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# ADR and Islamic law: the cases of the UK and Singapore\*

Arif A. Jamal<sup>1</sup>

## ABSTRACT

This paper examines the use of Alternative Dispute Resolution – and more particularly arbitration mechanisms – available to Muslims in the UK and in Singapore. With the rising importance of arbitration and other methods of ADR across many areas of law, the use of ‘religious arbitration’ has come to the fore. One of the oft-heralded virtues of arbitration has been its capacity to allow parties to choose the law governing their agreements and to choose the arbitrators to settle disagreements. In this respect, arbitration, even more so than other ADR methodologies, may be viewed as ‘pluralism enhancing’ since it opens the possibility of a wide range of different legal orders operating within one jurisdiction. When arbitration meets religious norms, however, certain issues can arise. First, need there be any limitation on the impact of religious norms in the arbitration process at either the level of substantive law or background of the arbitrators? Second, what if the substantive law that comes from religious norms is itself subject to diverse interpretations? This second issue is particularly relevant where the invocation of the Shari’a in arbitration agreements can actually invoke a broad spectrum of legal opinion. If states attempt to define the Shari’a, they may bring clarity to these norms. However, such a process runs the serious risk of constricting the interpretive plurality inherent in the Shari’a, and thus could, paradoxically, undermine the pluralism enhancing virtues of arbitration. The paper will explore these issues by examining the different contexts of the UK and Singapore.

Key words: Islam, Shari’a, ADR, arbitration, religion, pluralism

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## I. *Introduction*

This paper explores the use of Alternative Dispute Resolution (ADR) within Muslim legal traditions as they are expressed in the UK and in Singapore. In doing so, it addresses two areas of increasing concern in legal scholarship generally -- namely ADR and Islamic law. Moreover, within the context of Islamic law, the paper discusses an issue that currently is gaining attention as ancient Islamic norms, with a grounding in the Quranic text and expressing a preference for negotiated, amicable dispute settlement, are brought into conversation with contemporary ADR discourses.

The paper proceeds by discussing the classical bases for the use of forms of ADR -- particularly negotiation and mediation -- in Muslim legal thought and then proceeds to look at the ways in which ADR operates within Muslim contexts in the UK and in Singapore. This examination will show that Islamic law is applied more formally in Singapore than in the UK. This is well known and not surprising; however, its implications in the ADR context are interesting. Drawing upon literature about religious-based ADR, this paper will argue that the informal system in the UK may be more facilitative of Islamic ADR than the more formal system of Singapore. Lastly, the paper will raise the some of challenges that might emerge from operating in a more facilitative environment.

## II. *ADR and Islam*

The bases of ADR in classical Islamic thought and theory are well known and may be found even before the advent of Islam in the practice of pre-Islamic communities in Arabia, in the text of the Quran, and in early as well as contemporary Muslim practice, in part at least inspired from these bases. In other words, there has developed what one may call an 'ethic of ADR' in Muslim contexts.

As Toshihiko Izutsu has noted, in the pre-Islamic milieu, tribal solidarity was a key virtue.<sup>2</sup> As a result of this value and of the tribal organisation of society at that time, settlement of disputes through mediated means was encouraged especially within the tribe and in order to maintain the integrity of the tribal framework. Thus, conciliation and peace-making by elders, leaders and those in authority was practised through informal means within pre-Islamic Arabian society<sup>3</sup> and became part of the ethos of the society. By the time of the emergence of Islam, therefore, both the practice and the ethic of mediated settlement were known and established in the Arabian context.<sup>4</sup>

With the advent of Islam, the values of mediated and amicable settlement already present in the environment were not just validated but enhanced and reinforced, receiving Quranic sanction and thereby moving from being just pragmatic virtues now being cast within a richer notion of Islamic justice. In this light, both the use of amicable settlement involving mediation (*sulh*) and of arbitration (*takhim*) are referenced in the Quran.

For example, the fourth chapter (*sura*) of the Quran, Sura An-Nisa, makes reference to the concept of *sulh* saying:

And if a woman fears cruelty or desertion on her husband's part, there is no sin on them both if they make terms of peace between themselves; and making peace (*sulh*) is better. (Sura An-Nisa (4:128))

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<sup>2</sup> Toshihiko Izutsu, *Ethico-Religious Concepts in the Qur'an* (McGill-Queen's University Press, 2002; first published 1966), Chs. IV and V (pp. 55-104).

<sup>3</sup> Aseel Al-Ramahi, "Sulh: a Crucial Part of Islamic Arbitration" *LSE Law, Society and Economy Working Papers 12/2008* (Law Department, LSE), 3-4.

<sup>4</sup> Aida Othman, "And Amicable Settlement is best: *Sulh* and Dispute Resolution in Islamic Law" (2007) 21(1) *Arab Law Quarterly* 64 at 66.

Likewise, the Quran also says:

The believers are nothing else than brothers (in the Islamic religion). So make reconciliation between your brothers, and fear Allah, that you may receive mercy.” (Surah Al-Hujurat (49:10))

And:

So fear Allah and adjust all matters of difference among you.  
(Sura Al-Anfal (8:1))

*Sulh* therefore is presented as both a legitimate and even desirable form of settlement, and indeed the maxim ‘amicable settlement is best’ (*al-sulh khayr*)<sup>5</sup> or that amicable settlement is the best verdict (*al-sulh sayyid al-ahkam*) captures the notion that, as Ann Black has put it, “Sulh is not only regarded as an accepted method of dispute resolution within the Islamic justice system, but for some is seen as the ‘ethically and religiously superior’ means of settling disputes.”<sup>6</sup>

So, too, the use of arbitrator and arbitration (*takhim*) is mentioned in the Quran:

If you fear breach between them (husband and wife) appoint two arbiters, one from his family, and the other from hers. If they wish for peace, Allah will cause their conciliation. For Allah has full knowledge and is acquainted with all things.  
(Sura An-Nisa (4:35)).

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<sup>5</sup> Based on verse 4:128, cited above.

<sup>6</sup> Ann Black, “Mediation, arbitration and Islamic alternative dispute resolution” in Ann Black, Hossein Esmail and Nadirsyah Hosen, eds., *Modern Perspectives on Islamic Law* (Edward Elgar, 2013), 157.

It is important to note, as one can see in the verse above, that the arbitration was not conceived of, as it seems to be in the contemporary context, as distinct and independent from attempts at conciliation. Rather these processes could work simultaneously and in a complementary fashion. This is significant because it keeps to the fore the substantive value that the Islamic tradition gives to mediated arrangements even in the presence of other 'ADR' models of settlement.<sup>7</sup> As another verse of the Quran says:

The believers are but brothers, so make settlement (*sulh*) between your brothers. And fear Allah that you may receive mercy. (Sura al-Hujurat (49:10))

The Quranic ethos of amicable settlement was complemented by early practice, including of the Prophet Muhammad himself, of mediation or mediation-cum-arbitration of disputes. The Prophet as well as early leaders of the Muslim community after him served as mediators for private and public disputes and spoke of the virtue of *sulh*. They also identified its limits with the Caliph Umar (the second Caliph after the Prophet), saying that amicable settlement was fine but it could not agree to make licit the illicit, or illicit the licit.<sup>8</sup> It is useful to note that this practice continues today even in the context of the *qadi* (or judges) courts. For example, in his study of these courts in Saudi Arabia, Frank Vogel notes that "Saudi *qadis* (judges) show great skill as mediators and conciliators" and that "In Saudi sharia courts, I was often told, 'the great majority', or '99 percent' of all civil cases end in reconciliation."<sup>9</sup>

Mediation, conciliation and arbitration have thus been a fundamental part – and not just a recent addition – of the pre-Islamic and Islamic systems of

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<sup>7</sup> Wael Hallaq links this preference to the importance of the structures of the extended family or clan that existed at the time. See Wael Hallaq, *Sharia: Theory, Practice and Transformation* (Cambridge University Press, 2009) 159-164.

<sup>8</sup> As cited in Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill, 2000), 153.

<sup>9</sup> Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*, 155 & 154.

dispute settlement. They have been sanctioned by past and continuing practice and by the Quranic text and are thus considered virtuous elements of the ethos of the Islamic system of justice.

### III. *ADR, Islam and the UK*

The UK is broadly accommodating of ADR processes such as conciliation and arbitration, whether of commercial or private disputes and allows parties to choose the law that they wish to apply to their agreements.

Section 4 (2) of the *Arbitration Act 1996* allows “the parties to make their own arrangements by agreement but provides rules which apply in the absence of such agreement.”<sup>10</sup> For this purpose, an applicable law determined in accordance with the parties’ agreement, or which is objectively determined in the absence of any express or implied choice (via the Act), shall be treated as chosen by the parties.

The Act also states in sections 4 (4) and (5) that:

(4) It is immaterial whether or not the law applicable to the parties’ agreement is the law of England and Wales or, as the case may be, Northern Ireland.

(5) The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.

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<sup>10</sup> 1996 chapter 23.

These provisions are accommodating and facilitative of the use of religious norms, including of Muslim legal traditions, in the context of choice of law clauses for arbitration in the UK.

Moreover, as stipulated in the landmark decision of the UK Supreme Court, *Jivraj v Haswani* [2011] UKSC 40, [2011] WLR 1872, arbitral agreements can require arbitrators to have a particular religious background or affiliation in UK law, including, as in the *Jivraj* case, to have affiliations to a Muslim background. The Court stated that (at para 61):

61. One of the distinguishing features of arbitration that sets it apart from proceedings in national courts is the breadth of discretion left to the parties and the arbitrator to structure the process for resolution of the dispute. This is reflected in section 1 of the 1996 [Arbitration] Act which provides that: “the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest”. The stipulation that an arbitrator be of a particular religion or belief can be relevant to this aspect of arbitration. As the ICC puts in its written argument:

“The *raison d’être* of arbitration is that it provides for final and binding dispute resolution by a tribunal with a procedure that is acceptable to all parties, in circumstances where other fora (in particular national courts) are deemed inappropriate (e.g., because neither party will submit to the courts or their counterpart; or because the available courts are considered insufficiently expert for the particular dispute, or insufficiently sensitive to the parties’ positions, culture, or perspectives).”



Thus, when the above material is considered as a whole, there is no preclusion to the use of religious, including Islamic, norms in ADR process in the UK but for normal concerns of natural justice and conformity with public policy. Indeed, this was neatly summarised -- and one might even say endorsed -- by Lord Phillips (the then Lord Chief Justice of England and Wales) in a famous speech when he said: “There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution.”<sup>11</sup>

That said, there are some challenges. For instance, there is considerable debate as to whether there is any fundamental inconsistency – or indeed incompatibility – between the basic norms of Islamic law and justice and of British public policy (or, to the minds of some, even of British natural justice).<sup>12</sup>

Another challenge, highlighted by the well-known case of *Beximco*<sup>13</sup>, is the meaning that an appeal or reference to Islamic legal principles might have at law. In *Beximco*, the agreement stipulated a choice of law clause that said “[s]ubject to the principles of the Glorious Shari’a, this agreement shall be governed by and construed in accordance with the laws of England.” The challenge for the Court was to make sense of this stipulation, especially the meaning to give to “the principles of the Glorious Shari’a”. Lord Justice Potter wrote (at para 52):

The general reference to principles of Sharia in this case affords no reference to, or identification of, those aspects of Sharia law which are intended to be incorporated into the contract, let alone the terms in which they are framed. It is plainly

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<sup>11</sup> Speech by Lord Phillips, Lord Chief Justice, “Equality before the Law”, delivered at the East London Muslim Centre, 3<sup>rd</sup> July 2008. See:

<https://innertemplelibrary.wordpress.com/2008/07/04/equality-before-the-law-speech-by-lord-phillips-of-worth-matrovers/>

<sup>12</sup> On this matter, see generally Samia Bano, “Islamic Family Arbitration, Justice and Human Rights in Britain” 2007 (1) *Law, Social Justice and Global Development Journal* (LGD).

<sup>13</sup> *Beximco Pharm. Ltd v Shamil Bank of Bahrain EC* [2004] EWCA (Civ) 19, [2004] 1 WLR 1784.

insufficient for the defendants to contend that the basic rules of the Sharia applicable *in this case* are not controversial. Such 'basic rules' are neither referred to nor identified. Thus the reference to the "principles of ... Sharia" stand unqualified as a reference to the body of Sharia law generally. As such, they are inevitably repugnant to the choice of English law as the law of the contract and render the clause self-contradictory and therefore meaningless.

Adding (at para 55):

Finally, so far as the "principles of ... Sharia" are concerned, it was the evidence of both experts that there are indeed areas of considerable controversy and difficulty arising not only from the need to translate into propositions of modern law texts which centuries ago were set out as religious and moral codes, but because of the existence of a variety of schools of thought with which the court may have to concern itself in any given case before reaching a conclusion upon the principle or rule in dispute.

Hence, the courts in England and Wales have recognised that there is a diversity of opinion within Islamic law and reliance upon these legal traditions will therefore have to take cognisance of challenges arising from this interpretational plurality.

One area that has generated considerable discussion in the last few years is the phenomenon of 'Shari'a courts' in the UK. To be clear, this term is a misnomer as these are not courts in the proper sense of the term inasmuch as they are not formal parts of the judicial system. Rather, the 'courts' are community based and community organised mediation and arbitration fora, which employ

a framework of Islamic law in mediating disputes or arbitrating as the case may be.

‘Islamic ADR’ is thus a private matter in the UK and has arisen out of a desire amongst Muslims to have their affairs settled or dealt with in accordance with the norms of Islam. The different bodies such as the Muslim Arbitration Tribunal (MAT)<sup>14</sup>, the Muslim Law Sharia Council<sup>15</sup>, Islamic Sharia Council<sup>16</sup>, the Sharia Council of Britain and other bodies, in the main, serve, different Muslim communities. They also employ different procedures. The MAT, for example, has its panels sit with a qualified solicitor. The Ismaili Conciliation and Arbitration Board (CAB) for the UK also seeks to make extensive use of solicitors amongst its members, but this is not necessarily the case with all the other bodies. Most of the bodies will also try to mediate disputes as much as possible using their good offices and moral suasion to seek reconciliation, if possible, or to realise some other form of mutually agreed, amicable settlement.

In all instances, of course, the work of the boards or councils takes place either in the context of arbitration and thus the framework of the *Arbitration Act* 1996, or as part of less formal ‘community-based justice’. The work of these entities is reviewable by the state courts and they all therefore are conscious, in various degrees, of the fact that they operate in the shadow of state law and the state institutions. This also means that these institutions ‘compete’ with state institutions for jurisdiction. As John Bowen reports from work he has done looking at the work Islamic ADR bodies: “Today Muslims [in the UK] generally turn to civil courts for custody and financial disputes, as well as for civil divorces, and to the tribunals only for religious divorces. So the situation is

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<sup>14</sup> <http://www.matribunal.com>.

<sup>15</sup> <http://www.shariahouncil.org>.

<sup>16</sup> <http://test.islamic-sharia.org>.

largely one of distinct legal worlds with some shadow arbitration and no substitution.”<sup>17</sup>

#### IV. *ADR, Islam and Singapore*

Singapore’s system of addressing Islamic law is fundamentally different from that of the UK and this has an impact on ADR practice amongst Muslims.

Article 152 of the Constitution of Singapore addresses the Malay community, which is overwhelmingly Muslim, stating that:

##### *Minorities and special position of Malays*

152. (1) It shall be the responsibility of the Government constantly to care for the interests of the racial and religious minorities in Singapore.

(2) The Government shall exercise its functions in such manner as to recognise the special position of the Malays, who are the indigenous people of Singapore, and accordingly it shall be the responsibility of the Government to protect, safeguard, support, foster and promote their political, educational, **religious**, economic, social and cultural interests and the Malay language (emphasis added).

To this, Article 153 adds that:

153. The Legislature **shall by law make provision for regulating Muslim religious affairs** and for constituting

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<sup>17</sup> John R. Bowen “Private Arrangements: ‘Recognizing Sharia’ in England, *Boston Review*, 1 March 2009 (<http://www.bostonreview.net/john-bowen-private-arrangements-sharia-England>).

a Council to advise the President in matters relating to the Muslim religion (emphasis added).

It is on this basis that the Islamic Religious Council of Singapore, known locally by its Malay language acronym 'MUIS' (*Majlis Ugama Islam Singapura*), has been established by the Government. MUIS oversees religious affairs such as the maintenance of mosques, halal certification and the provision of religious education and guidance to the Malay (and other) Muslim communities. Furthermore, MUIS is empowered to issue legal opinions (*fatwa*, pl. *fatawa*) through its Legal (Fatwa) Committee<sup>18</sup>. *Fatawa* opinions need not be linked to any legal action in process. It should be noted, however, that these legal opinions are not binding -- though they may be persuasive -- on the regular courts in Singapore.<sup>19</sup>

The role of MUIS has been summarised by Tim Lindsey and Kerstin Steiner as follows:

MUIS is involved in a vast array of areas...This deep reach in to the life of Muslims has meant that the inward-looking, traditionalist and state-compliant norms discernible in MUIS' *fatawa* (and so many of its other public statements and programmes) have saturated the official religious culture of Singapore's Muslim community and will probably do so for the foreseeable future.<sup>20</sup>

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<sup>18</sup> Noor Aisha Abdul Rahman. "Muslim Personal Law and Citizen's Rights: The Case of Singapore" (2012) 7 *Asian J. of Comparative Law* 127, 133-134.

<sup>19</sup> On this, see the Singapore case of *Shafeeg bin Salim Talib v Fatimah bte Abud bin Talib* [2010] 2 SLR 1123 (CA).

<sup>20</sup> Tim Lindsey and Kerstin Steiner, *Islam, Law and the State in Southeast Asia, Volume II: Singapore* (London: IB Tauris, 2012), 134.

In addition, Singapore has the *Administration of Muslim Law Act (AMLA)*<sup>21</sup>, which, as its name suggests, provides a structure for the administration of Muslim law, including the establishment of MUIS. This Act pertains primarily to personal law matters such as marriage, divorce and inheritance. In the main, *AMLA* leaves the **substantive** law to be decided within the context of the Muslim community itself and the Act is concerned primarily with administrative procedures. That said, *AMLA* does provide the broad boundaries, if not the detailed specifics, within which Islamic law operates in Singapore.

Muslim law is also articulated by the operation of special Shari'a (local spelling 'Syariah') Courts, and a Board of Appeal (to hear appeals from the Shari'a Courts). On some matters such as child custody, divorce, maintenance of a wife and child, the Shari'a courts have concurrent jurisdiction with the High Court but, more generally, the Shari'a courts are inferior courts and are under the supervision of the High Court of Singapore. The application of Islamic law in the Shari'a courts is moderated via the *AMLA*, such that the Shari'a courts can only apply Islamic law as bound by the Act and overseen by the civil courts. *AMLA* provides that the Court can at its discretion appoint *hakam* (arbitrators) in a family dispute, and that it can prefer to appoint "close relatives of the parties having knowledge of the circumstances of the case".<sup>22</sup> This is consistent with the above-noted Quranic verse (4:35) that embodies a preference for relatives to be appointed as arbitrators in family disputes<sup>23</sup>:

If you fear breach between them (husband and wife) appoint two arbiters, one from his family, and the other from hers. If they wish for peace, Allah will cause their conciliation. For Allah has full knowledge and is acquainted with all things.

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<sup>21</sup> Cap. 3, 2009 Rev Ed.

<sup>22</sup> S. 50(1) *AMLA*.

<sup>23</sup> Mahdi Zahraa and Nora A. Hak, "Tahkim (Arbitration) in Islamic Law within the Context of Family Disputes" (2006) 20(1) *Arab L.Q.* 2, 21.

Further, consistent with the traditional notion that arbitrators' decisions should be binding, AMLA also "confers...arbitrators with the authority to order for divorce or *khulu*".<sup>24</sup> Essentially, the arbitrators' ability to pronounce a divorce is dependent upon the giving of authority from the parties, but if the arbitrators are of the opinion that the parties should be divorced but lack the authority to formally do so, the Court will simply appoint other *hakam* with the authority to effect a divorce.<sup>25</sup> Also, in line with the Islamic ethic, the AMLA also provides for *sulh* in requiring the *hakam* to "effect...reconciliation"<sup>26</sup> if possible between the parties prior to arbitration.

What is the impact of this framework on ADR practices amongst Muslims in Singapore? As a general matter, Singapore does not allow arbitration of family law issues, whether based on Muslim legal norms or otherwise. However, mediation is allowed and indeed encouraged. In commercial matters, however, arbitration is allowed and such arbitration may be based on some form(s) of Islamic law. In this context, the structure of the Shari'a courts provides a conducive venue for *sulh*-based practice and, indeed, particularly in the context of family issues like property division in cases of divorce or in disputes on inheritance, mediation at and with the support of the Shari'a courts is regularly attempted. There are two ways this is practiced. Outside of the court structure, mediation may be attempted by family representatives, by counsellors or indeed by lawyers acting for the different parties. At the court, a familiar pattern is for an officer of the Shari'a Court to attempt informal mediation between the parties, which is actually a mandatory stage of divorce proceedings. If the mediation takes place under the auspices of the Court the ultimate agreement can then be verified (as to its conformity with the law) and endorsed (to give it greater legal weight and standing) by the Court. In a divorce case, the mediation agreement would be converted into a Court order and this would result in the issuance after some time of a

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<sup>24</sup> *Ibid.*, 37, quoting S. 48(5) and S. 48(6) Malaysian *Islamic Family Law (Federal Territories) Act 1984*; Ss. 50(6) and 50(7) of the *AMLA* provides for the same.

<sup>25</sup> S. 50(7) *AMLA*.

<sup>26</sup> S. 50(5) *AMLA*.

Divorce Certificate. Neither MUIS nor any other agency provides an alternative institutional mechanism for ADR within the general Muslim community in Singapore. Thus, the Shari'a Court represents the only 'structured' (though still informal) venue for 'sulh practice' for the general Muslim community in Singapore.

In terms of substantive law, while this is left to the community (via MUIS and the Shari'a Courts) to determine, s. 33 of *AMLA* does direct MUIS ordinarily to follow the tenets of the Shafi'i school of law (*madhhab*), which has been historically the school which predominates in Southeast Asia generally. Other of the major schools can also be relied upon, however, and provisions relating to these possibilities are also found in the subsections of s. 33.<sup>27</sup> Muslim law in Singapore is also variable by "Malay custom", an acknowledgment of the historical, and still major, role of Malay Muslims in Singapore. Of particular interest, is that s. 114 of *AMLA* stipulates that the Court may accept "as proof of the Muslim law any definite statement on the Muslim law" in a list of seven texts.<sup>28</sup> This is not exactly to preclude reference to other materials but it provides a set of materials which might be seen to be 'canonised by legislation' as sources of Muslim law for Singapore.

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<sup>27</sup> See *AMLA*, S. 33(2) and 33(3).

<sup>28</sup> The section states:

**114.—**(1) In deciding questions of succession and inheritance in the Muslim law, the court shall be at liberty to accept as proof of the Muslim law any definite statement on the Muslim law made in all or any of the following books:

- (a) The English translation of the *Quaran*, by A. Yusuf Ali or Marmaduke Pickthall;
- (b) *Mohammedan Law*, by Syed Ameer Ali;
- (c) *Minhaj et Talibin* by Nawawi, translated by E. C. Howard from the French translation of Van den Berg;
- (d) *Digest of Moohummudan Law*, by Neil B. E. Baillie;
- (e) *Anglo-Muhammadan Law*, by Sir Roland Knyvet Wilson, 6th Edition Revised by A. Yusuf Ali;
- (f) *Outlines of Muhammadan Law*, by A. A. Fyzee;
- (g) *Muhammadan Law*, by F. B. Tyabji.



One may say, therefore, that the overall context for Islamic law in Singapore is for its norms and its adjudication to be governed much more heavily by state-influenced or state-defined norms than is the case in the UK: on the one hand, this is done by legislation in which the state defines the scope of Islamic law and establishes MUIS; on the other hand, this is realised by institutional structure whereby the state subjects the 'Shari'a courts' to the jurisdiction of the civil courts. This larger role and involvement of the state is a major distinguishing feature of Singapore model vis-à-vis the operation of Islamic legal norms in the UK. And it has implications.

As has already been mentioned, the Shari'a courts provide a convenient venue of mediation and a conducive institutional structure with physical space and court officers, in which to seek amicable settlement. But be that as it may, the institutional structure, and its link to MUIS and the stipulations of *AMLA*, also means that there is a normative, Islamic law, overhang in Singapore. Put differently, this is an example of a well-known and easily understood phenomenon of concretisation and some attendant rigidity that comes from taking the highly plural traditions of Islamic law, that emerged classically without the context of the modern state and expressed much interpretational diversity, and fitting them into a contemporary state environment. One might say that, of course, nowadays a state context is all but impossible to avoid and that there is as much of a state context in the UK as there is in Singapore because the British state will have its own normative overhangs – based on administrative law, human rights law, or other normative bases. This cannot be denied. The salient point for the context of this discussion, however, is that Singapore is palpably more directive about the normative content of Muslim legal traditions because bodies of the Singapore state are more involved in defining, shaping and implementing these norms than is the case in the UK.

## V. *Conclusion*

Amicable settlement (*sulh*) and arbitration (*takhim*) have a long history in pre-Muslim and Muslim contexts. They find sanction in the Quran and in the historical as well as contemporary practices of Muslim communities. These practices are also consistent and sit in happy congruence with what may be termed the ethos of contemporary ADR. A key part of this ethos is to let the parties come to their own terms of settlement with limited normative constraints. Both the Islamic systems and 'secular' ADR can, broadly speaking, accept such a framework.

When one looks at the operation of Islamic ADR in the UK and in Singapore one sees that both jurisdictions allow it to be practiced in different ways. In the UK, Muslim legal traditions may be invoked as part of choice of law clauses in arbitral clauses and, in family matters, Muslims may, and as a matter of fact some do, seek to use community-based bodies to deal with matters of (religious) divorce and attendant division of property, amongst other matters. These community-based bodies have no formal standing in British law, however, even though they obviously operate in the 'shadow' of the British legal system and its courts and its legal norms. This shadow operation allows British Muslims as the interested parties and the institutions that they may use to help them, to exercise a lot of freedom in the normative frameworks that they choose and the detailed substantive outcomes at which they arrive.

The situation in Singapore is different. Singapore is also accommodating of mediation and arbitration as part of the practice of Muslims in the country. Islamic legal norms are not precluded from arbitral provisions in commercial contexts and in family matters amicable settlement is encouraged and even facilitated. However, all of this work conducted in the context of important state institutions, especially MUIS and the Sharia courts, and within the framework of *AMLA*, which structures the understanding of Muslim legal

norms. These processes provide greater definition to the context of Islamic law, particularly along more traditionalist lines, in Singapore than they do in the UK. This situation in turn can constrain the breadth of the interpretational freedom available to Muslim participants in Singapore more so than in the UK.

Farrah Ahmed and Senwung Luk have written of the possibilities of religious arbitration enhancing personal autonomy.<sup>29</sup> They explore “whether there are reasons based on personal autonomy, which count in favour of religious arbitration [including but not limited to Muslim religious arbitration] in family matters”.<sup>30</sup> In short, they highlight the autonomy-enhancing potential of religious arbitration because it facilitates or, it might be said, acts as an expression of, religious practice.<sup>31</sup> Crucially, however, for the autonomy to be realised, the religious practice being promoted must be one that the individual defines for herself or himself. That is, they note that autonomy is only enhanced if: “Religious people can use religious arbitration to order and organize their lives **according to the religious norms they believe in**”.<sup>32</sup>

In this light, we can return to our two examples. As between the two structures we have seen in the UK and in Singapore, which is more conducive to the autonomy-enhancing potential of religious arbitration, and, one might add, to religious mediation? The argument that has sought to be presented here is that notwithstanding the status of Muslim legal norms in Singapore, and the institutions of MUIS and the Shari‘a courts with their venues and structures that facilitate and encourage settlement, it is the UK’s more loosely structured and privately arranged system that provides Muslims with greater scope for autonomy-enhancing amicable settlement and arbitration of disputes. This is because the UK’s system is more normatively capacious as a result of it being

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<sup>29</sup> Farrah Ahmed and Senwung Luk, “How Religious Arbitration Could Enhance Personal Autonomy” (2012) 1(2) *Oxford Journal of Law and Religion* 424.

<sup>30</sup> *Ibid.*, 426.

<sup>31</sup> See *ibid.*, 433ff.

<sup>32</sup> *Ibid.*, 433; emphasis added.

less directive as to the content and sources of Islamic legal norms, leaving these to be structured more by the parties engaging in the ADR practices themselves.

Of course, one might think that this looser structure raises its own problems. One notable problem is the potential for private arrangements to be (more likely) sites where coercion or inequality of bargaining power hold sway. Relatedly, private arrangements might also lead to dispute settlements that violate important norms of public policy, such as those related to gender relations or the priority of interests of children. The risk here is that private arrangements might fall 'under the radar' of scrutiny and public accountability. However, the UK system suggests that some of these concerns might be allayed by two factors: the first is that any private arrangements still fall under the shadow of the state system and may be reviewed by this system and its institutions. Second, private arrangements are never forced on parties but are entered into voluntarily. The capacity for this voluntariness to be checked by the involvement of officials may in fact commend the Singapore model in this regard. But if the great genius of the ethos of ADR is to give power to the parties themselves to operate freely and if this value – whether called autonomy or something else – is to be paramount, then, on balance, one can prefer the UK's structure to that of Singapore.