

A Return to 'Traditional' Dispute Resolution

An examination of Religious Dispute Resolution Systems

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Introduction

We live in a litigious society. As the Honorable Thomas J. Moyer points out, "our culture is becoming a culture of confrontation." (1) The first response of many people in disputes is to sue someone, take them to court and 'win' their case at another's expense. The legal system produces only winners and losers. (2)

Certainly law is necessary. Without it society would deteriorate. It provides the framework that our national and international communities need to survive in harmony. However, the law is based on an adversarial concept that at best results in compromise. The focus of the adjudicative system is win-lose where one party always ends up on top. There is little space in our courtrooms for a win-win concept that seeks to achieve a good outcome for both parties in a dispute.

Alternative dispute resolution stands in contrast to Canada's traditional adversarial approach to dispute resolution. Alternative dispute resolution is premised on creative and flexible solutions designed to go beyond adjudication as a single model for resolving disputes. These processes include conciliation, mediation and arbitration. Through such proceedings, disputants are given a voice in the resolution of their conflict and parties may become active participants in the process that will affect their lives. It is these meritorious attributes of alternative dispute resolution that leads to the thrust of this paper. Alternative dispute resolution should no longer be considered an 'alternative'. Rather, these processes should be thought of and utilized in the first instance, rendering alternative processes the norm and adversarial confrontation a measure of last resort.

There are many examples of alternative dispute resolution systems currently in practice. Many of these are products of religious and cultural initiatives that turned away from litigious practices to embrace a more holistic and culturally sensitive method of dispute resolution. An examination of Judaism, the Islamic faith and the Christian faith through the United Church provide insight into the informal processes that are currently considered alternatives to litigation. (3)

This paper proceeds on the following framework. The first section examines the Jewish system of alternate dispute processes. It is a very sophisticated system that is based on Jewish law. Next, the Ismaili Muslim tradition of dispute resolution is held up as an example of a relatively new and international-based system that incorporates traditional religious practices into the resolution of disputes. Finally, the United Church Dispute Resolution Policy is explored. The Policy is an involved and flexible approach to adjudicating disputes within the Church.

The Judaic, Ismaili Muslim and Christian systems represent strategies for resolving disputes that

encompass far more than our current antagonistic regime. In the realm of traditional law practices, the lawyer's duty to "represent the client zealously within the bounds of the law discourages concern with both the opponent's situation and the overall social effect of a given result". (4) This is no longer good enough in a global economy where national and international borders are breaking down and all the world's communities are coming together. Mediation, arbitration, ombuds, and conciliation provide avenues of dispute resolution that are necessary as *first instance* dispute resolution processes in today's global society.

II. Jewish Dispute Resolution System

If it is impossible to adjust amicably, and the parties must go to law, they should resort to a **betdin** of Israel. It is forbidden to litigate before judges or tribunals of idolators even when their law is similar to Jewish law, and even when both parties agreed to submit their case before them and, even if they are bound by kinyan or by instrument in writing. Such agreements are null and void. Whoever appears before them as plaintiff is indeed a wicked man like unto a reviler and blasphemor who raises his hand against the Torah of Moses (peace be upon him)...

Hoshen ha-Mishpat. 26, 1.

The Jewish law of *Halakha* prohibits Jews from initiating suits against fellow Jews in secular courts. Rather, disputes between Jews are to be resolved through the *Beth Din* (5) (House of Judgment), a rabbinical court of justice which adjudicates according to Jewish law. From its origins, "the commandments and proscriptions of the entire body of *Halakhah* in all its aspects and at all times have borne the imprint of religious obligation." (6) The religious underpinning of *Halakhah* is an important factor contributing to both the strength as well as the structural complexity of the Jewish legal system. Also contributing to this phenomenon is the national aspect of Jewish law. Whereas most religious legal systems, such as canon law and Muslim law, were created not by members of a single nation but by Catholics or Muslims from different nations, Jewish law is generally regarded as a national law. (7) Developed throughout the dispersement and exile of its people, Jewish law is seen by the Jews as "an integral and fundamental part of its cultural heritage as a nation." (8) Despite the principle of nationhood, *Halakhah* recognizes that its adherents may live in particular nation states, with such nation states' particular laws. The principle of *dina d'malchuta dina* [the law of the land], operates to ensure that the local laws are heeded. (9) Anchored in religious and national principles, the *Halakhah* has developed into a very strong and effective system for resolving disputes quickly and inexpensively. In this increasingly litigious era, characterized by escalating legal costs and clogged court schedules, Jewish disputants are increasingly turning to the *Halakhic* dispute resolution system. Rather than an alternative, the *Beth Din* is quickly becoming the primary forum for the resolution of conflict. (10)

A. The Beth Din -- Historical Origins

Jewish law has a history of more than three thousand years. For much of that period, the Jewish people did not enjoy political independence and were scattered all over the world without a clear geographical centre. Despite this lack of political independence (or more accurately because of it), Jewish law flourished. Its most vigorous development occurred during the period when people were widely scattered throughout the Diaspora (dispersion): (11)

The Jewish people, throughout its dispersion, regarded Jewish law as its national legal system -- as an integral and fundamental part of its cultural heritage as a nation. Because the Jewish people, even in exile and dispersion, continued to exist as a national entity and not merely as a religious sect, it constantly needed to make use of a particular national asset, namely, its national legal system, which

was developed entirely by its own members, the masters of the *Halakhah* and of legal thought. (12)

The *Beth Din* was developed to adjudicate disputes between Jews in accordance with *Halakhic* principles. Despite the Torah-based prohibitions on proceeding in secular courts (*Arkaot*) (13), the prevalence of the *Beth Din* is closely linked to the political climate of the day. During the Diaspora, for example, Jews often did not have access to the secular local courts. Eastern European merchants in the early twentieth century relied widely on *Batai Din* to resolve disputes arising from their extensive involvement with international commerce at the time. "Jewish merchants from different countries", writes June D. Bell, "were able to negotiate deals because they all spoke Yiddish and considered themselves bound by Jewish commercial law." (14)

By contrast, the prevalence of the *Beth Din* for North American Jews waned considerably in the twentieth century. A significant reason for this decline was the belief that the secular judicial system in North America would mete out justice for all regardless of religious origin. According to Rabbi Jonathan Reiss, director of the Beth Din of America, "It was either felt that the rabbis were out of touch...or would not conduct their proceedings with integrity. People had a perception of rabbis in the Beth Din were old rabbis with grey beards..." (15)

Recently, however, Jewish scholars have been emerging in the West with knowledge of both secular and religious law. As a result, modern responsa (16) is delving more exhaustively into issues surrounding secular litigation than it had previously. (17) Only recently have articles on this topic begun to appear in popular *Halakhic* journals. (18) The prevalence of *Batai Din* as a forum for resolving disputes is once again on the rise. The *Beth Din of America*, for example, was originally founded in 1960 and reconstituted in 1994 to serve affiliated and unaffiliated Jews, as well as the entire spectrum of the Orthodox community in their *Beth Din* needs. This national body provides services in the following areas: adjudication of monetary, interpersonal and communal disputes; issuance of divorce decrees (*Gittin*); and confirmation of personal status issues for rabbinical courts in Israel and elsewhere in the world. (19)

The Canadian parallel to this phenomenon is not as well developed as the American, but there seems to be a movement in the same direction. The Canadian Jewish Congress, for example, has recently launched Jewish Mediation Services of Ontario, a confidential dispute resolution service in accordance with *Halakhah*: "[f]or \$200 each, the parties receive a three-hour hearing before a mediator. If a resolution is forged, contracts are signed making it binding." (20)

>B. The Beth Din

The *Beth Din* has a sophisticated judicial structure. At the *Beth Din* itself, disputants argue their cases at a hearing for resolution by three rabbinical judges. Despite the existence of the formal Din hearing, however, disputants are encouraged to try to resolve their disputes through less formal processes such as arbitration (*p'sharah*) or mediation (*bitzua*).

Essentially, the *Beth Din* is a rabbinical arbitration panel. Both parties must agree to take their case before a Beth Din and adhere to its decision. The structure of the Beth Din is as follows: "[b]efore a panel of three rabbis who act as *dayanim* (judges), the litigants [make] their case, fully aware of the arbitration agreement they had signed, making the court's decision enforceable in secular court." (21) In a statement of expectations, the Beth Din of America affirms that it "conducts its cases in a manner consistent with the requirements of secular arbitration law [making] its ruling legally binding and enforceable in the secular court system." (22)

Beth Din rabbis are highly skilled in both Jewish and secular law. The rabbinical judges of the Beth Din of America, for example, are touted as erudites "capable of addressing Halakhic issues in the areas of financial and family law through the prism of contemporary commercial practice and secular law, thereby giving recognition to the practices of [the Jewish community.]" (23) Because of the high level of expertise required for the job, many congregational rabbis are not qualified for modern Beth Din functions. Although there is a growing number of U.S. scholars in this field, Canada is lagging behind.

Like secular courts, the Beth Din has very strict rules of procedure. The Beth Din of America, for example, provides a detailed handbook on the rules and procedures. (24) These rules cover such issues as the convening of pre-hearing conferences (section 8); representation by counsel (section 12); order of proceedings (section 16), etc. Like a secular court, the Beth Din has the power under section 18 to subpoena witnesses and documents, and to judge the relevance and materiality of evidence. Moreover, under section 28, the Beth Din has the power to grant any remedy or relief that it deems just and equitable.

Rabbis and legal experts on the Beth Din, however, take a more active role than trial judges. Like their counterparts in the secular courts, *dayanim* "can question the witnesses and parties and weigh their credibility." (25) However, the Beth Din encourages a more proactive participation of rabbis to facilitate the resolution of difficult cases in accordance to the principles of compromise. Although Rabbis of the Beth Din are often legal scholars, their role is also shaped by ecclesiastical principles. In the words of Rabbi Adam Berner, "Shalom [peace] ... should be the prime objective in resolving disputes. The Torah is more concerned with restoring social harmony than with arbitrating legal issues." (26)

A classic story in the Talmud (27) illustrates this guiding principle:

Once some porters broke a barrel of wine belonging to Rabbah ba Bar Hana; so he took their clothing from them. [According to Talmudic law, a worker is responsible for any loss caused by his negligence.]

Thereupon, they went to Rav, and he said to Rabbah: 'Give them back their clothing'.

'Is this the law', he asked.

'Yes', said Rav, That thou mayest walk in the ways of good men.

So he gave them back their clothing.

Then they said to Rav, 'We are poor and have toiled all day, we are hungry and have nothing'.

Said Rav to him, 'Go and give them their hire'.

Said Rabbah to him, 'Is this the law'?

Rav answered, 'Yes, And thou shalt keep the paths of righteousness.' (28)

This ethical principle informs Jewish law and dictates that one ought to do the finer, nobler thing and forego one's legal rights. (29) Social harmony is more important than strict adherence to the law.

Disputants themselves make this distinction. Chuck Lowenstein of Atlanta had a Beth Din arbitrate a disputed business transaction in which he felt he was owed money. Although he believes that he might have fared better in civil court, Lowenstein said he was satisfied with the decision. An important

intangible benefit of the Beth Din process, Lowenstein believes, is his post-dispute relationship with his former adversary: "At the end we shook hands, and now he doesn't hide from me, and I don't hide from him." (30)

Compromise is thus at the heart of Jewish law. To this end, the Beth Din has developed a sophisticated internal system of arbitration and mediation. *P'sharah*, [settlement conferences] are strongly encouraged: according to all opinions, *p'sharah* is the preferable way of resolving disputes. (31) Moreover, Halakhah mandates a *Beth Din* to ask disputants whether they wish to proceed in *p'sharah/bitzua* or in *Din* before commencement of the latter process. (32)

>C. P'sharah: Arbitrated and Mediated Compromise

Jewish disputants are strongly encouraged to mediate or arbitrate their disputes before launching a formal Beth Din hearing. *P'sharah* and *bitzua* refer to a compromise or settlement process based on Jewish law in which "the relative equities of the party's claims are considered in determining the award." (33) Representing alternative dispute mechanisms within the Jewish dispute resolution system, these processes evidence the sophisticated nature of the Halakhic legal regime.

More specifically, the terms *bitzua* and *p'sharah* relate, respectively, to the present-day concepts of arbitration and mediation. Although these are not considered *Din* hearings they nonetheless have binding authority (*Halakhically*) over the disputants. First, they are performed under the auspices of *Halakhah* and mediated or arbitrated by a rabbi; the hearings are thus in accordance with Jewish legal principles. Second, because these are not considered *Din* judgments, both must be executed by performing a *kinyan sudor* (handkerchief exchange) which introduces an important *Halakhic* element into the process. (34) A *kinyan sudor* is a symbolic barter in which the "transferee gives to the transferor a symbolic object such as a *sudor* (kerchief) in exchange for the object that is the subject of the transaction." (35) This exchange creates contractual obligations in Jewish law.

Whether a resolution process is characterized as *p'sharah* or *bitzua* is dependent on the timing of the *kinyan*: "If a *kinyan* is made in advance, thereby binding the parties to a decision, then *p'sharah/bitzua* is in this sense akin to arbitration. If a *kinyan* is required as an afterevent, then the *p'sharah/bitzua* is like a non-binding mediation in which settlement of the dispute is made enforceable only by subsequent agreement by the parties." (36)

P'sharah is the vehicle for applying the *Halakhic* principles of compromise within the Jewish legal system. A party who proves their legal position in the Beth Din, for example, is qualified to recover 100% of the amount sought, whereas in *p'sharah* such a party would not necessarily recover the entire amount. (37) Instead, wider interests of social harmony are taken into account and parties are encouraged to forego their strict legal rights for the sake of community interests. A broader flexibility in terms of remedies is an important characteristic of *p'sharah*. Whereas a *pesak* (judgment) in the Beth Din is only awarded where a party has made its case beyond the balance of probability, *p'sharah* can result in the absence of such proof. Furthermore, in cases governed by *p'sharah*, "an award could require a public apology, or other remedies not required in Jewish law." (38)

Arbitration and mediation are the primary forms of mediation in Jewish law. Jewish litigants are encouraged to solve their disputes through either *p'sharah* or *bitzua* **before** recourse to the *Din* is undertaken. How does *Halakhah* view secular mediation and arbitration? Since secular arbitration and mediation are not, strictly speaking, *Arkaot* (secular courts), non-Jewish arbitration and mediation panels are *halakhically* acceptable. (39) "So long as the litigants voluntarily agree to have their case mediated or arbitrated on these bases, there should be no *Halakhic* objections to these forms of *p'sharah* or

bitzua." (40) Jewish law does not bar the use of non-Jewish mechanisms for resolving disputes (short of secular courts) and who are encouraged to resolve their differences before recourse to the *Beth Din*.

According to Jewish thought, however, while such mechanisms are acceptable, it would be preferable to have parties voluntarily appear before fellow Jews. (41) Ira Kasden lists two significant reasons for this: first, keeping disputes within the community will reduce the potential for social discord; second, a mediation and arbitration over which a *Halakhically*-knowledgeable lawyer or other professional presides can consider not only common law and statutory customs but also principles of Jewish law.

The Canadian Jewish Congress has recognized the importance of *p'sharah* and has established Jewish Mediation Services of Ontario. Disputants can pay two hundred dollars for a three-hour session with a *Halakhic*-schooled mediator in an attempt to reach a mutually acceptable resolution. The Beth Din of America provides similar services.

D. Summary

The *Halakhic* prohibition on litigating disputes in secular courts effectively mandates arbitration (a *Beth Din* hearing) as the primary form of dispute resolution. Jews, therefore, do not see arbitration as an *alternative* dispute resolution mechanism, but rather, the *only* dispute resolution system. As a result, the Jewish legal system has developed an extremely sophisticated forum for resolving disputes, complete with internal ADR systems: *p'sharah* and *bitzua*.

For most of the twentieth century, however, Jews have bypassed *Batai Din* in favour of secular courts. Ironically, it is a new breed of young rabbis, highly educated in both secular and *Halakhic* law, which are rekindling ancient ideas. Increasingly these young rabbis are encouraging followers to turn to the dispute resolution system provided for by their religion. The *Beth Din* has "a success rate that approaches 100 percent." (42) A major reason for this impressive success rate is the reputation of the Beth Din itself. It is a moral authority, and thus has suasion over the parties that a secular court may not necessarily have.

III. Ismaili Muslim Dispute Resolution System

"With what weapons have you equipped yourself for war? Throw away those arrows and your vengeful sword, thrust your brutal claw into the earth and let us two make an end of standing. Let us rather seat ourselves and brighten our scowling visages with wine. Let us make a pact before the Lord and may our hearts repent our pursuit of war. Others can go to war; do you come to an agreement with me and let us prepare a feast."

Shah-Nama (the national epic of Persia) by Ferdowsi. (43)

The Ismaili Muslims form a sub-sect of the Muslim faith which has developed a dispute resolution mechanism available to community members in order to resolve differences without recourse to the traditional adjudicative process. While such development of a dispute resolution process within a cultural group is not unique to the Ismailis, the rationale underlying the creation of the process and the impetus for community members using the process is unique. Rather than acting as a response to a long history of persecution or exclusion as with the Jews or as a means of facilitating dispute resolution within local congregations in the United Church, the Ismaili Muslim Conciliation and Arbitration Boards seek to ensure that disputes within the community and between community members and other are resolved in a private and sensitive manner. This responds to a fear of disintegration of the Ismaili Muslim community.

Ismailis are widely dispersed and have communities in North America, Eastern and Western Europe, Asia and Africa. This broad dispersal of the community highlights the fact that the Ismailis have no nationality, only a cultural and religious tie that binds them together. The combination of a widely dispersed community subject to a broad range of legal and cultural systems and fear of community disintegration has led to the creation of a dispute resolution mechanism which seeks to resolve disputes between community members in an inexpensive and mutually satisfactory manner. This effort at community involvement in the disputes between members is a natural extension of a spirit of volunteerism inherent in the Ismaili community. The Princess Zahra Aga Khan highlighted this in the following extract from a recent speech:

How do you mobilize volunteers? I will again turn to Ismaili tradition for an answer. Amongst Ismailis, it starts early and continues throughout an individual's life. Young Ismaili children perform volunteer tasks at Jamatkhanas (gathering houses): serving water, collecting and looking after coats, and the like, tasks which require no professional knowledge, but which introduce, at an early age, the ethos of volunteerism. As she or he grows and develops academically and professionally, so do the complexity and performance of the voluntary tasks. For example, in order to protect people from the astronomical costs of litigation, we ask senior lawyers to volunteer their time on Conciliation and Arbitration Boards, in order to help people obtain professional and fair, yet completely free, judgement in commercial and domestic matters. Nowadays, this service is, in many places, used by Ismailis and non-Ismailis alike.

[\(44\)](#)

The Princess summarizes the spirit of volunteerism underlying participation in the Conciliation and Arbitration Boards. She also points out that the process is free and not exclusive to Ismailis. Provided that at least one party to a dispute is Ismaili, the dispute may be brought before the Board. Community involvement is encouraged both through participation as Board members and by using the Boards as a dispute resolution mechanism.

The fear of community disintegration and the tenets of Islam that underlie the Ismaili faith has led to the creation of the Conciliation and Arbitration Boards. While the Boards are a recent creation, the spirit of culturally sensitive dispute resolution is inherent to the faith. [\(45\)](#) Conciliation and Arbitration Boards provide an inexpensive, private and fully voluntary mechanism that meets the needs of Ismailis and non-Ismailis alike. The process should be viewed as the forum of first instance rather than as an alternative to formal adjudication. It also serves as a model for other community-based dispute resolution systems. While the process is fairly new and is not yet widespread amongst Ismailis, the reported usage and success experienced by participants indicates a shift towards greater use of the process [\(46\)](#). This section briefly examines the history of the Ismailis, the significance of the Islamic faith and Islamic law as factors underlying the creation of the Conciliation and Arbitration Boards.

A. Brief History of Ismailis [\(47\)](#)

The Ismailis are a sub-sect of Muslims that diverged from the mainstream of Shi'ites. The Ismailis came into being after the death of Ja'far ibn Muhammad (765 A.D.), the sixth Imam, or spiritual successor to the Prophet, who was recognized by the Shi'ites. A group of Shi'ites, the Fatamids, conquered Egypt in 969 A.D. and while they did not succeed in converting the bulk of their subjects during their rule of two centuries, they did establish a widespread missionary network with followers all over the Islamic world. The subsequent history of the Ismailis observed a series of schisms, which resulted in the modern branch of Ismailis led by an Imam called the Aga Khan. This subsect, comprising millions, has followers in India and Pakistan and in parts of Iran, Africa, Syria, North America, Europe, Russia and China

The late Aga Khan III (1887-1957) had taken several measures to bring his followers closer to the main body of Shia Muslims. There are differences, however. Ismailis do not have mosques but Jamatkhanas

(gathering houses), and their mode of worship bears little resemblance to that of Muslims generally. His Highness Prince Karim Aga Khan is the 49th Imam of the Ismaili Muslims, in direct lineal descent from Prophet Mohammed. As Imam he is concerned not only with the spiritual welfare of the Ismaili community, but also with its material well-being.

The first Ismailis arrived in Canada in the mid-1960's as part of the professional pool that emigrated from the UK and other Western European countries. The steady growth in the Canadian Ismaili population continued until the early 1970's when political changes in East Africa, and particularly Uganda, led to the arrival of a large number of Ismailis in Canada. Today the Ismaili Muslims in Canada number between 70-75,000.

The history of the Ismaili Muslims highlights the wide dispersal of the community, the establishment of a broad missionary network of followers throughout the world and the evolution of a strong cultural identity that relies upon religious and political foundations. These factors underlie the motivation of the Ismaili Muslims to establish a dispute resolution mechanism which is culturally sensitive and which minimizes the possibility for fragmentation of the community.

B. Role of Islam in Ismaili Dispute Resolution

The common thread that ultimately binds the Ismaili community is Islam. Islam is clearly a faith - that is, it defines and regulates the relationship between man and God. That relationship, together with man's duties to God, is clearly set out in the *Qur'an* and has been further elaborated and clarified in the *Sunna* > (48) . However, Islam also defines and regulates man's relationship with his fellow men both individually and collectively. It must therefore also comprehend a legal and ethical system, as well as principles of social behaviour. (49) Islam is neither an actor nor a factor in particular fields of activity. It is, rather, the framework within which activity takes place. Within the context of dispute resolution, Islam provides general principles and an authoritative set of rules and regulations. It both guides and defines, and provides the environment for dispute resolution. (50) The Conciliation and Arbitration Board process accords with Islamic principles in forming part of the environment within which an Islamic legal, ethical and social system may operate to resolve disputes.

C. Islamic Law and the Authority of the Conciliation and Arbitration Boards

Although the moral and ethical principles underlying the Western concept of law differ little from those of Islam, there are notable differences. In Western law, for example, the relationship between ethics and the law has been overlaid and obscured by secular ideas of right and wrong. This can be seen particularly in the detailed Western legal codes which are held to reflect the 'will of the people' and which define human rights and obligations as reciprocal and relating essentially to the needs of society. Transgressions are identified (and punished) as crimes against social order.

The traditional Muslim concept, on the other hand, rests on the proposition that the *shari'a* is the law of God set down for all time in the divine revelation. Muslims, by virtue of being Muslims, have accepted a positive obligation to seek to implement God's will and live in consonance with that law irrespective of the conduct of others, both at the individual and the collective level. The emphasis is upon obligations rather than upon rights, and upon the divine origin of the law. The *shari'a* is not, therefore, 'law' in the normally accepted sense of the term: "it contains an infallible guide to ethics. It is fundamentally a doctrine of duties, a code of obligations. Legal considerations and individual rights have a secondary place in it." (51)

The Western concept of law may be seen as directly underlying a rights-based approach to mediation

and arbitration, whereas the Islamic concept appears to implicitly combine both a rights and interest-based approach. The implementation and utilization of Conciliation and Arbitration Boards within the Ismaili community would appear to be less an alternative to adjudicative dispute resolution than a component of the religious and social structure of the society. The question arises, given the absolute authority of the *shari'a* in Islamic law, what powers Board members will have in seeking to resolve disputes that are not addressed in the *Qur'an* or the *shari'a*.

In order to fully understand dispute resolution in Islam, and by extension Ismailis, it is important to recognize the concept of *aql*, or intellect. *Aql* dictates that although God is the sole creator and provider of the law, He has furnished man with reason and the power of reasoning so that he may properly identify the terms of the law. This did, of course, raise a problem in that some rational explanation for the inevitable differences of opinion among the *ulama* (Muslim scholars) was needed. This problem was overcome by arguing that

...if the truth lay in only one of two opposing views and this could not be discerned through the techniques of *usul al fiqh* [source of Muslim jurisprudence] then it would be obligatory for the hidden Imam to manifest himself and give a decision. If he does not manifest himself, the truth must lie with both parties. (52)

The Shi'a community can be assured that no incorrect ruling has been given unless and until the Hidden Imam manifests himself. In other words, any ruling derived by the use of reason from the *Qur'an* and the *Sunna* cannot be in contradiction with any ruling reached through the application of rational principles.

The High Court of Lahore, in *Kurshid Jan v. Fazal Dad*, 1964 when asked to rule on the question: "Can courts differ from the views of Imams and other jurisconsults of Muslim law on grounds of public policy, justice, equity and good conscience?" The High Court answered:

If there is no clear rule of decision in *Qur'anic* and traditional text [the *sunna*]...a court may resort to private reasoning and, in that, will undoubtedly be guided by the rules of justice, equity and good conscience...the views of the earlier jurists and imams are entitled to the utmost respect and cannot be lightly disturbed; but the right to differ from them must not be denied to the present-day courts. (53)

The literature appears to indicate that under Shi'a philosophy the *Qur'an* is paramount in determining which law applies to Muslims. Where the *Qur'an* is silent or does not provide a clear rule of decision, the courts, and by extension Boards, may resort to the *aql*, or intellect, to resolve a dispute. The Ismaili Muslims, as a more progressive sect within Shi'a Islam, have gone further and accepted Western law as well as the Ismaili interpretation of Islam. The Ismaili interpretation accepts the law of the state of residence where that state does not allow personal Islamic law:

15.4 To the extent that the territory of domicile or residence of any Ismaili does not recognise and apply or allow the application of the personal law of Ismailis, he shall be governed in that territory by such personal law as is applicable to him under the law of that territory. (54)

D. The Conciliation and Arbitration Boards

In response to concerns about the long-term effect of conflict between broadly dispersed community members, the Conciliation and Arbitration Boards were established by the Aga Khan in 1987. There is an International Board, National Board and five Regional Boards, each comprised of at least two female members and one lawyer (55). As a general rule, matters arising at a local level are dealt with by the Regional Boards with a right of appeal to the National Board and thereafter to the International Board.

The Conciliation and Arbitration Board is a body established under *The Constitution of the Shia Imami Ismaili Muslims* (the "*Constitution*") (56). The International Board is established pursuant to Article 12.1:

12.1 There shall be an International Conciliation and Arbitration Board to be known as "His Highness Prince Aga Khan Shia Imami Ismaili International Conciliation and Arbitration Board":

to assist in the conciliation process between parties in differences or disputes arising from commercial, business and other civil liability matters, domestic and family matters, including those relating to matrimony, children of a marriage, matrimonial property, and testate and intestate succession; and

to act as an arbitration and judicial body and accordingly to hear and adjudicate upon:

commercial, business and other civil liability matters;

domestic and family matters including those relating to matrimony, children of a marriage, matrimonial property, and testate and intestate succession; and

disciplinary action to be taken under this Constitution and any Rules and Regulations.

The National and Regional Boards are established pursuant to Article 13.1 of the *Constitution* which employs substantially the same language. The majority of cases dealt with by Canadian Boards to date have been in the field of conciliation with approximately 60% matrimonial and 40% commercial matters. In their first nine years, the Boards handled close to 800 cases across Canada with over 70% handled to the satisfaction of the parties. (57)

Any Ismaili Muslim may apply to the Board. The Board, however, cannot take a case unless both or all parties are prepared to submit to the Board's authority. Therefore an interested party, including non-Ismaelis, need only contact the Board's chairperson, any other Board member, or Jamatkhana official to begin the process.

E. The Process

i. Conciliation

Upon receiving an application, the Board will promptly contact the other party[ies] regarding the matter in dispute. Once all the parties have agreed to take their case to the Board, a confidential file is opened. > (58)ize: 11pt"> The Board undertakes a fact-finding process with the parties in an effort to help define the issues and concerns. The focus is on generating options and alternatives for settlement and, where needed, the Board holds face-to-face settlement meetings.

Conciliation is an entirely voluntary process in which parties are encouraged to reach their own settlement with the assistance of a Board member. Parties to conciliation are at liberty to withdraw from the process at any time until a settlement has been reached. The result of the conciliation is that parties themselves decide on a settlement that becomes a contract between them.

ii. Arbitration

A panel of the Board will review submissions and any supporting documents, and conduct a hearing, which is less formal than a trial in the law courts. In arbitration, the Board imposes on the parties a

decision that is binding in law; a court may set aside an arbitration award only in very limited circumstances. > [\(59\)](#)

iii. Disciplinary Action

Upon receiving a complaint on a matter falling within its jurisdiction, as set out in Article 14 of the *Constitution*, the Board hears and adjudicates upon the matter, and may make any order prescribed under that Article:

14.2 Proceedings for disciplinary action against any Ismaili shall be commenced upon a complaint lodged by:

any member of a Council authorised in that behalf by the Council; or

any Ismaili.

A complaint shall be lodged with such Regional Conciliation and Arbitration Board or, if none, then such National Conciliation and Arbitration Board within whose jurisdiction the respondent is resident at the time of the alleged contravention.

14.3 If the matters alleged in the complaint are established, the Regional Conciliation and Arbitration Board or the National Conciliation and Arbitration Board may make one or more of the following orders:

order the offender to be conditionally or absolutely discharged;

order the offender to observe or perform any religious rites;

order the offender to pay compensation to any aggrieved party;

order temporary exclusion of the offender from jamatkhana for such period as the Conciliation and Arbitration Board may determine;

order that any Order made by it under this Article be announced by the National Council in the jamatkhana under its jurisdiction; and

recommend to the National Council to order the offender to be expelled from the jamat.

While Article 14.2 comprehends far more than merely discipline measures available to conciliators and arbitrators in considering a case it is illustrative of a uniform disciplinary mechanism with which to address local, national and international disputes. It contains provisions which relate purely to religious remedies to purely financial measures which address commercial disputes.

Interviews with Ismaili Conciliation and Arbitration Board members revealed that there is not a distinction between a rights-based versus an interest-based approach by conciliators or arbitrators. [\(60\)](#) In certain instances a traditional rights-based model may be utilized in adjudicating between competing rights. These rights are premised upon both Islamic and Western concept of law. Moral suasion is also used as a means to achieve equity between the parties. In addition, there is an effort to foster 'give and take' by the parties in order to arrive at a mutually acceptable solution.

F. Summary

The nature of the Ismaili Muslim community, as a widely dispersed group of individuals with strong cultural and religious ties and a desire to resist disintegration, has led to the implementation of a dispute resolution mechanism which is sensitive to cultural issues. The nature of the underlying faith of Ismailis instructs a legal system, ethical system, and principles of social behavior. Moreover, the faith fosters a belief that courts and arbitral bodies have authority to rule upon situations which are not explicitly addressed in the *Qur'an*. This enables Boards to both conciliate disputes and devise arbitral awards.

The ethos of volunteerism inherent in the Ismaili community further encourages members of the community to resort to the Boards for dispute resolution as opposed to submitting to the Western adjudicative system. The Canadian dispute resolution community attempts to design culturally sensitive dispute resolution systems by involving stakeholders in the design process (61) or by seeking to determine what comprises "culture" in an attempt to develop culturally sensitive mechanisms (62) for dispute resolution. More effectively, the Ismaili Muslim community has produced a system which employs elements of contemporary "alternative" dispute resolution systems. In doing so, it incorporates centuries of cultural evolution that has created their unique community. The Ismaili Conciliation and Arbitration Boards should be viewed as an "appropriate" dispute resolution mechanism to be turned to in the first instance and a model for other community-based dispute resolution systems.

IV. The United Church of Canada - Dispute Resolution Policy

We believe we are called to restore broken relationships wherever they occur, and to practice ministries of healing and restoration. We believe that conflict can and should, whenever possible, be resolved in ways that are non-adversarial, and which emphasize accountability, inclusivity, understanding, reparation, tolerance, safety, respect for human dignity and forgiveness. Healing may not mean agreement.

Dispute Resolution Policy Handbook

The United Church of Canada (63)

As Christians, parishioners of the United Church of Canada believe that all people are worthy of respect and love, that conflict is a spiritual issue, and that the church has a responsibility to promote healthy relationships within its congregation and in the world. According to the United Church, the biblical concept of justice is concerned with these relationships and is best promoted by constructive conflict resolution that not only achieves status quo but encourages growth, new understanding and transformation. (64) In 1997, the United Church's General Council took steps to achieve this goal with its adoption of the United Church of Canada's Dispute Resolution Policy Handbook (Handbook). Unlike the Muslim and Jewish dispute resolution systems, discussed above, the process espoused in the Handbook is designed to be used in the resolution of conflict only *within* the church. (65) These disputes range from how to spend church fundraising money, to what constitutes appropriate outreach, to differences on how to conduct worship. (66) Despite its limited scope however, the United Church has designed a system that uniquely encapsulates the heart of ADR processes: accepting responsibility and listening. (67)

The United Church explicitly recognizes conflict as an unavoidable part of life. Accordingly, conflict is not inherently bad. It can be an agent of constructive change, of greater understanding and growth. (68) The key to these higher goals of dispute resolution lies in how to deal with conflict. The United Church advocates that conciliatory processes and an open and co-operative environment create an atmosphere

where conflict can be dealt with for the benefit of all participants to the dispute. Unlike a secular courtroom, which is centered on a win/lose paradigm, the Handbook focuses on a win/win principle where disputants actively participate in the resolution of their disagreement. This process of discussion, listening, considering options and agreeing on a solution requires parties to assume their share of responsibility and thereby 'own' the outcome of the dispute.

One of the main goals of the Handbook is to "normalize" the alternatives in dispute resolution within the church. Mediation, arbitration, mediation/arbitration, ombuds and community conferencing, in other words, will become the *norm* in conflict resolution within the church. (69) The formal hearing process, similar to secular litigation with its confrontational manner and expense, will become, it is hoped, a rarely used "alternative" in those instances when the Dispute Resolution Policy (Policy) is unsuccessful or inappropriate. (70) To foster this end, the formal hearing is not accessible to resolve any dispute or determine any matter within the church unless the dispute resolution process is adhered to in the first instance. (71)

The aim of the United Church Dispute Resolution Policy is, generally, to avoid costly and confrontational secular civil litigation of internal disputes and to promote cohesiveness within the church community. (72) What is the process by which these goals are achieved? What are the responsibilities of participants in the process? What are the underlying principles for the conflict resolution model? The answers to these questions will reveal that the United Church Dispute Resolution Policy is a sophisticated and flexible dispute resolution model that effectively achieves its goals. It is an example of a dispute resolution process that has the potential to transcend the confines of the church walls. (73)

A. The Process

i. The Three-Prong Approach

The current dispute resolution model used by the United Church is a variation of a prior conflict resolution system within the church. The 'old' process has been modified to include the United Church Dispute Resolution Policy. It consists of a manual that stipulates a three-step procedure for conflict resolution. The first step is termed 'first consideration'. It simply directs parties immediately affected by a dispute to attempt to resolve the problem themselves. (74) There is no guidance or structure provided for this stage of the process and therefore it often fails to resolve differences that arise in the Church. The 'informal hearing' is the next step where 'first consideration' fails. (75) The informal hearing can be instigated at the request of any of the parties involved in the conflict yet it too has inherent failings. The course of action outlined by the Manual is not clear in that it has components of both a mediation process and a formal hearing. There is confidentiality in the process and an agreement to adhere to recommendations made by the church Court, however, like a formal hearing, the process is presided over by three to five persons, instead of a single mediator. In addition, this panel can decide who will or will not appear before them and has the power to recommend whether a formal hearing is advisable, without the consent of the parties. This system effectively leaves participants without any control over the outcome of their dispute contrary to the affirmations of the church with respect to accountability, inclusivity and respect for human dignity and forgiveness. (76) The formal hearing is the final step and is accessible at the request of the parties or the panel hearing the informal complaint. The formal hearing is the least satisfactory of all. It resembles a civil court proceeding. It is costly in that legal representation is an inevitable part of the method, it is adversarial as opposed to co-operative, and solutions are imposed rather than worked out by the parties.

ii. A New Approach

The criticism of the three-step process outlined above focused on the informal hearing. However, the United Church General Council, in examining each of the components of the three phases, recognized more general problems associated with its use. First of all, none of the parties may be satisfied with the outcome of the dispute and may remain alienated through anger and mistrust. (77) This is against the church philosophy of healing and reconciliation. (78) Secondly, the work of the mediators involved in this method of dispute resolution is done on a purely volunteer basis. This leads to a risk of legal error that could deny an individual procedural fairness or due process. (79) In addition, it creates inconsistency and uncertainty in the way the process is carried out in different church Courts. (80) This, in turn, contributes to a lack of credibility in the church's conflict resolution process and results in disputants resorting to the civil court processes to resolve contentious church affairs. Time and energy is therefore taken away from the church and the church itself loses governance over its own processes. The United Church of Canada Dispute Resolution Policy was implemented to combat the problems associated with the original dispute resolution system.

The current Dispute Resolution Policy replaces the informal hearing process in the three-step model described above. It is intended to be mandatory for all cases where a charge has been laid within the church, except in the case of a charge of sexual abuse. (81) In practice, any complaint or series of complaints that are instigated within the church are the subject of the new Policy. (82) The formal hearing still plays a role in dispute resolution, however, as explained above, it has been relegated to a 'last resort' type process. The Policy is well organized and reads like a piece of legislation with section numbers delineating each step in the process. Despite this seeming rigidity, however, the Policy is flexible and allows the participants the greatest level of participation possible in the resolution of their dispute. (83) Furthermore, the entire process is voluntary and any party can withdraw from it at any time. (84) Reverend McKechney describes two of the strongest attributes of the system: there is no "fencing in" of adherents and the consequences that result from the process are properly within the United Church's own sense of justice. (85)

iii. Launching the Process

The first step at the informal hearing stage is the laying of a complaint. (86) A formal complaint is made in writing to the appropriate Court of the church. (87) The appropriate Court is determined by section 067 of The Manual. (88) An officer of the Court then informs the respondent of the complaint and informs the complainant of the process involved in resolving the dispute. The officer also explores the need for pastoral support for the parties and arranges this support if it is deemed necessary. Once this is done, the Executive of the Court appoints a Conflict Resolution Facilitator. (89) The Facilitator is chosen from a pool of *trained* individuals available to take on the role of Conflict Resolution Facilitator under the Policy. (90) The Facilitator, after being appointed, interviews the parties and reports back to the Executive whether or not to proceed with the complaint. If a decision not to pursue the complaint is reached, the Facilitator will recommend further pastoral care as needed. If a decision to proceed is made then the Facilitator will propose the type of dispute resolution process to be used. (91) The choices include mediation, community conferencing, ombuds, or consensus building. Once these decisions have been made, the resolution process is implemented with the Facilitator responsible for guiding the dispute to a satisfactory resolution.

The outcome of the process can lead to different results. If a written agreement is reached between the parties, the Executive of the Court will arrange for monitoring of the conditions of the parties' agreement. (92) If the parties do not co-operate in the process, the Facilitator reports this fact to the Executive and a formal hearing may be arranged. (93) A formal hearing, however, may only be ordered if the Executive is satisfied that *all* other avenues of dispute resolution have been unsuccessful. (94) If, on the other hand, the parties do not reach a satisfactory conclusion by the specified date of agreement, the Facilitator is required to report this to the Executive. The report may include a request for additional

time that is usually granted by the Executive at the request of the Facilitator. (95) Finally, the Executive, with the Facilitator's recommendation and with the parties' consent and their acknowledgement that there is no appeal of a decision by an arbitrator, can direct that there be arbitration of the conflict. (96)

B. Underlying Principles for the Conflict Resolution Policy

One of the basic tenets of the new Policy is its adaptability. By using various

methods of dispute resolution, such as mediation, community conferencing and ombuds, the Policy is responsive to the individual needs of the disputants. This is because one model of dispute resolution may be more or less suitable to solve a problem depending on the people involved and the nature of the dispute. (97) At the same time, the Policy catalogs a "number of fundamental principles which it consider[s] to be the basic common thread in the resolution of all types of disputes within the church." (98)

The first is a holistic approach that emphasizes the needs of the whole person and each individual in the dispute. (99) Secondly, the interests of the community must also be accommodated in the resolution of the conflict. This represents the principle of inclusivity. Thirdly, there is a focus on healing, not punishment, as well as fairness, the fourth principle. Fairness encapsulates the concepts of empowerment, dignity, respect and care of all parties in the dispute. (100) Unlike a secular proceeding, there should be no 'losers'. Fifthly, problem solving, as opposed to blaming, is also emphasized. Accountability, the sixth principle, promotes the idea that everyone must take responsibility for the harm that has been done. Justice and love are the last two principles that underlie the Policy. These standards reflect the idea that there must be agreement in the resolution of the conflict by those who were affected by it. (101)

C. The Conflict Resolution Pact

The agreement that must be signed by participants prior to the dispute resolution process is called the 'Conflict Resolution Pact'. It provides guidelines as to disputants' conduct and, at the same time, epitomizes the virtues of 'alternate' dispute resolution processes.

In the pact, the parties agree to participate in the process in good faith. (102) This means appreciating the potential of the dispute resolution process for resolving the dispute, putting forth an honest effort to co-operate with all the parties involved, and not frustrating the process. (103) In addition, the signatories to the pact agree to provide all information openly in order to facilitate a mutually beneficial conclusion. In this same vein, the parties' are required to participate in the problem-solving process by "generating ideas and options." (104) Because any party can end the process at any time, the pact requires disputants to make a genuine effort to resolve the conflict. In addition, the parties are informed that they may bring legal counsel, at their own expense, if they feel it is necessary. Finally, participants are reminded that the process is confidential and that only information required to be reported under the Policy will be disclosed to the Court of the United Church of Canada. (105) The Pact is intended to motivate the parties to resolve their dispute in confidence and amicably. Disputants are reassured that what they reveal is confidential and that all parties are bound by the same rules as all are voluntary participants of the process.

D. Summary

The wide scope of the United Church Dispute Resolution Policy itself far outstrips the scope of those who are entitled to take advantage of it. The process is meticulously set out in the Policy and

incorporates enough flexibility to make it the successful method of dispute resolution that it has proven to be in practice. (106) Through pastoral care, Facilitator evaluation, interviews and recommendations, disputants' individual needs are accounted for and responded to in accordance to fundamental Church doctrines. In this way, the United Church has been able to adopt a system that works because all parties take an active role in the process and thereby have a stake in the outcome. As the Honorable Thomas J. Moyer points out: "when all parties take an active role, they are more likely to follow the terms of the settlement." (107) It is arguably easy to recognize the value in such a system, not as an 'alternative' but the *norm*.

>Conclusion: Taking the "Alternative" Out of ADR

Antagonism is inherent in the traditional legal adjudication of disputes in Canada and many international communities. This is not necessarily a good thing:

What I question is the ubiquity, the knee-jerk nature, of approaching almost any issue, problem, or public person in an adversarial way. One of the dangers of the habitual use of adversarial rhetoric is a kind of verbal inflation - a rhetorical boy who cried wolf: The legitimate, necessary denunciation is muted, even lost, in the general cacophony of oppositional shouting. What I question is using opposition to accomplish *every* goal, even those that do not require fighting but might also (or better) be accomplished by other means, such as exploring, expanding, discussing, investigating, and the exchanging of ideas suggested by the word "dialogue." (108)

Exploring, expanding, discussing, investigating, and the exchange of ideas is the epitome of the 'alternative' process and, arguably, the polar opposite of our current legal tradition. This dichotomy lies at the heart of the issue at hand - whether alternative dispute processes should be viewed as 'first instance' processes instead of last resort or alternative avenues.

The dispute resolution systems explored in this essay provide clear reasons why the 'alternative' should become the norm. In our increasingly litigious society religious groups provide alternatives for resolving disputes. Judaism, for example, has developed the Beth Din, a *Halakhically* mandated body to resolve disputes. Because of its religious mandate, the Jewish community has developed a highly sophisticated dispute resolution system with success rates approaching 100%. Likewise, the Ismaili community has developed an effective voluntary dispute resolution system based in part upon Islamic Law and in response to fears of community disintegration. By providing an efficient and inexpensive alternative to adjudication Ismailis seek to encourage community members to use the system and achieve acceptable resolutions. The United Church has developed a dispute resolution system that, while currently limited to church disputes, may in future have broader application. The detailed process provided to United Church members to resolve disputes ensures that church disputes are resolved in a forum that encourages community cohesiveness and mutual respect.

Each of these models permit the disputants to achieve a win/win solution unavailable in traditional adjudication. They permit gains not envisaged in adjudication. The Jewish, Ismaili and United Church communities minimize social discord within their districts and incorporate societal principles in individual resolutions. In short, each of these systems employs an interest-based approach to dispute resolution. Rather than being based solely on the rights of the particular litigants these systems incorporate community interests into resolutions.

Despite the fact that the dispute resolution systems discussed in this paper are mandated by religious law or are responses to disintegrative forces on the community, the principles upon which they are based have wide application. Rather than view such processes as "alternatives" an analysis of these religious

groups suggests that processes such as community conciliation, mediation and arbitration should be the forum of first instance and adjudication with its attendant publicity and costs should be viewed as the alternative.

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1. T. J. Moyer, "Essay: ADR as an Alternative to our Culture of Confrontation" 43:13 *Cleveland State Law Review* 13 at 13. T. J. Moyer is the Chief Justice, Supreme Court of Ohio.

2. J. Macfarlane, "How does the Legal System Understand Conflict?" in J. Macfarlane ed., *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery Publications, 1999) at 45.

3. But, as Julie Mcfarlane points out "It is evident, . . . that interest in Canada in alternatives to litigation is at a new high, exemplified in the expansion of relevant university and professional programs and in growing numbers of programs offering mediation and alternative dispute resolution services" [J. Mcfarlane, ed., *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Mongomery, 1999) at xv.]

4. L. Riskin, 'The Lawyer's Standard Philosophical Map' in J. McFarlane, ed., *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery, 1999) at 46.

5. Sometimes referred to as *Beit Din*. Plural: *Batai Din*.

6. M. Elon, *Jewish Law. History, Sources, Principles*, vol.1 (Philadelphia: The Jewish Publication Society 1999) at 5.

7. "Nation" and "state" must be understood as distinct concepts. The state is a geographically-centred political entity such as the Jewish state of Israel. The nation, on the other hand, exists independently from the state. The Jewish nation, for example, is dispersed all over the world and exists independently

from the Jewish state of Israel. Jewish law in this paper is not synonymous with Israeli law, but rather is the law of the Jewish nation as a whole.

8. Elon, *supra* note 6 at 5. See below on *The Beth Din - Historical Origins*.

9. Although Jewish law is basically in concordance with Canadian laws, there is potential for conflicts. Rabbi David Ellis of the Atlantic Jewish Congress offered the following example: *Halakhah* prohibits the embalming of a corpse whereas Canadian law requires it -- the principle of *dina d'malchuta dina* operates to require the embalming of corpses.

10. The *Beth Din of America* currently decides about 100 civil and commercial disputes per year in the New York area alone. There are *Batai Din* in approximately 10 cities across the United States. See J. D. Bell, "Jewish Justice" in Atlanta Jewish Times, Internet Edition, July 30, 1999, online: Atlanta Jewish Times < > www.altjewishtimes.com/073099cs.htm >

11. Elon, *supra* note 6 at 3.

12. *Ibid.* at 5.

13. Secular courts are referred to by the derogatory term *Arkaot Shel Nochrin*. *Arkaot* refers to the corrupt, partial and slow moving courts that were not viewed as dispensing justice for Jews.

14. Bell, *supra* note 10.

15. *Ibid.*

16. Responsa are replies made by rabbinical scholars in answer to submitted questions about Jewish law.

17. I.Y. Kasdan, "A Proposal for P'sharah: A Jewish Mediation/Arbitration Service" in *Jewish Law Articles*, online: Jewish Law Articles < > www.jlaw.com/Articles/psharah2.html > (visited 12 March 2000).

18. See for example, *Journal of Halacha and Contemporary Society*. Vol. H., Rabbi Simcha Kruass, "Litigation in Secular Courts"; also *Journal of Halacha and Contemporary Society*, Vol. IX., "Arbitration and the Courts in Jewish Law"; and *Halacha and the Modern World*, Vol. 11., Rav Yaacov Arid, "Secular Courts in the State of Israel"; and *Halacha and the Modern World*, Prof. Yaacov Bazak, "The Status of the Israeli Court System." all cited in Ira Yitzchak Kasdan, "A Proposal for P'sharah: A Jewish Mediation/Arbitration Service" in *Jewish Law Articles*, online: Jewish Law Articles < > www.jlaw.com/Articles/psharah2.html > (visited 12 March 2000).

19. Beth Din of America, online: Beth Din of America < > www.bethdin.org > (visited 12 March 2000). [hereinafter Beth Din]

20. R. Csillag, "Faith in the Law," *The Globe and Mail* (7 February 2000) R4. There is an open question on whether secular mediation and arbitration is violates the prohibition on *Arkaot*. A literal interpretation of the doctrine suggests that since secular arbitration and mediation exist outside the realm of secular courts, recourse to these systems therefore is likely not discordant with *Halakhah*. This issue is more fully discussed in the subsection entitled: **P'sharah: Arbitrated and Mediated Solutions**, below.

21. *Ibid.*

22. Beth Din, *supra* note 19. What You can Expect from the Beth Din, Rulings that are Binding. In the Preamble to the Guide to Rules on Procedures, paragraph (b): "These Rules of Procedure are designed to provide for a process of dispute resolution in a Beth Din which are in consonance with the demands of Jewish law that one diligently pursue justice, while also recognizing the values of peace and compromise, and to do so in a manner consistent with the requirements for binding arbitration so that they will be enforceable in the civil courts of the United States of America, and the various states therein."

23. Beth Din, *supra* note 19.

24. *Ibid.*

25. Bell, *supra* note 10 at 4.

26. A. Berner, "Divorce Mediation: Gentle Alternative to a Bitter Process", in *Jewish Law Articles*, > www.jlaw.com/Articles/berner.html (visited 12 March 2000).

27. Talmud is defined in *New Encyclopaedia Britannica*, vol. 11, 15 th ed. (Chicago: Encyclopaedia Britannica Inc., 1985) at 525 as: scholarly interpretations and annotations on the Mishna -- the first authoritative codification of Jewish oral laws, which was given its final form early in the 3rd century CE (Common Era) by Judah ha-Nasi -- and on other collections of oral laws, including the Tosefta."

28. This story is reproduced in G. Horowitz, *The Spirit of Jewish Law* (New York: Central Book Company, 1973) at 7a and is reproduced here verbatim.

29. *Ibid.* at 7a.

30. Bell, *supra* note 10 at 1.

31. Kasdan, *supra* note 17 at 4.

32. *Ibid.*

33. Beth Din, *supra* note 19.

34. M. Taragin, "The Role of Peshara within the Halakhic Judicial System", in *Jewish Law Articles*, < > www.jlaw.com/Articles/psharah1.html > (visited 12 March 2000).

35. Elon, *supra* note 6 at G-8.

36. Kasdan, *supra* note 17 at 3.

37. Beth Din, *supra* note 19.

38. Beth Din, *supra* note 19. Note: The footnote is clear that even in cases decided by the process of p'sharah it is possible that one litigant will triumph completely and be fully vindicated.

39. Kasdan, *supra* note 17 at 3.

40. *Ibid.*

41. *Ibid.*

42. Csillag, *supra* note 20.

43. Relief Web, online: Relief Web < > www.reliefweb.int/library/documents/tajikistan.html > (visited 10 June 2000). Relief Web is a project of the United Nations Office for the Coordination of Humanitarian Affairs - OCHA.

44. >0 Speech by Her Highness Princess Zahra Aga Khan, International Association for Volunteer Effort Edmonton, Canada, August 25, 1998, online: Ismaili Web < > <http://www.amaan.com/current/edmont.htm> > (visited 23 March 2000).

45. Telephone interview with Karim Sunderji [hereinafter "Sunderji"] (11 March 2000), Chair of the Ontario Conciliation and Arbitration Board. Mr. Sunderji indicated that, while the form of dispute resolution under the Boards is similar to conventional conciliations and arbitrations, moral suasion is employed to convince parties to resolve disputes in a manner which incorporates religious beliefs as well as western legal principles.

46. *Ibid.*

47. Paraphrased from Encyclopædia Britannica Online, online Britannica.com < > <http://www.britannica.com/bcom/eb/article/9/0,5716,43899+1,00.html> > (visited 22 March 2000).

48. > 0 *Sunna*: Habitual practice or customary procedure. Initially, the term meant the habitual practice of Muslims in a particular area, but was later applied more restrictively to mean the practice of the Prophet, inclusive of sayings and actions, as recorded in the *hadith* [an account of what the Prophet said and did, and of his tacit approval or disapproval of things said and done in his presence]. The *Sunna* of the Prophet is one of the four sources of the law. For the Shi'a the *Sunna* means the sayings and actions of the Prophet and the twelve Imams.

49. J. P. Bannerman, *Islam in Perspective, A Guide to Islamic Society, Politics and Law* (New York: Routledge, Chapman and Hall, Inc., 1988) at 19.

50. *Ibid.* at 20.

51. Bannerman, *supra* note 49 at 32.

52. M. Momen, *An Introduction to Shi'i Islam* (New Haven and London: Yale University Press, 1985) at 186.

53. N. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, (Chicago: University of Chicago Press, 1969) at 106-7.

54. *The Constitution of the Shia Imami Ismaili Muslims* [hereinafter the "*Constitution*"], First Ismaili Electronic Library and Database, online: First Ismaili Electronic Library and Database < > <http://global.globale.net/~heritage/Source/extra1.html> > (visited March 22, 2000).

55. While such a composition of Boards is desired it is not mandated under the *Constitution*.

56. *Constitution*, s *upra* note 54.

57. *Manual*, *supra* note 43.

58. The "Submission for Conciliation" Form requires the parties to a conciliation to acknowledge the following:

a) That they have voluntarily submitted the dispute to the CAB (Conciliation and Arbitration Board) for conciliation

b) That all records or other documents received by a conciliator while serving that capacity shall be confidential. The conciliator shall not be compelled to divulge such records or to testify in regard to the conciliation in any adversarial or judicial proceeding.

c) That the parties shall maintain the confidentiality of the conciliation and shall not rely on it, or introduce as evidence in any arbitral, judicial or other proceeding:

i) Views expressed or suggestions made by any party with respect to a possible settlement of the dispute;

ii) Admissions made by any party in the course of the conciliation proceedings;

iii) Proposals made or views expressed by the conciliator; or

iv) The fact that the other party had, or had not, indicated willingness to accept a proposal for settlement by the conciliator;

d) That the conciliator shall not act as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject matter of the conciliation proceedings;

e) That any statements made or opinions or views expressed by the conciliator are made or offered without intent that these be relied upon by the parties; that they have been counseled to seek independent legal advice or the opinion of their own professional advisors on matters involving technical knowledge or special expertise; and that they hereby waive any claim which they can or may have against any member of the Board for any statement made or opinion or view expressed as conciliator.

59. Under modern Canadian statutes based on the *Uniform Arbitration Act*, arbitral awards can be set aside only for specified procedural or jurisdictional defects. Given the appeal process available to parties within the Conciliation and Arbitration Board hierarchy disputes as to arbitral awards may be dealt with by a higher Board. Only where all internal mechanisms are exhausted and such specified procedural or jurisdictional defects are present is a court likely to intervene.

60. *Sunderji*, *supra* note 45.

61. G. Cormick, & N. Dale, & P. Emond, *et al.*, *Building Consensus for a Sustainable Future: Putting Principles Into Practice* (Ottawa: National Round Table on the Environment and the Economy, 1996) at 44-48.

62. J. Kruger, "The Tapestry for Culture: A Design for the Assessment for Intercultural Disputes" in *Conflict Analysis and Resolution as Education: Training Materials* (1994), University of Victoria Institute for Dispute Resolution) at 129-35.

63. The United Church of Canada, *Dispute Resolution Policy Handbook* (June 3, 1999). [hereinafter Handbook]

64. *Ibid.* at 3 and 10.

65. Alternatively, the Christian Mediation & Arbitration Service (C.MAS) is a Christian organization that is available to all Christians independently of their Church affiliations. It is particularly engaged in mediations and arbitrations concerning business affairs, property and business, financial and investment services, charities and trusts, as well as property and personal injury disputes. The C.MAS has a scale of fees that may be waived where the circumstances of the case or the parties warrant. [Online: The Christian Mediation and Arbitration Service <<http://www.iccc.net/intl-en/info/html/cmas.html>> (visited 03 March 2000).]

66. Other disputes include disagreement in interpretations of working conditions, for example maternity leave, as well as strained relationships between a Minister and the Congregation.

67. Moyer, *supra* note 1 at 14.

68. Handbook, *supra* note 63 at 3 and 10.

69. *Ibid.* at 7. "The Dispute Resolution Policy represents a shift away from viewing mediation and other forms of conflict resolution as "alternative processes". These processes become the norm in conflict resolution, while the formal hearing process becomes an alternative to be used in a very limited number of cases where extenuating circumstances may result in the new Dispute Resolution Policy being unsuccessful or inappropriate."

70. Unless the dispute resolution Policy specifically requires the formal process as in the case of an alleged sexual harassment, for example.

71. Handbook, *supra* note 63 at 6.

72. This is also a primary goal for both the Jewish and the Ismaili Muslim systems of ADR.

73. The United Church in Saskatchewan has had, at various times, people trained to deal with marital disputes. However it is costly and Church resources, time and energy limit these initiatives. [Telephone Interview with Rev. Margaret McKechney (March 20, 2000). [hereinafter McKechney]

74. Handbook, *supra* note 63 at 3.

75. *Ibid.* Parties who are involved in the conflict are often unable or unwilling to solve the problem themselves even through the assistance of others. First consideration is a very informal step.

76. *Ibid.* at 10.

77. *Ibid.* at 4.

78. *Ibid.* at 10.

79. *Ibid.* at 4.

80. *Ibid.*

81. *Ibid.* at 6.

82. Interview with R. Mundy (13 March 2000) Halifax, NS. A complaint can be as simple as a disagreement between staff, or as contentious as disagreements in the form of worshipping within the church.

83. Handbook, *supra* note 63 at 7.

84. United Church of Canada, *Annotated Dispute Resolution Policy* (3 June 1999), s. 1.4. [hereinafter Policy]

85. McKechney, *supra* note 73.

86. Policy, *supra* note 84 at s. 1.1. The complaint must name the party against whom the complaint is made, give brief details of the conflict, names of persons involved, and the date or dates on which it occurred. The complaint must also be signed by the party making the complaint. [See *Ibid.* at s. 1.3.]

87. The Policy provides guidelines as to what constitutes the appropriate church Court for the dispute in ss. 1.1 to 1.2. The various Courts are: Session or Church Board or Church Council, the Presbytery, the Conference or the General Council.

88. Policy, *supra* note 84 at 1.2.

89. *Ibid.* at ss. 2.1 to 2.4. In choosing a Facilitator, the Executive must take care not to appoint someone who may have a conflict of interest in facilitating the dispute.

90. As minimum qualifications, facilitators have to have completed a course in alternate dispute resolution from a list of eligible courses approved by the General Council Office and a course offered through the General Council Office which addresses multi-party dispute resolution and United Church polity issues. This training is intended to help establish the credibility of the Policy as a primary means of resolving conflict within the church. Other initiatives taken to achieve this goal include orientation and training workshops for church staff and volunteers, and preparation and distribution of resource materials. [See Handbook, *supra* note 63 at 8] Facilitators are given an honorarium for their services, not exceeding two hundred dollars.

91. Policy, *supra* note 84 at s. 4.1.

92. *Ibid.* at s. 5.2(b).

93. *Ibid.* at 5.1. This usually involves a lack of 'good faith' by the participants. S. 4.2 of the Policy stipulates that all parties are required to participate in good faith in the dispute resolution process. This means appreciating the potential of the dispute resolution process for resolving the dispute, putting forth an honest effort to co-operate with all the parties involved, and not frustrating the process.

94. *Ibid.* at s. 5.3(c).

95. *Ibid.* at s. 5.3(a).

96. *Ibid.* at 5.3(b). It is also important to note that all of the information discussed in this process is submitted by use of various forms: Conflict Resolution Facilitator Appointment Form; Conflict Resolution Facilitator Preliminary Diagnosis Report; and Conflict Resolution Facilitator Final Report Form where the Facilitator reports success or various other approaches discussed to resolve the conflict between the parties.

97. Handbook, *supra* note 63 at 6.

98. *Ibid.*

99. *Ibid.*

100. *Ibid.*

101. *Ibid.*

102. *Ibid.* at 25.

103. Policy, *supra* note 84 at s. 4.2.

104. Handbook, *supra* note 63 at 25.

105. *Ibid.*

106. McKechney, *supra* note 73. Although there are no statistics available, Rev. McKechney asserts that the process keeps the Church community more cohesive and provides many safeguards for people who are involved in a dispute. This allows successful resolution of many types of disagreements within the Church community.

107. Moyer, *supra* note 1 at 14.

108. D. Tannen, "Fighting for Our Lives" in J. Mcfarlane ed. *Dispute Resolution: Reading and Case Studies* (Toronto: Emond Montgomery, 1999) at 49.

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