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Democracy Dies in Darkness

The rise and rise of religious arbitration

By **Michael Broyde**

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The Causes

The rise of religious arbitration (RA) is a result of three phenomena that are together changing aspects of American society. The first (and not the focus my book) is the rise of arbitration generally. Over the last twenty-five years, more and more parties, from credit card companies to law firms themselves, have agreed to leave the court system and its laws, opting instead for private resolution of disputes. This has brought about renewed interest in the question of whether expanding arbitration law is generally good in areas as diverse as family law, religious law, class actions, and securities law. It has further engendered discussion about the values and virtues of allowing members of secular societies and subjects of secular legal systems to choose both different forums and different legal systems to resolve their civil disputes.

Second, almost all of the more conservative religious communities (Evangelical Christianity, Catholicism, Orthodox Judaism, Islam, to name just a few) feel more and more that they are at the margins of American law, and are seeking to opt out where possible from vast amounts of civil law, particularly family law. To some

A third phenomenon is now occurring because of these first two — almost otherwise unrelated — trends: Many religious communities are now forming arbitration tribunals to resolve disputes within their own communities. For example, the rise of Islamic law courts — both perceived and real — within the United States has generated much discussion over whether religious arbitration in particular is a good idea, and even if it is a good idea in the abstract, whether it is a good idea in practice, given the ways in which religions will use it, and how it will or should be implemented.

My book explores the rise of these religious tribunals.

The Law

For a long time, courts in the United States were viewed as experts in everything. Almost any dispute could be settled in a courtroom. In fact, courts were viewed as the only arena where legal disputes between parties *could* be settled. Over time, however, the ability of courts to settle disputes efficiently and effectively came into question. Courts got backed up and volumes of codified law piled up. Litigation progressively became more expensive and draconian. Parties sought viable alternatives. Out of this frustration, alternative dispute resolution (ADR) — and arbitration in particular — was born.

Until the Federal Arbitration Act of 1924, states were hostile to arbitration. As a member of the New York Court of Appeals in 1914, Justice Benjamin Cardozo discussed his concerns about arbitration, noting:

> In each case … the fundamental purpose of the contract [of arbitration] is the same — to submit the rights and wrongs of litigants to the arbitrament of foreign judges to the exclusion of our own.… If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary. The jurisdiction of our courts is established by law, and is not to be diminished, any more than it is to be increased, by the convention of the parties. *Meacham v. Jamestown, J. & C. R. Co.*, 105 N.E. 653, 655 (N.Y. 1914) (Cardozo, J., concurring) (internal citation omitted).

Cardozo was not alone. In fact, most Western legal systems were initially hostile to ADR forums operating apart from the state-sponsored justice system and resolving conflicts in accordance with substantive and procedural values different from those embraced by the courts.

In 1925, Congress passed the Federal Arbitration Act (FAA) which explicitly validates written agreements to arbitrate matters involving commerce. American arbitration is thus strongly grounded in contract theories. Under the FAA, a court may vacate an arbitration award under a variety of circumstances, but they are limited to cases where there was no valid arbitration agreement, or the award was through fraud or duress or misconduct by the arbitrators. Finally, while courts are generally not permitted to question the substance of an arbitration award, the FAA does allow them to vacate arbitral rulings that are contrary to public policy, and some courts have held that an award may be vacated if its substance amounts to manifest disregard for the law.

Although there has been a long and winding road over the last seventy-five years, the Supreme Court has consistently over the last three decades expanded the scope of arbitration to include most fields and most types of litigation. Essentially, by contract, a two people can now choose a forum other than a court and can choose a law other than American law. The forum can be an arbitration panel made up of

sixty-three Polish-speaking Italian jurists residing in New York or three members of the American Arbitration Association. It can be French law, British law, Jewish law or Islamic law. So long as it is clear in the contract, it works.

This has given rise to a thriving network of independent rabbinical courts throughout the United States, many Islamic courts that have been created over the last decade, and the beginnings of Christian arbitration as ever more people in the Evangelical community realize that individual Christian denominations, too, are a minority religion in the United States.

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[The guest posts in these series are designed to introduce the reader to the basic issues presented in my book Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West (Oxford, 2017), which is being released this week. I am a law professor at Emory University School of Law, and the Projects Director at its Center for the Study of Law and Religion. 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.

These posts are divided into five: The first, this one, explains the rise in religious arbitration and the law governing it. The second will explain the evolution of religious arbitration in America, focusing on the Jewish experience, which is the most nuanced and complex in America now. The third will explore the criticisms of religious arbitration and the fourth will explain its virtues. The final post will explore how this applies to the recent conversation about Islamic courts and what the rabbinical courts can teach Islamic courts about how to conduct religious arbitration.]

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