Dispute Resolution Bookshelf

Is There a God in the Courtroom?
The power and peril of religious courts as private arbitration

Reviewed by Frederick Hertz

The specter of delegating private family and business disputes to religious tribunals raises, in the minds of many of civil litigators and neutrals, unwelcome images of fundamentalist irrationality, church excommunications, issuance of Scarlet Letters, and other shibboleths of clerical tyranny. Most recently, for example, an overheated dispute in a New York City divorce focused on the custody terms of the Orthodox Jewish mother’s rights, resulting in a disturbing trial court upholding a burdensome agreement that had been facilitated by a religious court — only to be reversed on appeal (to the great relief of many observers) as an unconstitutional restriction of the mother’s rights of religious freedom.

Perhaps hoping to assuage some of these fears, in his book *Shari’a Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West* Michael Broyde of Emory Law School presents an elegant and thoughtful explanation — and to many readers, a convincing defense — of this emerging and growing segment of private arbitration.

Broyde opens by charting in detail the three historical trends in our justice system that have led to this development: 1) a slow but certain expansion of judicial acceptance of private arbitration generally over the past 100 years; 2) increased marginalization of religious communities from mainstream society, causing many religious parties to create and prefer their own autonomous legal systems; and 3) improved procedural protections within certain religious arbitration systems, offering far greater due process guarantees for its participants than what existed in the more traditional versions of these practices.

Most likely it was an unexpected consequence, he explains, that the door to religious tribunals was thrown open when private arbitration became more acceptable as a legitimate alternative to civil courts, first in commercial contexts and then, in some jurisdictions, in family and estate matters. From a social-policy angle, Broyde sees no reason to disallow the use of religious tribunals by participants who affiliate with that faith. From the perspective of their personal autonomy and an individual’s right to choose a culturally appropriate forum for adjudicating a dispute, there seems to be nothing inherently objectionable in allowing the selection of a religious form
of arbitration. And even more significantly, Broyde argues that it is equally permissible to allow the parties' religious principles to guide the decision-making principles. From a policy perspective, he contends, it's no different from any other choice-of-law or choice-of-forum provision.

With that historical context as background, Broyde’s well-researched volume examines Muslim, Jewish, and Christian arbitration practices and forcefully defends the “freedom of choice” that allows the followers of these faiths to resolve their conflicts in their own religious arena, as long as all participants are followers of the same faith. What could be wrong, Broyde proffers, in establishing a conflict-resolution process that aligns with the spiritual values of the congregants and honors the unique leadership structures of their religious communities?

To Broyde, the key is ensuring procedural justice in the operation of these panels. To his credit, he acknowledges that serious problems can arise when the participation in the tribunals appears to be forced on the participants and if the procedural rules lack due-process protections. As an example of how these barriers can be overcome, he details the evolution of the Jewish beth din (literally, a house of judgment, a rabbinical court that decides questions on the basis of Talmudic law), which has instituted procedural standards that, in his view, ensure the requisite due-process protections. And indeed, as long as such protections are in place, civil courts have generally — though not always, as the recent New York custody case illustrates — upheld the results of such arbitrations. But notwithstanding these few aberrations, Broyde argues that the greatest benefits of fostering these religious justice systems are social and cultural. Allowing the use of such tribunals increases the social cohesiveness within each of these religious communities, honors the principles of autonomy that empowers the participants to design their own conflict-resolution systems, and bestows respect on the central importance of religious beliefs in the lives of the litigants.

Broyde’s treatise seemed persuasive on the surface, but it left me with a nagging sense that the systems he endorses are not always so deserving of our approval. And indeed, according to the editors of Gender and Justice in Family Law Disputes, my caution was justified. “Not so quick,” exclaim the authors of a dozen essays in a compelling volume edited by Samia Bano, a lecturer in law at the University of London.

My concerns about Broyde’s advocacy were bolstered, as I learned from the perspective of these writers how women are treated in the Shari’a Council Tribunals, especially in the United Kingdom. These essays point out that allowing religious courts to adjudicate marital disputes can cause serious problems, procedurally and substantively. Many of the underlying shari’a family law rules are organized in a way that consistently harms women, both in the property-division standards and the tolerance of polygamy. The social pressures confronting the female participants throughout their lives belie any notion of true “autonomy” in the wife's agreement to participate in these tribunals, and the private realm of religious courts often reinforces the power dynamics inherent in many of these families. Several of the authors question the ability of women in these religious communities to exercise agency in any meaningful sense, given their broad lack of capacity to function as independent individuals within their religious community. Absent autonomy and agency in the decision to participate, some argue, the results can never be seen as fair or just.

Perhaps the most disturbing feature of many of these forums is the imposition of religious values in the standard mediation procedures and practices, where decision-making is supposed to be autonomous and the pressures of external values is viewed as an unwelcome bias. If a woman is desperately seeking to end a marriage that she experiences as oppressive, and the only way “out” is to sign an agreement structured according to the confines of a religious mediation process that is biased against her, it’s not surprising that these social pressures will create a climate of duress. As the female appellant in the New York custody dispute has said, she didn’t “see” the religious conditions imposed by the agreement she signed; the conditions were buried in the details of the agreement. How can such an agreement ever be deemed to be valid, from a civil law or constitutional perspective?

It’s not just a matter of shari’a law. The second part of Bano’s volume features essays on a variety of
religious arbitration systems in the United States as well as women’s courts in India and religious tribunals in Finland and Australia, all of which illustrate the same substantive and procedural challenges that haunt the shari’a forums. And from another perspective altogether, an insightful essay on same-sex couples in Catholic Italy by Maria Moscati of Sussex University explains how the overarching dominance of Catholic theology creates its own set of problems for same-sex couples. The broad condemnation of same-sex relationships creates internal psychological tensions that constrain the autonomy of the individuals, leading to a lack of self-respect or even guilt within the mind of the religious partner, resulting in a reluctance to enforce one’s legal rights. In practical terms, the religious social context directly impacts the manner in which the extended family and the Diocesan family counseling services operate in the resolution of dissolution conflicts between same-sex couples. Fairness and justice are not the most likely outcomes.

A serious consideration of these contrasting positions on religious tribunals leaves readers in a quandary. And, to those of us practicing outside these religious realms, neither extreme position in this social and legal policy debate seems to have it completely correct. Just as we always try to do in our own mediations, one can recognize the positive social benefits espoused by Broyde, yet be mindful of the biases that seem inherent in the religious tribunal systems. It is not easy to land on a fixed position on the legitimacy of these alternative conflict resolution venues.

Perhaps the wisest approach is to allow for the option of private religious arbitration but at the same time embrace the requirements for strict procedural standards that Broyde endorses. As further protection, one might also impose a more robust set of conditions for determining autonomy in the underlying choice of the religious forum, as well as minimum standards of gender and sexuality fairness in the substantive rules to be applied. As a result, the roster of acceptable religious tribunals might be dramatically narrowed — but not altogether disallowed.

As in every such conflict, it seems, one should be able to find a compromise that honors the legitimate concerns of all parties.

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