jewish law basis for its entitlement, is qualified to recover 100% of the amount sought, whereas in compromise or settlement related to Jewish law principles (*p'shara krova l'din*) such a party would not necessarily recover 100% of the amount sought, depending on that party's conduct throughout the

JEWISH LAW COURTS IN AMERICA

l'din has quite a bit of precedent in classical Jewish law as well,⁶⁵ but its combination with choice-of-law provisions creates a certain legal framework.

As a result of this commitment, many issues that come before the BDA today are not decided in the manner that they would be under native Jewish law. For example, in a case decided according to *din*, the party that proves his case by a preponderance of the evidence and establishes a basis in Jewish law for his entitlement will recover one hundred percent of the amount in dispute. In contrast, a case decided according to *p'shara krova l'din* may result in recovery of a lesser amount, depending on the relative equities of the parties' claims. *P'shara krova l'din* also recognizes more forms of recovery than *din*.

Though significant in its outcome determination, the shift from *din* to *p'shara krova l'din* is primarily an esoteric one, and this technical distinction would likely go unnoticed by many. It did, however, open the door to the BDA's second promise: to recognize and abide by common commercial customs where possible.⁶⁶ The BDA has arbitrated cases involving hundreds of millions of dollars in commercial disputes.⁶⁷ And while commercial customs are not legally binding—and, therefore, do not directly affect the enforceability of BDA's decisions—they do govern most litigants' commercial dealings and their expected resolution of commercial disputes. Accordingly, the BDA realized that a failure to resolve a commercial dispute in

matter under dispute. So too, in a case where neither party proves the "truthfulness" of its case "more likely than not," or does not prove the Jewish law basis for its entitlement, Jewish law (*din*) would not provide for an award, whereas compromise or settlement related to Jewish law principles (*p'shara krova l'din*) could provide for an award in that case. Remedies also might be different. In a case governed by the principles of compromise or settlement related to Jewish law principles (*p'shara krova l'din*) an award could require a public apology, or other remedies not required in Jewish law (*din*). Even in a case decided under the compromise or settlement related to Jewish law principles (*p'shara krova l'din*) it is quite possible that one litigant will triumph completely and be fully vindicated. Among the factors not considered in compromise or settlement related to Jewish law principles (*p'shara krova l'din*) in a financial dispute are: levels of religiosity, relative wealth of the parties, or gender. Compromise (*p'shara*) alone shall not be subject to these restrictions. It is the policy of the Beth Din of America to encourage the parties to adjudicate matters in accordance with compromise or settlement related to Jewish law principles (*p'shara krova l'din*).

In those cases in which Jewish law mandates that compromise (*p'shara*) alone provide the basis for the resolution of the dispute, no explicit acceptance of such shall be required.

Beth Din Rules, *supra* note 5, at § 3 n.1.

65. See RABBI ABRAHAM ZVI HIRSCH EISENSTADT, *PITCHAI TESCHUVA* ch. 12 nn. 3–4 (Bar Ilan CD-ROM, 20th ed.).
66. This commitment by the BDA to honor common commercial customs mirrors the American legal system's recognition of trade customs. See, e.g., U.C.C. § 1-205(5) ("An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance."); U.C.C. § 2-314(3) ("Unless excluded or modified . . . other implied warranties may arise from course of dealing or usage of trade."); U.C.C. § 2-202 (recognizing evidence of usage of trade as an exception to the parol evidence rule).
67. *Arbitration and Mediation*, BETH DIN OF AM., <http://bethdin.org/arbitration-mediation.asp> (last visited July 31, 2012).

accordance with the relevant commercial customs might result in a legally sound award that nevertheless dissatisfied the parties involved. In all likelihood, the losing party in such a case would walk away displeased in the knowledge that it should have won, and the winning party would rejoice in its immediate success but know better than to bring further disputes before the BDA for fear of the additional disputes also being resolved incorrectly. In a short time, word-of-mouth condemnation would alienate any members of the industry not already affected by firsthand disenchantment.

The final choice-of-law accommodation built into the Rules affects both litigant satisfaction and legal enforceability. As an American arbitration forum, the BDA recognized that cases would arise in which parties had agreed to follow a legal system other than Jewish law. Accordingly, the BDA added to its Rules the following commitment to honor litigants' choice-of-law provisions to the extent possible:

In situations where the parties to a dispute explicitly adopt a "choice of law" clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish law.⁶⁸

Jewish law has a strong, indigenous law-of-the-land rule.⁶⁹ Thus, in almost all commercial settings and in some family law settings, choice-of-law provisions are exceptionally binding. Why create a religious forum that is so beholden to secular law? The obvious and immediate answer is to maximize the tribunal's potential for secular court affirmation. Simply stated, if two parties come before the BDA with a contract governed by, for example, Ohio law, a secular court will not enforce a BDA's decision that contradicts Ohio law. On a related note, if litigants appoint the BDA as their preferred arbitrator but designate a legal system other than Jewish law as governing, resolving their dispute without regard to that other system would frustrate the intentions of those litigants.

A more nuanced answer to this question deals with the divergent nature of, and interplay between, Jewish and American secular laws. On the whole, American law is relatively libertarian in nature: its system of prohibitions suggests to citizens, "[o]utside of these activities, you are free to conduct yourselves as you wish." In contrast, Jewish law provides its constituents not only with prescribed prohibitions, but also with ethical mandates. As a system, it is also more comfortable reaching into areas of individuals' lives that American law would not venture to govern.⁷⁰ Accordingly, there are many instances in which Jewish law and American law can

68. *Beth Din Rules*, *supra* note 5, at § 3(d).

69. This rule is referred to as *dina d'malkhuta dina* ("the law of the community is the law"). It is generally interpreted to mean that the secular government is entitled to promulgate laws that are binding upon its citizens and so Jewish citizens of that jurisdiction must follow those laws to the extent permitted by Jewish law. For more on this see Michael J. Broyde, *Public and Private International Law From the Perspective of Jewish Law*, in *THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS* 363–87 (Aaron Levine ed., 2010).

70. See Bambach, *supra* note 7 at 383 (describing Jewish law as an "all encompassing [system] of living, including not only what we generally think of as 'law,' but also speaking more broadly to issues of ethics, ritual practice, hygiene, and good manners").

JEWISH LAW COURTS IN AMERICA

coexist, with American law providing a legal floor and Jewish law filling in the ethical gaps. In these situations, an observant individual who commits to conduct himself in accordance with American law for practical or commercial reasons, but also in accordance with Jewish law for religious or ethical reasons, may turn to the BDA for a resolution that satisfies both regimes.

B. Skilled Arbitrators

Providing litigants access to such a fluid framework proved exceptionally beneficial for the BDA, but accomplishing such a level of flexibility required more than a willingness to acknowledge outside legal systems. Traversing the gap between Jewish law and secular law demanded the cultivation and participation of arbitrators who were American lawyers—and skilled lawyers, at that. Today, almost no panel of the BDA sits without a well-trained lawyer who is comfortable in both American and Jewish law.⁷¹ The typical panel of *dayanim* for a child custody case, for example, consists of two rabbi lawyers and one child psychologist. And even in the universe of child custody cases, which are reviewed de novo by secular courts in many states, but not allowed in many others,⁷² no BDA decision has ever been overturned.⁷³

Beyond providing a level of institutional expertise to inform BDA decisions, this dual-system fluency contributed to the perceived legitimacy of those decisions. The BDA quickly discovered that opinions that demonstrate a great deal of comfort with secular law are afforded greater deference by secular court judges. In short, the BDA's experience suggests that an arbitrator's legal training renders him or her more credible in the eyes of a secular judge. Accordingly, the Muslim community in America must produce dual-trained individuals who live effortlessly in both universes and are able to practice Sharia law in a way that inspires religious confidence and to practice American law in a way that inspires judicial confidence.

Legal training, however, is only one of many professional backgrounds necessary to cultivate a pool of skilled arbitrators. As the previous section discussed, the success of the BDA's booming commercial arbitration practice relies in large part on its willingness to honor common commercial customs where possible. Unlike secular laws, trade customs are rarely memorialized in writing and are, therefore, not readily discernible to outside observers. Accordingly, in addition to religious and legal scholars, the BDA recruited *dayanim* engaged in various trades and familiar with the

71. The most recently published partial list of BDA arbitrators names twenty-six *dayanim*. Of those individuals, twenty-one are rabbis and nine are lawyers. However, seven of the lawyer-*dayanim* are also ordained rabbis. *Partial Listing of Dayanim*, BETH DIN OF AM., <http://www.bethdin.org/Dayanim.asp> (last visited July 31, 2012).

72. *See, e.g.*, *Glauber v. Glauber*, 192 N.Y.S.2d 740, 742 (2d Dep't 1993) (finding that "[t]he court must always make its own independent review and findings" in child custody cases, despite an arbitration award addressing the issue); *see also* *Fawzy v. Fawzy*, 199 N.J. 456, 62 (2009) (finding a New Jersey constitutional right to child custody arbitration).

73. This proposition acknowledges that one BDA-issued award has been overturned by a trial court, but was restored on appeal. *In re Brisman*, 887 N.Y.S.2d 414 (Sup. Ct. Kings Cnty. 2008) (vacating an award of the BDA), *rev'd*, 895 N.Y.S.2d 482 (2d Dep't 2010) (restoring the award).

commercial practices of those fields. As a result, the BDA's panel for a construction dispute will include a Jewish contractor, the panel for a dental malpractice case will include a Jewish dentist or doctor, and so on. To ensure their own success in the commercial realm, Sharia courts will likewise need to reach into the various professions to produce religiously observant arbitrators who are well versed in the common practices of their respective trades.

III. COMMUNAL GOVERNANCE

An organized religious court system is a building block to a coherent religious society.⁷⁴ The modifications discussed above transformed the BDA from one court among the relatively disjointed network of Jewish law tribunals in America to one of the nation's pre-eminent rabbinic authorities. In the course of that transformation, the BDA came to be regarded by Jewish law followers and external organizations, alike, as a dependable and just arbitrator whose opinions are regularly upheld by secular courts. As an organization now known for its unified and consistent approach to Jewish law matters, the BDA is frequently called upon to play a larger role than the sum of its individual arbitrations. Today, the organization serves an enormous stabilizing function within the Jewish community and on behalf of that community within the larger society.

As Jewish law followers have grown familiar with the BDA's procedures and reputation, the Jewish community as a whole periodically calls upon the BDA to perform a larger moderating function. In 2007, for example, the BDA assumed a prominent role in a nationwide revision and regulation of the conversion-to-Judaism process.⁷⁵ Prior to this undertaking, conversions to Judaism had been conducted by individual rabbis on a case-by-case basis. The disorganization of that ad hoc conversion process rendered the system susceptible to inconsistency and fraud. As a result, the Jewish community turned to the BDA and the Rabbinical Council of America to address this issue. Together, these organizations standardized the conversion process and authorized only a network of recognized *batei din* to perform them. Furthermore, those preapproved courts were instructed to work closely with the BDA to ensure compliance with the new procedures. This illustration demonstrates that, in a modern nationwide religious debate, the BDA emerged to the Jewish community as the natural choice to facilitate cohesion among its many courts.

Even organizations external to the Jewish faith have come to recognize the BDA's prominence as a leading rabbinic authority. Following the September 11, 2001 attacks on the World Trade Center towers, the city of New York found itself in a quandary with respect to its Jewish community: among the suspected victims of the attacks were several observant Jews whose deaths could not be confirmed with the

74. See 1 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCE, PRINCIPLES* 1–46 (1994). The proposition contained in this sentence is the theme of the first chapter of Elon's book.

75. See *RCA and Israeli Chief Rabbinate Announce Historic Conversion Agreement*, RABBINICAL COUNCIL OF AM. (Apr. 27, 2007), <http://www.rabbis.org/news/article.cfm?id=100905>.

certainty required by Jewish law.⁷⁶ Without proper evidentiary support to confirm these individuals' whereabouts at the time of the attacks, the victims' wives would face a fate known as *iggun*—unable to divorce without the consent of their husbands and unable to remarry absent incontrovertible evidence that their husbands were among the casualties of the attacks.⁷⁷ In the months following the tragedy, the BDA worked closely with the New York Medical Examiner's Office to locate and identify fingerprints, dental records, and DNA from the wreckage, in the hopes of compiling sufficient evidence to make a definitive ruling regarding the missing. Not only did the medical examiner's office supply the BDA with daily updates by fax, but members of the BDA were also granted personal access to the office's files.⁷⁸ Even representatives of the daily newspaper *USA Today* met with members of the BDA to compare notes on the attacks.⁷⁹ In the end, the cooperation between the BDA and relevant secular organizations enabled the resolution of each case.

While the 9/11 example illustrates the courtesy afforded a trusted religious organization by the larger secular society, it should be noted that obtaining such a position requires more than the procedural modifications described above. The BDA's acceptance by secular institutions rested in part on the successful integration of its decisions into the mainstream of American life. Upon judicial review, secular judges needed to see not only the procedural fairness of the BDA's decisions, but also their rationality—even without the benefit of a Jewish-law lens. Likewise, government institutions and media outlets would not readily offer assistance to a religious organization whose positions ran contrary to broader societal interests. In short, Sharia courts can and should aspire to a similar position of communal governance, but the realization of that goal will likely require not only a procedural, but also a *substantive* review of Sharia law in America.

By implementing the above suggestions, Sharia courts will gain the respect of secular courts. Over time, judges will grow accustomed to reviewing decisions issued by Muslim arbitrators educated at Harvard and Yale, NYU and Columbia, Emory and Duke, and through the explication of Sharia law in familiar terms or “legalese,” it will gradually shed some of its foreignness. Procedural soundness and conformity to the FAA, however, will carry Sharia courts forward only so far; inevitably, the Muslim community will need to reconsider some of the more controversial tenets of Sharia law that simply run contrary to American values.

This tension is aptly illustrated by *S.D. v. M.J.R.*, a 2010 case from New Jersey in which a Muslim husband was charged with several counts of domestic violence

76. See Michael J. Broyde & Yona Reiss, *Solving a Grim Jewish Quandry After the Attacks: Avoiding Agunah Problems for 9/11 Widows*, JEWISHJOURNAL.COM (Aug. 25, 2011), http://www.jewishjournal.com/nation/article/solving_a_grim_jewish_quandry_after_the_attacks_avoiding_agunah_problems_f/.

77. See Yona Reiss, *The Resolution of the World Trade Center Agunot Cases by the Beth Din of America: A Personal Retrospective*, in *CONTENDING WITH CATASTROPHE: JEWISH PERSPECTIVES ON SEPTEMBER 11th*, 13, 14–15 (Michael J. Broyde, ed., 2011).

78. *Id.* at 22.

79. *Id.* at 21.

against his then-nineteen-year-old wife.⁸⁰ At the trial court level, a family law judge heard testimony by the couple's Imam regarding sexual relations in Sharia law.⁸¹ The Imam explained that Sharia law requires a wife to submit to her husband's sexual demands.⁸² Accordingly, despite recognizing that the husband had engaged in multiple instances of nonconsensual sexual intercourse with his wife, the judge found that the husband's adherence to Sharia law deprived him of the requisite criminal intent (*mens rea*) and acquitted him of the criminal charges.⁸³ The decision was reversed on appeal,⁸⁴ but not before it sparked a deluge of critical commentary regarding the adverseness of Sharia and American law.⁸⁵

Although *S.D. v. M.J.R.* ultimately raised questions regarding the application of foreign law in secular courts rather than the enforceability of faith-based arbitrations, the underlying inconsistency between the legal systems on some points is relevant nonetheless. Professor John Witte has examined the expansion of Sharia law throughout Western cultures.⁸⁶ Regarding the growth of the Muslim community in America and its call for religious recognition, he argues that the question is not one of religious freedom.⁸⁷ For, he notes, "[e]ven the most devout religious believer has no claim to exemptions from criminal laws against activities like polygamy, child marriage, female genital mutilation, or corporal discipline of wives, even if their particular brand of Sharia commends it or if their particular religious community commends it"⁸⁸ In short, American laws impose behavioral mandates on all citizens, regardless of faith, and to the extent that religious regimes tolerate behaviors that fall outside those mandates, the secular court system will always come down on the side of secular laws. Professor Witte posits that the American legal system will happily offer certain accommodations to the Muslim community such as "[a]llowing religious officials to officiate at weddings, testify in divorce cases, assist in the adoption of a child, facilitate the rescue of a distressed family member, and the like."⁸⁹ The line, however, is drawn at granting Sharia courts complete sovereignty over these areas.

80. 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010).

81. *Id.* at 425–27.

82. *Id.*

83. *Id.* at 427–28.

84. *Id.* at 442.

85. See, e.g., Donna Leinwand, *More States Enter Debate on Sharia Law*, USA TODAY (Dec. 9, 2010), http://www.usatoday.com/news/nation/2010-12-09-shariaban09_ST_N.htm; Maxim Lott, *Advocates of Anti-Shariah Measures Alarmed by Judge's Ruling*, FOX NEWS (Aug. 5, 2010), <http://www.foxnews.com/us/2010/08/05/advocates-anti-shariah-measures-alarmed-judges-ruling/>.

86. See John Witte, Jr., *The Future of Muslim Family Law in Western Democracies*, in *SHARIA IN THE WEST?* 279 (Rex Ahdar & Nicholas Aroney eds., 2010).

87. *Id.*

88. *Id.* at 286.

89. *Id.* at 287.

JEWISH LAW COURTS IN AMERICA

A prevailing argument in favor of Muslim legal autonomy extends along contractarian lines: in essence, it suggests that parties are free to bind themselves by any laws they wish, so long as their participation therein is secured by willing agreement.⁹⁰ Even in the otherwise-permissive realm of arbitration, this logic has limits. For one, American arbitration is limited in available remedies, as physical coercion (e.g., detention, imprisonment, etc.) is reserved exclusively to police authority in the United States.⁹¹ Thus, the argument that followers of Sharia law can willingly submit to physical punishment by a Sharia law court—which lacks the procedural due process guarantees and recognition of fundamental rights exchanged for such a fate in secular courts—is a losing one.⁹²

Followers of Sharia law could, of course, simply ignore American laws that contradict their own. To the extent that American laws forbid polygamy, for example, some might engage in private marriages that disregard that legal constraint. As Professor Witte notes, however, the trade-off is that those family units would be without “the protections, rights, and privileges available through the state’s complex laws and regulations of marriage and family, marital property and inheritance, social welfare and more.”⁹³

The more viable option for the Muslim community is, therefore, to adhere once more to the Jewish law precedent by injecting some level of adaptability into the actual substance of Sharia law. Certainly, some components of traditional Jewish law would have raised similar substantive concerns among secular critics. Women, for example, were historically excluded from serving as witnesses in Jewish proceedings.⁹⁴ But given Judaism’s diasporic history, Jewish scholars promoted a law-of-the-land rule that has since permitted the Jewish community to embrace indigenous legal systems. A comparable measure among Sharia courts would contribute immensely to their ultimate acceptance in American society.

V. CONCLUSION

The BDA’s experience of integrating a religious legal system into American culture and jurisprudence can serve as a template for the Muslim community as it endeavors to develop its own religious courts. Over the course of nearly twenty years, the BDA undertook a significant refinement process to gain the societal and judicial acceptance it sought. And while it was ultimately successful in that pursuit, the lessons gleaned from that experience can and should spare other religious communities from certain growing pains encountered along the way. From the six modifications

90. See JODY S. KRAUS, *THE LIMITS OF HOBBSIAN CONTRACTARIANISM* 4–10 (1993).

91. See Witte, *supra* note 86, at 287 (noting “only the state and no other social or private unit can hold the coercive power of the sword”).

92. See *id.*

93. *Id.*

94. See *Feminism*, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsourc/judaica/ejud_0002_0006_0_06385.html (last visited June 19, 2012).

implemented by the BDA described above, four directives can be distilled for the Muslim community.

First, Sharia courts must compose and abide by detailed rules of procedure that provide litigants with a clear indication of what they may expect from Sharia law proceedings.⁹⁵ American law rests heavily on guarantees of procedural due process, and secular courts will not feel comfortable upholding Sharia courts' decisions until they implement and standardize certain procedural safeguards. The most straightforward template for such an overhaul comes from American arbitration law. Compliance with the FAA, for example, will go far to ensure that Sharia courts gain legitimacy in the eyes of secular judges. Adopting and publishing such rules will also benefit Sharia courts with respect to litigants, for whom consistency and uniformity are required of a legal network.

Second, Sharia courts need to acknowledge that Islamic law will not be the sole governing legal system in every dispute. Even religiously observant litigants that come before Sharia courts will be subject to American laws and, in the case of commercial arbitrations, to common trade practices. Disregard for these competing standards will lead either to the Sharia courts' issuing unenforceable decisions or to commercial alienation for litigant and tribunal, alike. To a large extent, this will require Sharia courts to recognize litigants' choice-of-law agreements. In some cases, however, Sharia courts will need to limit their own jurisdiction altogether by referring certain matters to secular court.

Third, the Muslim community needs to produce scholars who can comfortably navigate two worlds. The BDA has found that dual-trained arbitrators invoke more cursory review by secular judges, who are comforted by arbitration awards written in familiar legal terminology and consistent with common law rationale. Accordingly, Sharia courts' rulings would benefit from legal authorship by Muslim lawyers trained at recognized American institutions. Not only will secular judges come to trust those arbitrators' judgment, but the process of merging foreign and secular legal thought will help to normalize Sharia law amidst judicial review. Of equal importance is the cultivation of observant arbitrators involved in the various professions. Just as navigating America's legal system requires inside knowledge by trained lawyers,

95. Of course I make no claim that Sharia law or Sharia law courts *can* actually do the same things or make the same calculations that a *Beth Din* can under Jewish law. The BDA's success is largely attributable to the malleability of Jewish law, as encompassed by the principle of *dina d'malkhuta dina*. See *supra* text accompanying note 69. However, for a first step in this direction for Sharia law, see, for example, *Being Faithful Muslims and Loyal Americans*, issued by the Fiqh Council of North America (FCNA), a group of Islamic scholars who meet several times a year to draft opinions on issues of concern to American Muslims. It states in relevant part that:

Islamic teachings require respect of the laws of the land where Muslims live as minorities, including the Constitution and the Bill of Rights, so long as there is no conflict with Muslims' obligation for obedience to God. We do not see any such conflict with the U.S. Constitution and Bill of Rights. The primacy of obedience to God is a commonly held position of many practicing Jews and Christians as well.

Muzammil Siddiqi, *Being Faithful Muslims and Loyal Americans*, THE FIQH COUNCIL OF NORTH AM., <http://www.fiqhcouncil.org/node/10> (last visited June 26, 2012).

JEWISH LAW COURTS IN AMERICA

resolving disputes among commercial litigants requires specialized insight into their respective industries. A truly competent arbitration panel—one that inspires confidence in both judges and litigants—will demonstrate mastery of the religious, secular, and commercial issues before it.

Finally, Muslim scholars will need to soften some of the substantive edges of Sharia law to make the legal system itself more compatible with the American court system and its constituents. Despite America's strong commitment to the freedom of religious practice, American courts will resolve inconsistencies arising from the practice thereof in favor of secular law. Thus, to the extent that Sharia may tolerate and encourage behaviors that fall beyond the boundaries of legal conduct in America, enforceable religious awards must reconcile the two regimes in a manner consistent with American law.

In addition to promoting judicial acceptance, this substantive review will also reposition Sharia within the larger society. Ultimately, religious tribunals serve a stabilizing function for their communities and, in turn, represent those communities to the general population. By implementing the changes proposed in this article, Sharia courts will gain legal legitimacy and secular support. Over time, these will contribute to general acceptance of Sharia courts and enable their transformation from today's fledgling tribunals to a cohesive network of Muslim legal authorities in America.

APPENDIX A

P'sak Din: Chaya Plaut v. Anshei Troy Synagogue

March 29, 2004

The Beth Din of America (the “Beth Din”), having been chosen by the parties as arbitrators in an arbitration agreement between Chaya Plaut, as plaintiff, and Anshei Troy Synagogue, as defendant (attached hereto as Exhibit A) to decide the matters described in such Arbitration Agreement, having given proper notice of the time and the place of the meeting, and having also given said matters due consideration, and having heard all parties testify as to the facts of said dispute and differences, does decide and agree as follows:

Plaintiff, Mrs. Chaya Plaut, brought this case to the Beth Din seeking \$10,600, reflecting one year of lost wages. Her claim was that notice of the termination of her part-time employment by Anshei Troy Synagogue (“the Synagogue”), communicated to her on May 27, 2003, came too late for her to obtain a replacement position for the 2003/04 school year. The Synagogue was represented at the Din Torah by Paul Katz, the Synagogue’s president, and Sam Gilder, the former treasurer.

The material facts of the case are as follows:

Pursuant to a written contract dated August 20, 2001, Mrs. Plaut was hired by the Synagogue to serve as a Talmud Torah teacher during the 2001/02 school year for 5.5 hours/week, for a total salary of \$10,500. The contract was signed by Mrs. Plaut and Rabbi Shlomo Strill, who was until recently the rabbi of the Synagogue.

Mrs. Plaut performed her duties satisfactorily and her contract was renewed orally for the 2002/03 academic year. (According to Mr. Gilder, the renewal was accompanied by a \$1,000 raise. The Beth Din is not clear as to whether the total amount paid to Mrs. Plaut in 2002/03 was the \$10,600 claimed by Mrs. Plaut or something more. This decision is rendered based on the \$10,600 figure.) Mrs. Plaut states that Rabbi Strill informed her of the contract renewal in March or April of 2002, with the financial details worked out in a telephone conversation with Mr. Sam Gilder in the early summer of 2002. According to Mrs. Plaut, Rabbi Strill expressed great satisfaction with Mrs. Plaut’s work and conveyed the sense that Mrs. Plaut would have long-term employment with the Synagogue. Mr. Gilder is unaware of any such conversation between Mrs. Plaut and Rabbi Strill, and he thought that the first conversation with Mrs. Plaut about the renewal of her contract was his early summer conversation with Mrs. Plaut. In any case, Mrs. Plaut satisfactorily performed her duties during her second year at the Synagogue, ending in June 2003.

Rabbi Strill was not called to the Beth Din by either party and was thus unavailable for consultation. It is clear that the Synagogue’s lay leaders delegated to Rabbi Strill supervision of Mrs. Plaut, and Rabbi Strill’s illness, which began during Mrs. Plaut’s first year at the Synagogue, impeded communication with both the Synagogue’s lay leadership and with Mrs. Plaut.

In early 2003, Rabbi Strill announced that he would be leaving the Synagogue. According to Mr. Katz and Mr. Gilder, in March 2003 the Synagogue's leadership developed a job description to be used in their search for a new rabbi. The job description stated a preference that the new rabbi also teach the Hebrew school classes so that the Synagogue need not pay a separate salary for a Hebrew school teacher. Neither Mr. Katz nor Mr. Gilder informed Mrs. Plaut either that Rabbi Strill had resigned or that they hoped the new rabbi would take over Mrs. Plaut's position, leaving her with no role at the Synagogue. Mr. Katz and Mr. Gilder say that they assumed Rabbi Strill had informed Mrs. Plaut directly of his resignation, which Mrs. Plaut denies.

In late May 2003, the Synagogue reached oral agreement with a new rabbi who agreed to teach the Hebrew school classes. On May 27, 2003, Mr. Gilder telephoned Mrs. Plaut to say that she would not be rehired for the 2003/2004 school year. Mrs. Plaut states that she immediately began searching for a new position; however, despite a diligent search, she was unable to find an alternative position for 2003/04 because religious school positions are generally filled long before June. The Synagogue, while not expert in the hiring cycles for schools, believes that Mrs. Plaut was given adequate time to find a new position.

Mrs. Plaut now seeks full payment of her salary from the Synagogue, as if she had taught there throughout 2003/04.

Findings and Order

1. All parties acted in good faith in the events that gave rise to this Din Torah. Mrs. Plaut's termination was not for cause, but rather due to the Synagogue's decision, for financial reasons, to consolidate the rabbi and teacher positions.
2. Given the academic calendar and hiring schedules of most religious schools, we find that Mrs. Plaut was not given sufficiently early notice to enable her to find a replacement position for 2003/04. While positions do open at times over the summer, this is the exception. In fact, Mrs. Plaut states that she searched diligently for a new position (this is not disputed by the Synagogue) and was unable to find new employment. As an experienced educator with part-time positions in other religious schools, Mrs. Plaut would likely have found an alternative position if the Synagogue had informed her of the possible termination of her position when the new rabbi's job description was circulated.
3. However, we find that the Synagogue is not solely responsible for Mrs. Plaut's being without a replacement position for 2003/04. While Mrs. Plaut believed that her job at the Synagogue was secure, she had only two years of tenure at the Synagogue, a year-to-year contract (the second year of which was oral, rather than

written), and an ill/unavailable supervisor. In this context, she should have proactively sought to clarify her employment status for the following year earlier in 2003. This is particularly so since she states that the renewal of her contract for 2002/03 took place in March/April of 2002.

4. An employee who has been hired and subsequently terminated without adequate notice is not entitled to recover full salary. Instead the standard applied is *k'po'el batel*, which essentially means the amount that most employees hired for a job would accept in return for canceling the job and enabling them to remain at leisure. While there are various opinions as to the calculation of *po'el batel*, we apply here the opinion of the Taz (see Shulkhan Arukh, Chosen Mishpat, 333) that the standard translates into 50% of salary.
5. As applied in this case, *k'po'el batel* equals \$5,300, half of Mrs. Plaut's full salary of \$10,600. Since, as explained in paragraph 3, we find that Mrs. Plaut share responsibility for her being without a replacement position, we rule that the *k'po'el batel* payment should be reduced to \$4,000.

It is thus ordered that the Synagogue pay Mrs. Plaut \$4,000 in satisfaction of her claim.

Both parties are enjoined from making any public disclosure of this dispute or decision.

The parties shall not speak disparagingly of each other.

Penalties for the violation of any of these clauses shall be set by the Beth Din of America, in accordance with the rules and the Arbitration Agreement.

Any request for modification of this award by the arbitration panel shall be in accordance with the rules and procedures of the Beth Din of America and the Arbitration Agreement of the parties.

Any provision of this decision may be modified with the consent of both parties. All of the provisions of this order shall take effect immediately.

In Witness Whereof, we hereby sign and affirm this Order as of the date written above.

Rabbi AA, Esq.
Dayan

Rabbi BB
Dayan

CC, Esq.
Dayan

APPENDIX B

Anonymous v. Anonymous
August 30, 2010 – 20 Elul, 5770

This matter was heard by a single arbitrator (*dayan*) who issued a final opinion on May 24, 2010 (11 Sivan, 5770). The plaintiff has submitted requests for clarification and modification under Section 31 (a) and (b) of the Rules of the Beth Din of America which the defendant responded to; much evidence was submitted on appeal by both sides in the course of many submissions.

The Av Beth Din designated the undersigned on August 16, 2010 (6 Elul, 5770), in accordance with Section 1(b) of the Rules of the Beth Din, to resolve the request for modification and clarification.

It has been the practice of the Beth Din of America not to deem applications for review under Section 31 as completed and ripe for review until the original motion and all of the evidence related to it, including claims, counter-claims and subsequent responses have been submitted to the member of the Beth Din (*dayan*) authorized to resolve this matter. Thus, the practice of the Beth Din is to grant extensions of time for such reviews as permitted by the Rules and Procedures of the Beth Din of America in Section 38. Upon review by the Av Beth Din's designee, an extension was deemed to be the appropriate course of action in this case and such an extension was thus granted.

A procedural error occurred in this case. On March 18, 2010 the Beth Din of America indicated that the record in the matter will stay open for further written submissions until March 25, 2010. However, in error, the record was closed to further submissions on March 23, 2010, two days early and such was communicated to the parties, one of whom alleges that he was about to make a submission, which was precluded from the record due to this error.

Due to this procedural mistake, the original opinion is withdrawn and the record reopened for further review of the written record by the arbitrator (*dayan*). Thus, plaintiff's submission of March 18 shall be included in this record, and defendant shall be authorized to respond to this submission within a reasonable period of time as determined by the Beth Din of America. Plaintiff shall then be authorized to respond to this submission and Defendant shall be authorized to reply to that submission in a schedule determined by the Beth Din of America. Should the Beth Din of America determine that further hearings or briefings are needed, the Beth Din shall schedule such as it feels is proper.

The original opinion is thus vacated due to this procedural error and the matter is remanded to the original *dayan* for further consideration consistent with this decision. No other matter submitted in the plaintiff's requests for clarification and modification under Section 31 (a) and (b) of the Rules of the Beth Din of America or the defendant's response are addressed in this opinion, as there is no decision to clarify or modify.

All parties, of course, maintain their right to submit requests for clarification and modification under Section 31 (a) and (b) of the Rules of the Beth Din of America

when such an opinion is issued after the submissions by the parties and the issuance of a final opinion by the arbitrator (*dayan*) in this matter.

So ordered on August 30, 2010, corresponding to 20 Elul, 5770.

Rabbi ABC
Designee of the Av Beth Din