

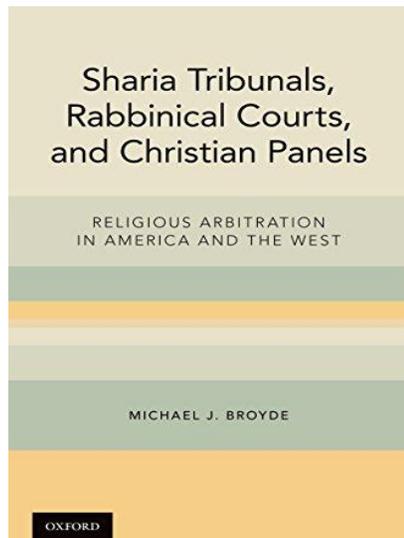
Religious Arbitration, Religious Courts & the Rule of Law: Friends or Foes?

Loyola College of Law

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Religious Arbitration as a Secular Value: Is Religious Arbitration Good for Society as a Whole or Just for the Religious Community?

For about twenty years, I served as an arbitrator in the Beth Din of America, first as the consultant hired to write the rules that are still used by the BDA, then as the director, and then as one of the four standing members of the rabbinical court. During that time, I grew to appreciate what a successful religious court did, and how it helped shape a religious community. Like all communities, “justice” and “law obedience” are very important values within the Jewish tradition, and like many communities, crafting a process for enforcing religious norms that are successful is not a simple task. Communities that fail to provide justice to its members consistently and regularly, one suspects, fail as thicker communities. Religious communities also fail when they are not sources of justice, both on a theoretical level and a practical one. So the virtues of having a functioning religious legal system, including a court system, that can “compel” (at least after the litigants agree to be “compelled”) plays a very important role in community formation and development – and even more so to those religious communities that are law based.

But, what has yet to be addressed is whether this is really a good idea from the perspective of a western liberal society. Is the rise of religious arbitration a good idea for the general liberal

community? This lecture is an attempt to answer that question in the affirmative and explain why a secular society ought to encourage – actually promote the growth of – religious arbitration (albeit within contractual limits).

Seven Challenges to the Recognition of Religious Arbitration by Secular Societies

- *One Law for One People*
- *Religious Arbitration Produces Substantive Injustice*
- *Religious Arbitration is Produces Procedural Injustice*
- *Religious Arbitration is Often Coercive and is Used to Entrench Unjust Power Relations in Religious Communities*
- *Religious Arbitration Cannot Be Adequately Policed or Regulated in Liberal Societies Committed to Religious Freedom*
- *Secular Enforcement of Religious Arbitration Violates Disputants' Rights to Freedom of Religion*
- *Secular Recognition of Religious Arbitration Promotes Isolation and Non-Integration Among Religious Communities*

Five Reasons Why Secular Societies Should Recognize and Enforce Religious Arbitration

- *Recognizing Religious Arbitration is a Religious Freedom Imperative*
- *Religious Arbitration Often Resolves Disputes Better than Secular Adjudication*
- *Religious Arbitration is Necessary for Resolving Religious Problems*

- *Secular Recognition of Religious Arbitration Helps Moderate and Integrate Religion*
- *Secular Recognition of Religious Arbitration Promotes Value Sharing that Enriches Public Policy and Discourse*

Precisely because as a society we can no longer agree on a single definition for what were once commonly held legal sacraments – and maybe in a Federal system like the United States, we never really had one -- religious arbitration is a fundamental tool to allowing many different and competing parts of society to flourish. For example, if traditionalists and progressives are to reach a workable detente on divisive questions of marriage equality, it will not be because all agree with a single vision about who should marry, what a civil union looks like, or what equality in marriage means. Rather it will be because the government will increasingly move to the contract model of unions, in which its secular model is merely the default model and people build their own model of marriage with prenuptial agreements. And what will faith-based communities do? They will write their own contracts of marriage, or even appeal to secular authorities to recognize that marriages performed by their own clergy have different rules and ought to have a different secular law.

Furthermore, the "Rise of Contract" as a fundamental basis of liberty allows for the proliferation of a wide array of religious arbitration tribunals across the United States. Of course, there has to be limitations: operating within the context of a secular legal system means that arbitration panels that enforce religious-legal norms must accept that religious principles will not excuse religious parties from criminal and other forms of liability under the relevant secular legal system. In order to garner the respect of the secular justice system by genuinely respecting secular law, arbitration institutions must educate their communities on the necessity of adhering to general legal norms.¹

So too, religious arbitration cannot address matters that are not fundamentally contractual between the parties. Occasionally, such exclusive, binding authority is not limited to criminal matters; it is found in certain civil matters, such as bankruptcy law, as well. According to federal law, after a party has filed for bankruptcy, there is an automatic stay in place, and no one may interfere with or seek to collect a debt without the bankruptcy court's permission. Private arbitration panels are bound by this limitation, and rulings that violate the automatic stay will simply be disregarded.

But this will be the exception and not the rule. In most areas, the law should not grant unique and exclusive authority to the state. If anything, the trend is to move further and deeper into contract and less and less into fixed, sacramental models set by the government that one cannot opt out of at all.

One final observation is worth noting. All of this need not be so: the law need not be this friendly to religious groups. Some secular legal regimes leave no breathing room for crafting private agreements that go against secular norms. One province in Canada has already legislatively prohibited private adjudication in family law matters and France, following the principles of *laïcité* (the secular legal norms in France) is throttling communal religious values. It is worth recognizing that it is possible to suffocate communal religious liberty without denying personal religious freedom (which no democracy can do). When both the substantive law is secular and the arbitration law resists the application of legal rules selected by the parties contractually in private law, religious communities can no longer function. Of course, France does not suffocate individual religious liberty, but in insisting that every dispute between two or more people be resolved without reference to the religious rules that the parties wished to govern them, this religious community is vastly diminished.

In sum, we in America live in a society in which religious traditions - Judeo-Christian or otherwise - have receded to the background of our legal culture, and the legal norms that once reflected those values are being replaced by secular principles, the most fundamental of which seems to be contract law. What this means is that our law is increasingly open to the idea that people can structure their relationships around a contract, rather than around sacrament. And the default model doesn't need to be the only model - customization can be allowed and even expected.

¹ Based on this, one suspects that communities like the Christian Domestic Discipline marriages will ultimately be subject to significant legal sanction over the use of force. See, Christian Domestic Discipline, <https://christiandomesticdisciplinelife.wordpress.com>)