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Religious Courts in Secular Jurisdictions

HOW JEWISH AND ISLAMIC COURTS ADAPT TO SOCIETAL AND LEGAL NORMS

Rabea Benhalim[†]

INTRODUCTION

In the post-9/11 era, public fear about the potential imposition of religious law on secular countries continues to rise. Presumptions about what comprises religious law, and its incompatibility with secular laws, abound. For some individuals, the fear of Islamic law has led to anti-Sharia legislation¹ and heated debates about “creeping Sharia.”² For others, the fear is that Judaism, Christianity, or religion generally will carry too much weight in secular activities.³ In light of all these concerns, even those who are broadly tolerant of religious practice might be surprised to discover that religious laws, and Islamic law in particular, are adjudicated and sometimes enforced in the United States, England, and Israel. The enforcement of religious

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¹ “Since 2010, 201 anti-Sharia law bills have been introduced in 43 states. In 2017 alone, 14 states introduced an anti-Sharia law bill, with Texas and Arkansas enacting the legislation.” Swathi Shanmugasundaram, *Anti-Sharia Law Bills in the United States*, S. POVERTY L. CTR. (Feb. 5, 2018), <https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states> [<https://perma.cc/7Y22-JE4D>].

² Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431, 431 (2014); *see also* CREEPING SHARIA, <https://creepingsharia.wordpress.com> [<https://perma.cc/R2VY-KPV7>].

³ *See, e.g.*, Laurie Goodstein, *Some Worry About Judicial Nominee’s Ties to a Religious Group*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/us/amy-coney-barrett-nominee-religion.html> [<https://perma.cc/6TM4-RFKY>] (discussing controversial Senate comments about whether now-Judge Amy Barrett would be able to separate her judging from her Catholic faith).

laws may seem anathema to the very principles on which those countries exist.

Missing from the popular discourse is any recognition of the multiple and varied ways in which religious courts, historically and today, operate in secular jurisdictions. Israel, for example, has rendered Jewish and Islamic law enforceable via state courts since the country's inception.⁴ Likewise, the United States and England each have longstanding religious courts whose decisions are enforceable via the countries' respective arbitration acts.⁵ Yet even in academia, the study of religious courts in secular contexts is narrow and limited. The academic analysis that does exist is rarely comparative—typically examining religious courts only within a particular subject matter or jurisdiction. Moreover, normatively, this work most often focuses on the single question of whether secular governments should accommodate religious arbitration.⁶

A more systematic approach is needed. Rather than examine how secular governments accommodate religious judicial bodies (RJBs), as other scholars have done,⁷ this article seeks to understand the ways in which RJBs conform to their secular environments. This article's approach encompasses the range of RJBs operating as informal mediation bodies, arbitral bodies, and state courts, both in contexts where the population served represents a majority of the population and in contexts where the population served represents a minority of the population. By considering together entities that have elsewhere been considered separately, this article aims to capture and exemplify their common ground and relevant differences.

⁴ See Moussa Abou Ramadan, *Notes on the Anomaly of the Shari'a Field in Israel*, 15 ISLAMIC L. & SOC'Y 84, 85–88 (2008); see also Zvi Triger, *Freedom from Religion in Israel: Civil Marriages and Cohabitation of Jews Enter the Rabbinical Courts*, 27 ISR. STUD. REV. 1, 2–3 (2012).

⁵ See MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST 7–10, 177–79 (2017).

⁶ See generally BROYDE, *supra* note 5; Michael J. Broyde et al., *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience*, 30 HARV. J. RACIAL & ETHNIC JUST. 33 (2014); Bilal M. Choksi, Comment, *Religious Arbitration in Ontario—Making the Case Based on the British Example of the Muslim Arbitration Tribunal*, 33 U. PA. J. INT'L L. 791 (2012); Almas Khan, *The Interaction Between Sharia and International Law in Arbitration*, 6 CHI. J. INT'L L. 791 (2006); Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573 (2008); Erin Sisson, *The Future of Sharia Law in American Arbitration*, 48 VAND. J. TRANSNAT'L L. 891 (2015); Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501 (2012); Norman Doe, *Britain's Religious Courts Symposium*, 13 ECCLESIASTICAL L.J. 354 (2011).

⁷ See generally Russell Sandberg et al., *Britain's Religious Tribunals: 'Joint Governance' in Practice*, 33 OXFORD J. LEGAL STUD. 263 (2013) (examining the ways in which Great Britain accommodates religious tribunals).

What emerges from this analysis is that, contrary to the concerns of the public discourse and past scholarship, religious courts that serve religious minorities tend to adapt to their secular surrounding, rather than the other way around. They accommodate, by necessity, both the desires of litigants who, living in democratic societies, have come to expect RJBs to preserve their secular civil rights, and the pressures of the secular courts on which they rely to enforce their decisions. Although the general public and politics often treat RJBs as alien to their secular environments,⁸ this article demonstrates that RJBs serving minority populations respond to pressures from the legal environment in which they operate.⁹ RJBs may strive to apply religious law by relying purely on original texts and traditional legal scholarship, but in practice, RJBs often accommodate both substantive and procedural secular norms.

At the theoretical level, religious judicial accommodation bears some resemblance to two other strands of thought in public law and administration. From one standpoint, RJBs are engaged in a sort of dialogue with popular culture that echoes the thinking of popular constitutionalism.¹⁰ Some scholars writing in this vein have argued that Supreme Court decisions “on a politically sensitive issue” are properly viewed “as generating a dialogue with the political branches of government and the people.”¹¹ Likewise, controversial RJB decisions, especially decisions that affect women’s rights, may generate a dialogue with the religious laity that the RJBs serve and the civil courts that enforce their decisions.

The adaptations of RJBs also resonate with literature that depicts institutions in survival mode. Indeed, religious courts vary from traditional Article III courts in one important way: religious courts have a plausible fear of losing business. To be sure, government-run courts may fear backlash that can

⁸ See, e.g., Lorraine E. Weinrib, *Ontario’s Sharia Law Debate: Law and Politics under the Charter*, in LAW AND RELIGIOUS PLURALISM IN CANADA 239, 250 (Richard Moon ed., 2008) (quoting the premier of Ontario, Dalton McGuinty, saying: “[t]here will be no sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians.”).

⁹ See discussion *infra* Section II.D.

¹⁰ See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5–6 (2004); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2598 (2003).

¹¹ Daan Braveman, *On Law and Democratic Development: Popular Constitutionalism and Judicial Supremacy*, 33 SYRACUSE J. INT’L L. & COM. 41, 47–48 (2005).

erode their credibility,¹² but religious courts might altogether cease to exist if litigants pivot to state-run courts. This suggests that RJBs' practice of accommodation is therefore rooted in a sense of survival—the sort of “organizational maintenance” that public administration scholar James Wilson has described.¹³

This article develops these claims by examining four RJBs—two Jewish and two Islamic: (1) Jewish arbitral bodies in the United States; (2) Islamic arbitral bodies in England; (3) the Rabbinical courts of Israel; and (4) the Sharia courts of Israel. Regarding the design of the study, the selection of these courts hinges on a number of factors. First, both Islamic and Jewish RJBs share similar legal structures, historical experiences, and positions within the countries in which they operate.¹⁴ Second, they all operate in common law jurisdictions. Third, the countries in which they are located all have well-established Jewish communities and rabbinical courts (*batei din*, *sing. beth din*). Fourth, these jurisdictions have sizeable Muslim populations with Islam as the largest minority religion in England and Israel, and the second largest minority religion in the United States. Fifth, these RJBs are well-established and actively issuing rulings. Finally, these RJBs all primarily deal with family law cases and face similar controversies regarding the impact of their application of religious family law on women's rights. They all also deal with commercial matters, in which they face limited to no controversy.

Additionally, instead of focusing only on jurisdictions wherein RJBs operate via arbitration or mediation,¹⁵ this article aims to address RJBs within the full spectrum of enforceability in

¹² See MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE, xi (2012).

¹³ JAMES Q. WILSON, POLITICAL ORGANIZATIONS 30–51 (1973).

¹⁴ While Christian alternative dispute resolution (ADR) exists in the United States, this article almost exclusively focuses on Muslim and Jewish judicial bodies and excludes Christian judicial bodies. The reason for this is two-fold. First, the motivations for Christians to engage in Christian ADR are “based on teachings of the Bible . . . which encourage Christians to settle disputes in a peaceful manner,” and not as a means of applying religious law in lieu of secular law. BROYDE, *supra* note 5, at 17 (citations omitted). Second, within Christianity the relationship to religious law is distinctly different than within Judaism and Islam. Unlike Judaism and Islam, “there seem to be vast areas of secular law that have no direct Christian counterpart.” *Id.* at 18. Therefore, the motivations for selecting Christian ADR are best understood as selecting a particular forum rather than specific law. *Id.* Furthermore, within the Catholic Christian context, while canon law is “one of the most ancient and robust legal systems in the world,” it is mostly used to resolve “church governance issues.” *Id.* at 18–19. Due to accessibility and common practice, Catholic laity rarely use canon law and “Catholic Church ecclesiastical law has no private ADR mechanism to resolve disputes between private parties.” *Id.* at 19.

¹⁵ See, e.g., Jennifer A. Selby & Anna C. Korteweg, *Introduction: Situating the Sharia Debate in Ontario*, in DEBATING SHARIA: ISLAM, GENDER POLITICS, AND FAMILY LAW ARBITRATION 12 (Anna C. Korteweg & Jennifer A. Selby eds., 2012).

which they operate. Prior works have only comparatively examined religious arbitral bodies that serve minority populations and addressed whether secular legal systems should accommodate religious minorities. This article includes the Rabbinical courts of Israel as a means of examining differences in RJB behavior when serving a majority population versus a minority population. Review of this full spectrum will help illustrate the conclusion that the secular environment—including the enforceability and exclusivity of subject matter jurisdiction—in which RJBs operate influences their procedure and judgments.

Part I of this article offers a primer on the jurisdiction and origins of RJBs in Israel, the United States, and England. It then synthesizes prior scholarship on RJBs and notes the public controversies that prompted that work. Part II explores the environmental milieu of historical, political, legal, and social factors in which these judicial bodies operate. Part III examines—through case law, rules of procedure, and anecdotal case studies—the environmental impact on the degree to which RJBs accommodate secular procedural and substantive norms. It concludes with a broader view of the implications of this study and suggests directions that future research might take.

I. UNDERSTANDING RELIGIOUS JUDICIAL BODIES

Understanding why and how RJBs accommodate secular norms requires basic background knowledge of the origins, jurisdiction, and guiding laws of RJBs, as well as knowledge of the controversies and scholarship RJBs have sparked. The majority of the existing literature focuses on whether secular, democratic nations should continue to foster legal pluralism that includes religious judicial options.

Israel, the United States, and England all have long histories of promoting legal pluralism that includes religious judicial options. The Israeli Rabbinical and Sharia courts have operated since the founding of the state, and indeed, even pre-date its creation, originating in the Ottoman Empire.¹⁶ Jewish RJBs in the United States began with pre-World War I *Kehillah* tribunals and have continued to develop into the robust arbitration bodies that are active today.¹⁷ Islamic RJBs in the United States remain in their infancy. Within England, the London *Beth Din* dates back to the early 1700s and remains

¹⁶ See Ramadan, *supra* note 4, at 85–88; see also Triger, *supra* note 4, at 2–3.

¹⁷ See Walter, *supra* note 6, at 514.

active today.¹⁸ England has also witnessed the development of British Islamic RJBs with the growth of England's Muslim population.¹⁹ Jews and Muslims continue to seek alternatives to the civil judicial system in order to resolve disputes according to their respective religious laws.²⁰ The roots these judicial bodies have in their respective environments and the depth of these roots are key factors in understanding how RJBs operate within the larger judicial system and how it affects them.

A. *Primer on RJBs*

Jewish arbitration bodies in the United States, Islamic arbitration bodies in England, the Sharia courts of Israel, and the Rabbinical courts of Israel represent the spectrum of the RJBs that exist in secular contexts. The Rabbinical and Sharia courts of Israel occupy one end of the spectrum. These state-run courts hold exclusive jurisdiction in many areas of family law.²¹ Islamic RJBs in England occupy the other end of the spectrum. Due to limitations within English arbitration law, these religious bodies tend to operate as informal mediation panels with some enforceable arbitration for commercial matters.²² Jewish RJBs in the United States fall in the middle of this spectrum with more robust RJBs that operate both as informal mediation and, due to flexibility within American arbitration law, more often as formal, enforceable arbitration. This spectrum is best understood in the context of the historical origin, jurisdiction, and guiding laws of each RJB.

This article will use the Israeli Rabbinical courts as the sole case study of a religious court in a secular society that serves the majority of the population. All the other courts examined serve a minority population in their respective countries. Israel's Sharia courts will be the sole example of a minority court that enjoys exclusive jurisdiction in some matters. The other two case studies, Islamic RJBs in England and Jewish RJBs the United States, both differ from Israel's religious courts in that they operate independently of the state via arbitration. In Israel, the Sharia and Rabbinical courts enjoy exclusive jurisdiction in

¹⁸ *About the London Beth Din*, THEUS, <https://www.theus.org.uk/article/about-london-beth-din> [<https://perma.cc/23ZY-87JH>].

¹⁹ See BROYDE, *supra* note 5, at 177–78.

²⁰ See Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L.J. 633, 635 (2004) (describing the “Talmudic ban on Jews voluntarily presenting their cases to courts governed by idolatrous people[.]”).

²¹ See Triger, *supra* note 4, at 6.

²² See Broyde et al., *supra* note 6, at 36–37.

some matters of family law.²³ Conversely, in the United States and England, litigants go before these RJBs only when they have elected to use religious arbitration/mediation because there is no jurisdictional exclusivity to compel them otherwise.

1. The Jewish and Islamic RJBs in Israel

The Rabbinical courts and Sharia courts in Israel share the historical legacy of the Ottoman Empire, a fact which explains their contemporary relationship to the state. Under the Ottoman Empire, non-Muslim religious communities were granted significant autonomy, including their own independent legal systems.²⁴ The legal independence of minority religious communities is known as the *Millet* System, wherein minority courts operated independently of the state-operated Sharia courts.²⁵ With the creation of the State of Israel, aspects of the *Millet* System, such as the concept of separate religious courts for the different religious communities, were maintained.²⁶

Today, the Rabbinical and Sharia courts of Israel enjoy exclusive jurisdiction in some areas of personal status law and concurrent jurisdiction with civil courts in others.²⁷ This jurisdictional focus on family law also reflects the influence of the late-Ottoman Empire. The historical legacy reaches into the present and extends beyond the mere existence of religious courts into the very laws they enforce.

With present-day Israeli Sharia courts, the following laws are derived from Ottoman codes: the *Majalla* (1876), the Ottoman Law of Family Rights (OLFR) (1917), and the Law of Procedure for Sharia Courts (1917). Ido Shahar explains why Ottoman law remains the law for Muslims in Israel today:

Since the Israeli legislature has generally refrained from intervening in the material religious laws . . . and since there is no Council of Muslim Jurists (*majlis ifta'*) in Israel, nor any other legitimate Muslim body of legislation, the Ottoman codes have remained in force in shari'a courts until this very day.²⁸

While these codes remain in place, they have been limited via civil family laws. The focus of these civil laws is the promotion

²³ See Triger, *supra* note 4, at 6.

²⁴ IZHAK ENGLAND, RELIGIOUS LAW IN THE ISRAEL LEGAL SYSTEM 13 (1975).

²⁵ *Id.*

²⁶ See Aharon Layish, *Adaptation of a Jurists' Law to Modern Times in an Alien Environment: The Case of the Shari'a in Israel*, 46 DIE WELT DES ISLAMIS 168, 170 n.11 (2006).

²⁷ See Ramadan, *supra* note 4, at 99–100.

²⁸ IDO SHAHAR, LEGAL PLURALISM IN THE HOLY CITY: COMPETING COURTS, FORUM SHOPPING, AND INSTITUTIONAL DYNAMICS IN JERUSALEM 34 (2016).

of gender equality. While the laws apply to civil and religious courts, the legislature did not intend for them “to affect the jurisdiction of the religious courts.”²⁹

Until 2001, the Sharia courts in Israel enjoyed the broadest jurisdiction of any of the religious courts.³⁰ The Sharia courts “were accorded exclusive jurisdiction in *all* matters of personal status . . . while the other courts were accorded exclusive jurisdiction in *some* matters, and concurrent jurisdiction in others.”³¹ In 2001, however, the Knesset³² granted civil family courts “concurrent jurisdiction over Muslim litigants, similar to the jurisdiction they had already with regard to litigants belonging to other religious communities.”³³

Surprisingly, the Rabbinical courts have had more limited jurisdiction for much of Israeli history. This first limitation on the Rabbinical courts’ jurisdiction originated prior to the creation of the State of Israel, during the Mandate period.³⁴ Under the Ottoman Empire, the Rabbinical courts “had exclusive jurisdiction over all matters of personal jurisdiction within the Jewish community.”³⁵ The British Mandatory Authority limited the Rabbinical courts’ exclusive jurisdiction “to matters of divorce, alimony, and the confirmation of wills” and allowed for concurrent jurisdiction with civil courts for other matters of personal status, including “maintenance, guardianship, legitimation, and adoption of minors, succession, incompetency, etc.”³⁶

In the 1950s, the Knesset “passed a series of laws which modified the jurisdiction, structure, and even some norms of the Rabbinical Courts,” such that they only possess exclusive jurisdiction in marriage and divorce and additionally have concurrent jurisdiction in the confirmation of wills.³⁷ During this period, Rabbinical court judges “became state officials akin to the judges of the civil courts and with equivalent salaries.”³⁸

Despite shifts in their exclusive and concurrent jurisdiction, the Rabbinical courts have maintained exclusive control over the interpretation of the Jewish law applied in their courtrooms. Although Conservative, Reform, and Liberal Judaism exist in Israel, the Rabbinical courts exclusively apply

²⁹ *Id.*

³⁰ *Id.* at 37.

³¹ *Id.* (emphasis in original).

³² Ramadan, *supra* note 4, at 87 (the Knesset is the name for Israel’s parliament).

³³ SHAHAR, *supra* note 28, at 37 n.24.

³⁴ MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 52 (1994).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 52–53.

³⁸ *Id.* at 53.

Orthodox interpretations of Jewish law.³⁹ The preservation of Orthodox Judaism in the courts predates the creation of the state from an agreement, which “set the parameters of what is known in Israel today as the religious status quo.”⁴⁰ Under the “status quo agreement,” the Rabbinical courts maintain jurisdiction over matters of personal status for all Jews, regardless of their individual adherence to Judaism.⁴¹

2. The Islamic RJBs in England

Islamic RJBs in England emerged out of a meeting in 1982 of Islamic scholars in Birmingham.⁴² Their intention had been to create a “new Britain-wide shari‘a council” that would address “a wide range of religious issues, from banking and mortgages to standards for halal food.”⁴³ One founding scholar, Suhaib Hasan, later reflected that:

We intended that the council provide decisions for the Muslim community on any and all matters, but pretty soon it became clear to us that we were spending all our time giving women divorces. This was not what we set out to do, but there was a vacuum in the community, and we filled it.⁴⁴

Because of issues regarding women’s rights, these RJBs have become controversial in England. The press⁴⁵ and politicians⁴⁶ have often mischaracterized the jurisdiction of Islamic RJBs in England as allowing for “legally binding” Islamic Sharia courts for all matters. In reality, under the Arbitration Act of 1996, only some religious disputes of a commercial nature “may be resolved through binding arbitration” under the Act.⁴⁷ Binding

³⁹ See *id.* at 51.

⁴⁰ See *id.*

⁴¹ *Id.*

⁴² JOHN R. BOWEN, ON BRITISH ISLAM: RELIGION, LAW, AND EVERYDAY PRACTICE IN SHARI‘A COUNCILS 47 (2016).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See John Bingham, *Sharia Courts ‘as Consensual as Rape,’ House of Lords Told*, TELEGRAPH (Oct. 20, 2012), <http://www.telegraph.co.uk/news/religion/9621319/Sharia-courts-as-consensual-as-rape-House-of-Lords-told.html> [<https://perma.cc/DN8H-M447>]; Matthew Hickey, *Islamic Sharia Courts in Britain are now ‘Legally Binding’*, DAILY MAIL (Sept. 15, 2008), <http://www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html> [<https://perma.cc/Q5KQ-W2PJ>].

⁴⁶ See Frank Cranmer, *Sharia law, the Arbitration Act 1996 and the Arbitration and Mediation Services (Equality) Bill*, LAW & RELIGION UK (Oct. 24, 2012), <http://www.lawandreligionuk.com/2012/10/24/sharia-law-the-arbitration-act-1996-and-the-arbitration-and-mediation-services-equality-bill> [<https://perma.cc/GJX9-AWHC>].

⁴⁷ BOWEN, *supra* note 42, at 155; Arbitration Act of 1996, c. 23 (UK), <http://www.legislation.gov.uk/ukpga/1996/23/contents> [<https://perma.cc/R4RQ-GA6P>].

enforceability requires that a “proper contract is drawn up in the presence of a lawyer and freely agreed to by the parties.”⁴⁸

Similar to the situation in the United States, the Arbitration Act “limits the conditions under which either party may appeal,” such that “appeals are allowed on grounds that the procedures followed were unfair or misleading.”⁴⁹ Also like the United States, the Act does not prohibit “a religious body from supervising such an arbitration procedure . . . as long as proper contractual procedures are followed.”⁵⁰

While the Arbitration Act clearly allows for religious arbitration of commercial matters, it is less clear regarding family law. The act “prohibits arbitration of all except civil law matters. This excludes all family law as well as criminal disputes.”⁵¹ Prior to 2012, divorced couples were prevented “from submitting financial matters to binding arbitration because doing so would ‘fetter’ the court.”⁵²

Shifts to the law in 2012 now indicate that judges may rule that “the arbitration of financial and property disputes for divorcing couples” is permitted under the act.⁵³ A 2012 proposal from the Institute of Family Law Arbitrators (IFLA) has been “met with approval from some key judges.”⁵⁴ The proposal might allow arbitration of some family law matters within religious courts (in the form of financial and property disputes), although the proposal “stipulates that the arbitrator may only decide the dispute in accord with the law of England and Wales, that is, not elements of Islamic law, Jewish law, or foreign law.”⁵⁵

As a result, disputes before Islamic RJBs in England most often take the form of mediation or non-binding arbitration, as the majority of disputes before it are divorce cases.⁵⁶ The most prominent of these courts is the Muslim Arbitration Tribunal (MAT), which “provides a network of relatively formal and transparent arbitral tribunals for British Muslims.”⁵⁷ Other

⁴⁸ BOWEN, *supra* note 42, at 155.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Sisson, *supra* note 6, at 892–93.

⁵² Matrimonial Causes Act of 1973, c. 18 (UK), <http://www.legislation.gov.uk/ukpga/1973/18> [<https://perma.cc/D86Q-WF7S>].

⁵³ *Id.*

⁵⁴ BOWEN, *supra* note 42, at 177.

⁵⁵ *Id.*

⁵⁶ See *Services: How Does the Islamic Sharia Council Work?*, ISLAMIC SHARIA COUNCIL, <http://www.islamic-sharia.org/services> [<https://perma.cc/YJW5-XTKY>] (“80% of all letters received by the Council are related to matrimonial problems faced by Muslims in the UK. The remaining are related to people asking for Islamic injunctions (*fatawa*) pertaining to their daily lives. Matters of dispute amongst Muslim groups have been also referred to the Council for resolution.”).

⁵⁷ BROYDE, *supra* note 5, at 187.

courts, such as the Islamic Sharia Council (ISC)⁵⁸ and the Muslim Law Sharia Council, “operate outside the British arbitration framework” and issue unenforceable decisions.⁵⁹

The MAT differentiates itself from the sharia councils by, in addition to marital mediation, also offering commercial arbitration. It has focused its efforts on “offer[ing] the Muslim community a real and true opportunity to settle disputes in accordance with Islamic Sacred Law with the knowledge that the outcome as determined by MAT will be binding and enforceable.”⁶⁰ “The . . . MAT was established in 2007 to provide British Muslims with a more effective alternative for resolving disputes in accordance with Islamic law”⁶¹ Due to the MAT’s popularity and focus on enforceability, it serves as a case study in understanding how and why Islamic RJBs “settle disputes in accordance with Islamic Sacred Law” in such a way that is also enforceable under the Arbitration Act of 1996.⁶²

3. The Jewish RJBs in the United States

The legal situation of religious courts in the United States is similarly situated to those in England with a few important differences. Arbitration existed during America’s colonial period and was widely used by Christian communities.⁶³ In the post-Revolutionary era, religious arbitration lost its general popularity among Christians with a number of notable exceptions within certain religious communities, including Utopian and Mormon communities.⁶⁴ The American Jewish community is perhaps the most well-known religious community in the United States to utilize religious arbitration.⁶⁵

One of the foremost RJBs in the United States is the Beth Din of America (BDA). It was developed in 1960 “to provide a more effective adjudicative forum for Jews committed to living in

⁵⁸ *See About Us*, ISLAMIC SHARIA COUNCIL, <http://www.islamic-sharia.org/aboutus/> [<https://perma.cc/C4CX-V85G>] (“The Islamic Sharia Council was formed to solve the matrimonial problems of Muslims living in the United Kingdom in the light of Islamic family law. The council comprises members from all of the major schools of Islamic legal thought (*mad’hab*) and is widely accepted as an authoritative body with regards to Islamic law.”).

⁵⁹ BROYDE, *supra* note 5, at 187. These courts have doctrinal differences rooted in their practitioners’ adherence to and training in particular Islamic law schools of thought. *See id.* at 187–88. Despite their differences, they typically accept “the other’s judgments to be sound.” BOWEN, *supra* note 42, at 85.

⁶⁰ *About Us: Why MAT?*, MUSLIM ARB. TRIBUNAL, <http://www.matribunal.com/why-MAT.php> [<https://perma.cc/N6C7-WZ7Y>].

⁶¹ BROYDE, *supra* note 5, at 177.

⁶² *About Us: Why MAT?*, *supra* note 60.

⁶³ Walter, *supra* note 6, at 510–11.

⁶⁴ *Id.* at 512–13.

⁶⁵ *See* Broyde et al., *supra* note 6, at 36.

accordance with *halakha* [Jewish law] in a secular American legal and social context.”⁶⁶ It has gone through several iterations and in its current iteration, “provides a sprawling network of Jewish law courts that function as fully legal, *halakha*-compliant arbitration panels” that offer observant Jewish litigants access to a religious law-compliant adjudicatory forum marked by the characteristic expedience and affordability of arbitration.⁶⁷

The BDA has achieved this via the adoption of “a host of prudent measures designed to improve the transparency, consistency, equity, and professionalism of its arbitral process,” and in doing so, “has gained widespread acceptance among America’s secular courts, which are comfortable enforcing its arbitral decisions, and which to date have never overturned a BDA-issued arbitration award.”⁶⁸ While the BDA handles many marital matters, it also arbitrates in commercial matters.⁶⁹ Due to its well-known success, the MAT modeled itself on the BDA.⁷⁰

The BDA utilizes the Federal Arbitration Act (FAA) to enforce its decisions.⁷¹ U.S. arbitration law is “strongly grounded in contract theories” and courts generally hold that “[p]arties’ decisions to arbitrate private disputes should be upheld in order to promote and respect the contractual autonomy and freedom of private parties to order their private affairs in whatever way seems best to them.”⁷² As a result, sophisticated religious arbitration has developed for both commercial and marital matters.

The FAA does not have the same limitations on family law arbitration as the United Kingdom’s Arbitration Act of 1996.⁷³ While divorce must go through the civil courts, parties may agree via contract to arbitrate aspects of their divorce (although some limitations exist in state law).⁷⁴ Unlike England, in many instances, parties may arbitrate such matters as property

⁶⁶ BROYDE, *supra* note 5, at 138 (emphasis in original).

⁶⁷ *Id.* (emphasis in original).

⁶⁸ *Id.*

⁶⁹ See Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & RELIGION 379, 394 n.65 (2009).

⁷⁰ BROYDE, *supra* note 5, at 173.

⁷¹ See Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006); Amy S. Fancher, *Policies, Frameworks, and Concerns Regarding Shari’a Tribunals in the United States—Are They Kosher?*, 24 REGENT U.L. REV. 459, 473–77 (2012).

⁷² BROYDE, *supra* note 5, at 95–96.

⁷³ Arbitration Act of 1996, c. 23 (UK), <http://www.legislation.gov.uk/ukpga/1996/23/contents> [<https://perma.cc/R4RQ-GA6P>].

⁷⁴ BROYDE, *supra* note 5, at 132 (citing AM. JUR. 2D DIVORCE & SEPARATION § 665 (2016)) (discussing how some states maintain exclusive control over some areas of family law, including child support and custody, despite contractual agreements to arbitrate).

distribution, alimony, child support, and custody agreements.⁷⁵ Like the MAT, it deals with divorce and commercial cases.⁷⁶

Due to political and cultural realities regarding Islamic law in American society, Islamic binding arbitration has yet to develop in the United States as it has in England. Some non-binding mediation and arbitration has developed in the United States but remains limited to serving the North Texas Muslim community.⁷⁷ While the Jewish and Muslim communities in the United States share similar characteristics in terms of size and the role of religious law in their faiths, Jewish courts are much better established.⁷⁸ Therefore, the BDA is used as a case study for understanding how and why Jewish courts in the United States accommodate secular justice norms.

B. Past Controversies

Understanding why RJBs make adaptations and accommodations in secular contexts challenges the alarm and assumptions about Islamic law raised by politicians and the general populace. A series of controversies in Canada and the United Kingdom in the last decade has prompted the majority of the scholarship on RJBs. These controversies reflect rising tensions around the question of the role of religious law in secular countries. Such alarm flared following proposals to accommodate religious arbitration in Canada and the U.K.⁷⁹ The general perception of RJBs, especially Islamic courts, exhibits an understanding of religious law that is antiquated at best and dangerous at worst. Critics of RJBs often focus on Islamic law and reduce it to the subset of criminal laws that detail corporal punishment (*hudud* laws).⁸⁰ The prevailing assumption about Islamic law is that it “is a uniform thing, a fixed, unchangeable

⁷⁵ *Id.* at 131–32.

⁷⁶ *Id.* at 138.

⁷⁷ See *Our Mission*, ISLAMIC TRIBUNAL, <https://www.islamictribunal.org/our-mission> [<https://perma.cc/4VXA-GSE6>] (“The need for a mediation and non-binding arbitration firm that adheres to Islamic principles in the Muslim community has been a long time in the making.”).

⁷⁸ See BROYDE, *supra* note 5, at 138, 175 (stating that the BDA was founded in 1960 and Muslims are still in the process of developing religious tribunals).

⁷⁹ See Selby & Korteweg, *supra* note 15, at 22 (“The resulting public debate did not reflect how ordinary Sharia is in the everyday lives of many Canadian Muslims, but instead portrayed it as alien within a liberal democratic context. Nor did the debate reflect the complexity or malleability of Sharia. Rather, it created two positions: one for the institutionalization of Sharia-based arbitration boards and one against.”); Bingham, *supra* note 45.

⁸⁰ See Selby & Korteweg, *supra* note 15, at 19 (describing reactions during the Ontario Sharia Debate as follows: “The media portrayed Islamic law as patriarchal and authoritarian, as punishment rather than rehabilitation-oriented, and (perhaps most importantly) as unchanging.”).

set of norms that is binding upon all Muslims.”⁸¹ Two events in recent memory reflect these commonly held beliefs. Both have triggered scholarship on the topic.

The first event was a lengthy international debate, which occurred in Ontario, Canada from 2004 to 2005.⁸² It arose when the Islamic Institute of Civil Justice (IICJ) announced in 2003 that it “would begin offering arbitration services in family disputes in accordance with established Islamic law and the province of Ontario’s 1991 Arbitration Act.”⁸³ Although Jewish and Christian groups had previously used Ontario’s 1991 Arbitration Act to “set up alternate dispute resolution boards that arbitrated in accordance with their religious principles,” these RJBs did not trigger a state of alarm.⁸⁴ Conversely, the IICJ’s announcement that they would establish an Islamic arbitral body, which “paralleled Jewish arbitration practices,” resulted in a massive debate.⁸⁵

In June 2004, in response to the public outcry and debate, Michael Bryant, the former Attorney General, and Sandra Pupatello, the Minister Responsible for Women’s Issues, appointed former Attorney General Marion Boyd “to conduct a formal review of the use of arbitration in family and inheritance law in the province.”⁸⁶ In December 2004, Boyd published her report with a set of extensive recommendations and “concluded that binding religious arbitration of family law issues based on ‘Islamic legal principles’ was permissible according to the Arbitration Act.”⁸⁷

Boyd’s recommendations called for greater oversight of religious arbitration both prior to and post arbitration. Boyd’s recommendations included: (1) screening of arbitration parties, prior to arbitration, in order to determine whether any “issues of power imbalance” exist and to “ensure that both parties are agreeing voluntarily to arbitration and understand the nature and consequences of entering into the process”⁸⁸; and (2) civil court judicial review of arbitration awards that would require the court to set aside arbitration awards that do not meet an established

⁸¹ Jan Michiel Otto, *Towards Comparative Conclusions on the Role of Sharia in National Law*, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 615 (Jan Michiel Otto, ed., 2010).

⁸² Anver M. Emon, *Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation*, 87 CANADIAN B. REV. 392, 392 (2008).

⁸³ Selby & Korteweg, *supra* note 15, at 12.

⁸⁴ *Id.* at 18.

⁸⁵ *Id.*

⁸⁶ *Id.* at 20.

⁸⁷ *Id.* at 21.

⁸⁸ Marion Boyd, *Ontario’s “Sharia Court”: Law and Politics Intertwined*, in ISLAM AND ENGLISH LAW: RIGHTS, RESPONSIBILITIES AND THE PLACE OF SHARIA 176, 179 (Robin Griffith-Jones ed., 2013).

set of requirements designed to protect civil rights.⁸⁹ Had these recommendations been implemented, they would have resulted in a much higher degree of substantive review of religious arbitration. Boyd's report, however, was not enough to squelch the swell of panic the IICJ's initial announcement created.

The movement against Islamic arbitration in Ontario included "prominent women's organizations such as the pro-faith Canadian Council of Muslim Women (CCMW) and the secular International Campaign against Shariah Courts."⁹⁰ Of particular concern was that women would be unequal under Islamic law, especially with regard to divorce.⁹¹ By the summer of 2005, international opposition to Islamic faith-based arbitration resulted in "eighty-seven human rights groups" opposing the Ontario plan.⁹² Most of this opposition "did not reflect how ordinary Sharia is in the everyday lives of many Canadian Muslims, but instead portrayed it as alien within a liberal democratic context."⁹³ Despite Boyd's recommendations, as well as support from prominent scholars, the outcry resulted in amendments to the Arbitration Act that banned religious arbitration.⁹⁴

A similar phenomenon occurred in the U.K. in 2008 when then Archbishop of Canterbury, Rowan Williams, gave a speech "explor[ing] ways in which the legal system might 'recognise shari'a,'" observing that such recognition would entail "access to recognised authority acting for a religious group."⁹⁵ His speech led to fierce opposition to the perceived imposition of Islamic law, with headlines declaring that "Islamic sharia courts in Britain are now 'legally binding'" and "Sharia courts as 'consensual as rape.'"⁹⁶

C. *Prior Scholarship*

Most scholars of religious law who pay attention to RJBs focus on the normative question of whether RJBs have a role to play in secular jurisdictions.⁹⁷ Scholarship is mostly divided between those in favor of religious legal pluralism, arguing that

⁸⁹ *Id.*

⁹⁰ Selby & Korteweg, *supra* note 15, at 20.

⁹¹ *Id.* at 20–21.

⁹² *Id.* at 22.

⁹³ *Id.*

⁹⁴ *Id.* at 23; Choksi, *supra* note 6, at 791.

⁹⁵ BOWEN, *supra* note 42, at 175.

⁹⁶ Hickley, *supra* note 45; Bingham, *supra* note 45.

⁹⁷ See, e.g., Selby & Korteweg, *supra* note 15, at 12; AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 3 (2001); Shachar, *supra* note 6; Brody et al., *supra* note 6; Choksi, *supra* note 6.

RJBs promote religious liberty and social integration,⁹⁸ and those in favor of “one law for all,” arguing RJBs undermine civil liberties and civil integration.⁹⁹ These scholars can all be broadly understood as working within the field of legal pluralism. As other scholars examining religious courts have found, “the insights of legal pluralism are most useful” in understanding the complexity of the courts, their application of religious law, and their interaction with civil law.¹⁰⁰

Professor Ayelet Shachar’s work, *Multicultural Jurisdictions*,¹⁰¹ is the seminal work in this area. Scholars¹⁰² and activists¹⁰³ have especially built on her theories regarding how governments can best accommodate cultural and religious differences, while preserving women’s rights.¹⁰⁴ Shachar provides support for arguments in favor of “expanding the jurisdictional autonomy of religious and cultural minorities,” but also “offer[ing] hardnosed and practical legal-institutional solutions to the problem of sanctioned in-group rights violations.”¹⁰⁵ In particular, academic literature has focused on Shachar’s theory of “transformative accommodation.”¹⁰⁶ According to the former Archbishop of Canterbury, this theory provides “a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters,” while concurrently ensuring the protection of civil rights.¹⁰⁷

On the other side of the debate are those scholars¹⁰⁸ and activists who advocate for “One Law for All” and the eradication of RJBs.¹⁰⁹ This literature is primarily motivated by concerns

⁹⁸ See, e.g., BROYDE, *supra* note 5, at 237–38, 259.

⁹⁹ Emon, *supra* note 82, at 420.

¹⁰⁰ See, e.g., Pascale Fournier et al., *Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel*, 18 WM. & MARY J. WOMEN & L. 333, 338 (2012).

¹⁰¹ SHACHAR, *supra* note 97.

¹⁰² See Sandberg et al., *supra* note 7, at 265 (citing ANTHONY BRADNEY, *LAW AND FAITH IN A SCEPTICAL AGE* 51–52 (2009); Bernard Jackson, ‘Transformative Accommodation’ and Religious Law, 11 ECCLESIASTICAL L.J. 131, 132 (2009); AVIGAIL EISENBERG & JEFF SPINNER-HALEV, *MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY* (2005)).

¹⁰³ See generally Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, 10 ECCLESIASTICAL L.J. 262, 264 (2008).

¹⁰⁴ See SHACHAR, *supra* note 97, at 11.

¹⁰⁵ *Id.* at 5–6.

¹⁰⁶ See *supra* note 102 and accompanying text.

¹⁰⁷ See Williams, *supra* note 103, at 274.

¹⁰⁸ See, e.g., BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2002); ELHAM MANEA, *WOMEN AND SHARIA LAW: THE IMPACT OF LEGAL PLURALISM IN THE UK* 111 (2016).

¹⁰⁹ For instance, the organization “One Law for All” advocates for the eradication of Sharia Councils and Muslim Arbitration Tribunals, and calls for “one secular law for all and no Sharia.” *One Law for All: Campaign Against Sharia law in Britain*, ONE LAW FOR ALL, <http://onelawforall.org.uk/about> [https://perma.cc/ESG4-5LFE].

regarding applications of Islamic law that may violate civil rights and suggests that the best way to ensure equal rights for all citizens is to ban the application of religious law. For instance, Professor Elham Manea falls decidedly among those scholars who oppose the introduction of RJBs in secular contexts.¹¹⁰ She criticizes religious legal pluralism advocates for viewing Islamic law as an “expression of the universal principles of Islam,” and not as “concrete religious laws and rules . . . which can violate human dignity and human rights,” as can be seen in countries such as “Iran, Saudi Arabia, Sudan and Afghanistan”¹¹¹ Authors such as Manea do not consider the societal context surrounding Islamic RJBs and how that context influences RJBs’ interpretation of religious law and religious litigants’ perspectives.¹¹²

Other scholars have documented how enforcement and interpretation of Islamic law differs in varying societal contexts, noting distinct differences in places like Saudi Arabia, which has highly puritanical interpretations, and Indonesia, which has “moderate, contemporary interpretations.”¹¹³ Societal context also plays an important role in terms of the expectations and desires religious people living in secular society have about religious law. Surveys of Muslims living in Europe and the United States find that “Muslims are quite satisfied with the secular nature of European political regimes,” and that “they engage in politics and the democratic process, utilizing mainstream parties and institutions.”¹¹⁴ However, this “does not mean that [Muslims] renounce Islamic principles and legal rules to guide or structure their daily lives.”¹¹⁵

According to Professor Julie Macfarlane, Muslims’ desire to utilize RJBs does not necessarily reflect either a particularly high degree of religiosity or the desire for Islamic law to replace or supersede secular law.¹¹⁶ In interviews with imams in the United States and Canada, she found many of the Muslims who came to the imams for a divorce did not “practice Islam in a traditionally observant fashion.”¹¹⁷ The imams understood that these individuals were “looking for affirmation or an absolution

¹¹⁰ See generally MANEA, *supra* note 108.

¹¹¹ *Id.* at 111.

¹¹² See Jocelyne Cesari, *Foreword: Sharia and the Future of Western Secularism*, in DEBATING SHARIA, *supra* note 15, at 6.

¹¹³ Otto, *supra* note 81, at 615.

¹¹⁴ Cesari, *supra* note 112, at 6.

¹¹⁵ *Id.* (citing surveys led in Europe and the United States from 2007 to 2008).

¹¹⁶ Julie Macfarlane, *Practising an ‘Islamic Imagination’: Islamic Divorce in North America*, in DEBATING SHARIA, *supra* note 15, at 53.

¹¹⁷ *Id.*

that they . . . followed the ‘right’ course Islamically.”¹¹⁸ These imams observed that “[e]ven if they are [otherwise] secular [Muslims], they don’t want to mess with sensitive family issues . . . they want to do it right.”¹¹⁹ Macfarlane further found that respondents tended to marry and divorce according to both civil and Islamic law and did “not want a set of parallel courts for Islamic law” that would replace civil options.¹²⁰

These three broad groups in the contemporary scholarship—pro-multiculturalism, One Law for All, and contextual studies of RJBs—have all made important contributions, yet even taken together they leave key areas unexplored. The first two, focused as they are on the question of whether secular governments need to accommodate religious RJBs, are limited by their choice to adopt the perspective of secular governments. As a result, their arguments make little to no consideration of whether, how, and why RJBs adapt *themselves* to secular environments.

Even the aforementioned contextual studies cannot capture the entire picture. While scholars like Manea cite Saudi Arabian and Iranian RJBs to determine how RJBs would likely act in secular contexts,¹²¹ the reality is that Islamic law within the secular context takes on a wide variety of interpretations and accommodations. Muslims living in secular countries are “debating how they should relate to their tradition, what social and gender norms they should adopt, and how they should deal with the question of integration.”¹²² This debate is very much one still in progress as Muslims continue to develop specific legal interpretations for living as minorities in non-Muslim majority countries (*fiqh al-aqalliyat*).¹²³

To date, a single monograph has looked more systematically at RJBs. Professor Michael Broyde, in his book, *Sharia Tribunals, Rabbinical Courts, and Christian Panels*, focuses on the Jewish experience in the United States and the Muslim experience in England.¹²⁴ In his book, Broyde “explains why religious communities and individuals are increasingly

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Omar Sacirbey, *Correction: Study Says U.S. Muslims Don’t Want Shariah, Either*, WASH. POST (Jan. 31, 2012), https://www.washingtonpost.com/national/on-faith/correction-study-says-us-muslims-dont-want-Sharia-either/2012/01/31/gIQAB3H0fQ_story.html [<https://perma.cc/6CCM-UWQC>].

¹²¹ See MANEA, *supra* note 108.

¹²² L. Clarke, *Asking Questions About Sharia: Lessons from Ontario*, in DEBATING SHARIA, *supra* note 15, at 155.

¹²³ *Id.*

¹²⁴ BROYDE, *supra* note 5, at xxv.

turning to private, faith-based dispute resolution” and “explain[s] how it is that American law came to permit litigants to opt-out of secular law and instead choose to resolve their disputes through faith-based arbitration.”¹²⁵ He identifies how faith-based arbitration, especially the BDA, has developed in America and England to meet the procedural justice norms of secular law.¹²⁶

Yet this work, while significant, focuses solely on arbitration bodies and does not focus on litigants’ influence on RJBs. This last point is significant, as scholars have called for a shift in legal pluralism studies to a focus on legal subjects instead of the state, what they term “critical legal pluralism.”¹²⁷ Critical legal pluralism “embraces a philosophical commitment to the subjective construction of law by legal subjects.”¹²⁸ The law within critical legal pluralism “encompass[es] ‘how legal subjects understand themselves and the law.’ For critical legal pluralists, ‘law arises from, belongs to, and responds to everyone.’”¹²⁹ Religious laity (subjects of religious law) living in secular settings develop expectations of religious law based on the legal norms of the country in which they live. Accordingly, religious courts tend to interpret religious law in ways that lend themselves to these expectations.¹³⁰

For critical legal pluralists, religious laity “shape and produce law as much” as judges and mediators on religious courts.¹³¹ According to Professors Martha-Marie Kleinahns and Roderick Macdonald, the flag-bearers of critical legal pluralism: “Legal subjects . . . possess a transformative capacity that enables them to produce legal knowledge and to fashion the very structures of law that contribute to constituting their legal subjectivity.”¹³² This methodology identifies religious people who use RJBs as social and political agents who influence the interpretations and development of religious law.

While religious laity act as agents in the development and interpretation of religious law in a secular state, the state still plays an important role in this socio-legal inquiry.¹³³

¹²⁵ *Id.* at xii.

¹²⁶ *Id.* at 164, 177.

¹²⁷ Fournier et al., *supra* note 100, at 338.

¹²⁸ *Id.*

¹²⁹ *Id.* (first quoting Martha-Marie Kleinahns & Roderick A. Macdonald, *What is a Critical Legal Pluralism?*, 12 CANADIAN J.L. & SOC’Y 25, 36 (1997); then quoting RODERICK ALEXANDER MACDONALD, *LESSONS OF EVERYDAY LAW* 8 (2002)).

¹³⁰ See discussion *infra* Part III.

¹³¹ Fournier et al., *supra* note 100, at 338.

¹³² *Id.* at 399 (citing Martha-Marie Kleinahns & Roderick A. Macdonald, *What is a Critical Legal Pluralism?*, 12 CANADIAN J.L. & SOC’Y 25, 38 (1997)).

¹³³ Martha-Marie Kleinahns & Roderick A. Macdonald, *What is a Critical Legal Pluralism?*, 12 CANADIAN J.L. & SOC’Y 25, 34–35 (1997).

Specifically, the state still plays an important role on religious courts' conformity to secular procedural and social justice norms, as RJBs rely on the state to maintain their jurisdiction and enforce their judgments.

II. THE EVOLUTION OF RJBs: LEGAL PLURALISM AND LIMITED JURISDICTION

The difference between RJBs that serve minority populations and RJBs that serve majority populations in their accommodation of secular norms hinges on four factors. These four factors are: (1) the historical narrowing of their jurisdiction; (2) the political environments that threaten their continued existence; (3) civil courts' judicial oversight of RJBs and RJBs' reliance on civil courts to enforce decisions; and (4) the expectations of litigants that RJBs uphold their civil rights, especially as regards women's rights. The influence of litigants' expectations on RJB behavior finds some support in popular constitutionalism.¹³⁴ Likewise, possible explanations for the motivations of RJBs to accommodate secular norms also finds some resonance in James Wilson's explanations of political organization behavior.¹³⁵

A. *Historical Development*

The RJBs examined herein all emerge out of a historical environment wherein RJBs were prominent—and in some instances the exclusive—judicial bodies. The influence of the Enlightenment led to a curtailment of the jurisdiction and specific form of RJBs.¹³⁶ Yet, the Enlightenment ideals in each country also led to a valuing of religious and legal pluralism. As detailed below, the RJBs have all undergone a narrowing of their jurisdiction and now rely on a secular state to enforce their decisions. The historical evolution of the RJBs has led to current political and social implications. RJBs now exist in a political environment wherein secularism dominates, resulting in increased questioning of whether RJBs ought to exist.

¹³⁴ See, e.g., Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 597 (2009).

¹³⁵ See generally WILSON, *supra* note 13.

¹³⁶ See Ido Shahar, *Legal Pluralism and the Study of Shari'a Courts*, 15 ISLAMIC L. & SOC'Y 112, 129–30 (2008).

1. Evolution of Islamic and Jewish RJBs in Israel

For both the Sharia courts and the Rabbinical courts in Israel, tensions exist between the religious courts and the secular laws and courts of the state. Here, the question of judicial reform and activism has often gone hand in hand with questions of jurisdiction, which have themselves originated out of the tension between the concurrent existence of religious courts and secular courts and laws. This tension, however, did not begin with the creation of the State of Israel. The tension can be traced as far back as the *Tanzimat* reforms in the Ottoman Empire and the concurrent immigration of European Jews into Ottoman territory, when a narrowing of Ottoman religious courts' jurisdiction began. During the *Tanzimat* period, spanning the late 18th century up to the disintegration of the Ottoman Empire, "the sultans enacted a series of governmental, administrative and legal reforms which" can be understood as an attempt to "transition to modernity."¹³⁷ The Ottoman Empire's "transition to modernity," which was driven by the Enlightenment in Europe and competition with Europe, primarily took the form of secularization of governmental and legal structures.¹³⁸

Pre-*Tanzimat*, minority subjects of the Ottoman Empire were permitted to, and did, operate their own religious courts in which they had jurisdiction over almost all matters, including commercial matters and taxation (with the exception of "capital crimes and issues pertaining to religious endowments").¹³⁹ The Sharia courts handled all matters but also began to see their jurisdiction limited during the *Tanzimat* era.¹⁴⁰

The *Tanzimat* reforms in particular are understood as the period that shifted the "historical balance between 'secular' law and [religious law]."¹⁴¹ These reforms included the codification of law (as described earlier, some of which remain enforced in Israel today), including family law, and the creation of secular, civil courts, which functioned parallel to the Sharia courts.¹⁴² This led to an erosion of the Sharia courts' jurisdiction,

¹³⁷ *Id.* at 129.

¹³⁸ See Hakan Köni, *Politics of Religion and Secularism in the Ottoman Empire, 14th to 20th Century: A Study*, INT'L J. RES. SOC. SCI. 11, 13–15 (2013); see also Brian Duignan, *Enlightenment: European History*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Enlightenment-European-history> [<https://perma.cc/TWB5-TRXJ>] ("The Enlightenment produced the first modern secularized theories of psychology and ethics.").

¹³⁹ Jacob M. Landau, *Changing Patterns of Community Structures, with Special Reference to Ottoman Egypt*, in JEWS, TURKS, OTTOMANS: A SHARED HISTORY, FIFTEENTH THROUGH THE TWENTIETH CENTURY 77, 86 (Avigdor Levy ed., 1st ed. 2002).

¹⁴⁰ *Id.* at 86.

¹⁴¹ Shahar, *supra* note 136, at 130.

¹⁴² *Id.* at 129.

such that the Sharia courts eventually only retained jurisdiction over “matters relating to personal status.”¹⁴³ This erosion led to a weakening of the power of *qadis* (Sharia court judges).¹⁴⁴

The *Tanzimat* reforms also increased secularization of the Jewish community by significantly reducing the jurisdiction of their Rabbinical courts (operating autonomously under the *millet* system) down to only “marital and inheritance issues,”¹⁴⁵ a drastic change from the broad jurisdiction they previously enjoyed over almost all subject matters. This contributed to a decline in the authority and utilization of the Jewish community’s Rabbinical courts in various regions of the empire.¹⁴⁶ This implementation not only ultimately “reduced the competence of the Jewish courts” but also diminished the power and authority of local religious leadership.¹⁴⁷

The transformation of the Rabbinical courts resulted from several societal factors besides the *Tanzimat* reforms themselves. For instance, many Ashkenazi immigrants of the time viewed the Ottoman Empire as a safe haven from the vast Enlightenment reforms occurring in their home countries and immigrated to Ottoman territories in order to carve out enclaves of Orthodoxy.¹⁴⁸ The Ashkenazi Orthodox response to the perceived threat of the *Haskalah* (the European Jewish Enlightenment reform movement) “manifested itself in the adoption of stringent positions on a wide range of aspects of modern life . . . and a controlled, begrudging accommodation with the changing realities.”¹⁴⁹ For instance, in Jerusalem a controversy emerged between the European Jewish communities. Eastern European Jews, predominately Russian, opposed an attempt to open a modern school. Their opposition was based, at least in part, on “the struggle of traditional East European Jewry against the establishment of government schools . . .”¹⁵⁰ They viewed themselves “as part of a worldwide front defended by the Orthodox, those faithful to Jewish

¹⁴³ *Id.* at 130.

¹⁴⁴ See Ramadan, *supra* note 4, at 99–100.

¹⁴⁵ Landau, *supra* note 139, at 86.

¹⁴⁶ *Id.* at 86–87.

¹⁴⁷ Daniel J. Schroeter, *The Changing Relationship Between the Jews and the Arab Middle East and the Ottoman State in the Nineteenth Century*, in *Jews, Turks, Ottomans: A Shared History, Fifteenth Through the Twentieth Century* 88, 96 (Avigdor Levy ed., 2002).

¹⁴⁸ Israel Bartal: *From “Kollel” to “Neighborhood”*: *Revisiting the Pre-Zionist Ashkenazi Community in Nineteenth-Century Palestine*, in *OTTOMAN AND TURKISH JEWRY: COMMUNITY AND LEADERSHIP* 203, 208 (Aron Rodrigue ed., 1992).

¹⁴⁹ *Id.* at 207.

¹⁵⁰ *Id.*

values.”¹⁵¹ They viewed Palestine as the “last stronghold of traditional society still unsullied by the pernicious influence of European *Haskalah* in all its manifestation.”¹⁵² While this struggle emerged in the Ottoman period, it has had long-lasting effects on the Orthodox Jewish control of the Rabbinical courts, as further described below.¹⁵³

By the time Palestine fell under the British Mandate both the Sharia and Rabbinical courts had their previously almost unlimited jurisdictions narrowed to the area of personal status law, although they had exclusive jurisdiction in these matters.¹⁵⁴ In addition to the significant changes to the Rabbinical and Sharia courts, related to changes in sovereignty, the British Mandate authorities introduced a number of structural changes that have impacted the courts’ contemporary rulings. In particular, as part of an endeavor to align the procedural norms of the religious courts to those of English law, the Mandate authorities introduced courts of appeals into the Rabbinical and Sharia courts.¹⁵⁵ Neither Islamic Law nor *Halakha* (Jewish Law) formerly had conceptualized such a construction.¹⁵⁶ As will be further explored below, these courts of appeals have played a major role in the reform of the Sharia courts in the modern period.¹⁵⁷

The creation of the State of Israel significantly affected the relationship of both the Sharia and Rabbinical courts to their sources of law. Although the Israeli State was founded by secular, European Zionists, Orthodox authorities worked prior to the establishment of the state to establish the authority of the Rabbinical courts.¹⁵⁸ A status quo agreement between the European Zionist and Orthodox factions was reached a year before the creation of the state regarding the position of Judaism in the soon to be state.¹⁵⁹ The agreement “gave the Orthodox authorities a monopoly on personal status issues” and has led to the strength of the Rabbinical courts today.¹⁶⁰ The Zionist movement, while secular, recognized that “religious tradition

¹⁵¹ *Id.* at 208.

¹⁵² *Id.*

¹⁵³ See discussion of the current political environment in Israel *infra* Section II.B.

¹⁵⁴ Ramadan, *supra* note 4, at 88–89, 98–100.

¹⁵⁵ See M. Chigier, *The Rabbinical Courts in the State of Israel*, 2 ISR. L. REV. 147, 174–77 (1967).

¹⁵⁶ Imen Gallala-Arndt, *Personal Status Law in Israel: Disputes Between Religious and Secular Courts*, in CHANGING GOD’S LAW: THE DYNAMICS OF MIDDLE EASTERN FAMILY LAW 204, 206 (Nadjma Yassari ed., 2016).

¹⁵⁷ See *infra* Section III.C.

¹⁵⁸ EDELMAN, *supra* note 34, at 50–51.

¹⁵⁹ *Id.*

¹⁶⁰ Gallala-Arndt, *supra* note 156, at 206.

‘provided the affective ties of unity needed by the modern nation-builders.’”¹⁶¹ The Rabbinical courts achieved a major win, further guaranteeing their position, with the passing of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953, which “recognized the Orthodox religious realm’s monopoly on matters of marriage and divorce for Jews.”¹⁶² This has had lasting impacts on the ability of the Rabbinical courts to withstand reform, including attempts by factions of the Knesset to curtail the Rabbinical courts’ jurisdiction.¹⁶³

The most significant change the Sharia courts witnessed with the establishment of the State of Israel was the shift from operating under a Muslim sovereign and serving a majority population, to operating under a secular Jewish sovereign and serving a minority population. This shift especially impacted the role of the *qadi* (Islamic court judge). Historically, jurisprudential development and reform (*ijtihad*) fell to specially qualified jurists (*mujtahid*) that the head of state designated.¹⁶⁴ With the creation of the State of Israel, this task fell to the *qadis*.¹⁶⁵ For many years, however, the *qadis* on the Israeli Sharia courts were ill equipped to fulfill this task due to issues with appointment process, as with the establishment of the Israeli State, and consequently, the Muslim population lost control over the appointment of *qadis*.¹⁶⁶ Per the 1961 *Qadi* Law, “*Qadis* are salaried state officials . . . nominated by the President of the State of Israel.”¹⁶⁷

As a result, many *qadis* in Israel lacked the necessary legal education and experience for the position.¹⁶⁸ This led to narrow opinions from the Sharia courts that could not meet the needs of the Muslim population facing questions of modernity and norms of the state and provide for constitutionally protected rights.¹⁶⁹ However, the *Qadi* Law of 2002 now requires that *qadis* “have a significant religious education in Sharia or Islamic studies, or have considerable experience in a legal profession.”¹⁷⁰

¹⁶¹ *Id.* at 207.

¹⁶² *Id.*

¹⁶³ See Fournier et al., *supra* note 100, at 341.

¹⁶⁴ See Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT’L J. MIDDLE E. STUD. 3, 13, 24 (1984).

¹⁶⁵ See Moussa Abou Ramadan, *Judicial Activism of the Shari’ah Appeals Court in Israel (1994–2001): Rise and Crisis*, 27 FORDHAM INT’L L.J. 254, 271 (2003).

¹⁶⁶ See Ramadan, *supra* note 4, at 88, 90–91.

¹⁶⁷ Gallala-Arndt, *supra* note 156, at 209.

¹⁶⁸ See Ramadan, *supra* note 165, at 259 n.24, 291.

¹⁶⁹ See *id.* at 293.

¹⁷⁰ Gallala-Arndt, *supra* note 156, at 209. Education of judges has also played an important role in Jewish and Islamic RJBs in the United States and England. Both sets of RJBs have introduced requirements for panels to include judges with religious law and civil law training.

This has led to *qadis* expanding their traditionally strictly judicial role to include the role of legal scholarship and development. The primary means by which they have done this is through the Sharia Court of Appeals, which issues legal circulars.¹⁷¹ As discussed more extensively below, this has led to a court better able to “adjust the legal norm to the changing circumstances of the time.”¹⁷²

The Sharia Court of Israel has accomplished most of this legal adaptation via its use of classical Sunni Islamic legal scholarship. This scholarship is divided into four denominations or legal schools of thought (*madhab*). Traditionally, Muslim judges issue opinions based on the legal reasoning and conclusions of a specific school. In the Israeli Sharia courts, however, the judges’ source of law is much broader. They rely on Ottoman family law (the codification of primarily one of the schools of thought),¹⁷³ draw upon all four Sunni schools of thought (*takhayyur*)¹⁷⁴ and look to modern Islamic Laws from Muslim majority states (particularly those in the Middle East).¹⁷⁵ Importantly, they apply the binding opinions of the Sharia Appeals court, which did not exist historically. The application of binding appellate decisions is notably also used by the American Jewish judicial bodies and the English Islamic judicial bodies. Likewise, the MAT also approaches classical Sunni Islamic legal schools of thought with the methodology of *takhayyur*, which allows judges to draw on opinions from any of the four schools.¹⁷⁶

2. Evolution of RJBs in England

RJBs in England have also experienced a historical evolution of narrowing jurisdiction. Prior to the Reformation, church courts in England enjoyed extensive jurisdiction over what would be considered today as “secular contract law.”¹⁷⁷ These church courts serve as the historical backdrop to England’s modern religious arbitration.¹⁷⁸ In pre-modern England, “religious authorities frequently provided routes to justice that were an alternative to the state courts.”¹⁷⁹ While these “religious courts

¹⁷¹ See Ramadan, *supra* note 165, at 284–88.

¹⁷² Layish, *supra* note 26, at 214.

¹⁷³ *Id.* at 174–76.

¹⁷⁴ *Id.* at 174, 192–93, Emon, *supra* note 82, at 397.

¹⁷⁵ Layish, *supra* note 26, at 187–90.

¹⁷⁶ BROYDE, *supra* note 5, at 183.

¹⁷⁷ Walter, *supra* note 6, at 506 (citing R.B. OUTHWAITE, THE RISE AND FALL OF THE ENGLISH ECCLESIASTICAL COURTS, 1500–1860, at 15 (2006)).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 505.

exercised compulsory jurisdiction,” they overlapped with modern religious arbitration “in that they competed directly with civil courts.”¹⁸⁰ The parallel nature of the church courts was such that in the fourteenth century, “church courts had adopted the practice of hearing appeals from the common-law courts.”¹⁸¹

This jurisdiction was “in direct competition with the royal courts” and can be understood as a circumstance of “quasi-arbitral jurisdiction in contract matters.”¹⁸² Within the sixteenth and seventeenth century, the jurisdiction of church courts included “matrimonial, probate, tithe, and defamation cases.”¹⁸³ This jurisdiction was enjoyed via “the doctrine of *fidei laesio*, or breach of faith.”¹⁸⁴ Such that the ecclesiastical jurisdiction was not based on failure to perform, but rather, that “he had breached his oath to perform.”¹⁸⁵ Within the sixteenth century, the common law courts also “found ways of exercising jurisdiction over these disputes.”¹⁸⁶ In a similar vein, from the mid-sixteenth to the mid-seventeenth century, the church heard an explosion of slander cases and tithe related cases (as the entire population was required to pay tithes).¹⁸⁷ The jurisdiction of the church courts were severely curtailed in the English Revolution, but similar to the Sharia courts in the late-Ottoman Empire, were able to maintain jurisdiction over “matrimonial and probate disputes until 1857.”¹⁸⁸ With the English Revolution, the church lost jurisdiction over “all that is now considered ‘secular.’”¹⁸⁹

This historical legacy continues to be negotiated in the modern era via the Arbitration Act of 1996¹⁹⁰ and non-binding mediation. While the Arbitration Act is not specifically intended for use by religious bodies, nothing in the Act prohibits its use by RJBs (although the Act limits the kinds of disputes to mostly commercial disputes).¹⁹¹ Much like the Federal Arbitration Act in the United States, the act “limits the conditions under which either party may appeal . . . appeals are allowed on grounds that

¹⁸⁰ *Id.* at 505–06.

¹⁸¹ *Id.* at 506.

¹⁸² *Id.* at 507, 507 n.25 (quoting WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 131 (vol. 12 3d reprinted 1977)).

¹⁸³ *Id.* at 506.

¹⁸⁴ *Id.* at 506 n.16.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 506.

¹⁸⁸ *Id.* at 507.

¹⁸⁹ *Id.*

¹⁹⁰ See Arbitration Act, 1996, c. 23 (U.K.) <http://www.legislation.gov.uk/ukpga/1996/23/contents> [<https://perma.cc/R4RQ-GA6P>].

¹⁹¹ BOWEN, *supra* note 42, at 155.

the procedures followed were unfair or misleading.”¹⁹² As will be discussed below, however, the use of the Arbitration Act by RJBs especially Islamic RJBs, has led to calls for legislative action to limit Islamic arbitration and mediation in England.

3. Evolution of RJBs in the United States

Although the U.S. historical experience with religious courts departs from the English experience in that the United States never had a state religion, it shares a similar background with regard to the historical role of church courts in the colonial period. Within the earlier American experience of religious courts, there was “competition between state- and church-sponsored dispute resolution,” as well as areas in which no “civil alternatives” existed to the “church dispute resolution.”¹⁹³ Both countries’ religious courts were also likely impacted by Enlightenment ideals regarding freedom of thought and religion on religious courts.¹⁹⁴

Within the American colonial experience, a variety of churches were established with different states having their own churches.¹⁹⁵ This laid the groundwork for a culture of valuing a diversity of religious choices. While a significant portion of Israel’s early founders were Orthodox Jews seeking to escape the Enlightenment, America’s founders were seeking to preserve the Enlightenment ideals of freedom of thought and religion.¹⁹⁶ Of particular significance to the American experience was the passing of the First Amendment in 1789, “which prevented an established church from reaching the same position in national American life as it had in Britain.”¹⁹⁷ The variety of churches also led to judicial diversity in the colonial period.¹⁹⁸

During the colonial period, churches were frequently the only courts available and a culture of utilizing alternative

¹⁹² *Id.*

¹⁹³ Walter, *supra* note 6, at 509.

¹⁹⁴ See Lynn Hunt, *The Enlightenment and the Origins of Religious Toleration*, DUTCH-BELGIAN SOC’Y FOR EIGHTEENTH-CENTURY STUD.: 4 BURGERHART LECTURES (Oct. 25, 2011), <https://achttiendeeeuw.files.wordpress.com/2013/04/hunt.pdf> [<https://perma.cc/8HHL-FSGA>].

¹⁹⁵ Walter, *supra* note 6, at 509 (“In colonial America, various colonies had established churches.”).

¹⁹⁶ *American Government: Foundations of American Government*, UShistory.org, <http://www.ushistory.org/gov/2.asp> [<https://perma.cc/C8BV-GZJN>] (“The American founders were well versed in the writings of the philosophes, whose ideas influenced the shaping of the new country. Thomas Jefferson, George Washington, James Madison, and others took the brave steps of creating a government based on the Enlightenment values of liberty, equality, and a new form of justice.”).

¹⁹⁷ Walter, *supra* note 6, at 509.

¹⁹⁸ *See id.* at 510.

dispute resolution developed.¹⁹⁹ For instance, in 1635 a Boston community issued an ordinance requiring that “no congregation members could litigate unless there had been a prior effort at arbitration.”²⁰⁰ Religious belief and convenience supported this culture of turning towards alternative dispute resolution. According to Nicholas Walter:

The civil courts functioned as a “back-up” when the civil power was needed—for example, to arrest persons and attach property. The parallel jurisdiction of the civil and church courts is a feature of modern-day arbitration, and it is not surprising that the other characteristics that we often associate with modern arbitration—speed, informality and inexpensiveness—were present in religious arbitration before American independence.²⁰¹

Religious arbitration within the American Jewish community has taken on a number of different forms, including the pre-World War I *Kehillah* tribunals and the creation of different arbitral bodies for the Ultra-Orthodox, Orthodox, and Conservative communities.²⁰² Of particular significance to the lasting success of Jewish arbitration was the “passage of the Municipal Court Act of 1915, which made their judgments legally binding.”²⁰³ Other jurisdictions passed similar laws in the early 20th century, making Jewish arbitration viable in multiple jurisdictions.²⁰⁴ The historic and contemporary popularity of religious arbitration within minority and off shoot religious communities reflects the religious requirements of those communities to comply with religious law. As will be discussed in Part III, these RJBs have taken several steps to ensure compliance with both religious and civil law.²⁰⁵

The current form of Jewish judicial bodies arises out of the historical experience of these courts in the United States. While they have existed in the United States for over a hundred years, it is only recently that these courts have found “their footing in the American legal system.”²⁰⁶ Some of the earlier difficulty is likely attributable to anti-Semitic sentiments in the American public at large and as a result, within the American judiciary. During the early period of Rabbinical courts in the United States, “secular courts were uncomfortable upholding

¹⁹⁹ See *id.* at 510–11.

²⁰⁰ *Id.* at 511 (quoting JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 23 (1983)).

²⁰¹ *Id.*

²⁰² See *id.* at 514.

²⁰³ *Id.*

²⁰⁴ See *id.*

²⁰⁵ See *infra* Section III.A–C.

²⁰⁶ BROYDE, *supra* note 5, at 138.

and enforcing arbitral decisions” of Jewish courts, viewing these decisions as entailing “foreign, inaccessible substantive and procedural law.”²⁰⁷ The situation today is dramatically different.

This historical experience has translated into the modern use of the Federal Arbitration Act (FAA) by RJBs, such as the BDA. Like the U.K.’s Arbitration Act of 1996, the FAA is also centered on contract and “makes it clear that agreements to arbitrate are valid” with a few limitations.²⁰⁸ The FAA reflects “the law’s long-held preference for courts honoring private agreements between parties.”²⁰⁹

Also similar to the UK’s arbitration act, an arbitration award may be vacated “where the award was procured by corruption, fraud, or undue means.”²¹⁰ Generally, the FAA does not permit a substantive review of arbitration awards.²¹¹ Case law has developed, however, such that a court may “vacate arbitral rulings that are contrary to public policy, and some courts have gone further to hold that an award may be vacated if its substance amounts to manifest disregard for the law.”²¹² While courts rarely vacate arbitration awards on these grounds, RJBs demonstrate an awareness of the procedural requirements necessary to have their decisions upheld.²¹³

In all three countries, the historical relationship to religious courts has resulted in an environment which values legal pluralism with the option to resolve disputes before RJBs. Because of the historical development of secular law in each country, the RJBs have limited jurisdiction and compete with civil courts. The current political climate in these countries, however, reflects a growing unease with RJBs.

B. *Hostile Political Environments*

Opposition to religious courts in all three jurisdictions has centered on gender politics; in particular, opposition has coalesced around the perceived threat of Islamic and Jewish courts to

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 116, 179.

²⁰⁹ *Id.* at 116.

²¹⁰ Federal Arbitration Act, Pub. L No. 68-405, ch. 213, § 10, 43 Stat. 883, 885 (1925) (codified as amended at 9 U.S.C. § 10(a)(1) (2012 & Supp. V 2018)); BROYDE, *supra* note 5, at 119.

²¹¹ BROYDE, *supra* note 5, at 119.

²¹² *Id.*; see also Walter, *supra* note 6, at 522 (“The New York Supreme Court noted in *Berg v. Berg* that an arbitral award could be overturned on public policy grounds if a provision of it violated a state statute or regulation. In this regard, however, religious arbitral awards are simply like secular arbitral awards.”).

²¹³ See Yechiel (Gene C.) Colman, *Ensuring Enforceability of Beis Din’s Judgements*, JEWISH L. BLOG, <https://www.jlaw.com/Articles/beisdin3.html> [<https://perma.cc/5QU5-BDML>].

women's equal rights. These politics have focused on divorce rights in both faiths, as in both traditional interpretations of Jewish and Islamic law women do not share the same rights as men to unilateral divorce.²¹⁴ Furthermore, the vast majority of issues that RJBs address deal with family law, especially related to divorce, i.e. custody, distribution of property, etc.²¹⁵

The political reaction to Islamic arbitration and mediation has been more tempered in England than the United States. In England, political action has mostly taken the form of calls for legislative limitations on arbitration and mediation. For instance, in 2012, "the House of Lords gave a second reading to the Arbitration and Mediation Services (Equality Bill)."²¹⁶ While the bill is facially neutral, comments on the bill indicate that the primary concern is the perceived unequal treatment of women in Islamic arbitration and mediation, especially with regard to divorce.²¹⁷ Lord Carlile of Berriew expressed similar concerns and "suggested that the House might usefully consider whether England and Wales should adopt at least some of the provisions of the Ontario Family Statute Law Amendment Act 2009," which banned all religious arbitration in reaction to the Ontario Sharia Debate discussed earlier in this article.²¹⁸

Were such an amendment passed, it would significantly limit the ability of RJBs to issue rulings based on religious law. Such an amendment would require that "any decision made by a third party in arbitration or other proceedings ha[s] no legal effect unless exclusively in accordance" with the laws of the jurisdiction.²¹⁹ The Bishop of Manchester raised some concern about the impact such legislation would have on Jewish courts.²²⁰ The debate on the bill represents lingering political concerns about Muslim judicial policies in particular. While the Government determined that existing law largely addressed the concerns of the proposed amendment and therefore was unnecessary, concerns about the role of Islamic law in England continue.²²¹

In the United States, political action has frequently taken the form of outright "Sharia bans," which have resulted in state legislatures passing legislation banning the application of Islamic

²¹⁴ BROYDE, *supra* note 5, at 212–13.

²¹⁵ *See id.* at xi.

²¹⁶ *See* Cranmer, *supra* note 46.

²¹⁷ *Id.*

²¹⁸ *Id.*; *see* discussion *supra* Section I.B.

²¹⁹ *See* Cranmer, *supra* note 46.

²²⁰ *Id.*

²²¹ *See id.*

law in “their state legislatures and courts.”²²² The first such legislation originated in Oklahoma in November 2010 with its “popularly-ratified ‘Save our State’ Amendment to the Oklahoma Constitution.”²²³ This legislation has been prompted by “imagined legal worries” and a desire to “head[] off a problem before it started.”²²⁴ Although a federal court “found that the Sharia law provisions of the amendment are unconstitutional” for its specific targeting of one religion, more than a dozen states have passed an alternative version directed at “foreign law” to accomplish the desired effect of banning Islamic law.²²⁵

This legislation has prompted concern within the Jewish community about the potential impact it may have on religious arbitration. The passing of this legislation led Jewish organizations, such as the Agudath and the Orthodox Union, to join with the American Civil Liberties Union, among others, as signatories to letters sent to state legislatures to encourage them to reject anti-Sharia legislation.²²⁶ One such letter reads:

The impact of this legislation goes well beyond prohibiting religious tribunal resolution of monetary or ministerial disputes It would apparently prohibit the courts from looking to key documents of church, synagogue or mosque governance—religious law—to resolve disputes about the ownership of a house of worship, selection and discipline of ministers, and church governance.²²⁷

While the full impact of such legislation on religious arbitration remains to be seen, there is little indication that sentiments towards Muslims or Islamic law in the United States have warmed since their passing. In 2017, anti-Muslim and anti-Sharia movements continued to gain momentum as hate crimes and “anti-sharia” rallies increased.²²⁸

In Israel, political concerns about RJBs have also centered on women’s rights in both Judaism and Islam. This has

²²² John Witte, Jr. & Joel A. Nichols, *Who Governs the Family? Marriage as a New Test Case of Overlapping Jurisdictions*, 4 FAULKNER L. REV. 321, 330 (2013).

²²³ *Id.*

²²⁴ *Id.* at 331.

²²⁵ See *Awad v. Zirriax*, 966 F. Supp. 2d 1198, 1207 (W.D. Okla. 2013) (citing *Awad v. Zirriax*, 670 F.3d 1111, 1128, 1132 (10th Cir. 2012)).

²²⁶ Ron Kampeas, *Anti-Sharia Laws Stir Concerns That Halachah Could be Next*, JEWISH TELEGRAPHIC AGENCY (Apr. 28, 2011), <https://www.jta.org/2011/04/28/life-religion/anti-sharia-laws-stir-concerns-that-halachah-could-be-next> [<https://perma.cc/HC8D-NQ4Q>].

²²⁷ *Id.*

²²⁸ See Brian Levin, *Islamophobia in America: Rise in Hate Crimes Against Muslims Shows What Politicians Say Matters*, NEWSWEEK (July 21, 2017), <http://www.newsweek.com/islamophobia-america-rise-hate-crimes-against-muslims-proves-what-politicians-640184> [<https://perma.cc/75FE-L5HD>]; David DeKok & Tom James, *Protesters Rally Against Islamic Law in Dozens of U.S. Cities*, REUTERS (June 10, 2017), <https://www.reuters.com/article/us-usa-islam-protests/protesters-rally-against-islamic-law-in-dozens-of-u-s-cities-idUSKBN1910RC> [<https://perma.cc/UV83-JHV7>].

resulted in both legislative and judicial action. The Israeli Supreme Court, both as the highest appellate court and as the High Court of Justice (HCJ),²²⁹ has issued rulings curtailing the jurisdiction of the Rabbinical and Sharia courts.²³⁰ As described earlier, the Knesset has previously taken steps to limit the jurisdiction of the religious courts through the narrowing of existing jurisdiction and the creation of concurrent legislation.²³¹

In addition to the historic role of Orthodox Judaism to the cultural identity of Israel, political positioning of the Orthodox subculture in Israel has also led to unwillingness in the Rabbinical courts to accommodate the secular legal norms of the state. Israel is a parliamentary democracy in which coalition governments have long been a defining feature.²³² Due to these coalitions, the Orthodox Jewish community has often wielded significant political weight.²³³ Religious parties have become a critical element to almost all coalitions and “[a]s a result, every Government since 1959 has explicitly committed itself, in the formal coalition agreement which established the Government, to maintaining the religious status quo” agreement, which preserves the Rabbinical courts.²³⁴ The subculture of Orthodox Judaism in Israel is centered on *Halachah* and disputes often emerge due to contrary legal interpretations.²³⁵ One component of this subculture is the religious Zionists who have aligned themselves with the National Religious Party (NRP).²³⁶ Another component is the “Torah Sages, the rabbis who have earned great prestige through their ability to interpret Halachah,” most of whom are not aligned with the NRP.²³⁷ The Torah sages suspect the religious Zionist leadership “of surrendering Halachic principles for ‘mere’ political advantage.”²³⁸ To combat these suspicions, the religious Zionists “are quite rigid on

²²⁹ When acting as the High the Court of Justice, the Supreme Court “deals with matters involving issues of justice which do not fall under the jurisdiction of any other court.” KNESSET, *Lexicon of Terms—The High Court of Justice* (2003) https://knesset.gov.il/lexicon/eng/bagatz_eng.htm [<https://perma.cc/U8XM-CQNX>].

²³⁰ Ruth Halperin-Kaddari, *Expressions of Legal Pluralism in Israel: The Interaction Between the High Court of Justice and Rabbinical Courts in Family Matters and Beyond*, in JEWISH LAW ASSOCIATION STUDIES XIII: JEWISH FAMILY LAW IN THE STATE OF ISRAEL 185 (M.D.A. Freeman ed., 2002) [hereinafter JEWISH FAMILY LAW].

²³¹ See *supra* Section I.A.1.

²³² EDELMAN, *supra* note 34, at 52.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 68–70.

²³⁶ *Id.* at 70.

²³⁷ *Id.*

²³⁸ *Id.*

matters squarely within traditional Judaic concerns—for example, marriage and divorce.”²³⁹

Furthermore, religious coercion regarding the appointment of judges to the Rabbinical courts remains a major political issue in Israel. For instance, in late December 2017, the governing coalition of Likud, Shas, and United Torah Judaism (major political parties in Israel) reached an agreement that their representative to appoint Rabbinical court judges would come from one of the two ultra-Orthodox parties.²⁴⁰ Despite campaign promises that he would fight religious coercion, Yesh Atid’s leader, Yair Lapid, also supported the appointment “of an ultra-Orthodox lawmaker to the committee that appoints judges to Israel’s rabbinical courts.”²⁴¹ In doing so, he “forced two [of his own] party[s]” representatives to step down from candidacy.²⁴² Through these kinds of political alliances, the ultra-Orthodox and Orthodox factions of Israel have maintained control over the appointment of Rabbinical court judges and perpetuate rigid interpretations of religious law in the Rabbinical courts.

C. Civil Court Pressure

RJBs exist within larger secular judicial frameworks that require that they meet certain procedural rules and uphold civil rights, which require RJBs to accommodate these requirements if they want their decisions upheld. RJBs that represent religious minority populations exist more precariously within the society and possess less autonomy in the enforcement of their awards. Due to the political power of the Orthodox Jewish lawmakers in Israel, the Rabbinical courts in Israel (which uphold Orthodox interpretations of Jewish law), can essentially disregard the Supreme Court of Israel.

1. The Rabbinical Courts’ Defiance of Judicial Review

The Israeli Supreme Court acting as the High Court of Justice affirmed its supremacy and jurisdiction over the Rabbinical courts in two high-profile cases, the *Lev* case and the *Bavli* case.²⁴³ Prior to these cases, “[t]he assumption was that the Rabbinical courts would . . . apply religious law to each and

²³⁹ *Id.*

²⁴⁰ Aaron Rabinowitz, *Despite Election Promise, Yair Lapid to Support ultra-Orthodox Candidate for Rabbinical Court Panel*, HAARETZ (Dec. 23, 2017, 10:45 PM), <https://www.haaretz.com/israel-news/premium-1.830786> [https://perma.cc/N285-EAXT].

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Halperin-Kaddari, *supra* note 230, at 197.

every matter which arose during the course of the hearing, including matters which exceeded the scope of the issues of personal status.”²⁴⁴ Read together, these rulings “lead to the application of the general civil law to the Rabbinical courts in all matters, save in matters of personal status.”²⁴⁵ But the Rabbinical courts met the *Bavli* decision with open hostility. In response, they convened emergency meetings “on how to handle the new ruling . . . and religious leaders stated that rabbinical courts would not abide by it.”²⁴⁶ In the line of cases following the decision, the Rabbinical courts have refused to apply it. The Rabbinical courts display a confidence and independence absent from RJBs representing minority populations.

2. The Sharia Courts’ Responsiveness to Judicial Review

The Supreme Court of Israel has asserted its jurisdiction over the Sharia courts in multiple cases. Unlike in the case of the Rabbinical courts, the Supreme Court has not imposed the application of civil law on the Sharia courts, but rather, has narrowed the Sharia courts’ jurisdiction.²⁴⁷ In a custody case before the Sharia Court of Appeals involving a Muslim father and a Christian mother, the court ruled that as under Islamic Law, religious identity of a minor is determined patrilineally; the child was a Muslim and Islamic Law required custody be granted to the Muslim parent.²⁴⁸ The Supreme Court, however, ruled that in custody matters involving parents of different religions, “the Sharia courts lack jurisdiction.”²⁴⁹

Similarly, in a case regarding paternity of an illegitimate child, a civil district court rejected the case “*in limine* on ground of lack of competence, since paternity and maintenance are matters of personal status and fell, at the time, within the sole jurisdiction of the *Sharia* court.”²⁵⁰ The case was then appealed to the Supreme Court. The Court held that the child was “entitled to benefit from ‘civil paternity’ that is, biological, natural paternity.”²⁵¹ The Court framed its ruling in terms of subject-matter jurisdiction, stating:

²⁴⁴ *Id.* at 191.

²⁴⁵ *Id.* at 197.

²⁴⁶ *Id.* at 193.

²⁴⁷ Gallala-Arndt, *supra* note 156, at 212.

²⁴⁸ *Id.* at 211–12.

²⁴⁹ *Id.*

²⁵⁰ Layish, *supra* note 26, at 181.

²⁵¹ *Id.* at 182.

Where the [Sharia] Court cannot and will not exercise its jurisdiction, and consequently denies, even if indirectly, rights that a Moslem has earned according to the law of the land, namely the civil law, the Order-in-Council should not be interpreted as giving sole jurisdiction to the religious Court, while denying the civil systems jurisdiction.²⁵²

The Court, in framing its decision took care to recognize that the Court was not compelling the Sharia court to apply “laws that are against its religious doctrine.”²⁵³

The Sharia courts responded to this narrowing of their jurisdiction via internal reform, especially within the Sharia Court of Appeals. The Sharia Court of Appeals, in an initiative led by the President of the Court of Appeals, issued a series of circulars leading to reform in the Sharia courts’ judgments.²⁵⁴ This response to the Supreme Court’s judicial review shows sincere concern over further erosion to their jurisdiction.

3. The Arbitral RJBs’ Reliance on Civil Court Enforcement

RJBs in England and the United States mostly operate as arbitral bodies and depend on civil courts to enforce their decisions. All other RJBs in England and the United States act as informal mediation and advisory bodies that issue non-binding opinions. The BDA is the most prominent Jewish RJB in the United States and the MAT is the most prominent Islamic RJB in England.²⁵⁵ Because they operate as arbitral bodies that rely upon civil courts to enforce their decisions, both the BDA and the MAT have deliberately modeled their procedural rules after the procedural rules of the civil courts.²⁵⁶ Because they operate as arbitral bodies, they rely upon civil courts to enforce their decisions. Although distinct rules of procedure exist in Jewish and Islamic law, the BDA and MAT utilize innovative methods to ensure that their arbitration procedures meet the requirements of their countries’ respective arbitration acts and the requirements of their respective religious law.²⁵⁷

The MAT and the BDA demonstrate an explicit consciousness of the secular legal system in which they operate. On the MAT website, it differentiates itself from other Islamic RJBs in England by highlighting its ability to “adher[e] to the

²⁵² Halperin-Kaddari, *supra* note 230, at 203.

²⁵³ *Id.* at 202.

²⁵⁴ SHAHAR, *supra* note 28, at 102.

²⁵⁵ See BROYDE, *supra* note 5, at 138, 177, 260; see also Broyde et al., *supra* note 6, at 36–37.

²⁵⁶ See BROYDE, *supra* note 5, at 141–45, 179–81.

²⁵⁷ *Id.* at 179.

English Legal System whilst still preserving . . . practices of Islamic Sacred Law.”²⁵⁸ Likewise, the BDA in the introduction to its procedural rules states: “The Beth Din of America adjudicates disputes in a manner consistent with secular law requirements for binding arbitration so that the resolution will be enforceable in the civil courts of the United States of America, and the various states therein.”²⁵⁹ Failure to comply with the legally mandated procedural standards of their respective arbitration acts “can serve as grounds for vacating the arbitration award.”²⁶⁰

Arbitral RJBs in the United States have focused their concern on meeting procedural requirements of the FAA due to the current standard of review for arbitration decisions. Per the FAA, civil courts do not differentiate between secular, commercial arbitration and religious arbitration, simply treating them all as arbitration.²⁶¹ Therefore, enforcement of awards from religious arbitration “avoids any excessive entanglement with religious doctrine because the courts, when enforcing arbitration awards, are instructed not to investigate the merits of the dispute between the parties.”²⁶² In recent years, the Supreme Court has expanded the “deference and autonomy granted to arbitration tribunals,”²⁶³ although it has maintained that “a substantive waiver of federal civil rights [in arbitration agreements] will not be upheld.”²⁶⁴

Civil courts may vacate arbitration awards that “seriously conflict with the law,”²⁶⁵ either in the form of “a substantive waiver of civil rights,” a violation of “public policy”²⁶⁶ or a demonstration of “manifest disregard of the law.”²⁶⁷ A violation of

²⁵⁸ *About Us: History*, MUSLIM ARB. TRIBUNAL, <http://www.matribunal.com/history.php> [<https://perma.cc/HQW8-XUL9>].

²⁵⁹ RULES AND PROCEDURES, BETH DIN OF AMERICA (2013), <http://s589827416.onlinehome.us/wp-content/uploads/2015/07/Rules.pdf> [<https://perma.cc/X28V-67XV>].

²⁶⁰ Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 CHI.-KENT L. REV. 141, 144 (2015).

²⁶¹ *See, e.g.*, 9 U.S.C. § 10(a)(4) (2012 & Supp. V 2018) (referring to arbitration and arbitrators generally without categorization).

²⁶² Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 508 (2013).

²⁶³ *Id.* at 506 (citing the following cases, which enlarge “the scope of the Federal Arbitration Act”: *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010)).

²⁶⁴ Walter, *supra* note 6, at 543–44 (quoting *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009)). In the Southern District of Indiana, a judge noted that the correct remedy for a waiver of rights was after the arbitration action had concluded, not before. *Easterly v. Heritage Christian Sch., Inc.*, No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099, at *3 n.3 (S.D. Ind. Aug. 26, 2009).

²⁶⁵ BROYDE, *supra* note 5, at 217.

²⁶⁶ Walter, *supra* note 6, at 543–44 (citing *14 Penn Plaza*, 556 U.S. at 273).

²⁶⁷ Jason P. Steed, *Appealing Arbitration Awards and the Circuit Split over “Manifest Disregard of the Law”*, A.B.A. (May 10, 2016), <http://apps.americanbar.org/litigation/committees/appellate/articles/spring2016-0516-appealing-arbitration-awards->

“public policy” within an arbitration award may also result in a civil court vacating the arbitration award. In these instances, courts will generally not enforce the arbitration award on the basis “that the waiver of substantive rights is not merely a matter of private contract, but implicates broader societal interests that ought not be permitted to be abrogated through private agreements.”²⁶⁸ Some American civil courts have extended this principle to vacate arbitration decisions “that conflict with broader, but not strictly *legal* policy concerns.”²⁶⁹

Thus far, the BDA and the MAT approach to crafting arbitration procedural rules that meet all the procedural requirements of their respective arbitration acts has led to success. Civil courts in the United States “have never overturned a BDA-issued arbitration award” and the MAT has met similar success in England.²⁷⁰

D. Litigants’ Social Expectations

The expectations of religious practitioners also impact the willingness of RJBs to accommodate secular norms. Both the BDA and the MAT indicate sensitivity to the desires of their litigants. The MAT states: “where appropriate, that members of the Tribunal have responsibility for ensuring this [is] in the interests of the parties to the proceedings and in the wider public interest.”²⁷¹ Likewise, the BDA rules allow for disputes where the parties explicitly adopt a “choice of law” provision and “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.”²⁷²

Religious laity living in these countries are aware of their rights under secular laws and, in some instances, come to expect preservation of those rights by RJBs. This is particularly true regarding women’s rights.²⁷³ Both Jewish and Muslim women have initiated movements calling for their equal treatment

circuit-split-manifest-disregard-law.html [https://perma.cc/U77Q-WPCV] (describing “manifest disregard of the law” as a “common-law ground for vacatur” over which the circuits are currently split) (citing *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009)).

²⁶⁸ BROYDE, *supra* note 5, at 217.

²⁶⁹ *Id.* (emphasis in original) (citing *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 63 (2000)).

²⁷⁰ Broyde et al., *supra* note 6, at 36–37.

²⁷¹ *About Us: Procedure Rules of Muslim Arbitration Tribunal*, MUSLIM ARB. TRIBUNAL, <http://www.matribunal.com/rules.php> [https://perma.cc/2UA4-5WUH].

²⁷² RULES AND PROCEDURES § 3(D), at 5, BETH DIN OF AMERICA (2013), <http://s589827416.onlinehome.us/wp-content/uploads/2015/07/Rules.pdf> [https://perma.cc/HQJ3-TJER].

²⁷³ *See generally* Fournier et al., *supra* note 100.

under religious law.²⁷⁴ These women often seek change within religious law itself and call upon RJBs to support them in ruling in more equitable ways. These expectations are especially important for the BDA and the MAT, as the majority of cases before them are divorce cases, which have particular implications for women's rights in Jewish and Islamic law.²⁷⁵

As in the Ontario Sharia Debate, Muslim women have often led the charge for more equal treatment under religious law. In her research on Muslim women, Cassandra Blachin, Chair of the Muslim Women's Network, found that Muslim women "want greater financial autonomy and security, a fairer division of property reflecting their contribution to the family's finances, freedom of mobility and equality in decision-making, a monogamous relationship, and, should mutual understanding break down, then equal access to divorce."²⁷⁶

Some legal scholars have also misinterpreted Muslim women's interest in preserving their civil rights. For instance, in England, at least one study has shown that "less than half" of Muslim women who married "a partner domiciled in England had registered their marriages according to civil law, meaning that the largest group of women in [the] sample were in effect unmarried according to English family law."²⁷⁷ Other legal scholars have interpreted this data to show that British Muslims "intentionally choose to avoid using state law," but studies show that the majority of "women had in fact expected their religious marriages to be registered in accordance with the Marriage Acts," and thus they intended to enjoy the protections of civil marriage.²⁷⁸ In those instances where these women then seek a divorce, they are shocked to learn that they do not have the protections of civil marriage.²⁷⁹

At the same time, motivations for utilizing religious arbitration and mediation often derive from a religious conviction that a religious divorce is necessary to remarry, and

²⁷⁴ See Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in *WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM* 177, 183–85. (Lynn Welchman ed., 2004); see also SUSAN ARANOFF & RIVKA HAUT, *THE WED-LOCKED AGUNOT: ORTHODOX JEWISH WOMEN CHAINED TO DEAD MARRIAGES* 1, 9 (2015); Fournier et al., *supra* note 100, at 337, 339.

²⁷⁵ See Fournier et al., *supra* note 100, at 349; see also SAMIA BANO, *MUSLIM WOMEN AND SHARI'AH COUNCILS: TRANSCENDING THE BOUNDARIES OF COMMUNITY AND LAW* 232–34 (1st ed. 2012).

²⁷⁶ BANO, *supra* note 275, at 234 (citing Cassandra Balchin, *Negotiating Bliss*, *OPENDEMOCRACY* (Mar. 8, 2010), <https://www.opendemocracy.net/5050/cassandra-balchin/negotiating-bliss> [<https://perma.cc/9NFS-TB35>]).

²⁷⁷ *Id.* at 160.

²⁷⁸ *Id.* at 160–61.

²⁷⁹ *Id.* at 161–62.

that civil divorce alone is insufficient. In order to obtain a religious divorce, Muslim women often must petition an Islamic judicial body to rule in her favor,²⁸⁰ as under classical interpretations of Islamic law, a Muslim woman cannot unilaterally declare herself divorced (as a Muslim man can). A similar challenge exists for Orthodox Jewish women living in secular societies, as the husband's consent is required for a Jewish divorce (*gett*); civil divorces are not enough to release them to remarry within their religious practice.²⁸¹ As well documented in the book, "*The Wed-Locked Agunot: Orthodox Jewish Women Chained to Dead Marriages*," Orthodox Jewish women have been at the forefront of the movement to rectify the plight of Jewish women stuck in marriages (*agunah/agunot*) because of the disparities in divorce rights in Orthodox interpretations of Jewish law.²⁸²

Central to the *agunah* question is that "[a]ccording to [Jewish law], a Jewish marriage comes to an end by the husband giving his wife a *get* [a written bill of divorce with specific procedural requirements], a process only he can carry out."²⁸³ A woman becomes an *agunah* when for all intents and purposes she is divorced but has yet to receive a *get*.²⁸⁴ Failure to receive a *get* prohibits her from religiously remarrying, but no such prohibition exists for her husband.²⁸⁵ If she remarries without the *get*, under Jewish law she will be viewed as committing adultery and any children resulting from such a marriage will have the religious legal designation of *mamzerim* (illegitimate) (which carries certain legal repercussions).²⁸⁶

Susan Aranoff and Rivka Haut led the effort to challenge the Orthodox Jewish courts to end the plight of the *agunot*. In particular, they publicized the inaction of the courts to help these women and brought greater awareness to the Orthodox Jewish community of the courts' injustice. Aranoff and Haut document how for some of the *agunot* the ill treatment of the Rabbinical courts led to a crisis of faith and serious consideration of leaving the Orthodox faith.²⁸⁷ This led to members in the community

²⁸⁰ Lee Ann Bambach, "That Ye Judge with Justice" Faith-Based Arbitration by Muslims in an American Context 147 (2014) (unpublished Ph.D. dissertation, Emory University) (on file with author).

²⁸¹ ARANOFF & HAUT, *supra* note 274, at 9.

²⁸² *Id.*

²⁸³ Adena Berkowitz, *The Prisoners of Divorce*, LILITH, Winter 1987–1988, at 1 (italization added).

²⁸⁴ BROYDE, *supra* note 5, at 248–49.

²⁸⁵ *Id.*

²⁸⁶ Benjamin Steiner, *The Lieberman Clause Revisited*, 69 AM. JEWISH ARCHIVES J. 41, 44 (2017).

²⁸⁷ ARANOFF & HAUT, *supra* note 274, at 84.

pressuring the Rabbinical courts to better address the legal needs of the *agunot*.²⁸⁸ Although the issue persists today, Conservative and Orthodox Jewish courts have taken steps to help resolve the problem, as discussed in greater detail below.

In Israel, Muslim women have also led the initiative for legal reform to address inequities under divorce law related to maintenance. In the 1990s, Arab Muslim feminists joined forces with Palestinian and non-Palestinian organizations to form a “Working Group for Equality in Personal Status Issues.”²⁸⁹ The stated goal of the group “was to ‘combat discrimination against Arab women in the area of personal status, and change social norms by promoting significant changes in attitudes and behavior toward Arab women and their personal status issues.’”²⁹⁰ With the passing of the Family Courts law in the Knesset (which created parallel jurisdiction in parallel family law courts),²⁹¹ the Working Group launched a successful initiative for an amendment which granted “Muslim and Christian women the option of recourse in maintenance suits—as well as in all other matters of personal status, except for marriage and divorce—to the new family courts.”²⁹² As discussed below,²⁹³ the Sharia courts reacted to these calls for reform and limits on their jurisdiction by initiating an internal reform of their own.²⁹⁴

In contrast, the Israeli Rabbinical courts have largely, successfully resisted calls for reform. As a matter of law, the Rabbinical courts must adhere to the decisions of the Supreme Court of Israel, yet the political clout of Orthodox and Ultra-Orthodox Jews in Israel allows for the Rabbinical courts to essentially disregard the Supreme Court decisions.²⁹⁵ Although the majority of Jewish Israelis are not Orthodox, the Orthodox control of the courts remains due to the political power of Orthodox Jews and the role of Orthodox Judaism in national identity.²⁹⁶ Scholars have noted that:

The term Jewish state denotes far more to Israelis than the fact that a majority of its population is Jewish. Ninety-three percent of the Jewish population believes that Israel ought to be a Jewish State. Now Jewish state undoubtedly means different things to different people, but to the vast majority of the population it means a state which is

²⁸⁸ *Id.* at 84–85.

²⁸⁹ SHAHAR, *supra* note 28, at 100.

²⁹⁰ *Id.* at 101.

²⁹¹ *See id.*

²⁹² *Id.*

²⁹³ *See infra* Section III.C.

²⁹⁴ SHAHAR, *supra* note 28, at 101.

²⁹⁵ *See* Fournier et al., *supra* note 100, at 356, 358 n.130.

²⁹⁶ *See* EDELMAN, *supra* note 34, at 56.

predominantly Jewish (83 percent), which lives in accordance with the values of Judaism (64 percent), and whose public image is in accord with the Jewish tradition (62 percent). Seventy-seven percent feel that there ought to be some relationship between religion and state in Israel. In other words, Jewishness contains religious overtones for the vast majority of Israeli Jews, and they seek a reflection of this content in the conduct of the state.²⁹⁷

This national identity strengthens the position of the Rabbinical courts, as they are aware of the cultural affiliations of the majority of the population. This translates into a reliance on the courts for religious legal matters, such as divorce, that exists even when civil options are available.

This is not to say that Jewish groups have not called for reform. For instance, Israel now recognizes secular marriages performed abroad, although divorce proceedings for those marriages must still occur before the Rabbinical courts for Jewish litigants.²⁹⁸ Furthermore, historically when Jewish courts were serving minority populations, they “frequently had to change the Law to meet novel conditions.”²⁹⁹ Those calling for reform often “invoke the memory of Rabbi Abraham Isaac Kook (1865–1935).”³⁰⁰ During the Mandate period, Rabbi Kook “facilitated cooperation between Orthodox and other Jews . . . by, among other things, reinterpreting Halachah to deal with the exigencies of contemporary life.”³⁰¹ For instance, the successful passing of the *Sanction Law* in 1995 was “[a] major step forward with regard to the *agunah* problem” created by *get* refusal.³⁰² Under the *Sanctions Law*, rabbinical court judges may “issue sanctions and a variety of restrictive orders upon a recalcitrant spouse.” While historically the community would “use indirect pressure to influence a husband to issue a bill of divorce,” the legislation has transferred that power to the courts which may “withhold certain benefits of the husband.”³⁰³ Unfortunately, despite the ability to do so, Rabbinical courts rarely utilize the *Sanction Law* and *get* refusal remains a problem for Jewish women in Israel.³⁰⁴

²⁹⁷ *Id.* at 56–57 (quoting CHARLES LIEBMAN & ELIEZER DON-YEHIYA, CIVIL RELIGION IN ISRAEL 13 (1983)).

²⁹⁸ Fournier et al., *supra* note 100, at 335, 335 n.18.

²⁹⁹ EDELMAN, *supra* note 34, at 68.

³⁰⁰ *Id.* at 69.

³⁰¹ *Id.*

³⁰² Fournier et al., *supra* note 100, at 360 n.135 (quoting RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 238 (2004)).

³⁰³ *Id.* at 350; see also *Israel: Extrajudicial Sanctions Against Husbands Noncompliant with Rabbinical Divorce Rulings*, LIBRARY OF CONGRESS (May 24, 2017), <https://www.loc.gov/law/help/divorce-rulings/israel.php> [<https://perma.cc/P8JT-XACS>].

³⁰⁴ See *id.*

The “internal dynamics of the Orthodox subculture in Israel” does not lend itself to accommodating the “exigencies of contemporary life” created by the secular norms of the state.³⁰⁵ In part, this is due to the lack of a “rabbinical seminary offering a university-oriented program of studies,” as exist in all other Western countries with sizeable Jewish populations.³⁰⁶ Furthermore, a cultural attitude exists within Israel’s Orthodox population to not “change the Halachic norms governing marriage and divorce”³⁰⁷ and “for them the applicability of religious law is not conditioned upon the secular lawmaker’s will.”³⁰⁸ After the Israeli Supreme Court required the Rabbinical courts to follow civil law, the Rabbinical court judges met and formally rejected the decision on the grounds “that they consider themselves bound only by the religious law and not by state law or by precedents set by the SC.”³⁰⁹

This does not suggest that Halachic reform in the areas of divorce and marriage law is inherently impossible, but rather that the Rabbinical courts in Israel refuse to reform religious law at the dictates of a secular state. Historical evidence exists of rabbinical authorities reforming divorce and marriage law based on the needs of the populace: “[F]or a period of approximately four hundred years (650–1050), Rabbinic authorities in several Mediterranean countries interpreted Halachah so as to permit *either* party to obtain a divorce against the other’s will.”³¹⁰ Furthermore, as discussed in Part III, Jewish courts in contemporary jurisdictions such as the United States are developing solutions to accommodate the exigencies of contemporary life.³¹¹

E. Institutional Parallels

The article thus far has portrayed RJBs serving minority religious communities as responsive to external forces, including pressure from litigants and civil courts. Although this account is a new view of RJBs, the understanding of judicial tribunals as responsive to forces beyond merely the law on the books resonates with work in both constitutional theory and public administration. First, consider the resonance between RJB accommodation and theories of popular constitutionalism. Despite obvious differences

³⁰⁵ EDELMAN, *supra* note 34, at 69.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 70.

³⁰⁸ ENGLARD, *supra* note 24, at 46.

³⁰⁹ Gallala-Arndt, *supra* note 156, at 214.

³¹⁰ EDELMAN, *supra* note 34, at 71 (emphasis in original).

³¹¹ See *infra* Sections III.A-B.

between civil courts and RJBs, distinct similarities exist in the dynamic between the Article III courts and the public and RJBs and the populations they serve. As such, popular constitutionalism echoes some of the explanations of why RJBs respond to popular opinion. They face similar consequences if they are unresponsive to popular opinion. Furthermore, in both instances, a tension exists between faithfulness to the original intent of the founding texts and responsiveness to the popular desire of the populace.

RJBs respond to changing values of religious laity by reinterpreting the past legal commitments of previous generations of scholars and applying these past commitments in new ways or at a higher level of generality. According to one theory of popular constitutionalism, Article III courts similarly “synthesize new values and institutions with the past by reinterpreting the past constitutional commitments of previous generations, showing how what the political branches are doing is actually faithful both to the Constitution and to the past.”³¹² One way in which Jewish and Islamic RJBs demonstrate this approach is in their continued commitment to regarding marriage as a contractual relationship, while concurrently reinterpreting standard clauses of the marriage contract to include protection for women in the event of divorce (as discussed in more detail in Part III).³¹³ Additionally, Article III “courts may describe past commitments in new ways or at a higher level of generality, often drawing on the entire history of readings of the Constitution by political and judicial actors.”³¹⁴ This parallels Islamic RJBs’ use of *takhayyur*, the methodology that allows judges to draw on opinions from any of the four classical schools of Islamic legal theory.³¹⁵

Popular constitutionalism suggests that RJBs may face consequences if they are unresponsive to the values and desires of religious laity. Potential consequences include: “First, it may render a judicial decision *futile* Second, outrage might make a judicial decision *perverse*, in the sense that it might produce consequences that are the opposite of those intended by the Court.”³¹⁶ Additionally, there is the view that “judges should attend to public outrage because of the particular risks to the judiciary

³¹² Balkin, *supra* note 134, at 570.

³¹³ Muslim American legal scholars have also taken similar approaches. For instance, Asifa Quraishi-Landes has outlined how existing Islamic legal doctrines can be used to support women’s rights. See Asifa Quraishi-Landes, *A Mediation on Mahr, Modernity, and Muslim Marriage Contract Law*, in *FEMINISM, LAW, AND RELIGION* 173–74 (Marie A. Failinger et al. eds., 2013).

³¹⁴ Balkin, *supra* note 134, at 570.

³¹⁵ BROYDE, *supra* note 5, at 183; Emon, *supra* note 82, at 397.

³¹⁶ Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care*, 60 *STAN. L. REV.* 155, 170–71 (2007) (emphasis in original).

itself. Lacking electoral legitimacy or a police force, judges are highly dependent on public acceptance of their authority. If the public is outraged, judicial authority might well be jeopardized.”³¹⁷

RJBs’ authority depends on the religious laity utilizing them and accepting their judgment. Despite religious commitments, religious laity may be prone to seek redress in civil courts, instead of an RJB, if their civil rights might be lost by going to an RJB. RJBs have very weak to non-existent enforcement mechanisms, relying on religious commitment as a primary means of ensuring their judgments are upheld.³¹⁸ This weak enforcement can lead to RJBs’ decisions being rendered futile. If RJBs contradict an individual’s sense of justice or beliefs about religious law, then they may not comply with the ruling, may not recommend the RJB to others, and may not utilize the RJB in the future.

Outrage may also have eschatological implications that render an RJB decision perverse. Since the RJBs aim to promote the application of and adherence to religious law, outrage to a decision may result in the opposite effect. Namely, because these RJBs are operating in democratic societies that protect freedom of religion and speech, religious laity may choose to leave their religions. Within the Islamic context, apostasy has grave eschatological impact, such that Islamic RJBs may be concerned with the moral consequences of being implicated in causing apostasy.³¹⁹ Thus, beyond competition from civil-courts and the possibility of forum shopping, the consequences facing RJBs include potentially contributing to apostasy.

RJBs concerns regarding their continued existence also resonate with the force at play in Wilson’s descriptions of “organizational maintenance.” An organization’s maintenance “is threatened by any number of forces which we might describe generally as ‘strain.’ They include the withdrawal of valued members . . . [and] the challenge of a rival organization . . .”³²⁰ Organizational maintenance requires an active membership, which for RJBs means a religious population that views the RJB as legitimate and chooses to regularly utilize them.

Membership maintenance directly relates to an organization’s ability to accommodate its environment—“[A]ll organizations seek some form of accommodation with their environment, because the costs of sustaining indefinitely a combat-

³¹⁷ *Id.* at 171.

³¹⁸ Bambach, *supra* note 280, at 211, 286 (“Muslim faith-based ADR systems generally . . . must rely on individuals’ good will and community pressure for enforcement of arbitration decisions.”).

³¹⁹ See generally SIMON COTTEE, *THE APOSTATES: WHEN MUSLIMS LEAVE ISLAM* (2015).

³²⁰ WILSON, *supra* note 13, at 30–31.

oriented organization are generally too high to be borne by the members.”³²¹ Members of an RJB may bear personal costs if the larger society views the RJB as out of sync with or even a threat to its environment. For instance, within the context of Islamic RJBs in England and the United States, if the larger society considers an Islamic RJB at odds with secular norms, political organizations may target it and the popular media may portray it as violating women’s rights or threatening national security. In those instances, social and political consequences may accompany any affiliation with the RJB for individuals involved with the RJB.

RJBs, like political organizations, “are highly averse to risk and thus avoid active rivalry except under special circumstances.”³²² This risk aversion leads to the “maintenance strategy [of] develop[ing] *autonomy*—that is, a distinctive area of competence, a clearly demarcated and exclusively served clientele or membership, and undisputed jurisdiction over a function, service, goal, or cause.”³²³ RJBs cannot completely avoid competition with civil courts. They minimize the competition, however, by creating procedural norms that mirror the civil courts (thus, reducing the potential attractiveness of the civil courts) and carving out undisputed competence and jurisdiction over the application of religious law.

Finally, “[o]rganizations do not recruit and motivate members from a homogenous population of equally interested, or uninterested, prospects; rather, they offer inducements to persons who differ.”³²⁴ While it may be easy to imagine the population that utilizes an RJB as homogenous, in reality the population may differ in significant ways, including religiosity, cultural and linguistic background, age, and citizenship. Therefore, to maintain membership, RJBs behave in ways that accommodate the broad normative expectations of the diverse populations they serve.

Although RJBs are outside courts and public administration bodies that popular constitutionalism and Wilson’s political organization theory address, these strands of thought mirror some of the forces at play with RJBs. In particular, RJBs face similar concerns to Article III courts regarding the backlash they may face from unpopular opinions. They also share motivations with political organizations regarding self-preservation. In short, RJBs share motivations and behaviors of other courts and political organizations in secular democratic societies.

³²¹ *Id.* at 31.

³²² *Id.* at 263.

³²³ RONALD J. HREBENAR, INTEREST GROUP POLITICS IN AMERICA (71 (3d ed. 2015) (emphasis added).

³²⁴ WILSON, *supra* note 13, at 56.

III. RJBs' ACCOMMODATIONS: GENDER AND PROCEDURE

This Part substantiates the article's core claim: that religious judicial bodies accommodate the secular norms of the nation in which they operate. It gathers several examples from Islamic and Jewish RJBs serving minority populations in Israel, the United States, and England. These RJBs have adjusted their application of pre-marital agreements and divorce, arbitration procedure, commercial law, and jurisdiction, all in an apparent effort to gain legitimacy in the eyes of secular courts (which may enforce their judgments) and litigants (who could otherwise select a different forum).

The primary areas of accommodation have been in divorce law and civil procedure. In the first instance, this is due to two factors. First, the majority of cases before these RJBs are divorce cases.³²⁵ Second, women's rights—especially equalizing the right to divorce—has become a rallying cry both for religious women and for political forces opposed to RJBs.³²⁶ Conformity to rules of civil procedure for arbitration-based RJBs has also been a locus of accommodation, as “[f]ailure to comply with such standards can serve as grounds for vacating [an] arbitration award.”³²⁷ I contrast these examples with the example of Rabbinical courts in Israel, which serve a majority population and has adopted “an ideology under which any change or alternation undermines the foundations of religion.”³²⁸

A. *The U.S. and England: Gender Equality*

Given that divorce cases comprise the majority of the cases before the MAT and BDA, both RJBs have sought to align their respective religious laws with the secular norms of substantive justice of the state via the preemptive use of prenuptial agreements and standardized marriage contracts to alleviate inequalities in divorce proceedings.

In England, the Muslim Institute, Britain's foremost Muslim think-tank,³²⁹ drafted and has advocated for the use of its standard marriage contract. The contract includes provisions such as:

³²⁵ Sandberg et al., *supra* note 7, at 276.

³²⁶ See Fournier et al., *supra* note 100, at 341, 345.

³²⁷ Helfand, *supra* note 260, at 144.

³²⁸ Pinhas Shifman, *Civil Marriage in Israel: The Case for Reform*, in JEWISH FAMILY LAW, *supra* note 230, at 128.

³²⁹ The Muslim Inst., *UK: Muslim Institute Launches Model Muslim Marriage Contract*, WOMEN LIVING UNDER MUSLIM LAWS, <http://www.wluml.org/node/4749> [<https://perma.cc/P2C8-FUVL>].

- 1) Removing the requirement for a “marriage guardian” (*wali*) for the bride, who, as an adult, can make up her own mind about whom to marry
- 2) Enabling the wife to initiate divorce and retain all her financial rights agreed in the marriage contract
- 3) Forbidding polygamy whether formally or informally in the UK or abroad
- 4) Encouraging mosques to register to perform marriages³³⁰

The BDA has also looked at contractual solutions to address inequalities in Jewish divorce law. The BDA has developed and advocated for the use of a prenuptial agreement (the Prenup) to address the unequal treatment of Jewish women under Orthodox interpretations of Jewish law.³³¹ In September 2015, the Rabbinical Council of America issued a resolution stating that its “members must utilize, in any wedding at which he is the officiant (*mesader kiddushin*), in addition to a *ketubah*, a rabbinically-sanctioned prenuptial agreement, where available, that aids in our community’s efforts to ensure the timely and unconditional issuance of a *get*.”³³² The reasoning the BDA provides for the need for the Prenup—from their website theprenup.org—is that in modern society *bataei din* “frequently lack the authority” to ensure that the “*get* is not improperly withheld.”³³³ Therefore, the Prenup, which is entered into prior to marriage, stipulates that in the event of divorce “the *beit din* will have the proper authority to ensure that the *get* is not used as a bargaining chip.”³³⁴

The recommended use of “the Prenup” resulted from a long debate within the American Jewish community about how to best address the issue of *get* refusal. It addresses the issue by requiring, in the event of divorce, that the couple agree to arbitrate the divorce before the BDA.

While the BDA is the most prominent Jewish judicial body in the United States, it is but one of many such bodies.³³⁵ Distinct differences exist between Orthodox Jewish judicial bodies (of which the BDA is one) and Conservative Jewish

³³⁰ BANO, *supra* note 275, at 234.

³³¹ *Explaining the Prenup: Jewish Divorce and the Role of the Prenup*, PRENUP, <http://theprenup.org/explainingtheprenup.html> [https://perma.cc/8SUR-5C5D].

³³² *2016 Resolution: Requiring the Use of Prenuptial Agreements for the Prevention of Get-Refusal*, RABBINICAL COUNCIL AMERICA (Sept. 22, 2016), <http://www.rabbis.org/news/article.cfm?id=105863> [https://perma.cc/2332-MKB7].

³³³ *Explaining the Prenup*, *supra* note 331 (emphasis added).

³³⁴ *Id.*

³³⁵ BROYDE, *supra* note 5, at 80.

judicial bodies. The differences between them in large part exist due to their respective perspectives on “the extent to which Jewish law could be bent to meet the ‘progressive standards of American life.’”³³⁶ The *get* refusal problem is one of the fundamental ways in which this difference has been drawn.

How to address the *get* refusal problem within the United States became a major debate between Orthodox and Conservative Jewish scholars.³³⁷ During this period, the Jewish Theological Seminary (JTS)—the locus for Conservative Jewish scholarship and home of Conservative Judaism’s judicial body, the JTS Beth Din—crafted a solution known as the “Lieberman Clause.”³³⁸ Under the Lieberman Clause, the JTS Beth Din added an addenda to the *ketuba* (the Jewish marriage contract), in which the parties to the contract, the marrying couple, “agreed to recognize the Bet Din of JTS as having the authority to counsel them to summon either partner before it.”³³⁹ Today, the Orthodox BDA resolves this issue by requiring the use of its pre-nuptial agreement.³⁴⁰

B. *The U.S. and England: Secular Procedural Justice*

The BDA displays a distinct consciousness of the secular legal environment in which it operates and its reliance on civil courts to enforce its decisions. It has constructed its judicial bodies around six principles in order to “gain the respect of secular courts.”³⁴¹ While the BDA existed since 1960, the transformation of the BDA into a respected arbitration venue began in 1996.³⁴² The BDA board of directors deliberately “worked with the BDA’s rabbinic leaders to craft an arbitration process that secular courts are comfortable upholding.”³⁴³ Rather than merely focusing the “technical legal requirements” to adhere to American arbitration law, the BDA took a multi-pronged approach to gain the confidence of American secular courts.³⁴⁴

The approach did not entail “substantive alternations of Jewish law not permitted by the *halakhic* system itself,”³⁴⁵ but rather existing options within the interpretation of Jewish law.

³³⁶ Steiner, *supra* note 286, at 42 (quoting JONATHAN D. SARNA, AMERICAN JUDAISM: A HISTORY 240–41 (2004)).

³³⁷ See, e.g., Berkowitz, *supra* note 283, at 1.

³³⁸ *Id.* at 2.

³³⁹ *Id.*

³⁴⁰ See *Explaining the Prenup*, *supra* note 331.

³⁴¹ BROYDE, *supra* note 5, at 139–40.

³⁴² *Id.* at 139.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

The “permissible but innovative approaches” allow the BDA to “successfully navigate[] the complex relationship between secular and religious law in the United States,” providing religious adherents a judicial form “consonant with both Jewish and American law.”³⁴⁶ Michael Broyde, a member of the BDA and Emory Law School professor, has identified six main pillars as key elements to the success of the BDA. He describes these six main pillars as follows: (1) the development of formal procedural rules, ensuring due process for all parties; (2) the establishment of an appellate process, promoting accountability and transparency; (3) respect for the ultimate legal authority of the secular state; (4) the use of “customs” in commercial cases; (5) “dual-system fluency” of arbitrators in both the American legal system and their respective religious law; and 6) an “active role” in representing their religious communities’ interests to the larger society.³⁴⁷

Within these pillars, the BDA exhibits a distinct conscientiousness of the larger, secular legal environment in which it operates. This conscientiousness takes two forms: taking into consideration the expectations of secular courts enforcing their decisions and, importantly, taking into consideration the expectations of disputants living within the secular environment. The BDA displays awareness that disputants’ “sense of fairness and justice” is informed by both their religious identity and their membership as citizens of a secular state.³⁴⁸

Disputants’ expectations also come into consideration regarding issues of custom and commercial practice. While Jewish judges know the requirements of religious law, the community may not and may have “already adopted the commercial law norms of the general society in which it lives and works and [have] fully integrated secular law norms with the Jewish law.”³⁴⁹ Within Jewish law this does not necessarily mean that Jewish law will be contravened to meet the expectations of disputants. Rather, within the realm of commercial matters, two elements allow for this accommodation: (1) “any condition that is agreed upon with respect to monetary matters is valid, and (2) customs established among merchants acquire Jewish law validity, provided that the practices stipulated or commonly undertaken are not otherwise ritually prohibited.”³⁵⁰ The introduction to the BDA’s rules of procedure recognizes that the BDA “provides a forum where adherents of Jewish law can seek

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 140.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 155.

³⁵⁰ *Id.* at 156.

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 society.”³⁵¹ To achieve this, the BDA rule Section 3(e) states that the BDA will accept “common commercial practices . . . to the fullest extent permitted by Jewish Law.”³⁵²

The BDA also accepts the jurisdictional limits imposed by the secular state. For instance, recognizing that a religious divorce will never also serve as a civil divorce, the BDA has taken measures to ensure that divorcing couples also receive a civil divorce. To this end, the BDA hinges the effect of the religious divorce on the attainment of civil divorce. The BDA Jewish divorce documents state that each party is “free to marry provided that s/he is also civilly divorced.”³⁵³ Rather than renouncing civil divorce as illegitimate, and advocating for Jewish marriage and divorce alone, the BDA recognizes the limits on its jurisdictions and the importance of civil marriage in regards to the protection of civil rights for Jews living in under secular, civil law.

The MAT in England followed in the footsteps of the BDA to deliberately create “innovative processes . . . ensur[ing] that its arbitrations would conform to the formal requirements of the Arbitration Act, garner the respect of British courts, and make judges more comfortable enforcing its rulings.”³⁵⁴ Also like the BDA, the MAT has used innovation within the religious legal tradition, particularly in regards to procedure, to craft “an arbitration process that gives British Muslims the opportunity for effective dispute resolution services consistent with both British and Islamic law.”³⁵⁵ In doing so, the MAT views itself “as building on Islamic law’s normative adjudicatory framework in light of contemporary views about what procedures best protect litigants and ensure just outcomes.”³⁵⁶

A 2009–2011 Cardiff University study found that like their American counterparts, “religious courts [in England] strongly encourage the parties to obtain a civil divorce before they engage in religious proceedings, recognising that the law of the state takes priority and that it is in no one’s interest to have a

³⁵¹ BETH DIN AMERICA, *supra* note 259.

³⁵² *Id.* at 5.

³⁵³ BROYDE, *supra* note 5, at 152 (citing LOUIS JACOBS, THE JEWISH RELIGION: A COMPANION 132–33, 188 (1995)).

³⁵⁴ *Id.* at 179.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 181.

‘limping marriage.’³⁵⁷ This respect and prioritization of the laws of the state also extends into the asserted jurisdiction of Jewish and Islamic judicial bodies in the United States and England.

What is absent from any of these RJBs are attempts to expand their jurisdiction. Within the English and American context, what we do not see are any indications that these RJBs desire to expand their jurisdiction beyond their current limitations. There are no efforts, for example, to expand their scope to include criminal or tort law. Jewish and Muslim RJBs in both the informal context of unenforceable ADR and the more formal context of enforceable arbitration have accepted that, though their respective religious legal systems apply to a much broader range of contexts, they will limit themselves to the matters of commercial and family law permitted under civil law.

C. *The Islamic RJBs in Israel: Gender Equality and Civil Courts*

The Israeli Sharia courts in recent decades have also had to address the issue of limitations on their jurisdiction. They have responded to the threats of the civil courts to the erosion of their jurisdiction with sincere concern around the potential loss of Muslims to the civil courts and a desire to accommodate the needs of the entire Muslim population.³⁵⁸ The response of the Israeli Sharia court to the attempts of the secular courts to erode its jurisdiction can be traced to two causes: (1) the minority identity of the population it serves; and (2) its sources of law. The Sharia courts serve the Muslim population of Israel, which is Arab and “largely [has] an Arab-nationalist consciousness.”³⁵⁹ For this Muslim population, recourse to civil courts reflects issues related to political identity. Although the *qadis* (judges) are state appointed, the Sharia courts represent a degree of legal autonomy, otherwise not enjoyed by the Arab Muslim population.³⁶⁰ Furthermore, recourse via legislative action is also complicated due to political and religious identity. Petitioning the Knesset for legislative reform is tantamount to inviting the Israeli State to further interfere in the narrow autonomy of the Arab Muslim population.

³⁵⁷ Elizabeth Butler-Sloss & Mark Hill, *Family Law: Current Conflicts and Their Resolution, in ISLAM AND ENGLISH LAW: RIGHTS, RESPONSIBILITIES AND THE PLACE OF SHARIA* 108, 111 (Robin Griffith-Jones ed., 2013).

³⁵⁸ See SHAHAR, *supra* note 28, at 102–03.

³⁵⁹ ENGLARD, *supra* note 24, at 46.

³⁶⁰ See Ramadan, *supra* note 165, 294–95.

Furthermore, from a religious-legal perspective, statutory codification of Islamic Law is only “appropriate for independent Muslim countries.”³⁶¹ Without a Muslim sovereign or independent Muslim legislative authority, the only means for reform is via the Sharia Court of Appeal.³⁶² Israel’s Jewish population does not face the same political or religious concerns and has civil and legislative options for reform as the majority Jewish population.

In the area of divorce, the Sharia courts have carried out a series of reforms via the Sharia Court of Appeals. These appeals have “led to an improvement of women’s status with relation to divorce,” resulting in dissolution of a marriage becoming “an option for both husband and wife.”³⁶³ These reforms have in large part derived from a shift in the relationship of the Sharia Court to Islamic Law. Rather than strictly adhering to traditional interpretations of Islamic Law, the Justices on the Sharia Court of Appeals look to it for “inspiration” and derive their rulings from a variety of sources, such as the laws of regional Muslim majority countries like Egypt and Jordan.³⁶⁴ Furthermore, the *Qadis* do not restrain themselves to a single school for their sources of inspiration. While they restrain themselves to the realm of Sunni Islam, they may draw on multiple schools, such as *Maliki* and *Hanafi* jurisprudence, in an opinion. Specifically, the Islamic Law the Sharia Court of Appeals draws upon is “an interaction between jurist’s law written by *fugaha*, statute law inspired by these *fugaha* and the legal contributions of the *qadis*.”³⁶⁵ By broadly drawing on a wide range of legal sources that may all broadly fall under Islamic law, the *qadis* may select the legal opinion or reasoning that best meets the specific needs of a case.

The Sharia courts, however, have only engaged in the process of reforming their understanding of Islamic Law for the past two decades. This change can be traced back to the appointment of three *qadis* to the Sharia Court of Appeals: Ahmad Natur, Faruq Zu’bi and Zaki Midlag.³⁶⁶ Under their guidance the Court “initiated a policy which attempted to balance women’s rights on the one hand and meet the requirements of the Islamic movement on the other.”³⁶⁷

³⁶¹ See Layish, *supra* note 26, at 214.

³⁶² *Id.*

³⁶³ Moussa Abou Ramadan, *Divorce Reform in the Shari’a Court of Appeals in Israel (1992–2003)*, 13 ISLAMIC L. & SOC’Y 242, 257 (2006).

³⁶⁴ See Layish, *supra* note 26, at 188–89, 206.

³⁶⁵ Ramadan, *supra* note 363, at 245.

³⁶⁶ Moussa Abou Ramadan, *Islamic Legal Reform: Sharia Court of Appeals and Maintenance for Muslim Wives in Israel*, 4 HAWWA 29 (2006).

³⁶⁷ *Id.* at 30.

They have “introduced reforms in the fields of maintenance, child custody, inheritance, and procedure.”³⁶⁸ They have also “adopted facets of Israeli legislation, such as the principle of judging in the interest of the child,”³⁶⁹ as a means to better reflect the sensibilities of the populations they serve and to prophylactically avoid further erosion of their jurisdiction by the civil courts. They have accomplished this reform via creatively interpreting traditional Islamic jurisprudence, “reaffirming its power over the regional Shari’ah Courts,” and “enhancing its symbolic image.”³⁷⁰

Qadi Natur, former President of the Israeli Sharia Court of Appeals, played a particularly important role in these reforms. The *Qadi* Law of 2002 has increased the perceived legitimacy of *qadis* as arbiters of Islamic Law.³⁷¹ The *Qadi Law* granted the president of the Sharia Court “jurisdiction to make the procedures faster and more efficient, to adopt temporary procedures, and to disqualify *qadis*,” similar to the efficiency found in arbitration systems.³⁷² Qadi Natur served as President of the Court of Appeals for two decades until 2013.³⁷³ It was under his tenure that the Sharia Court of Appeals began its “process of judicial activism . . . which continues until this day.”³⁷⁴ This judicial activism has relied heavily on the creation of a hierarchy of law (which previously did not exist in Islamic Law) and the issuance of pseudo-legislation in the form of circulars.³⁷⁵

D. *The Jewish RJBs in Israel: Resistance*

The Sharia and Rabbinical courts have responded to threats to their jurisdiction from the Israeli Supreme Court in very different ways. The Rabbinical courts have mostly refused to reform religious law to meet the needs and pressures of the entire Jewish population and thus alleviate motivations for Israeli Jews to petition civil courts for relief. The Rabbinical court claims to “protect its autonomy against external interference of the secular authority,” but ignores the increasing expansion of civil law into the area of family law.³⁷⁶ Furthermore, the Rabbinical court has

³⁶⁸ *Id.*

³⁶⁹ Ramadan, *supra* note 363, at 243.

³⁷⁰ Ramadan, *supra* note 165, at 297.

³⁷¹ The Qadis Law (No. 10) 2002.

³⁷² Ramadan, *supra* note 363, at 248.

³⁷³ *Former President of Sharia Court of Appeals in Israel Joins Hebrew University Faculty of Law*, HEBREW UNIV. OF JERUSALEM (Sept. 9, 2013), <https://new.huji.ac.il/en/article/18476> [<https://perma.cc/L292-2MWD>].

³⁷⁴ Ramadan, *supra* note 165, at 256.

³⁷⁵ *See id.* at 297.

³⁷⁶ Shifman, *supra* note 328, at 103.

been accused of “covering up its *religious failure* to deal with the social and cultural reality of Israel.”³⁷⁷

As noted earlier, in response to an Israeli Supreme Court case limiting the Rabbinical courts’ jurisdiction, the Rabbinical courts judges met and formally declared that they were rejecting the decision and would not comply with it on the grounds “that they consider themselves bound only by the religious law and not by state law or by precedents set by the [Supreme Court].”³⁷⁸ Although the secular, civil courts in Israel view the Rabbinical courts as subject to the laws of the state and ruling under state authority, religious judges believe that their application of religious law “is not conditioned upon the secular lawmaker’s will.”³⁷⁹

The Jewish population has mostly responded to the recalcitrant position of the Rabbinical courts through legislative action³⁸⁰ and selection of civil options (such as marriage abroad).³⁸¹ Today, the majority of Jewish Israelis are not Orthodox³⁸² and the Rabbinical courts do not necessarily reflect their non-Orthodox understanding of religion. For instance, the Rabbinical courts do not accommodate Conservative or Reform interpretations of Jewish Law commonly found in the United States. The Orthodox men that sit on the Rabbinical courts tend to “apply Jewish law in its most traditional form” and “adhere to the principle that women should be confined to the private sphere.”³⁸³

The Rabbinical courts’ response to threats to their jurisdiction has recently taken the form of asserting jurisdiction over Israeli Jews who seek to avoid their authority. For instance, in a 2010 divorce, the Rabbinical courts assumed jurisdiction over a couple who married “in Cyprus because, as secular Jews, they wished to avoid religious requirements.”³⁸⁴ Rather than applying the Supreme Court’s 2006 ruling requiring the Rabbinical courts to provide a quick dissolution of the marriage, the Rabbinical court disregarded the Supreme Court’s ruling and required a full *get*.³⁸⁵

The problem of *get* refusal remains a serious one for Jewish women in Israel. Despite the intervention of secular courts in this area, the intervention of the secular courts “has

³⁷⁷ *Id.*

³⁷⁸ Gallala-Arndt, *supra* note 156, at 214.

³⁷⁹ England, *supra* note 24, at 46.

³⁸⁰ See Gallala-Arndt, *supra* note 156, at 204 (“On 28 October 2013 the Israeli parliament (the Knesset) voted in a law allowing couples who want to marry to choose the rabbi who will perform their marriage.”).

³⁸¹ See Triger, *supra* note 4, at 6.

³⁸² Pnina Lahav, *Israel’s Rosit the Riveter: Between Secular Law and Jewish Law*, 93 B.U. L. Rev. 1063, 1064–65 (2013).

³⁸³ *Id.* at 1065.

³⁸⁴ Triger, *supra* note 4, at 7.

³⁸⁵ *Id.*

led to a stalemate.”³⁸⁶ In response to the attempts of the secular courts to erode their jurisdiction, the Rabbinical courts have developed “an ideology under which any change or alteration undermines the foundations of religion.”³⁸⁷ At the same time, the availability for recourse to the civil courts reduces “the pressure that could otherwise be brought upon” the courts to reform their interpretations and interpret Jewish law in a way that “would show awareness of the exigencies of life . . . sensitivity to the needs of the hour and flexibility in the face of the conditions of the time and place.”³⁸⁸

CONCLUSION

Muslim and Jewish judicial bodies serving minority populations demonstrate a willingness to accommodate the secular norms of substantive and procedural justice of the state. As other scholars have noted, when adopting facets of secular law, these religious courts rarely acknowledge that they are borrowing the dominant legal system, but rather they undertake a process of internal contextualization, such that the principles are established as existing within the religion itself.³⁸⁹ Through this process of internalization, the courts meet the procedural requirements necessary for enforcement by the state and meet the expectations of litigants necessary to maintain legitimacy.

Conversely, the example of the Rabbinical courts in Israel shows rigid adherence to religious law as unchanging and unaccommodating. Since the courts shifted from their position of serving a minority population under the Ottoman Empire to serving a majority population with the inception of the State of Israel, the Rabbinical court “has been less flexible and less innovative in its Halachic interpretation.”³⁹⁰

This suggests that perhaps assumptions about Islamic courts in majority-Muslim countries as “archaic, unchanging institutions”³⁹¹ have more to do with the political environments in which they operate and the majoritarian populations they serve,

³⁸⁶ Matthijs de Blois, *Religious Law Versus Secular Law, The Example of the Get Refusal in Dutch, English and Israeli Law*, 6 UTRECHT L. REV. 93, 106 (2010).

³⁸⁷ Shifman, *supra* note 328, at 128.

³⁸⁸ *Id.* at 128–29.

³⁸⁹ Ramadan, *supra* note 363, at 243 (“[T]he Shari’a Court of Appeals has adopted facets of Israeli legislation, such as the principle of judging in the interest of the child, even though it does not acknowledge borrowing from the Israeli legal system. Rather, this principle undergoes a procedure of Islamicization (i.e., it is interpreted as existing in the *Shari’a* itself), and the Shari’a Court of Appeals holds that *fiqh* rules concerning custody constitute a mere presumption that can be refuted.”).

³⁹⁰ EDELMAN, *supra* note 34, at 53.

³⁹¹ SHAHAR, *supra* note 28, at 39.

than an inherent flaw in Islamic law itself. To fully answer this query, additional research on the historical and contemporary operation of Jewish and Islamic courts is necessary.

Based on the findings of this article, future avenues of inquiry might examine the factors and mechanisms that promote or deter majority serving RJBs' responsiveness to popular opinion and the secular norms of the state in a variety of democratic countries. For instance, a fuller examination might comparatively examine the Rabbinical courts of Israel, Hindu courts in India, and Sharia courts in Indonesia focusing particularly on the role of religion to national identity and the use of political coalitions to protect RJBs. Such an inquiry might also include a close review of the published opinions of these RJBs to determine their legal reasoning in instances where they demonstrate a willingness to accommodate popular opinion or the secular norms of the state.

This article's focus has been on conceiving of religious judicial bodies more broadly to include both state-run and arbitration bodies and orienting the inquiry on RJBs from the prevailing perspective of whether democratic legal systems should accommodate religious legal pluralism to whether RJBs accommodate litigants and their environment. By looking at RJBs that serve majority and minority populations, this article suggests, that at the very least, the cultural and political position of an RJB influences its willingness to consider context and environment in the application of religious law.