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FAITH-BASED LEGAL SYSTEMS





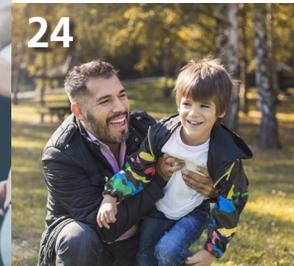
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Religious Options for Conflict Resolution

By Kenneth A. Vogel

A rabbi, an imam, and a priest walk into a bar...

Not just any bar, but a court of religious law. This article discusses religion in the context of the law, the courts and dispute resolution.

Dispute resolution means the method by which parties resolve conflicts. At its most basic, it is the use of force. The first recorded case of dispute resolution is found in the Bible.

Genesis 4:8: "And Cain said to Abel his brother, 'Let us go out to the field,' and when they were in the field Cain rose against Abel his brother and killed him."

Violence between individuals, tribes and nations is disfavored in most societies. Throughout history the human race has sought better ways to end conflict.

Exodus 18:25 - 26: "[Moses] chose capable men from all Israel and made them leaders of the people, officials over thousands, hundreds, fifties and tens. They served as judges for the people at all times. The difficult cases they brought to Moses, but the simple ones they decided themselves."

Violence is the historical norm. Any method other than the use of raw power to force an opponent to do one's will is a form of alternative dispute resolution. Peace activists wish that countries could settle their conflicts by sending their leaders to do battle, instead of sending their young men to war. That is called "champion warfare," where the outcome of the conflict is determined by an individual duel between the best soldier from each opposing army.

1 Samuel 17: 1 - 11: tells the story of David and Goliath.

"Now the Philistines gathered together their armies to battle, and they were gathered together at Socoh, which belongeth to Judah...

And Saul and the men of Israel were gathered together, and pitched in the valley of Elah, and set the battle in array against the Philistines.

And the Philistines stood on the mountain on the one side, and Israel stood on the mountain on the other side; and there was a valley between them.

And there went out a champion from the camp of the Philistines, named Goliath...

And he stood and cried unto the armies of Israel, and said unto them: 'Why do you come out to set your battle in array? Am not I a Philistine, and you servants to Saul? Choose you a man for you, and let him come down to me.

If he is able to fight with me, and kill me, then we will be your servants; but if I prevail against him, and kill him, then shall you be our servants, and serve us.'

And the Philistine said: 'I do taunt the armies of Israel this day; give me a man, that we may fight together.'

And when Saul and all Israel heard those words of the Philistine, they were dismayed, and greatly afraid." [Spoiler Alert – Israel sent David as its champion. Goliath lost.]

The American System

Federal and state constitutions require the government, including the courts, to be non-religious. The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

The Maryland Declaration of Rights, Article 36, provides:

"That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to

protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry; nor shall any person, otherwise

competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.

“Nothing shall prohibit or require the making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place.

“Nothing in this article shall constitute an establishment of religion.”

Religious Alternative Courts

The words Alternative Dispute Resolution (ADR) now mean that the parties have undertaken to resolve their controversies by selecting an alternative to the courts. It is conflict resolution by extra-judicial means, outside of a civil courtroom. There is no governmental official legal system to resolve disputes of a religious nature. Parties in the US may voluntarily go into religious courts.

Litigants selecting their own private judge is not new. Groups such as the American Arbitration Association; Construction Dispute Resolution Services; and others, provide arbitrators upon request. Litigants in arbitration may choose an arbitrator based on his or her subject matter expertise. For example, if the subject of the controversy is a construction dispute, the parties might select an arbitrator experienced in building and development. Arbitration awards are enforceable in court per statutes such as the Federal Arbitration Act, the Maryland Uniform Arbitration Act, the International Commercial Act and others. Maryland attorneys are also referred to MD Rules of Procedure, Title 17 - Alternative Dispute Resolution.

If the parties wish their dispute to be decided on the basis of religious law, they have every right to do so provided



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Penal violations have no place in American religious courts. A religious court cannot make criminal any conduct based on a violation of church law. It cannot administer a physical punishment such as confinement, corporal punishment or capital punishment. This misconception has fueled much anti-Sharia legislation around the country. No one needs to fear having his hand cut off for stealing or being executed by stoning. The parties may use as an arbitrator a cleric or a trained lay leader to hear the matter. The decision maker may use whatever religious or secular laws or procedures are agreed upon by the parties.

Civil courts are prohibited from deciding religious questions when resolving disputes within religious organizations. *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). Judges may not interpret religious doctrine or rule on theological matters. They may defer to the church's own court system, or courts may resolve church property disputes using "neutral principles of law." This means that a court may examine any materials that it would examine in cases involving a similar dispute in a secular organization, such as property deeds, articles of incorporation, or any other legal documents, as long as the court does not need to interpret religious doctrine in assessing these sources. *Jones v. Wolf*, 442 U.S. 595 (1979).

Many religions have courts which govern internal disputes of a religious nature within their congregations, such as disciplining its leaders or members for misconduct. Some religious courts handle other types of disputes upon the consent of the parties or if in accordance with an organization's rules and by-laws. Discipline such as excommunication cannot be appealed to or enforced in a secular court.

An ecclesiastical court, also called a court Christian or court spiritual, is part of the Catholic Church. The Western (Latin) Church and the Eastern Catholic churches each have systems

of canon law. Formal tribunals hear cases. Bishops appoint judges, led by a priest known as the judicial vicar or *officialis*. Ecclesiastical courts hear cases related to church activities, rather than hearing general disputes between congregants, but the jurisdiction does not have to be so limited, and in other Christian denominations it is not.

St. Paul's First Letter to the Corinthians urged believers to bring their grievances to fellow believers, rather than to outside authorities. At 1 Corinthians 6:1 - 8, he writes:

"When any of you has a grievance against another, aren't you ashamed to bring the matter to be settled before a pagan court instead of before the church? Don't you know that Christians will one day judge the world? And if you are to judge the world do you consider yourselves incapable of settling such infinitely smaller matters? Don't you also know that we shall judge the very angels themselves - how much more then matters of this world only! In any case, if you find you have to judge matters of this world, why choose as judges those who count for nothing in the church? I say this deliberately to rouse your sense of shame. Are you really unable to find among your number one man with enough sense to decide a dispute between one and another of you, or must one brother resort to law against another and that before those who have no faith in Christ! It is surely obvious that something must be seriously wrong in your church for you to be having lawsuits at all. Why not let yourself be wronged or cheated? For when you go to law against your brother you yourself do him wrong, for you cheat him of Christian love and forgiveness."

There are a number of other religious institutions which offer arbitration. Jewish law is called Halacha, meaning "the path" or "the way." It is based on the Torah, the five books of Moses. The Talmud and the Mishna are compilations and explanations of oral law, writings and teachings of the rabbis.

Sholom Aleichem, the Yiddish author and playwright whose stories formed the basis of the musical *Fiddler on the Roof* told a story of two men who went to see the village rabbi to settle their dispute. The first man told his side of the story, and the rabbi said "You're right." Then the second man then told his side of the story and the rabbi said "You're right." A passerby over heard the exchange and exclaimed "Rabbi, how can they both be right?" The rabbi said to him, "You're also right!"

Today, rabbinical courts follow a more formal process of case evaluation and religious jurisprudence. A rabbinical court is called a Bet Din. Bet Din translates as "House of Judgment." The concept of a Bet Din traces its history to the Second Temple period and its establishment is attributed to the Prophet Ezra, circa 480 BCE.

The arbitrators, all Rabbis, interpret contracts based on principles of the Torah, Talmud and other sources of Jewish Halachic law. The rabbis adjudicate financial claims and commercial disputes including employer-employee disputes, landlord-tenant disputes, real property disputes, and claims regarding business interference, breach of contract, breach of fiduciary duty, investor mismanagement, defective merchandise, and unfair competition. The West Coast Bet Din, based in Los Angeles, arbitrates disputes where the amount in controversy ranges from the hundreds to the millions of dollars. It conducts proceedings in English, Hebrew, Yiddish, Spanish, French, Arabic, German, Hungarian, or Russian.

Sharia is Islamic law, a code of religious belief and conduct derived from the Qur'an. The Sunnah are the Prophet Muhammad's recorded actions. The Hadith are the Prophet Muhammad's

recorded sayings. Sunnah and Hadith are used as persuasive authority to interpret the Qur'an. There are several different schools of jurisprudence which interpret Sharia in different ways.

Sharia is comprised of five main branches which governs all aspects of a Muslim's life. The fourth branch, mu'amalat, addresses contracts, transactions, real and personal property law, civil suits, wills, estates, business transactions and other non-criminal matters. In the United States, organizations such as the Islamic Institute of Boston handle matters which might otherwise be resolved in secular courts, such as inheritance disputes and child-custody cases. The Islamic Tribunal in Dallas, Texas serves as an arbitration provider, including business disputes. As with all arbitrations, the process is voluntary. Decisions of the Islamic Tribunal are enforceable in civil courts.

Enforceable Arbitration

The Higuera Hardwoods Company, located in Washington State, sells bamboo flooring online and through dealers nationally. Its customers are bound by the following dispute provision in its contract:

"Arbitration. It is the intention of the parties that any claim, action or proceeding arising under or in connection with this agreement or the transactions contemplated hereunder or out of the distributorship relationship between principal and customer or the end of that relationship, shall be resolved by final and binding arbitration. **Arbitration shall be by a single arbitrator experienced in the matters at issue and selected by principal and agent in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Ministries.** The decision of the arbitrator shall be final and binding and may be enforced in any court of competent jurisdiction." (Edited. Emphasis added)

Teen Challenge is a "Christ-Cen-

tered, Faith Based Solution for Youth, Adults, and Families struggling with Life-Controlling Problems, Such As Addiction."

Nicholas Ellis died after attending a Teen Challenge camp in 2012. Nicholas was over the age of 18 at the time. The contract for his admission to Teen Challenge included the provision that: "The undersigned parties accept the Bible as the inspired Word of God. They believe that God desires that they resolve their disputes with one another within the Church and that they be reconciled in their relationships in accordance with the principles stated in First Corinthians 6:1-8, Matthew 5:23-24, and Matthew 18:15-20. Accordingly, **the undersigned parties hereby agree that, if any dispute or controversy that arises out of, or is related to this agreement is not resolved in private meetings between the parties pursuant to Matthew 5:23-24 and 18:15, then the dispute or controversy will be settled by biblically based mediation and, if necessary, legally binding arbitration, in accordance with the Rule[s] of Procedure for Christian Conciliation (rules) of the Association of Christian Conciliation Services.** The undersigned parties agree that these methods shall be the sole remedy for any dispute or controversy between them and, to the full extent permitted by applicable law, expressly waive their right to file a lawsuit in any civil court against one another for such disputes, except to enforce an arbitration decision, or to enforce this dispute resolution agreement. Any mediated agreement or arbitrated decision hereunder shall be final and binding, and fully enforceable according to its terms in any court of competent jurisdiction." (Edited. Emphasis added)

Pamela Spivey, Nicholas's mother sued Teen Challenge for wrongful death. The trial court granted Teen Challenge's motion to compel arbitration, finding that "the arbitration agreement did not deprive a participant of due process or access to secu-

lar law and did not implicate Ms. Spivey's First Amendment rights."

In *Spivey v. Teen Challenge of Florida, Inc.*, 122 So.3d 986, 992 (Fla. App. 2013), the District Court of Appeal of Florida, First District, upheld the arbitration agreement finding "Next, we make two observations. First, we note that "[c]ourts are required to indulge every reasonable presumption in favor of arbitration recognizing it as a favored means of dispute resolution." **This presumption extends to private religious arbitration, which is exceedingly common in our pluralistic religious society—most major religious denominations have some method of private dispute resolution within their domains, some going back hundreds of years. As one commentator notes, the "current and continued existence of religious arbitration in the United States is not disputed, as it has been utilized for decades within a variety of religious communities."** Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 Vt. L.Rev. 157, 157 (2012); see also Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L.Rev. 1231, 1242 (2011) (examining the "deferential treatment U.S. courts afford to religious arbitration awards and the institutional role religious arbitration plays in religious communities."). Indeed, courts routinely uphold agreements to submit disputes to religious arbitration in the absence of fraud, duress, or corruption. See, e.g., *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 359-64 (D.C. 2005) (applying D.C. Uniform Arbitration Act to synagogue, and reversing order dismissing action to compel arbitration before Beth Din); *Jabri v. Qaddura*, 108 S.W.3d 404, 412-14 (Tex.App. 2003) (ordering Islamic arbitration to determine the enforceability of a marriage contract); *Encore Prods., Inc. v. Promise Keepers*, 53 F.Supp.2d 1101, 1111-13 (D.Colo. 1999) (analyzing the Rules of Chris-

tian Conciliation under the Federal Arbitration Act, and granting a motion to dismiss on the basis that the parties agreed to arbitrate under the Rules); *see also Ainsworth v. Schoen*, 606 So.2d 1275, 1276 (Fla. 3d DCA 1992) (reversing summary judgment confirming an arbitration award because it was unclear whether the award was final, but recognizing that the parties “agreed to be bound by Jewish law”).

“Second, we note that the arbitration agreement at issue in this case requires compliance with the Rules, which appear to be indistinguishable in almost every respect to those of secular arbitration organizations. The Rules consist of ten pages of single-spaced text covering every major aspect of standard secular mediation and arbitration processes. Boiled down to their essence, **the Rules differ from those of secular groups only because of a scattering of religious elements added to solemnize the process and to promote and advance conciliation as a spiritual goal.**

“Turning back to the specific religious objections, Ms. Spivey first points to Rule 4, which states: “Conciliators [arbitrators] shall take into consideration any state, federal, or local laws that the parties bring to their attention, but the Holy Scripture (the Bible) shall be the supreme authority governing every aspect of the conciliation process. (Emphasis in original). We emphasize the word “process” because nothing in this provision suggests that the Bible is to provide decisive substantive guidance on principles of negligence, wrongful death or the collateral source rule, for examples. On its face, instead, Rule 4 envisions that secular laws are given consideration and that the Bible is to be the authoritative guide for shepherding a case through the arbitration process. **That religious precepts will guide the arbitration process does not create a constitutional issue that would preclude enforcement of a voluntary agreement between private parties to arbitrate accord-**

ing to spiritual principles. Nicklaus and Teen Challenge were free to choose, as they did here, a religious *process* they deemed appropriate to resolve their disputes. Their doing so does not raise a concern that the resolution of their dispute would be inconsistent with any federal or state substantive law. (“Once the parties agree to submit to arbitration, the [Florida Arbitration Code] limits the authority of the court to interfere in the process prematurely.”) (Edited. Internal citations removed. Emphasis added)

The plaintiff also objected to a provision in the Rules providing for prayer as a normal part of the mediation and arbitration process. She argued that she, as personal representative, should not be forced to engage in a process involving Christian prayer (even though she herself is a Christian) because she contended that court enforced mediation would violate principles prohibiting governmentally-coerced religious acts. She asserted that her right to the free exercise of her personal religious beliefs is inalienable and cannot be waived, even in the context of her duties as the plaintiff estate’s personal representative. In effect, the plaintiff claimed the legal right for her personal religious views to nullify and thereby trump the religious arbitration agreement into which her son and Teen Challenge voluntarily entered. The Court did not accept this argument. It ruled that “a personal representative generally cannot object that fulfilling the deceased’s wishes offends the religious sensibilities of the personal representative; personal representatives serve the estate’s interests, not vice-versa.” [*Id.* at 994]. If Mrs. Spivey felt that she could not act in compliance with the agreement because of her religious views, she would need to resign or ask the probate court to appoint suitable individuals who could carry out the decedent’s wishes.

The Maryland Court of Special Appeals considered the issue of upholding a religious arbitration award in *Lang v. Levi*, 16 A.3d 980 (2009). The parties, Ms. Lang and Mr. Levi, entered into a Maryland secular mar-

riage and a Jewish marriage. At that time they executed a prenuptial agreement and an arbitration agreement, electing that the arbitration should be held by a Jewish court, a Bet Din, and that the decision of the Bet Din shall be made in accordance with Jewish Law (Halacha) and general principles of arbitration and equity (Pesharah) customarily employed by rabbinical tribunals. The Circuit Court for Montgomery County, Maryland issued a consent order granting the divorce and resolving custody and visitation disputes. The Circuit Court also issued an order related to alimony, payment of their child’s expenses and denied both side’s attorney’s fees requests.

After the Circuit Court’s ruling, the husband demanded arbitration before a panel of three rabbis regarding the religious divorce and the parties’ conflicting interpretation of their prenuptial agreement. The Bet Din gave Ms. Lang a partial award. Both sides appealed to the head of the Bet Din for a modification of the award in accordance with the internal Rules and Procedure of the Bet Din of America. Ms. Lang lost, whereafter she appealed to the Montgomery County Circuit Court. The Circuit Court upheld the ruling of the Bet Din, including the modification by the Av Bet Din, its most senior jurist. Ms. Lang then appealed her Circuit Court loss to the Court of Special Appeals.

The Court of Special Appeals upheld the Bet Din’s award. First, the Court of Special Appeals found looked at the standard for vacating an arbitration panel’s decision and found that the Bet Din’s decision was not tainted by any of the standards warranting an arbitration reversal. *Id.* at 985, finding that “factual findings by an arbitrator are virtually immune from challenge” and that decisions on issues are law are not a basis for a court to disturb the award. The head of the Bet Din was found to have appropriately exercised his authority within the confines of the organization’s own rules and procedures. Next, the Court looked at the First Amendment’s Free Exercise and Established Clauses and the religious question doctrine, finding that it

was prohibited from interpreting the underlying religious dogma. Finally, the Court examined whether the Bet Din denied Ms. Lang basic procedural protections afforded to her under the Maryland Uniform Arbitration Act (“MUAA”). It held that the Bet Din did not need to strictly comply with the MUAA as long as the parties knowingly and voluntarily agreed to the arbitration procedures and the arbitration procedures conformed with notions of basic fairness and due process. *Kovacs v. Kovacs*, 633 A.2d 425 (Md.App. 1993), *cert denied*.

Conclusion

An injured person might transfer his grievances into violence. Access to the courts helps temper this rage. When an aggrieved person has an opportunity to have his case heard by an independent judge who can dispense justice, that injured person does not have to take justice into his own hands. He can leave it to the system to dispense judgment in accordance with society’s goals. Vigilante justice is prevented.

Religion has always been an integral part of the American experience. In creating a tolerant society, secular law replaced religious law. Voters elect legislators who, with constitutional safeguards, pass laws which reflect societal norms. For some, secular law does not address their legal needs and personal values. For them, having an opportunity to voluntarily enter into a religious court, with a cleric acting as the judge, to decide a matter in accordance with the parties’ ethical belief system is a tremendous opportunity for the parties to have their dispute resolved. The parties are not forced to participate in a secular system with which they do not agree. If the participants have a buy-in to the alternative system, which they themselves chose, they are far more likely to accept with the outcome, even if adverse. That is the ultimate form of justice for all.

Mr. Vogel is a Maryland and Washington, D.C. attorney whose practice consists of business transactions and civil litigation, with an emphasis on construction. He acts as a mediator and as an arbitrator.