

1-30-2015

## Introduction

Mark D. Rosen

*IIT Chicago-Kent College of Law*

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

---

### Recommended Citation

Mark D. Rosen, *Introduction*, 90 Chi.-Kent L. Rev. 3 (2015).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/2>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

SHARI'A AND HALAKHA IN  
NORTH AMERICA

Mark D. Rosen  
Symposium Editor



## SHARI'A AND HALAKHA IN NORTH AMERICA: INTRODUCTION

MARK D. ROSEN, PROFESSOR, IIT CHICAGO-KENT COLLEGE OF LAW

Islamic religious law—shari'a—has come under attack in recent years as a system that threatens American freedoms. More quietly, there recently was an attempt in San Francisco to ban circumcision, a ritual central to both Jewish law (halakha) and Muslim law.<sup>1</sup> And bans on both Jewish and Muslim modes of slaughtering animals have been enacted in a number of European countries.<sup>2</sup> Indisputably, prejudice and hatred have played a large role in motivating these developments. But they have also raised some deep questions—generally untreated in media accounts—about how liberal democracies can and should accommodate legal systems that are not themselves originally grounded on liberal or democratic principles. One can pose a similar question from the opposite perspective: to what degree can, and should, religious systems of this sort adapt themselves to a liberal democratic environment?

This volume reproduces the proceedings of a conference jointly sponsored by the IIT Chicago-Kent College of Law and the Jewish-Muslim Initiative at the University of Illinois-Chicago in April of 2013 that addressed these issues.<sup>3</sup> The conference brought together Moslem and Jewish scholars, political activists and playwrights, journalists and judges.

To begin, the conference organizers wanted to start with a concrete sense of 'where we presently are' in fact, taking account of what the Islamic and Jewish communities view to be both the bad and the good. As to the bad, the conference aimed to better understand the anti-shari'a movement, as well as nascent moves to ban circumcision, ritual slaughter, and other

1. See generally B.C., *Circumcision and the Law: A Clash of Entitlements*, ECONOMIST (Nov. 14, 2013), <http://www.economist.com/blogs/erasmus/2013/11/circumcision-and-law> (discussing efforts to ban male circumcision in San Francisco, France, and Germany).

2. See Sam Sokol, *Denmark Outlaws Jewish and Muslim Ritual Slaughter as of New Week*, JERUSALEM POST (Feb. 14, 2014), <http://www.jpost.com/Jewish-World/Jewish-News/Denmark-outlaws-Jewish-and-Muslim-ritual-slaughter-as-of-next-week-341433> (noting bans in Denmark, Poland, Iceland, Norway, Sweden and Switzerland).

3. I coordinated the conference, along with Professors Sam Fleischacker (philosophy) and Junaid Quadri (religious studies) of the University of Illinois-Chicago. The first and fourth paragraphs of this introductory essay draw substantially from the conference statement that the three of us jointly authored.

organized opposition to these religious communities' ways of life, such as opposition to the establishment of the *eruvim* that permit observant Jews to carry objects during the Sabbath. As to the good, the conference organizers wanted to explore an extraordinary mechanism in operation in the United States that affords religious communities substantial autonomy to resolve disputes among their members: courts' willingness, pursuant to American law, to enforce the awards of religious arbitration tribunals.

Concretely understanding where we are facilitates reflection on the normative question of where we should be. And this normative question, it seemed to the conference organizers, is usefully approached by considering matters from two perspectives. First, what are the appropriate limits on the degree to which minority religions (like Islam and Judaism) should be accommodated in a liberal democracy, from the liberal polity's perspective? Second, what are the appropriate limitations on religious communities situated in liberal democracies, from the internal perspective of Islam and Judaism? As to this last issue, both shari'a and Jewish law have countenanced various relationships between religious law and the law of the secular state, sometimes even allowing state law to be privileged over religious law. So, we conference organizers queried, what are the metes and bounds of the circumstances where Jewish and Islamic law allow the sovereign to restrict, limit, or suspend certain religious laws? Are such restrictions, limitations, or suspensions always viewed as normatively suboptimal from the religious community's perspective, or are they ever seen as a good thing? Are there other ways in which the legal systems of diaspora Islamic and Jewish communities affected by the liberal democracies in which they find themselves, for both good and bad?

\*\*\*

The first publication in this issue, *Opposition to Islamic and Jewish Religious Practices in Contemporary America: Overlap and Divergences*, is a transcription of a fascinating roundtable discussion among playwright and essayist Wajahat Ali, New York Times journalist and professor at the Columbia University Graduate School of Journalism Sam Freedman, and Emory University PhD candidate Lee Ann Bambach. Their discussion explored the background 'where we presently are' issues. The discussion provides an informative overview of American Islamophobia, identifying individuals who have spearheaded anti-Muslim campaigns and politicians who have run campaigns that have included anti-shari'a memes. The discussion also canvasses the anti-shari'a movement's efforts to pass tens of bills restricting the religious freedom of Muslims, and American courts'

uniform rejection of those few that have passed. Interestingly, the discussion also reveals that some of the efforts to oppose religious accommodation have been spearheaded by co-religionists—meaning that they have been intra-group conflicts. The discussants also considered to what extent lessons from the Jewish experience of increasing degrees of acceptance in mainstream American society may be applied to America’s new Muslim-American communities, as well as respects in which the two religious communities’ situations and experiences are divergent. Discussants also considered Islamophobia’s spillover effects on other religious minorities in North America and, more generally, the role that growing American secularism is having on traditional accommodationist norms. Finally, the panelists discussed ways in which the Jewish and Moslem communities have been working together to combat some of the opposition.

Professor Charlotte Elisheva Fonrobert’s contribution, *Installations of Jewish Law in Public Urban Space: An American Eruv Controversy*, examines in detail a litigation growing out of a proposed *eruv* installation in Westhampton Beach, New York. An *eruv* is an “installation of boundary-marking structures”<sup>4</sup>—mostly plastic strips and fishing line—that allows observant Jews to carry objects outside their homes during the Sabbath. Though the installation is “relatively minor, relatively invisible, and entirely permeable because symbolic only,”<sup>5</sup> some recent efforts to establish *eruvim* have generated strong public opposition. Against the view that such opposition is inevitable on account of the Establishment Clause, Professor Fonrobert notes that *eruvim* have been “installed in many American cities without controversy since the 1970s”<sup>6</sup> and “have existed for over a century”<sup>7</sup> in New York City. Professor Fonrobert proceeds to consider the reasons for the recent controversies, and shows that the opposition frequently has been led by other Jews. Professor Fonrobert explores the constitutional arguments that were advanced in the Westhampton case, and discusses her involvement as an expert in the litigation.

Professor Mustafa Baig’s contribution, *Operating Islamic Jurisprudence in non-Muslim Jurisdictions: The Case of the United States*, provides a fascinating account of what Western jurisprudence would call Islamic choice-of-law principles. Focusing on the pre-modern Islamic legal tradition, Baig’s essay examines four related issues. The first is if and when Muslims may live under a non-Muslim jurisdiction. While there appears to

4. See *infra* p. 63.

5. See *infra* p. 64.

6. *Id.*

7. *Id.*

be a range of answers given by Islamic jurists, Baig finds a consensus among many jurists that Moslems may live in non-Moslem lands so long as they can practice their faith without difficulty. Baig next examines the obligation of Muslims to abide by non-Muslim law when living in non-Muslim jurisdictions, discussing the principle that if a Muslim enters a non-Muslim jurisdiction “by way of trade (or other means) it is not permitted for him to infringe on their property and life.”<sup>8</sup>

Next, Baig explores the extent to which Muslim polities have jurisdiction over actions undertaken by Moslems while they are in non-Muslim territory. Here, too, jurists in different schools of Islam offer divergent answers. While the “Hanafis hold that Muslim jurisdiction cannot extend to non-Muslim territory,”<sup>9</sup> the other schools “give far less significance”<sup>10</sup> to geography, and sometimes will apply Islamic law to a Moslem’s wrongdoings in non-Muslim lands. Moreover, even the Hanafī judges, who believe Islamic law cannot be extended beyond Muslim territories, sometimes issued fatwas—a verdict short of a legally binding decree—against Muslims in non-Muslim lands, demonstrating that “a Muslim will not be relieved from his religious sin or his moral obligations in the event of breaking the law”<sup>11</sup> while in non-Muslim lands. Baig cautions, however, that the jurists’ discussions conceived of the Muslims “as temporary sojourners to non-Muslim lands, and in the case of permanent residency, we can understand that there would be no question of applying Islamic law in non-Muslim lands.”<sup>12</sup>

Finally, Baig explores how Muslims living in non-Muslim jurisdictions are to organize their community’s legal affairs. There are to be Muslim judges (or perhaps scholars), and Baig discusses, without resolving, the complex question of who has the authority—the non-Muslim polity or the Islamic community itself—to appoint those judges. Islamic law’s attentiveness to Islamic judges for diaspora Islamic communities is important insofar as it addressed “how Muslims could lead a practicing Muslim life”<sup>13</sup> while living in non-Muslim lands. Islamic law wants Muslims to “live by Islamic laws beyond ritual matters,”<sup>14</sup> and therefore “vests authority in personalities that have legal and binding power in the absence of an *imam*

8. See *infra* p. 90.

9. See *infra* p. 91.

10. See *infra* p. 94.

11. See *infra* p. 105.

12. *Id.*

13. *Id.*

14. *Id.*

in non-Muslim territory.”<sup>15</sup> Yet, Baig concludes, “[t]raditional jurists did not clearly delineate which areas of the law should be administered, . . . leaving it open to the Muslims of a particular time and place.”<sup>16</sup>

Michael J. Broyde—a law professor, ordained rabbi, rabbinical judge, and former member of the rabbinical court known as the Beth Din of America—delivered one of the conference’s two keynote addresses. In *Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, Broyde explores how, as a matter of choice-of-law, American law permits members of religious communities to determine that their relationships will be governed by religious, rather than state, law. Further, Broyde discusses how, as a matter of choice-of-forum, the Federal Arbitration Act permits people to contract out of the state’s courts and direct their disputes to private arbitration panels whose awards generally will be enforced by state courts. American law’s flexibility as to choice-of-law and choice-of-forum allows members of religious communities to “conduct themselves in accordance with privately held religious values that are not reflected in secular law.”<sup>17</sup>

Drawing on his experience as a judge in such religious tribunals, Broyde identifies six principles for ensuring the enforceability of the tribunal’s decision and maintaining the religious tribunal’s respect within the religious community. One crucial requirement is that the tribunals comply with secular procedural norms. Broyde details many examples of how the Beth Din of America does this, stressing (among other things) the importance of having some appellate process internal to the religious tribunal that can correct the mistakes that inevitably will be made. While state courts will review the procedural fairness of religious tribunals before enforcing their judgments, Broyde suggests they do not—and should not—review the correctness of a religious tribunal’s determinations as to religious substantive law.

Even so, Broyde interestingly argues that those who serve on the religious tribunals must be familiar not only with religious law and the social and cultural mores of their religious community, but also, at least regarding commercial matters, with “the street law,”<sup>18</sup> that is to say with what “is actually being followed by people.”<sup>19</sup> This is because “Jewish law incorpo-

15. *See infra* p. 106.

16. *See infra* p. 107.

17. *See infra* p. 112.

18. *See infra* p. 127.

19. *Id.*

rates the custom”<sup>20</sup> actually followed by people in many commercial matters. Broyde also urges that religious tribunals include among their three members an “expert[] in the particular matter at hand”<sup>21</sup>—for example a dentist in a dental malpractice dispute—even if that person is not a Jewish law scholar. The religious communities, Broyde notes, “are in a perpetually dynamic relationship with secular law and secular society, incorporating secular legal rules and ideas into their commercial and family law—and to do justice, the arbitrators chosen by this community need to be part and parcel of that process.”<sup>22</sup>

Echoing Professor Baig’s observations concerning the establishment of Islamic judges in non-Islamic lands, Broyde notes that “religious leadership that resolves disputes between parties ultimately serves a role in shaping the community.”<sup>23</sup> The tribunals “assume roles in communal governance,”<sup>24</sup> resolving “not only mundane disputes but also communal disputes.”<sup>25</sup> Broyde observes that “[o]ver time, this gives the community increased structure, stability, and cohesiveness.”<sup>26</sup> Broyde is deeply appreciative of the space American law affords religious communities, rightly recognizing that the secular state “need not be this friendly to religious groups,”<sup>27</sup> as is the case in France. According to Broyde, the American practice shows that “[l]iberal and secular western democracy is compatible with religious community.”<sup>28</sup> American law allows different religious communities to be “gloriously different, each in its own way, each sharing its religious values in a grand whole, and exercising the freedom to maintain [its] own set of beliefs and practices within the majestic mosaic of diverse communities that make up our United States.”<sup>29</sup>

Like Professor Broyde, Professor Michael A. Helfand’s contribution, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, lauds the autonomous space for religious tribunals that is created by the United States’ Federal Arbitration Act. But Professor Helfand takes issue with the commonly held view, echoed in Broyde’s essay, that courts should limit themselves to ensuring the tribunal’s conformity with

20. See *infra* p. 127.

21. See *infra* p. 132.

22. See *infra* p. 133.

23. *Id.*

24. *Id.*

25. See *infra* p. 134.

26. *Id.*

27. See *infra* p. 138.

28. *Id.*

29. See *infra* p. 140.

procedural norms, and never review a religious tribunal's religious determinations. Helfand interrogates both prongs of this conventional wisdom. As to the first, Helfand considers whether a court should refuse to enforce an arbitration award where the tribunal, in accordance with religious law, refused to allow testimony from the losing party's star witness only because she was a woman. Evidentiary rules typically are treated as procedural, and so it might be thought the tribunal's award should not be judicially enforceable. Against this, Helfand provides a consent-based argument that courts should enforce such awards: "[r]eligious arbitration agreements generally incorporate choice-of-law provisions that require the tribunal to apply a particular set of religious procedural rules,"<sup>30</sup> which "ensures that the dispute is resolved in accordance with shared religious rules and values—one of the primary motivations behind parties submitting disputes for religious arbitration."<sup>31</sup> In the other direction, Helfand considers at some length several plausible doctrinal grounds that a domestic court might rely upon to decline enforcement of such an award.

As to the second prong, Helfand observes that whereas the awards of ordinary arbitrators are subject to judicial review under the manifest disregard of the law standard, "[s]uch limited judicial review is not available in the religious arbitration context."<sup>32</sup> The constitutionally based 'religious question doctrine,' which prevents courts from resolving claims that turn on disputes over religious doctrine or practice, "short-circuit[s] the manifest disregard of the law inquiry before it even begins."<sup>33</sup> Helfand thinks the lack of any judicial review "opens the door for some significant abuse of the arbitral process."<sup>34</sup> Helfand's main concern seems to be instances where a religious tribunal willfully disregards its religious tradition's law (it would be interesting to learn how large a problem this is). Helfand suggests the lack of judicial oversight might make people less likely to seek out religious arbitration, thereby undermining the "very infrastructure of religious freedom that religious arbitration is intended to provide."<sup>35</sup> Helfand supports a return to the Supreme Court's earlier approach to religious disputes, which permitted courts to insure that a religious institution had adhered to its own internal religious rules during its decision-making process. Helfand believes that the limited state review he endorses can

30. *See infra* p. 148.

31. *Id.*

32. *See infra* p. 155.

33. *See infra* p. 156.

34. *See infra* p. 159.

35. *See infra* p. 160.

actually help maintain the integrity, both real and perceived, of religious tribunals, and thereby ultimately aid religious freedom.

Professor Mohammad Fadel was the symposium's second keynote speaker. His contribution, *Religious Law, Family Law and Arbitration*, addresses the judicial enforcement of religious tribunals awards in family law (primarily divorce) that presently is the practice in the United States, and which had been in effect in Ontario, Canada until a decade ago. Drawing heavily on renowned political theorist John Rawls, Fadel argues that judicial enforcement of tribunal awards, subject to the review provided under American law, is fully consistent with Rawlsian liberalism. This is true even though, as Fadel illustrates in detail, Islam's "conceptions of the family . . . necessarily conflict in certain respects with the politically liberal conception of the family . . ."<sup>36</sup> For example, as Fadel shows, "Islamic law's conception of family law was highly structured by gender, with men and women assigned different rights and obligations within the household."<sup>37</sup> Further, men had the "prerogative to divorce their wives at will as well as the right to marry another woman while remaining married to their first wife, without recognizing a reciprocal right in the wife."<sup>38</sup> "The rules governing custody and guardianship of minor children were similarly gendered,"<sup>39</sup> and Islamic inheritance law "provided that males of the same class would receive twice as much as similarly situated females."<sup>40</sup>

Given Islamic law's deeply gendered structure, how can a state court's enforcement of a Muslim tribunal's award based on Islamic law be consistent with liberalism? To begin, Fadel clarifies what he takes to be the appropriately limited jurisdictional scope of religious tribunals: they do not, and should not, make child custody determinations or interfere with criminal law. Further, Fadel suggests that many of Islam's gendered family law rules are defaults around which the parties can contract to make them "more . . . in line with values of gender egalitarianism."<sup>41</sup>

But even with these caveats, Fadel acknowledges that Islamic family law is unlikely to coincide with liberal sensibilities regarding gender relations, and nonetheless argues that "recognition of a qualified right to arbitrate family law disputes in accordance with the internal norms of a religious community . . . is deeply consistent with the ideals of political

36. See *infra* p. 164.

37. See *infra* p. 169.

38. *Id.*

39. See *infra* p. 170.

40. See *infra* p. 169.

41. See *infra* p. 170.

liberalism . . . .”<sup>42</sup> Fadel reads Rawls as allowing a “pluralism within the family,”<sup>43</sup> under which the state can properly restrict family life only insofar as a community’s way of life interferes with the “reproduction of political society.”<sup>44</sup> Fadel argues that Islamic family law is not inconsistent with this basic requirement “because women [still] enjoy all the basic rights of citizens and also have access to the material means necessary to allow them to make effective use of their liberties and opportunities.”<sup>45</sup> Fadel recognizes that Islamic family law may generate gendered financial outcomes, but argues that “[t]he only gender-based inequality that must be abolished as a matter of the principles of justice is that which is involuntary.”<sup>46</sup> According to Fadel, “Religiously justified inequality satisfies the voluntariness requirement because adherence to religion in a politically liberal regime is, by definition, voluntary.”<sup>47</sup>

Interestingly, Fadel also suggests that religious tribunals “may be an ideal institution for effecting the kind of interaction between the public principles of justice and the internal norms of various religious communities that may reject some application of those norms.”<sup>48</sup> Drawing on Rawls’ concept of reflective equilibrium, Fadel suggests that, “[A]rbitration could plausibly act as a catalyst in accelerating internal doctrinal reforms within Muslim communities on crucial questions, such as what constitutes a fair division of property between spouses upon dissolution of the household.”<sup>49</sup>

\*\*\*

Two broad attitudes toward the relationship between liberalism and religious communities appear in the articles. One—probably the dominant one—reflects the view that according broad autonomy to religious communities is perfectly consistent with, perhaps even the best instantiation of, liberal values.<sup>50</sup> The second is that the needs of religious communities give rise to a core conflict between competing liberal values—for example, between religious freedom and equality. The consent-based arguments that

42. See *infra* p. 172.

43. See *infra* p. 171.

44. *Id.*

45. See *infra* p. 167.

46. *Id.*

47. *Id.*

48. See *infra* p. 172.

49. See *infra* p. 182.

50. I myself advanced such an argument earlier in my career. See Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053 (1998).

figure prominently in many of the contribution essays' analyses are part and parcel of the first attitude. But to the extent there may not be real, meaningful consent in this context, the first attitude may prove to be less tenable than the second. The second attitude does not lead to the conclusion that liberal states should not go far toward accommodating religious communities. But an implication of the second attitude is that the issues raised in this conference involve real conflicts and dilemmas, and veritable costs attend whatever decision is made as to how liberalism's conflicting commitments are to be harmonized.