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## Articles



## Student Notes



## Forum: Symposium on Brunei's New Islamic Criminal Code



Program in Islamic Law
at Harvard Law School

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# The Other Muslim Bans: State Legislation Against "Islamic Law"

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## Abstract

*This Article addresses and critiques the case for state-level legislative bans on courts citing "Islamic law" or the law of Muslim-majority countries. In particular, the Article reviews the most substantive evidence adduced by the bans' supporters, in the form of a set of state court cases published by the Center for Security Policy (CSP). Very few of these cases, in fact, show courts actually applying Islamic or foreign law, and in none of these cases would the various forms of proposed legislation have been likely to alter the result. Thus even this report does not suggest a need for the state laws purporting to ban* sharīʿa*. The Article thus argues that even if these bans are not unconstitutionally discriminatory in their effect, they are ineffective at achieving their claimed purpose.*

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CONTENTS

## Introduction

President Donald Trump's executive orders blocking travel and immigration from five Muslim-majority countries are not the only measures that have recently sparked debate over legal responses to alleged threats to the United States from Islam and Muslims.[1] In the first months of 2017, Arkansas and Texas enacted, while Idaho, Montana, Oregon, and Wisconsin considered, laws that would prohibit courts from using foreign law. The bills' advocates claimed that such legislation was necessary to meet the threat posed by Islamic law (commonly called *sharīʿa*).[2] These states follow in the wake of Florida, North Carolina, Kansas, Arizona, Louisiana, and Tennessee, all of which have enacted such bans since 2010.[3] These efforts began in Oklahoma, where a 2010

1 *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018); Int'l Refugee Assistance Project v. Trump, 857 F. 3d 554 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017); Sarsour v. Trump, 245 F. Supp. 3d 719 (E.D. Va. 2017).

2 H.B. 1041, 91st Gen. Assemb., Reg. Sess. (Ark. 2017), http://www.arkleg.state.ar.us/assembly/2017/2017R/Pages/BillInformation.aspx?measureno=HB1041 [https://perma.cc/2FCW-H4N2]; H.B. 94, 2017 Leg., 1st Reg. Sess. (Idaho 2017), https://legislature.idaho.gov/sessioninfo/2017/legislation/h0094 [https://perma.cc/6SPA-UQAN]; S.B. 479, 79th Leg. Assemb., Reg. Sess. (Or. 2017), https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/SB479 [https://perma.cc/P98Q-DD26]; H.B. 45, 2017 Leg., 85(R) Sess. (Tex. 2017), http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=HB45 [https://perma.cc/5KY3-NXTH]; A.B. 401, 2017–2018 Leg. (Wis. 2017–2018), http://docs.legis.wisconsin.gov/2017/related/proposals/ab401 [https://perma.cc/X3UV-YYX8]. *See also* Erin Loranger, *Bill Would Prohibit State Courts from Applying Islamic Law*, Helena Indep. Rec. (Jan. 24, 2017), http://helenair.com/news/politics/state/bill-would-prohibit-state-courts-from-applying-islamic-law/article_e8e8765e-0949-55ed-941d-5dd785d13a05.html [https://perma.cc/VF8F-Z7MJ]; George Prentice, *It's Back: Anti-Sharia Law Measure Resurfaces at Idaho Legislature*, Boise Wkly. (Feb. 1, 2017), https://www.boiseweekly.com/boise/its-back-anti-sharia-law-measure-surfaces-at-idaho-legislature/Content?oid=3974008 [https://perma.cc/2MPQ-DXDX]. Montana's governor vetoed the bill there (Bobby Caina Calvan, *Montana Governor Rejects Bill Banning Sharia Law in Courts*, Helena Indep. Rec./Associated Press (Apr. 6, 2017), http://helenair.com/news/politics/montana-governor-rejects-bill-banning-sharia-law-in-courts/article_7424b33d-6583-5c1d-a0da-73ae9f875af5.html [https://perma.cc/8LC8-LEYM]).

3 *See* Florida Chapter 2014-10, S.B. 386, 2014 Leg. (Fla. 2014), http://laws.flrules.org/2014/10 [https://perma.cc/Q6B5-5QQL]; H.B. 2087, 2011 Reg. Sess. (Kan. 2011), http://www.kslegislature.org/li_2012/b2011_12/measures/documents/hb2087_01_0000.pdf [https://perma.cc/G47C-CC7K]; H.B. 522, 2013 Gen. Assemb. (N.C. 2013), http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=h522 [https://perma.cc/PBX3-QXKK]; Ariz. Rev. Stat. Ann.

referendum authorized a "Save Our State" constitutional amendment that specifically banned state courts from considering "international law or Sharia law."[4]

The debate about these bills is often expressed in terms of religious freedom and discrimination concerns,[5] but this Article takes a different angle—asking whether these laws are effective in their stated goals. I argue, using the bills' proponents' own evidence, that they are not effective, thereby suggesting that there is little to this legislative movement beyond misperceptions and possibly unconstitutional discrimination.

Fears that courts are applying Islamic law in violation of constitutional rights arose in parallel to the rise of the Tea Party, when former House Speaker Newt Gingrich memorably warned of "creeping sharia" during his own short-lived campaign for president.[6] However, the anti-*sharīʿa* movement lived on beyond 2010, and seems to have blossomed in conjunction with the successful 2016 Trump campaign. Even though federal courts quickly enjoined the Oklahoma amendment,[7] the continued proliferation of anti-foreign law bills proves that academic observers were wrong to believe that "[t]his legislative moment in middle America passed quickly."[8]

By August 2017, anti-foreign or anti-religion law bills had been introduced in forty-three states.[9] David Nersessian useful-

§ 12-3101 (2011); La. Rev. Stat. Ann. § 9:6001 (2010); H.B. 3768, 106th Gen. Assemb., 2d Reg. Sess. (Tenn. 2010).

4 *See* H.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010), https://www.sos.ok.gov/documents/questions/755.pdf [https://perma.cc/L59T-CS8R].

5 *See infra* note 15.

6 *See* Newt Gingrich, *No Mosque at Ground Zero*, Human Events (July 28, 2010), http://www.humanevents.com/2010/07/28/no-mosque-at-ground-zero [https://perma.cc/6Q8B-PZV]; Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. Times (Dec. 21, 2011), http://www.nytimes.com/2011/12/22/us/politics/in-shariah-gingrich-sees-mortal-threat-to-us.html [https://perma.cc/49HB-9B9T].

7 *See* Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).

8 *See, e.g.*, Ruth Miller, Review Article, *Save Our State: A Decade of Writing on Jurisdiction and Sovereignty in East and West Asia*, 45 Int'l J. Middle E. Stud. 149, 149 (2013).

9 Hatewatch Staff, *Anti-Sharia Law Bills in the United States*, Southern Poverty Law Center (Feb. 5, 2018), https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states [https://perma.cc/SN68-QBRQ].

ly divides these "blocking" laws into three types: "full," "rights-based," and "reciprocal."[10] "Full" blocking legislation, such as the bill approved in Oklahoma in 2010 (and then enjoined by a federal judge), simply ban the application of certain elements of foreign, religious, or international law.[11] "Rights-based" laws, such as those enacted in Arizona in 2011 and North Carolina in 2013, prevent courts from recognizing foreign laws if doing so would "work[] a rights infringement in practice."[12] The model "American Laws for American Courts" (ALAC) bill, and the Kansas bill signed into law in 2012, reflect a third, "reciprocal" approach, "block[ing] foreign laws that do not provide the same rights protection as American state or federal law."[13] A fourth approach, not noted by Nersessian's typology, might be called a "public policy" approach. Florida's 2014 law, for example, simply prevents courts from recognizing or enforcing foreign laws if they conflict with Florida's "strong public policy," and it reiterates the aspects of public policy already found in the state's case law.[14]

This Article asks whether such blocking bills, especially the second, third, and fourth types, serve any purpose—are they needed to change the rules of decision in U.S. state courts, and would they have resulted in previously decided cases turning out differently? I approach these questions by engaging with the most substantive evidence the bills' proponents have yet produced—a 635-page report, *Sharia Law in American State Courts* (*SLASC*), published by the Center for Security Policy (CSP), a conservative Washington think tank.[15] The report, issued in 2011, serves as the

10 *See* David L. Nersessian, *How Legislative Bans on Foreign and International Law Obstruct the Practice and Regulation of American Lawyers*, 44 Ariz. St. L.J. 1647, 1700 (2012).

11 *Id.* at 1655–56; *see also Awad*, 670 F.3d at 1111 (affirming a lower court's injunction).

12 Nersessian, *supra* note 10, at 1656; Elizabeth LaForgia, *North Carolina Governor Allows Anti-Sharia Bill to Become Law*, Jurist (Aug. 27, 2013), http://jurist.org/paperchase/2013/08/north-carolina-governor-allows-anti-sharia-bill-to-become-law.php [https://perma.cc/S7U9-J45H].

13 Nersessian, *supra* note 10, at 1656.

14 *See* S.B. 386, 2014 Leg. (Fla. 2014), *supra* note 3.

15 Center for Security Policy, Sharia Law and American State Courts: An Assessment of State Appellate Court Cases (2011) [hereinafter SLASC].

foundation for a 2014 book.[16] The report lists fifty state-court cases in which, it claims, U.S. courts have applied *sharīʿa*, or in which Islamic law or the law of Muslim states was "relevant" to the decision. Scholars have typically passed over this report without much discussion, but I aim to take it on its own terms and to show that it misrepresents and misconstrues the available evidence. While the report does provide a useful look at how state courts engage with Islamic and Muslim law (a distinction discussed below), that look does not reveal the picture the CSP report paints. In fact, a close analysis of the cases shows that, when engaging with Islamic and Muslim law, U.S. courts consistently look to established limiting principles from the fields of contracts, family law, and conflict of laws. There is no indication of a problematic line of major cases that both recognized foreign law and would be fixed easily by the proposed types of legislation.

## I. Existing Arguments and Counter-Arguments on Blocking Bills

### *a. First Amendment Challenges*

Oklahoma's initial ban quickly drew federal constitutional challenges because it directly targeted Islam. Two days after voters approved the state constitutional amendment in a referendum, a Muslim Oklahoman named Muneer Awad challenged the amendment's certification, arguing that it would violate his rights under the Establishment and Free Exercise Clauses of the U.S. Constitution's First Amendment. The Federal District Court for the Western District of Oklahoma granted an injunction, which the Court of Appeals for the Tenth Circuit affirmed on appeal on Establishment Clause grounds. Specifically, the Tenth Circuit held that Awad was likely to prevail in his claim that the amendment "discriminated among religions," and was therefore subject to strict scrutiny—a

16 Center for Security Policy, Sharia in American Courts: The Expanding Incursion of Islamic Law in the U.S. Legal System (2014). In this Article I cite the report, but the book is based on the same cases.

test it would fail, as the state did not "identify any actual problem the challenged amendment seeks to solve."[17] In 2013, the District Court made the injunction permanent.[18]

Faced with these challenges, advocates of blocking laws have shifted their support toward more limited, and facially religiously neutral, bills of the "rights-based" and "reciprocal" varieties.[19] However, such laws may still be vulnerable to First Amendment challenges based on their intent or impact.[20] Indeed, there seems to be evidence for this view. Many state legislators have been clear that the newer blocking bills are still aimed at Islam, even if the laws' texts do not say so.[21] South Carolina State Representative Chip Limehouse, who sponsored a "reciprocal" blocking bill in that state, noted, "I think in order to avoid the constitutional challenges that will certainly come, we're gonna change the word Sharia Law to foreign law."[22] One of blocking bills' main advocates, lawyer David Yerushalmi, indicated that his efforts were specif-

17 *Awad*, 670 F.3d at 1129–30.

18 Awad v. Ziriax, 966 F. Supp. 2d 1198 (W.D. Okla. 2013).

19 *See, e.g.*, Bradford J. Kelley, Comment, *Bad Moon Rising: The Sharia Law Bans*, 73 La. L. Rev. 601 (2013); Steven M. Rosato, Comment, *Saving Oklahoma's "Save Our State" Amendment: Sharia Law in the West and Suggestions to Protect Similar State Legislation from Constitutional Attack*, 44 Seton Hall L. Rev. 659 (2014). *But see* Kimberly Karseboom, Note, *Sharia Law and America: The Constitutionality of Prohibiting the Consideration of Sharia Law in American Courts*, 10 Geo. J.L. & Pub. Pol'y 663 (2012) (defending the constitutionality of Oklahoma's law).

20 *See* Faiza Patel, Matthew Duss & Amos Toh, Foreign Law Bans: Legal Uncertainties and Practical Problems (2013); Gadeir Abbas, *Anti-Muslim Legislation and Its Hopeful Demise*, 39 Am. B. Ass'n: Hum. Rts. (2013), https://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/january_2013_no_2_religious_freedom/anti_muslim_legislation_and_its_hopeful_demise.html [https://perma.cc/WX6Y-8EF6]; Ryan H. Boyer, Note, *"Unveiling" Kansas's Ban on Application of Foreign Law*, 61 Kan. L. Rev. 1061 (2013); Muhammad Elsayed, Note, *Contracting into Religious Law: Anti-Sharia Enactments and the Free Exercise Clause*, 20 Geo. Mason L. Rev. 937, 961 (2013).

21 *See, e.g.*, Patel et al., *supra* note 20, at 33–35.

22 Javaria Khan & Hannah Allam, *Report: State Lawmakers Tweak Wording to Push Through Anti-Islam Bills*, Miami Herald (June 20, 2016), http://www.miamiherald.com/news/politics-government/article84931367.html [https://perma.cc/7NRT-BFCC]. This legislation, H. 3521, passed the House but not the Senate in the 2015–2016 term. *See* H. 3521, 2015 Leg. (S.C. 2015), http://www.scstatehouse.gov/billsearch.php?billnumbers=3521&session=121&summary=B [https://perma.cc/SSU5-FMGQ].

ically directed at *sharīʿa*, and went beyond merely changing the law: "If this thing passed in every state without any friction, it would have not served its purpose," he told *The New York Times*. "The purpose was heuristic—to get people asking this question, 'What is Shariah?'"[23]

*b. Conflict of Laws Concerns*

Alongside their constitutional arguments, opponents of blocking bills also argue that such bills are unnecessary. Even if elements of Islamic law, or the law of Muslim-majority countries, offend commonly held U.S. norms, the American Civil Liberties Union (ACLU) argues that there was no cause for concern because existing conflict-of-laws principles already provide safeguards. The ACLU notes that "[c]ourts may not defer to *any* law—religious or not—if doing so would result in an outcome contrary to public policy."[24]

The CSP, however, produced the *SLASC* report in large part to respond to these arguments. The report's introduction claims that it demonstrates "that Shariah law [*sic*] has entered into state court decisions, in conflict with the Constitution and state public policy."[25]

The report, the book based on it, and its associated website[26] have thus played an important role in the campaign for blocking bills. The report itself has been cited in news reports and blogs, by a U.S. Senator, in letters to the editor, and in at least

23 Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. Times (July 30, 2011), http://www.nytimes.com/2011/07/31/us/31shariah.html [https://perma.cc/5FSF-LPTA].

24 ACLU Program on Freedom of Religion and Belief, Nothing to Fear: Debunking the Mythical "Sharia Threat" to Our Judicial System 3 (2011) (emphasis original). *See also* Patel et al., *supra* note 20, at 33–35. The ACLU, responding to an earlier version of the CSP report, discusses a few of the cases analyzed herein.

25 SLASC, *supra* note 15, at 8.

26 Sharia in American Courts: The Expanding Incursion of Shariah Law and American State Courts (2014), http://shariahinamericancourts.com [https://perma.cc/T8AY-VF38].

one academic defense of anti-*sharīʿa* bills.[27] The cases it reprints also appear in a recent book by constitutional lawyer Jay Sekulow warning of "radical Islam"'s threat to the United States.[28] When state legislators claim that in unspecified court cases "[s]haria ha[s] already overtaken our American courts"—as Idaho State Representative Eric Redman did in 2016—they are likely also referring to the CSP report.[29] Notably, the American Public Policy Alliance, a principal advocate of model state legislation to ban the use of foreign law, prominently features the CSP report on its website. A sidebar advertises stories of "10 American Families and Shariah Law," describing cases drawn from the CSP report. The site explicitly invokes the report on its "Frequently Asked Questions" page to rebut a suggestion that existing legal doctrines protect against undesirable decisions.[30]

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27 *See, e.g.*, Kelley, *supra* note 19, at 609–12; Eli Clifton, *FBI: Center for Security Policy Sharia Report Made "Unsubstantiated Assertions,"* ThinkProgress (Feb. 24, 2012), https://thinkprogress.org/fbi-center-for-security-policy-sharia-report-made-unsubstantiated-assertions-6517a618ca91#.nheo48k1o [https://perma.cc/9QEG-FPTL]; Carla Garrison, *Why Islam's Sharia Law Is the Biggest Threat to American Safety*, Nat'l Black Robe Regiment (July 15, 2014), http://nationalblackroberegiment.com/islams-sharia-law-biggest-threat-american-safety [https://perma.cc/6PYA-352E]; Stephen M. Gelé, *Southern Poverty Law Center on Sharia in American Courts: Move On, Nothing to See Here*, Breitbart (June 20, 2011), http://www.breitbart.com/Big-Peace/2011/06/20/Southern-Poverty-Law-Center-on-Shariah-in-American-Courts--Move-On--Nothing-To-See-Here [https://perma.cc/2DJQ-KWMM]; Fred Grandy, *The Sharia Threat to America*, Am. Thinker (Dec. 28, 2012), http://www.americanthinker.com/articles/2012/12/the_sharia_threat_to_america.html [https://perma.cc/UKB2-DVEN]; William R. Levesque, *Appeals Court Won't Stop Hillsborough Judge from Considering Islamic Law*, Tampa Bay Times (Oct. 24, 2011), http://www.tampabay.com/news/courts/civil/appeals-court-wont-stop-hillsborough-judge-from-considering-islamic-law/1198321 [https://perma.cc/4F4R-CJ8F]; Robert Steinback, *Report Aiming to Prove "Creeping Sharia" Theory Proves the Opposite*, Southern Poverty Law Center: Hatewatch Blog (June 14, 2011), http://www.splcenter.org/blog/2011/06/14/report-to-prove-creeping-shariah-theory [https://perma.cc/NB26-A6XK].

28 Jay Sekulow, Unholy Alliance: The Agenda Iran, Russia, and Jihadists Share for Conquering the World 66–73 (2016).

29 *See* Betsy Z. Russell, *Redman, at Hearing on Anti-Sharia Law Bill, Says It's "Already Overtaken Our American Courts,"* Spokesman-Rev. (Spokane, Wash.) (Mar. 17, 2016), http://www.spokesman.com/blogs/boise/2016/mar/16/redman-hearing-anti-sharia-law-bill-says-its-already-overtaken-our-american-courts/ [https://perma.cc/HL88-Y3H3].

30 *American Laws for American Courts*, American Public Policy Alliance, http://publicpolicyalliance.org/legislation/american-laws-for-american-courts

What is missing, however, is an analysis of *whether* these cases actually illustrate a need for blocking bills. Would any of the different models of anti-*sharīʿa* laws have changed the outcome in these cases? Through an analysis of the facts, arguments, and outcomes in each of these cases, I argue that the answer is "no." The CSP report itself has no such analysis, simply coding each case as "sharia compliant" or "not sharia compliant" at the trial and appellate levels. I work through the state courts' interpretive efforts in different substantive areas, and I put these cases in their legal context. The discussion reveals that the blocking bills would be essentially meaningless: not only would they not change the outcome of any of these cases, but also very few, if any, of these cases raise plausible concerns about violating important existing values in the U.S. legal system. In other words, regardless of whether they are unconstitutional or discriminatory, bills banning foreign law are simply an ineffective solution to a non-existent problem. The only real importance of blocking laws, then, may lie in their likely discriminatory intent—perhaps bolstering the argument for their unconstitutionality.

First, however, a caveat: the cases in the report are certainly not a complete, and probably not a representative, sample of U.S. state court cases where courts are called on to apply Islamic law, though they do offer a broad picture. Collecting a database of all such cases would be valuable, and may be a useful future project.[31] However, for the purposes of this research, an analysis of the fifty cases cited by the CSP report, along with others that are

(last visited Apr. 18, 2020) [https://perma.cc/DM7W-DTYG]. To the extent scholars have been critical of the report, they have simply dismissed it with little discussion, analyzed only a few of the cases, or not considered what effect the proposed bans would have on the cases. *See*, *e.g.*, Elsayed, *supra* note 20, at 961; ACLU, *supra* note 24; Steinback, *supra* note 27; Ed Brayton, *The Fraudulent Sharia in American Courts "Study,"* Science Blogs (June 10, 2011), http://scienceblogs.com/dispatches/2011/06/10/the-fraudulent-sharia-in-ameri [https://perma.cc/4WNS-3P5G]. The last piece, while not scholarly, is particularly cutting in its critique of the report's methodology.

31 For the SHARIAsource page designed to host such a collection, see the SHARIAsource Portal Special Collection, Islamic Law in U.S. Courts, beta.shariasource.com/projects/9.

connected and relevant, is useful to inform the debate over blocking bills. The CSP report represents the strongest, most substantive, and lengthiest argument presented by the bills' proponents, who have presumably mustered their best evidence. If the cases in the report do not provide convincing evidence of a significant problem with Islamic law in American courts, then the bills' proponents have not met their burden of proof.

## II. Background: Islamic Law and the CSP Report

### *a. Muslim Law and American Conflicts of Law*

A thorough discussion of the tenets of either Islamic law, or the principles of law in each of the world's many Muslim-majority states, is beyond the scope of this Article. A bit of background, however, is helpful. Islamic law, through most of history, was a "jurists' law."[32] It evolved through scholarly reasoning from the Qur'ān and recorded traditions attributed to the Prophet Muḥammad. Islamic law opinions were recorded in a variety of treatises representing different schools of interpretation, and those opinions were applied through *fatwā*s (opinions issued in response to real or hypothetical fact patterns) and judicial rulings, neither of which had precedential value. There is considerable variation among the four mainstream legal schools of Sunnī Islam (Ḥanafī, Ḥanbalī, Mālīkī, and Shāfiʿī), and between them and Shīʿī Islam, but many of the principles discussed here are common to all the schools, and the differences are not vital for our purposes.

Three substantive aspects of Islamic law are particularly prominent in the U.S. cases at issue. Upon marriage, the parties agree to a marriage contract. Notably, husbands traditionally give

32 The following discussion is based on Wael Hallaq, An Introduction to Islamic Law (2009) (giving basic background on Islamic law); Chibli Mallat, Introduction to Middle Eastern Law (2007) (giving basic background on Islamic and Muslim law); Abed Awad, *Islamic Family Law in American Courts: A Rich, Diverse and Evolving Jurisprudence*, *in* Muslim Family Law in Western Courts (Elisa Giunchi ed., 2014) (giving an overview of the ways U.S. courts engage with Islamic family law).

their wives a dowry (*mahr* or *ṣadāq*), which has been conventionally divided into two parts. One part is paid immediately, while the "deferred" dowry is payable by the husband to the wife only upon divorce or death, unless specified otherwise in the contract.[33] Because there is, generally, no community property in most schools of Islamic law, the deferred dowry acts to compensate the wife for the loss of support from her husband's property and income that she might experience upon divorce.[34] Husbands, classically, could unilaterally divorce their wives by pronouncing *ṭalāq* (a verbal formula for dissolution of the marriage).[35] Upon divorce, child custody is typically determined by the age and gender of the children; the mother is assumed to take custody of children up to a certain age (older for girls than for boys), and the father for children older than that.[36] These principles, traditionally found in Islamic law treatises,[37] have been partially, but not completely, adopted in the family law codes of various Muslim-majority states.[38]

To refer both to Islamic law as a religious tradition and to the law of Muslim-majority countries incorporating Islamic principles—the usage apparently meant by those who fear "*sharīʿa*"

33 Mallat, *supra* note 32, at 100, 360–61.

34 *Id.*

35 Hallaq, *supra* note 32, at 172.

36 Mallat, *supra* note 32, at 357.

37 For a few English translations of such treatises, see, for example, ʻAlī Ibn Abī Bakr Al-Marghīnānī & Imran Ahsan Khan Nyazee, Al-Hidāyah/The Guidance (2006); Ahmad Ibn Luʼlu' Ibn Al-Naqīb, Reliance of the Traveller Nuḥ Ḥā Mīm Keller (ed. 1999); Majid Khadduri, The Islamic Law of Nations: Shaybani's *Siyar* (2001).

38 For arguments that these principles violate human and constitutional rights, and should be limited or not enforced in U.S. courts, see Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting* Mahr *Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. Cal. L. Rev. 189 (2002); Monica E. Henderson, *U.S. State Court Review of Islamic Law Custody Decrees: When Are Islamic Custody Decrees in the Child's Best Interest?*, 36 Brandeis J. Fam. L. 423, 427–29 (1998); Chelsea A. Sizemore, Note, *Enforcing Islamic* Mahr *Agreements: The American Judge's Interpretational Dilemma*, 18 Geo. Mason L. Rev. 1085 (2011). For an overview arguing for a comparative perspective in approaching Muslim family law in U.S. courts, see Emily L. Thompson & F. Soniya Yunus, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 Wis. Int'l L.J. 361 (2007).

in the United States—I use the term "Muslim law."[39] This includes not only Islamic law as interpreted by scholars or invoked in contracts but also the law of Muslim-majority countries (like Egypt or Pakistan) that explicitly draws, at least to some extent, on the Islamic legal tradition. Some majority non-Muslim countries, such as India and Israel, also draw on Islamic law to regulate Muslim personal and family status. The Supreme Court of India, notably, held the practice of triple *ṭalāq* (by which a husband sought to unilaterally and irrevocably divorce his wife by pronouncing *ṭalāq* three times outside of court) unconstitutional in 2017.[40]

American courts, meanwhile, are often called upon to engage with foreign law and foreign judgments (known as comity). The need for this engagement can happen in several ways. First, the parties might have agreed, in a contract, for disputes to be governed by foreign law. Second, foreign law might govern a tort case depending on where the wrongful act giving rise to the civil claim occurred. Third, in such cases one party may argue that because of the existing foreign connections, U.S. courts should dismiss the case so that foreign courts, more conversant with the facts and the law, can hear it (a doctrine known as *forum non conveniens*).[41] Such arguments can occur in both commercial and family law contexts. Parties also, at times, contract to subject themselves to rules drawn from neither foreign nor U.S. law, but from other sources—including religious legal systems like Islamic law.[42] Finally—and importantly in many of the cases below—Islamic or Muslim law might enter courts not as law, but as "extrinsic evidence" of

39 This distinction is loosely based on the usage in Khaled Abou El Fadl, Rebellion and Violence in Islamic Law 2–3 (2001).

40 *See* Supreme Court of India, *Shayara Bano v. Union of India, etc. (Supreme Court of India): Judgment on Constitutionalism of Triple Ṭalāq*, SHARIAsource (Sept. 11, 2017), https://beta.shariasource.com/documents/2982 [https://perma.cc/X2CF-M7TL]. *See also* Hallaq, *supra* note 32, at 143–51; Mallat, *supra* note 32, at 364–65.

41 For a review of comity in the context of foreign law bans, see Sarah M. Fallon, Note, *Justice for All: American Muslims, Sharia Law, and Maintaining Comity Within American Jurisprudence*, 36 B.C. Int'l & Comp. L. Rev. 153 (2013).

42 *See* Michael A. Helfand, *Litigating Religion*, 93 B.U. L. Rev. 493 (2012); Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 Santa Clara L. Rev. 501 (2012).

the cultural and religious attitudes that governed parties' beliefs about their rights or responsibilities.[43] There are important limits, however, on the circumstances in which courts will enforce foreign law, and on the substantive and procedural requirements that law must meet to be enforceable. These limits will become clear in the ensuing discussion, but at a basic level, courts will usually not enforce foreign law when it conflicts with the "public policy" of their own state. This can sometimes include constitutional concerns for due process and equal protection. More specific barriers to enforcing foreign law exist in the context of child custody—a major topic here—where widely adopted uniform legislation requires that foreign decrees, to be enforceable, be reached under laws in "substantial conformity" with those of the court asked to enforce the law (the forum). This legislation, the Uniform Child Custody Jurisdiction Act (UCCJA, adopted by all fifty states by 1983) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA, adopted by many states since 1997), ensures that courts apply the "best interests of the child" standard in assigning custody.[44]

*b. Methodological Problems with the CSP Report*

A number of the cases cited by the CSP seem entirely out of place, and were likely located only because they used the terms "Islamic law" or "Muslims." These cases have no place in a debate about *sharīʿa* in American courts, and indeed serve only to call into question the research behind the *SLASC* report. In thirteen cases—all at the appellate level—the courts were never called upon to enforce foreign judgments or apply Muslim law.[45]

43 Awad, *supra* note 32, at 170.

44 Henderson, *supra* note 38, at 433; Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA): A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. Rev. 301 (1999).

45 Technically, Ivaldi v. Ivaldi, 672 A.2d 1226 (N.J. Super. Ct. App. Div. 1996), could be placed in this category because foreign and Islamic law played no role in the outcome of the child custody case, but I have chosen to discuss it below because the Court, after deciding that New Jersey had no jurisdiction, found, in dicta (or arguably as an alternative ground of decision), that Moroccan law *would* have been granted comity. *See In re* Ferguson, 361 P.2d 417 (Cal. 1961); Mohammad v. Moham-

The most irrelevant case is one in which African American Muslim inmates unsuccessfully sought further access to religious materials in a California prison in 1961—never invoking Islamic or foreign law.[46] Five other cases are criminal. In the Illinois case of *People v. Jones*, a male, Muslim defendant who beat his wife to death (and severely injured two other women to whom he claimed he was religiously married) claimed ineffective assistance of counsel because his attorney could not locate an Islamic scholar who would endorse his belief that he was within his rights to "discipline" the women. The Illinois appeals court noted that it "seriously doubt[s] that anyone knowledgeable on Islamic teachings would have proved helpful to this defense[,]" because the record "reflects a grave misapplication of any Islamic license for his conduct."[47] The court went on to articulate the basic principle that religious beliefs cannot serve as defenses against laws of general applicability. "If a religion sanctions conduct that can form the basis for murder, and a practitioner engages in such conduct and kills someone, that practitioner need be prepared to speak to God from prison."[48]

In 2010, a New Jersey appeals court carefully walked through a similar analysis. That court traced the relationship between religious license and legal restraint from nineteenth-century polygamy jurisprudence to the more recent case of *City of Boerne v. Flores*, before reversing a trial court's revocation of a restraining order against a husband accused of beating and raping his wife. Both were Moroccan citizens.[49] This case attracted wide-

mad, 358 So. 2d 610 (Fla. Dist. Ct. App. 1978); People v. Jones, 697 N.E.2d 457, 460 (Ill. App. Ct. 1988); Shady v. Shady, 858 N.E.2d 128 (Ind. Ct. App. 2007); Amro v. Iowa Dist. Court for Story Cty., 429 N.W.2d 135 (Iowa 1988); State v. Haque, 726 A.2d 205 (Me. 1999); Tazziz v. Tazziz, 533 N.E.2d 202 (Mass. App. Ct. 1988); State v. Al-Hussaini, 579 N.W. 2d 561 (Neb. Ct. App. 1998); Kamal v. Imroz, 759 N.W.2d 914, 915 (Neb. 2009); S.D. v. M.J.R., 2 A.3d 412, 422–26 (N.J. Super. Ct. App. Div. 2010); Abouzahr v. Matera-Abouzahr, 824 A.2d 268 (N.J. Super. Ct. App. Div. 2003); Pirayesh v. Pirayesh, 596 S.E.2d 505 (S.C. Ct. App. 2004); Accomack Cty. Dept. Soc. Servs. v. Muslimani, 403 S.E.2d 1 (Va. Ct. App. 1991).

46 *In re* Ferguson, 361 P.2d 417 (Cal. 1961).

47 People v. Jones, 697 N.E.2d 457, 460 (Ill. App. Ct. 1988).

48 *Id.*

49 S.D. v. M.J.R., 2 A.3d 412, 422–26 (N.J. Super. Ct. App. Div. 2010). *See*

spread attention from legal scholars and conservative as well as liberal commentators alike.[50] In two other cases cited in the CSP report, defendants attempted to use their cultural and religious background, including Islam, to claim that they had not formed criminal intent or to mitigate their sentences. In both cases, trial and appellate courts alike rejected these arguments.[51] Finally, in a third case, the norms of "Muslim culture" were invoked in a child custody matter involving a man accused of sexually abusing, and then marrying, his stepdaughter. But the dueling evidence about what is allowed in "Muslim culture" played no role in the trial and appellate courts' decisions.[52] To the limited extent that Islam was involved in any of these cases, it represented individual claims about religious beliefs and cultural norms, not law, and it never impacted the final outcome of the cases.[53]

In other cases cited by the report, Muslim law *could* have entered the case, but did not for procedural reasons—for example, when claims about an Islamic marriage agreement were dropped on remand,[54] or when a couple "married pursuant to Islamic law,"

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*also* City of Boerne v. Flores, 521 U.S. 507 (1997).

50 *See, e.g.*, Abed Awad, *The True Story of Sharia in American Courts*, Nation (June 13, 2012), http://www.thenation.com/article/168378/true-story-Sharia-american-courts [https://perma.cc/3KNU-89DY]; Cully Stimson, *The Real Impact of Sharia Law in America*, Heritage Foundation: Foundry (Sept. 22, 2010), http://blog.heritage.org/2010/09/02/the-real-impact-of-sharia-law-in-america [https://perma.cc/76DV-6F3E]; Eugene Volokh, *Cultural Defense Accepted as to Nonconsensual Sex in New Jersey Trial Court, Rejected on Appeal*, Volokh Conspiracy (July 23, 2010), http://www.volokh.com/2010/07/23/cultural-defense-accepted-as-to-nonconsensual-sex-in-new-jersey-trial-court-rejected-on-appeal [https://perma.cc/A26Y-KUNN].

51 *See* State v. Haque, 726 A.2d 205 (Me. 1999); State v. Al-Hussaini, 579 N.W.2d 561 (Neb. Ct. App. 1998).

52 Accomack Cty. Dept. of Soc. Servs. v. Muslimani, 403 S.E.2d 1 (Va. Ct. App. 1991). The appellate court remanded the case on entirely separate grounds for further fact-finding.

53 For the question of culture as a legal justification, see Alison Dundes Rentein, The Cultural Defense (2004).

54 Mohammad v. Mohammad, 371 So. 2d 1070 (Fla. Dist. Ct. App. 1979) (noting that the husband dropped the claims based on their Iranian marriage contract). *See also* Mohammad v. Mohammad, 358 So. 2d 610 (Fla. Dist. Ct. App. 1978) (remanding the case to consider the contract). The latter is the case noted by the CSP. Tazziz v. Tazziz, 533 N.E.2d 202 (Mass. App. Ct. 1988), may be similar, but it is also possible that the case was settled or decided by a lower court, without leaving a record in Westlaw, which I used for my research.

but resolved their divorce entirely under Nebraska law.[55] In *Amro v. Iowa District Court for Story County*, "Islamic law" was present only insofar as a man held in contempt of court invoked it in an unsuccessful (and disingenuous, the court found) attempt to persuade his father to return his son to the United States in compliance with a custody order.[56] Finally, in three other child custody cases, courts noted concerns that one parent might abduct a child to certain Muslim-majority countries, but were never called upon to apply these countries' laws.[57]

These thirteen cases, then, contribute nothing to discussions about the place of Islamic and foreign law in American courts, because in none of them were courts called upon to consider foreign judgments, foreign law, or Islamic law. Their inclusion in the report calls into question the rigor of the CSP's research. Moreover, the inclusion of several criminal cases, in which defendants did no more than invoke cultural defenses (which all failed) leads one to wonder if the report's authors simply sought to associate Muslims with criminal activity.

## III. Cases Where Muslim Law Was at Issue

In twenty-two of the cases cited by the CSP, parties requested that U.S. state courts apply Muslim law or an Islamic contract provision, but ultimately the courts did not (either at the trial or appellate level). In sixteen other cases, the courts (either at trial or, if heard on appeal, at that level) ultimately enforced a foreign judgment or recognized foreign or Islamic law. Before discussing these cases, it is important to note that, as a threshold matter, in only 32% of these cases (sixteen cases total) did courts enforce

55 Kamal v. Imroz, 759 N.W.2d 914, 915 (Neb. 2009).

56 Amro v. Iowa Dist. Court for Story Cty., 429 N.W.2d 135 (Iowa 1988).

57 *See* Shady v. Shady, 858 N.E.2d 128 (Ind. Ct. App. 2007) (noting that child abduction to Egypt would be easier for the father to prevail upon because Egypt might not recognize the wife's civil divorce); Abouzahr v. Matera-Abouzahr, 824 A.2d 268 (N.J. Super. Ct. App. Div. 2003) (noting, but largely discrediting, concerns that the father would abduct the child to Lebanon); Pirayesh v. Pirayesh, 596 S.E.2d 505 (S.C. Ct. App. 2004) (affirming a family court order banning the father from traveling with the children outside the United States for risk of possible abduction to Iran).

*any* foreign law, regardless of whether the law recognized impinged upon any party's rights. By contrast, in 44% of cases where parties sought to apply Islamic or Muslim law, courts found that the basic tools of choice of law, comity, and contract law made that law inapplicable. The following discussion will examine six areas of law, showing how courts have drawn careful lines between permissible and impermissible invocations of foreign law or Islamic contract provisions. I begin with the areas often seen as least problematic (litigation and arbitration) and move on to those that have caused more concern (family law).

### *a. Litigation:* Forum Non Conveniens *and Foreign Law*

Cross-border litigation cases are largely, though not entirely, absent from the CSP report. This is a bit surprising, given the volume of business between American and Middle Eastern corporations. Indeed, a Westlaw search for state and federal cases involving the terms "*forum non conveniens*" and "Saudi Arabia," in Texas alone, reveals forty opinions since 1971. However, only three of these cases were in *state* courts, and the only one that involved Saudi *law* (as opposed to simply mentioning the country) was noted in the *SLASC* report, and will be discussed below.[58] This omission, therefore, may reflect the report's limitation to state, as opposed to federal, courts, and the tendency for complex cross-border litigation to be filed in, or removed to, federal court. More importantly, the relative absence of cross-border litigation in the CSP's report reflects the fact that anti-*sharīʿa* advocates are generally unconcerned about subjecting businesses to foreign law. Many anti-*sharīʿa* bills, as well as the American Public Policy Alliance's model bill, explicitly allow corporate entities to include choice of law clauses in their contracts that would lead to U.S. courts resolving cases in accordance with foreign law.[59]

58 This case is CPS Int'l, Inc. v. Dresser Indus., Inc., 911 S.W.2d 18 (Tex. Ct. App. 1995); the other two cases are Dickerson v. Doyle, 170 S.W.3d 713 (Tex. Ct. App. 2005), and Ace Ins. Co. v. Zurich Am. Ins. Co., 59 S.W.3d 424 (Tex. Ct. App. 2001).

59 *See*, *e.g.*, Kan. Stat. Ann. § 60-5108 (2013) ("Without prejudice to any

Ordinary litigation in American courts involving foreign law falls into two basic categories: cases where a party seeks to invoke foreign law, and cases where a party asks a U.S. court to dismiss the charges so the case can be refiled in a more suitable foreign forum (*forum non conveniens*). Anti-*sharīʿa* bills have sought to limit both the enforcement of foreign law and the granting of *forum non conveniens*.

Both of the CSP's cases involving *forum non conveniens*, however, resulted in U.S. courts *not* dismissing the case and retaining jurisdiction. In *Rhodes v. ITT Sheraton Corp.*, a trial court denied the defendants' motion to dismiss for *forum non conveniens* in a suit filed by a British plaintiff, injured at a resort in Jeddah, Saudi Arabia, alleging that the two corporate defendants, parent companies of the Jeddah Sheraton, were liable for negligence and breach of implied warranty.[60] The court based its decision on "the existence of biases against women and non-Muslims in Saudi Arabia," as well as that country's restrictions on party testimony and written evidence, its lack of uniform procedures or binding judicial precedent, and other practical factors related to the availability of evidence and documents.[61] Indeed, the court noted that Massachusetts was the "corporate home forum" of both defendants.[62]

In the report's second *forum non conveniens* case, an Iranian Bahá'í refugee, resident in California, sued her stepmother, also a U.S. resident, for damages arising out of a dispute about the probate of the plaintiff's father's estate (the defendant's estranged husband), who had died in Iran.[63] The California trial court stayed,

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legal right, this act shall not apply to a corporation, association, partnership, limited liability company, limited liability partnership or other legal entity that contracts to subject itself to foreign law or courts in a jurisdiction other than this state or the United States."); American Public Policy Alliance, Model ALAC Act, http://publicpolicyalliance.org/legislation/model-alac-bill [https://perma.cc/5CJD-65YZ] ("Without prejudice to any legal right, this act shall not apply to a corporation, partnership, limited liability company, business association, or other legal entity that contracts to subject itself to foreign law in a jurisdiction other than this state or the United States.").

60 Rhodes v. ITT Sheraton Corp., No. CIV.A. 97-4530-B, 1999 WL 26874 (Mass. Super. Ct. Jan. 15, 1999).

61 *Id.* at *2–5.

62 *Id.* at *5.

63 *See* Karson v. Soleimani, Nos. B216360, B219698, 2010 WL 2992071

and then dismissed, the suit based on *forum non conveniens*, but the appellate court reversed, finding that the defendant had not met her burden of proving that an adequate alternative forum was available. In part this ruling was procedural, as it was unclear whether the defendant was subject to Iranian jurisdiction or service of process.[64] But she had also not shown that Iran had "an independent judiciary" that would "apply principles of due process," as required by California case law.[65] In particular, the plaintiff had produced a 2009 U.S. Department of State report on Iranian human rights, calling into question the Iranian judiciary's independence.[66] Taken together, these two cases provide no evidence that state courts overlook constitutional due process or equal protection concerns in granting *forum non conveniens*. Instead these cases suggest that courts do indeed meet their obligations to attend to other forums' law, and their protections, before transferring cases out of the country. Because the CSP report did not identify any cases in which courts granted *forum non conveniens*, it provides no evidence that the principle is being abused.

The CSP report does note three cases in which state appellate courts agreed to *enforce* foreign law in litigation matters. Two of these featured commercial litigation involving Saudi Arabia, while the third was a dispute between a creditor and two married couples. None seem to implicate constitutional rights.

In the first case, the court applied Saudi law to remove certain claims from the suit.[67] In a suit by an American corporation and its Panamanian subsidiary against Saudi defendants for breach of contract and tort claims arising from a failed joint venture, the Texas Court of Appeals applied ordinary tools of contract interpretation to conclude that all of the relevant breach of contract claims were governed by Texas, not Saudi, law. The court, citing the *Restatement (Second) of Conflicts*, found that Saudi Arabia had a more "significant relationship" with the conduct at issue in

(Cal. Ct. App. Aug. 2, 2010).

64 *Id.* at *6.

65 *Id.* at *3, *7.

66 *Id.* at *7.

67 *Dresser*, 911 S.W.2d 18.

the tort claims, and that Saudi law should thus apply.[68] However, the court also ruled that Saudi law recognized no equivalent to the types of tort actions (tortious interference, civil conspiracy, and breach of fiduciary duty), and thus dismissed these claims.[69] The court considered, and rejected, the argument that depriving plaintiffs of these causes of action would impermissibly violate Texan public policy. "The fact that the law of another state is materially different from the law of this state does not itself establish that application of the other state's law would offend the fundamental policy of Texas,"[70] the court noted, and it saw no reason to conclude that Texas's interests in applying its own tort law outweighed its interest in having claims "governed by the state with the most significant relationship to the claims and parties."[71] The end result of *Dresser*, then, was to allow *only* claims under Texas law to proceed, and the court applied Saudi law only to eliminate, not to create, causes of action. It is difficult to see how the court's analysis would have changed if it explicitly considered the parties' constitutional rights, especially as it found that its ruling did not violate Texas's "fundamental policy."

In the later case of *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co.*,[72] a Saudi energy company ("SABIC") sought declaratory judgment in Delaware that it had not overcharged two other companies, which then counterclaimed for breach of contract and the Saudi tort of *ghaṣb*, or "usurpation."[73] All parties agreed that Saudi law governed,[74] and the Delaware Supreme Court affirmed lower courts' rulings that this changed the

68 *Id.* at 28–31.

69 *Id.* at 31–33.

70 *Id.* at 34 (quoting DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 680 (Tex. 1990)).

71 The court thus found that, according to Texas Supreme Court precedent, the Restatement (Second) of Conflicts' "most significant relationship test itself is woven into the fabric of Texas policy." *Id.*

72 866 A.2d 1 (Del. 2005).

73 For *ghaṣb* in general and in Saudi law, see Mallat, *supra* note 32, at 289–90; O. Spies, *Ghaṣb*, *in* Encyclopaedia of Islam (P. Bearman et al. eds., 2d ed. 1960–2005), http://dx.doi.org/10.1163/1573-3912_islam_SIM_2470 [https://perma.cc/66XD-DHCZ].

74 *Saudi Basic Indus.*, 866 A.2d at 15.

elements of tort liability and the extent of available damages. But here again, there is no indication that Saudi law infringed on any party's constitutional rights. Indeed, the Delaware Supreme Court went out of its way to note that the parties' rights were protected. Noting that SABIC's challenges to the jury instructions implied a view "that this case should never have been tried to, or decided by, a jury," the court reminded the parties that SABIC had moved to avoid a jury trial, but that the trial court "ruled that ExxonMobil was constitutionally entitled to have a jury decide its counterclaims."[75] Thus, in the only instance where constitutional rights were implicated in this case, the Delaware courts ensured that such rights were protected even while recognizing Saudi law. Indeed, the Saudi energy company lost the case—under Saudi law—and was ordered to pay $416.8 million.

The third case in this category, *Nationwide Resources Corp. v. Massabni*,[76] involved individual litigants on one side rather than a corporation, and foreign law was critical to the outcome. Nationwide Resources, a creditor, sought to garnish a note for a debt owed to Pierre Zouheil by the Jankes, a married couple to whom he had loaned money. Zouheil, a Christian Syrian citizen who, with his wife Linda, had been domiciled in Morocco at the time of the loan to the Jankes but who now resided in Arizona, argued that the note was his and his wife's community property, and thus not subject to garnishment.[77] Although Arizona law created a "presumption that all property acquired by either spouse during marriage is community property,"[78] the trial court found that the note was Pierre Zouheil's separate property based on Moroccan law (which the appellate court referred to as "Islamic law").[79] The appellate court, however, noted that Moroccan law itself (in the form of a 1957 Royal Decree) applied to alien non-Muslims "their national law regarding their personal status."[80] Because Pierre and Linda

75 *Id.* at 36–37.
76 694 P.2d 290 (Ariz. Ct. App. 1984).
77 *Id.* at 292–93.
78 *Id.* at 293.
79 *Id.* at 294.
80 *Id.* (quoting Michel Bourely, Droit public marocain 44 (1965)).

Zouheil were Syrians, the appellate court looked to Syrian statutes for the Catholic communities, which made property, by default, separate, unless explicitly designated as community property.[81] As a result of this analysis, the appellate court recognized the note as Pierre Zouheil's separate property, subject to garnishment. This case depended on the court's recognition of foreign (though not Islamic) law. But no party raised any constitutional objections, and it is difficult to see a presumption in favor of separate property, rather than in favor of community property, as a violation of due process or equal protection rights.

Thus, none of the commercial cases the CSP cites seem to involve the application of Islamic or Muslim law to the detriment of the parties' constitutional rights.

### *b. Litigation and Arbitration Under Islamic Law*

Muslims in non-Muslim-majority countries sometimes contract to subject themselves to Islamic law, either by applying substantive rules or by resolving disputes through Islamic arbitration.[82] Leaving aside family law, which I will discuss below, CSP's sampling of U.S. state cases reflects four instances in which courts were called upon to enforce such contracts, either directly, by compelling arbitration, or indirectly, by enforcing arbitral awards. While Islamic arbitration has aroused debate, especially in the United Kingdom, where an official arbitral tribunal has been established,[83] the four arbitration cases in the CSP report do not suggest any challenges that blocking bans could remedy.

In the first of these cases, *El-Farra v. Sayyed*,[84] an *imām* sued his employer, the Islamic Center of Little Rock, Arkansas, for breach of contract, tortious interference with contract, and defamation. He based his claims on a contract allowing the Center's

81 *Id.* at 294–95.

82 *See*, *e.g.*, Mona Rafeeq, Note, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 Wis. Int'l L.J. 108 (2010).

83 *Id.* at 124.

84 226 S.W.3d 792 (Ark. 2006).

directors to terminate him "on valid grounds according to Islamic Jurisdiction (Shari'a)."[85] The Arkansas Supreme Court affirmed the circuit court decision in finding that it lacked subject matter jurisdiction because it could not adjudicate the claims based on "neutral principles of law." Here the court followed the test the U.S. Supreme Court laid out in a 1979 case, *Jones v. Wolf*, in part, that state courts could consider "neutral principles of law" in determining disputes over church property but had to defer to religious organizations on what constituted their "true" beliefs if deemed relevant in determining ownership.[86] The Arkansas Supreme Court applied the same reasoning to the *imām*'s defamation claims, which involved the Center's claims that he had violated Islamic law, and his derivative tortious interference action.[87] The Arkansas courts, at all levels, thus declined to take jurisdiction precisely because the case would force them to apply religious law.

The other three cases of contracts referencing non-family Islamic law all concerned arbitration. In the first case,[88] a Texas Court of Appeals overturned a lower court's decision to appoint arbitrators pursuant to a commercial contract between a computer manufacturer, DynCorp, and an oil company, Aramco. The question was not whether the contract required arbitration (in fact, *both* sides had moved to compel arbitration), or even whether Saudi law would govern, but simply whether U.S. or Saudi courts should appoint the arbitrators. The appellate court determined that the contract vested this duty in Saudi courts. Neither party challenged Saudi substantive law, or the degree of due process that the arbitral tribunal would afford.[89]

85 *Id.* at 793. The word "jurisprudence" may be meant, as this would fit more common translations.

86 *Id.* at 795; *see also* Jones v. Wolf, 443 U.S. 595, 599 (1979) (establishing the "neutral principles" test).

87 *El-Farra*, 226 S.W.3d at 796.

88 *In re* Aramco Servs. Co., No. 01-09-00624-CV, 2010 WL 1241525 (Tex. Ct. App. Mar. 19, 2010).

89 Aramco also challenged the appointed arbitrators on the grounds that they did not meet requirements to be Muslims and Saudi nationals, but the court did not reach this issue because it vacated the lower court's appointments. *Id.* at *4, *6. Had it reached this issue, it might have had to grapple with First Amendment religious

The other two cases involved the enforcement of arbitral awards. *Abd Alla v. Mourssi* and *Mansour v. Islamic Education Center of Tampa, Inc.*, involved disputes between Muslim business partners,[90] and over the corporate governance of an Islamic community center.[91] The question of arbitration under religious law is still hotly debated, not only in Muslim contexts, but also in Christian and Jewish contexts.[92] In neither of these two cases did any party claim that its constitutional rights had been violated.[93] The latter case, *Mansour*, attracted a great deal of attention because of the judge's comment that "as to the question of enforceability of the arbitrator's award the case should proceed under ecclesiastical Islamic law."[94] At least one scholar, Eugene Volokh, has argued that the *Mansour* decision was in error,[95] as it seemed to put the court in the position of enforcing substantive religious law. The constitutional question, however, would not be about the conduct of the arbitration itself, but what law the court itself should use in determining whether and how to enforce the arbitration's *outcome* if asked to do so. The traditional rule, as Volokh notes, is that courts will use "neutral principles of law" on this point.[96] Here, therefore, the Florida court may have erred.

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freedom and Fourteenth Amendment equal protection questions.

90 Abd Alla v. Mourssi, 680 N.W.2d 569 (Minn. Ct. App. 2004).

91 Mansour v. Islamic Education Center of Tampa, Inc., No. 08-CA-3497 (Fla. Cir. Ct. 2011), *aff'd*, No. 2D11-1159, 2011 WL 5926157 (Fla. Dist. Ct. App. Oct. 21, 2011).

92 *See*, *e.g.*, Helfand, *supra* note 42; Walter, *supra* note 42. For a relevant recent incident, see Eugene Volokh, *Court Enforces Religious Arbitration Agreement, Over Objection of Plaintiff*, Volokh Conspiracy (Oct. 15, 2013), http://www.volokh.com/2013/10/15/court-enforces-religious-arbitration-agreement-objection-plaintiff [https://perma.cc/K9LN-5FHC].

93 However, in *Mourssi*, the loser under arbitration argued the award should be set aside for fraud, corruption, or other undue means; the trial and appeals courts agreed that his claims were insufficiently clear as a matter of law. 680 N.W.2d at 573–74.

94 *Mansour*, No. 08-CA-3497 at *4.

95 *See* Eugene Volokh, *"The Case Should Proceed Under Ecclesiastical Islamic Law" / Jews, Kethubahs, and Gets*, Volokh Conspiracy (Mar. 25, 2011), http://www.volokh.com/2011/03/25/the-case-should-proceed-under-ecclesiastical-islamic-law-jews-ketubahs-and-gets [https://perma.cc/F8SV-RRVG].

96 *Id.*

### *c. Family Law*

The majority of the Report's cases in which courts were asked to apply or enforce Muslim law—indeed, the majority of cases overall, thirty out of fifty—were in the area of family law, all dealing with heterosexual marriages. This area is also the subject of special concern among American activists, as evidenced by the Florida anti-foreign law bill's limitation to the family law arena.[97] These cases therefore deserve careful exploration. Accordingly, the following sections will examine how state courts have reasoned through the applicability, and inapplicability, of various types of Islamic law in four substantive areas of family law. The following sections are arranged in order, based on the "life cycle" of possible legal developments in a marriage: the validity of religious marriages, the validity of foreign divorces, the enforceability of foreign custody decrees, and the enforceability of marriage contracts. For the most part, I will show that courts have been careful in applying foreign law, and have been rigorous in testing its compliance with their states' public policy and with constitutional rights. There are a few cases, however, that raise questions.

#### i. Recognizing the Validity of Marriages

The first legal question in the marriage "life cycle" is whether a valid marriage has even been formed. In three cases located by the CSP, courts were faced with couples (both having split from one another) in which at least one party believed they were married under Islamic law, even though such marriage had not been confirmed by any U.S. state or foreign sovereign. In all three cases, the courts declined to find a valid marriage. In the 1988 case *Vryonis v. Vryonis*, an Iranian Shīʿī Muslim visiting professor at the UCLA Center for Near Eastern Studies, Fereshteh R. "Vryonis," wed the center's Greek Orthodox director, Speros Vryo-

97 Steve Miller, *Bill Prohibits Foreign Family Law in State Courts*, Wash. Times (May 1, 2014), http://www.washingtontimes.com/news/2014/may/1/bill-prohibits-foreign-family-law-in-state-courts [https://perma.cc/YB24-AAMJ].

nis, in a temporary marriage (*mutʿa*).[98] Likewise, in a 2010 Florida case, a couple had participated in a Muslim marriage ceremony, but did not receive a marriage license.[99] Finally, a Virginia appeals court dealt with a couple who had entered a proxy marriage in the United Kingdom, without having fulfilled British requirements for a valid marriage.[100] In all three cases, the courts held that the marriages were void—because Fereshteh had no "reasonable belief" that a valid California marriage existed; because the Virginia couple's "marriage" had been void *ab initio* under Virginia law; and because the U.K. proxy marriage, too, had not been valid according to the standards of the place where it was performed.[101]

None of these decisions are surprising, since they concerned American civil marriage laws and clear conflict of laws rules (and, in one case, the law of the same state as the appeals court). These rules would be applicable in dealing with any foreign marriage, regardless of whether it had anything to do with Islam or Muslims. Slightly more complicated are cases in which the marriage was performed abroad. In general, U.S. courts have a "strong public policy" in favor of recognizing marriage, partly to avoid the inequities which can result if one spouse believes he or she is entitled to support but none is forthcoming after separation.[102]

98 *See* Vryonis v. Vryonis (*In re* Marriage of Vryonis), 248 Cal. Rptr. 807 (Cal. Ct. App. 1988). Speros Vryonis, a prominent historian of the Middle East, wrote a classic history of Anatolians' medieval conversion to Islam, Speros Vryonis, Jr., The Decline and Fall of Medieval Hellenism in Asia Minor and the Process of Islamization from the Eleventh Through the Fifteenth Century (1971). His own personal life is now cited by those who fear the United States' "Islamization." The opinion, for reasons left unexplained, referred to Fereshteh with the last name Vryonis despite holding the marriage void. Today such temporary marriages are generally recognized only by Shīʿī scholars, and many of the rules—on maintenance, inheritance, or property—that apply to other marriages are inapplicable. *See* W. Heffening, *Mutʿa*, *in* Encyclopaedia of Islam (P. Bearman et al. eds., 2d ed. 1960–2005), http://dx.doi.org/10.1163/1573-3912_islam_COM_0819 [https://perma.cc/P8K7-364B].

99 *See* Betemariam v. Said, 48 So. 3d 121 (Fla. Dist. Ct. App. 2010).

100 *See* Farah v. Farah, 429 S.E.2d 626 (Va. Ct. App. 1993).

101 Vryonis v. Vryonis (*In re* Marriage of Vryonis), 248 Cal. Rptr. 807 (Cal. Ct. App. 1988); Betemariam v. Said, 48 So. 3d 121 (Fla. Dist. Ct. App. 2010); Farah v. Farah, 429 S.E.2d 626 (Va. Ct. App. 1993).

102 *See* Awad, *supra* note 32, at 181.

Two such cases appear in the CSP report, and they illustrate the lines American courts have drawn between marriages to which they will grant comity, and those to which they will not. In *Moustafa v. Moustafa*,[103] a Maryland appellate court refused to grant comity to a bigamous Egyptian marriage. The case involved a couple who had married in Egypt, come to the United States, and then divorced. The husband remarried in Egypt, but then remarried his first wife, telling her that he had divorced his second wife. The Maryland appellate court affirmed a lower court ruling granting an annulment to the second wife, on the grounds that the bigamous marriage was void. The key factor was that the husband had not presented enough evidence of Egyptian law's willingness to recognize a bigamous marriage, which would be necessary to overcome the appellate court's presumption that foreign law was the same as Maryland law, that is, "unless the law of a foreign jurisdiction is proven to be otherwise."[104] But the court also noted that in any case it would "nonetheless deny recognition and enforcement to those foreign judgments which are inconsistent with the public policies of the forum state,"[105] rightly implying that a bigamous marriage would fail this test.

By contrast, in the 2008 case *Ghassemi v. Ghassemi*, a Louisiana appeals court overturned a lower court decision and granted comity to an Iranian marriage between two first cousins.[106] The state of Iranian-U.S. relations, the appellate court pointed out, was irrelevant to a comity analysis, and instead the vital question was whether a first-cousin marriage violated a "strong public policy" in Louisiana, the test laid out in the state's Civil Code.[107] Based on the history of first-cousin marriages in Louisiana, and their legality in other states and foreign countries, the court found that there was no strong Louisiana public policy against such marriages, even though these types of marriages could not legally be formed in Louisiana at the time.

103 888 A.2d 1230 (Md. Ct. Spec. App. 2005).
104 *Id.* at 1234.
105 *Id.* (quoting Telnikoff v. Matusevich, 702 A.2d 230, 237 (Md. 1997)).
106 Ghassemi v. Ghassemi, 998 So. 2d 731 (La. App. 1 Cir., 2008).
107 *Id.* at 736.

These two cases, taken together, do not demonstrate that American courts are applying *sharīʿa* in violation of constitutional rights. Rather, they illustrate that the "public policy" exception to comity allows courts to make fine distinctions between the types of marriages they will recognize and those they will not. If the outcome in *Ghassemi* troubles legislators, the solution is probably not a blanket ban—as will be discussed below—but a more targeted statute.

### ii. Recognizing Foreign Divorces

A much larger body of case law, reflected in the *SLASC* report, deals with whether, and when, courts will recognize divorce decrees from foreign countries, especially when those countries incorporate elements of Islamic law in their legal systems. The CSP report finds five such cases from Ohio, New Jersey, New Hampshire, Michigan, and Maryland involving divorces granted under Pakistani, Indian, and Syrian law.[108] As in the case of foreign marriages, these cases show that courts are quite willing to use public policy and constitutional objections to refuse comity—as they did in four of the five cases.

The simplest case, which never reached questions of substantive law, is *In re Ramadan*.[109] There, Sonia Ramadan, who had married Samer Ramadan in Lebanon, filed for divorce in New Hampshire, where they both lived. He moved to dismiss, arguing that he had pronounced *ṭalāq* (verbal divorce, as discussed above) the day before she filed, and had telephoned an attorney in Lebanon, then flown there, to sign paperwork for a Lebanese court to grant a divorce, which it did.[110] The New Hampshire Supreme Court, however, affirmed the trial court's refusal to dismiss the

108 Aleem v. Aleem, 947 A.2d 489 (Md. 2008); Tarikonda v. Pinjari, No. 287403, 2009 WL 930007 (Mich. Ct. App. Apr. 7, 2009); *In re* Ramadan, 891 A.2d 1186 (N.H. 2006); Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978); Rahawangi v. Alsamman, 2004-Ohio-4083, 2004 WL 1752957 (Ohio Ct. App. Aug. 5, 2004).

109 891 A.2d 1186 (N.H. 2006).

110 *Id.* at 1188.

wife's petition on these grounds. The court invoked the "strong public policy" exception to comity, finding that "recognizing an *ex parte* divorce obtained in a foreign nation where neither party is domiciled 'would frustrate and make vain all State laws regulating and limiting divorce.'"[111] Without reaching the substantive merits of whether the Lebanese court's procedures and standards had conflicted with New Hampshire or U.S. public policy or constitutional values, the court refused to grant comity.

An Ohio court considered the merits of a Syrian divorce in a roughly contemporaneous case, *Rahawangi v. Alsamman*.[112] The couple had married in Syria, come to the United States, and then moved to Saudi Arabia, where they separated. The wife, Hanadi Rahawangi, eventually moved to Ohio, where she filed for divorce. Her (ex-)husband, Husam Alsamman, moved to dismiss, arguing that a Syrian court had already granted a divorce.[113] The trial court, however, refused to grant comity to the Syrian divorce, and an appellate court upheld the ruling. Ohio doctrines of comity, the appellate court noted, provided that a divorce would not be recognized "where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy" of the state.[114] Alsamman, the trial court found, had served notice of the Syrian divorce proceedings only at Rahawangi's mother's house in Syria, despite having "full knowledge that the appellee and the children were residing in the United States."[115] "[T]his lack of due process fatally flawed the Syrian divorce proceeding," and thus neither the trial court nor the appellate court agreed to grant comity.[116] The Ohio courts in this case, then, came one step closer to

111 *Id.* at 1191 (quoting Slessinger v. Sec'y of Health & Human Servs., 835 F.2d 937, 942–43 (1st Cir. 1987)).

112 2004-Ohio-4083, 2004 WL 1752957 (Ohio Ct. App. Aug. 5, 2004).

113 *Id.* at *1–2.

114 *Id.* at *5 (quoting Kalia v. Kalia, 151 Ohio App. 3d 145, 155, 2002-Ohio-7160, 783 N.E.2d 623 (Ohio 2002)).

115 *Id.* at *6.

116 *Id.* The appellate court's standard of review meant that it did not consider the merits *de novo*, finding simply that "[t]he trial court's findings were not against the manifest weight of the evidence." *Id.*

the substantive merits than the New Hampshire Supreme Court had in *Ramadan*, reaching beyond the question of whether it would violate public policy to decline jurisdiction given the state's connections to the case, to challenge the procedures of the foreign court. But the outcome was the same in both cases, and in neither case did the respective court reach the substantive merits of the *law* that the foreign court had applied.

Maryland, Michigan, and New Jersey courts did reach those merits in the last three divorce cases, all dealing with *ṭalāq*. As noted above, *ṭalāq* is a procedure in the Islamic legal tradition by which husbands can divorce their wives verbally, and as often construed, without going to court.[117] The most important, and recent, *ṭalāq* case cited in the CSP report is *Aleem v. Aleem*.[118] The husband, Irfan Aleem, was an economist at the World Bank who resided with his wife, Farah, in Maryland. When she filed for divorce, he answered the complaint, without challenging jurisdiction, before going to the Pakistani Embassy in Washington and executing a *ṭalāq* divorce. He argued that the Maryland courts should grant comity to this "foreign divorce," divesting them of jurisdiction to divide the marital property (in particular, his World Bank pension, titled in his name and valued at about $1,000,000). This would leave Farah Aleem with only a $2,500 delayed dowry, due upon death or divorce, as specified in their Pakistani marriage contract.[119] The Maryland trial court refused to grant comity to this divorce, while the Court of Special Appeals sidestepped the issue, finding that the only justiciable controversy was the division of property—which it resolved in favor of Farah.[120]

117 The codified laws of many Muslim countries have curbed the extrajudicial use of *ṭalāq*. *See* J. Schacht & A. Layish, *Ṭalāḳ*, *in* Encyclopaedia of Islam (P. Bearman et al. eds., 2d ed. 1960–2005), http://dx.doi.org/10.1163/1573-3912_islam_COM_1159 [https://perma.cc/5U5X-7RMC].

118 947 A.2d 489 (Md. 2008).

119 *Id.* at 490–91. For cases on the enforceability of Islamic marriage contracts, see Aleem v. Aleem, 931 A.2d 1123 (Md. Ct. Spec. App. 2007), *infra* note 120; Tarikonda v. Pinjari, No. 287403, 2009 WL 930007 (Mich. Ct. App. Apr. 7, 2009), *infra* note 125; Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978), *infra* note 131; Siddiqui v. Siddiqui, 968 N.Y.S.2d. 945 (Sup. Ct. App. Div. 2013), *infra* note 129.

120 *See* Aleem v. Aleem, 931 A.2d 1123 (Md. Ct. Spec. App. 2007). This is the lower appeals court's opinion, and it also summarizes the trial court's findings.

The Maryland Court of Appeals, granting *certiorari*, emphatically refused to grant comity to either the Pakistani divorce itself or the division of property it entailed. Maryland, the appeals court pointed out, had expressed a public policy in favor of equitably dividing marital property. So the Pakistani division was in "direct conflict with our public policy," and therefore unenforceable.[121] Moreover, *ṭalāq* divorce itself was also contrary to the public policy of Maryland. The court noted that *ṭalāq* is asymmetrically available only to a husband, that it grants no due process to the affected wife, and that its acceptance for Maryland residents would afford a way for any husband who is the citizen of "any country in which Islamic law, *adopted as the civil law*, prevails" to circumvent Maryland courts. He could simply go to that country's embassy and divorce his wife by *ṭalāq* (as in this case) before she could complete a Maryland divorce.[122] Therefore, *ṭalāq* offended Maryland's public policy both on the issue of due process, and on the issue of equality. The court further pointed to Article 46 of the Maryland Declaration of Rights, providing that "[e]quality of rights under the law shall not be abridged or denied because of sex."[123]

*Aleem* represented not only a decisive, but also a highly visible, rejection of *ṭalāq*. It was heard by Maryland's highest court; it was argued for the husband by a partner (Priya Aiyar) at the elite appellate firm Kellogg, Huber, Hansen, Todd, Evans & Figel; and it was covered by the *Washington Post* and *Baltimore Sun*.[124]

Indeed, a year later, in the next *ṭalāq* case noted by the CSP report, a Michigan appeals court faced with a *ṭalāq* divorce cited *Aleem* as persuasive authority, and ruled the same way as the Maryland Court of Appeals had.[125] Saida Tarikonda, an Indian

121 *Aleem*, 947 A.2d at 502.

122 *Id.* at 500–01.

123 Md. Const. Declaration of Rts., art. 46.

124 *See* Ruben Castaneda, *Islamic Divorce Ruled Not Valid in Maryland*, Wash. Post (May 8, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/05/07/AR2008050703592.html [https://perma.cc/AWS4-XFVQ]; Nick Madigan, *Court Denies Islamic Divorce*, Baltimore Sun (May 7, 2008), http://articles.baltimoresun.com/2008-05-07/news/0805060427_1_aleem-divorce-wife [https://perma.cc/ZBV8-478T].

125 *See* Tarikonda v. Pinjari, No. 287403, 2009 WL 930007 (Mich. Ct. App.

Muslim woman living in Michigan, filed for divorce one month after her estranged husband, an Indian Muslim man who resided in New Jersey, had flown to India and pronounced *ṭalāq*. After a trial court recognized the Indian divorce, Tarikonda appealed, pointing to *Aleem* to support her position. The appeals court agreed with her, overturning the trial court decision and ruling that the Indian *ṭalāq* divorce was not entitled to comity, as it denied Tarikonda due process. Moreover, the court concluded, the male-female asymmetry embedded in *ṭalāq* was an "arbitrary and invidious" distinction, offensive to the Equal Protection Clauses of the Michigan and United States Constitutions.[126] "To accord comity to a system that denies equal protection," the appellate court held, "would ignore the rights of citizens and persons under the protection of Michigan's laws."[127]

In two other cases, courts implicitly accepted *Aleem*'s reasoning while distinguishing it under factual circumstances. They found that the husbands' use of Pakistani divorce law in these cases did not conflict with their states' public policy. In 2015 a Texas appellate court granted comity to a divorce performed in Pakistan for two Texas residents, after determining the procedure did not conflict with Texas public policy and particularly with due process or fundamental fairness. In this case, *Ashfaq v. Ashfaq*,[128] the court distinguished *Aleem* on the grounds that *Ashfaq*, unlike the Maryland case, concerned only divorce and not the division of property (which had occurred in a Texas court), and that the *Aleem* Court had not heard complete evidence on the state of Pakistani marriage law. Pakistan's 1939 Dissolution of Muslim Marriages Act, the *Ashfaq* Court noted, *did* give wives the right to initiate divorce, calling into question the *Aleem* Court's view that Pakistani law gave husbands asymmetrical rights. The court also noted that both husband and wife had been present in Pakistan when the divorce took place (unlike in *Aleem*, where the husband had gone

Apr. 7, 2009).

126 *Id.* at *3.

127 *Id.*

128 467 S.W.3d 539 (Tx. Ct. App. 2015).

to the Pakistani Embassy while both were present in the United States), and that the wife in *Ashfaq* had received notice of the divorce before it was finalized, had an opportunity to respond, and indicated her acceptance by accepting the *mahr* (dowry) payment in Pakistan (unlike in *Aleem*).

Similarly, in 2013 a New York appellate court distinguished *Aleem* (and *Tarikonda*) in a case in which a husband residing in the United States obtained a divorce in Pakistan while proceedings (which he initiated) were ongoing in the United States.[129] Here, as in *Ashfaq*, the court noted that unlike in *Aleem*, property division was not at issue and the wife had received notice before the divorce was finalized but had not challenged it until two years later (in which time the husband had remarried in reliance on the Pakistani divorce).

Taken together, these Maryland, Michigan, Texas, and New York cases suggest that courts have continued to look closely at the facts in determining whether foreign *ṭalāq* divorces conflict with U.S. public policy. Their analyses usually relied on U.S. laws requiring due process and prohibiting sex-based discrimination.[130]

The third, and oldest, *ṭalāq* case included in the CSP report, however, shows that not all U.S. state courts have refused to accord comity to such divorces. In 1978, a New Jersey appellate court dealt with a dispute between a Pakistani husband, Hanif Chaudry, living in New Jersey, and wife, Parveen Chaudry, who was residing in Pakistan with their children.[131] In response to Parveen's petition in a New Jersey court, Hanif argued that he was already divorced from her, having pronounced *ṭalāq* at the Pakistani Consulate in New York, and that the Pakistani divorce, in accordance with the couple's marriage contract, had settled all questions of property distribution and maintenance.[132] The trial judge rejected these arguments, finding that the Pakistani divorce

129 Siddiqui v. Siddiqui, 968 N.Y.S.2d 945 (Sup. Ct. App. Div. 2013).

130 *See also* Awad, *supra* note 32, at 175–79 (discussing several cases in which U.S. courts applied comity analysis to foreign divorces granted under Islamic or Muslim law).

131 *See* Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978).

132 *Id.* at 1002, 1004.

(in the words of the case he cited) "failed to constitute a judicial proceeding."[133] Furthermore, he ruled against the husband on the grounds that the Pakistani property distribution was "so offensive to this State's public policy as to invalidate the divorce and to entitle her to separate maintenance," which he awarded.[134]

A New Jersey appellate court, however, reversed this decision, implicitly finding that the *ṭalāq* divorce *did* afford the wife due process. The court determined that, because the wife, Parveen Chaudry, had (unsuccessfully) contested the divorce in Pakistani courts up to the appellate level, and because both parties were Pakistani citizens throughout the proceedings, "principles of comity require that the divorce be recognized."[135] Moreover, the court concluded, the parties had a sufficient nexus to Pakistan that it would be improper for New Jersey courts to grant separate maintenance, alimony, or equitable distribution of property.[136] Indeed, the court continued, the wife was entitled only to the $1,500 delayed dowry specified in the couple's marriage contract, which was "freely negotiated" with "no proof that the agreement was not fair and reasonable at the time it was made."[137] The appellate court thus ordered that the Pakistani divorce be recognized, with no payments to Parveen Chaudry, though it noted that she could still petition to adjust support payments if insufficient to provide for the children, of whom she had retained custody.[138]

Commentators have critiqued *Chaudry*, noting the apparent injustice of "effectively precluding Parveen—after fourteen years of marriage—from any portion of her psychiatrist-husband's estate."[139] Critics have also called the case's legal reasoning "confused."[140] Indeed, there are several troubling aspects in the case.

133 *See id.* at 1002. The quotation is not found in the appellate opinion; it is drawn from Shikoh v. Murff, 257 F.2d 306, 308 (2d Cir. 1958), upon which, according to the appellate opinion, the trial judge relied.

134 *Chaudry*, 388 A.2d at 1002.

135 *Id.* at 1005.

136 *Id.* at 1006.

137 *Id.*

138 *Id.* at 1007–08.

139 Blenkhorn, *supra* note 38, at 190.

140 Nathan B. Oman, *How to Judge* Shari'a *Contracts: A Guide to Islamic*

The court placed some weight on Parveen's residence in Pakistan in determining the case's strong connection to that country, "even though, as the trial judge found, it was the husband's conduct that prevented the wife" from coming to the United States.[141] Moreover, while the appellate court referred to the Pakistani marriage contract as "freely negotiated," it also admitted that "[u]nder Pakistan law she [Parveen] was not entitled to alimony or support upon a divorce. A provision in the agreement to the contrary would be void as a matter of law."[142] Thus, as Professor Nathan Oman argues, the court "in effect adopted Pakistani property law as a whole under the guise of interpreting a contract[.]"[143] More fundamentally, the trial court's factual determinations are far from making clear that the Pakistani courts granted Parveen sufficient judicial process to satisfy American standards.

Despite its flaws, a New Jersey appellate court cited *Chaudry* in 2012 (after the CSP report was published), as it remanded a disputed Pakistani divorce to a lower court for further proceedings to determine the extent of judicial procedures accorded a Pakistani woman whose husband divorced her in Pakistan.[144] The court emphasized, however, that "[t]he issues to be addressed before rejecting or applying comity principles include review of the Pakistani tribunal's jurisdictional determination and an examination of whether the judgment's determination of the issues does not offend New Jersey's public policy."[145] It does not appear that any court has cited *Chaudry* in actually granting comity to a *ṭalāq* divorce.[146]

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*Marriage Agreements in American Courts*, 2011 Utah L. Rev. 287, 313 (2011).

141 *Chaudry*, 388 A.2d at 1006. The couple had lived in the United States between 1966 and 1968, and when Parveen and the children then returned to Pakistan, they expected Hanif would follow, but he did not for two years, and then quickly returned to the United States. According to Parveen's testimony, Hanif "agreed to arrange for her and the children to join him," but "[t]here is a conflict in the proofs as to his good faith efforts" to accomplish this. *Id.* at 1004.

142 *Id.*

143 Oman, *supra* note 140, at 314.

144 Sajjad v. Cheema, 51 A.3d 146, 158–60 (N.J. Super. Ct. App. Div. 2012).

145 *Id.* at 159–60.

146 Only two other cases involving foreign marriages seem to cite *Chaudry*. One was *Aleem*, in which the husband invoked *Chaudry*. But only the lower Maryland

While each of these decisions turned on the facts of the particular case and the law of the country concerned, more courts seem to have embraced *Aleem*, with its skeptical approach to *ṭalāq*, than *Chaudry* with its more permissive approach.

### iii. Enforcing Marriage Contracts

Both *Aleem* and *Chaudry* touch on another issue that is prominent in CSP's collection of U.S. state cases dealing with Islamic law: the validity of marriage contracts, and in particular of deferred dowries and the lack of community property (noted above). In general, when dealing with Islamic marriage contracts, American courts sometimes approach them as prenuptial agreements (which, if valid, would preempt the equitable distribution of assets and alimony payments) or as simple contracts. It is easier for marriage contracts to be enforced as contracts, because states generally require that prenuptial agreements be made with legal advice and financial disclosures for both parties.[147] In eight of the *SLASC* report's cases, state appellate courts dealt with Islamic marriage contracts, and they split evenly on whether to apply them.[148] Tracing the reasoning will reveal some common trends

appellate court noted the case in its opinion, and it did not follow *Chaudry*'s lead in applying Pakistani marital property law. *See* Aleem v. Aleem, 931 A.2d at 1123, 1131, 1135. A Texas appeals court, while declining to uphold a non-judicial *ṭalāq* divorce, distinguished *Chaudry* based on the Pakistani court's confirmation of *ṭalāq*, absent in the case at bar. *See* Seth v. Seth, 694 S.W.2d 459, 463–64 (Tex. Ct. App. 1985). *Chaudry* has also been noted by a Louisiana appellate court in the context of *mahr* (dowry) and community property (Shaheen v. Khan, 142 So. 3d 257 (La. App. 2014); *ṭalāq* divorce was not at issue), and a California court has cited *Chaudry* for the proposition that a party's (in *Chaudry*, the wife's) choice to litigate a divorce in a foreign court weighs in favor of comity if that party later challenges the foreign divorce (*In re* Marriage of Ruppert, 2014 WL 6853696 (Cal. Ct. App. 2014); the case concerned German law and neither party was Muslim).

147 *See* Awad, *supra* note 32, at 174; *see also* The Islamic Marriage Contract (Asifa Quraishi & Frank E. Vogel eds., 2009).

148 Shaban v. Shaban (*In re* Marriage of Shaban), 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001); Dajani v. Dajani (*In re* Marriage of Dajani), 251 Cal. Rptr. 871, 872 (Cal. Ct. App. 1988); Akileh v. Elchahal, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996); Rahman v. Hossain, 2010 WL 4075316 (N.J. Super. Ct. App. Div. June 17, 2010); Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978); Afghahi v. Ghafoorian, No. 1481-09-4, 2010 WL 1189383 (Va. Ct. App. Mar. 30, 2010); *In re*

in courts' approaches, as well as the absence of any clear constitutional problems.

Two of the CSP's cases on this issue are either unclear or irrelevant, and therefore will not be discussed in this section. In one of these cases, *Mohammad v. Mohammad*, a Florida appellate court reversed a trial court's award of alimony and child support in a divorce between two Florida residents married in Iran, ordering the lower court to consider the validity of their marriage contract. But the parties dropped the contract issue on appeal.[149] Equally inapplicable is *In re Marriage of Notash*, in which a Texas appeals court considered claims, under Texas law, to modify an Iranian divorce decree. Neither party contested the validity of the divorce, and, apparently, neither party challenged the trial court's finding that their marriage contract was "void under the law and public policy of this State." (It is unclear what the contract's provisions were.)[150]

In deciding whether and how to enforce a typical Islamic marriage contract, courts essentially face two questions: first, whether they will require the husband to pay the delayed dowry (which can be accomplished if the marriage contract is construed as a simple contract); and second, whether this payment suffices to deprive the wife of her other interests in marital property (which would require the contract to be construed as a prenuptial agreement).[151]

The courts' approach to the first question is relatively consistent, at least in the CSP's selection of cases.[152] The classic analysis is found in *Akileh v. Elchahal*, a Florida case of first impression, which held that the secular portions of a contract "touching on" religious matters are still enforceable, if they can be applied

Marriage of Obaidi and Qayoum, 226 P.3d 787 (Wash. Ct. App. 2010); *In re* Marriage of Altayar and Muhyaddin, 139 Wash. App. 1066 (Wash. Ct. App. 2007).

149 *See Mohammad*, 358 So. 2d at 610; *see also* Mohammad v. Mohammad, 371 So. 2d 1070 (Fla. Dist. Ct. App. 1979) (noting that, between the case being remanded in 1978 and returning to the court in 1979, the issue had been dropped).

150 *In re* Marriage of Notash, 118 S.W.3d 868, 871 (Tex. Ct. App. 2003).

151 *See generally* Awad, *supra* note 32.

152 *See also id.* at 173–74.

according to "neutral principles" of contract law (applying a test derived from the 1979 U.S. Supreme Court case *Jones v. Wolf*).[153] In *Akileh*, the appellate court established that the marriage contract had been accompanied by sufficient consideration (the marriage itself), and that there was a meeting of the minds. It thus overturned a lower court, instructing it to enforce the contract and order Safwan Elchahal to pay Asma Akileh a deferred dowry of $50,000, even though Akileh had initiated the divorce. (Here, the Florida court directly disagreed with a California appellate court, which had in 1988 held that a *mahr* payment requirement upon divorce was *not* enforceable in such a situation, because California public policy opposed contracts that "facilitate divorce or separation by providing for a settlement only in the event of such an occurrence."[154] This case is not noted in the CSP report.)

While it did not reach the merits, a Virginia appeals court, in another CSP case, likewise upheld a lower court's enforcement of a delayed dowry provision in an Iranian marriage contract. That delayed dowry payment was worth about $141,000.[155]

The last two cases noted by the CSP report that address delayed dowries are, in different ways, the exceptions proving the rule that such payments will be enforced if they can be interpreted according to neutral principles of contract law. But they also reveal different understandings of what "neutral principles" are. In 2010, a Washington appeals court overturned a lower court decision enforcing a delayed dowry payment of $20,000 after Afghan Canadian Husna Obaidi filed for divorce from her husband, Afghan

153 Akileh v. Elchahal, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996). *See also* Jones v. Wolf, 443 U.S. at 605 (describing the "neutral principles" approach); Aziz v. Aziz, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985) (holding that an Islamic marriage contract's "secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony"). Although *Akileh* prominently cites *Aziz*, the latter case is not included in the CSP report. Another case often cited by later decisions, and in scholarly treatments of the topic, but not noted by the CSP is Odatalla v. Odatalla, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002), in which the court enforced a *mahr* payment by applying the "neutral principles" test.

154 Dajani v. Dajani (*In re* Marriage of Dajani), 251 Cal. Rptr. 871, 872 (Cal. Ct. App. 1988).

155 *See* Afghahi v. Ghafoorian, No. 1481-09-4, 2010 WL 1189383 (Va. Ct. App. Mar. 30, 2010).

American Khalid Qayoum.[156] The lower court had found a contract based on neutral principles of law, and had then continued on to find that "the wife was not abused, not unfaithful, and did not do anything to create a forfeiture of the *mahr* under Islamic law."[157] The appellate court, however, believed that under the neutral principles of Washington contract law, and based on the facts that the trial court had found, "there was no meeting of the minds," and thus no contract. In particular, the Court noted that the negotiations and the document were in Farsi, a language Qayoum did not speak, and that the lower court had described Qayoum as "psychologically coerced in [his] own mind with family pressures."[158]

In sharp contrast and in the same year, but on the other side of the country, a New Jersey appellate court used the same methodology as the trial court in *Obaidi*—an approach the Washington appeals court rejected. A couple was married in Maryland, signing a contract "to be united 'under the law of Islam.'"[159] The husband, Arifur Rahman, made an immediate (i.e., upon marriage) dowry payment of $12,500. Upon granting a divorce, a New Jersey trial judge ordered the wife, Obhi Hossain, to return the payment. Finding the payment enforceable under neutral principles, subject to "the law of Islam," the trial judge heard expert testimony on the law's content. At a default hearing, in which Hossain and her attorney could not participate because of their default posture (the reasons for which are unclear), the court heard expert testimony from "a New Jersey attorney knowledgeable in Islamic law," who informed the court that, "under Islamic law and customs," the court could order the wife to return the dowry "if it made a finding that the ex-wife was 'at fault' in precipitating the divorce."[160] The judge made such a finding, specifically that Hossain's "undisclosed mental illness constituted an impediment to the marriage under

156 *See In re* Marriage of Obaidi and Qayoum, 226 P.3d 787 (Wash. Ct. App. 2010).

157 *Id.* at 790.

158 *Id.* at 791.

159 Rahman v. Hossain, 2010 WL 4075316 at *1 (N.J. Super. Ct. App. Div. June 17, 2010).

160 *Id.*

Islamic law."[161] The appellate court upheld this decision. Both courts regarded the couple's marriage contract as simply that—a contract—and attempted to apply the contract according to the parties' expressed intent that the contract be governed by "the law of Islam," as interpreted by the expert witness. Presumably the wife's counsel could have, if not in default, introduced any concerns that the outcome abridged her constitutional rights.

These cases suggest that all courts have applied *Jones v. Wolf*'s "neutral principles" test, but in different ways. Sometimes these differences may arise from a careful attention to states' different public policies, as in California's refusal to allow delayed *mahr* payments when the wife initiates divorce, while Florida does the opposite.[162] At other times, however, the differences arise from entirely different understandings of how broadly "neutral principles" can sweep, and how much they can be allowed to fill in gaps in a contract.[163] Most importantly for our purposes, it is far from clear that any of the cases noted in the CSP report on dowry payments have impinged on constitutional rights.

Courts are in greater agreement on the second question raised by Islamic marriage contracts: whether they operate to deprive wives of their interests in marital property beyond their dowries. In *Chaudry*, as noted above, a New Jersey appeals court held that they did, finding a $1,500 delayed dowry to have been "freely negotiated" by Parveen Chaudry in exchange for her interests in her husband's other property.[164] But no other court has ever cited *Chaudry* for such a proposition, and in all three of the CSP report's relevant cases, courts have refused to find or enforce such terms. As noted above, the Maryland courts, at every level, refused to interpret the Aleems' marriage contract so as to deprive Farah Aleem of equitable distribution.[165]

161 *Id.* at *2.

162 *Compare Akileh*, 666 So. 2d at 246, *with Dajani*, 251 Cal. Rptr. at 871.

163 *Compare In re* Marriage of Obaidi and Qayoum, 226 P.3d at 787, *with* Rahman v. Hossain, 2010 WL 4075316 at *1.

164 *See Chaudry*, 388 A.2d at 1000.

165 *See Aleem*, 947 A.2d at 489; *Aleem*, 931 A.2d at 1123.

Two other cases in the *SLASC* report deal directly with women's waiver of interests in their husbands' property; courts refused to enforce such provisions in both cases. In 2007, a Washington appellate panel interpreted an Islamic marriage contract between two Iraqi immigrants as a prenuptial agreement, and upheld a trial court's refusal to enforce it.[166] The agreement promised the wife, Sarab Muhyaddin, nineteen grams of twenty-one-karat gold, in exchange for relinquishing claims to marital property to her husband, Souhail Altayar. A prenuptial agreement, the court noted, must meet a two-step test in Washington: it must be "substantively fair and reasonable for the party not seeking to enforce it," and parties must disclose their assets and have the opportunity to obtain counsel, so that they can enter the agreement "voluntarily and with full knowledge."[167] The agreement in question failed both steps because "[o]n its face, the exchange of 19 pieces of gold for equitable property rights under Washington law is not fair, and Altayar presented no evidence to prove otherwise."[168] Moreover, "[e]ven if it were a fair agreement, there is no evidence that he disclosed his assets or that Muhyaddin received any independent advice."[169]

A more complex analysis, turning on California rather than Washington law but coming to the same conclusion, appears in the case *Shaban v. Shaban*.[170] In a couple, married in Egypt and divorced in California, the husband, Ahmad, pointed to an Egyptian marriage contract prescribing a delayed *mahr* payment of 500 Egyptian pounds (said at oral arguments to be worth about $30 at the time).[171] Ahmad argued that the contract incorporated Islamic law, thus depriving his wife, Sherifa, of any interest in his medical practice or retirement accounts.[172] The trial court reject-

166 *See In re* Marriage of Altayar and Muhyaddin, 139 Wash. App. 1066 (Wash. Ct. App. 2007).

167 *Id.* at 2.

168 *Id.* at 3.

169 *Id.*

170 Shaban v. Shaban (*In re* Marriage of Shaban), 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001).

171 *Id.* at 866.

172 *Id.* at 866–67.

ed this claim, as did the appellate court. Turning to the principles of California contract law, the court noted that the state's statute of frauds required all prenuptial agreements to be signed writings, and that parol evidence (evidence from beyond the contract, necessary here to clarify the agreement) was allowable only to clarify terms of art, but not to constitute the contract itself. Taken together, these two principles required that "the writing, 'considered alone,' must express 'the essential terms with sufficient certainty to constitute an enforceable contract;' hence 'recovery may not be predicated upon *parol proof of material terms omitted from the written memorandum*.'"[173] The court therefore affirmed the trial court's refusal to enforce the agreement, while noting that it did not consider Muhyaddin's public policy attacks on the contract. "After all," the court asked, "how can one say that an agreement offends public policy when it is not possible even to state its terms?"[174]

*Shaban*, like the other cases dealing with marriage contracts adduced by the CSP report and discussed in this section, shows that courts have in fact generally been attentive to public policy considerations, the First Amendment, statutes, and general principles of contract law when they are called upon to interpret and apply Islamic marriage contracts. Some cases may appear problematic depending on one's policy preferences (for example, enforcing delayed *mahr* agreements that mitigate the financial impact of divorce on wives more than on husbands), but federalism allows states to adopt different substantive divorce law and, for the most part, requires them to recognize that of other states—as the contrast between *Akileh* and *Dajani* illustrates. Other cases—*Chaudry* comes to mind, here as in the previous section—may raise more serious concerns. But the cases cited here suggest that courts are likely, overall, to find that enforcing delayed *mahr* payments to wives, but not to the detriment of their other marital property interests, vindicates freedom to contract, while uphold-

173 *Id.* at 869 (quoting Burge v. Krug, 160 Cal. App. 2d 201 (Cal. Ct. App. 1958) (emphasis original)).

174 *Id.*

ing state public policies in the equitable distribution of marital property.

### iv. Recognizing Foreign Custody Decrees

The previous sections have traced cases on the legal "life cycle" of marriages, from marriage to divorce to property distribution. Now it is time to turn to the last, and usually most fraught, issue: child custody. These cases, understandably, provoke strong emotional responses, not only from parents but also observers. While a few of the cases in which American courts were called upon to enforce foreign decrees could plausibly be challenged on normative grounds, there is no evidence here, as elsewhere, that courts are applying Muslim law at the expense of constitutional rights, or that there are problems that could be easily fixed by legislating generally against foreign law.

Leaving aside one case in which the court rendered no decision on the merits, and which may have been settled after the appellate court remanded it for further fact-finding,[175] there are eleven cases in the CSP report in which U.S. state courts were called upon to enforce custody decrees from other courts, or to decline jurisdiction in comity to pending custody proceedings in other courts. In four cases, courts granted comity or declined jurisdiction in favor of foreign courts; in the other seven, they did not.

These cases, like those involving marital contracts, reveal that courts have applied fairly consistent, but not fully uniform, principles to varying fact situations. Most notably, the UCCJ(E)A provides for granting comity to foreign custody decrees (whether from other states or from other countries).[176] Monica Henderson has suggested that this provision means that "state courts likely will abandon foreign decrees from courts that do not clearly base

175 *See* Tazziz v. Tazziz, 533 N.E.2d 202 (Mass. App. Ct. 1988) (remanding a custody case to the trial court for fact-finding pertaining to whether it had jurisdiction and what law would be applied by an Israeli *sharīʿa* court if the Massachusetts case were dismissed).

176 *See* Henderson, *supra* note 38, at 423.

custody decisions on best interest [of the child] criteria."[177] This finding is also true of the cases presented in the CSP report.

In the most recent of these cases, a Massachusetts appeals court in 2010 used the touchstone of the "best interests of the child" to affirm a lower court's refusal to grant comity to a custody decree issued by a "Lebanese Sunnite court."[178] The Massachusetts Child Custody Jurisdiction Act, the court noted, requires courts to grant comity to "custody determinations in substantial conformity" with Massachusetts's own law.[179] Here, the Lebanese court had focused narrowly on the mother's unauthorized removal of the child from Lebanon, and the Massachusetts court found "no indication in the documents put before the probate judge that the Lebanese law governing custody disputes takes into consideration all the relevant factors bearing on the child's best interests as that standard is understood under the laws of the Commonwealth."[180] The court stressed that, although Lebanon had made *some* reference to the child's best interests, "it does not necessarily follow that the substantive law applied by the foreign court is reasonably comparable to our own law."[181] For this proposition, the *El Chaar* Court cited another Massachusetts appellate decision, issued just one month earlier, *Charara v. Yatim*, which is also included in the CSP report.[182] This case, too, involved a Lebanese custody decree, though issued in a Shīʿī rather than Sunnī court, and here, too, the Massachusetts court found that the Lebanese court had not performed an adequate best interests analysis in conformity with Massachusetts law. It had considered only the father's fitness, in rebuttal to his presumed custody for children over certain ages.[183] Even though the wife in this case, Hiba Charara, had agreed to grant the father custody, the Massachusetts court refused to see this grant as a bar to her claims for custody, because she had

177 *Id.* at 424.
178 *See* El Chaar v. Chehab, 941 N.E.2d 75 (Mass. App. Ct. 2010).
179 *Id.* at 79 (quoting Mass. Gen. Laws ch. 209B, § 14).
180 *Id.* at 80–81.
181 *Id.* at 80.
182 937 N.E.2d 490 (Mass. App. Ct. 2010).
183 *Id.* at 496–99.

returned to Lebanon from the United States for the divorce based on an earlier, informal agreement that she *would* receive custody. Moreover, the court observed that the wife's later agreement to grant the father custody had been reached in the shadow of the Lebanese court's inadequate custody rules.[184]

Several other cases cited by the CSP reached similar conclusions. In 2001, the Louisiana Supreme Court explicitly cited Henderson's article in upholding a lower court's refusal of comity to an Egyptian custody decree, which the court found had been based on "strict guidelines, irrespective of the best interests of the child."[185]

Several other courts, in addition to concerns about the substantive law applied by foreign courts enforcing Islamic or Muslim law, have also raised due process concerns. In *State ex rel. Rashid v. Drumm*,[186] a Missouri appellate court overturned a lower court's decision to decline jurisdiction in a custody case between an American-citizen wife, resident in Missouri, and a Saudi-citizen husband, resident in Saudi Arabia. Instead, the court ordered further fact-finding to determine whether a Saudi court would "afford minimum due process" or "decide custody on the best interests of the child."[187] A Washington appeals court reached a similar conclusion in *Noordin v. Abdullah* (cited by the Louisiana Supreme Court in *Amin*), reversing and remanding a lower court's deference of jurisdiction to a Philippine court applying Muslim personal law, and requiring the lower court to determine whether the Philippine court's standards afforded due process and considered the best interests of the child.[188] Without these factors, the court noted, both the UCCJA and the public policy exception to comity, drawn from the *Restatement (Second) of Conflicts*, would counsel in favor of Washington jurisdiction.[189] Another Washington appellate

184 *Id.* at 499–501.

185 Amin v. Bakhaty, 798 So. 2d 75, 85 (La. 2001).

186 824 S.W.2d 497 (Mo. Ct. App. 1992).

187 *Id.* at 504–05.

188 Noordin v. Abdulla (*In re* Custody of R.), 947 P.2d 745 (Wash. Ct. App. 1997).

189 *Id.* at 752–53; Restatement (Second) of Conflict of Laws § 90 (1971).

panel applied a similar standard in 2005, despite an intervening change in the Washington custody jurisdiction statutes, in declining to recognize an Iranian custody determination on the grounds that it had been entered without an opportunity for the mother to be heard, and that it conflicted with Washington's "strong public policy." The court came to this conclusion because the Iranian court "did not consider the best interests of the child but rather awarded custody on the sole consideration of the child's age."[190] A New Jersey trial court likewise refused to grant comity to a Gaza *sharīʿa* court's custody order, finding that the mother had not been afforded due process in being given notice, and that the *sharīʿa* court's "mechanical formula" for determining custody conflicted with New Jersey public policy.[191]

By contrast, four other cases identified by the CSP for the *SLASC* Report *did* involve a final decision to accord comity to foreign custody decrees (though one case was decided on other grounds).[192] Two of these cases involved unusual circumstances that seemed to determine the outcome. An Iowa appeals court in 2005 upheld a lower court's decision to recognize a Jordanian custody order, noting that the mother in the case, Manal Makhlouf, had repeatedly lied to Iowa courts in her quest for an Iowa custody decree in her favor.[193] The appeals court found that Iowa courts were bound by a statutory requirement to decline jurisdiction "if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct." The appeals court further determined that Ms. Makhlouf had "blatantly" met that standard, "subject[ing] both Samantha [the child] and her father, Ahmad, to mistreatment and abuse."[194] In making this decision, the Iowa appeals court ap-

190 *In re* Marriage of Donboli, 128 Wash. App. 1039, at *17–18 (Wash. Ct. App. July 18, 2005).

191 *See* Ali v. Ali, 652 A.2d 253, 259 (N.J. Super. Ct. Ch. Div. 1994).

192 Malak v. Malak (*In re* Marriage of Malak), 227 Cal. App. 3d 1018 (Cal. Ct. App. 1986); *In re* Makhlouf, 695 N.W.2d 503 (Iowa Ct. App. 2005); Hosain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996); Ivaldi v. Ivaldi, 672 A.2d 1226 (N.J. Super. Ct. App. Div. 1996).

193 *See In re* Makhlouf, 695 N.W.2d 503 (Iowa Ct. App. 2005).

194 *Id*. at *3–4.

parently sidestepped, without comment, an exception in the Iowa Uniform Child Custody statute allowing it to decline application of a foreign custody decree "if the child-custody law of a foreign country violates fundamental principles of human rights."[195]

The 1996 New Jersey case *Ivaldi v. Ivaldi*[196] presented a mirror image of *Makhlouf*, again turning on questions of jurisdiction but with the parties' actions reversed. Jean Jacques Marcel Ivaldi, a dual French-U.S. citizen resident in New Jersey, sought custody of his daughter, Lina, in that state after her mother, Lamia Khribeche Ivaldi, took her to Morocco and filed for divorce there. The appellate court reversed a lower court's decision to restrain Lamia from pursuing custody proceedings, because the parents' prior agreement, to be interpreted under New Jersey law, expressly granted Lamia permission to take Lina to Morocco, thereby removing any statutory grounds for New Jersey jurisdiction.[197] The court noted in dicta, and without explanation, that, even if the lower court had properly taken jurisdiction, "[i]n our view, the court would have been obliged to abstain and defer to the jurisdiction of the Moroccan court under recognized principles of international comity."[198]

Thus, in both cases, U.S. state courts passed over, without actually reviewing, the merits of the foreign custody law in question. In *Makhlouf*, the court did so because procedural rules denied jurisdiction and the court declined without discussion to find any human rights violations. In *Ivaldi*, the court did so because it had no jurisdiction so it did not need to reach that question.

The last two cases, by contrast, involved direct decisions on the merits to grant comity. In 1986, a California appellate court carefully analyzed the law applied by a Lebanese Sunnī *sharīʿa* court before granting comity to that court's custody decree.[199] The couple, originally from Lebanon, had lived in the United Arab Emir-

195 Iowa Code Ann. § 598B.105(3) (West 2014).

196 672 A.2d 1226 (N.J. Super. Ct. App. Div. 1996).

197 *Id.* at 1229, 1231.

198 *Id.* at 1233.

199 *See* Malak v. Malak (*In re* Marriage of Malak), 227 Cal. App. 3d 1018 (Cal. Ct. App. 1986).

ates before the wife, Laila Sawaya Malak, took the children to the United States and filed for separation in California. The husband, Abdul Latif Malak, invoked two foreign custody decrees in his favor, one from Lebanon and the other from the U.A.E. The California trial court refused to grant comity to the U.A.E. decree, reasoning that it was issued without a proper opportunity for Laila Malak to be heard. (The appellate court also noted, in dicta, that a U.S. Embassy report called into question the adequacy of the U.A.E.'s substantive custody laws.)[200] The trial court applied the same decision to the Lebanese decree, finding that it violated due process and did not consider the best interests of the children.[201] The appellate court, however, disagreed. In its review of the record, it determined that Laila Malak had been given "reasonable notice and opportunity to be heard" in the Lebanese proceedings, and that the four factors that the court then had considered sufficed as "tak[ing] the best interests of the children into consideration."[202]

Thus the California court in *Malak* directly differed with the Massachusetts appellate courts' rulings in *Charara* and *El Chaar* that Lebanese legal standards *were* sufficient to be entitled to comity. Both the Massachusetts and the California courts recognized significant barriers to granting comity, but they simply differed in their legal analysis of whether Lebanon's substantive and procedural rules met those standards.

Ten years after *Malak*, the Maryland Court of Special Appeals likewise granted comity to a Pakistani custody decree.[203] Joohi Hosain (the wife) and Anwar Malik (the husband) had married in Pakistan and began raising a child there before they separated. After Hosain moved to the United States with their child in 1990 or 1991, a Pakistani court awarded Malik custody. Upon Malik locating her in Maryland in 1992, Joohi Hosain filed there for custody and a restraining order, which was granted temporarily. However, the lower court was reversed by the Maryland Court

200 *Id.* at 1022, 1028–29.
201 *Id.* at 1025.
202 *Id.* at 1025, 1027.
203 *See* Hosain v. Malik, 671 A.2d 988 (Md. Ct. Spec. App. 1996).

of Special Appeals, which relied on Maryland's UCCJA to rule that Maryland should decline jurisdiction, "unless persuaded that the Pakistani court either...did not apply the best interest of the child standard...or appl[ied] a law (whether substantive, evidentiary, or procedural) so contrary to Maryland public policy as to undermine confidence in the outcome of the trial."[204]

On remand, the trial court concluded that the testimony of the husband's expert witness, which stated that the Pakistani proceedings did not fall into either exception, was controlling. The trial court granted comity on that basis. The Court of Special Appeals affirmed, concluding that the trial court could have reasonably concluded that Pakistan did apply the best interests formula, even though it also considered "the customs, culture, religion, and mores of the community and country of which the child and—in this case—her parents were a part, i.e., Pakistan."[205] The court also noted that Pakistani law included formulas for assigning custody based on gender and age, but it noted that these were only some factors, that those factors were rooted in British colonial legislation, that it was "only more doctrinaire in degree" than the preference for maternal custody in American law (which had been long-lived), and finally that the formulas would have favored Hosain, but had not been applied because she had abducted the child and allegedly renounced Islam.[206] The court also discounted Hosain's claims that her due process rights were violated because, having been accused of adultery, she could not return to Pakistan for the custody proceedings without risking execution. Declining to consider this claim did not render the lower court clearly erroneous, the appeals court held, because Hosain's own expert witness claimed that "punishment for adultery was extremely unlikely and...proving the crime was extremely difficult."[207] More broadly, the court seemed to dismiss any concerns about the substantive content of Pakistani law as being attacks on Islam more generally,

204 Malik v. Malik, 638 A.2d 1184 (Md. Ct. Spec. App. 1994); *see also Hosain*, 671 A.2d at 991 (noting the 1994 decision).

205 *Hosain*, 671 A.2d at 1000.

206 *Id.* at 1003–05.

207 *Id.* at 1006.

because "we are simply unprepared to hold that this longstanding doctrine [formulas for custody] of one of the world's oldest and largest religions practiced by hundreds of millions of people around the world and in this country...is repugnant to Maryland public policy."[208]

The court's ruling in favor of Malik attracted a strong dissent from two judges. They argued that the majority had misread several of the lower court's factual findings, including on the critical question of whether the Pakistani court had *actually* applied the best interests standard, or simply *would have* done so if Hosain had appeared. "We were clear in *Malik*," the dissent noted, "that, unless the Pakistani courts applied the best interests standard, comity was not appropriate."[209] Sounding much like the California courts in *El Chaar* and *Charara*, the dissent continued by arguing that "[t]he Pakistani courts' use of phrases such as the 'welfare of the minor' does not constitute the application of the best interests of the child standard."[210]

Taken together, these custody cases show that courts in many states have been guided by the same general principles—of comity, public policy, and the UCCJA—when called upon to enforce foreign custody decrees, but have nonetheless come to sharply differing conclusions. The greatest uncertainty, manifested in the contrast between cases like *El Chaar* and *Charara* on one side, and those like *Hosain* and *Malak* on the other, seems to revolve around exactly how closely foreign law must resemble the American best interests of the child standard to be entitled to comity and "substantial conformity" under public policy and UCCJ(E)A analyses.

## IV. The Effect of Legislation

This review has analyzed the fifty cases that, according to the CSP report, justify and necessitate the enactment of state-level bans on the recognition of Islamic law. As we have seen, U.S. state

208 *Id.* at 1005.
209 *Id.* at 1021 (Hollander, J., dissenting).
210 *Id.*

courts already apply the law or judgments of Islamic countries only after considering a number of possible bars. But in the remaining cases, where foreign law *was* recognized as applicable through U.S. laws of comity, would the proposed or passed laws banning *sharīʿa* or foreign law make a difference? A brief analysis will suggest that the answer, for the most part, is no. Next we can consider whether and how other legal approaches *could* make a difference.

*a. Blocking Laws*

To understand how blocking bills could or could not affect the cases described in the CSP report, it helps to move systematically through Professor Nersessian's three categories of 1) "full," 2) "reciprocal," and 3) "rights-based" bills and, finally, the fourth category of "public policy" legislation.

i. "Full" Blocking Laws

"Full" blocking bills would clearly prevent courts from enforcing any foreign law, and would thus change the outcome in the cases here in which courts granted comity. Oklahoma's "Save Our State" state-constitutional amendment, most notably, would have blocked courts from considering "international law or Sharia Law," or foreign law if that state "include[d] Sharia Law," or more broadly, "the legal precepts of other nations or cultures."[211] But these bills' very breadth raises profound concerns about how they would interfere with American courts' ability to adjudicate any case with transnational dimensions.[212] Moreover, as the Tenth Circuit has decided, laws like Oklahoma's are unconstitutional violations of the First Amendment, as they single out a particular

211 *Awad*, 670 F.3d at 1118.

212 *See*, *e.g.*, Fallon, *supra* note 41; Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law*, 106 Am. J. Int'l L. 107 (2012); Nersessian, *supra* note 10; Eugene Volokh, *Foreign Law in American Courts*, 66 Okla. L. Rev. 219 (2014).

religion.[213] Probably for that reason, few states have recently considered "full" blocking bills. One such bill was introduced in the Oregon State Senate in 2017, but did not make it out of committee.[214]

### ii. "Reciprocal" Blocking Laws

The effect of "reciprocal" laws is a bit more ambiguous than that of "full" blocking bills. The Kansas bill, for example, which precisely tracks the model ALAC legislation,[215] prevents the enforcement of foreign judgments based on "any foreign law, legal code or system that would not *grant the parties affected by the ruling or decision* the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions." It also bans the recognition of foreign law or arbitral awards that would apply "any substantive or procedural law, *as applied to the dispute at issue*, that would not grant the parties" the same rights. And it prevents courts from declining jurisdiction "if the courts of this state find that granting a claim of *forum non conveniens* or a related claim violates or would likely violate" such rights "with respect to the matter in dispute."[216]

Some scholars have interpreted these provisions as blocking *any* foreign law that does not precisely comport with American standards.[217] In particular, they note that in a whole host of proceedings, the United States, but not any other country, would require a jury trial.[218] They also point out that different state constitutions accord somewhat different sets of rights.[219]

213 *See generally Awad*, 670 F.3d 1111.

214 S.B. 479, 2017 Leg. (Or. 2017), https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/SB479 [https://perma.cc/58GA-JKLT].

215 *See Awad*, 670 F.3d at 1068–69.

216 Kan. Stat. Ann. § 60-5104, 5105(a)–(b) (2013) (emphasis added).

217 *See generally* Boyer, *supra* note 20; Fellmeth, *supra* note 212; Nersessian, *supra* note 10.

218 *See* Volokh, *supra* note 212, at 238–40 (raising jury trial concerns).

219 *See* Boyer, *supra* note 20; Fellmeth, *supra* note 212, at 116 ("Many state constitutions include extensive rights that would be unfamiliar to non-citizens of the state."); Nersessian, *supra* note 10.

However, the language of these types of bills seems to leave open an alternate, more limited reading, that would prevent the recognition of foreign law or judgments only when such application would *actually* violate the constitutional rights of a party in the case at bar. (See the emphasized portions of the quotations above.) This reading is more persuasive for the second clause, on the recognition of foreign law, since it refers specifically to laws "as applied to the dispute at issue." This interpretation may be a route courts will prefer. Professor Aaron Fellmeth has suggested that "state legislatures and federal courts alike can be expected to minimize" the laws' "unpredictable consequences."[220]

Minimization of unforeseen consequences seems to have resulted from Kansas's blocking law. In 2012 a Kansas trial court refused to enforce a Muslim marriage contract during a divorce on the grounds that it was incomplete; the contract did not specify an amount for the dowry, and no certified translated copy of the agreement had been entered into evidence.[221] In dicta, the court analyzed the anti-foreign law legislation, noting on one hand that it could block the application of any premarital agreement that was "the product of a legal system which is obnoxious to equal rights based on gender," but also that "[i]n one respect, this recent enactment appears to be superfluous" because "[t]he judiciary already is charged with protecting constitutional rights."[222]

This is the crux of the matter: the judiciary must protect constitutional rights. As has been seen from the very cases presented in the CSP report, courts frequently discuss constitutional

220 Fellmeth, *supra* note 212, at 116–17. *See also* Volokh, *supra* note 212, at 239, 242.

221 Soleimani v. Soleimani, No. 11CV4668 (Kan. Cir. Ct. 2012), http://www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf [https://perma.cc/2RPZ-5AB7]. For further discussion of this case, see Eugene Volokh, *Court Refuses to Enforce Islamic Premarital Agreement That Promised Wife $677,000 in the Event of Divorce*, Volokh Conspiracy (Sept. 10, 2012), http://volokh.com/2012/09/10/court-refuses-to-enforce-islamic-premarital-agreement-that-promised-wife-677000-in-the-event-of-divorce [https://perma.cc/4G9W-5X5A]. *See also* Abbas, *supra* note 20; Boyer, *supra* note 20, at 1078–79. Others have, I believe, over-emphasized the court's reliance on the new law, which did not serve as the basis for its decision; even concerns about gender equality would have stemmed from existing constitutional law.

222 *Soleimani*, at 30–31.

questions, even when parties have not raised them. Even facially non-constitutional grounds for denying comity or refusing to enforce a contract, like the public policy exception and the *Jones v. Wolf* "neutral principles" approach, are in fact based on constitutional concerns (about due process and equal protection in the former case, and about freedom of religion in the latter). To the extent that "reciprocal" blocking laws are interpreted narrowly, they may be entirely superfluous, simply instructing the judiciary to do what it already does. If they are interpreted broadly, they risk creating chaos, as Professors Fellmeth, Nersessian, and Volokh have suggested.

### iii. "Rights-Based" Blocking Laws

"Rights-based" blocking laws, such as those enacted in Arizona, Louisiana, Tennessee, and North Carolina, and under consideration in Montana and Wisconsin, would prevent courts from recognizing foreign law or enforcing foreign judgments if this would result in an "actual violation[] of the constitutional rights of a person or actual conflict with the laws of this state[.]"[223] As Volokh notes, these laws are even more likely than "reciprocal" legislation to be superfluous. After all, "[c]ourts already may not do things that actually violate constitutional rights or conflict with other laws. And while courts sometimes indeed erroneously violate constitutional rights or other laws, the new rules wouldn't prevent such errors."[224]

Indeed, such laws would probably not have changed the outcome in any of the cases discussed above. Even in the few cases where courts actually enforced Muslim law on U.S. law comity grants, and in the even fewer cases where such grants raised plausible normative or legal concerns (for example, in *Hosain*, *Chaudry*, or *Mansour*), it is highly doubtful that the courts would have

223 *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 12-3102 (2014); S.B. 97, 65th Leg. (Mont. 2017), https://legiscan.com/MT/text/SB97/2017 [https://perma.cc/PPF4-Q4JN]; A.B. 401, 2017–2018 Leg. (Wis. 2017–2018), http://docs.legis.wisconsin.gov/2017/related/proposals/ab401 [https://perma.cc/268G-NMA8].

224 Volokh, *supra* note 212, at 243.

come to a different conclusion had they been statutorily required to note that their decision did not operate to deprive any party of constitutional rights.

Perhaps some observers believe Jooha Hosain or Parveen Chaudry were in fact subjected to violations of their right to due process. But it is absurd to imagine that the courts that granted comity thought so. The parties could have appealed either decision on constitutional grounds *regardless* of whether there were a specific statute on the subject. As noted above, every court that enforced a foreign law on comity grants had to pass through several filters, such as the public policy exception to comity, the "substantial conformity" provisions of the UCCJ(E)A, and more basic concerns about due process and equal protection, which inherently guard against unconstitutional decisions. If the courts in *Hosain* and *Chaudry* did not see these requirements as bars to their decisions, it is implausible that they would have changed their minds if faced with an even less clear, and normatively less stringent, statutory test for "violations of...constitutional rights."

### iv. "Public Policy" Blocking Laws

Blocking laws based on "public policy"—such as the law enacted in Florida in 2014—seem even less meaningful than "reciprocal" or "rights-based" legislation. Florida's law, in fact, began the legislative process as a "rights-based" bill but was completely overhauled after opposition from the Anti-Defamation League and the Florida Bar.[225] The final bill was "largely a product of the International Law Section of the Florida Bar, which had previously opposed the action."[226] The text, as enacted, explicitly codifies the holdings of several Florida Supreme Court and appellate decisions, and one legislator commented that it "only simplifies current law.... You can go to one statute and find the answer to a

225 Miller, *supra* note 97. For the earlier version, see S.B. 58, 2014 Leg. (Fla. 2014), http://www.flsenate.gov/Session/Bill/2013/0058/BillText/c2/HTML [https://perma.cc/BK24-VL94].

226 Miller, *supra* note 97.

(legal) question. Right now you have to search through cases and have a lawyer synthesize that, and articulate that to a judge."[227] The law's provisions essentially track the "public policy" exception to comity, as clearly established in case law.[228] It establishes that foreign laws and foreign judgments, in several different contexts, cannot be enforced if doing so would conflict with Florida's "strong public policy."[229] While the bill does define "public policy," the definition is circular and appears meaningless: "As used in this section, the term 'strong public policy' means public policy of sufficient importance to outweigh the policy of protecting freedom of contract."[230]

As a result of these changes, Florida's law likely would have had no effect on any of the cases discussed in this Article. If adopted in various states, it would simply provide the courts with another ground for the public policy holdings they would have otherwise reached.

*b. Legislators' Real Tools*

While the main goal of this Article is to examine both the evidence for the claim that *sharīʿa* or Islamic or Muslim law challenges the U.S. legal system and the effectiveness of existing responses, it is worth briefly discussing what tools legislators actually have. It is clear that, even though Islamic and Muslim law provisions are rarely enforced (through comity rules) and never produce clear constitutional violations, state courts have reached different conclusions on enforcement as they reason through the tangled thicket of contract, choice of law, comity, and religious freedom. Some of their conclusions may be troubling to observers or, more relevantly, to state legislatures. None of the existing or proposed anti-*sharīʿa* bills, however, would clear this thicket. Instead, they would only make it more complicated, either by forcing

227 *Id.* (quoting Fla. State Rep. Larry Metz).

228 *See* S.B. 386, 2014 Leg. (Fla. 2014), http://www.flsenate.gov/Session/Bill/2014/0386/BillText/er/HTML [https://perma.cc/NSX5-E452].

229 *Id.*

230 *Id.*

courts to undertake frivolous layers of constitutional review, or by forcing them to reinvent their conflict of laws jurisprudence entirely. So to the extent that legislators do have real concerns about these cases, not motivated by religious bigotry or fear—particularly about cases that have drawn criticism, like *Chaudry*, *Hosain*, *Mansour*, or *Ghassemi*—what can they do?

State legislatures in fact have a variety of simple and effective tools at their disposal. First, they could enact narrowly targeted laws to overturn individual cases. If the New Jersey legislature wants to overrule *Chaudry*, it could simply overrule *Chaudry*. A statute could explicitly state, for example, that a divorce obtained at a foreign consulate without granting the other spouse a chance to respond is contrary to public policy, or that any agreement seeking to depart from the default of equitable distribution must say so in unambiguous terms and must provide consideration that is reasonable under state law. Likewise, the Louisiana legislature could easily overturn *Ghassemi* by passing a simple statute stating that first-cousin marriages conflict with the strong public policy of the state (although doing so would have other negative consequences).[231] These measures would be far more effective than blocking bills. Legislatures could also see fit to codify other interpretive approaches—for example, to dowries or marriage contracts—that commentators have suggested.[232]

Likewise, if a state legislature is truly troubled by *Mansour* (in which a court indicated it would cite Islamic law to determine the enforceability of an arbitral award), it could pass a statute reiterating existing law, that courts may use only neutral principles to determine the enforceability of religious arbitration under religious law. If a state legislature wishes to go beyond that, to affect the arbitration itself—perhaps by mandating substantive judicial review of arbitral decisions reached under religious principles—it might face First Amendment Free Exercise Clause problems. Moreover, efforts to interfere with arbitration might also conflict

231 *See* Volokh, *supra* note 212, at 230–31.

232 *See*, *e.g.*, Blenkhorn, *supra* note 38; Henderson, *supra* note 38; Oman, *supra* note 140; Sizemore, *supra* note 38; Thompson & Yunus, *supra* note 38.

with the 1925 Federal Arbitration Act,[233] or with state law on arbitration. If such efforts were directed solely at Muslims, they would again run afoul of the First Amendment's Establishment Clause.

As the *Aleem* case shows, states can also create new constitutional rights. Equal Rights Amendments, prohibiting all discrimination on the basis of sex, are an example of one such approach. The Federal ERA, of course, fell three states short of ratification decades ago, but some states, including Maryland, adopted their own versions.[234] As we saw, the Maryland Court of Appeals relied partly on that amendment when it found *ṭalāq* divorce to be contrary to public policy in *Aleem*.

## Conclusion

The preceding analysis of the most substantive evidence adduced by those who fear *sharīʿa* in the United States, and advocate special laws guarding against it, illustrates that there is little reason for concern. Many cases in the CSP's report do not even deal with the recognition of Islamic or Muslim law, while in the plurality of them, courts used existing legal tools to *decline* to enforce that law based on constitutional and public policy concerns. In the few cases where state courts have enforced Islamic or Muslim law or enforced foreign judgments, they have done so only after deciding that the existing legal tools do not bar the enforcement of some foreign judgments or the recognition of Muslim countries' laws. Some lower courts have erred, of course, and they have been reversed on appeal. And of those appellate court opinions that affirmed or required the enforcement of foreign and Islamic law, there are only a few that might be plausibly attacked on constitutional grounds.

This analysis suggests that there is little cause for the type of alarmism that seems to motivate the campaign for blocking bills.

233 9 U.S.C. § 1. For the questions surrounding religious arbitration, see Helfand, *supra* note 42; Volokh, *supra* note 212; Walter, *supra* note 42.

234 *See The ERA in the States*, Equal Rights Amendment, http://www.equalrightsamendment.org/states.htm (last visited Apr. 18, 2020) [https://perma.cc/Z22A-7DZN].

The cases in the CSP report, far from demonstrating that "some judges are making decisions deferring to Shariah law [*sic*] even when those decisions conflict with Constitutional protections,"[235] show no such thing. The report's research is slipshod, it is entirely lacking in analysis, and, as this Article has shown, a proper analysis does more to undermine its conclusions than to support them. There is no evidence in the report to suggest that courts have been using Islamic or Muslim law to reach decisions that violate constitutional rights. Even the few decisions here that might raise plausible normative concerns are unlikely to have come out differently if a blocking bill had been in effect. To the extent that state courts are confused about how to approach aspects of Islamic or Muslim law, particularly family law, state legislatures have a variety of more precise tools available to address these issues. If they choose instead to pass ineffective or entirely meaningless blocking bills, and especially if they express a particular fear of Muslims while doing so, this suggests that those laws deserve further First Amendment scrutiny.

235 SLASC, *supra* note 15, at 8.

# Judicial Intervention in Facilitating Legal Recognition (and Regulation) of Muslim Family Law in Muslim-Minority Countries: The Case of South Africa

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## Abstract

*In 2018, a groundbreaking judgment was delivered by a full bench of the Western Cape High Court in the matter of the* Women's Legal Centre Trust v. President of South Africa*. This case followed a long line of judgments spanning some twenty-one years in which the South African judiciary afforded limited recognition to aspects of Muslim marriages. In this decision, the Western Cape High Court ordered the South African State to prepare, initiate, enact, and implement legislation that provides for the recognition and regulation of the consequences of Muslim marriages within twelve months of the date of judgment. In this Article, the author examines the following questions: Why has the South African State not yet recognized Muslim marriages despite repeated calls to do so by South African Muslim communities? Why has it taken a court to instruct the South African State to enact legislation to recognize Muslim marriages? What, if any, are the human rights implications of the judgment? And what difference, if any, will the judgment make in the lives of Muslims? The author argues that, despite the groundbreaking nature of the judgment, it does not go far enough to ensure sufficient protection for the human rights of Muslim women and that the manner in which the Western Cape High Court's order is implemented could perpetuate the undermining of Muslim women's human rights.*

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## Introduction

The question of legal recognition of Muslim marriages in South Africa surfaces in the South African public domain from time to time, usually when national elections loom and the majority party wants to secure its "Muslim vote." When that happens, promises are made in one way or another that Muslim marriages will be recognized. This has been the narrative since before the attainment of a constitutional democracy in 1994.[1] Twenty-five years later, there is still no legal recognition being afforded to Muslim marriages in South Africa, despite continuous calls for recognition of Muslim marriages by various sections of civil society and the Muslim communities in South Africa. This led to a groundbreaking judgment delivered in 2018 by a full bench of the Western Cape High Court in a consolidated application comprising three cases: the *Women's Legal Centre Trust v. President of the Republic of South Africa* (hereinafter *WLCT*),[2] *Faro v. Bingham N.O.* (hereinafter *Faro*),[3] and *Esau v. Esau* (hereinafter *Esau*).[4]

In the above consolidated application (hereafter also referred to as "The WLCT Matter"),[5] the South African State was ordered to enact legislation to recognize and regulate the consequences of Muslim marriages within twenty-four months of the judgment being handed down.[6] Enactment of such legislation would be in accordance with the constitutional right to freedom of religion, which is of an individual and collective nature. The individual right to freedom of religion is encompassed in section 15(1) of the South African Constitution, 1996, which protects "[e]veryone's...right to freedom of conscience, religion, thought, belief and opinion." The collective right to freedom of religion is

1 For examples, see the discussion on state initiatives relating to the recognition of Muslim marriages in Part IV of this Article.

2 Case No. 22481 (2014).

3 Case No. 4466 (2013).

4 Case No. 13877 (2015).

5 Women's Legal Ctr. Tr. v. President of South Africa 2018 (6) SA 598 (WCC) [hereinafter *The WLCT Matter*].

6 Judgment was delivered on Aug. 31, 2018.

reflected in section 31 of the Constitution and recognizes the right of each person who belongs to a religious community to practice her or his religion with other members of that community and to form, join, and maintain religious associations.[7] Through the right to freedom of religion ensconced in section 15(3) of the Constitution, the South African State may also enact legislation to recognize traditional and religious marriages or personal and family law systems.[8] The individual and collective rights to freedom of religion are both internally limited in sections 15(3)(b) and 31(2) respectively to the extent that no one may practice her or his religion in a way that violates other constitutional rights including gender and sex equality, and legislation affording recognition to, *inter alia*, religious marriages or personal and family law systems may not be inconsistent with other rights in the Bill of Rights including gender and sex equality.[9]

In accordance with the right to freedom of religion, African customary marriages were recognized through the enactment

7 *See* S. Afr. Const., 1996 § 31:

> Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

8 *See* S. Afr. Const., 1996 § 15(3):

> (a) This section does not prevent legislation recognising—
>
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
>
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
>
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

9 *See* S. Afr. Const., 1996 § 9(3) (proscribing unfair discrimination on the basis of, *inter alia*, gender and sex): "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

of the Recognition of Customary Marriages Act,[10] which came into force in 2000. Same-sex couples were also afforded the opportunity to access legal rights and obligations that attach to a civil marriage[11] by being able to enter into civil unions registered under the Civil Union Act.[12] Why then has the South African State not also recognized Muslim marriages despite repeated calls by South African Muslim communities for recognition of Muslim marriages? Why has it taken a court to instruct the South African State to enact legislation to recognize Muslim marriages? What, if any, are the human rights implications of the judgment? And what difference, if any, will the judgment make in the lives of Muslims?

In seeking to address the above questions, particular reference is made to the WLCT judgment, which relates to the primary case in the aforementioned consolidated application. This Article commences by providing a brief historical context to the non-recognition of Muslim marriages in South Africa, followed by a short commentary on the judicial intervention provided prior to the WLCT judgment, in which the courts attempted to afford some relief to Muslim parties, especially women. A synopsis of the effects of non-recognition of Muslim marriages is also offered as well as the state initiatives undertaken thus far relating to the recognition of Muslim marriages in South Africa. Thereafter, the consolidated application with particular attention to the WLCT case and its implications for human rights is discussed. I argue that despite the groundbreaking nature of the judgment, it does not go far enough to ensure sufficient protection for the human rights of Muslim women and that the manner in which the Western Cape High Court's orders is implemented could perpetuate the undermining of Muslim women's human rights.

10 120 of 1998.

11 Entered into in terms of the Marriage Act 25 of 1961. Civil marriages registered under the Marriage Act are required to be monogamous and can only be concluded between a male and a female.

12 17 of 2006.

## I. Historical Context

The WLCT matter is a culmination of more than two decades of case law, which involved claims by Muslim wives for recognition of their Muslim marriages or aspects of their Muslim marriages.[13]

The Muslim communities in South Africa originate from slaves and indentured laborers imported by colonialists from various parts of South Asia and Southeast Asia during the seventeenth and eighteenth centuries. Throughout the nineteenth century, Muslims also entered South Africa as traders from South Asia. Thereafter, they came to South Africa as immigrants from various parts of Africa.[14] Presently, the Muslim communities comprise the largest religious minority in South Africa.[15]

Non-recognition of Muslim marriages dates back to the colonial period when the only form of marriage that was considered worthy of legal recognition and protection was one that conformed to a Christian paradigm of marriage, namely heterosexual and monogamous.[16] This approach to marriage was confirmed by the apartheid-era Appellate Division per Justice Trengove in the case of *Ismail v. Ismail*.[17] In particular, Justice Trengove held that any contract and custom arising from a potentially polygynous marriage

13 The main cases that were adjudicated since 1997 include the following: Moosa v. Harnaker 2017 (6) SA 425 (WCC); Arendse v. Arendse 2013 (3) SA 347 (WCC); Hoosein (Hoosain) v. Dangor 2010 2 All SA 55 (WCC); Mahomed v. Mahomed 2010 (2) SA 223 (ECP); Hassam v. Jacobs 2009 (5) SA 572 (CC); Jamaloodien v. Moola (NPD) (Unreported, Case No. 1835/06); Cassim v. Cassim (Part A) (TPD) (Unreported, Dec. 15, 2006, Case No. 3954/06); Khan v. Khan 2005 (2) SA 272 (T); Daniels v. Campbell 2004 (5) SA 331 (CC); Amod v. Multilateral Motor Vehicle Accidents Fund (Comm'n for Gender Equal. Intervening) 1999 (4) SA 1319 (SCA); Ryland v. Edros 1997 (2) SA 690 (C).

14 Ebrahim Moosa, *Prospects for Muslim Law in South Africa: A History and Recent Developments*, 3 Y.B. Islamic & Middle E. L. 131 (1996).

15 Muslims constitute 1.9% of a total population of 54.4 million South Africans. The remaining religious communities include: Christians as the majority religious community (86%); followed by traditional African religions (5.4%); Hindus (0.9%); Jews (0.2%); no religion (5.2%); and other religions (0.4%). *Table 9: Percentage Distribution of Religious Affiliation by Province, 2015, General Household Survey*, Statistics S. Afr. (2015), http://www.statssa.gov.za/publications/P0318/P03182015.pdf [https://perma.cc/F3WP-D5W2].

16 *See, e.g.*, Bronn v. Frits Bronn's Executors (1860) 3 Searle 313.

17 1983 (1) SA 1006 (AD).

ran contrary to public policy.[18] This included a potentially polygynous marriage such as a Muslim marriage. Thus, Justice Trengove deemed a Muslim marriage contract and customs arising from that contract to be *contra bonos mores* and unenforceable.[19]

The apartheid-era conception of public policy was subsequently rejected by the democratic-era judiciary. In the case of *Ryland v. Edros*, Judge Farlam on behalf of the Cape High Court (as it then was) found that the notion of public policy as understood by the apartheid-era judiciary could no longer hold water in a democratic and plural society such as South Africa, which is underscored by the constitutional values of equality and appreciation of diversity.[20] Judge Farlam held that South Africa's post-1994 public policy as defined by the parameters of its constitutional democracy permits the recognition and enforceability of a Muslim marriage contract.[21]

Following *Ryland*, a gamut of cases was adjudicated across South Africa over a period of more than twenty years, in which the South African judiciary followed the example set by Judge Farlam in respect of judicial treatment of Muslim marriages.[22] South Africa consequently witnessed the unilateral Islamic law obligation of a husband to maintain his wife being considered worthy of legal recognition,[23] and Muslim wives being included in the definition of "spouse" and "surviving spouse" for the purpose of specific legislation that made provision for spouses. For instance, Muslim wives in monogamous and polygynous Muslim marriages can now claim

18 *Id.* at 1024D-F.

19 *Id.*

20 Ryland v. Edros 1997 (2) SA 690 (C) at 708I-J; 709A-B.

21 *Id.* at 710D-E.

22 *See id.*; Waheeda Amien, *South African Women's Legal Experiences of Muslim Personal Law*, *in* Religion as Empowerment: Global Legal Perspectives 53 (Lauren Fielder & Kyriaki Topidi eds., 2016); Razaana Denson et al., *The Bastardization of Islamic Law by the South African Courts*, 39 Obiter 152 (2018); Najma Moosa, *Muslim Personal Laws Affecting Children: Diversity, Practice and Implications for a New Children's Code for South Africa*, 115 S. Afr. L.J. 479 (1998); J.M. Pienaar, *Duty to Support and the Dependant's Claim: The Struggle of Women Married in Terms of Customary and Muslim Law*, 2 Stellenbosch L. Rev. 314 (2006); Christa Rautenbach, *Some Comments on the Current (and Future) Status of Muslim Personal Law in South Africa*, 7 Potchefstroom Elec. L.J. 1 (2004).

23 Amod v. Multilateral Motor Vehicle Accidents Fund (Comm'n for Gender Equal. Intervening) 1999 (4) SA 1319 (SCA) paras. 14–15, 20, 25.

maintenance against their husbands through the Maintenance Act.[24] Monogamous and polygynous Muslim spouses can inherit from their deceased spouses' intestate estates in terms of the Intestate Succession Act.[25] Muslim wives in monogamous Muslim marriages can claim maintenance from their deceased husband's intestate estates via the Maintenance of Surviving Spouses Act.[26] Muslim monogamous and polygynous surviving spouses may also benefit under the Wills Act,[27] which enables a surviving spouse to acquire the inheritances of their deceased spouse's descendants who are named as heirs in the deceased spouse's will but who renounce their benefits in favor of the surviving spouse of the deceased.

In the post-1994 period, the South African judiciary therefore afforded protection to both monogamous and polygynous Muslim spouses. This approach accords with the constitutional value of diversity, which in the family law context acknowledges the pluralism of family forms; that multiple forms of marriage exist; and that a spouse in those marriages is entitled to legal protection.[28] However, the judiciary has not provided wholesale legal recognition to Muslim marriages because it is of the view that such recognition should be undertaken by the legislature.[29] The judiciary has therefore only enabled limited recognition to certain aspects of a Muslim marriage such as the Muslim marriage contract, terms arising from the marriage contract such as spousal *nafaqa* (maintenance)[30] and recognizing Muslim wives and husbands as spouses for particular legislation.

24 99 of 1998. *See* Khan v. Khan 2005 (2) SA 272 (T).

25 81 of 1987. *See* Daniels v. Campbell 2004 (5) SA 331 (CC).

26 *Khan* 2005 (2) SA (T) para. 10.5.

27 Wills Act 7 of 1953 § 2C(1). Moosa v. Harnaker 2017 (6) SA 425 (WCC).

28 *Moosa* 2017 (6) SA.

29 *Faro*, Case No. 4466 para. 44; *Moosa* 2017 (6) SA (WCC) para. 16; *Daniels* 2004 (5) SA (CC) para. 108; *Amod* 1999 (4) SA 1319 (SCA) para. 28.

30 A traditional and conservative interpretation of Islamic law places a unilateral obligation on the husband to maintain his spouse(s) and children. Ibn Rushd, The Distinguished Jurist's Primer: A Translation of Bidayat Al-Mujtahid 63 (1996). *See also* Qurʾān 4:34: "Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what God would have them guard."

## II. Effects of Non-Recognition of Muslim Marriages

Failure to recognize Muslim marriages engenders negative effects for Muslims, particularly marginalized members of the Muslim communities such as women and children. Some of the negative effects include the following.

First, as noted by the WLCT in the consolidated application, the best interests of minor children born of Muslim marriages are not automatically subject to court oversight when there is a Muslim divorce.[31] In contrast, a civil divorce or legal dissolution of an African customary marriage that involves minor children immediately activates intervention by the Family Advocate's Office followed by judicial oversight to ensure that the child's best interests are protected.[32]

Secondly, Muslim spouses cannot automatically access the benefits of civil legislation as spouses in civil and African customary marriages are able to. This is because the legality of civil and African customary marriages immediately confers the status of lawful spouse on husbands and wives in those marriages, which brings them within the ambit of legislation that makes provision for spouses. In contrast, a spouse in a Muslim marriage must first approach a High Court and ask that she or he be recognized as a spouse for the purpose of particular legislation and/or to access legislative benefits that accrue to spouses. This means that Muslim parties can only be afforded *ad hoc* relief on a case-by-case basis, which requires resources that are not available to all.

Thirdly, Muslim spouses cannot automatically access benefits that are permitted under Islamic law that attach to Muslim family law.[33] For example, a Muslim marriage contract must con-

31 WLCT's argument as expressed in the judgment. *The WLCT Matter* 2018 (6) SA para. 59.

32 Divorce Act 70 of 1979 § 6; Mediation in Certain Divorce Matters Act 24 of 1987 § 4.

33 Muslim family law encompasses marriage and divorce and all the consequences pertaining to marriage and divorce such as *nafaqa* (maintenance), parental rights and responsibilities, and matrimonial property regimes, which are underscored by Islamic law principles.

tain an agreement relating to the payment of *mahr* (dower).[34] When the benefit such as the aforementioned *mahr* arises from the Muslim marriage contract, a Muslim wife must approach the High Court to institute a claim, which again has cost implications. Only women who have the necessary financial and emotional resources are likely to pursue such a claim.

Fourthly, Muslim wives cannot challenge gender-discriminatory Islamic law rules and practices that ascribe to Muslim family law in a civil court. For instance, traditional and conservative interpretations of Muslim divorce[35] confer unequal

34 *Mahr* is a payment made by the husband to the wife, which could be given promptly at the time that the Muslim marriage is concluded, or it could be deferred to a stipulated date during the course of the marriage, failing which it becomes payable when the marriage dissolves through death or divorce. Abdur Rahman I. Doi, Shariah: The Islamic Law 158–66 (1984); Joseph Schacht, An Introduction to Islamic Law 167 (1964). *See also* Qurʾān 4:4: "And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer."

35 There are four main forms of Muslim divorce, namely *ṭalāq*, *tafwīḍ al-ṭalāq*, *khulʿ*, and *faskh*. *Ṭalāq* is effected when a husband utters the word "*ṭalāq*" or its equivalent in a language other than Arabic (for example, "I repudiate you," in English). When a marriage terminates through *ṭalāq*, a husband is required to pay any outstanding *mahr* to the wife. *Ṭalāq* is the exclusive preserve of the husband to unilaterally repudiate his wife without requiring grounds for the repudiation. The *ṭalāq* need not be given in the wife's presence or in the presence of witnesses or with the wife's knowledge or consent. One or two utterances of *ṭalāq* renders the marriage only tentatively terminated. This means that if the husband chooses to reconcile with his wife during the *ʿidda* period (three-month waiting period observed by the wife following the utterance of "*ṭalāq*"), the *ṭalāq* is revoked and the marriage remains intact. During *ʿidda*, the wife is expected to be house-bound, and she is not permitted to engage in a romantic relationship or enter into marriage with another man who is not her husband. The *ṭalāq* becomes irrevocable if, after the completion of the *ʿidda* period, the parties fail to reconcile or after the utterance of a third *ṭalāq*. After the first or second irrevocable *ṭalāq*, the parties must remarry before they can reconcile. However, after the third utterance of *ṭalāq*, the wife must first undergo *hilala* before the parties may remarry. *Hilala* refers to an intervening marriage where the wife must marry another man and consummate that marriage, and the marriage must dissolve through death or divorce before she and her previous husband may marry each other again. *Tafwīḍ al-ṭalāq* is a delegated form of Muslim divorce where the husband delegates the right of *ṭalāq* to his wife; thus, it is also extrajudicial. Whether or not the *tafwīḍ al-ṭalāq* requires fault to be shown depends on whether the husband delegates his right on a conditional or unconditional basis. *Tafwīḍ al-ṭalāq* may be included as a provision in a marriage contract. *Khulʿ* is an extrajudicial, no-fault-based Muslim divorce that is available exclusively to women. When a wife effects *khulʿ*, she is required to return her *mahr*. A traditional and conservative interpretation of Islamic law

rights between men and women and are adopted by most of the South African *ʿulamāʾ*.[36] In South Africa, men often effect divorce through triple *ṭalāq*,[37] which is accepted as an Islamically permissible form of divorce by the South African *ʿulamāʾ*. Triple *ṭalāq* is a pernicious form of *ṭalāq* that entails the utterance of the word "*ṭalāq*" (divorce) thrice in succession in one sitting, which immediately and irrevocably terminates the marriage without providing the wife with any form of defense or recourse to prevent the dissolution of the marriage. The triple *ṭalāq* therefore negates the wife's right to *audi alteram partem* (the right to be heard). Should the parties decide to reconcile, the wife must first undergo *ḥilāla*, which requires her to marry another man and for

requires the husband's consent for the *khulʿ*, while a progressive understanding of Islamic law sees the *khulʿ* as a balance against the *ṭalāq* mechanism and accordingly does not require the husband's consent. *Faskh* is available to both the husband and wife. It is a fault-based and judicial form of Muslim divorce. Since *ṭalāq* is easily obtainable by men, *faskh* is usually relied on by women who may be required to return their *mahr* in order to be released from the marriage. K.N. Ahmad, Muslim Law of Divorce 29, 33, 219–20 (1978); Doi, *supra* note 34, at 192; John L. Esposito, Islam: The Straight Path 41, 78, 83 (1991); John L. Esposito & Natana J. DeLong-Bas, Women in Muslim Family Law 28–29 (2d ed. 2001); Asaf A.A. Fyzee, Outlines of Muhammadan Law 144 (1949); Wael B. Hallaq, The Origins and Evolution of Islamic Law 23 (2005); Ibn Rushd, *supra* note 30, at 75; Vijay Malik, Muslim Law of Marriage, Divorce and Maintenance 99 (1961); David Pearl, A Textbook on Muslim Law 52, 102 (1979); Abduraghiem Sallie, The Book on Ṭalāq 177–78 (1993); Schacht, *supra* note 34, at 164; Talāq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce; An Information Kit 11 (L. Carroll & H. Kapoor eds., 1996); Women Living Under Muslim Laws, Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World 278–79 (2003); Amien, *supra* note 22, at 53–77; Sayyid Sabiq, *Fiqh Us-Sunnah: Doctrine of Sunnah of the Holy Prophet* 51 (undated). *See also* Qurʾān 2:229 ("If ye (judges) do indeed fear that they (men and women) would be unable to keep the limits ordained by God, there is no blame on either of them if she give something for her freedom."); Qurʾān 65:1 ("When ye do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: ... And turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness."); Qurʾān 2:232 ("When ye divorce women, and they fulfil the term of their (*ʿIddat*), do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms.").

36 The *ʿulamāʾ* comprises a body of male religious leaders within the South African Muslim community who provide religious guidance on matters pertaining to interpretations of Islamic law.

37 Firasat Ali & Furqan Ahmad, Divorce in Mohammedan Law: The Law of Triple Divorce 22 (1983).

her subsequent marriage to be terminated before the parties are permitted to remarry.[38] Men are not similarly required to observe *ḥilāla*.

Although men are also not expected to obtain anyone's permission to issue *ṭalāq*, it has become customary in South Africa for them to acquire a *ṭalāq* certificate from the South African *'ulamā'* as confirmation that a *ṭalāq* has taken place. In cases of dispute regarding the validity of the *ṭalāq*, the *'ulamā'* usually make a pronouncement whether the *ṭalāq* is valid or not. The dispensing of the *ṭalāq* certificate and decisions relating to the validity of the *ṭalāq* are sometimes undertaken in an arbitrary manner, usually with disastrous consequences for women and children who have no recourse to appeal the decisions in a secular court due to the non-recognition of Muslim marriages in South Africa. The arbitrary nature in which the South African *'ulamā'* can dispense *ṭalāq* certificates and the kind of harm that can be caused by that was illustrated in the case of *Faro v. Bingham*.[39] The *Faro* case was adjudicated in the Western Cape High Court in 2013 and is one of the cases in the consolidated application.[40] In the *Faro* case, the applicant, Faro, was married to the deceased by Muslim rites only.[41] When the applicant tried to access the benefits of the Intestate Succession Act[42] and the Maintenance of Surviving Spouses Act,[43] the Master of the High Court refused to recognize her claims because the Muslim Judicial Council (MJC),[44] which is one of the main *'ulamā'* bodies in the Western Cape, confirmed that her marriage to the deceased was annulled by way of *ṭalāq*.[45] As a result, the applicant was rendered homeless, and her children were taken into state care.[46] In the context of an application to be

38 Esposito, *supra* note 35, at 78, 83; Hallaq, *supra* note 35, at 23.
39 *Faro*, Case No. 4466.
40 For a discussion of the *Faro* case, see Amien, *supra* note 22, at 68.
41 *Faro*, Case No. 4466, para. 2.
42 81 of 1987.
43 27 of 1990.
44 More information about the Muslim Judicial Council can be accessed on its website: https://mjc.org.za [https://perma.cc/8ATH-U8ZX].
45 *Faro*, Case No. 4466, paras. 3–7, 10.
46 *Id.* at para. 9.

recognized as a spouse under the Intestate Succession Act and the Maintenance of Surviving Spouses Act, the applicant disputed the validity of the *ṭalāq* on the basis that it was revoked by the deceased during her '*idda* period.[47] On assessing the evidence placed before it, the Court found that the *ṭalāq* was indeed revoked and that the parties were still married to each at the time of the deceased's death.[48] The Court therefore found that Faro could inherit as a surviving spouse in terms of the Intestate Succession Act and the Maintenance of Surviving Spouses Act.[49]

In the consolidated application, Faro also argued that the Master's decisions arising from inquiries into the validity of Muslim marriages for the purpose of assessing claims in respect of the Intestate Succession Act and the Maintenance of Surviving Spouses Act amounted to administrative action as envisaged by the Promotion of Administrative Justice Act.[50] Faro asked for an order that the Minister of Justice and Constitutional Development put into place policies and procedures to regulate inquiries by the Master of the High Court into the validity of Muslim marriages.[51] The Western Cape High Court disagreed that there was any statutory obligation on the Minister of Justice and Constitutional Development to implement the requested policies and procedures and accordingly denied the order.[52] In the absence of state regulation of Muslim marriages and divorces, the Court's order will most likely result in the Master's office continuing to be guided by the arbitrary manner in which the *ṭalāq* mechanism is approached within South African Muslim communities. Consequently, Muslim widows who face challenges to the validity of their marriages will suffer the brunt of a lack of administrative measures when trying to access the benefits of the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

Unlike men, women in South Africa have to obtain permis-

47 *Id.* at para. 4.
48 *Id.* at paras. 29–32.
49 *Id.* at para. 32.
50 3 of 2000; *The WLCT Matter* at paras. 42–43.
51 *The WLCT Matter*, para. 42.
52 *Id.* at paras. 236, 252.

sion to divorce either by acquiring their husbands' consent to exercise *khulʿ* or *tafwīḍ al-ṭalāq* or by obtaining *faskh* from the *ʿulamāʾ*. *Tafwīḍ al-ṭalāq* is usually included as a provision in a marriage contract. However, anecdotal observation suggests that most South African Muslims do not enter into written marriage contracts, either because they are unaware of their right to do so or because of power imbalances in the relationship where men refuse to sign a written contract to regulate their marriages.[53] The parties tend to sign only a Muslim marriage certificate that contains a stipulation relating to the payment of *mahr*. Thus, Muslim husbands in South Africa rarely delegate their right of *ṭalāq* to their wives. If a South African wife wishes to exit her Muslim marriage, she must apply to the *ʿulamāʾ* for *faskh* to dissolve the marriage on an Islamically permissible ground. The South African *ʿulamāʾ* establish Muslim tribunals to adjudicate *faskh* applications. In the event that the husband opposes the wife's application, the *ʿulamāʾ* tend not to grant *faskh* even when Islamic law grounds appear to exist for the granting of *faskh*. Instead, the *ʿulamāʾ* encourage wives to attempt reconciliation with their husbands.[54] It is therefore difficult for a wife to obtain *faskh* in South Africa. In the few instances where a Muslim tribunal decides a matter in favor of a wife, non-recognition of Muslim marriages renders the decision unenforceable in a court of law.[55] A South African Muslim wife may also effect *khulʿ*, but this form of Muslim divorce is not as commonly invoked as *faskh*. Also, *khulʿ* is only deemed valid by the South African *ʿulamāʾ* if the husband consents to it. It is thus easier in South Africa for men to end their Muslim marriages than it is for women.

Unequal treatment between men and women that attach to a Muslim marriage in South Africa, which militates against women, also relates to, among others, consent to marriage, *mahr*, *nafaqa*, matrimonial property regimes, and *ʿidda*, each of which is discussed briefly below.

53 Amien, *supra* note 22, at 53–77.

54 Mariam Orrie, Domestic Violence in Cape Town: The Role of Religious Leaders in Marital and Divorce Disputes Within the Muslim Minority Communities 28 (2012) (unpublished MPhil dissertation, University of Capetown).

55 *The WLCT Matter* at para. 137.

A traditional and conservative understanding of Islamic law requires the consent of the adult bridegroom-to-be for a valid Muslim marriage to be entered into, while the consent of the bride-to-be is not always required.[56] For instance, the Shāfiʿī school of thought, which is predominant in the Western Cape province in South Africa, requires the consent of the *walī* (guardian) of a female who has never been married for the marriage to be considered valid, regardless of the female's age and whether or not she consents to the marriage.[57] Fortunately, the latter aspect of the consent requirement no longer appears to be practiced in South Africa. However, the bride's *walī* or whomever the *walī* designates as his *wakīl* (guardian's delegate) must still, in addition to the bride, consent to the marriage. Furthermore, the *walī* is required to be male (usually the bride-to-be's father), unless the bride-to-be has no paternal male relative.[58] In contrast, the consent of the *walī* of the bridegroom-to-be is not similarly required. The consent of the bridegroom-to-be is considered sufficient.[59]

The above description of consent to marriage has evolved into a practice within the South African Muslim communities where only males attend the *nikāḥ* (marriage ceremony). In the few instances where females attend, they are not part of the ceremony and sit away from the men, usually in another part of the venue from where the *nikāḥ* is taking place. The bride-to-be's *walī* or his *wakīl* acts as her proxy and offers consent to the marriage on her behalf. The bridegroom-to-be can be involved in the *nikāḥ* if he wishes. However, he may choose to have his *walī* or his *walī*'s *wakīl* contract the *nikāḥ* on his behalf and in his presence. A simi-

56 Ibn Rushd, *supra* note 30, at 4.

57 Under traditional Islamic law, males and females are considered to be adults when they reach puberty. Thus, the consent of a male who has reached puberty is always required for marriage. In contrast, the Shāfiʿī and Mālikī *madhāhib* do not require the consent of a virgin female to marry even if she is considered an adult. *See id.* In the context of South African Muslim communities, there appears to be an (unspoken) presumption that if you have never been married, you are presumed to be a virgin.

58 Sabiq, *supra* note 35, at 105.

59 Ibn Rushd, *supra* note 30, at 4.

lar choice is not bestowed on the bride-to-be. Her *walī* or the latter's *wakīl* is expected to contract the *nikāḥ* and sign the Muslim marriage certificate on the bride-to-be's behalf. In the meantime, the bride-to-be is expected to remain out of sight, or at the very least, not be heard.

In the case of *mahr*, most of the South African *ʿulamāʾ* accept the traditional and conservative Islamic law implication attached to the payment of *mahr*, which requires a wife to be sexually subservient to her husband.[60] Furthermore, the husband's Islamic law unilateral obligation to provide *nafaqa* to his wife in turn requires the wife to be obedient to her husband.[61] In the absence of a written provision regulating the matrimonial property regime of the parties, the Muslim marriage is deemed to be one where the estates of the parties are kept separate when they enter the marriage, during the marriage, and at dissolution of the marriage.[62] In most Muslim marriages in South Africa, assets are usually acquired in the husband's name. Thus, when the marriage terminates, women are left financially destitute. Furthermore, the traditional and conservative interpretation of Islamic law that does not provide the wife with a right to post-*ʿidda* spousal *nafaqa* is adopted by the *ʿulamāʾ* in South Africa since the husband's duty to support his wife is considered to have ended after the expiration of the *ʿidda* period.[63] This compounds the wife's financial impoverishment when the marriage ends. Moreover, *ʿidda* (and as previously mentioned *ḥilāla*) are burdens that only women are expected to bear under a traditional and conservative understanding of Islamic law.

It is evident from the above that non-recognition of Muslim marriages in South Africa has effectively left the regulation of

60 Ziba Mir-Hosseini, *The Construction of Gender in Islamic Legal Thought and Strategies for Reform*, 1 Hawwa 13 (2003).

61 Kecia Ali, *Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law*, *in* Progressive Muslims: On Justice, Gender, Pluralism 170 (Omid Safi ed., 2003); Sabiq, *supra* note 35, at 106. *See also* Qurʾān 4:34.

62 S.H. Hacq Nadvi, *Towards the Recognition of Islamic Personal Law*, *in* The Internal Conflict of Laws in South Africa 16 (A.J.G.M. Sanders ed., 1990).

63 Ibn Rushd, *supra* note 30, at 114.

the body of Muslim family law to Muslim communities. Since the *'ulamā'* strongly influence the way in which Muslim marriages and divorces are practiced in the South African Muslim communities, their traditional and conservative interpretations of Islamic law have resulted in rules and practices that discriminate against women, some of which are described above. Non-recognition of Muslim marriages and limited judicial recognition of aspects of Muslim marriages therefore mean that Muslim family law is either not regulated at all or is not regulated sufficiently by the South African legal system.[64] This in turn means that gender-discriminatory Islamic law rules and practices are maintained within a private domain that is not held publicly accountable, particularly to human rights standards. Muslim parties, especially women, are thus unable to access the South African legal system to regulate the consequences of their Muslim marriages and divorces in a way that would protect and promote women's human rights.

The above are strong indicators that legal recognition and regulation of Muslim marriages in South Africa are necessary. Although, as mentioned previously, the judiciary has provided relief wherever possible to parties married by Muslim rites, it has refrained from amending existing law to afford full legal recognition to Muslim marriages. Instead, as also mentioned previously, the judiciary has adopted the position that recognition of Muslim marriages should be effected by the legislature.[65] Furthermore, there are some forms of relief that a civil court would not be able to provide without an "empowering basis,"[66] such as legislation that recognizes and regulates the features of a Muslim marriage and divorce. For example, a civil court has neither legal nor religious authority to grant a Muslim divorce. However, if legislation were to be enacted to make provision for the dissolution of a Muslim marriage by a civil court and such legislation elicited buy-in from the majority of the *'ulamā'* bodies in South Africa, a civil court

64 *See* the founding affidavit in *The WLCT Matter*, para. 8.

65 Amod v. Multilateral Motor Vehicle Accidents Fund (Comm'n for Gender Equal. Intervening) 1999 (4) SA 1319 (SCA) at paras. 28, 108; *Faro*, Case No. 4466, para. 44; Moosa v. Harnaker 2017 (6) SA 425 (WCC) at para. 16.

66 *The WLCT Matter* at para. 141.

would be able to award a Muslim divorce that would be deemed acceptable within the Muslim communities and would be legally enforceable. An example of legislation that proposes to enable a civil court to grant Muslim divorce is the Muslim Marriages Bill,[67] which is discussed briefly in the following sections.

For the past twenty-five years since the inception of South Africa's constitutional democracy in 1994, the South African State has from time to time initiated one initiative or another purporting to lead to the recognition of Muslim marriages. As illustrated below, the timing of each initiative appears to coincide with the periods linked to South Africa's national elections, which occur every five years. It is therefore hard not to surmise, as indicated in the introduction to this Article, that the primary motivation underlying state initiatives relating to the recognition of Muslim marriages may be to solicit votes among the South African Muslim electorate.

## III. State Initiatives Relating to the Recognition of Muslim Marriages

The first state initiative was the establishment of a Muslim Personal Law Board in 1994. The Muslim Personal Law Board was required to draft legislation to recognize Muslim Personal Law. Due to ideological differences relating to Islamic law and human rights, the Muslim Personal Law Board disbanded within a year of its formation.[68]

Several years later, in 1999, the South African Law Reform Commission constituted a Project Committee to draft legislation to recognize and regulate Muslim marriages.[69] In 2003, the South

67 *Islamic Marriages and Related Matters: Report [Project 59]*, South African Law Reform Commission 110 (2003), http://www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf [https://perma.cc/5P47-MS46]. A subsequent amended Muslim Marriages Bill, which no longer appears to be available online, is on file with the author.

68 Ebrahim Moosa, *The Fate of Muslim Personal Law*, Centre for Contemporary Islam, University of Cape Town (1999), http://www.cci.uct.ac.za/usr/cci/publications/aria/download_issues/1999/1998_6.pdf [https://perma.cc/JVL4-Y26X].

69 Waheeda Amien, *Overcoming the Conflict Between the Right to Religious*

African Law Reform Commission Project Committee submitted a draft Muslim Marriages Bill (hereafter referred to as the "first Muslim Marriages Bill") to the Ministry of Justice and Constitutional Development.[70] The first Muslim Marriages Bill was the negotiated result of protracted discussions between the South African Law Reform Commission Project Committee and various sections of civil society and Muslim communities in South Africa.

In about 2005, the Commission on Gender Equality attempted to offer an alternative to the Muslim Marriages Bill by drafting a Recognition of Religious Marriages Bill, which it submitted to the Ministry of Home Affairs.[71] The Recognition of Religious Marriages Bill purports to afford recognition to all religious marriages by allowing religious communities to regulate their own religious marriages while requiring the dissolution of the marriages to be regulated through a civil court on terms similar to those contained in the Divorce Act.[72] The Recognition of Religious Marriages Bill did not appear to elicit support from any of the South African religious communities and appears to have been shelved.[73]

By 2009, when no further progress appeared to be on the horizon for the recognition of Muslim marriages, the Women's Legal Centre Trust (WLCT) launched an application in the Constitutional Court, asking for direct access to the Court and that the Court order the South African government to enact legislation to recognize and regulate the consequences of Muslim marriages.[74] The WLCT is a non-profit trust and manages the Women's Legal Centre (WLC), a non-profit law center that conducts public inter-

*Freedom and Women's Rights to Equality: A South African Case Study of Muslim Marriages*, 28 Hum. Rts. Q. 740 (2006).

70 *Islamic Marriages and Related Matters*, *supra* note 67, at 110.

71 A copy of the Recognition of Religious Marriages Bill is on file with the author.

72 70 of 1979. Clauses 2, 10 of the Recognition of Religious Marriages Bill.

73 For a discussion of the Recognition of Religious Marriages Bill, see Waheeda Amien, *A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context*, 24 Int'l J.L. Pol'y & Fam. 369 (2010).

74 *The WLCT Matter*.

est litigation to protect and advance the human rights of women.[75] The Constitutional Court found that the disputed issues raised in the matter involved factual as well as legal ones. The Court therefore held that it was not appropriately placed as a court of first and final instance to adjudicate the disputed issues, which may require the tendering of evidence. The Court accordingly dismissed the application for direct access.[76]

Although the WLCT was not successful in the Constitutional Court, it appears that the application spurred the Department of Justice and Constitutional Development to apply its mind to the Muslim Marriages Bill. In 2009/2010, the Department of Justice and Constitutional Development unilaterally effected changes to the first Muslim Marriages Bill without eliciting input from any of the stakeholders who were consulted about the first Muslim Marriages Bill. The amended Muslim Marriages Bill (hereafter referred to as the "second Muslim Marriages Bill") was gazetted in 2011, and the public was invited to submit comments on it.[77] Both the first and second Muslim Marriages Bills purported to comprehensively recognize and regulate the consequences of a Muslim marriage. Even though the majority of mainstream *'ulamā'* bodies represented by the United Ulama Council of South Africa (UUCSA)[78] expressed support for the Muslim Marriages Bill,[79] the

75 WLCT's founding affidavit at paras. 3, 30.

76 *The WLCT Matter* at para. 28.

77 The second Muslim Marriages Bill no longer appears to be online, but a copy is on file with the author. For further discussion on the Muslim Marriages Bill, see Waheeda Amien, *The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa*, *in* Managing Family Justice in Diverse Societies, 109–17 (Mavis Maclean & John Eekelaar eds., 2013); Amien, *supra* note 73, at 371–80.

78 The United Ulama Council of South Africa (UUCSA) is an umbrella structure that represents most of the Sunnī *'ulamā'* bodies in South Africa. The majority of South African Muslims follow the Sunnī tradition. Within this tradition, most South African Muslims adhere to the Ḥanafī *madhhab* (school of thought), followed by adherents of the Shāfi'ī *madhhab* and to a lesser extent the Māliki *madhhab*. Among others, a minority of South African Muslims are located within the Shī'ī tradition through the Ja'farī *madhhab*. Amien, *supra* note 69, at 731; Moosa, *supra* note 14, at 131; *UUCSA Hosts a Successful Elective AGM*, Muslim Judicial Council (SA) (Oct. 13, 2017), http://mjc.org.za/2017/10/13/uucsa-hosts-a-successful-elective-agm [https://perma.cc/76A6-S5K5].

79 *The WLCT Matter* at para. 100.

South African State has taken no further steps to process the Muslim Marriages Bill for parliamentary consideration. The reasons for the state's inaction are provided later in the Article when the state's arguments in the consolidated application are discussed.

I have elsewhere offered an analysis of the different options for recognizing Muslim marriages including the Muslim Marriages Bill and the Recognition of Religious Marriages Bill.[80] Without duplicating the analysis in this Article in great detail, I argue that the Muslim Marriages Bill offers better protection for women's rights than the Recognition of Religious Marriages Bill. This is because the Muslim Marriages Bill purports to recognize and comprehensively regulate the features of a Muslim marriage and divorce, while the Recognition of Religious Marriages Bill enables the regulation of different religious marriages and religious divorces to be undertaken by the religious communities themselves.[81] Under the Muslim Marriages Bill, women will be able to enforce their Islamic law rights to Muslim divorce, among others, through a civil court. Similarly, since features of the Muslim marriage and divorce would be regulated through the Muslim Marriages Bill, gender-discriminatory rules and practices that are contained in the legislation could be challenged in a civil court and reformed in a way that could be consistent with human rights norms. In contrast, if religious communities are permitted to regulate their religious marriages and religious divorces according to their understanding of religious law requirements, as is made possible under the Recognition of Religious Marriages Bill, it could result in gender-discriminatory religious rules and practices being maintained within those communities. For instance, although the Recognition of Religious Marriages Bill proposes terms similar to those contained in the Divorce Act for a legal dissolution of a religious marriage,[82] a pronouncement of a religiously valid divorce can only be obtained from within the religious communities themselves. Therefore, women would face the same impediments

80 Amien, *supra* note 73, at 371–80; Amien, *supra* note 77, at 109–17.
81 Recognition of Religious Marriages Bill, clause 2.
82 *Id.*, clause 10.

to accessing religious divorce within their religious communities under the Recognition of Religious Marriages Bill as they do currently. The difficulties that Muslim women in South Africa face to obtain Muslim divorce have already been raised. Women in Jewish and Hindu communities in South Africa face similar difficulties, although for different reasons. Even though Jewish and Hindu parties appear to have equal rights in relation to divorce, due to the potentially polygynous nature of Jewish and Hindu marriages, the impact of Jewish and Hindu divorce rules on men and women is unequal. For example, while Jewish husbands and wives each require the other's consent to obtain a *get* (Jewish divorce), if a wife withholds her consent, the husband may remarry according to Jewish law, but the wife may not similarly remarry if it is her husband who is withholding consent to divorce.[83] Under Hindu law in South Africa, neither party is permitted to divorce.[84] Yet, the Hindu husband may marry other women while the Hindu wife is precluded from marrying other men.[85] So, Muslim and Jewish women who experience difficulty in obtaining religious divorce and Hindu women who are not permitted to divorce under Hindu law in South Africa end up being trapped in unwanted marriages without the possibility of being able to move on with their lives while their husbands have the religious right to do so.

Several years later, just weeks before South Africa's fifth national elections in 2014, the Department of Home Affairs launched what is now known as the "Imām Project."[86] The Department of Home Affairs invoked section 3(1) of the Marriage Act,[87] which enables Muslim religious leaders such as *imām*s to be authorized as marriage officers so that they may register civil marriages.[88] The

83 Pascale Fournier, Pascal McDougall & Merissa Lichtsztral, *A "Deviant" Solution: The Israeli* Agunah *and the Religious Sanctions Law*, *in* Managing Family Justice in Diverse Societies 89, 91 (Mavis Maclean & John Eekelaar eds., 2013).

84 Singh v. Ramparsad 2007 (3) SA 445 (D) at para. 1.

85 Werner F. Menski, Hindu Law: Beyond Tradition and Modernity 427 (2003).

86 *The WLCT Matter* at para. 23; WLCT's founding affidavit at para. 90.

87 25 of 1961.

88 Marriage Act 25 of 1961 § 3(1), provides:

> The Minister and any officer in the public service authorized

Department of Home Affairs suggested that registration of *imām*s would legalize Muslim marriages.[89] This was a fallacy. Even when an *imām* performs a *nikāḥ* and simultaneously registers a civil marriage, only the latter is legal. The Muslim marriage remains unlawful, which, as mentioned previously, means that Muslim wives cannot automatically access rights attached to the Muslim marriage contract and need to approach the High Court for relief.

The most recent state initiative, during the run-up to South Africa's sixth national elections in 2019, was the establishment of a South African Law Reform Commission Advisory Committee and the publication of an Issue Paper to explore the possibility of a single marriage statute to afford recognition to all marriages in South Africa.[90] The South African Law Reform Commission suggests that it is exploring the possibility of a single marriage statute, which could take one of two forms: a) a "single or unified marriage act" that would comprise "a unified set of requirements (and possibly consequences)" for all marriages; or b) an "omnibus or umbrella marriage statute" that would contain "different chapters which reflect the current diverse set of legal requirements for and consequences of civil marriages, civil unions, customary marriages, Muslim, and possibly other religious marriages."[91]

The first option proposed by the South African Law Reform Commission, namely a "single or unified marriage act," appears to emanate from the desire of the current Minister of Home Affairs, Naledi Pandor, for marriages to adhere to uniform norms and to ensure that all marriages in South Africa are registered and

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thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.

89 *Imams Graduate as Marriage Officers*, S. Afr. Gov't News Agency (May 1, 2014), http://www.sanews.gov.za/south-africa/imams-graduate-marriage-officers [https://perma.cc/48WR-DX35].

90 *Single Marriage Statute [Project 144, Issue Paper 35]*, South African Law Reform Commission 15, http://www.justice.gov.za/salrc/ipapers/ip35_prj144_SingleMarriageStatute.pdf [https://perma.cc/DXC5-FA34].

91 *Id.*

captured on the Department of Home Affairs data system.[92] She formulates her concerns with reference to the doctrine of equality by suggesting that all marriages should meet the same requirements.[93] She also suggests that "the state should have no interest in who one marries, how the religious or cultural rituals are conducted and should therefore have no interest in giving legal legitimacy to one or other practice in relation to the conclusion of a marriage."[94]

The underlying premise as conveyed by Minister Pandor for the proposed "single or unified marriage act" is problematic for four reasons. First, it is tantamount to suggesting that the Marriage Act and common law definition of marriage should be amended to make provision for the recognition of all forms of marriages in South Africa. This will not solve the current difficulties that women face within their religious communities relating to discriminatory religious rules and practices, the most pressing being access to religious divorce. Second, while the proposal may meet the requirements for formal equality (that likes be treated alike), it will not promote substantive equality, which is the approach to equality that is consistent with South Africa's constitutional imperatives. As indicated by the South African Constitutional Court:

> [A]lthough a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which

92 *Id.* at 1–2.
93 *Id.*
94 *Id.* at 2.

> furthers the constitutional goal of equality or not.[95]

The Constitutional Court also acknowledged that

> The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women.[96]

If the impact of equal treatment results in inequality, particularly where the inequality exacerbates disadvantage among marginalized members of society such as women in religious communities, then differential treatment is justified. Religious rules and practices, particularly of a discriminatory nature, will not be able to be regulated through a single or unified marriage act and could continue unabated within religious communities. For instance, a single or unified marriage act will not enable women in religious marriages to obtain religious divorce. In this way, a single or unified marriage act will not be responsive to the lived realities of all women in South Africa, which is an imperative of substantive equality. Third, the proposal for a single or unified marriage act promotes assimilation of the religious identity of religious marriage and religious divorce into the common law identity of a civil marriage and civil divorce, both of which are underscored by a Judeo-Christian paradigm of marriage. This is inconsistent with the ethos of legal pluralism and the celebration of diversity, which are promoted by the South African Constitution.[97] Fourth, the proposal assumes that the state has no responsibility to protect marginalized members within communities against harmful prac-

95 President of the Republic of South Africa v. Hugo 1997 (4) SA 1 (CC) at para. 41.

96 Daniels v. Campbell 2004 (5) SA 331 (CC) at para. 22.

97 Hassam v. Jacobs 2009 (5) SA 572 (CC) at para. 33.

tices within those communities. In fact, it ignores the private and public nature of the consequences of marriage. The Constitutional Court notes that marriage "bring[s] the most intense private and voluntary commitment into the most public, law-governed and state-regulated domain."[98] Marriage is thus deemed to be constitutionally significant because of its private and public importance.[99] To not bring religious marriages into the public "state-regulated domain" where they can be held accountable to human rights standards underscored by the foundational values of the Constitution, namely dignity, equality, and freedom, would mean that discriminatory religious family law rules and practices can remain hidden in the private sphere.

The second option for a single marriage statute, namely an "omnibus or umbrella marriage statute," proposes to accommodate the diverse forms of marriages in South Africa by incorporating chapters that each deal with a different type of marriage. In effect, this could mean incorporating existing legislation into the omnibus or umbrella marriage statute such as the Marriage Act,[100] Divorce Act,[101] Civil Union Act,[102] and Recognition of Customary Marriages Act,[103] which, respectively, make provision for opposite-sex marriages, same-sex unions, and African customary marriages. This could also be an opportunity for the South African Law Reform Commission to amend existing legislation that is potentially problematic, such as the Recognition of Customary Marriages Act, to make it more responsive to the lived realities of those who enter into the marriages.[104] Additional chapters could be included that each deal with different types of religious mar-

98 Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at para. 63.

99 *The WLCT Matter* at paras. 1–3, 124. *See also* DE v. RH 2015 (5) SA 83 (CC) at para. 39.

100 25 of 1961.

101 70 of 1979.

102 17 of 2006.

103 120 of 1998.

104 The Women's Legal Centre undertook a ten-year review of the implementation of the Recognition of Customary Marriages Act 120 of 1998, which highlights gendered challenges relating to the legislation. *Recognition of Customary Marriages*, Women's Legal Centre (2011).

riages. Some religious marriages may require more or less regulation than others. To ensure that the omnibus or umbrella marriage statute is appropriately responsive to the nuances of the different types of marriages and caters to the specific needs within the relevant communities, in-depth consultation with stakeholders within the relevant communities and broader civil society is required. This could take several more years. In the meantime, the Muslim Marriages Bill is capable of ameliorating many of the difficulties experienced by Muslim women. The Muslim Marriages Bill could therefore be enacted now and incorporated later into the omnibus or umbrella marriage statute.

The WLC notes that "it is regularly approached by [Muslim] women who experience hardships and are left with no remedies."[105] The suffering of women resulting from non-recognition of Muslim marriages and the delay by the South African State to afford legal recognition to Muslim marriages prompted the consolidated application in 2018 involving the *WLCT*, *Faro*, and *Esau* cases, in which the applicants asked the Western Cape High Court to order legislative intervention to recognize and regulate the consequences of Muslim marriages.[106] Several organizations supported the application as *amici curiae*, including the UUCSA, the Commission on Gender Equality, the Law Society of South Africa, South African Lawyers 4 Change, and the Muslim Assembly.[107] Salient arguments considered by the Western Cape High Court, the Court's decision, and the reasoning underscoring the decision are provided below.

## IV. The Consolidated Application: *Women's Legal Centre Trust v. President of South Africa* (*WLCT*), *Faro v. Bingham* (*Faro*), and *Esau v. Esau* (*Esau*)

As the primary applicant in the consolidated application,

105 The WLCT's argument expressed in the judgment. *The WLCT Matter* at para. 138.

106 WLCT's founding affidavit at para. 32.

107 *The WLCT Matter* at paras. 101, 103–05.

the WLCT argued that failure to recognize Muslim marriages as legally valid resulted in the state's abdication of its section 7(2) and 237 constitutional obligations.[108] Section 7(2) of the South African Constitution requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." Section 237 of the Constitution requires "[a]ll constitutional obligations...[to] be performed diligently and without delay." The WLCT contended that the constitutional rights affected by the state's failure to recognize Muslim marriages include equality (section 9), access to courts (section 34), best interests of the child (section 28(2)), dignity (section 10), and freedom of religion (section 15).[109] The WLCT's arguments, the South African State's responses and the Court's finding in respect of each of the aforementioned rights are discussed below.

*a. Equality*

The equality claim was based on the WLCT's argument that non-recognition of Muslim marriages differentiates between spouses in civil marriages on the one hand and monogamous and polygynous Muslim spouses on the other hand as well as between polygynous spouses in African customary marriages and polygynous spouses in Muslim marriages.[110] The test for determining a violation of the equality clause, particularly section 9(1) of the Constitution, which recognizes everyone's right to equality before the law and to "equal protection and benefit of the law," and section 9(3) of the Constitution, which proscribes unfair discrimination on the grounds of, among others, religion, marital status, gender, and sex, has been established by the South African Constitutional Court in the case of *Harksen v. Lane*.[111]

Guided by the aforementioned *Harksen* test, the WLCT contended the following: The differentiation between the afore-

108 *Id.* at paras. 4, 145.
109 *Id.* at para. 56.
110 *Id.* at para. 57.
111 1998 (1) SA 300 at paras. 42–53.

mentioned categories of spouses is based on grounds of religion, marital status, gender, and sex.[112] Since these are listed grounds for unfair discrimination contained in section 9(3), the discrimination arising from the differentiation is presumed to be unfair in terms of section 9(5) of the Constitution.[113] The unfair discrimination is of a direct and indirect nature.[114] Direct discrimination on the basis of religion and marital status arises from the fact that non-recognition of Muslim marriages negatively affects Muslim wives, husbands, and children.[115] Indirect discrimination on the basis of gender and sex results from Muslim women being disparately affected by the non-recognition of Muslim marriages *vis-à-vis* Muslim men.[116] For example, gender-discriminatory Islamic law rules and practices described earlier such as unequal access to divorce negatively affect Muslim wives while protecting Muslim husbands.

In response, the South African State averred that spouses in a Muslim marriage have the opportunity to enter into civil marriages.[117] The state's defense rested on three ways in which South African Muslims could enter into a civil marriage or union while simultaneously contracting a Muslim marriage. Muslim parties can a) register a civil union in terms of the Civil Union Act; or b) register a civil marriage under the Marriage Act with an authorized marriage officer such as a magistrate before or after concluding their Muslim marriage;[118] or c) have their *nikāḥ* officiated by a person who is a designated marriage officer registered under section 3(1) of the Marriage Act.

Until 2014, hardly any *imām*s were registered as marriage officers because they viewed civil marriages as un-Islamic, primarily for the following two reasons.[119] First, the default matrimonial property regime for a civil marriage is in community of prop-

112 *The WLCT Matter* at para. 122.

113 *Id.* at para. 57.

114 *See* S. Afr. Const., 1996 § 9(3) (proscribing direct and indirect forms of unfair discrimination).

115 *The WLCT Matter* at para. 122; WLCT's heads of arguments at para. 336.

116 *The WLCT Matter* at para. 122; WLCT's heads of arguments at para. 337.

117 *The WLCT Matter* at paras. 76, 85.

118 Marriage Act 25 of 1961 § 2(1).

119 WLCT's founding affidavit at para. 81.2.

erty, which conflicts with the traditional and conservative Islamic law rule that the estates of spouses must be kept separate at all times.[120] Second, marriage officers are not permitted to register polygynous marriages,[121] which is permissible under a traditional and conservative interpretation of Islamic law,[122] and is practiced among South African Muslim men. Yet, the Department of Home Affairs claims that more than 100 *imām*s across South Africa were trained and registered as marriage officers through the previously discussed "Imām Project."[123]

Through an informal investigation conducted by the WLC of the implementation of the "Imām Project," it appears that the Department of Home Affairs may have persuaded the *imām*s that they could overcome the aforementioned anti-Islamic impediments in two ways, namely a) by requiring parties to enter into antenuptial contracts to register their marriages as out of community of property without accrual, which is tantamount to maintaining separate estates, and b) that they could continue to perform polygynous Muslim marriages but need only register one of the marriages under the Marriage Act.[124] This means that subsequent polygynous Muslim marriages would not be legally recognized and the polygynous wives who are not party to the civil marriage would be without legal protection.

The WLC's investigation also reveals that few of the *imām*s who are authorized to register civil marriages are in fact registering civil marriages.[125] Most of the *imām*s who are marriage officers insist that the parties conclude a marriage out of community

120 Schacht, *supra* note 34.

121 Marriage Act 25 of 1961 § 11(2); WLCT's founding affidavit at para. 78.1.

122 Pearl, *supra* note 35, at 70. *See also* Qurʾān 4:3:

> If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.

123 *Imams Graduate as Marriage Officers*, *supra* note 89.

124 WLCT's founding affidavit at para. 101.

125 WLCT's founding affidavit at paras. 79, 101.

of property without accrual.[126] As noted previously, the separate estates-type matrimonial property regime has a disparate impact on Muslim women. In fact, the Muslim Judicial Council (MJC) drafted a *pro forma* marriage contract that parties are required to sign before MJC *imām*s are willing to register a civil marriage.[127] In addition to requiring the parties to register a marriage out of community of property without accrual, the *pro forma* marriage contract requires women to waive their Islamic law rights as wives and their civil rights as spouses. For instance, under Islamic law, a wife may claim compensation from her husband for labor that she performs in the home or any contributions that she makes for which he is responsible under his spousal *nafaqa* obligation.[128] The *pro forma* marriage contract contains a clause that expects a wife to relinquish her rights to claim such compensation.[129] The *pro forma* marriage contract also requires the wife to surrender her civil rights under the Intestate Succession Act[130] and Maintenance of Surviving Spouses Act[131] in the event that her husband predeceases her.[132] Thus, the WLCT argued that the MJC's *pro forma* marriage contract is prejudicial to women.[133] In fact, it is arguably unconstitutional on the basis that it unfairly discriminates against Muslim wives on the grounds of sex and/or gender. Accordingly, the WLCT asked the Western Cape High Court to declare the MJC's *pro forma* marriage contract contrary to public policy and unenforceable at law.[134] However, the Court dismissed the claim on the basis that it could not properly interrogate the *pro forma* marriage contract since the relevant parties involved in the

126 WLCT's founding affidavit at paras. 101–02; Matrimonial Property Act 88 of 1984 § 2.

127 WLCT's founding affidavit at para. 101.9.

128 Ali, *supra* note 61, at 170.

129 Muslim Judicial Council *pro forma* marriage contract, clause D(ii). Attached as an annexure to the WLCT's founding affidavit.

130 81 of 1987.

131 27 of 1990.

132 Muslim Judicial Council *pro forma* marriage contract, clause E. Attached as an annexure to the WLCT's founding affidavit.

133 WLCT's founding affidavit at para. 105; Matrimonial Property Act 88 of 1984 § 2.

134 *The WLCT Matter* at paras. 39, 63; WLCT's founding affidavit at para. 26.

contract were not before the court.[135] Hopefully the WLC (or another not-for-profit organization) will consider proceeding with a separate claim against the MJC to have its *pro forma* marriage contract declared contrary to public policy and unconstitutional. The horizontal application of the South African Constitution makes it possible for a constitutional claim to be instituted by one private party against another.[136]

Notwithstanding the Western Cape High Court's ruling on the MJC's *pro forma* marriage contract, the Court rejected the state's defense that Muslims can choose to register a civil marriage and could derive legal protection through that avenue for the following reasons.[137] First, the Court found that the option to register a civil marriage is not available to polygynous Muslim spouses since a civil marriage only affords legal recognition to *de facto* monogamous marriages.[138] Secondly, the Court observed that not all Muslim women in South Africa are aware that their Muslim marriages are not legally protected.[139] Thirdly, the Court noted that even when Muslim women realize that they need a civil marriage to access legal protections, unequal bargaining power between spouses could result in Muslim husbands refusing to enter into civil marriages, thereby preventing women from being able to exercise a choice to register a civil marriage.[140] Consequently, few South African Muslims avail themselves of the opportunity to enter into civil marriages, and the majority of South African Muslims, regardless whether they are in monogamous or polygynous marriages, still enter only into Muslim marriages.[141] The Court therefore found that the civil marriage option does not provide an adequate solution for the challenges presented by the non-recognition of Muslim marriages.[142] The Court held that "the

135 *The WLCT Matter* at para. 237.

136 Richard J. Goldstone, *The South African Bill of Rights*, 32 Tex. Int'l L.J. 460 (1997).

137 *The WLCT Matter* at paras. 76, 85, 129.

138 *Id.* at para. 129.

139 *Id.* at para. 131.

140 *Id.* at para. 130.

141 WLCT's founding affidavit at para. 78.2.

142 *The WLCT Matter* at para. 129.

assessment of the constitutional obligation [to equality before the law, equal protection and benefit of the law, and to not be unfairly discriminated against] cannot be negated by the women's choice not to register their marriages."[143] The Court accordingly found that the right to equality, particularly the right to not be unfairly discriminated against, had been infringed.[144]

In considering the second leg of the *Harksen* test—whether or not the infringement could be justifiably limited under section 36 of the Constitution[145]—the Western Cape High Court accepted the WLCT's contention that the state had not advanced any legitimate governmental purpose for infringing the equality provision.[146] The Court held that the state had failed to justify the unfair discrimination and found that continued non-recognition of Muslim marriages violates the right to equality.[147]

### *b. Access to Courts and the Best Interests of the Child*

Non-recognition of Muslim marriages also has an overlapping effect on the right to access to courts as contained in section 34 of the South African Constitution and a child's right to have her or his best interests protected as entrenched in section 28 of the Constitution. Section 34 provides, "Everyone has the right to have

143 *Id.* at para. 134.

144 *Id.* at paras. 134–35.

145 S. Afr. Const., 1996 § 36 provides:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

146 *The WLCT Matter* at paras. 57, 135.

147 *Id.* at para. 57.

any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." Section 28(2) provides, "A child's best interests are of paramount importance in every matter concerning the child."

As argued by the WLCT, the overlapping effect on the above two rights is caused by the preclusion of spouses in Muslim marriages from accessing a civil court to resolve disputes arising from their Muslim marriage and/or Muslim divorce relating to, among others, proprietary rights, *nafaqa*, and guardianship of, custody of, and access to minor children born of the Muslim marriage.[148] This especially has a disparate effect on Muslim women and children. For instance, as mentioned previously, Muslim women are unable to challenge adverse decisions emanating from Muslim tribunals, and, as previously noted by the WLCT, children born of only Muslim marriages do not enjoy judicial protection to ensure that their best interests are protected during the dissolution of their parents' Muslim marriage.[149] The WLCT pointed out that dissolution of Muslim marriages through Muslim divorce often results in "maltreatment, evictions and economic hardships for women and children of Muslim marriages."[150] Lack of judicial intervention to regulate the dissolution of Muslim marriages thus compounds the socioeconomic difficulties experienced by women and children as a result of non-recognition of Muslim marriages in South Africa.

In light of the above, the Western Cape High Court observed:

> Muslim women are not able to access the system for purposes of dissolving their marriages and regulating consequences thereof.... Vulnerabilities still exist, despite the protections that have been availed by the courts by extending consequences of different statutes to spouses in Muslim marriag-

148 *Id.* at para. 137.
149 *Id.* at para. 59.
150 *Id.*

> es.... [And] [c]hildren in Muslim marriages are... not provided with adequate protection as those in civil and customary marriages enjoy, upon dissolution of the marriage of their parents by way of divorce.[151]

Thus, the Court found that non-recognition of Muslim marriages violates sections 34 and 28 of the Constitution.[152]

*c. Dignity*

Dignity is a founding value in the South African Constitution along with equality and freedom.[153] It is also entrenched in section 10 of the Constitution as a stand-alone right. The WLCT argued that "[t]o treat spouses in Muslim marriages as unworthy of protection of the law devalues, stigmatises and further marginalises this vulnerable minority group."[154] In other words, non-recognition of Muslim marriages conveys the message that Muslim spouses are not of equal worth in relation to spouses whose marriages are lawfully recognized. This exacerbates the marginalization of an already marginalized minority community that has suffered historical discrimination on the basis of race and religion. Moreover, Muslim women suffer additional marginalization within the South African Muslim communities as a result of traditional and conservative interpretations and application of Muslim family law rules and practices that weigh against them. South African Muslim women therefore experience multiple marginalization because non-recognition of Muslim marriages increases their marginalization as marginalized members within a marginalized religious community. The Court thus held that continued non-recognition of Muslim marriages infringes against the right to dignity.[155]

151 *Id.* at para. 139.

152 *Id.* at para. 179.

153 S. Afr. Const., 1996 § 1(1). *See also* Daniels v. Campbell 2004 (5) SA 331 (CC) at paras. 54–55.

154 *The WLCT Matter* at para. 58.

155 *Id.* at para. 179.

The Western Cape High Court notably observed that the violation of the rights to equality, access to courts, best interests of the child, and dignity was caused by the continued non-recognition of Muslim marriages in South Africa and is thus systemic in nature.[156] In the words of the Court:

> As seen through the cases, the non-recognition of Muslim marriages is historic, persistent and unfulfilled since the beginning of democracy. This is not a single instance, but rather a systemic failure by the State to provide recognition and regulation, potentially effecting millions of people around the country. Marriage concerns a plethora of issues, from status to property, involving a wide range of laws, which are complex and fundamentally important.[157]

The above observation by the Western Cape High Court is significant in the context of the historical disadvantage suffered by the Muslim communities in South Africa as a result of their Muslim marriages not being recognized since their entry into the country during the seventeenth century. The religious discrimination experienced by South African Muslims also arises from the racial discrimination perpetrated against them during apartheid since most Muslims in South Africa were not classified "white" under apartheid. As the Constitutional Court has observed, "religious marginalization coincided strongly with racial discrimination, social exclusion and political disempowerment."[158]

The systemic discrimination caused by the continued non-recognition of Muslim marriages is perpetuated by the South African State's delay in affording legal recognition to Muslim marriages, which has resulted in especially Muslim women having to experience unnecessary hardships that have not been suffi-

156 *Id*. at para. 143.
157 *Id*. at para. 180.
158 *Daniels* 2004 (5) SA (CC) at para. 20 n.26.

ciently ameliorated by *ad hoc* judicial interventions over the last two decades.[159] The South African State claims that the delay is especially due to lack of consensus about the Muslim Marriages Bill within the Muslim communities.[160] In its capacity as *amicus curiae* in the consolidated application, the Commission on Gender Equality pointed out that lack of consensus regarding the Muslim Marriages Bill is insufficient as a reason not to enact legislation to recognize Muslim marriages when non-recognition of Muslim marriages results in a violation of rights against Muslim parties.[161] Also, non-consensus as a reason for the state's delay is disingenuous since the state has enacted other pieces of legislation that were equally, if not more, contentious. For example, the call for the recognition of same-sex unions and recognizing a woman's right to choose to terminate her pregnancy elicited huge outcries from religious communities.[162] Still, the South African State enacted the Civil Union Act, which recognizes same-sex unions, and the Choice on Termination of Pregnancy Act,[163] which gives effect to a woman's right to choose to abort her fetus during the first three months of pregnancy.[164] Furthermore, the state's claim that South African Muslims do not support the Muslim Marriages Bill appears to be inaccurate. As mentioned previously, the United Ulama Council of South Africa (UUCSA) indicated support for the Muslim Marriages Bill in the consolidated application.[165] At the same time, UUCSA advises that there are aspects of the first Muslim Marriages Bill, which were removed from the second Muslim Marriages Bill, that they would want to see reinserted into legislation seeking to rec-

159 *The WLCT Matter* at paras. 55, 184.

160 *Id.* at para. 22.

161 *Id.* at para. 1.

162 *Thousands Protest Against South African Gay Marriage Bill*, 365Gay.com (Sept. 17, 2006), https://web.archive.org/web/20070311053712/http://www.365gay.com/Newscon06/09/091606saf.htm [https://perma.cc/BX9Y-ZCMN]; Sally Guttmacher et al., *Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act*, 24 Int'l Persp. on Sexual & Reprod. Health 193 (1998).

163 92 of 1996.

164 Choice on Termination of Pregnancy Act 92 of 1996 § 2(1)(a).

165 *The WLCT Matter* at para. 100.

ognize Muslim marriages.[166] Yet, the contentious aspects of the second Muslim Marriages Bill are not insurmountable.[167] For instance, UUCSA expects the provision in the first Muslim Marriages Bill that enables opposed Muslim divorces to be adjudicated by a secular court comprising Muslim judges and assessors to be included in a final version of the Muslim Marriages Bill.[168] If it is unrealistic to expect only judges who identify as Muslim to adjudicate opposed matters arising from the Muslim Marriages Bill, given the small number of Muslim judges available in South Africa, there are creative ways to overcome this hurdle that could render an Islamically permissible solution.[169] For example, if a judge regardless of religious affiliation were to be guided by Islamic law experts sitting as assessors, the judgment would be informed by and thus rendered consistent with Islamic law. Yet, the South African State has not indicated a willingness to sit down with the relevant stakeholders in the South African Muslim communities to discuss and negotiate possible solutions that could potentially satisfy the interests of the affected parties. Consequently, the WLCT argued in the consolidated application that the delay on the part of the South African State to afford legal recognition to Muslim marriages is unreasonable.[170]

Persuaded by the applicant's arguments, the Western Cape High Court found that by failing to afford legal recognition to Muslim marriages, the South African State failed to fulfill its obligations under sections 7(2) and 237 of the Constitution.[171] To comply with its constitutional duties, the state would have to take reasonable and effective steps to ensure that the rights to equality, access to courts, best interests of the child, and dignity are complied with.[172]

166 *Id.* at para. 22.

167 Waheeda Amien & Dhammamegha Annie Leatt, *Legislating Religious Freedom: An Example of Muslim Marriages in South Africa*, 29 Md. J. Int'l L. 527–28 (2014).

168 *The WLCT Matter* at para. 22.

169 Amien & Leatt, *supra* note 167, at 527–28.

170 *The WLCT Matter* at paras. 55, 94, 109.

171 *Id.* at para. 252.

172 *Id.* at para. 152.

The WLCT argued that the most reasonable and effective way for the state to meet its constitutional obligations would be for it to enact legislation that recognizes and regulates the consequences of Muslim marriages.[173] In opposing the WLCT application, the South African State relied on, among others, the following two arguments. First, enactment of legislation that recognizes and regulates Muslim marriages would infringe against section 15(1) of the Constitution, which protects the individual right to freedom of religion.[174] Second, the enabling nature of section 15(3) of the Constitution does not oblige the state to enact legislation to recognize and regulate Muslim marriages or any other religious or traditional marriage or personal and family law system.[175] The state's arguments, the WLCT's responses, and the Western Cape High Court's findings in relation to religious freedom are discussed below.

*d. Freedom of Religion*

It seems that the basis for the first leg of the South African State's argument that legislation codifying Muslim family law would infringe against the right to freedom of religion is that codification would presumably preclude South African Muslims from practicing their religion in the manner that they choose.[176] This leg of the state's argument is self-defeating. The only way that codification of a Muslim marriage and divorce could undermine freedom of religion is if the way in which Muslim family law is currently interpreted and applied within South African Muslim communities is inconsistent with the rights in the Bill of Rights.[177] As pointed out at the beginning of this Article, the right to freedom of religion is not absolute. The South African Constitution does not permit anyone to practice her or his religion in community with others in a manner that violates other rights in the Constitution, including gender and sex equality. In fact, the Constitutional Court

173 *Id.* at para. 4.
174 *Id.* at para. 61.
175 *Id.* at paras. 77, 86.
176 *Id.* at para. 107.
177 S. Afr. Const., 1996, ch. 2.

confirmed that freedom of religion "cannot be used to shield practices which offend the Bill of Rights."[178] Thus, the WLCT argued that "religious practices in respect of divorce which violate the right to equality cannot be justified on the basis of the right to freedom of religion."[179]

The state's argument against codification of Muslim family law appears to be an admission that the way in which Muslim family law is presently practiced conflicts with constitutional rights. This is at odds with one of the objectives of family law, which is to afford protection to the most marginalized members of a family.[180] In the context of Muslim family law, state intervention is necessary to ensure that the constitutional rights of the most marginalized members of the South African Muslim communities, namely women and children, are protected. It has been noted in this Article that judicial relief for parties negatively affected by the non-recognition of Muslim marriages, while helpful, has proven to be insufficient. Furthermore, as observed by the Constitutional Court in *Bhe v. Khayelitsha*,[181] judicial intervention on a case-by-case basis is far from ideal because any changes to improve the position of marginalized parties is extremely "slow."[182] Thus, legislative intervention is required.

At the same time, the Western Cape High Court agreed with the second leg of the state's argument that section 15(3) of the Constitution does not place an obligation on the state to enact legislation to recognize and regulate religious marriages including Muslim marriages or religious personal and family law systems.[183] Yet, the Court noted that the Constitution does not prevent the enactment of such legislation.[184] Indeed, the Court found that the systemic discrimination and rights violations arising from the

178 Christian Educ. South Africa v. Minister of Educ. 2000 (4) SA 757 at para. 26; *The WLCT Matter* at para. 61.

179 *The WLCT Matter* at para. 61.

180 Khan v. Khan 2005 (2) SA 272 (T) at para. 10.5.

181 2005 (1) SA 580 (CC).

182 *The WLCT Matter* at para. 112.

183 *Id.* at paras. 183–84.

184 *Id.*

continued non-recognition of Muslim marriages require the enactment of legislation to recognize and regulate the consequences of Muslim marriages.[185] In particular, the Court held that "legislation is the most reasonable and effective way of protecting the rights implicated."[186]

The WLCT also argued that failure to legislate Muslim marriages may be inconsistent with South Africa's international and regional law obligations.[187] South Africa has ratified the main international and regional human rights instruments relating to women's rights including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[188] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol),[189] and the Southern African Development Community Protocol on Gender and Development (SADC Protocol).[190] The aforementioned instruments oblige States Parties to ensure that women and men enjoy equal rights in marriage, in family relations, and upon dissolution of the marriage. Moreover, the regional protocols require States Parties to enact legislation that enables all marriages including religious marriages to be registered according to national laws.[191] The

185 *Id.* at paras. 181, 183–84.

186 *Id.* at para. 188.

187 *Id.* at para. 70.

188 G.A. Res. 34/180 (Dec. 18, 1979). Ratified by South Africa in 1995. *South Africa's Compliance with the Convention on the Elimination of All Forms of Discrimination Against Women & 1995 Beijing Platform for Action Reporting Requirements: Commission on Gender Equality Briefing*, Parliamentary Monitoring Group (July 20, 2010), https://pmg.org.za/committee-meeting/11736/ [https://perma.cc/CVG7-QDVE].

189 Adopted by the African Union on July 11, 2003. Ratified by South Africa in 2003.

190 Ratified by South Africa in 2011. *Advocacy Toolkit for Women in Politics: Using the SADC Protocol on Gender and Development as an Advocacy Tool*, U.N. Entity for Gender Equality and the Empowerment of Women (n.d.), http://www.ipsnews.net/publications/usingthesadcprotocolongender.pdf [https://perma.cc/9B6P-YNW8].

191 Article 16(1) of CEDAW provides:

> States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

Western Cape High Court interpreted the above international and regional obligations as requiring South Africa to enact legislation to recognize Muslim marriages.[192] The international and regional instruments therefore fortify South Africa's domestic obligation to legislate Muslim marriages. In order for South Africa to effectively comply with its international, regional, and constitutional obligations, it has to enact legislation that not only recognizes Muslim marriages but also regulates the features and consequences of Muslim marriages within a human rights framework.

## V. The WLCT's Claims

In light of the aforementioned arguments presented by the WLCT, the latter put forth several claims. First, the WLCT asked the Western Cape High Court to grant a declaratory order that the South African State failed to fulfill its section 7(2) and 237 consti-

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(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution.

Article 6 of the Women's Protocol requires:

> States Parties [to] ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. [States Parties] shall enact appropriate national legislative measures to guarantee that...every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognized.

Article 8 of the SADC Protocol reads:

> (1) States Parties shall enact and adopt appropriate legislative, administrative and other measures to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage.
>
> ....
>
> (2)(c) Legislation on marriage shall ensure that every marriage, including civil, religious, traditional or customary, is registered in accordance with national laws.
>
> ....
>
> (3)(b) States Parties shall enact and adopt appropriate legislative and other measures to ensure that where spouses separate, divorce or have their marriage annulled...they shall, subject to the choice of any marriage regime or marriage contract, have equitable share of property acquired during their relationship.

192 *The WLCT Matter* at para. 183.

tutional obligations by failing to enact and bring into operation "diligently and without delay" legislation recognizing and regulating Muslim marriages.[193] Second, the WLCT requested the Court to grant an order directing that the South African State prepare, initiate, enact, and bring into operation legislation that provides for the recognition and regulation of the consequences of Muslim marriages within twelve months of the date of judgment.[194] In opposing the latter claim, the South African State relied on the doctrine of separation of powers. The state argued that a direction from the Court (representing the judiciary as one arm of the state) instructing the executive and/or legislature (representing the two other arms of the state) to enact legislation to recognize and regulate Muslim marriages infringes against the doctrine of separation of powers.[195] By way of reply, the WLCT contended that the judiciary is under a constitutional obligation to ensure that the arms of state conduct themselves in a constitutionally compliant manner, failing which the Court is obliged to declare the conduct invalid and ensure that an effective remedy is provided.[196] The Western Cape High Court observed that an order for a legislative remedy would not necessarily dictate to the executive and legislature which form the legislation should take.[197] The Court took the view that the manner of recognition and regulation would remain within the purview of the legislature and executive.[198] Thus, the Court did not accept that an order for the enactment of legislation to recognize and regulate Muslim marriages would undermine the doctrine of separation of powers.[199]

The South African State also argued that the relief sought by the WLCT would result in regulating fundamental features of Islamic law, which would undermine the doctrine of religious en-

193 *Id.* at para. 33.
194 *Id.*
195 *Id.* at paras. 81, 87, 90.
196 *Id.* at para. 71.
197 *Id.* at para. 188.
198 *Id.*
199 *Id.*

tanglement.[200] Both the WLCT and UUCSA took the view that the doctrine of religious entanglement does not arise in the application under discussion because the Court was not being asked to adjudicate on any religious precepts, and the Muslim Marriages Bill had been agreed to by the mainstream Muslims in South Africa.[201] The Western Cape High Court did not pronounce on this issue. However, one could assume that since the Court granted the WLCT's primary relief for the enactment of legislation to recognize and regulate the consequences of Muslim marriages, it most likely did not support the state's view on the matter of religious entanglement. The Court's orders are discussed later in the Article.

Until the enactment of legislation to recognize and regulate the consequences of Muslim marriages, the WLCT asked that interim relief be provided in the form of a reading-in to the Recognition of Customary Marriages Act[202] to include Muslim spouses within the ambit of the Recognition of Customary Marriages Act.[203] This was to ensure that women and children in Muslim marriages are not left unprotected pending the enactment of legislation to recognize and regulate Muslim marriages.[204] The WLCT's second primary claim was supported by Esau and the Commission on Gender Equality (CGE).[205] However, the CGE offered an alternative form of interim relief pending the enactment of legislation to recognize and regulate Muslim marriages. The CGE suggested that the Divorce Act should apply to the dissolution of Muslim marriages during the interim period and that words similar to those contained in sections 8(4)(b) and (c) of the Recognition of Customary Marriages Act[206]

200 *Id.* at paras. 80, 88.
201 *Id.* at paras. 72, 102.
202 120 of 1998.
203 *The WLCT Matter* at para. 36.
204 *Id.* at para. 202.
205 *Id.* at paras. 48, 111.
206 Recognition of Customary Marriages Act 120 of 1998 § 8(4), reads:

> A court granting a decree for the dissolution of a customary marriage
>
> ....
>
> (b) must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of

should be read into the Divorce Act.[207, 208] The aforementioned provisions of the Recognition of Customary Marriages Act require a court to consider all relevant factors in relation to the dissolution of a polygynous marriage and to make an equitable order that it deems just. The provisions also give the court discretion to order any person who the court believes to have sufficient interest in a matter to be joined in the proceedings. The latter order could enable an existing wife in a polygynous marriage to present her views to the court about the impending marriage.

In the alternative, the WLCT sought an order that the Marriage Act,[209] Divorce Act, and Recognition of Customary Marriages Act be declared inconsistent with the aforementioned constitutional rights to the extent that they do not provide for the recognition and regulation of Muslim marriages.[210] Overlapping relief was also sought in the *Faro* application in which Faro asked for a declaratory order to enable Muslim marriages to be brought within the ambit of the Marriage Act or the common law definition of marriage.[211] At the same time, the WLCT requested that a declaration of invalidity in respect of the Marriage Act, Divorce Act, and Recognition of Customary Marriages Act be suspended for a period of twelve months to afford Parliament the opportunity to correct the constitutional defects in the impugned legislation.[212]

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section 7 (4), (5), (6) or (7) and must make any equitable order that it deems just;

(c) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings...

207 70 of 1979.

208 *The WLCT Matter* at paras. 113, 212.

209 25 of 1961.

210 *The WLCT Matter* at para. 35.

211 *Id.* at para. 41. Faro's initial application was considered in the Western Cape High Court in 2013. Her claim for a declaratory order that Muslim marriages be treated as valid under the Marriage Act or that the common law definition of marriage be extended to bring Muslim marriages within its ambit was suspended by the Court to afford the South African State an opportunity to report on the progress of the Muslim Marriages Bill. The *Faro* case was thus added to the consolidated application under discussion, in which its claim for a declaratory order that Muslim marriages be deemed valid was included. *See supra* note 3.

212 *The WLCT Matter* at para. 37.

## VI. The Court's Orders

The Western Cape High Court granted the WLCT's primary claims and declared that the South African State failed to fulfill its obligations under sections 7(2) and 237 of the South African Constitution. The Court ordered the state to prepare, initiate, introduce, enact, and bring into operation, diligently and without delay, legislation to recognize and regulate the consequences of Muslim marriages within twenty-four months from the date that judgment was handed down.[213]

I have argued elsewhere that mere legislative recognition of Muslim marriages is not sufficient to ensure protection for women's rights. Rather, comprehensive regulation of the features of a Muslim marriage and divorce is required, not only to protect freedom of religion but also to provide appropriate protection for women's rights.[214] It is therefore heartening that the Western Cape High Court found that "[c]omprehensive legislation is required because it would provide effective protection of Muslim marriages concluded in terms of the tenets of Islamic law, whilst giving expression to Muslim persons' rights to freedom of religion."[215]

If Muslim family law was practiced within South African Muslim communities in a manner that was consistent with gender and sex equality, there would be no need for legislative intervention to recognize and comprehensively regulate the features of a Muslim marriage and divorce. Comprehensive regulation of the features of Muslim family law will ensure that the Muslim identity of the marriage and divorce remain intact and not be assimilated into the common law identity of a civil marriage. Comprehensive regulation will further bring the specific features of Muslim family law into the judicial domain where gender-discriminatory rules

213 *Id.* at para. 252.
214 Amien, *supra* note 73, at 381–84; Amien, *supra* note 77, at 121.
215 *The WLCT Matter* at para. 184.

and practices can be held accountable to human rights standards in the public sphere.

Notwithstanding the Court's indication that comprehensive recognition and regulation of Muslim marriages is needed, as mentioned previously, it was not inclined to dictate to the executive and legislature which form codification should take.[216] In this respect, the Court arguably guarded against infringing against the doctrine of separation of powers. However, the Court's reluctance to inform the manner of legislative intervention for the recognition and regulation of Muslim marriages means that the South African State can continue to choose not to enact the Muslim Marriages Bill. It would be a pity if the state ignored the rationale of the Court underpinning the aforementioned order that comprehensive regulation in addition to recognition of Muslim marriages is the only way to afford sufficient protection for the human rights of Muslim women. As outlined previously, any kind of legislation that does not purport to regulate the features of a Muslim marriage and divorce will create fertile ground for the violation of women's human rights.

The Court did not grant the WLCT's alternative claims or its claim for interim relief pending the enactment of legislation to recognize and regulate the consequences of Muslim marriages. Instead, guided by the CGE's claim for interim relief, the Court ordered that in the event that the state failed to meet its twenty-four-month deadline, interim relief would be afforded to enable Muslim marriages to be dissolved through the Divorce Act.[217] In other words, should the state not enact legislation within twenty-four months of the judgment being handed down, Muslim parties would be able to access the Divorce Act to have their marriages dissolved. The Court presumably granted the CGE's claim for interim relief because it considers divorce to be the main area where the judiciary has not yet provided relief to Muslim par-

216 *Id.* at para. 185.
217 *Id.*

ties.[218] This is not entirely accurate. Muslim women are certainly vulnerable at the point when the Muslim marriage terminates. However, their vulnerability is not confined to divorce. The fact that their Muslim marriages are not legally recognized and regulated also makes them vulnerable to discriminatory Muslim family law rules and practices that operate within marriage.

It is unclear why the Court deemed it necessary to only make the interim relief possible after the expiration of the twenty-four-month deadline. The challenges that Muslim women face in having their Muslim marriages dissolved exist presently, which is why the CGE asked that the interim relief be afforded pending the enactment of legislation to recognize and regulate Muslim marriages. The Court's order will leave Muslim women without protection for a further two years from the date of judgment, and this could be extended should the state succeed in getting the deadline extended further.

It is also unclear how the Court envisages the interim relief to be applied in the absence of having granted the WLCT's alternative claim that the Marriage Act, Divorce Act, and Recognition of Customary Marriages Act be declared unconstitutional and that Parliament be afforded an opportunity to amend the aforementioned legislation to include Muslim marriages within their ambit. In other words, for the Divorce Act to apply to the dissolution of Muslim marriages, the latter must be deemed to be lawful. In the absence of legislation that recognizes Muslim marriages, how can they be deemed to be lawful without existing marriage legislation being appropriately amended or the common law definition of marriage being extended to include Muslim marriages?

Even if Muslim marriages are deemed lawful after the expiration of the twenty-four-month deadline, dissolution of the marriage by way of the Divorce Act will still not solve the difficulties that Muslim women experience in accessing Muslim divorce. In fact, the Western Cape High Court indicated that in applying the provisions of the Divorce Act to the dissolution of a Muslim

218 *Id.* at paras. 142, 225.

marriage, the judiciary "would need to be sensitive to the requirements of Islamic law."[219] While this may not negatively affect minor children born of the Muslim marriage because the principle of the best interests of the child will likely outweigh religious considerations that could be adverse to the interests of the child, it could very likely militate against the interests of Muslim women. For example, in accordance with a traditional and conservative interpretation of Islamic law, the marriage could be deemed to be out of community of property without accrual. Also, while a civil divorce may be granted, Muslim women could still experience difficulty in obtaining a Muslim divorce and would therefore not be able to remarry according to Islamic law. In fact, section 5A of the Divorce Act gives the court discretion to not grant a civil divorce if a religious divorce has not been obtained.[220] Section 5A could thus have a disparate impact on a Muslim woman if she is seeking divorce and her husband and/or the *'ulamā'* are unwilling to grant her a religious one.

## Conclusion

The need for legal recognition of Muslim marriages in South Africa is patently evident. Without legal recognition of Muslim marriages, marginalized members within Muslim communities, namely women and children, are left without legal protection. In particular, this paper demonstrates that non-recognition

219 *Id.* at para. 229.

220 Divorce Act § 5A, reads:

> If it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just.

of Muslim marriages in South Africa results in the privatization of gendered oppression of Muslim women. A constitutionally permissible solution to the challenges presented by non-recognition of Muslim marriages is provided by the South African Constitution itself, which enables legislative intervention to afford legal recognition to, among others, Muslim marriages.

Yet, legal recognition alone will not provide sufficient protection for women's human rights because gender-discriminatory Muslim family law rules and practices will continue to persist within the private sphere of the South African Muslim communities. Comprehensive regulation is therefore necessary to ensure that rules and practices related to Muslim marriages and divorces that negatively affect women are transferred into a public domain that is informed by a human rights framework.

The necessity for comprehensive regulation of the consequences of Muslim marriages in addition to legal recognition of those marriages was confirmed by the Western Cape High Court in the WLCT matter. This confirmation defines the groundbreaking nature of the judgment. While the South African judiciary in several cases that were decided prior to the WLCT matter acknowledged the need for legal recognition of Muslim marriages, none identified the need for comprehensive regulation of the features of Muslim marriages. The groundbreaking feature of the judgment is also attributed to the fact that this was the first case in the history of South Africa that has directed the South African State to enact legislation to recognize and regulate the consequences of Muslim marriages.

Unfortunately, the ground-breaking effect of the judgment is limited by the Court having left the manner of recognition open to the discretion of the South African State, which could result in the enactment of a single marriage act or omnibus or umbrella marriage act. Should the aforementioned pieces of legislation not incorporate the Muslim Marriages Bill or fail to comprehensively regulate the features of Muslim marriages and divorce, it could enable gendered discrimination arising from traditional and conservative interpretations and application of Muslim family law

rules and practices to be maintained in the South African Muslim communities. The same could be said of other religious and customary marriages. The Court's failure to implement some form of suitable interim relief pending the enactment of legislation to recognize and regulate Muslim marriages is a further limitation on the positive potential of the judgment. Until legislation is in fact enacted, Muslim women are left without any legal protection and their rights to equality, access to courts, and dignity will continue to be infringed. Similarly, children born of Muslim marriages will continue to be denied the constitutional protection that is encased in the principle of the best interests of the child.

# The Last Sharīʿa Court in Europe: On *Molla Sali v. Greece* (ECHR 2018)

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## Abstract

*On its face, the ruling in* Molla Sali v. Greece *(European Court of Human Rights 2018) was about choice of forum: in an inheritance dispute, could heirs choose to apply Islamic inheriance law or did a will drawn up in accordance with Greek inheritance law govern a Muslim decedent's estate? The case is significant not so much for its outcome, but because it involved features of two legal systems that are relatively unknown among European and American jurists: interpersonal law and Islamic law in the autonomous region of Greece. The Court's reasoning provides detailed insight into how features of these systems may clash with systems of European civil and common law, particularly in the framework of human rights.*

## Introduction

The 2018 ruling of the European Court of Human Rights in the case of *Molla Sali v. Greece*[1] reminded me of a heated conversation I had in 1998 with an Arab lawyer. She had studied law in Europe but practiced in the Middle East. The discussion started pleasantly enough with talk about the intricacies of Islamic family law. Then she asked about the legal possibilities for Jews and Muslims in Europe, but when I answered that almost all European countries apply a single civil law to their citizens, she flew into a rage: "What, are they not entitled to their own religious family laws? But that is against freedom of religion!" Taken aback, I argued that all Europeans were perfectly free to fulfill religious legal requirements for their family life, but that the principle of equality before the law demanded that nationals were governed by the same law. It did not convince her: my call for equality before the law clashed with her demand for religious diversity as a matter of freedom of religion. This was a veritable clash of legal cultures. "If I were a European, I would take this matter to the European Court of Human Rights!" she ended our talk bellicosely. It took twenty years for this to happen.

The ruling of *Molla Sali v. Greece* is not so significant for its outcome, but for the fact that it involved choice of law questions in two legal systems that are relatively unknown among European and American jurists: interpersonal law and Islamic law. These are two systems of law with their own internal logic and coherence. The Court's reasoning provides close insight into how the features of these legal systems may clash with systems of European civil and common law, particularly in the framework of human rights.

## I. The Case

Molla Sali and her husband belonged to the Muslim minority of a Greek province called Western Thrace, located at the

1 Molla Sali v. Greece, App. No. 20452/14, Eur. Ct. H.R. (2018), https://hudoc.echr.coe.int/eng?i=001-188985 [https://perma.cc/EFA7-7DL7].

most eastern tip of the European continent.[2] This minority was entitled to have its family and inheritance law regulated by Islamic law, as will be explained in more detail below. However, the husband decided to make his will according not to Islamic law but to Greek civil law, and he left his entire estate to his wife. When he died, his sole heirs were his wife and two sisters. These sisters contested the deceased's will because under civil law they were not considered heirs, whereas under Islamic inheritance law they were intestate heirs. The question therefore arose whether the husband had the freedom to choose Greek inheritance law or was bound by Islamic inheritance law.

While the legal question in this case seems quite straightforward—is choice of law allowed?—the typical situation in this part of Greece and the manner in which the case was legally put before the European Court of Human Rights raised several other legal questions of importance. But before we discuss these points, we first need an understanding of the Greek situation.

## II. Interpersonal Law

Greece is perhaps the only country in Europe that inherited the Ottoman system of plurality in family law. According to this system, there is not one single (civil) family law for the entire population, but a number of religious family laws that coexist within a single state. In the case of the late Ottoman Empire, thirteen religious communities (*millets*) were recognized by the state, each with its own family law and courts.[3]

This system of plurality in family law is still maintained in many countries in the world, whereby these family laws can pertain to ethnic as well as religious communities. In the case of the

2 To name a region "Western" while it is located in the east is confusing, but the region of Thrace straddles Greece on its western part and Turkey on its eastern part.

3 These thirteen were: Greek Orthodox, Catholic, Syrian Catholic, Chaldean Catholic, Syrian Jacobites, Armenian Gregorians, Armenian Catholics, Protestants, Melkites, Jews, Bulgarian Catholics, Maronites, and Nestorians. Kamel S. Abu Jaber, *The Millet System in the Nineteenth-Century Ottoman Empire*, 57 Muslim World 214 (1967).

Middle East, for instance, Syria has one Islamic, one Druze, eleven Christian, and two Jewish family laws;[4] Egypt has one Islamic, six Christian, and two Jewish family laws;[5] and Israel has one Islamic, one Druze, four Christian, and two Jewish family laws.[6] Greece is not as excessive as this, and with its two family laws (civil and Islamic) is more comparable to Morocco (Jewish and Islamic law).

In legal theory, such systems are considered a *sui generis* field of law, referred to as "interpersonal law" (or "interreligious law" when the laws in question are all religious). Most studies of this field in English, French, or German date from the first half of the twentieth century, mostly as a matter of colonial interest.[7] Both the lack of study and practice of interpersonal law in Europe since then may explain why this system of coexisting national family laws is exotic and little known to today's European jurist. We will see below that this had its effect on the Court's ruling.

To understand the relevance of all this to Greece, we need to go back to the nineteenth century, when Southeastern European peoples were fighting Ottoman rule and claiming independence, often resulting in the practice of ethnic and religious cleansing. While this was mostly done by means of armed conflict, Greece and Turkey decided to do so by mutual agreement with regard to the Muslim Turks residing in Greece and the Orthodox Greeks residing in Turkey. In 1923, Greece and Turkey agreed to swap these nationals: an estimated 1.5 million Greeks were forced

4 Maurits S. Berger, *The Legal System of Family Law in Syria*, 49 Bulletin d'études orientales 115 (1997).

5 Maurits S. Berger, *Public Policy and Islamic Law: The Modern* Dhimmi *in Contemporary Egyptian Family Law*, 8 Islamic L. & Soc'y 88 (2001).

6 Jayanth K. Krishnan & Marc Galanter, *Personal Law and Human Rights in India and Israel*, 34 Isr. L. Rev. 101 (2000).

7 There is no recent literature on this topic. In my own research I have made grateful use of authors like: Kessmat Elgeddawy, Relations entre systèmes confessionnels et laïque en droit international privé (1971); Klaus Wähler, Internationales Privatrecht und interreligiöses Kollisionsrecht (1981); G.W. Bartholomew, *Private Interpersonal Law*, 1 Int'l & Comp. L.Q. 325 (1952); Raoul Benattar, *Problème de droit international privé dans les pays de droit personnel*, Recueil des cours de l'Académie de droit international de La Haye 121 (1967); Pierre Gannagé, *La distinction des conflits internes et des conflits internationaux de lois*, *in* 1 Mélanges en l'honneur de Paul Roubier 228 (1961).

to move from Turkey to Greece, and an estimated half a million Turkish Muslims from Greece to Turkey.[8] Only a small community of Turks in the Greek province of Thrace and a small community of Greeks in Istanbul were not included in this population exchange. For them, Greece and Turkey concluded treaties in which they reciprocally guaranteed that these minorities could maintain their rights.[9] These rights were the typical religious minority rights of that time, which included the right to have religious family law applied.[10]

In the case of Greece, the jurisdiction of Islamic family, property, and inheritance law for the Muslim minority in Western Thrace was given to the *muftī*s, Islamic scholars who doubled as jurisconsults and judges, and whose rulings were recognized by the Greek state.[11] In Western Thrace, three Islamic courts (*muftiyet*) were established in the cities of Xanthi, Komotini, and Didymoteicho. In the century following these treaties, this arrangement in Western Thrace was a freeze frame of Ottoman times. The law and the judicial system in this region remained as it was, untouched by any changes. The most typical example of the fossilization of this arrangement is perhaps the fact that the rulings in the court of Komotini are still written in the old Ottoman language and script

8 Onur Yildirim, Diplomacy and Displacement: Reconsidering the Turco-Greek Exchange of Populations, 1922–1934, at 90, 106 (2006).

9 Treaty of Peace with Turkey Signed at Lausanne (Treaty of Lausanne), July 24, 1923, 18 L.N.T.S. 11 (1924), *reprinted in* 18 Am. J. Int'l L. 4 (Supp. 1924), *inter alia*, art. 45: "The rights conferred by the provisions of the present Section on the non-Moslem minorities of Turkey will be similarly conferred by Greece on the Moslem minority in her territory."

10 Treaty Concerning the Protection of Minorities in Greece (Treaty of Sèvres on Minorities), Aug. 10, 1920, 28 L.N.T.S. 243, *reprinted in* 15 Am. J. Intl'l L. 161 (Supp. 1921), *inter alia*, art. 14: "Greece agrees to take all necessary measures in relation to Moslems to enable questions of family law and personal status to be regulated in accordance with Moslem usage."

11 Treaty of Athens (1913), art. 11:

> The muftis, in addition to their authority over purely religious affairs and their supervision of the administration of vakouf [public] property, shall exercise jurisdiction between Muslims in matters of marriage, divorce, maintenance payments (néfaca), guardianship, trusteeship, emancipation of minors, Islamic wills, and succession to the position of Mutevelli. The judgments rendered by the muftis shall be executed by the proper Greek authorities.

that was officially abolished in Turkey in 1928 and has become a dead language ever since, except in this corner of Europe.[12]

This arrangement was exclusively for the Muslim minority in Western Thrace. No such status was created for Muslims in other parts of Greece, like the islands of Kos and Rhodes, hence the distinction in official terminology between "Muslim minority" (the name for the Muslims in Western Thrace) and "Muslim community" (the name for the Muslims on Kos and Rhodes).[13] The "Muslim community" has its own *imām*s, but no Islamic judges or schools as the "Muslim minority" in Western Thrace has. To complicate matters, these Muslims are together called "Old Muslims," as opposed to the "New Muslims" who have come to Greece as immigrants during the past decades. The New Muslims, with an estimated number of 200,000, are more numerous than the Old Muslims. Still, the special status under discussion here only applies to the estimated 130,000 "Muslim minority" in Thrace. And it is to this minority and their legal status that the *Molla Sali* case applies.

## III. Dynamics of Greek Interpersonal Law

As of late, the position of the *muftī* and the application of Islamic family law in Western Thrace has become a matter of debate in Greek society. The *muftī* is questioned because of an alleged lack of procedural rule of law, and Islamic family law is criticized for its contravention of human rights standards, in particular the notion of gender equality.[14] However, the Greek Constitutional Court has consistently adhered to the notion of *pacta sunt servanda*, arguing that the state of Greece has committed itself by

12 Personal observation by the author in February 2018.

13 For a thorough study on this, see Konstantinos Tsitselikis, Old and New Islam in Greece: From Historical Minorities to Immigrant Newcomers (2012).

14 Yüksel Sezgin, *Muslim Family Laws in Israel and Greece: Can Non-Muslim Courts Bring About Legal Change in Shariʿa?*, 25 Islamic L. & Soc'y 235 (2018); Angeliki Ziaka, *Greece: Debates and Challenges*, *in* Applying Sharia in the West: Facts, Fears and the Future of Rules of Islam on Family Relations in the West (Maurits S. Berger ed., 2013).

treaty to this legal situation, and that this commitment cannot be altered unilaterally.[15]

Within the Muslim minority a more practical and pressing question had arisen, namely whether they are obliged to refer to the Islamic court for their family law matters, or if they are allowed to refer to the civil court. In other words, do they have a choice of *forum*? Since 1982, the Muslim minority members have had the option to choose between a religious (Islamic) or civil marriage.[16] But does this mean that all the legal consequences of that marriage are governed by that same law? Had a civil marriage been chosen, the answer would have been affirmative: according to the civil court in Xanthi (one of the three cities in Western Thrace), the spouses' choice for a civil marriage "implicitly indicates their desire not to be subject to the jurisdiction of the divine Muslim law, but to the civil law, like other Greek citizens."[17] A Muslim who had concluded his or her marriage in accordance with civil law was therefore assumed to have opted for civil law for all family law matters after that.

But did the same reasoning also apply to Muslims who had entered into a religious marriage? Had they in doing so "implicitly" opted for religious law? This was a controversial issue in the courts until the *Molla Sali* case. Here was a case of a couple who belonged to the Muslim minority of Western Thrace, who had married in accordance with Islamic law, but where the husband had bequeathed his entire estate to his wife in accordance with civil law.

The Thrace Court of Appeal ruled on September 28, 2011, that the husband was free to choose the type of will he wished to draw up, and therefore was not obliged to follow Islamic law. The Greek Court of Cassation, however, ruled on October 7, 2013, that the law applicable to the deceased's estate was the Islamic law of succession, based on the various international treaties that

15 Sezgin, *supra* note 14, at 262–63.

16 Law no. 1250 (1982).

17 Sezgin, *supra* note 14, at 259 (referring to Xanthi Court of First Instance, case no. 1623/2003).

stipulated thus. According to this court, Islamic law was, "pursuant to Article 28 § 1 of the Constitution, an integral part of Greek domestic law and prevailed over any other legal provision to the contrary."[18]

The case was then brought before the European Court of Human Rights in September 2017, but while still pending there, the Greek legislature moved quickly and introduced a law in January 2018 promulgating that:

> Inheritance matters relating to members of the Thrace Muslim minority shall be governed by the provisions of the Civil Code, unless the testator makes a notarised declaration of his or her last wishes...,explicitly stating his or her wish to make the succession subject to the rules of Islamic holy law.[19]

This settled the matter. A year later, the European Court of Human Rights came to the same conclusion based on the reasoning that denying such choice of forum, as the Greek Court of Cassation had done, would constitute a form of discrimination.

## IV. The Ruling

The plaintiff, Molla Sali, had argued her case in terms of non-discrimination: because the Greek state requires the application of Islamic inheritance law, she was put in a more disadvantageous position than if she had been a widow to whom civil inheritance law is applied. She invoked the prohibition of discrimination as stipulated by Article 14 of the European Convention on Human Rights: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or

18 *Molla Sali*, *supra* note 1, ¶ 18.

19 Law no. 4511 (2018), art. 1, subsection 4(c), which came into force on Jan. 15, 2018.

other opinion, national or social origin, association with a national minority, property, birth or other status."

In order to ascertain whether discrimination had taken place, the European Court of Human Rights followed its standard methodology in such cases: a) is the person in question discriminated against, b) is that discrimination justified by a legitimate aim (keeping in mind a "margin of appreciation" for the defending state), and c) are the means pursued proportional to this aim?

To ascertain the discrimination, the Court made the comparison between the widow of a Muslim man (to whom Islamic family law applies) and the widow of a non-Muslim man (to whom civil law applies).[20] The difference was clear, the Court concluded, as according to Islamic inheritance law the Muslim wife would only inherit one-fourth of her husband's estate (the sisters of the deceased are entitled to the remaining three-fourths) while the non-Muslim woman according to Greek civil law would inherit all of it (as sisters of the deceased are not considered heirs). The application of "Sharia law," the Court explained, would deprive the Muslim widow of three-quarters of the inheritance,[21] and therefore "placed the applicant in a different position from that of a married female beneficiary of the will of a non-Muslim husband."[22]

The Court then continued with the question whether this difference was justified by a legitimate aim. The Court did not fully address this question as it curtly stated that "it is not necessary for the Court to adopt a firm view on this issue because in any event the impugned measure [i.e., the imposition of Islamic inheritance law] was in any event [*sic*] not proportionate to the aim."[23] In other words, the Court saw no need to define and evaluate the aim of the Greek state in imposing Islamic inheritance law as this subject of the Court's argument would be addressed in the last question on

20 The Court "needs to ascertain whether the applicant, a married woman who was a beneficiary of her Muslim husband's will, was in an analogous or relevantly similar situation to that of a married female beneficiary of a non-Muslim husband's will" (¶ 138 of the ruling).

21 *Molla Sali*, *supra* note 1, ¶ 145.

22 *Id.* ¶ 140.

23 *Id.* ¶ 143.

proportionality.

The Court was firm in its decision that the means used by the Greek state were not proportional to the aim, for two reasons. First, the application of Islamic law to the estate at issue "had serious consequences for the applicant, depriving her of three-quarters of the inheritance."[24] Second, Greece was wrong in assuming it was bound by the treaties: "The Court notes that there can be no doubt that in signing and ratifying the Treaties of Sèvres and Lausanne Greece undertook to respect the customs of the Muslim minority. However...those treaties do not require Greece to apply Sharia law."[25] Moreover, the Court argued that "the highest Greek courts disagree as to whether the Treaty of Athens is still in force."[26] The Court also concluded that "the Treaty of Lausanne does not explicitly mention the jurisdiction of the mufti...nor did the treaty confer any kind of jurisdiction on a special body in relation to such religious practices."[27]

From this, the Court concluded that the Muslim minority in Greece has the right of choice of family law:

> Refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts not only to discriminatory treatment but also to a breach of a right of cardinal importance in the field of protection of minorities, that is to say the right to free self-identification.[28]

The Court further argued that this freedom should allow the minority members the right to opt in to, as well as the right to opt out of, the family law that was in place specially for them.

## V. Comments on the Ruling

24 *Id.* ¶ 145.
25 *Id.* ¶ 151.
26 *Id.* ¶ 44.
27 *Id.* ¶ 151.
28 *Id.* ¶ 157.

### *a. Prohibition of Discrimination*

Molla Sali argued that an obligatory application of Islamic inheritance law constituted a form of discrimination, as it would put her in a legal position that would be less advantageous than under civil law. The Court, in following her in this argument, however, made a skewed comparison. Ascertaining the act of discrimination requires that it is done within the same environment: a woman gets paid less than the man for doing the same job; a homosexual is not allowed for the same function that a heterosexual is admitted for; a woman with a headscarf is not admitted in a restaurant that allows other women. In the case of *Molla Sali*, that same environment is inheritance law. However, in this particular case there are two entirely different systems at work within this environment: civil and Islamic inheritance law.

In civil inheritance law, there is an equal distribution of inheritance shares among all the heirs. Islamic inheritance law, on the other hand, has a complex two-tier system.[29] On the one hand, there is the equal distribution of inheritance shares among all the male heirs. This was the existing, pre-Islamic system. Islam introduced a second tier by allotting shares to those persons excluded from this system. They were mostly women, like the wife, daughter, or sister of the deceased. These heirs did not share with the other male heirs, however, but were given fixed fractions of the inheritance. These fractions differed per person (daughters had a higher fraction than the widow, for instance), but could also differ depending on the composition of the family (when there are many daughters, they need to divide their fraction among themselves and may individually have less than the widow). Moreover, these fixed fractions are specifically mentioned in the Qur'ān and consequently enjoy an untouchable status in Islamic law.

In the case of *Molla Sali* we are therefore confronted with the rather unique situation of an inheritance case involving only

29 Islamic inheritance law is very structured and mathematical, but extremely complex. See the seminal work by N.J. Coulson, Succession in the Muslim Family (1971).

female heirs who, consequently, are each entitled to a so-called "Qurʾānic fraction" (*farīd qurʾanīya*). In this case, Islamic law is specific in the legal fractions allotted to these women: one-fourth for the widow, and three-fourths for the sisters (to be divided among them).[30] It is this particular case that the Court used for its comparison with civil law. The Court held that the widow would be deprived of three-fourths of the inheritance if Islamic inheritance law were applied. She is therefore better off under civil law. That is true in this particular case. But would the Court have decided differently if the widow would have been better off under Islamic law? One can imagine a situation where the widow inherits *less* under civil law than under Islamic inheritance law.[31] One can also imagine a situation where the presence of other family members had left the widow with a *higher* share under Islamic law than she would have received under civil law.[32] In these cases, the logic of the Court would dictate that, as a matter of non-discrimination, Islamic law should be upheld, because that would be more beneficial to the widow than civil law. This brings an element of arbitrariness in the Court's reasoning, as the measuring stick for comparison applied here by the Court is—albeit unwittingly—not fair and equal treatment, but the best interests of the party in question, in this case the widow.

The Court's assessment of non-discrimination also overlooks another consequence: it denies the legal rights of other parties, in this case the sisters-in-law. The Court correctly states that by applying Islamic inheritance law the widow only receives one-fourth and is deprived of the remaining three-fourths of the inheritance

30 There are no English-language tables for these calculations. A website that is helpful (but should not be considered conclusive) is Islamic Inheritance Calculator, http://www.inheritancecalculator.net [https://perma.cc/TFY5-F3AQ].

31 For instance, in the situation that the husband, in accordance with civil law, had bequeathed most (or all, if permissible by law) of his estate to his children or a foundation, and the wife were left with a legal share that would be less than the legal one-fourth to which she would have been entitled if Islamic law were applied.

32 For instance, in the case of male heirs like sons and a father-in-law, the Qurʾānic share of the widow would then be reduced to one-eighth, but if she had more than six sons (or four sons and four daughters), this share would then be higher than what she would receive under civil law.

that she would otherwise receive under civil law. But the same argument applies *vice versa* to the sisters-in-law: if Islamic inheritance law is *not* applied, the two sisters are equally deprived of *their* intestate share under Islamic inheritance law, which is three-fourths of their brother's estate. Either way, one of the parties is deprived of part of the inheritance, and hence put in a position that may be considered discriminatory. One may, of course, argue that the wife and the sisters of the deceased do not enjoy the same status as heirs. But this is the position that most modern European inheritance laws might take. In Islamic family law, we have seen, both the wife and the sisters of the deceased are equally entitled to legally fixed fractions of the inheritance.

In short, by comparing the position of the widow in civil and Islamic inheritance law, the Court compared apples to oranges. Moreover, in doing so, the Court did not make an absolute assessment, but a relative one based on an incidental and particular situation. As a result, the Court had made a consideration not based on non-discrimination, but on the litigant's best interests.

*b. Interpersonal Law*

The Court's inconsistencies in comparing the two legal systems can possibly be explained by its unfamiliarity with the system of interpersonal law. In Greece, both civil family law and Islamic family law are considered Greek domestic law. We have seen that such a system is called interpersonal law, which allows for the coexistence of more laws that all deal with the same subject matter, but apply to different communities. In some countries with this legal system, one is bound by the law of one's ethnicity or religion; in other countries, one can also opt out of this community law by choosing the alternative of civil law. Regardless of which framework is chosen, the system of interpersonal law presumes equal status of all coexisting laws, however different they may be, and however one law may be considered discriminatory or otherwise wrong in the eyes of another law.

Greece has inherited the system of interpersonal law that prevailed in the Ottoman Empire, and which was based on the Islam-

ic perspective on freedom of religion: religious communities have the freedom to live in accordance to the rules of their religion, and these include the rules of family life.[33] This explains the indignation of the Syrian lawyer when she learned that most European countries do not allow for such legal plurality. She failed to understand the radically different perspective of the European legal systems where the notion of equality prevails. This equality demands a mono-legal approach: that is, a single law that applies to all. Comparing these two systems is therefore like looking in the mirror: where one system focuses on equality and hence tends to eradicate differences, the other system embraces the differences and hence avoids making comparisons. By using the principle of non-discrimination, the Court has applied a mono-legal approach to a plural-legal system.

The Court is aware of the existence of an interpersonal law system in the Greek case. In the words of the Court, a state "may feel required as a matter of freedom of religion to create a particular legal framework in order to grant religious communities a special status entailing specific privileges."[34] However, the Court continues, in such a case the state must ensure "that the criteria established for a group's entitlement to it are applied in a non-discriminatory manner."[35] Here, the Court is not entirely clear what it means by "criteria." Are they the criteria under which *the system operates*? If so, then non-discrimination would mean that individuals have the freedom to make use of such laws or not. The Court is quite adamant that such choice of law should exist.[36] However, as we have seen above, the Court also seems to base the non-discriminatory criteria on the *comparative outcome* of various laws within that system.

Regardless of what non-discrimination principle or criteria the Court refers to, it is of little use in the context of an inter-

33 Maurits S. Berger, *Secularizing Interreligious Law in Egypt*, 12 Islamic L. & Soc'y 394 (2005) (with reference to primary Islamic law sources). *See generally* Antoine Fattal, Le statut légal des non-musulmans en pays d'Islam (1958); Wähler, *supra* note 7.

34 *Molla Sali*, *supra* note 1, ¶ 155.

35 *Id.*

36 *Id.* ¶ 157.

personal system, because the *raison d'être* of such a system is the coexistence of various family laws that are by definition different from each other and hence mutually discriminatory. Assessing any possible discrimination within the Greek legal system of interpersonal law, as the Court does, will therefore by default lead to ascertaining such discrimination.

### *c. Human Rights and Islamic Law*

In its ruling, the Court has in several instances indicated that "Sharia law" is discriminatory *within the community* to which it applies.[37] In the case of family law, that is a correct observation: Islamic family and inheritance law discriminates on the basis of gender and religion. To name just a few examples: men and women have different marital rights and duties; women have fewer, if any, rights to divorce; non-Muslim men are not allowed to marry Muslim women; Muslims and non-Muslims cannot inherit from each other. But this being true, it has no relevance for the case at hand. The discrimination to which the widow referred was not based on gender or religion (both parties involved are female and Muslim).

Nonetheless, even though this discussion is not pertinent to the case at hand, it plays an important role in the background of it, because the discriminatory nature of several rules of Islamic family and inheritance law poses a problem for Greece because it considers these rules domestic law. Greece is a signatory to the 1950 European Convention on Human Rights, and the cohabitation of opposing legal systems poses a challenge to Greece's obligations under the Convention, to put it mildly.

Among the signatories to the European Convention on Human Rights, it would be inconceivable to apply laws with a discriminatory character. But that is exactly the case with the application of Islamic family law in the Greek province of Western Thrace. For that reason, it is confusing that the Court discusses the

37 *See*, *e.g.*, *id.* ¶¶ 145, 153, 154, and 158.

Greek case together with "the application of Sharia law in England and Wales."[38] Confusing, because there Islamic law is not applied as a matter of state law, as is the case in Greece. In England and Wales, as in many other European countries, rules of Islamic family law are applied on a voluntary basis among Muslims, just as Catholics, Protestants, and Jews are doing with their own religious family laws.[39] Such application has no standing in the court of law of the relevant country. All citizens enjoy the same protection of the national law, which is governed by human rights values. However, under that rule of law they are free to apply any religious rule of their choosing, even in instances where such a rule would contravene human rights. The gender differences in marital duties and divorce rights, for instance, are typical of most religious family laws. People are allowed to live in accordance with these discriminatory regulations, and many orthodox communities do so, although in several Western European countries there is increasing political and judicial pressure to contain the excesses thereof in Muslim communities.[40]

The Greek situation is different, however, as Islamic family law there is not a community practice but domestic law, which makes the case of Greece unique in Europe. It is understandable, therefore, that much discussion is going on with respect to this particular situation regarding how to reconcile the existence of a law that is discriminatory among its believers with the existence of human rights that apply to all citizens. Two solutions seem to present themselves. The first is to modify the religious law in such a way that it conforms to the basic tenets of human rights. In the

38 *Id.* ¶ 83.

39 Compared to the literature on Islamic law in Europe, the practice and legal status of other religious courts and laws in Europe are little studied. For a general overview, see Norman Doe, Law and Religion in Europe: A Comparative Introduction (2011), especially ch. 4, *The Legal Position of Religious Organizations*.

40 The most consistent and persistent in this regard is the British government. Mona Siddiqui et al., *The Independent Review into the Application of Sharia Law in England and Wales*, UK Parliament (Feb. 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPFG_Report_into_Sharia_Law_in_the_UK_WEB.pdf [https://perma.cc/UL2U-4T6S].

Muslim world, this is a well-known discussion with proponents suggesting that such conciliation is possible while others argue the contrary.[41] Such discussions are hardly taking place in Greece at the moment.[42]

The second solution is to make this religious law optional, which seems to be the road taken by the Greek legislature and the Court. But even then, the case in the Canadian province of Ontario in 2004 and the ongoing discussions in England show that the freedom to choose does not always mean that this option is freely enjoyed: peer pressure and social coercion within the communities often prove stronger than the individual strength to choose for one's own good.[43]

*d. The Term "Sharia Law"*

A comment is needed about the Court's use of the term "Sharia law" when it discusses the Greek case. Elsewhere I have discussed the disadvantages of this term.[44] First, because for many it alludes to violent and oppressive practices by the likes of Boko Haram, ISIS, or the Taliban while *sharīʿa* also refers to less controversial legal rules like contract, ownership, use of land and water,

41 There is ample literature on this. Examples are Jasser Auda, Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach (2007); Abdullahi Ahmed An-Na'im, Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law (1990); Amina Wadud, Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective (1999); Khaled Abou El Fadl, *The Human Rights Commitment in Modern Islam*, *in* Human Rights and Responsibilities in the World Religions (Joseph Runzo, Nancy M. Martin & Arvind Sharma eds., 2003); *CEDAW and Muslim Family Laws: In Search of Common Ground*, Musawah 26 (2011), http://www.musawah.org/wp-content/uploads/2018/11/CEDAW-MuslimFamilyLaws_En.pdf [https://perma.cc/7UAT-4JVM].

42 Although I know from personal conversations with Greek jurists and government officials that such thinking is taking place on an informal level.

43 For Ontario, see the report by the Attorney General and the Minister Responsible for Women's Issues, Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, Ministry of the Attorney General (Dec. 2004), https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html [https://perma.cc/89XF-33T8]. For England and Wales, see Siddiqui et al., *supra* note 40, at 3, 12, 21.

44 Maurits S. Berger, *Understanding Sharia in the West*, 6 J.L. Religion & St. 236 (2018).

and religious rituals. Second, it is an umbrella term that refers to both practices in the current era as well as classical legal scholarship from centuries ago. Third, the term is often used by opposing factions: both the Muslim democrats and the anti-democrats base their arguments on *sharīʿa*, just like those with conservative and oppressive visions of the role of women and those who are staunch feminists. Finally, the term encompasses many domains of rules, ranging from civil law to penal law, from finance to social conduct, from religious rituals to the conduct of the state. In other words, the term "Sharia law" has little meaning if it is not qualified. And that is precisely what the Court neglects to do.

This is not the first time that the Court omits juridical precision in Islamic law cases when it is needed. In the case law of the Court, the term "Sharia law" even obtained a more pejorative meaning when in 2003 the Court ruled that "sharia clearly diverges from [the European] Convention [on Human Rights] values."[45] Given the fact that *sharīʿa* has so many meanings and interpretations, this seems quite careless of the Court. Indeed, if we realize that *sharīʿa* also includes rules pertaining to prayer, fasting, marriage, and burial, it seems unlikely that the Court considered these contrary to European human rights values.[46]

It would have done the Court credit if it had been more precise in its choice of words. In the case of *Molla Sali*, wording like "Islamic family law" or "the Islamic inheritance law applicable in Western Thrace" would have been much more specific than the generic term "Sharia law."

### *e. Choice of Law*

45 Refah v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98, and 41344/98, Eur. Ct. H.R. (2003), http://hudoc.echr.coe.int/eng?i=001-60936 [https://perma.cc/AYW7-82JP].

46 I argued this in my article (in Dutch), *Tien jaar later: kritische beschouwingen bij de visie van het Europees Hof op de sharia*, 3 Tijdschrift voor Religie, Recht en Beleid 69 (2013); I summarized it in English in Berger, *supra* note 44, at 237.

The legal detours, terminology, and arguments of the Court, as discussed above, are puzzling when we come to the end of the ruling where the Court in a very clear and lucid manner makes its case for a choice of law in an interpersonal legal system. The Court argues that the treaties, to which the Greek Court of Cassation holds itself bound, are misinterpreted as there is no requirement by the Greek state to apply "Sharia law." The Court rejects the Greek Court of Cassation's argument that it is treaty-bound to have this law applied to the Muslim minority in Western Thrace.

I am not in a position to assess these arguments as they pertain to the field of international law, in which I hold no expertise. However, assuming this argument is correct, then its logical consequence is that Greek citizens should have the freedom to opt for one of the applicable laws. This is also the Court's conclusion. The Court further argues that this freedom should allow the minority members the right to opt in as well as the right to opt out. In other words, they must have the freedom to equally choose for the application of Islamic family or inheritance law, as they may choose for non-applicability.[47]

This statement is legally clear and precise, and actually makes all the Court's earlier deliberations redundant.

## Conclusion

In this case, the European Court of Human Rights overturned the standard case law of the Greek Court of Cassation that Islamic family and inheritance law was obligatory for Muslims in Western Thrace who had opted for an Islamic marriage: such an obligation does not exist, the European Court held, because as long as a domestic law recognizes more than one family law, people should have the right of choice. The Court based this right of choice on the principle of non-discrimination.

47 *Id*. For a similar argument, see Dominic McGoldrick, *Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws*, 9 Hum. Rts. L. Rev. 603 (2009).

This ruling is not so significant, as Greek case law was already moving in this direction, and the Greek legislature had put it into law shortly before the ruling was issued. What may be considered significant, however, is that the case involved two legal features that are relatively unknown among European jurists: interpersonal law and Islamic law. These are two systems of law with their own internal logic and coherence. Within the systems of European civil and common law, particularly in the framework of human rights, the ruling gave a glimpse of the resulting clash of legal cultures.

Two points can be highlighted in this respect. The first is that the Court's application of the non-discrimination principle was not as consequential as it could have been. This had to do with the unique nature of the legal system of interpersonal law at hand, in which the coexisting family laws are by default mutually discriminatory. Ascertaining the possible discrimination of the applicant by comparing her position as a Muslim widow with that of a non-Muslim widow was therefore not a neutral comparison because the outcome would by definition be different, and hence discriminatory.

Another significant feature of this ruling is that it has to do with Islamic law, specifically Islamic family and inheritance law, which is considered domestic law in Greece. This law contains discriminatory rules on the basis of gender and religion, and as such is controversial in the context of human rights. However, in this particular case, these discriminatory rules were *not* relevant as both opposing parties were female and Muslim, and the main legal question at hand was that of choice of law. By still referring now and again to the discriminatory nature of Islamic family law (and thereby consistently using the ominous term "Sharia law"), the Court showed its lack of insight into and comprehension of this particular law.

## Abstract

*Student Editor Marzieh Tofighi Darian (SJD Candidate, Harvard Law School) summarizes the landmark case* Molla Sali v. Greece *(ECHR 2018).*

*Student Editor Dixie Morrison (JD Candidate, Harvard Law School) examines how the Indian Supreme Court's reasoning in* Shamim Ara v. State of U.P. & Anr. *(Supreme Court of India 2012) influenced the legal status of triple* ṭalāq *and Islamic divorce in India.*

## Case Brief :: European Court of Human Rights Rules Against Forcing Greek Muslim Minority to Follow Islamic Law: *Molla Sali v. Greece* (ECHR 2018)

*Marzieh Tofighi Darian (Harvard Law School)*

### Facts

The applicant, Mrs. Chatitze Molla Sali, was named as the sole beneficiary in a notarized public will drawn by her Muslim husband in 2003 in accordance with the rules of the Greek Civil Code.

Despite the initial approval of the will by the Court of First Instance, the deceased's two sisters challenged the validity of the will. They invoked Greece's international obligations for the protection of Muslim minorities under the Treaty of Sèvres (1920) and Treaty of Lausanne (1923). They argued that, because the testator belonged to the Thrace Muslim minority, the issue of wills and inheritance fell within the jurisdiction of the *muftī* and should have been subject to the rules of succession in Islamic law wherein the will only complements the intestate succession.

The Court of First Instance dismissed the challenge noting that invalidating the will would deprive Greek Muslims of freely disposing of their property in a will, which amounts to unacceptable discrimination on the grounds of religious beliefs. The decision was upheld in the Appellate Court but was overturned by the Court of Cassation. The Court of Cassation, on two occasions before and after remitting the case, stated that the international obligations of Greece according to the above-mentioned treaties were an integral part of the Greek domestic law according to Article 28 § 1 of the Constitution. As a result, the Court of Cassation identified the Islamic rules of succession applicable in the instant case which would render the public will in question legally invalid. It also rejected the applicant's claim that her husband was not a practicing Muslim and therefore not subject to Islamic law. The Court stated that the applicant's claim would amount to evaluating the extent of the deceased's religious sentiment, which is not legally valid.

Having exhausted all domestic remedies, the applicant lodged a complaint in 2014 before the European Court of Human Rights ("ECHR") against the government of Greece for the violation of her rights under Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) taken alone and in conjunction with Article 14 and Article 1 of Protocol No. 1.

## Issue

The ECHR was set to determine whether the Court of Cassation's decision to invalidate the public will resulted in treating the applicant differently compared to a beneficiary in a will drawn by a non-Muslim testator to the extent that subjects her to discrimination prohibited under Article 14 of the Convention[1] read in conjunction with Article 1 of Protocol No. 1.[2]

## ECHR Analysis and Judgment

The Court noted that, in order to find out whether there was a violation of a right protected under the Convention, it needed to proceed in three steps.

First, the Court had to determine whether Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 was applicable in this case: the Court found that the term "possession" in Article 1 of Protocol No. 1 was not limited to the ownership of material goods, and "property rights" may include certain other rights and interests constituting assets. In the instant case, the Court concluded that the public will did confer on the appli-

1 Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, 213 U.N.T.S. 222 ("The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as...religion...or other status.").

2 Protocol to the Convention of the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.").

cant title to a substantive interest as protected by Article 1 of Protocol No. 1.

In terms of non-discrimination as guaranteed under Article 14 of the Convention, the Court defined the test as "but for the alleged discrimination, the applicant would have had a right enforceable under domestic law." As a result, the Court concluded that the applicant would have inherited the entire estate if her husband were non-Muslim.

Second, the Court proceeded to establish whether the applicant was in "an analogous or relevantly similar" situation to that of a beneficiary of a will drawn by a non-Muslim testator in accordance with the Civil Code and was treated differently because of the religion of her husband. The Court stated that the violation of Article 14 of the Convention occurs when the different treatment is based on "an identifiable characteristic or status." However, the Court added that the Article also entails situations in which the person is treated differently on the basis of another person's status or protected characteristics. The Court concluded that in this case, the applicant was, in fact, in a similar situation to beneficiaries of wills drawn by non-Muslim testators and was treated differently on the basis of her husband's religion under the concept of "other status" as recognized in Article 14.

Third, the Court determined whether the violation of Article 14 of the Convention was justified on the basis of a governmental legitimate objective and a reasonable relationship of proportionality between the means employed and the legitimate objective.

The government argued that the obligation to protect Thrace's Muslim minority was a legitimate objective requiring the application of Islamic law by Greek courts. The Court, however, found that the measures taken by the Greek government did not suit the alleged objective. The Court went on to say that even if the measures were suitable for achieving the objective, they were not proportionate to the aim pursued as they deprived the applicant of three-quarters of her husband's estate.

The Court stated that neither the international treaties ratified by Greece to protect Muslim minorities nor freedom of religion under the Convention require Greece to apply Islamic law or to confer any jurisdiction to a special body with regard to religious practices. Rather, a state that has given special status to a religious group must ensure that the group's entitlement to the status is applied in a non-discriminatory manner.

Moreover, a state cannot deprive an individual of a right to voluntarily opt out of belonging to a specific group and not to practice its rules. In this case, the fact that the Muslim testator chose to draw the public will in accordance with the Greek Civil Code and not Islamic law was a manifestation of this right. Therefore, denying him such a right is contrary to the requirement of "self-identification" as a core concept in the protection of minorities.

In the end, the Court concluded that the discrimination was not overcome by "an objective and reasonable justification" and therefore there was a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 to the Convention.

## Case Brief :: *Shamim Ara* and the "Judicialization" of Divorce: On *Shamim Ara v. State of U.P. & Anr.* (Supreme Court of India 2002)

*Dixie Morrison (Harvard Law School)*

### Case Summary

*Shamim Ara v. State of U.P. & Anr.* is a family law case decided by the Supreme Court of India in 2002. In 1979, petitioner Shamim Ara filed suit against her husband, Abrar Ahmad, alleging that he deserted and failed to support her. Ahmad responded, in 1990, that he was under no obligation to support Shamim Ara because he had divorced her in 1987 via triple *ṭalāq* (unilateral repudiation). The primary legal issue was at which point, if any, Ahmad's *ṭalāq* took effect: 1) it took effect upon his first utterance in front of witnesses but outside his wife's presence, 2) it took effect when he informed Shamim Ara in writing in 1990, or 3) neither action constitutes a valid divorce. The Court held for the third option, concluding that *ṭalāq* outside of the wife's presence and delivered to her later by writing is so inequitable to Muslim wives as to be without legal sanction. This Note analyzes how the Court's reasoning to this conclusion "judicializes" Islamic divorce by requiring this previously private proceeding to be approved by the courts before validation.

### Analysis

While the specific legal issue before the Court was the technical one of when the parties' divorce may take effect, the bulk and primary significance of the Court's discussion consists of dicta regarding the place of *ṭalāq* and other elements of Islamic family law in the twenty-first century. Judge R.C. Lahoti, who wrote the decision, was troubled by the very existence of unilateral divorce, citing "eminent jurists" generally as condemning "[s]uch liberal view of *ṭalāq* bringing to an end the marital relationship

between Muslim spouses and heavily loaded in favour of Muslim husbands."[1]

Seeking additional justification in the authorities for this interpretation of Islamic divorce law, Lahoti quoted Judge V.R. Krishna Iyer in *A. Yousuf Rawther v. Sowramma*, AIR 1971 Kerala 261 (India): "The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions," for "in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law."[2] The historical record is somewhat more complicated than Iyer's sweeping statement. It is true that Muslim jurists did not traditionally consider divorce a desirable occurrence; "[t]he message the jurists wished to urge upon men was that they should not resort to *ṭalāq* unless there is a compelling cause, and even when such a cause appears to exist, they should proceed with caution."[3]

However, this normative disapproval of arbitrary *ṭalāq* did not extend to the outright prohibition suggested by this Court's statements. Rather, men who overcame normative pressures not to divorce their wives were not "queried as to their motives" because "husbands were generally seen as having no interest in repudiating their wives without a good cause."[4] Far from being a repugnant last resort, divorce seems to have been fairly common in medieval and early modern Islamic society,[5] and "the role of the courts was mainly confined to putting an official stamp on the settlements brought before them," rather than poring over the separation's merits.[6] This benefit of the doubt directly contradicts Iyer's statement in *A. Yousuf Rawther* that "the husband must satisfy the court about the reasons for divorce."[7]

Lahoti's and Iyer's interpretation of the judiciary's role in

1 Shamim Ara v. State of U.P. & Anr., (2002) 7 SCC 518, at 4 (India).

2 *Id*. at 5.

3 Wael B. Hallaq, Sharīʿa: Theory, Practice, Transformations 282 (2009).

4 *Id*.

5 *See* Yossef Rapoport, Marriage, Money and Divorce in Medieval Islamic Society 1–3 (2005).

6 *Id*. at 74.

7 *Shamim Ara*, 7 SCC 518 at 5.

divorce under Islamic law, while apparently unorthodox, takes its context from both judges operating at the tail end of a long period of changes to how courts apply Islamic law. In the area of divorce, modern colonialist reforms—in India's case, from the British—removed much of the flexibility and negotiating power accorded to Muslim wives under traditional Islamic legal interpretations, all while "a husband's unilateral right to divorce at will...remained unquestioned."[8] In this way, "the cultural industry of modernity...made [*ṭalāq*] a morally repugnant instrument" that "came to symbolize, on the one hand, the tyranny of the Eastern male and, on the other, the wretched existence of the Muslim female."[9] This limited view surfaces in *Shamim Ara* when the Court approvingly quoted Judge V. Khalid in *Mohammed Haneefa v. Pathummal Beevi*, 1972 K.L.T. 512 (India): "[S]hould Muslim wives suffer this tyranny [*ṭalāq*] for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity."[10] The Court in *Shamim Ara* shared Khalid's disturbed conscience but took it a step further than in *Mohammed Haneefa* by using this discomfort as justification for changing the law of divorce.

In *Shamim Ara*, the Court formulated a new standard for *ṭalāq*: "The correct law of *ṭalāq* as ordained by the Holy Quran is that *ṭalāq* must be for a reasonable cause and be preceded by attempts at reconciliation."[11] While it is the Court's prerogative to make equitable judgments and set new interpretations based on changing social mores, it is disingenuous for Lahoti to claim that this definition of legitimate *ṭalāq*—only for cause and after mandatory attempts at reconciliation—is "ordained by the Holy Quran." Regardless of the merits of such a practice, records of divorce proceedings in medieval Islamic society illustrate "[t]he absolute

8 Amira El-Azhary Sonbol, *A History of Marriage Contracts in Egypt*, *in* The Islamic Marriage Contract: Case Studies in Islamic Family Law 87, 90 (Asifa Quraishi & Frank E. Vogel eds., 2008).

9 Hallaq, *supra* note 3, at 465.

10 *Shamim Ara*, 7 SCC 518 at 4.

11 *Id*. at 6.

right of husbands to disband the marriage contract at will," upheld by *qāḍī*s (judges) who "were generally reluctant to intrude more assertively in the domestic sphere, where the word of the husband was supposed to reign supreme."[12] Additionally, while reconciliation and mediation before divorce were "normative" in medieval Islamic law, they were not mandatory for *ṭalāq* to take effect.[13] Under the Court's holding in *Shamim Ara*, "the court has been made indispensable, for it has appropriated the exclusive right to execute *ṭalāq*" and to set the conditions for doing so, including a prior reconciliation attempt.[14]

Giving the courts—an arm of the government—the authority to grant or withhold divorce accomplishes two objectives. First, it further consolidates state power by creating another tool by which state agents may regulate private lives. Second, it tautologically brings marriage and divorce into the category of "public matters," since that is what they must be if the state has the authority to regulate them. *Shamim Ara*'s significance lies in its "judicialization" of divorce, transferring Muslims' family law from the private to the public sector and, in so doing, removing an essential aspect of its Islamic legal character.

12 Rapoport, *supra* note 5, at 69.
13 Hallaq, *supra* note 3, at 467.
14 *Id*. at 465–66.

FORUM:
SYMPOSIUM ON BRUNEI'S NEW ISLAMIC CRIMINAL CODE


## Abstract

*In this inaugural issue of Harvard Law School's* Journal in Islamic Law, *we use the new* Forum*, designed for scholarly debate on recent developments and scholarship in the field, to feature a Symposium on the passage of a new 'Islamic Criminal Code' in Brunei. This new criminal code has generated extensive international media attention but little close analysis. In this* Forum*, four scholars offer scholarly essays that examine the contours of this new legislation and the extent to which it intersects with antecedents in Islamic history and with precedents in modern criminal law and procedure, comparatively. With a foreword by Intisar A. Rabb, Mansurah Izzul Mohamed, Dominik M. Müller, and Adnan A. Zulfiqar assess the history, workings, and critiques surrounding Brunei's new code. Accompanying their essays is the SHARIAsource Online Companion to the Forum on Islamic Criminal Law in Brunei, which provides the text of each law, and of its antecedents, at beta.shariasource.com.*

# Foreword

## *Codification of Islamic Criminal Law*

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This first issue of Harvard Law School's *Journal in Islamic Law Forum* focuses on a new development in Islamic legislation that has generated much international media attention but little close analysis: Brunei's new Islamic criminal code. This development follows a The *Forum* features contributions from three scholars and practitioners with expertise in Islamic criminal law, Southeast Asian history and society, and international law and foreign affairs from within Brunei: Mansurah Izzul Mohamed, Dominik M. Müller, and Adnan A. Zulfiqar. These three essays assess the history, workings, and critiques of Brunei's new Code. Accompanying their essays is the SHARIAsource Online Companion to the Forum, which provides the text of each law, and of its antecedents, at beta.shariasource.com (2020).

### Overview of Brunei's New Criminal Laws

Brunei recently passed two acts reforming the country's codes of criminal law and procedure: the Syariah (*Sharīʿa*) Penal

* The author would like to thank Daniel Jacobs and Stephanie Müller for superb research assistance.

Code Order of 2013 (SPCO) [*Perintah Kanun Hukuman Jenayah Syariah* 2013],[1] and the Syariah Courts Criminal Procedure Code Order of 2018 (SCCPCO).[2] Both Codes came into effect last year, in May 2019.

The idea of reforming Brunei's criminal justice system through new Islamic criminal laws is not new. Both Codes have been six years in the making, or longer, when considering the range of Islamic legislation proposed and passed in the 1990s. Sultan Hassanal Bolkiah first announced his plan to pass Islamic criminal legislation in 2013,[3] meant to bring the laws into compliance with Islamic tradition and to reduce foreign influences. But his decision dates back long before: since independence from British oversight in 1984, Brunei's legal structure has always incorporated both Islamic and "civil" law (modeled after British common law). Moreover, Brunei follows a national ideology of *Melayu Islam Beraja*[4]—a policy that gives primacy to a mix of Malay language, culture, and customs as well as the teaching and practice of Islamic laws and values—announced from the country's inception.

## Why Now? The International and Islamic Context

What explains, then, passage of the Codes now? In announcing the main Code, the Sultan specifically mentioned foreign powers that had "reduced the strength and effectiveness of Islamic legislation."[5] It seems, though, that he was referring to something more than the notion that Muslim former colonies and protector-

1 Syariah Penal Code Order (SPCO) 2013 (No. S 69) (Oct. 22, 2013), http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2013/EN/s069.pdf [https://perma.cc/VUL5-W8QM].

2 Syariah Courts Criminal Procedure Code Order (SCCPCO) 2018 (No. S 9) (Mar. 5, 2018), http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2018/S009.pdf [https://perma.cc/KU9Y-RUH5].

3 *30.04.14 Implementation of the Shariʿah Penal Code Order, 2013*, Prime Minister's Office (Apr. 30, 2014), http://www.pmo.gov.bn/Lists/Announcements/NewDispform.aspx?ID=30 [https://perma.cc/CFL4-GWNA].

4 *National Philosophy MIB Concept*, Government of Brunei Darussalam, https://web.archive.org/web/20000915110300/http:/www.gov.bn/government/mib.htm [https://perma.cc/BR83-A8DZ].

5 *See supra*, note 3.

ates like Brunei were wary (and weary) of Western domination. By 2013, the world had witnessed a rise in non-state actors in Muslim countries implementing harsh criminal punishments that seemed to be extreme perversions of classical Islamic law. Consider the rights-violating stories of medieval Islamic criminal law turned modern—that is, the criminal prosecutions by members of ISIS in Iraq,[6] militant groups in Northern Mali,[7] and harsh versions of criminal codes in Northern Nigeria[8]—all characterized by excessive criminalization and few procedural protections. Contrary to Brunei's vision, many of these "foreign powers" experimented with regimes of Islamic criminal law without state authorization, legislation, or consultation on incorporating norms that would include local Islamic mores on criminal law and procedure. Furthermore, they failed to consider or incorporate evolving standards of decency and due process.

Brunei sought a different path. Through a five-year process of legislation, the Sultan designed the Code to proceed in three phases[9]: the first for small crimes and misdemeanors (which took effect in May 2014), and the last two for more severe crimes and punishments (which took effect in April 2019). He tasked decision-makers with deliberating about the legislation and incorporating all areas of the government, bench, and bar as well as the religious legal establishment. The Sultan also invited the involvement of members of the Legislative Council, the judiciary, the Attorney General's office, and the Brunei Bar Association as well as the State Muftī and Ministry of Religious Affairs. Finally, this broader group consulted academics and *faqīh*s (religious law ex-

6 *In the News: Revkin on ISIS's Legal System*, Islamic Law Blog (July 11, 2018), https://islamiclaw.blog/2018/07/11/in-the-news-revkin-on-isiss-legal-system [https://perma.cc/76EX-X5HT].

7 *Sharia Law Enforced in Mali*, National (Abu Dhabi) (Aug. 1, 2012), https://www.thenational.ae/world/africa/sharia-law-enforced-in-mali-1.441694 [https://perma.cc/V38C-5CFH].

8 *The Nigeria Papers: Sharīʿa Implementation in Northern Nigeria*, SHARIAsource, https://beta.shariasource.com/projects/3 [https://perma.cc/8HVY-2ZF7].

9 Constance Johnson, *Brunei: Islamic Law Adopted*, Library of Congress (May 6, 2014), http://www.loc.gov/law/foreign-news/article/brunei-islamic-law-adopted [https://perma.cc/9HJ5-WNN5].

perts and practitioners) in Brunei, in neighboring Southeast Asian countries, and worldwide on a range of questions concerning historical and modern criminal codes. As a scholar of Islamic law and author of a book on the expansive notion of reasonable doubt in classical Islamic criminal law,[10] I was among the academics who visited the country for discussions about historical and comparative perspectives on Islamic criminal law.

The Code has garnered near-constant international attention and controversy from the beginning. When the Sultan made his 2013 announcement, the draft bill attracted sharp criticism for its harsh provisions.[11] When Phase One of the Code came into effect in 2014, activists and staff protested the Brunei-owned, iconic Beverly Hills Hotel.[12] These concerns became a potential stumbling block for the proposed 2015 Trans-Pacific Partnership Agreement (TPP)[13]—a twelve-country trade deal proposed under the Obama Administration between mostly Asian and Latin American countries plus the United States, which was designed to lower tariffs and reduce dependency on Chinese trade in favor of the U.S. market. Most countries signed in 2016, but the United States, by then under the Trump Administration, withdrew from the deal before it could take effect.[14] When Phases Two and Three of Brunei's new Criminal Code came into effect in April 2019, international criticism intensified, and the Beverly Hills Hotel boycott contin-

10 Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law (2015).

11 *Brunei Moving Forward with Islamic Penal Code*, Voice of America (Oct. 22, 2013), https://www.voanews.com/east-asia/brunei-moving-forward-islamic-penal-code [https://perma.cc/9XLX-N6WH].

12 *Protestors Call for Renewed Boycott of Beverly Hills Hotel*, Hollywood Reporter (Oct. 17, 2016), https://www.hollywoodreporter.com/news/beverly-hills-hotel-boycott-still-938972 [https://perma.cc/8RR2-VLBJ].

13 *Summary of the Trans-Pacific Partnership Agreement*, Office of the U.S. Trade Representative (Oct. 4, 2015), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership [https://perma.cc/D8UT-XERG].

14 Donald J. Trump, *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, White House (Jan. 23, 2017), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement [https://perma.cc/62R5-BLVA].

ued, with George Clooney leading the charge. That same month, Brunei's Minister for Foreign Affairs exchanged letters with the U.N. High Commissioner for Human Rights seeking to answer the criticisms.[15] In May 2019, the Sultan declared a moratorium on the death penalty—turning a *de facto* practice into a *de jure* policy.[16]

## Concerns over Brunei's New Criminal Justice Regime

What concerns does the new legislation raise for individual defendants in Brunei's criminal justice system? Three main concerns and policy disagreements have to do with the scope, harshness, and procedural fairness of the legislation. All of them suggest that Brunei's new code is genuinely new: it has no exact Islamic historical precedent, nor does it reproduce contemporary criminal codes of peer Muslim-majority states, peer Muslim-minority states (including those of the United Kingdom, the United States, or otherwise), or Islamist non-state actors.

The first anxiety is over the *scope of criminalization*. Brunei outlaws conduct that many states no longer see as criminal acts, such as a range of sex crimes that many Muslim-majority states prohibit but that the United States and other countries have recently decriminalized (e.g., *Lawrence v. Texas*,[17] decriminalizing sodomy in the United States). It also punishes acts that not only would make the international community balk at as threats to freedom of belief but that historical precedents in Islamic law also would not recognize, such as attempted apostasy. These facts raise questions about the appropriate line between state autonomy to define and deter behavior based on societal norms of morality, not to mention matters of fundamental human rights and freedoms.

Second is the *severity and proportionality of punishment*.

15 *Brunei Says Controversial Sharia Law Aimed at "Prevention,"* BBC (Apr. 12, 2019), https://www.bbc.com/news/world-asia-47906070 [https://perma.cc/CG2V-48AQ].

16 *05.05.19 SPCO Clarified*, Prime Minister's Office (May 5, 2019), http://www.pmo.gov.bn/Lists/News/DispForm.aspx?ID=1188 [https://perma.cc/9QSF-5XC8].

17 Lawrence v. Texas, 539 U.S. 558 (2003).

Brunei's new Islamic criminal code adopts provisions for the whole range of notorious harsh penalties of medieval Islamic criminal law—from fines and imprisonment (Phase One crimes), to corporal punishment in the form of public whipping, hand amputation, and the death penalty (Phases Two and Three crimes). This invites questions about the nature of enforcement in Brunei: whether the new Code is designed to deter on the model of the expressive function of criminal law (as one Symposium contributor, Izzul Mohamed, claims) or whether it follows the more common models of utilitarian or retributive punishment that instead suggest a wait-and-see stance before evaluating their design or effects (as another Symposium contributor, Dominik Müller, seems to suggest).

Third is the extent of *procedural protections* necessary for seeing to defendants' rights. Brunei incorporates what I have called elsewhere the "jurisprudence of doubt" in reference to historical Islamic norms that sought to mitigate the harsh effects of Islam's fixed criminal punishment with heightened evidentiary and other procedural requirements before securing a conviction.[18] Brunei's new laws require a "no doubt at all" standard, install parallel Islamic and "civil" jurisdictions and prosecutors, and otherwise require state prosecutors of crime to default to the "civil" courts that do not feature the harshest of the new Code's punishments. But the Code also removes or relaxes some of classical Islamic law's procedural protections for offenders who are minors or who are otherwise not legally competent or culpable, and it relaxes evidentiary standards for crimes like rape. These features of the Code raise questions about whether and how the laws follow the jurisprudence of doubt across the board to indeed mitigate the harshest of penalties and procedural traps of criminal law systems rife with injustice. A close look at the Code makes clear how it could raise concerns about over-criminalization, over-punishment, and thinner-than-needed procedural protections.

To be sure, the new Brunei Code follows the basic tripartite division of classical Islamic criminal law: *ḥudūd* fixed crimes

18 Rabb, *supra* note 10.

and punishments, *qiṣāṣ* "eye-for-an-eye" rules of retaliation for murder and personal injury (commutable by financial compensation), and *taʿzīr* discretionary crimes and punishments. But it diverges from historical treatment of Islamic criminal law for better and for worse. For the better, with discretionary penalties, Brunei paints a picture different from the medieval landscape of criminal law enforcement—such as in Umayyad, ʿAbbāsid, and Mamlūk practice, to take a few of the more notable dynasties. Whereas those states more often than not *elevated* discretionary penalties to capital punishment and torture for a wide range of unspecified crimes, the new code in Brunei reduces *taʿzīr* penalties to fines and imprisonment for a statutory list of misdemeanors. It also instituted an initially *de facto* and eventually *de jure* moratorium on implementation of the death penalty. For the worse, when it comes to capital punishment, Brunei charts a path far from the early modern trajectory of legislative fixes to the over-criminalization and over-punishment of medieval laws—such as the Ottoman rulers' issuance of a criminal code that *reduced* provisions for corporal punishment and death-eligible crimes and replaced those punishments with fines and imprisonment. Brunei's new Code seems not to have pursued the path of converting the principles behind the substantive criminal law into legislative fixes, or to apply the most expansive notion of doubt jurisprudence, which would bar criminal procedures that permit prosecutions against classes of offenders and offenses typically out of reach of criminal punishment.

Instead, Brunei amalgamates legislative harshness with an attempt at procedural savings meant to recognize the public and symbolic appeal of *sharīʿa*, but not yield to excessive punishments far beyond the culture and history of moderation in Brunei. For both Mohamed and Müller, the Code's emphasis on procedure, when placed against its history, indeed suggests that Brunei's harshest new provisions are more bark than bite and will tilt in the direction of moderation. Reading Adnan Zulfiqar's examination of several problematic points of procedure, we must wonder: are procedural savings enough? If not, Brunei may consider re-

examining its legislation and procedure to better square with its desire to respect traditional Islamic principles and promote sophisticated forms of engagement with its past and present, in a way that could model legislation for the region and the world.

## A Close Look at the New Codes: Three Essays

In her essay, **Mansurah Izzul Mohamed** focuses on the legislative and operational aspects of Brunei's new criminal laws: What are their most significant provisions? Where do the new laws intersect with the new laws of criminal procedure? How do the "civil" criminal courts (on the model of common law courts) operate in parallel to the expanded jurisdiction of the *sharīʿa* courts charged with implementing the new laws? In answering these questions, she looks at the numbers. Mohamed outlines the punishments in the new SPCO as comprising about 74% minor crimes, the "general offenses" or *taʿzīr* offenses defined as acts against society; 10% serious crimes, called *ḥudūd* offenses and defined as acts against God; and 5% violations of rules against murder and personal injury, called *qiṣāṣ* offenses and defined as acts against individuals. The remainder—also acts against individuals—are offenses that carry a penalty of financial compensation in lieu of corporal punishment or imprisonment. As noted, these divisions follow the basic tripartite division of classical Islamic criminal law. But to understand how they operate in Brunei requires examining the new laws alongside existing "civil" (or secular) laws—which continue to be in force—and modifications to criminal procedure. Two features guide and potentially mitigate the harshness of the new laws. First, the choice of forum tilts in the direction of the civil courts as the default forum. Second, relatedly, the new procedures entail high evidentiary bars before a prosecutor can pursue the new Islamic charges or punishments—a fact that will result in civil court prosecution or Phase One-type punishment of lighter penalties (with lower evidentiary bars) for small offenses. The most prominent of these is a requirement of four eyewitnesses for death-eligible sex crimes (a standard designed to be virtually im-

possible to meet) and an elevation of the typical reasonable doubt standard to a "no doubt at all" standard of proof—again, following classical Islamic law. Mohamed suggests additional reasons to expect moderation in Brunei's criminal law enforcement, not least of which is Brunei's public rejection of torture, with the country's accompanying announcement of joining the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and its commitment to international law as a member state of the United Nations and other organizations attentive to universal human rights. To wit: in response to several countries' insistence that Brunei review its capital punishment legislation, the Sultan convened a committee to do so, resulting in the addition of life imprisonment as an alternative to capital punishment. Separately, Mohamed writes, was his official recognition of a moratorium on the death penalty. If correct, the future looks promising, but as Phases Two and Three are newly launched, more research is required on applications in this arena as well.

* * *

In his essay, **Dominik M. Müller** takes an historical approach. He traces Brunei's new Islamic criminal code back to the country's independence in 1984, and, even further, to the so-called Anglo-Mohammadan law established by the British protectorate earlier in the twentieth century, and to the *Hukum Kanun Brunei* before that—some version of which may have stretched all the way back to Islam's arrival to Borneo in the fifteenth century. Müller is the first to assess the Code based on the evidence, albeit from Phase One. From 2014 to 2019, Phase One saw some application of the new Islamic Code to misdemeanors, but the extent of application was narrow in comparison with applications of the existing state Code. Looking at a twelve-month period from 2015 to 2016, Müller counts a total of 247 prosecutions under the new Code, all including fines (with the corporal punishments of the new Code from Phases Two and Three not yet in effect). He puzzles over the expressions of surprise among the international media outlets at the new Code, given the centuries-long history

that preceded it as well as the legislative history that followed the phased introduction of the new law announced in 2013, and the minor penalties since. Müller then contrasts the international criticism with the local response: feeling under attack, an educated elite and other social media influencers in Brunei closed ranks in support of the new Code under the banner #BruneiUnited. For Müller, while none of these developments should have surprised the world, the fact that they did likely follows from the fact that Brunei is both historically insular and the "academically most understudied Southeast Asian country." If true, his observation underscores the extent to which more research is required.

* * *

In a short essay, **Adnan A. Zulfiqar** takes a more critical approach to aspects of Brunei's criminal laws that have garnered less attention but that he finds troubling. The international community has, rightly in his view, protested against and condemned the law's potential violations of human rights norms against torture and individual freedom. Most condemnations have focused on provisions for capital punishment, whipping, and amputation for the new Code's crimes of *liwāṭ* (sodomy), *zinā* (unlawful sexual intercourse between heterosexuals), and theft. But little attention has been paid to the Code's departures from "classical Islamic law's substantive and procedural constraints" that allow legislators and prosecutors to "criminalize more conduct." For example, the Code permits punishment of offenders who lack legal capacity, requires four eyewitnesses to prove rape, and prosecutes beliefs through punishing *attempted* apostasy—that is, where resolving to renounce Islam is made equivalent to renouncing it at a time when renunciation of religion, unlike during medieval regimes, does not carry the threat of treason. For these reasons, despite the procedural protections and heightened standards of doubt jurisprudence to which Mohamed and Müller point, he concludes that the new Code entails many provisions that signal the need for greater caution and perhaps further modification. Zulfiqar argues that Brunei codified Islamic criminal law in a way that creates new

crimes and disregards defendant rights, and thus diverges from norms of fairness and cultural relevance in the historical precedents and mores of the very Islamic system which it seeks to reinterpret for its society today.

# Understanding the Situation on the Ground

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## Abstract

*Mansurah Izzul Mohamed comments on the implementation of Syariah Penal Code Order 2013—Brunei's new Islamic criminal code. Phase One, covering small crimes and misdemeanors, took effect in May 2014. Phases Two and Three, specifying more serious crimes and more severe punishments, took effect in April 2019. This post outlines the history and procedural components of the law with respect to national and international law. Her basic argument is that Codification + Procedure = Just Implementation.*

International attention to Brunei's plan to pass a new Islamic criminal code peaked in May 2014. That was Phase One, when the country had just announced the legislation. The attention returned in April 2019, as the country went on to pass into law Phases Two and Three.[1]

One part of the story is missing: even before the Syariah (*Sharīʿa*) Penal Code Order (SPCO) of 2013, components of Islamic law in Brunei were present through customary norms—well before the country attained protectorate status from the British in 1888, and independence in 1984. Under the British protectorate, residents and colonial officers alike would advise the Sultan on religious administration. They sought to systematically institutionalize and codify Islamic laws, following Western ideas of nation building and particular types of law.[2] To be sure, until 2014, the Islamic legal sphere was confined to family and personal status law. But the colonial influence provided an institutional foundation for the creation of post-colonial Islamization policies thereafter.

## Codification of Islamic Principles[3]

What Brunei has done with respect to the codification of Islamic principles into law is to allow for a uniform and clarified interpretation that can provide legislative mechanisms to improve criminal law practices and informal norms. The codification established that the authority to amend the legislation would be with the national government and not an individual judge.

While still in the primary stages of implementation, the new law in Brunei is one in which criminal law tracks the community's judgments of justice in order to build legitimacy locally. Paul

1 Syariah Penal Code Order 2013 (No. S 69) (Oct. 22, 2013), http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2013/EN/s069.pdf [https://perma.cc/VUL5-W8QM].

2 One of the legal codes that came out of this was the Mohammedan Laws Enactment 1912.

3 Codification is "the act or process of arranging something, such as laws or rules, into a system." *Codification*, Cambridge Advanced Learner's Dictionary & Thesaurus, https://dictionary.cambridge.org/us/dictionary/english/codification [https://perma.cc/Q9FJ-R7SC].

Robinson refers to this form of lawmaking as "moral credibility": the local community is a moral authority that helps set the law and compliance norms for community behavior.[4] The result allows for what the Brunei government aspires to achieve: a just system that can use internalized norms and social influence to benefit society by policing crime.

The first phase of the new Code covers what might be thought of as misdemeanors, and became law on May 1, 2014. That is, it set fines and prison terms for "non-*ḥudūd*" offenses, including some fifty-five "general offenses" with relatively minor penalties (*taʿzīr*), such as skipping Friday prayers, disrespecting norms for Ramadan, and the like.[5]

The next two phases, introduced on April 3, 2019, were more serious. The new Code includes more severe punishments under the rubric of *ḥudūd* (fixed criminal punishments and sentences) and *qiṣāṣ* (murder and personal injury laws). These offenses range from apostasy and murder to adultery and sodomy as crimes. All are matters of life or death: each could result in the death penalty or imprisonment and fines depending on the severity of the crime.

More generally, the SPCO punishments are a combination of what might be called "misdemeanors" and "serious crimes." SPCO punishments are divided into the general, or *taʿzīr*, offenses (defined as acts against society), *ḥadd* offenses (defined as acts against God), *qiṣāṣ* offenses (defined as retaliation or retribution for wrongful death or personal injury), and offenses of financial compensation (*diyāt*, *badal al-sulḥ*, and *arsy* (Arabic: *arsh*)). Most of the offenses under the SPCO draw on classical *sharīʿa* crimes and penalties, though Brunei introduced new general offenses.

The procedures and structures governing these Codes are unique to Brunei. The law requires that stringent evidentiary conditions be met. The Syariah Courts Criminal Procedure Code Or-

4 Paul H. Robinson, Keynote Address at the University of Tehran on the Codification of Shari'a-based Criminal Law in Developing Muslim Countries (Mar. 6, 2019).

5 Refer to Parts I, II and III of the Syariah Penal Code Order 2013 (No. S 69), Oct. 22, 2013.

der (SCCPCO) of 2018, which commenced January 1, 2019, makes provisions related to criminal procedure for Syariah Courts.[6] Structurally, according to Attorney General Hairol Arni Abdul Majid, Brunei is the first to adopt the *Civil* Criminal Penal Code into the *Syariah* Criminal Penal Code. The two align in 95% of the content, but the Syariah Criminal Penal Code differs on provisions for certain investigations and the use of confession.[7]

## The Strengthening of Procedure

The main objective of criminal justice is to render justice in accordance with due process of the law. The SPCO gives Syariah Courts jurisdiction over criminal cases, within a dual or hybrid legal system in which legislation based on Islamic law and common law function concurrently.

What happens when one offense can be heard by a Syariah Court or a Common Law Court? The procedure of overlapping offenses under the jurisdiction of both Courts is as follows:[8]

- **Investigation**: Cases involving serious offenses such as theft, robbery, murder, causing hurt, and rape are to be reported to and investigated by the Royal Brunei Police Force with the assistance of other law enforcement agencies where relevant.
- **Reporting & Probable Cause**: After investigation, the Investigation Paper will be submitted for evaluation by the Public Prosecutor with the assistance of the Chief Syar'ie

6 Syariah Courts Criminal Procedure Code Order (SCCPCO) 2018 (No. S 9) (Mar. 5, 2018), http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2018/S009.pdf [https://perma.cc/KU9Y-RUH5].

7 Eileen Ng, *Brunei Defends Move to Implement Syariah Law Amid Global Outrage*, Straits Times (Apr. 12, 2019), https://www.straitstimes.com/asia/se-asia/brunei-defends-move-to-implement-syariah-law-amid-global-outrage [https://perma.cc/5VK8-VKTT].

8 Datin Hayati Pehin Mohd Salleh, *The Special Lecture on the Enforcement of the Syariah Penal Code Order 2013 for Phase One*, Declaration Ceremony of the Enforcement of the Syariah Penal Code Order (Apr. 30, 2014), http://www.agc.gov.bn/AGC%20Images/downloads/speech/english.pdf [https://perma.cc/6QMB-ED3F].

Prosecutor if required. Assessment will be made as to the sufficiency of the evidence to prove the offenses under the SPCO 2013, or whether the suspect wishes to make a confession (*iqrār*) in accordance with the Syariah Courts Evidence Order (SCEO) of 2001 and the SCCPCO.

- **Choice of Jurisdiction**: By default, cases will go to Common Law Courts. If the evidence accords with the SPCO or a confession comes under the SCEO, the case will be transferred to the Syariah Courts for prosecution by Syar'ie Prosecutors with the assistance of Deputy Public Prosecutors, if required. Otherwise, the prosecution will continue under the Penal Code (Chapter 22) in civil courts.

On the one hand, the SCCPCO is specific in laying out punishments. The Order governs the conduct of investigation and prosecution as well as the role of the Syariah Court. The Order even graphically illustrates how several punishments should be carried out.[9]

The difference in procedure from other Islamic law-implementing countries is seen in offenses that carry corporal punishment, such as whipping. In Brunei, the conditions for carrying out such a sentence are constrained by restrictions on carrying out punishments and limitations on accepting confessions. In Brunei, the enforcer of any punishment has to be of the same gender, and may use only moderate force—without lifting his or her hand over his or her head to ensure that no bones are broken or skin lacerated.[10] While a perpetrator confessing to his crime would be one of the instances that could obviate the need to fulfill the witness and evidentiary requirement, the Brunei system calls for medical checks to make sure that anyone who confesses is competent to do so (i.e., that they are of sound mind), and it prompts or permits defendants to retract any confession at three designated points

9 Refer to Annex A for illustrations as shown in the SCCPCO 2018.

10 This is different from the images circulated in foreign media, where whipping sentences executed in public in areas such as Aceh, Indonesia, were conducted by a man on a female perpetrator.

in the trial proceedings: before the trial starts, before sentencing, and before execution. The Code further allows defendants to withdraw their confession at any time, including during punishment.[11] This is designed to ensure that no sentence would be carried out due to a confession.

Several government officials iterated that the high evidentiary threshold is difficult to implement. The Brunei law requires two or four men of high moral standing and piety as witnesses to meet the standard of proof of "no doubt at all" for all aspects of the penal crimes.[12] Brunei seems to be embarking on a continuation of its pre-British protectorate practice of non-punishment, in line with Intisar A. Rabb's observation on doubt in Islamic law.[13]

## National Enforcement or Moderation?

There are reasons to suggest that the emphasis in the new Brunei code is on moderation rather than on strict enforcement. First, classical Islamic law norms require defendant protections, and so do Brunei's new laws—following those norms. I have already mentioned the principle of doubt above, the classical notion which Intisar A. Rabb explained in her book *Doubt in Islamic Law* and a modern example of which was codified in Brunei's new procedure code as a higher-than-reasonable-doubt standard of "no doubt at all." In addition, the Islamic law principle of proportionality in punishment would further ensure that this severe punishment be reserved for the most egregious cases. Moreover, forgiveness, mercy, repentance, and restitution are encouraged as alternatives to punishment.

Second are the procedural protections specific to the death penalty and the Sultan's recent declaration of a moratorium on its enforcement. The death penalty is not new under Brunei law, but it now has provisions to allow for commutation. While the death

11 SPCO § 86.

12 "No doubt at all" is higher than the common law standard of "beyond reasonable doubt." *See* Ng, *supra* note 7.

13 Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law (2015).

penalty is present in the SPCO and SCCPCO, it is also present in the civil Criminal Procedure Code (CPC). Under the new Code, there are more ways for avoiding the death penalty. Imposition of the death penalty for murder upon the satisfaction of an extremely high evidentiary threshold can be avoided by a pardon from the next-of-kin of the victim or upon payment of *diyāt* (blood money) if requested by the next-of-kin. The Sultan can pay the *diyāt* if the accused cannot afford to do so.

Related is the Sultan's role in legislation and enforcement, which has guided the historical practice. Importantly, the Sultan, in a recent *titah* (royal decree), announced a *de facto* moratorium on the executions for capital cases under the SPCO, which provides a wider scope for remission.[14] Brunei has moreover shown how, although the death penalty is present in legislation, both civil and Islamic (*sharīʿa*), it is rarely enforced and has not been enforced at all recently. The Sultan then made this *de facto* moratorium *de jure* in all cases.

Third, Brunei is bound to international obligations and has demonstrated willingness to revise legislation in response to reasoned debate and recommendations. Brunei is a small country that has thrived on its participation in regional and international fora, as a member of organizations such as the Association of Southeast Asian Nations (ASEAN), United Nations (U.N.), Commonwealth of Nations, Organisation of Islamic Cooperation (OIC), and Group of 77 (G77). Brunei is committed to observing international obligations in promoting and protecting human rights, and signals that it will continue to uphold obligations to international covenants on human rights such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC). Additionally, Brunei rejects all forms of torture, as well as inhumane or degrading treatment or punishment. In his *titah* in conjunction with the month of Ramadan, His Majesty proclaimed that Brunei would be

14 *05.05.19 SPCO Clarified*, Prime Minister's Office (May 5, 2019), http://www.pmo.gov.bn/Lists/News/DispForm.aspx?ID=1188 [https://perma.cc/9QSF-5XC8].

ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).[15]

During the first session of the United Nations Human Rights Council Universal Periodic Review (UNHRC-UPR), several countries recommended that Brunei review its capital punishment legislation, even though it had a *de facto* moratorium status.[16] This led to Brunei assembling an *ad hoc* committee and resulted in the addition of life imprisonment as an alternative to offenses that had previously warranted the death penalty. This process and outcome demonstrates Brunei's willingness to consider fellow nations' recommendations and those of the international community through deliberation and legislation. The country's eagerness to conform and to be a welcome member of the international community should be a testament to the idea that Brunei will not seek to enforce severe criminal punishments, and that it instead emphasizes that the punishments are more of a deterrent than a means to an end.

## Whither Brunei's New Laws?

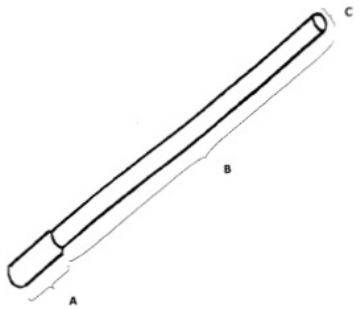
The key to safe, defendant-protecting enforcement of an Islamic criminal justice system in Brunei depends on the codification of a uniform and clarified interpretation of Islamic law (*sharīʿa*), as well as sound procedural components outlined in the SCCPCO clauses—all within the national cultural context. It is yet to be seen how the Syariah Courts will implement the legislation, examine cases through either a civil or *sharīʿa* lens, and determine the threshold by which the stringent evidentiary conditions and high burden of proof will be met. The next steps will be to elaborate and clarify the laws before and in the process of implementing them.

**ANNEX A: Graphic Illustrations Depicting How Corporal Punishments Should Be Carried Out, As Shown in the Syariah Courts Criminal Procedure Code Order (SCCPCO) 2018**

Fifth Schedule: Whipping Rod [§ 179(a)]

FIFTH SCHEDULE
[section 179(a)]

WHIPPING ROD

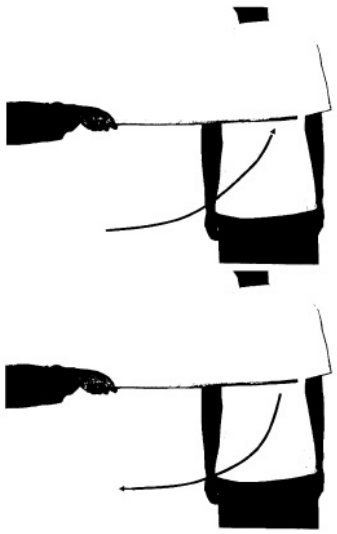



A. WHIPPING ROD HOLDER
B. LENGTH OF WHIPPING ROD — not exceeding 1.22 metres
C. DIAMETER OF WHIPPING ROD — not exceeding 1.25 centimetres

Sixth Schedule: Execution of Sentence of Whipping [§§ 179(e)–(f)]

SIXTH SCHEDULE
[section 179(e) and (f)]

EXECUTION OF SENTENCE OF WHIPPING



# Brunei's Sharīʿa Penal Code Order: Punitive Turn or the Art of Non-Punishment?

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## Abstract

*In his essay, Dominik M. Müller takes an historical approach. He traces Brunei's new Islamic criminal code back to the country's independence in 1984, and even further, to the so-called Anglo-Mohammadan law established by the British protectorate earlier in the twentieth century, and to the* Hukum Kanun Brunei *before that—some version of which may have stretched all the way back to Islam's arrival to Borneo in the fifteenth century. Müller is the first to assess the Code based on the evidence, albeit from Phase One. From 2014 to 2019, Phase One saw some application of the new Islamic Code to misdemeanors, but the degree paled in comparison with applications of the existing state Code. Looking at a twelve-month period from 2015 to 2016, Müller counts a total of 247 prosecutions under the new Code, all including fines (with the corporal punishments of the new code from Phases Two and Three not yet in effect). He puzzles over the expressions of surprise among the international media outlets at the new Code, given the long history that preceded as well as the legislative history that followed the phased introduction of the new law announced in 2013, and the minor penalties since. Müller then contrasts the international criticism with the local response: feeling under attack, an educated elite and other social media influencers in Brunei closed ranks in support of the new Code under the banner #BruneiUnited. For Müller, while none of these developments should have surprised the world, the fact that they did likely follows from the fact that Brunei is both historically relatively insular and the "academically most understudied Southeast Asian country." If true, his observation underscores the extent to which more research is required.*

* I wish to thank Intisar Rabb for inviting me to contribute to this Forum. Her comments and the *Journal of Islamic Law*'s editorial assistance have been tremendously helpful in improving earlier versions of this essay.


Image circulating on Bruneian social media, comparing criticism against the SPCO with the Prophet Muḥammad: "He was insulted, boycotted, slandered, and ashamed for upholding the Sharia—now we are going through the same experience."


Meme circulating on Bruneian social media, using the hashtag "#BruneiUnited." April 2019.


Image circulating on Bruneian social media: "Gays stoned to death in Brunei? What a hoax!" April 2019.

## I. Brunei's Sharia Reform: Getting the Facts Right

International media coverage exhibited a regrettable lack of knowledge about Brunei and its legal reform.[1] Most journalists approaching me knew close to nothing about Brunei society, its legal landscape, its domestic politics, or the governmentally prescribed national ideology *Melayu Islam Beraja* (officially translated as "Malay Islamic Monarchy," commonly referred to by its acronym "MIB").[2] This lack of knowledge resulted in the peculiar question, "Why did the Sultan suddenly decide to implement *sharīʿa* law?" Such ignorance shaped the public debate and fueled frustrated counter-reactions against international protests.[3] Con-

1 On Phase One of the legal reform, implemented in May 2014, see, for example, Andrew Buncombe, *International Outcry as Brunei Introduces Sharia Law and Takes Country Back to the Dark Ages*, Independent (Apr. 30, 2014), https://www.independent.co.uk/news/world/asia/international-outcry-as-brunei-introduces-sharia-law-and-takes-country-back-to-the-dark-ages-9308088.html [https://perma.cc/8VMR-KBHL] (with a headline claiming that Brunei "introduce(s) sharia law," despite Islamic law having long existed in Brunei); Eyder Peralta, *Sultan of Brunei Introduces Sharia Law*, NPR (Oct. 22, 2013), https://www.npr.org/sections/thetwo-way/2013/10/22/240012174/sultan-of-brunei-introduces-sharia-law [https://perma.cc/Q3SD-QZR9] (mistakenly claiming that Brunei had become "the first Southeast Asian country to institute Sharia Law at a national level"); Lucy Westcott, *Brunei Becomes First Asian Country to Impose Nationwide Sharia Law*, Atlantic (Apr. 30, 2014), https://www.theatlantic.com/international/archive/2014/04/brunei-becomes-first-asian-country-to-impose-nationwide-sharia-law/361458/ [https://perma.cc/Z2W2-KLNY] (reiterating the NPR statement). On Phases Two and Three, which took effect in 2019, see *Brunei Regresses to Stone Age Laws*, Eur. Diplomatic (Mar. 29, 2019), https://europediplomatic.com/2019/03/29/brunei-regresses-to-stone-age-laws [https://perma.cc/B2FD-NJUR] (repeating a popular journalistic "stone age" trope and claiming that "any individuals found guilty of the offenses will be stoned to death publicly" even though that conclusion is in fact contrary to the letter of Brunei's new law); Hollie McKay, *Brunei's Crackdown on Homosexuality: Why Kingdom Is Implementing Draconian Sharia Law*, Fox News (Apr. 2, 2019), https://www.foxnews.com/world/bruneis-crackdown-on-homosexuality-why-kingdom-is-implementing-draconian-sharia-law [https://perma.cc/553C-YGWU] (reporting on "the Islamic Penal Code known as Sharia Law" and quoting an "expert" warning that "[t]he radical Islamic ideology behind the law can rapidly turn into mass executions").

2 *See* Dominik M. Müller, *Hybrid Pathways to Orthodoxy in Brunei Darussalam: Bureaucratised Exorcism, Scientisation and the Mainstreaming of Deviant-Declared Practices*, 37 J. Current Southeast Asian Affs. 141, 150–83 (2018).

3 Every journalist and NGO representative from the United States, United Kingdom, Italy, Germany, and Singapore who approached the author repeatedly asked this question. Some of the most common, purely speculative answers they themselves

versely, many, including highly educated, cosmopolitan Bruneians, perceived "our Sultan and sovereignty" to be "under attack." They used hashtags like *#BruneiUnited* on Instagram and Twitter,[4] and repeatedly indicated that Brunei was being fundamentally misrepresented and misunderstood by the (non-Muslim) world.

### *a. A Short History of the Reform, 1996–2013*

The legal reform was no sudden decision. Sultan Hassanal Bolkiah first declared on May 19, 1996, that Brunei should have an Islamic penal code. State-Islamic elites have long lobbied for it, behind the scenes and publicly. They have also successfully pushed forward many other "Islamization" policies since the 1990s.[5]

In 2011, following a meeting of the authoritative Brunei Islamic Religious Council (*Majlis Ugama Islam Brunei* (MUIB)) headed by the Sultan, he affirmed the plan, rhetorically asking,

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suggested (and others wrote) included indications that "oil reserves begin to decline" (Holly Robertson, *Brunei Enacts Islamic Laws to Punish Gay Sex with Stoning to Death*, ABC News (Apr. 3, 2019), https://www.abc.net.au/news/2019-04-03/brunei-introduces-sharia-law-lgbt-whipping-stoning-to-death/10959618 [https://perma.cc/J39S-L4BC]); that the Sultan was attempting "to clean up his family's image" (Rebecca Wright, *Is the Sultan of Brunei Imposing Sharia Law to Clean Up his Family's Image?*, CNN (Apr. 9, 2019), https://www.cnn.com/2019/04/09/asia/brunei-sultan-intl/index.html [https://perma.cc/ZE4G-ERZT]); and other comments that Brunei might be manipulated by Saudi Arabia or that its leader wanted to please Middle Eastern countries for business-related purposes.

4 *See, e.g.*, #bruneiunited, Instagram, https://www.instagram.com/explore/tags/bruneiunited (last visited Apr. 23, 2020) [https://perma.cc/R5DN-5PXG]; #bruneiunited, Twitter, https://twitter.com/hashtag/bruneiunited (last visited Apr. 23, 2020) [https://perma.cc/7S7A-JMED].

5 In 1990, a working group, following up on an earlier "Committee of Harmonising Laws in Accordance with Islam" (*see* Awang Abdul Aziz bin Juned, The King who Shapes History: A Tribute in Conjunction with the Golden Jubilee of the King's Ascension to the Throne 215 (2017)), began examining all existing laws to bring them "in line with Islam" (*see* Dominik M. Müller, *Sharia Law and the Politics*, *supra* note 5, at 327–45; Dominik M. Müller, *Islamic Authority and the State in Brunei Darussalam*, *in* Islamism in Southeast Asia: Kyoto Review of Southeast Asia (Special Issue) 23 (Joseph Chinyong Liow ed. 2018). As Black puts it, since the 1980s, the government has stressed its "commitment to making the Islamic (legal) system the most effective system in the country," and it gradually widened the jurisdiction of Islamic courts to comprise and traverse fields such as family law, adoption, evidence, arbitration mechanisms, and banking and finance. *See* Ann Black, *ADR in Brunei Darussalam: The Meeting of Three Traditions*, 4 ADR Bull. 107, 108 (2002); *compare* Müller, *Sharia Law and the Politics*, *supra* note 5, at 321.

"Who are we to say 'wait'?"[6] (much cited[7] by Islamic penal code advocates in neighboring Malaysia), and stressing his duty as ruler of an Islamic state to enforce such a code. He unambiguously stated that "only when Islamic laws are in place...can [Brunei] be called '*baldatun ṭayyibatun wa Rabbun Ghafūr*,'[8] or a good nation—we have no option but to obey *all* of Allah's commandments, this is our highest obligation!" He asked again: "Who are we, in the face of Allah [to say] 'no' or 'wait'?!" and later added, "We cannot wait any longer..., we have the capability (*kemampuan*) and power (*kuasa*) to do it!"[9] On October 22, 2013, in another locally very prominent speech, he declared the code's finalization—still largely unnoticed in the international media.

This sentiment was neither new nor idiosyncratic to the

6 *See* Hajah Zabaidah & Haji Salat, *Jangan kata "Tidak" atau "Tunggu Dulu"* (*Don't Say "No" or "Wait First"* (author's translation)), Pelita Brunei (Oct. 15, 2011); *Who Are We to Say "Wait,"* Brunei Times (Oct. 13, 2011). The State Muftī, one of the SPCO's key architects, printed the Sultan's statement preceding that rhetorical question in the same speech, stating, "We cannot wait any longer or say 'wait first'" (*kita tidak boleh lagi berkata tidak atau tunggu dulu*), on the cover of a book of poems lauding the SPCO, authored by himself (published under his pen name). *See* Adi Rumi, Perintah Kanun Jenayah Syariʾah: "Neraca Allāh" (2013).

7 The news became widely shared in social media, for example, by supporters of the Pan-Malaysian Islamic Party (*Parti Islam Se-Malaysia (PAS)*), about whom I conducted ethnographic research at that time. Prominent Malaysian preachers like Ustaz Azhar Idrus ("UAI") lauded the Sultan for fulfilling his "duty" while critically contrasting it with Malaysia "opposing God's Law." *See* Ustaz Azhar Idrus, *Pandangan Tentang Hudud Di Brunei 31.12.2013 - Ustaz Azhar Idrus*, YouTube (Dec. 31, 2013), https://www.youtube.com/watch?v=f1P-qc2BJ_4 [https://perma.cc/U7JD-UKQT]. For one of the many blogs that enthusiastically carried the news, similarly noting contrasts between the Sultan of Brunei as exemplary and the then-Malaysian Prime Minister Najib Tun Razak as not for refusing to implement *ḥudūd* laws, *see Cer Citer.. Cer Citer..*, (Feb. 15, 2012), http://ezwankini.blogspot.com/2012/01/baginda-sultan-brunei-juga-yang_15.html [https://perma.cc/F6HC-SU4K]. On the Bruneian legal reform's cross-border impacts, *see* also Dominik M. Müller, *Paradoxical Normativities in Brunei Darussalam and Malaysia: Islamic Law and the ASEAN Human Rights Declaration*, 56 Asian Survey 415, 437–39 (2016).

8 A Qurʾānic expression, translatable as a "prosperous country blessed by the Almighty God Allah" (Qurʾān, 34:15). This translation was taken from Haedar Nashir, Muhammadiyah: A Reform Movement 101 (2015).

9 A video of the Sultan's speech, held at the opening ceremony of a Seminar on Islamic Law (*Seminar Antarabangsa Perundangan Islam*), which shows him explaining—with English subtitles—the SPCO as an instrument to realize the notion of "*baldatun thayyibatun wa rabbun ghafur*," is available at https://www.youtube.com/watch?v=ES4ifVH1E8Q [https://perma.cc/VES9-W6ZN]. It is also cited in Zabaidah & Salat, *supra* note 6, at 2.

person of the Sultan. Prominent state-Islamic advisors, like State Muftī Awang Abdul Aziz bin Juned (a key architect of Bruneian state-Islam), the late Mahmud Seadon Othman (who already in the 1990s proposed to abandon all non-*sharīʿa* legislation and have an Islamic penal code), and Anwarullah Shafiullah (originating from Pakistan), have always promoted this narrative. They did so mostly behind the scenes (where Islamic policies in Brunei are normally lobbied for, drafted, and introduced "internally..., slowly and quietly"[10]), though they regularly also did so in public and in local Bruneian Malay-language publications.[11] In the absence of an opposition or independent civil society, the Islamic bureaucracy is among Brunei's most powerful political forces.[12] Some wonder whether the absolute monarch controls them, or they control him, and the truth probably lies somewhere in between.

*b. Phased Implementation, 2014–2019*

On April 3, 2014, implementation of the Syariah (*Sharīʿa*) Penal Code Order 2013 (SPCO, or *Perintah Kanun Hukuman Jenayah Syariah 2013*) began, announced to unfold in three stages. In a speech, with key royal family and government members sitting on stage, symbolizing undivided support, the Sultan noted his fulfillment of an unquestionable divine obligation, and said that state-Islamic agencies would now be tasked with implementing the law "with full responsibility."[13] Not only were international

10 Iik Arifin Mansurnoor, *Islam in Brunei Darussalam and Global Islam: An Analysis of Their Interaction*, *in* Islam in the Era of Globalization: Muslim Attitudes Towards Modernity and Identity 71, 88 (Johan Meuleman ed., 2002); Müller, *supra* note 2, at 153; Müller, *Sharia Law and the Politics*, *supra* note 5, at 327.

11 *See, e.g.*, Anwarullah, Criminal Law of Islam (2015); Mahmud Saedon Othman, Jejak-Jejak: Kumpulan kertas kerja Allahyarham Dato Paduka Seri Setia Profesor Dr. Haji Awang Mahmud Saedon bin Awang Othman (2003); Mahmud Saedon Othman, Perlaksanaan dan Pentadbiran Undang-Undang Islam di Negara Brunei Darussalam: Satu Tinjauan (1996); Mahmud Saedon Othman, A Review on the Implementation and Administration of Islamic Law in Brunei Darussalam (2008); *Experts Laud Brunei for Introducing Syariah Law*, Borneo Post (Oct. 25, 2013), https://www.theborneopost.com/2013/10/25/experts-laud-brunei-for-introducing-syariah-law [https://perma.cc/F9ZP-ZC2T].

12 Müller, *Sharia Law and the Politics*, *supra* note 5, at 320.

13 The original Malay wording is: "terutama agensi-agensi yang berkaitan,

media outlets surprised, but also many Bruneians who had not followed Sharia-related royal decrees and discourses before, were caught by surprise.[14] American celebrities, concerned about animus against homosexuals, staged protests at the Beverly Hills Hotel. For example, Fox News TV aired a segment in 2014, using the slogan, "Welcome to the Hotel Sharia—you can check in, but you can never leave."[15] But the media caravan soon moved on.

Phase Two was scheduled to begin twelve months after an additional procedural code had been finalized. The completion of the Syariah Courts Criminal Procedure Code Order (SCCPCO) was initially said in 2014 to take six months. But it was only finalized much later, in March 2018. Some mistakenly speculated about the SPCO's "postponement";[16] others assumed that it was "abandoned" due to international pressure.[17] The Sultan, meanwhile, publicly criticized the Ministry of Religious Affairs and Attorney General's Chambers in 2016 for the SCCPCO's slow progress, warning that delays could make the legal reform look "worthless."[18] He repeatedly noted that the world would misunderstand the law, but that its purpose was "not to look left and right in search for anyone who

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hendaklah melaksanakannya dengan penuh tanggungjawab." *See* Sultan Haji Hassanal Bolkiah's Royal Address (*Titah Sempena Majlis Pengisytiharan Penguatkuasaan Perintah Kanun Hukuman Jenayah Syar'iah 2013*) (Apr. 30, 2014).

14 This note is based on my personal observation from conversations with Bruneians at that time and later, in retrospect.

15 *Welcome to the Hotel Sharia*, Fox News TV (May 10, 2014), https://archive.org/details/FOXNEWSW_20140510_100000_FOX_and_Friends_Saturday/start/1206/end/1266 [https://perma.cc/754N-8ZCB]. *See also* Meena Jang, *Jay Leno Joins Feminists at Beverly Hills Hotel Protest: "What Year Is It, 1814?,"* Hollywood Reporter (May 5, 2014), https://www.hollywoodreporter.com/news/jay-leno-joins-feminists-at-701320 [https://perma.cc/852K-YFYV].

16 Already in his 2014 speech, the Sultan stressed that "there is no question at all that we are postponing the order's enforcement as quoted by media" (translation), responding to articles like *Brunei Postpones Tough New Islamic Law*, BBC News (Apr. 23, 2014), https://www.bbc.com/news/world-asia-27122016 [https://perma.cc/7V4X-QJFM].

17 This assessment is based on personal conversations with various interested parties between 2016 and 2018. *See also* Rui Hao Puah, *Brunei's Sharia Dilemma*, cogitASIA (CSIS Asia Program, Center for Strategic & International Studies) (Sept. 25, 2015), https://www.cogitasia.com/bruneis-sharia-dilemma [https://perma.cc/G4J2-GV9U].

18 For further discussion, see Müller, *supra* note 7, at 203.

likes or dislikes it, but to fulfill Allah's commandments"[19] (mirroring the State Muftī's long-expressed view that non-Muslims could by definition not "understand Islam" and naturally "oppose" it, implying assumed wider agendas to "colonize" Muslim minds).[20] Throughout this period (2014–2018), Brunei's state-controlled media, and the State Muftī, constantly referred to the SPCO as a symbol of historically deep-rooted national identity and tradition under the "national ideology" of *Melayu Islam Beraja* (MIB). The daily evening news on Radio Television Brunei (RTB) presented one "beautiful" SPCO section per day to educate the public. Trainings, the establishment of a diploma program in Islamic Criminal Justice at Brunei's Sultan Sharif Ali Islamic University, and preparatory international exchanges took place.[21] The Sultan also noted

19 For example, in the speech marking the inauguration of the SPCO on April 30, 2014, he noted that "my personal obligation and our obligation to Him in enforcing Islamic Laws, have already been accomplished (by enforcing the SPCO)," and added, "Remember, our focus is on Allah alone, to seek his blessings, and not looking left and right in search of anyone who likes or dislikes it [the SPCO]. ... Allah's commandments are not a theory, but obligatory law...as prescribed by the Quran and Sunnah." Sultan Haji Hassanal Bolkiah, *Enforcing Shariah Law - Golden Speech of Sultan of Brunei*. *May 1st, 2014*, YouTube (Apr. 30, 2014), https://www.youtube.com/watch?v=Vjv3b_Zd_ic [https://perma.cc/5LFE-Z9BQ], minutes 3:35–3:50, 4:10–5:31 (author's translation). In his SPCO-related speech on October 13, 2011, he said, "[W]e have no option but to obey all of Allah's commands, this is our highest duty. One of His commands is to implement His laws. These are Sharia laws." Sultan Haji Hassanal Bolkiah, *Ucapan Sultan Brunei Berkaitan Hukum Hudud – Malaysia-Berih*, YouTube (Oct. 13, 2011), https://www.youtube.com/watch?v=19hW_Aw8rho [https://perma.cc/H9Q9-4VAX], minutes 1:02–1:25 (author's translation). In yet another speech, in October 2013, the monarch stressed the implementation of Islamic law was meant to ensure blessings for the afterlife (Arabic: *ākhira*; Malay: *akhirat*), as "promised" by Allah, against which factually questionable arguments of potential economic disadvantages would have no value. *See* Sultan Haji Hassanal Bolkiah, *Titah Baginda Sultan Brunei : Perlaksanaan Syariat*, YouTube (Oct. 11, 2013), https://www.youtube.com/watch?v=rHQaQg7w8PM [https://perma.cc/3J3N-KDYV]. For the State Muftī's writings on Brunei's Islamization policies as "hereafter investments," see Abdul Aziz Juned, *supra* note 5, at 310, 315.

20 This sentiment was expressed, for example, in a televised lecture from 2014. *See* Müller, *supra* note 2, at 325. Similarly, the prominent MIB interpreter cited in the same context Qurʾānic verse (2:120) stating that "never will the Jews or the Christians approve of you until you follow their religion," to advise that Bruneians should thus "stop being apologetic" while "making the implementation of Islamic law our top priority at all levels." *See* Abdul Latif Ibrahim, Melayu Islam Beraja: Suatu Pemahaman xix, 109 (2013).

21 *See* Dominik M. Müller, *Brunei Darussalam in 2016: The Sultan Is Not*

that the SPCO might create (generally lacking) new jobs for Islamic Studies graduates.[22]

Before 2019, the SPCO's Phase One (Arabic: *taʿzīr*; Malay: *takzir*) was applied in some cases, but much fewer than the regular penal code. According to local media reports, a cross-dresser, for example, was sentenced to a monetary fine in 2015,[23] and another cross-dresser was arrested and charged under the SPCO in 2016.[24] In total, 247 Sharīʿa offenses were reportedly prosecuted in the fiscal year 2015–16, none including corporal punishments, as SPCO sections enabling these more severe punishments (*ḥudūd/qiṣāṣ*) would become enforceable only in Phases Two and Three.[25]

In April 2019, one year after the SCCPCO was presented and thus on schedule, the SPCO's next phase followed. Again, the world was strangely caught by surprise, as indicated by the reactions of representatives from international news media outlets, human rights organizations, and otherwise well-informed parties, and as also indicated by the reactions of many Bruneians, including members of the LGBTQ community as well as government officials working outside of the Islamic bureaucracy (as observed by the author, partly through personal exchanges). But the only real surprise was that Phases Two and Three were enforced together, counterbalancing the SCCPCO's prior delay. The SCCPCO's draft was already near-complete in 2016, and in my personal interviews those involved gave no clear explanation as to why its finalization took two more years. In 2014, the authorities stated that the phased implementation would allow the public to "get

*Amused*, 57 Asian Survey 199, 204 (2017).

22 *Id.*

23 *See* Ak Md Khairuddin Pg Harun, *Bruneian Civil Servant Fined $1,000 for Cross-Dressing*, Brunei Times (Mar. 11, 2015), https://btarchive.org/news/national/2015/03/11/bruneian-civil-servant-fined-1-000-cross-dressing [https://perma.cc/TC36-RBDU].

24 *See Cross-Dresser Arrested During Joint Operation*, Borneo Bull. (Aug. 16, 2016).

25 For citations and further discussion, see Müller, *Brunei Darussalam*, *supra* note 21, at 204. *See also* Khai Zem Mat Sani, *MoRA, AGC Finalising Syariah Courts Criminal Procedure Code*, Brunei Times (Mar. 15, 2016), https://btarchive.org/news/national/2016/03/15/mora-agc-finalising-syariah-courts-criminal-procedure-code [https://perma.cc/F4WC-6RTY].

used" to the SPCO.[26] This sentiment might partly explain the SCCPCO's delay, as would initially underestimated logistical challenges, and potentially some parties' reluctance to take responsibility—a hiccup to which the monarch himself alluded in his 2016 speech criticizing the delay.[27]

### *c. International Controversy and the Death Penalty Moratorium, May 2019*

The beginning of Phases Two and Three was met by massive international protests. These protests were amplified by the involvement of Hollywood celebrities—which I dub the "Clooney effect" to refer to George Clooney's public stance against the bill.[28] Human rights advocacy groups protested as well.[29] The Brunei Project, run by the Australian human rights activist Matthew Woolfe, has been particularly influential and widely present in different media outlets, having been the first voice in March 2019 to make international audiences aware of Brunei's imminent plans to enforce the SPCO's Phases Two and Three.[30] The European Union in 2019 considered various consequences, and several multinational companies and banks declared publicly they would reconsider their business relations with Brunei.[31]

In response, on May 5, 2019, the Sultan publicly stated

26 *See* Müller, *supra* note 2, at 324; *see also* Quratul-Ain Bandial, *Implementation of Syariah Law*, Brunei Times (Dec. 15, 2014), https://btarchive.org/news/national/2014/12/15/implementation-syariah-law [https://perma.cc/CY7Y-G6U9].

27 Müller, *supra* note 21, at 204.

28 *See* Ben Westcott, *George Clooney Calls for Hotel Boycott over Brunei LGBT Death Penalty*, CNN (Mar. 30, 2019), https://www.cnn.com/2019/03/29/asia/george-clooney-brunei-lgbt-intl/index.html [https://perma.cc/LT6Q-2HRZ].

29 *See*, *e.g.*, *Brunei: New Penal Code Imposes Maiming, Stoning; Immediately Suspend Highly Abusive Law*, Human Rights Watch (Apr. 3, 2019), https://www.hrw.org/news/2019/04/03/brunei-new-penal-code-imposes-maiming-stoning [https://perma.cc/CDX6-TRN5].

30 *See* various SPCO-related entries since March 2019 on The Brunei Project, Facebook, https://www.facebook.com/thebruneiproject [https://perma.cc/J99E-4TSM].

31 Emily Dixon, *More Companies Boycott Brunei over Anti-Gay Laws*, CNN (Apr. 5, 2019), https://edition.cnn.com/2019/04/05/asia/brunei-hotel-airline-boycott-scli-intl/index.html [https://perma.cc/682B-DSBN].

what government representatives had long stressed (albeit never said publicly),[32] and what many Bruneians equally assumed: that Brunei's "*de facto* moratorium on the death penalty" would continue under the SPCO.[33] This statement was not the "dramatic U-turn" that the international media claimed it to be, grounded in their own previous claims about the SPCO.[34] Content-wise, the Sultan's statement was not surprising, but his explicit declaration was. He explained, once again, responding to foreign "misconceptions" ("*salah tanggapan*"), while clearly aiming to counter massive international pressures targeting Brunei's economic interests.[35]

Even though it did not in fact present a media-proclaimed rupture from past practice, the explicit statement of a moratorium on the death penalty has changed the landscape of controversy surrounding Brunei's new Islamic criminal code. It reduces the risk of the law developing a life of its own in the hands of potentially zealous enforcers. Affected individuals, for example, ex-Muslims or LGBTQ persons, may not feel appeased.[36] The Van-

32 Bruneian authorities avoid speaking with international media on "sensitive" issues—which most political and religious matters are considered (except where a higher authority's pre-existing official position is supportively reproduced, but in *sharīʿa*-related matters not even then). This systemic silence contributes to the poor quality of international understanding and media coverage of Bruneian state and society, and deepens the very misunderstandings that the Sultan has repeatedly pointed out and that Bruneian social media voices rightly complain about.

33 Hajah Siti Muslihat Haji Salleh & Haniza Abdul Latif, *Undang-undang Jenayah Syariah penuh rahmat*, Pelita Brunei (May 5, 2019).

34 *See* Maya Oppenheim, *Brunei Says It Will Not Enforce Death Penalty for Gay Sex in Dramatic U-Turn After Widespread Criticism*, Independent (May 5, 2019), https://www.independent.co.uk/news/world/asia/brunei-death-penalty-gay-sex-law-stoning-sharia-sultan-hassanal-bolkiah-a8900636.html [https://perma.cc/PNB4-4992]. *See also Brunei Says It Won't Enforce Death Penalty for Gay Sex*, BBC News (May 6, 2019), https://www.bbc.com/news/world-asia-48171165 [https://perma.cc/T8RH-YQFU] (speaking of a "rethink" and Brunei having "backtracked").

35 The full speech, on the occasion of the beginning of the fasting month of Ramadan, is available at *Titah Sultan Brunei Sempena Menyambut Bulan Suci Ramadhan 1440h*, YouTube (May 5, 2019), https://www.youtube.com/watch?v=gk-fTiqiknik [https://perma.cc/5B8X-GGES].

36 This note is based on personal interviews with a Bruneian ex-Muslim of non-normative gender orientation and a Bruneian homosexual in exile in Vancouver, May 2019. Personal communication with Shahiran Sheriffuddin Shahrani Muhammad, in Vancouver, Canada (May 7, 2019).

couver-based political refugee Shahiran Shahrani, for example, who faced sedition charges for insulting the Ministry of Religious Affairs over *ḥalāl* regulations on his private Facebook page, responded that a statement that the Sultan does not explicitly frame as "definite royal decree" is not binding, even if it is made within a royal speech (*titah*). He called it a "clever complicated ploy" that would leave various options on the table for his successor to the throne. He also pointed to what he considered to be the new law's many other human rights-violating provisions beyond the death penalty.[37]

The moratorium statement was remarkable also considering that the SPCO's key propagator, State Muftī Awang Abdul Aziz Juned, had not long ago criticized earlier (pre-SPCO) calls among state institutions other than his own to formalize the long-existing *de facto* moratorium into a *de jure* moratorium.[38] The Muftī expressed this criticism,[39] somewhat ironically, in a book ostensibly about the Sultan.[40]

Furthermore, the Sultan's declaration of such a moratorium now is striking for internal government dynamics in Brunei, considering the Muftī's otherwise extensive powers in any *sharīʿa*-related policy matters.[41] For two decades, the Sultan appears to have always consented to the recommendations of the Islamic bureaucracy's elites—the SPCO's very existence and de-

37 For a comprehensive overview of human rights violations, see *Brunei Darussalam*, *in* Keeping the Faith: A Study of Freedom of Thought, Conscience, and Religion in ASEAN 55 (David Cohen & Kevin Tan eds., 2015). The remainder is based on my May 2019 interview with Shahiran Sheriffuddin Shahrani Muhammad, and a digital follow-up correspondence for clarification on August 9, 2019.

38 *See* Abdul Aziz Juned, *supra* note 5, at 199–203.

39 Among other categorical statements contradicting an explicitly declared moratorium, the State Muftī wrote, "Imagine if the death penalty is abolished, does that not give a signal that encourages people to kill? There is nothing to fear anymore because the penalty for killing is no longer death. Who will fear killing one another if the penalty is merely a fine or imprisonment?" Abdul Aziz Juned, *supra* note 5, at 202.

40 This very interesting book, The King Who Shapes History (*see* Abdul Aziz Juned, *supra* note 5), in my reading however says more about the Islamic bureaucracy's political achievements than about the actual person of the Sultan.

41 *See* Müller, *supra* note 2, at 154–55.

sign being a case in point. Regrettably, there is no known research on such intra-state dynamics, government institutions' workings behind closed doors, their implications for Islamic policymaking, or their societal consequences. Bruneian government representatives, would, understandably, claim "harmony" and that they share a monolithic, unified stance when they speak to outside audiences (if they speak to them at all). They also customarily adhere to a strict code of secrecy, while state-controlled media provide zero space for any such political analysis. These elements make research on Islam-related (and any other) politics in Brunei a highly challenging endeavor, but they also illustrate an urgent need to enable more grounded and adequate understandings of local developments.

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Although international media have largely failed to provide any substantial insights, accessing local knowledge about Islamic (or any other) policymaking in Brunei is admittedly a challenging endeavor, as Brunei presents arguably the academically most understudied Southeast Asian country. Rising to the challenge will require a lot of trust-building for foreign scholars and journalists alike, if they/we want to gradually change the current *status quo*. It will only be possible through respectful epistemic partnerships. For the Brunei government, opening its iron gates at least a little might serve its own interests, as doing so could enable the world to gain a more realistic picture than that of some of the orientalist caricatures that have emerged from the current wave of protests and calls for boycotts or sanctions.

## II. Situating Brunei's *Sharīʿa* Reform: Punitive Turn or the Art of Non-Punishment?

Contrary to international media language, Brunei has *not* recently decided to "implement Sharia Law," in the words of ABC

News among others.[42] It has transformed an existing *sharīʿa* judiciary, which mainly addressed family law, but also presided over criminal offenses in a *sharīʿa* court under the Religious Council and Kadis Courts Act of 1984 (*Akta Majlis Ugama Islam dan Mahkamah Kadi Penggal* 77).[43] Codifying and prosecuting *sharīʿa* offenses in Brunei dates back to Anglo-Muhammadan colonial laws, beginning in the early twentieth century.[44] Before that, an Islamically inspired code, called the *Hukum Kanun Brunei*, was in place, to which government authorities today questionably refer when claiming that the SPCO would restore a centuries-old Bruneian "tradition" of enforcing Islamic criminal law.[45]

42 *See* Kanaha Sabapathy, *Brunei Set to Implement Sharia Law*, ABC News (Apr. 24, 2014), https://www.abc.net.au/news/2014-04-24/an-brunei-sharia-law-enactment/5410588 [https://perma.cc/6SU6-SYYD].

43 The MUIB is *de jure* the "chief authority" in "all matters relating to religion." Religious Council and Kadis Courts Act § 38 (1984) (as amended) [hereinafter RCKCA], http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap077.pdf [https://perma.cc/M25Z-73ZS]. This official belongs to the Ministry of Religious Affairs. Müller, *supra* note 2, at 153.

44 *See* Timothy Lindsey & Kerstin Steiner, 3 Islam, Law and the State in Southeast Asia: Malaysia and Brunei (2012); Iik Arifin Mansurnoor, *Formulating and Implementing a Shariʿa-Guided Legal System in Brunei Darussalam: Opportunity and Challenge*, 1 Sosiohumanika 219 (2008); Iik Arifin Mansurnoor, *Re-establishing Order in Brunei: The Introduction of the British Legal System During the Early Residential Period*, 52 Islamic Studies 155 (2013); Müller, *supra* note 2, at 321.

45 *See* Mahmud, *supra* note 11, at 14ff; Kerstin Steiner & Dominik M. Müller, *Pluralism in Brunei's Constitution? Ethnicity, Religion, and the Absolute Monarchy*, *in* Pluralist Constitutions in Southeast Asia 86 (Jaclyn L. Neo & Bui Ngoc Son eds., 2019). The Sultan adopted this narrative in his speech of May 1, 2014, when he declared the implementation of the SPCO Phase One and stated that Brunei would "repeat its history of Islamic Law that has already been practiced centuries ago in this country." The speech is available at *Enforcing Shariah Law - Golden Speech of Sultan of Brunei*. *May 1st, 2014,* YouTube (May 2, 2014), https://www.youtube.com/watch?v=Vjv3b_Zd_ic [https://perma.cc/5LFE-Z9BQ], minutes 2:25–2:30). Regrettably, no substantial historical research exists detailing whether, and if so how, this pre-colonial code, modelled after the more famous *Hukum Kanun Melaka* (*cf.* Michael G. Peletz, Islamic Modern: Religious Courts and Cultural Politics in Malaysia 62 (2002)), has been applied. Very little is known about pre-colonial judicial and policing practices in Brunei, except some colonial anecdotes about provisions in the SPCO era locally discussed about the amputation of a hand in a theft case. *See* Awang Abdul Aziz bin Juned, Islam in Brunei During the Reign of His Majesty Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah Sultan and Yang Di-Pertuan of Negara Brunei Darussalam, xlix (2008) (original Malay-language publication: 1992); John S. Carroll, *Berunai in the Boxer Codex*, 55 J. Malaysian

In post-colonial Brunei, the SPCO presents only the latest of many political and legal "Islamization" measures under Brunei's national ideology, *Melayu Islam Beraja*, that is, of "Malay Islamic Monarchy," as noted above. Since independence in 1984, the government has framed Brunei as a "non-secular" Islamic State (*Negara Islam*),[46] and as an "MIB State" (*Negara MIB*).[47] For a century, Islamic legislation (originally called "Mohamedan Law") coexisted with the code inspired by British common law: the so-called Civil Law (*Undang-Undang Sivil*),[48] which includes the Penal Code of 1951 and which remains in force.[49] The SPCO does *not* replace this "civil" Penal Code, and the dual system continues to exist,[50] with some "hybridizing" modifications.[51]

The pre-SPCO Sharia offenses varied in scope. Some were sexuality related, others protected the state's exclusive authority to interpret and speak publicly about "authentic" Islam. The pre-SPCO laws outlawed "deviant teachings" (*ajaran sesat*),[52] and banned pre- and extra-marital sex—both normally resulting in fines (though theoretically punishable with two months' imprisonment).[53] Childbirth outside of marriage was legally framed as resulting in "illegitimate children,"[54] and "disobedient" behavior of wives was pronounced illegal[55]—even though petitioners rarely

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Branch of the Royal Asiatic Soc'y 1–25 (1982).

46 Ibrahim, *supra* note 20, at xxxiv; Abdul Latif Ibrahim, Issues in Brunei Studies 197 (2003); Sharon Siddique, *Brunei Darussalam 1991: The Non-Secular Nation*, Southeast Asian Affairs 91–100 (1992).

47 *See* Müller, *supra* note 2, at 151.

48 *See id.* at 154.

49 The Penal Code's English version is available at http://www.agc.gov.bn/AGC%20Images/LOB/pdf/Cap22.pdf [https://perma.cc/J375-Y4FW].

50 Abdul Aziz Juned, *supra* note 5, at 218.

51 *See Unique Hybrid Legal System Mooted*, Brunei Times (Jan. 5, 2012); Müller, *supra* note 7, at 426.

52 RCKCA § 186. For a key Bruneian government publication defining and demonizing "deviant teachings" (*ajaran sesat*), authored by Brunei's current Rector of Sultan Sharif Ali Islamic University (UNISSA), see Norafan Zainal, Perkembangan Ajaran Sesat di Negara Brunei Darussalam (2007). *See also* Müller, *supra* note 2, at 153, 328; Müller, *Brunei Darussalam*, *supra* note 21, at 424.

53 RCKCA §§ 177–78.

54 RCKCA §§ 83, 92.

55 RCKCA § 176.

brought such cases to court. All of these offenses were punishable with milder sentences than the Penal Code offenses, and only applicable to Muslims. Since around 1990, the Civil Law was systematically reviewed to become "*sharīʿa*-compliant," in accordance with the state-Islamic authorities' interpretation of the *sharīʿa*.[56] The sale of alcohol and pork was banned in the early 1990s.[57] Even certain royal regalia that the State Muftī considered incompatible with Islam, including two golden cats attached to the throne,[58] were abandoned upon the Sultan's decision.[59] Frequently mentioning these "divine blessings-generating achievements," the State Muftī considers Brunei's Civil Law not as "secular" but as a manifestation of *taʿzīr* laws, that is, discretionary laws that a legitimate Islamic ruler can define and that are therefore counted as a part of Islamic law, or *sharīʿa*.[60]

The SPCO presents neither simple continuity nor radical rupture. While it had precursors, it introduces numerous *sharīʿa* offenses, increases maximum punishments for existing ones, and makes some applicable to non-Muslims.[61] Although international media and protests focus on LGBTQ matters and the amputation of limbs, the SPCO and SCCPCO are multifaceted documents deserving broader analysis that should address larger human rights implications.

Consider the punishment of stoning for sex crimes outlined in the new law. For homosexual or heterosexual anal in-

56 *Laws to Be Brought in Line with Islam*, 60 Brunei Darussalam Newsl. 1 (Sept. 1990); Dominik M. Müller, *Bureaucratic Islam Compared: Classificatory Power and State-ified Religious Meaning-Making in Brunei and Singapore*, 33 J. L. & Relig. 212 (2018); Müller, *supra* note 2, at 321; Müller, *supra* note 7, at 426.

57 Müller, *supra* note 56, at 224.

58 According to the State Muftī's legal reasoning, depicting animals (if their full body is shown) is Islamically forbidden. Having such depictions in a building would furthermore prevent the Angel of Compassion from entering that house. Abdul Aziz Juned, *supra* note 45, at 147–48.

59 Abdul Aziz Juned, *supra* note 5, at 228–45, 349.

60 Abdul Aziz Juned, *supra* note 5, at 213, 216–17. *See also* Sherman Jackson, Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī (1996).

61 *See* Müller, *supra* note 2, at 324; see also the author's comparisons between pre-SPCO and SPCO stipulations for punishments in *Brunei Darussalam*, *supra* note 37, at 62ff.

tercourse and adultery, stoning is the maximum punishment on paper. It applies to Muslims generally, and to non-Muslims if the act was committed with a Muslim (but see Part I, Section C, on the death penalty "moratorium"). Lesbian sex among Muslims is punishable with up to ten years' imprisonment, or a fine, or whipping, or a combination of all three. The SPCO § 69(2a) states that if the procedural requirements for a *ḥadd*-based (fixed criminal law) death penalty are not met, offenders face up to seven years in prison and thirty strokes. In comparison, the British-originating Penal Code (§ 377) punishes these acts with up to ten years' imprisonment.[62]

Several new offenses are socially oriented. Some include cross-dressing (up to one year or a fine, also for non-Muslims, SPCO § 198), causing a married Muslim woman "to leave the matrimonial home determined by her husband" (SPCO § 201), causing a non-married woman "to leave the custody of her parents or her guardian" (also for non-Muslims, SPCO § 202), parents "giving away" a Muslim child to non-Muslims (SPCO § 204), "indecent behavior" (SPCO § 197), "sorcery" and the advertising thereof (SPCO § 208), murder by sorcery or attempting to do so (SPCO §§ 151–154), and holding traditional presumably deviant beliefs according to which objects possess "healing powers" or "grant wishes" (SPCO § 216) The new law also makes punishable Muslims accusing other Muslims of being infidels (SPCO § 219).

Penalties have increased for some pre-existing offenses. For example, building mosques without permission (previously RCKCA § 124, now SPCO § 240), men not attending Friday prayers (previously RCKCA § 171, now SPCO § 194), and "close proximity" (*khalwat*) among non-married couples (previously RCKCA § 173; now SPCO § 196) all carry higher maximum punishments.

Particularly remarkable, considering its consequences for both Islamic intellectual reasoning and freedom of thought, conscience, and speech, is how the SPCO further cements the state's exclusive Islamic authority. Questioning *ḥadīth* considered to be

62 The author is not aware of any case where such a punishment has ever been imposed.

authentic risks punishment that ranges from lengthy prison terms to the death penalty (SPCO §§ 111, 222–224, falling under apostasy and blasphemy charges). Disseminating "beliefs contrary" to the government's interpretation of Islamic law can be punished with up to five years' imprisonment (SPCO § 207), for Muslims and non-Muslims alike, declaring oneself or others to be prophets—Malaysia recently saw such a case (Abdul Kahar Ahmad[63])—risks death, and if the *ḥadd* punishment conditions are not met, up to thirty years (SPCO § 109). For minorities like the Ahmadiyyah or Bahá'í (long banned and condemned as entirely intolerable by the State Muftī for having prophet-like figures as their founders),[64] this makes their situation even more precarious. Blasphemy risks the same punishments (SPCO §§ 110, 221). Owning or distributing publications contradicting state interpretations of Islamic law carries a punishment of up to two years' imprisonment (SPCO §§ 213–215), as does the public teaching of Islam without a permit (SPCO § 229). Also punishable are issuing "illegal fatwas" (three years' imprisonment, SPCO § 228), and collecting or paying religiously mandated alms/taxes (*zakat*) outside of state channels (two years' imprisonment, SPCO §§ 237–239). Anyone can be imprisoned for inciting a Muslim to neglect "religious duties" (SPCO § 199). Non-Muslim missionary work targeting Muslims (SPCO §§ 209–211), or telling a Muslim child or a child whose parents have "no religion" to convert to a religion other than Islam, can cause imprisonment (SPCO § 212), as can performing or teaching *sharīʿa*-violating ceremonies to Muslims (SPCO § 207), or inviting Muslim children to participate in non-Muslim religious activities (SPCO § 212). The government, however, in reaction to protests, repeated its stance that the SPCO is not discriminatory, does not violate anybody's rights, and would protect people's privacy. Many Bruneians wholeheartedly agreed on social media.

It cannot be stressed enough that listing maximum pun-

63 Christina Tan, *"Prophet" Gets Ten Years*, Star (Petaling Jaya) (Oct. 22, 2009), https://www.thestar.com.my/news/nation/2009/10/22/prophet-gets-10-years-jail [https://perma.cc/CQ55-LPWR].

64 Abdul Aziz Juned, *supra* note 45, at 121–25; *cf.* Müller, *supra* note 2, at 328.

ishments does not do justice to the situation's complexities in light of defendant-regarding procedures. For some offenses, authorities can flexibly decide, case-by-case, whether to apply the SPCO or the old Penal Code.[65] Government representatives have from the start stressed off-record that authorities will avoid using the SPCO, and if they do, they will avoid its harshest punishments, reflecting the laws' "educational" orientation and "Islamic mercy."[66] For apostasy (*irtidād*), the maximum punishment on paper is stoning, or, if procedural requirements cannot be met, up to thirty years' imprisonment and forty strokes of lashing (SPCO §§ 107–117). But following repentance, the accused must be freed of charges (and, depending on the details of the case, undergo forced "faith counselling") (SPCO § 117, SCCPCO §§ 204–208). Adultery (*zinā*) and anal sex (*liwāṭ*) cases (SPCO §§ 68–81, 82–85) require a group of four witnesses of "just" (*ʿadil*) character who are practicing Muslims and have seen the act (SPCO § 69(1); Syariah Courts Evidence Order 3(1))—an unlikely scenario (see also SCCPCO § 173(1)(i)). In murder (*qatl*) cases (SPCO §§ 124–164) requiring payment of blood money (*diyāt*) that the accused cannot afford, the Sultan can pay it (SPCO § 133(3)). Confessions (*syahadah*) pose a problem but can be withdrawn (SPCO §§ 184–190, and SCCPCO First Schedule, pp. 628–633), and authorities claim they would encourage this. Finally, the Sultan can pardon anyone sentenced to death and reinforce his popular image as a "caring monarch."[67] In short, Brunei's legislation, *sharīʿa* and non-*sharīʿa* alike, undeniably includes human rights law-violating and authoritarian stipulations, but the mentioned procedural provisions are a key part of the larger scheme, and are frequently referred to in local counter-discourses against international protests.

Existing criminal laws that preceded the new *sharīʿa*-

65 How this will be practiced in detail remains to be seen. The author is unclear about the decision-making on which of the two penal codes will be used, and the SPCO and SCCPCO themselves seem to provide no solid answer.

66 I based these observations on various personal communications between 2014 and 2019. On the emphasis of mercy (Arabic: *raḥma*; Malay: *rahmat*), see Sultan Hassanal Bolkiah cited in *Undang-undang*, *supra* note 33.

67 Müller, *supra* note 2, at 149.

based Code are mostly justified by the government on national security grounds, such as the Sedition Act and the Internal Security Act;[68] these laws will continue to be enforced, carrying penalties as harsh as those of the new Islamic laws but without the procedural protections.[69] International attention, however, apparently only arises where tensions with human rights law are linked to the buzzwords "*sharīʿa*" and "LGBTQ." Bruneians have been sentenced to caning under the non-*sharīʿa* penal code during the SPCO's first period.[70] Yet this fact was of no interest to international media, whose attention is limited to *sharīʿa*-based canings. The anthropologist Matthew Erie's notion, made in another context, of the *sharīʿa* being a "taboo of modern law," comes to mind.[71] Furthermore, the Sultan's speech on the moratorium to the death penalty (see Part I) became peculiarly framed by most international media as declaring the death penalty's non-enforcement "on homosexuals" or "for gay sex,"[72] although he never mentioned this particular type of SPCO offense. Meanwhile various other SPCO sections, as

68 *See* Sedition Act of 2010 (Brunei), http://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/cap024.pdf [https://perma.cc/G5F4-F62P] and http://www.agc.gov.bn/AGC%20Images/LOB/pdf/Internal%20Security%20Act%20(chapter%20133).pdf [https://perma.cc/AMY7-73MB].

69 For a prominent case related to the Islamic bureaucracy that unlike other recent cases has been made public, see Fadley Faisal, *Defendant in Sedition Trial Flees Before Verdict*, Borneo Bull. (Nov. 15, 2018), https://borneobulletin.com.bn/defendant-in-sedition-trial-flees-before-verdict [https://perma.cc/GF6S-VAJL].

70 *See, e.g.*, Fadley Faisal, *12 Years' Jail, Caning for Thieving Duty Guard*, Borneo Bull. (Aug. 4, 2017), https://borneobulletin.com.bn/12-years-jail-caning-thieving-duty-guard [https://perma.cc/6CFW-CKH9]; Hakim Hayat, *Trio to Learn Fate Soon over String of Housebreaking*, Borneo Bull. (Feb. 26, 2017), https://borneobulletin.com.bn/trio-learn-fate-soon-string-housebreaking [https://perma.cc/TV76-6T4W].

71 *See* Matthew S. Erie, *Shariʿa as Taboo of Modern Law: Halal Food, Islamophobia, and China*, 33 J. L. & Relig. 390 (2019), discussed further on the Islamic Law Blog (Apr. 19, 2019), https://islamiclaw.blog/2019/04/19/recent-scholarship-erie-on-%e1%b8%a5alal-food-in-china [https://perma.cc/YZ6R-S3QX].

72 *See, e.g.*, Ben Westcott & Rebecca Wright, *Brunei Backs Down on Gay Sex Death Penalty After International Backlash*, CNN (May 6, 2019), https://edition.cnn.com/2019/05/05/asia/brunei-lgbt-death-penalty-intl/index.html [https://perma.cc/FG6X-5BME]; *Brunei Will Not Impose a Death Sentence on Homosexuals After Rejection and International Boycott*, NewsBeezer (May 6, 2019), https://newsbeezer.com/mexicoeng/brunei-will-not-impose-a-death-sentence-on-homosexuals-after-rejection-and-international-boycott [https://perma.cc/S5TJ-J3QY].

detailed above, stipulate the same penalty but were of no media interest. The logic behind this selective attention deserves further consideration.

There remain questions. Can Brunei realize the "art of not punishing,"[73] which legal historians writing on Islamic criminal law, such as Professor Intisar A. Rabb, show has characterized much of its pre-colonial practice? This is driven by high burdens of proof and the *doubt canon*—the principle requiring judges to "avoid criminal punishment in cases of doubt."[74] Or will the situation gradually become shaped by the "punitive turn" that the legal anthropologist Michael Peletz observes in neighboring Malaysia's *sharīʿa* judiciary?[75] These queries remain empirically open questions. Current speculative predictions in either direction tend to be ideological or politically motivated. Time will tell. We must do the work of close research and analysis of Brunei's new laws.

73 Elias Saba, *The Art of Not Punishing*, Books & Ideas (Jan. 11, 2016) (reviewing Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law (2015)), https://booksandideas.net/The-Art-of-Not-Punishing.html [https://perma.cc/G4GT-3JXN].

74 Intisar A. Rabb, Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law (2015); Intisar A. Rabb, *The Islamic Rule of Lenity*, 44 Vand. J. Transn'l L. 1299 (2011).

75 *See* Michael G. Peletz, *Are Women Getting (More) Justice? Malaysia's Sharia Courts in Ethnographic and Historical Perspective*, 52 Law & Soc'y Rev. 652 (2018); Michael G. Peletz, *A Tale of Two Courts: Judicial Transformation and the Rise of a Corporate Islamic Governmentality in Malaysia*, 42 American Ethnologist 144 (2015).

# Pursuing Over-Criminalization at the Expense of Islamic Law

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## Abstract

*In a short essay, Adnan A. Zulfiqar takes a more critical approach to aspects of Brunei's criminal laws that have garnered less attention but that he finds more troubling. The international community has, rightly in his view, protested against and condemned the law's potential violations of human rights norms against torture and individual freedom. Most condemnations have focused on provisions for capital punishment, whipping, and amputation for the new Code's crimes of* liwāṭ *(sodomy),* zinā *(unlawful sexual intercourse between heterosexuals), and theft. But little attention has been paid to the Code's departures from "classical Islamic law's substantive and procedural constraints" thus allowing legislators and prosecutors to "criminalize more conduct." For example, the Code permits punishment of offenders who lack legal capacity, requires four eyewitnesses to prove rape, and prosecutes beliefs through punishing attempted apostasy. For these reasons, despite the procedural protections and heightened standards of doubt jurisprudence to which Mohamed and Müller point, the new Code entails many other provisions that signal the need for greater caution and perhaps further modification. Zulfiqar argues that Brunei codified Islamic criminal law in a way that creates novel crimes and disregards defendant rights, thus diverging from norms of fairness and cultural accommodation present in the precedents and mores of the very Islamic system which it seeks to reinterpret for its society today.*

Brunei's recent implementation of a new penal code (hereafter "the Code") has drawn condemnation from many quarters, including calls to boycott the Sultan of Brunei's overseas investments.[1] The harshest criticism has been reserved for sections of the Code that conflict with human rights norms on torture and individual freedom, specifically the inclusion of severe punishments for *liwāṭ* (sodomy), *zinā* (unlawful sexual intercourse between heterosexuals), and theft.[2] While these sections deserve attention, other less-noticed parts of the Code are potentially of greater concern. Broadly speaking, the Code's overall disposition frequently ignores classical Islamic law's substantive and procedural constraints in favor of criminalizing more conduct.

Hence, while Brunei's Code purports to align itself with Islamic law, there are several provisions that represent significant departures from classical Islamic law and its prescribed limitations. Perhaps the most glaring example is the Code's decision to punish "persons without legal capacity," described as "not *mukallaf*" in the Code.[3] Historically, like most legal systems, Islamic

1 Lauren M. Holson & Emily S. Rueb, *Brunei Hotel Boycott Gathers Steam as Anti-Gay Law Goes into Effect*, N.Y. Times (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/world/asia/brunei-hotel-boycotts.html [https://perma.cc/G57V-RP3Z]; *L.A. Will Press Boycott of Beverly Hills Hotel Despite Brunei Death Penalty Reprieve*, L.A. Times (May 8, 2019), https://www.latimes.com/local/lanow/la-me-beverly-hills-hotel-boycott-20190508-story.html [https://perma.cc/WH8X-NV7V]; Kate Rooney, *Wall Street Banks Boycott Brunei-Owned Hotels After Kingdom Makes Homosexuality Punishable by Death*, CNBC (Apr. 29, 2019), https://www.cnbc.com/2019/04/29/wall-street-boycotts-brunei-owned-hotels-after-gay-death-penalty-law.html [https://perma.cc/NCT5-SMUU]; Jack Sidders & Will Mathis, *U.K. Property Brokers Shun Brunei Fund over Anti-Gay Laws*, Bloomberg (May 2, 2019), https://www.bloomberg.com/news/articles/2019-05-02/u-k-property-brokers-said-to-shun-brunei-fund-for-anti-gay-laws [https://perma.cc/4U3T-ZMMA]; *U.N. Joins Clooney in Decrying "Inhuman" Brunei Anti-Gay Law*, Guardian (Apr. 1, 2019), https://www.theguardian.com/world/2019/apr/01/brunei-cruel-and-inhuman-law-on-stoning-for-gay-sex-condemned-by-un [https://perma.cc/R4PV-T9VW].

2 *Brunei's Pernicious New Penal Code*, Human Rights Watch (May 22, 2019), https://www.hrw.org/news/2019/05/22/bruneis-pernicious-new-penal-code [https://perma.cc/Y6NH-QKRG]; Francesca Paris, *Death by Stoning Among Punishments in New Brunei Anti-LGBT, Criminal Laws*, NPR (Apr. 3, 2019), https://www.npr.org/2019/04/03/709359137/death-by-stoning-among-punishments-in-new-brunei-anti-lgbt-criminal-laws [https://perma.cc/3D5G-JZJD].

3 Syariah Penal Code Order (SPCO) 2013 (No. S 69) (Oct. 22, 2013) [hereinafter SPCO], http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2013/EN/s069.pdf [https://perma.cc/VUL5-W8QM]. *See, e.g.*, SPCO § 70 (2013) 1704–05.

law assessed capacity prior to assigning legal responsibility or criminal liability.[4] While Brunei's Code recognizes various excuse defenses for incapacity, at various points it also inexplicably punishes actors it does not deem legally responsible.[5] For instance, SPCO § 70 punishes *zinā* committed by persons without legal capacity, including pre-pubescent minors (non-*bāligh*).[6] One might be tempted to think Brunei views *zinā* as a strict liability crime, however this is not the case; various other provisions in Part II of the Code account for mental state.[7] Rather, the Code is simply expanding criminalization and allowing actors that technically lack legal capacity to somehow attain the required mental state for the prohibited conduct.

Furthermore, although the Code includes Islamic law's traditional evidentiary requirement of four eyewitnesses to establish liability for *zinā*, the Code considers absence of this evidence as only a *partial* defense.[8] Instead, the Code creates a second-tier *zinā* crime where the four eyewitnesses may not be present but "other" evidence exists.[9] This structure departs from the norms of classical Islamic law, where failure to produce four witnesses in a case involving consensual, non-marital sexual intercourse constituted a complete defense.[10] In fact, the absence of four credible

4 Mawil Izzi Dien, Islamic Law: From Historical Foundations to Contemporary Practice 102 (2004) ("[A]n individual who is unable to under the rules of the law is not viewed as a responsible subject of the law, mukallaf."); Ahmad Hasan, The Principles of Islamic Jurisprudence: The Command of the Shari'ah and Juridical Norm 292–96 (1993).

5 SPCO §§ 12 ("Act of child who is not mumaiyiz"), 13 ("Act of child who is mumaiyiz but not baligh"), and 14 ("Act of person of unsound mind") (2013), 1682.

6 SPCO § 70 (2013), 1704–05.

7 *See, e.g.*, SPCO § 6 (2013) ("[N]othing is an offense which is done by a person who...in good faith believes himself to be bound by law to do it."); § 9 ("[N]othing is an offense which is done...without any criminal intention or knowledge...."); § 17 ("[N]othing which is not intended to cause death, is an offence by reason of any harm....").

8 Rudolph Peters, Crime and Punishment in Islamic Law 60 (2005) ("[F]or proving this offence, very strict standards of evidence are applied: instead of the testimonies of two, those of four eyewitnesses are required....").

9 SPCO § 69(2), 1704.

10 Hina Azam, Sexual Violation in Islamic Law: Substance, Evidence and Procedure 220 (2015) (noting that the absence of four eyewitnesses who testify to the act or discrepancy in their testimonies lead to the case being "dropped").

eyewitnesses would trigger potential criminal penalty for false accusation, which suggests that prosecution of *zinā* crimes was not emphasized even if the underlying conduct was strongly discouraged.[11] Against this classical framework, Brunei's Code protects "false accusations" as long as they are made in "good faith."[12]

Possibly the most disturbing departure from classical Islamic legal procedure in the Code is its requirement of four eyewitnesses in cases involving rape (*zinā bi' l-jabar*).[13] Conflating the evidentiary requirements for non-consensual as opposed to consensual circumstances not only lacks a basis in classical Islamic law, but has far-reaching consequences. This was demonstrated by the devastating effects of a similar evidentiary requirement for rape incorporated into Pakistan's 1979 Hudood Ordinance.[14]

The Code also contains other areas of expanded criminalization, such as ill-considered provisions regarding inchoate crimes, specifically attempts. For instance, the Code includes a provision that punishes attempted apostasy (*irtidād*).[15] It notes that an attempt at apostasy will be punished the same as apostasy. As an example of what constitutes "attempted apostasy," the Code notes that simply being "determined to renounce" Islam is enough to trigger punishment for apostasy. By criminalizing "attempted apostasy" at a very early stage of preparation, the Code actually undermines classical Islamic legal doctrine on apostasy, which al-

11 Peters, *supra* note 8, at 63–64.

12 SPCO § 88 (2013), 1710–11.

13 SPCO § 76 (2013), 1707–08.

14 Under the 1979 Hudood Ordinance in Pakistan, a rape victim was required to produce four eyewitnesses to her rape. Failing to produce these four eyewitnesses would lead to the rape victim being arrested for falsely accusing someone of unlawful sexual intercourse. An estimated 80% of women in Pakistan's jails were charged for failing to produce evidence against their rapist or for confessing their own unlawful sexual intercourse by being pregnant with their rapist's child. *See* Dan McDougall, *Fareeda's Fate: Rape, Prison and 25 Lashes*, Guardian (Sept. 16, 2006), https://www.theguardian.com/world/2006/sep/17/pakistan.theobserver [https://perma.cc/5EZM-VA4E]. *See generally* Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 Mich. J. Int'l L. 287 (1997); *Consensus on Amending Hudood Ordinance*, News Int'l (Karachi) (June 12, 2006), http://www.thenews.com.pk/archive/print/643871-consensus-on-amending-hudood-ordinance [https://perma.cc/J78T-LFJ6].

15 SPCO § 71 (2013), 1705.

lowed numerous opportunities for retraction prior to accepting that someone was an apostate. In other words, classical Islamic law did not have a crime of attempted apostasy.[16] Furthermore, in the pre-modern period, criminalizing apostasy was arguably justified due to its intimate connection to political treason; no such connection exists today.[17] Similarly, in another instance, the Code punishes attempted *zinā* then provides an example of what would constitute an attempt: an unmarried couple lying down on the same bed.[18] Again, the Code defines attempt at a very early stage, well before what would be considered "perpetration" of the crime. There is no indication that these two individuals are engaged in any intimacy, but their presence on the same bed is enough to trigger a penalty for attempted *zinā*.

In sum, Brunei's Code gives one pause from the standpoint of Islamic law and code drafting. In trying to achieve the comprehensiveness of modern criminal codes alongside misplaced notions of what Islamic criminal law should look like, Brunei ends up criminalizing far more conduct than classical Islamic law ever sought to sanction. Aside from the numerous issues outlined above, other serious problems exist, most notably the sparse mention of culpability requirements,[19] poorly constructed accomplice liability,[20] and a *sharīʿa* catch-all provision[21] that defeats the Code's fundamental purpose. These are alarming flaws for a Code that seeks to produce anything resembling a more just criminal law in Brunei, let alone one that can be considered faithful to classical Islamic law.

16 Peters, *supra* note 8, at 65.

17 Rudolph Peters & Gert J.J. De Vries, *Apostasy in Islam*, 17 Die Welt des Islams 18 (1976).

18 SPCO § 88 (2013), 1710–11.

19 Part II of the SPCO (2013) discusses ideas like "knowledge," "intent," and even mistake, but it is not clear how other types of culpability, such as negligence, would be treated by the Code.

20 SPCO §§ 37–50 (2013), 1690–1697.

21 SPCO § 253 (2013), 1766 ("On any matter which is not expressly provided for in this Order, the Court shall follow Hukum Syara.").

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