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Sharia Law in Western Traditions: Irreconcilable Differences or an Endeavor in Religious Autonomy?

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*"Sharia is incompatible with the fundamental principles of democracy."
-European Court of Human Rights*

"In Islam, law and religion are considered inseparable." -Jacqueline McCormack.

Bayonne, New Jersey was the site of a brutal attack ostensibly condoned by Islamic Law. A Muslim woman, identified only as "S.D.", had been subjected to multiple beatings and sexual assaults by her husband, "M.J.R."¹ Within a two-month period, S.D. had been physically assaulted five times, four of them involving multiple episodes of nonconsensual sex. During each of these incidents, M.J.R. maintained that the attacks on his wife were "according to our religion. You are my wife, I can do anything to you. The woman, she should submit and do anything I ask her to do."² Thus, M.J.R. believed Islam justified the brutal beatings he executed on a regular basis. This was confirmed by an Imam, or Muslim religious leader, who stated that the wife must comply with the sexual demands of her husband.³

Because of this routinized abuse, S.D. decided to secure a Final Restraining Order (FRO) against M.J.R. in Hudson County Superior Court. The judge found that the defendant had engaged in conduct rising to sexual assault under the Prevention of Domestic Violence Act.⁴ Stunningly, however, the judge further explained that, in this particular case, the defendant should not be held liable for sexual assault because he did not possess the requisite criminal intent. The Superior Court judge specifically stated that M.J.R. was "operating under his belief that it is, as the husband, his desire to have sex when and whether he wanted to, (sic) something that was consistent with his practices and it was something that was not prohibited."⁵ Despite

¹ S.D. v. M.J.R., 415 N.J. Super. 417, 420-3 (App. Div. 2010)

² Id. At 424.

³ Id. At 426.

⁴ Id. At 427.

⁵ Id. At 428.

having found the defendant's acts to be unlawful, the judge set M.J.R. free strictly based on his beliefs, and denied the FRO.

Thankfully, the Appellate Division overturned the decision of the Superior and initiated the FRO in favor of S.D. The Appellate Division explained that the requisite intent for the sexual assault charge turns solely on whether the actor knew that their partner did not consent to the act, rather than whether the actor knew what he was doing was wrong.⁶ By overruling the Superior Court, the Appellate Division placed the secular rule of law above the governing principles of the Muslim faith.

The case of S.D. v. M.J.R. illustrates a rising trend in international jurisprudence. Muslims who move to Western nations bring with them not just their history and ideology, but also a comprehensive legal structure all its own. As the Muslim population continues to grow and enter the mainstream in Western nations, a potential conflagration between the legal framework of these nations and the legal principles of Islam is on the horizon.

Whether Sharia Law can work within Western nations' constitutional framework remains to be seen. United States Supreme Court Justice Robert Jackson explained his concern with Sharia law because it

“leaves little room for additional legislation...It is not possible to separate political or juristic theories from the teaching of the Prophet, which establish rules of conduct concerning religious, domestic, social and political life. This results in a law of duties, rather than rights.”⁷

Justice Jackson's concern illustrates the fear that some have in Western society; that Islamic Law as an all-encompassing doctrine, will leave no room for other legal frameworks. However, as

⁶ Id. At 433.

⁷ Karen Lugo, *American Family Law and Sharia-Compliant Marriages*, 13 Engage: J. Federalist Soc'y Prac. Groups 65, 65-6 (2012).

has been displayed in the United States and elsewhere, there is an opportunity to utilize Sharia Law in a responsible way without causing constitutional conflict.

This paper will seek to address how and in what fashion Sharia Law is coming into contact with laws of particular sovereignties. Specifically, this paper will analyze the prospects of Islam dominating certain parts of the Western legal experience, and whether these religious interventions of the law are a necessarily new phenomenon. Finally, this paper will argue that Sharia Law, and the law of all other religions, could exist within Western territories through a laissez faire approach to religious arbitration law; and that this would provide parties to choose Sharia law in civil discourse while maintaining a generally unified legal structure. In this facet, Balkanization will be avoided because these arbitration agreements will operate as any other, and this Muslims can enjoy the freedom to choose their religious law in cases that will not impinge on other people's rights.

The Law of the Land: Islamic Nations' Approach to Sharia Law

But how is Sharia Law carried out in "Islamic" nations? The involvement of Sharia Law in Islamic nations varies from the completely secular (Turkey) to an Islamic theocracy where all laws are subject to review by the nation's supreme religious leader (Iran).⁸ Typically, however, Islamic nations seek to strike a constitutional balance between Sharia and other governing law. This balance is exemplified in the Iraqi and Egyptian constitutional arrangements.

The Iraqi Constitution endorses Islam without codifying Sharia Law. Article 2 of the Iraqi Constitution establishes Islam as the official religion, and states that "no law may be

⁸ Noah Feldman, After Jihad: America and the Struggle for Islamic Democracy, Farrar, Straus and Giroux, New York, 2003. Page 110.

enacted that contradicts the established provisions of Islam.”⁹ While obviously supporting Islam, the Article also states that Islam is only “a foundation source of legislation.”¹⁰ It is clear that Iraq’s Constitution leaves open the question of just how much will Sharia Law become a part of the legislative process. Although there can be no law in direct contravention of Sharia, Article 2 offers a considerable amount of leeway for legislators wishing to keep Iraq a more liberal democracy.

This language is a product of the recent history of Iraq. In 2004, U.S. coalition forces worked to establish an Interim Iraqi Constitution designed to facilitate the transfer of powers from the U.S. to Iraq.¹¹ In doing so, U.S. Diplomat Paul Bremer steadfastly refused to sign the Interim Constitution until it was agreed that Islam would serve only as one of many sources for legislators to consider in their law making.¹² Thus American influence helped to moderate the amount of Islamic influence in the new Iraqi Constitution.

Nations who nominally subscribe to the use of Sharia Law as their primary legal foundation have not been immune from the tension between religious law and that of the State. In Egypt, for example, the nation’s new constitution – established after the ouster of Hosni Mubarak’s secular regime – is currently in limbo as the people decide to what degree Sharia Law should control their jurisprudence. This constitutional battle pits the conservative political parties who won power in the recent elections against the more liberal population that believes that their removal of Hosni Mubarak serves as a mandate for a more democratic society.

⁹ Iraqi Constituion, Article 2, *available at* http://www.uniraq.org/documents/iraqi_constitution.pdf

¹⁰ *Id.*

¹¹ PBS Online Newshour, “Iraqis Sign Interim Constitution Amid Protest from Key Cleric,” PBS, *available at* http://www.pbs.org/newshour/updates/constitution_03-08-04.html

¹² Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 Geo. Wash. Int’l L. Rev. 695, 742 (2004).

As it is written currently, the new constitution maintains its previous iteration that Islam is the official religion and that “Principles of Islamic law (Shari’a) are the principal source of legislation.”¹³ The language of this Article tends to indicate that Sharia Law, while of obvious importance in political life, will not serve as the sole source of legislation, and will be subject to legislators and legal analysts who may not desire to invoke all of the tenets of Sharia into their legal structure. Indeed, this was how similar language was viewed in the previous iteration of the Egyptian Constitution. In civil matters, this language supported the notion that Sharia Law was to be used as a gap-filler when the Legal Code was silent.¹⁴ The role of Sharia in Egypt was even further subjugated by statutory language instructing judges to look to Egyptian customs (‘urf) before referring to Sharia law.¹⁵ While the language in the new Constitution remains the same, though, it is an unresolved issue as to whether Egypt will maintain its hierarchy of legal authority in this way.

This particular point has created significant friction between those who wish to see the State remain relatively secular and those who, in light of the victories by the Muslim Brotherhood in recent elections, wish to see the country become a more strict Islamic state.¹⁶ Both sides of the ideological spectrum – the ultraconservative “Salafis” arguing for an Iran-like theocracy, and the liberal Muslims arguing for equal rights and democracy – filled Tahrir Square to express their displeasure that the Egyptian Constitution did not go far enough toward their end.¹⁷ A woman, advancing the ultraconservative ideology, explained that Sharia is more than a

¹³ Article 2 of the Egyptian Constitution, March 23, 2011, *available at* http://www.cabinet.gov.eg/AboutEgypt/ConstitutionalDeclaration_e.pdf

¹⁴ Stilt, *supra* at 730.

¹⁵ *Id.*

¹⁶ David D. Kirkpatrick, “A Vague Role for Religion in Egyptian Draft Constitution,” N.Y. Times, November 9, 2012, *available at* <http://www.nytimes.com/2012/11/10/world/middleeast/draft-egyptian-constitution-adopts-a-role-for-religion.html>

¹⁷ *Id.*

legal structure, but rather, “Sharia is a style of life – an Islamic style of life. We want Sharia to be strict in the new constitution.”¹⁸ For now, it remains to be seen whether legal scholars will choose to follow a stricter or looser interpretation of Sharia, but regardless it is clear that the impact of Sharia in a legal system has far-reaching implications, and it is telling that even some Muslims fear its complete control over a legal structure.

But why would some Muslims be fearful of the prospect of a State’s complete adherence to Sharia? Perhaps it is due to the way Sharia Law is interpreted. Professor Sherman Jackson explains that the instituting of “taqlid,” meaning a “blind following” of the interpretations of Islam from as far back as the ninth century, has made Sharia Law nearly impossible to augment.¹⁹ He attributes the rigidity of Sharia Law through the centuries to a legal battle between pre- and post-modern Islamic jurists in which the former have handily dominated the latter.²⁰ One of the hallmarks of American constitutional jurisprudence, the ability to overturn precedent or develop new interpretations to the law over time²¹, has not truly existed in Sharia courts. Jackson asserts that the rigidity of Sharia Law throughout time is what maintains the notion that Islamic Law is significantly flawed and archaic.²² This is a critical point, because it illustrates that the tension between Sharia Law and West stems not just from a politically ethno-centric fear of the Other²³ but also from a concern that Sharia jurisprudence is, in many respects, at odds with Western approaches.

¹⁸ Sarah Lynch, “Egypt Constitution: Too Strict or Too Permissive?” USA Today, November 13, 2012, *available at* <http://www.usatoday.com/story/news/world/2012/11/13/egypt-constitution/1700927/>

¹⁹ Jackson, *supra*, at 90.

²⁰ Jackson, *supra* at 93.

²¹ As an example, the broadening of the 14th Amendment Due Process Clause and the selective incorporation of fundamental rights.

²² *Id.*

²³ The concept of the “Other” stems from Edward Said’s “Orientalism,” which postulates that Western nations have constructed the concept of the Other typically those from which they differ socio-politically, to reinforce their own beliefs of superiority and control.

Islam in Practice: The Legal Execution of Sharia Law

For Muslims, Sharia Law is an all-encompassing document which guides not only religious practice, but also social and legal practices. As a result, some Muslim groups have argued that Sharia Law should take precedence over secular law as it relates to Muslims in the society.²⁴ Syed Mumtaz Ali, a leader of the Islamic Institute for Civil Justice in Canada, explains concisely that, in Islam, “There is no separation of state and church...(Islam) is not practiced only when a Muslim offers his “service of worship”...but “worship” encompasses even every mundane act.”²⁵ Ali cites the Qur’an, the Muslim holy book, for his assertion that Sharia Law is the only law true Muslims should follow, as Chapter 7, verse 3 states, “Oh people! Follow what has been sent down to you [the Law] from your Lord, and do not go behind other masters, leaving Him.”²⁶ Thus, within some Muslim circles, there is a belief that domestic secular law should not apply to Muslims in particular legal respects.

To be fair, this belief is not strictly reserved to Muslims. Orthodox Jews also subscribe to the notion that their religious law should dictate certain legal claims, to the exclusion of secular law.²⁷ In fact, some Orthodox Jewish sects in the United States believe that one who pursues a legal claim in a secular court – as opposed to their own rabbinical courts – would run the risk of sanctions from their religious community.²⁸ Nonetheless, it is perhaps the stark differences between Sharia Law and Western notions of jurisprudence that has made the prospect of increased use of Islamic law such a hot button issue.

²⁴ The Islamic Institute for Civil Justice, <http://muslimcanada.org/IICJ.html>

²⁵ *Id.*

²⁶ *Id.*

²⁷ Michael A. Hefland, “Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders,” 86 N.Y.U. L. Rev. 1231, 1248-9 (2011)

²⁸ *Id.*

Sharia Practice in Family Law: A Different Approach to Prenuptial Agreements

Before appreciating how Western societies have approached Sharia Law constitutionally, it is critical to understand some basic points of Islamic Law that could create legal issues in Western institutions. Sharia Law differs significantly from traditional Western law in a number of respects. In the context of family law, marriages are often arranged for women in Islamic society. This means that the bride lacks both a choice in her husband and opportunity to negotiate for the “Mahr,” which is a sum of money the husband must pay the wife’s family both for the opportunity to marry and in the event that there is a divorce.²⁹

Like marriage, the procedure to obtain a divorce is drastically different from Western customs. If a man wishes to obtain a divorce for whatever reason, he need only perform the “Talaq” – exclaiming “I divorce you” three times.³⁰ Meanwhile, a woman may only divorce her husband in limited circumstances, such as him having a venereal disease or being insane, and usually must acquire his consent to initiate the divorce action.³¹ A divorce proceeding, however, is just one way in which Sharia Law operates to the disadvantage of a woman.

Other stark differences in family law involve polygamy and child custody. Some sects of Islam allow men to marry up to four women, with the only limitation being that he treats them all equally.³² In a divorce proceeding, meanwhile, the mother has custody of the child until the age of seven, but then the child is usually moved to the custody of the father.³³ Clearly these laws represent terrible hardship for women, and pose a significant challenge to Western constitutional norms.

²⁹ Lugo, *supra* at 68.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

Sharia Law in Contractual Arrangements: A Restrictive Ideology in the Marketplace

Due to its inherent nature as an all-encompassing doctrine, it is not surprising that Sharia Law reaches into the economic realm and controls contracts made between Muslim parties. The effectiveness of Sharia Law in contracts is typically limited to filling gaps in contracts for the sale of goods, as well as contracts for future performance. There still are, however, some fundamental differences between Western commerce and Islamic finance. Most notable among these differences are Sharia Law's prohibition of "Riba" and "Gharar." Riba refers to any excessive profit one would receive from a contract, usually earned from interest or the charging of too high a price.³⁴ Specifically, the Qur'an states, "be mindful of your duty to Allah and relinquish your claim to what remains of interest,"³⁵ and advises followers to "devour not interest, for it goes on multiplying itself."³⁶ In Islamic commerce, if there is found to be any Riba, the contract is automatically declared void.³⁷

Gharar, meanwhile, prohibits any risk or uncertainty in the contract.³⁸ This is quite a restrictive rule, as it prohibits parties from entering into speculative contracts, requires that all prices and other terms of the contract are known, and forces parties to set a standard for interest rates and currency exchange values.³⁹ In fact, as a general rule consequential damages are not part of a remedy in contract law, because the calculation of lost profits constitutes Gharar.⁴⁰ While this burdensome standard may have prevented the 2008 recession, it is unique in its

³⁴ Jacqueline McCormack, *Commercial Contracts in Muslim Countries of the Middle East: A Comparison with the United States*, 27 Int'l J. Legal Info. 1, 19 (2009)

³⁵ Qur'an, Sura II, 275-9

³⁶ Qur'an, Sura III, 130

³⁷ McCormack, 27 Int'l J. Legal Info. At 19.

³⁸ Id. At 20.

³⁹ Id.

⁴⁰ Id at 26

constrictive approach to the market and its players. This highlights the Islamic belief that “individuals must be protected from themselves.”⁴¹

Sharia’s Penal Code: A Strict and Extreme Proposition

Sharia Law’s Penal Code, as interpreted by religious leaders in the territories in which it is practiced, can be quite severe and abridges many rights that Western institutions consider fundamental. The criminal code, as it is applied in Iran, allows for judges to consider using Sharia Law in both their adjudication and punishment, which leads to results such as stoning to death one who commits adultery. These punishments are available even though they are not written into the Penal Code.⁴² Furthermore, Iran’s Penal Code invokes Sharia Law in setting the age of criminal responsibility – specifically, the ages at which boys and girls may be killed for their offenses – at nine years old for women and fifteen years old for men.⁴³ Exposing children so young to capital punishment is illustrative of how Sharia Law can deeply conflict with Western values of justice.

In Islamic nations, Sharia Law often works as a supplement to the penal code of the country, which can lead to additional prosecutions. In Afghanistan, for example, while the secular Penal Code does not expressly forbid it, a child can be taken into custody for running away because it violates Sharia Law.⁴⁴ The enforcement of such a fractured legal system can create problems for those in Islamic nations who do not practice Islam. While Muslims in the country would be intimately aware of the rules of Sharia Law, having Sharia Law as an unwritten supplement exposes non-Muslims to punishment for crimes they did not even know

⁴¹ Id. At 24

⁴² Human Rights Watch, “Iran: Proposed Penal Code Deeply Flawed,” August 29, 2012, *available at* <http://www.hrw.org/news/2012/08/29/iran-proposed-penal-code-deeply-flawed>

⁴³ Id.

⁴⁴ Dianne Molvig, *Mission Possible: Improving Justice in Afghanistan*, 81-OCT Wis. Law. 10, 61 (2008)

existed. One is left wondering whether the maxim, “Ignorance of the law is no excuse,” is still applicable in this situation?

Western Entanglements with Sharia Law

BRITAIN: Arbitration in the Shadows

Britain is an interesting constitutional entity, primarily due to the fact that it does not possess a constitution in the traditional sense. Rather, it is understood that the supreme law of the land for Britain is necessarily what laws pass in the Parliament.⁴⁵ The primary sources that make up the British Constitution consist of statutes passed by Parliament, Conventions, Common Law, as well as binding law from the European Commission.⁴⁶ While this unique constitutional construction presents flexibility that typical constitutions do not have, it also presents the possibility that Sharia Law may be able to creep in faster to the legal system than in a country with only one path toward Constitutional change.

Without a written Constitution, the acceptance of Sharia Law in some areas of British law has become a relatively easy process. Since the enactment of the English Arbitration Act of 1996, Sharia Law has taken on a greater legal significance in Britain; implicating divorce, inheritance and even select criminal cases.⁴⁷ The advent of Sharia Law in Britain has not come without controversy, and its unequal treatment under the law creates constitutional questions that have yet to be addressed.

⁴⁵ University College of London Constitution Blog, *available at* <http://www.ucl.ac.uk/constitution-unit/research/uk-constitution>

⁴⁶ *Id.*

⁴⁷ Arsani William, “An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England,” *Stanford Journal of International Relations*, Vol. 11, No. 2, pg. 43 (2010)

Family Law in the British constitutional context

Family law is increasingly becoming the most accessible facet of law for Muslims desiring to apply Sharia Law in Britain. Scholars believe that the reason for this is family law represents one area within the Muslim world that has been relatively untouched by Western nations.⁴⁸ In Britain, Sharia Courts allow Muslims to pursue family law matters according to their religious beliefs.

Muslims marrying pursuant to both Muslim and British law have encountered difficulty in a number of ways. Firstly, in some Muslim cultures girls can be married at as young an age as nine years old, and imams have publicly stated their willingness to marry girls as young as twelve to Muslim men well into their 20's.⁴⁹ This is in clear contravention of British law, which states that the minimum age that one can marry is sixteen.⁵⁰ Nonetheless, it appears that the British authorities are apprehensive in intervening in such circumstances, desiring instead to defer to the courts so as to not cause a conflict. This does not seem like the proper approach to such an issue, considering the fact that there is not only unequal justice across religions, but also because there is at some point a child endangerment issue.

Secondly, Muslim women can be trapped between their religious and governmental structures once they decide to leave a marriage. In what is known as a "limping" marriage, a Muslim couple divorces according to British Law, but not under Sharia Law.⁵¹ The effect of this situation is that the husband may get married again – because men are allowed to have up to four

⁴⁸ Sameer Ahmed, *Pluralism in British Islamic Reasoning: The Problem with Recognizing Islamic Law in the United Kingdom*, 33 Yale J. Int'l L. 491, 492 (2008)

⁴⁹ Baroness Cox, "From a Distinguished Peer Fighting To Protect Women...Sharia Marriages for Girls of 12 and the Religious Courts Subverting British Law," The Daily Mail, September 13, 2012, *available at* <http://www.dailymail.co.uk/news/article-2202991/Sharia-marriages-girls-12-religious-courts-subverting-British-law.html>

⁵⁰ Parliament Website, <http://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage/>

⁵¹ Id. At 493.

wives – while the woman is stuck in a religious bind. Sometimes, this leads to the husband blackmailing the wife into buying him out of their religious marriage.⁵² It is clear that this duality between religious and secular divorce law needs to be reconciled in Britain.

The British court's inability to adjudicate these religious claims has led to a proliferation of "Sharia councils" which settle claims that are uniquely Islamic in an unofficial capacity.⁵³ While this helps to free a woman in a "limping marriage" out of her predicament, the dual-adjudication for British Muslim women poses a significant obstacle for dissolution of marriage. Thus, even if the wife can obtain a proper legal divorce, honoring her religious duties naturally places her in a position of subjugation.

The application of Sharia Courts in Britain, officially (though quietly) sanctioned in 2008 by the British Government, have been met with stern hostility. Unable to speak to a written constitution as their guide, lawmakers nonetheless complained that "equality before the law is part of the glue that binds our society together. We cannot have a situation where there is one law for one person and different laws for another."⁵⁴ This was in response to the Archbishop of Canterbury claiming that incorporation of some aspects of Sharia into the British legal system was "unavoidable."⁵⁵ Thus there is a recognition that the Muslims in Britain will not be operating completely under a secular legal structure. As it turns out, however, this is nothing new in Britain.

Other religious actors have operated under their own religious doctrines within Britain for quite a while. The Arbitration Act of 1996 allowed the Jewish population in Britain to have civilly enforced judgments pursuant to Orthodox Jewish law, with the caveat that both sides had

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 Wm. & Mary Bill Rts. J. 925, 927 (2010)

⁵⁵ Ruth Gledhill and Philip Webster, "Archbishop of Canterbury Argues For Islamic Law in Britain," *The London Times*, February, 8, 2008, available at <http://www.thetimes.co.uk/tto/faith/article2098951.ece>

to agree to binding arbitration.⁵⁶ Therefore, given the fact that the Sharia courts would offer the same opportunities to the Muslim community as they have for the Jewish community, the “equal protection under the law” argument by members of Parliament would fail, ironically enough, if they did NOT offer Muslims their own adjudicative branches. It therefore becomes apparent that some of the impetus for arguments against Sharia Law stems more from socio-political fears than from legalistic complexities.

Nonetheless, there have been cases in British family law that have vindicated those who fear Sharia Courts in Britain go too far in their adjudications. In one such case, a woman named Jameela appealed to her local Sharia council seeking dissolution of her marriage due to her husband’s constant beatings.⁵⁷ The Sharia council denied her petition, stating instead that, because Sharia Law dictated that the father was responsible for the children’s education, Jameela would be forced to maintain “cordial relations” with her abusive husband.”⁵⁸ Whether this seemingly unjust result should fall within the purview of British courts is a question with which Parliament itself continues to struggle.

Contract Law in Sharia Courts: Shamil Bank and Britain’s deferment

The British court system – as opposed to Sharia courts or arbitration – has struggled to deal with contractual claims pursuant to Sharia Law. In Shamil Bank, A British Court of Appeal stated that it will honor Sharia contracts to the extent that their terms are precise and narrowly tailored.⁵⁹ Shamil Bank involved an Islamic bank engaged in a set of “Morabaha Agreements” – similar to a purchase-money loan, the bank buys the good and then immediately sells it to the

⁵⁶ Wilson, *supra* at 928.

⁵⁷ Jonathan Wynne-Jones, “Sharia: A Law Unto Itself?,” The UK Telegraph, August 7, 2011, *available at* <http://www.telegraph.co.uk/news/uknews/law-and-order/8686504/Sharia-a-law-unto-itself.html>

⁵⁸ *Id.*

⁵⁹ Beximco Pharma. Ltd. v. Shamil Bank of Bahrain EC, England and Wales Court of Appeal (Civil Division), 2004, *available at* <http://www.bailii.org/ew/cases/EWCA/Civ/2004/19.html>

guarantor who pays the bank back in installments – with a company and its affiliates in the amount of \$47 million dollars.⁶⁰ Morabaha agreements, though facially involve making a profit from securing finance for another's goods, are not considered by Sharia Law to violate the prohibition of Riba.⁶¹ The contract itself stated, "Subject to the principles of the Glorious Sharia'a, this Agreement shall be governed by and construed in accordance with the laws of England."⁶² When the defendant guarantors failed to pay the money back, they alleged that the contract was void because its structure violated Sharia Law because the contracts involved interest.⁶³

The Appellate Court affirmed the decision below and rejected the company's defense. Having asserted the proper choice of law was British, the Appellate Court found that this general reference to Sharia Law in the contract did not afford the defendant any defense to a proper British contract.⁶⁴ While general principles of Sharia Law cannot dictate the terms of a contract, the Appellate Court left open the idea that, if specific Sharia terms are properly defined, the parties could be held liable to those specific terms.⁶⁵ Thus, the British courts have punted on analyzing Sharia Law independently when a contract does not specifically set out the terms of sharia to which the parties are bound.

Sharia-Controlled Zones in Britain: The Consequence of Blurred Legal Lines

While the criminal aspect of Sharia Law has not officially reached into British jurisprudence, there is a growing concern that the Sharia councils are a sign to Muslim enclaves that all aspects of Sharia law control. After all, citizens in London areas of Waltham Forest,

⁶⁰ Id. At paragraph 14.

⁶¹ Id.

⁶² Id. At paragraph 1.

⁶³ Id. At paragraph 27

⁶⁴ Id. At Paragraph 52

⁶⁵ Id. At Paragraph 59

Tower Hamlets and Newham had erected signs claiming the area to be a “Sharia-controlled zone” that prohibited gambling, alcohol and music.⁶⁶ While this does not rise to a state action (police later removed the signs), one wonders whether an unintended consequence of separate Sharia councils in Britain is the “enclavization” of religious sects who, encouraged by the use of their religious law in particular aspects of society, desire to have their religious law control all aspects of their society.

A person embodying this notion is the leader of the Basildon Islamic Centre, Sarfraz Sarwar. He has repeatedly argued for Sharia Law’s application to the criminal realm in Britain.⁶⁷ Complaining that “the British legal system is...very sweet for criminals,” Mr. Sarwar public advocated for infusion of Sharia principles in penal law that are far more extreme and present international rights violations.⁶⁸ For example, Mr. Sarwar stated that Sharia Law should control punishment for under-age sex, which would lead to the stoning death of the woman involved.⁶⁹ If this seems like a punishment from a by-gone era, that’s because it is. Mr. Sarwar defends the strict nature of Sharia by claiming that “In Victorian days they applied sharia... Why not go back to it?”⁷⁰ While, facially, the advent of Sharia law to family and contract law seems workable, the lack of any demarcation by the British government has made real the fear of a slippery slope towards enactment of complete Sharia law in parts of the country.

The “unwritten” constitution of Britain makes it difficult to decipher when exactly a constitutional violation will occur in the event that Sharia councils in Britain implement Sharia criminal law. Looking to the European Court of Human Rights (ECHR), however, it is clear to

⁶⁶ Wynne-Jones, *supra*

⁶⁷ Edna Fernandes, “Sharia Law UK: Mail on Sunday Gets Exclusive Access to a British Muslim Court,” UK Daily Mail, July 4, 2009, *available at* <http://www.dailymail.co.uk/news/article-1197478/Sharia-law-UK-How-Islam-dispensing-justice-side-British-courts.html>

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

see that Islamic criminal procedures cannot be implemented anywhere in Europe without a constitutional challenge. In 2003, the ECHR laid the foundation for Sharia Law analysis within the European Union in Refah.⁷¹ In Refah, a Turkish political party presented the idea of allowing all religious factions to apply their own laws, rather than abiding by Turkish law.⁷² The ECHR followed the lower court's ruling that the plurality of legal systems in a sovereign nation is not compatible with the Convention system. Citing the lower court, the ECHR stated that such a legal system would "undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy."⁷³ Perhaps even more damning to the idea of Sharia Law's usage in Europe was the assertion that "Sharia is incompatible *with the fundamental principles of democracy*, as set forth in the convention."⁷⁴ The court cited the fact that it was almost impossible "to declare one's respect for democracy and human rights while at the same time supporting a regime based on Sharia, which clearly diverges from Convention values, *particularly with regard to its criminal law and criminal procedures*."⁷⁵ This ruling, while embracing what Americans would consider as equal protection under the law, goes one step further in foreclosing the possibility that Sharia Law, as a basis of a sovereign legal system, is consistent with Western values. Thus it seems inconceivable that any European nation would invoke Sharia Law to adjudicate criminal claims.

⁷¹ Case of Refah Partisi (The Welfare Party), v. Turkey, available at <http://www.iilj.org/courses/documents/RefahPartisivTurkey.pdf>

⁷² *Id.* At 4.

⁷³ *Id.* At 7., Paragraph 14

⁷⁴ *Id.*

⁷⁵ *Id.* at 7

CANADA: Fear of Sharia Ends Decades of Religious Arbitration

Canada has had a tumultuous time accommodating Muslim practices into their legal structure. Relatively new constitutional developments in Canada – the 1982 Charter of Rights and Freedoms and the 1991 Arbitration Act – have created an opportunity for Sharia Law to establish a toehold in the nation’s legal structure. Recently, however, public concern over the extent to which Muslim jurists desire to inject Sharia into mainstream Canadian law has prompted a restriction of rights for all religious arbitration actors.

The 1982 Charter looks quite similar to other Western constitutions. Like the United States, the Charter includes a Free Exercise Clause; recognizing “the freedom of conscience and religion.” Interestingly, however, the Canadian constitution does not include anything akin to the Establishment Clause, thus permitting the government to fund and support any religious actor it so chooses.⁷⁶ While this constitution perhaps affords more leniency to government actors to influence the religious realm, Canadian officials only recently have taken an active role in restricting the legal parameters of religious law.

Like England, Canada allowed religious sects to invoke their religious law in particular aspects of society through arbitration. The 1991 Arbitration Act, along with a 1994 report by the Chief Justice supporting arbitration’s ability to clear backlogged cases, sparked a vast increase in the institution in Canada.⁷⁷ The prevailing view at the time was that arbitration would provide a private means of resolving legal disputes, and would loosely be subject to the legal scrutiny of the court system where appropriate.⁷⁸ As religious arbitration tribunals began to take shape,

⁷⁶ Laureve Blackstone, *Courting Islam: Practical Alternatives to a Muslim Family Court in Ontario*, 31 Brook. J. Int’l L. 207, 231 (2005)

⁷⁷ *Id.* At 235

⁷⁸ *Id.*

however, it became clear that in Canada the panels had become more trouble than they were worth.

Muslims' Appeal for Equal Arbitration Access Sparks Reversal

The 1991 Arbitration Act in Canada ushered in a new era of jurisprudence in Canada, and subsequently opened the door to potential religious arbitration in family law. The Act expanded previous Arbitration Law in Canada by, for the first time in its history, giving private religious tribunals binding authority without complying with Canadian law.⁷⁹ These religious tribunals did not create much controversy when only the Jewish population utilized this legal avenue in Canada. In 2003, however, Canada began to reconsider its position on religious arbitration once the Muslim population appealed to have the same right as the Jewish population.⁸⁰

During that time, the Islamic Institute of Civil Justice (IICJ) was formed to serve as the Muslim Court of Arbitration. The problem with the IICJ was made clear once they stated their desired role in Canadian jurisprudence. Taking a very literal view of the Canadian Charter of Rights and Freedom – which is found in Part 1 of the Canadian Constitution Act of 1982 – the organization interpreted the “freedom of conscience and religion” to mean that “if a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.”⁸¹ Conveniently ignoring the fact that these rights are “subject to such limitations as are necessary to protect...the fundamental rights and freedoms of others,” the IICJ sought to allow Muslims in Canada to exist subject to their own religious law, to the exclusion of Canadian law.

The IICJ supported its belief in legal religious autonomy by differentiating its religious scheme from other faiths. Unlike Christian secularism, the organization explained that, “There is

⁷⁹ Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 Santa Clara L. Rev. 501, 536 (2012)

⁸⁰ *Id.* At 537

⁸¹ IICJ website, <http://muslimcanada.org/IICJ.html>

no separation of state and church” in the Muslim tradition.⁸² Thus, from the IICJ’s viewpoint, the very purpose of the Muslim arbitration court was to facilitate the allowance of Sharia Law into every facet of Canadian Muslims’ lives.

This theory of religious law sparked fear throughout Canada and made the Canadian government wary of allowing Muslim arbitration courts. Ironically enough, far from granting the IICJ the same legal standing as the Jewish arbitration tribunals, Ontario decided to simply ban any and all religious arbitration practices. This was done an attempt to modify the rules of judicial review over arbitration courts so as to protect Canadians from excessive use of Sharia Law.⁸³

This drastic measure was aided by protesters who saw Sharia Law as a threat to their way of life in Canada. Homa Arjomand, the founder of the International Campaign Against Sharia Court in Canada, stated that Muslim arbitration courts in Canada would “push back Canadian law by 1,400 years.”⁸⁴ Thus, the controversy regarding Sharia Law’s use in arbitration courts in Canada is more than simply a constitutional issue. It is clear that there is also a significant concern among the public that Sharia Law will produce inequitable outcomes for Muslims and threaten their way of life in Canada.

Canadian Family Law – A Lack of Acknowledgement Leaves Muslims Families in Limbo

Far from solving the problems inherent in the application of religious law, Canada’s decision to completely eliminate religious arbitration has led to more inequitable outcomes. For example, When Hoda Hussein Hazimeh wanted to sponsor her new husband to Canada, the Canadian courts denied her husband entry, citing the fact that her “Talaq” divorce from her old

⁸² *Id.*

⁸³ Walter, *supra* at 539.

⁸⁴ James Sturcke, “Sharia Law in Canada, Almost,” The Guardian News Blog, February 8, 2008, *available at* <http://www.guardian.co.uk/news/blog/2008/feb/08/sharialawincanadaalmost>

husband was not valid in Canada.⁸⁵ The court stated that Ms. Hazimeh was required to divorce her old husband by Canadian law in order to marry her new husband.⁸⁶ Thus, Canada's struggle to reconcile Sharia Law and the Constitution has put Muslims' legal status in a precarious position since the IICJ was barred in 2003.

Adding to the constitutional controversy recently has been the inconsistent legal outcomes handed down from Canadian courts regarding the use of Sharia Law. In Rashid v. Sharer, a court enforced a paying of Mahr despite later claiming that "Sharia law is not the law of Ontario."⁸⁷ In Rashid, a husband and wife negotiated a Mahr agreement prior to their Islamic marriage.⁸⁸ Both parties to the marriage recognized that their marriage was not legal in Canada.⁸⁹ Despite these facts, the Ontario Superior Court found that the \$60,000 Mahr payment (a \$20,000 initial payment and \$40,000 at the conclusion of the marriage) was enforceable, citing contract principles.⁹⁰ The Superior Court was careful to base their decision on the marriage contract rather than Sharia Law principles.⁹¹ This is perhaps why the Judge denied the ex-wife's claim that she was entitled to an additional \$24,000 as "support" under Sharia Law, for this term was not defined in the marriage contract.⁹²

The Superior Court in Rashid, despite its statements to the contrary, immerses itself in Sharia Law in a way that was prohibited in Canada in 2004. Unlike Ms. Hazimeh's case above, the Court here honored the Islamic marriage, as evidenced by the fact that they recognized the

⁸⁵ Tom Godfrey, "Sharia Divorce Law Rejected," The Toronto Sun, April 30, 2009, *available at* <http://cnews.canoe.ca/CNEWS/Canada/2009/04/30/9300071-sun.html>

⁸⁶ *Id.*

⁸⁷ Rashid v. Sharer, 2010 ONSC 4351, *available at* <http://www.canlii.org/eliisa/highlight.do?text=sharia%2C+criminal&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/on/onsc/doc/2010/2010onsc4351/2010onsc4351.html>

⁸⁸ *Id.* At 32.

⁸⁹ *Id.* At 1.

⁹⁰ *Id.* At 152.

⁹¹ *Id.* at 149 (the Mahr agreement is laid out in section 8 of the marriage "contract")

⁹² *Id.* at 156.

marriage contract as a valid agreement between the parties.⁹³ The Judge could just as easily have stated that the contract was void because the marriage did not exist under Canadian law, but rather sought to thread the needle by honoring a “contract” rather than a marriage. Thus, in the same case, the Superior Court Judge both rejected Sharia Law in Canada and upheld a strictly Islamic document that recognized an illegitimate marriage.

Two years later, the Court again managed to circumvent the ban on Sharia Law in legal decisions in Isse. In that divorce proceeding, Justice Broad stated that although the parties engaged only in an Islamic marriage, the marriage was still enforceable.⁹⁴ The Judge concluded that Paragraph 31 of the Marriage Act allowed a couple to be considered “married” so long as they “*intended* to be in compliance with the Marriage Act.”⁹⁵ Perhaps the Judge ruled in this manner so as to award the wife an “equalization” claim, which is complete division of all marital property.⁹⁶

Nonetheless, this decision has powerful precedential value, as it may open the way to allowing Islamic marriages to still be enforced despite any engagement with the civil law of Canada. As these cases indicate, without the use of religious arbitration courts, courts in Canada will try to craft decisions in contravention of the Canadian constitution and in spite of directives from legislators. What is left is a family court system balancing between what it feels is right in equity and what the constitution actually permits.

Canadian Judges Are Forced to Become Experts in Sharia Contract Law

Without religious arbitration firms to handle strictly religious issues of contract law, and in the absence of an Establishment Clause like in the United States, the courts in Canada are

⁹³ Id. At 13.

⁹⁴ Isse v. Said, 2012 ONSC 1829 (2012)

⁹⁵ Id. At 16.

⁹⁶ Id. At 2.

sometimes left to interpret whether contracts are Sharia-compliant. In KSCC, the Chancery Division was left with the issue of whether particular contracts made with a firm in Kuwait were Sharia-compliant.⁹⁷ The court allowed expert testimony on both sides to speak to whether the contracts were Sharia-compliant.⁹⁸ The Judge granted an appeal from summary judgment, stating in his view that the contractual arrangement at issue “would at least to some eyes appear to be the payment of interest under another guise, that is at least an indirect practice of a non-Sharia compliant activity.”⁹⁹ Thus judges in Canada are not barred by their constitution to make legal judgments based solely on Sharia Law. Perhaps this is an unintended consequence of the prohibition of religious arbitration courts; in an ironic twist, the banishment of religious arbitration courts has brought Sharia Law directly into the courts of Canada.

UNITED STATES – Excessive Fear of the Other Creates Unconstitutional Law

The United States has a series of constitutional barriers which make it difficult for a religion to establish its own completely autonomous legal system. Unlike Canada, The United States has an Establishment Clause in the First Amendment which proscribes any state action that is considered an “active involvement of the sovereign in religious activity.”¹⁰⁰ The case on point is Lemon, in which the Supreme Court stated that the government cannot engage in “excessive entanglement with religion.”¹⁰¹ As it turns out, however, there are avenues in American jurisprudence which allow Muslims to adjudicate some private matters according their religious law.

⁹⁷ Investment Dar Co KSCC v. Blom Developments Bank Sal, 2009 EWHC (Ch), 2009 WL 5386898

⁹⁸ *Id.* At pg. 4

⁹⁹ *Id.* At pg. 5

¹⁰⁰ Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

¹⁰¹ Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz, *supra* at 674)

Religious arbitration is not a new phenomenon in America. Indeed, Christian and Jewish arbitration panels have adjudicated private religious matters for quite some time.¹⁰² The Beth Din of America, the primary Jewish arbitration panel in America, has held jurisdiction over purely civil matters – including both family and commercial law – for decades.¹⁰³ Thus, in theory, Muslims should be able to enjoy the benefits of private religious arbitration that Jews and Christians currently enjoy in the United States.

Religious arbitration panels avoid conflicts with the American Constitution because their awards are enforced under secular laws. Courts have long held that religious parties may have disputes resolved and enforced in court so long as the court does not rely on religious tenets in rendering a decision.¹⁰⁴ In Jones, the court claimed justiciability in a property disputes concerning two religious entities.¹⁰⁵ In so doing, the court explained that if adjudication of the matter is made using “no consideration of doctrinal matters, whether the ritual and liturgy of worship of the tenets of faith,” then there is no excessive entanglement of government action and religion.¹⁰⁶ The court concluded that, applying “neutral principles” such as trust and property, the judicial system could oversee legal matters of religious groups.¹⁰⁷ Thus, the court in Jones had crafted a secular exception to adjudicating religious claims, opening the door for enforcement of religious agreements in a variety of ways.

Family Law in the United States – Neutral Principles Keep the Courts out of Religion

The “Neutral Principles” test, as outlined in Jones, provides courts in the United States with the opportunity to constitutionally adjudicate religious family matters in a secular way.

¹⁰² Amy Fancher, *Policies, Frameworks, and Concerns Regarding Shari’a Tribunals in the United States – Are They Kosher?*, 24 Regent U. L. Rev. 459, 473 (2012)

¹⁰³ Id. At 476.

¹⁰⁴¹⁰⁴ Jones v. Wolf, 443 U.S. 595, 602 (1979)

¹⁰⁵ Id. At 596.

¹⁰⁶ Id. At 602

¹⁰⁷ Id. At 603.

Applying contract law to marital contracts is one way that courts have been able to sidestep the religious clauses of the Constitution. In Aziz, for example, the Supreme Court of Queens County upheld a Mahr agreement as an “enforceable contractual obligation.”¹⁰⁸ The court explained that the contract entered into was not a religious one, “notwithstanding that it was entered into as part of a religious ceremony.”¹⁰⁹ Thus, despite the Muslim nomenclature, Islamic prenuptial agreements do not run afoul of the First Amendment when they are treated like any other pre-marital contract.

Explicit contract considerations have been invoked to enforce religious marriage contracts. In Akileh, the District Court was faced with a “sadaq,” which is a prenuptial agreement in which a penalty is assessed to the husband if he chooses to divorce the wife. The trial court held that the sadaq was unenforceable; not for any religious reason, but simply because the agreement lacked consideration.¹¹⁰ The District Court of Appeal reversed, citing the fact that, in Florida, the marriage itself suffices as consideration to enforce the prenuptial arrangement.¹¹¹ In using contract principles in marriage contracts, courts in the United States have been able to create efficient pathways to adjudication without entangling themselves in religious considerations.

The benefits of this legal arrangement are numerous. For one, the courts’ ability to enforce these arrangements provides stability in the contract process, encouraging both prenuptial contract arrangements and marriages. Further, the application of contract principles, without any consideration of religious issues, ensures equal treatment in the eyes of the law for all parties contracting to marry. Lastly, this arrangement increases judicial efficiency, as courts

¹⁰⁸ Aziz v. Aziz, 127 Misc. 2d 1013, 1014 (Sup. Ct. 1985)

¹⁰⁹ Id.

¹¹⁰ Akileh v. Elchahal, 666 So.2d 246, 247 (2nd Dist. 1996)

¹¹¹ Id. At 248.

need only look to the words of the agreement rather than become religious experts in family disputes.

Encore Productions Opens the Door to Sharia Compliance in Contract Law

Courts in the United States have also extended Jones to explicitly allow judicial enforcement of religious arbitration awards. In Encore Productions, two parties had entered into a service contract providing production and consulting services for meetings and conferences.¹¹² The service contract contained an arbitration clause that would subject both parties to the “Rules of Procedure for Christian Conciliation.”¹¹³ The Court denied Encore’s claim that this clause violated both the Establishment Clause and the Free Exercise Clause of the Constitution.¹¹⁴

The District Court first explained that it had the power to enforce decisions of religious organizations to the extent that the decision was grounded in neutral principles.¹¹⁵ Thus, holding Encore to the contract to which it initially agreed was not a religious decision. Secondly, the Court dismissed the Free Exercise claim because Encore freely chose to abide by the arbitration clause in the contract, and thus must have contemplated that its employees would have agreed to those terms as well.¹¹⁶ The emphasis on these contract principles indicates recognition by the court that parties who freely enter into a contract should be bound by the terms, regardless of their religious connotation. Thus, religious arbitration in American allows Muslims to adjudicate on their own terms as they do in Britain, but with the added bonus of oversight by the secular courts.

¹¹² Encore Productions v. Promise Keepers, 53 F. Supp. 2d 1101, 1106 (D. Colo. 1999)

¹¹³ *Id.*

¹¹⁴ *Id.* At 1112

¹¹⁵ *Id.*

¹¹⁶ *Id.* At 1113

The Save Our State Amendment: Fear of Islam at its Unconstitutional Extreme

In 2010, the State of Oklahoma passed the “Save our State” Amendment to their Constitution.¹¹⁷ The Amendment forbade any consideration of Sharia Law by the judiciary in the Sooner State.¹¹⁸ Perhaps inspired by a fear that Sharia Law’s all-encompassing nature would come to eventually dominate their court system (and, perhaps, scared from what the Superior Court did in S.D. v. M.J.R.), Oklahoma preemptively blocked of Sharia Law – “preemptive” because there is no case law in Oklahoma where Sharia Law influenced the decision¹¹⁹ - and in doing so perhaps created more problems than they solved in the legal realm.

While the “Save Our State” Amendment ostensibly solves the “problem” of Sharia Law’s creep into Oklahoma’s jurisprudence, it may spawn a litany of constitutional challenges against it. Legal Scholars anticipate the Amendment will be attacked on Free Exercise, Establishment and Equal Protection Clause grounds in the coming years.¹²⁰ Jaron Ballou posits that the Amendment violates the Establishment Clause because, by only banning Sharia Law from judicial opinions, “Oklahoma is, in effect, favoring all other religions over Islam.”¹²¹

That very issue is being addressed in Federal Court currently. Thus far, the Tenth Circuit has instituted an injunction against the state to prevent it from instituting the Amendment.¹²² In Awad, the Tenth Circuit addressed the legal applicability of enjoining Oklahoma from instituting the 2010 Amendment on First Amendment grounds.¹²³ For the purposes of determining if the plaintiff (Awad) had a likelihood of success on the merits, the court applied the Larson test,

¹¹⁷ Jaron Ballou, *Sooners vs. Shari’a: The Constitutional and Societal Problems Raised by the Oklahoma State Ban on Islamic Shari’a Law*, 30 Law & Ineq. 309, 317 (2012)

¹¹⁸ *Id.*

¹¹⁹ *Id.* At 318

¹²⁰ *Id.* At 323

¹²¹ *Id.* At 324

¹²² Awad v. Ziriax, 670 F.3d 1111, 1133 (10th Cir. 2012)

¹²³ *Id.* At 1116

citing the fact that the language of the Amendment indicated that the law discriminated *among* different religions.¹²⁴ The Larson test provides that “if a law discriminates among religions, it can survive only if it is ‘closely fitted to the furtherance of any compelling interest asserted.’”¹²⁵

In applying the Larson test to the Oklahoma Amendment, the Tenth Circuit found that the State’s proffered concern – that Oklahoma had an interest in determining what laws apply to their courts – was not a compelling one, thus negating an analysis of whether the act was “closely fitted” to the interest.¹²⁶ It remains to be seen whether the Oklahoma legislature will redesign the parameters of the Amendment in order to avoid Constitutional barriers. It seems clear, however, that a statute that singles out Sharia Law for expulsion from American jurisprudence will be unlikely to survive a Constitutional attack.

CONCLUSION: A Constitution Balancing Religious Rights and Western Secularism

The British, Canadian and American Constitutional approaches to Sharia Law illustrate a spectrum regarding the amount of weight western sovereign institutions give to the law of Islam. Britain’s unwritten Constitution and willing cessation of legal duties to Islamic Councils have paved the way for semi-parallel legal entities, while Canadian social backlash has ended the importation of any and all religious jurisprudence in the country’s legal system. The United States, meanwhile, has adopted a middle ground, through the use of secular contract law, to enable parties to appropriate Sharia Law in select circumstances. Each of these nations has sought arbitration as the primary avenue to including Sharia Law in their jurisprudence.

While each of these models possesses at least some merit, an ideal constitutional model would give great deference to religious arbitration firms in family and contract law, but would

¹²⁴ Id. At 1126

¹²⁵ Id. (quoting Larson v. Valente, 456 U.S. 228, 255 (1982))

¹²⁶ Id. At 1130.

require transparency and regular oversight over the semi-autonomous courts. This would give primacy to the established law of the land in laws of general application (such as criminal law), while at the same time allow for parties to freely choose alternative terms that could be upheld along secular lines. In America, this methodology would avoid both the Lemon (when all religions are implicated) and Larson tests (when only one religion is implicated).¹²⁷

Critical to the success of this arrangement is ensuring that parties enter into religious agreements of their own free will and with the terms clearly identified. In this capacity, contract prohibitions against fraud and duress could be used as procedural backstops, which would ameliorate concern that women are not being treated equally. What defines equality, in this sense, is not the outcome that may be reached under Sharia Law, but rather the assurance that a man and a woman would have equal access in entering, say, a marriage contract under Sharia terms.

Some scholars suggest that religious arbitration should be subject to public policy concerns or “general principles of justice” in secular courts of appeal.¹²⁸ The problem with subjecting religious arbitration panels to “general principles of justice” is that there is a possibility that courts may overreach their parameters in order to effectuate an outcome most desirable to them; in doing so, courts would couch their reasoning in arbitrary notions of “justice” simply to prevent consenting parties to choose the terms of their agreements.

Similarly, notions of “public policy” are nebulous in nature and allow courts to substitute their own policies for those desired by contracting parties. For example, Maryland’s Court of Appeals defined “public policy” in such a way as to foreclose the opportunity of Muslim couples

¹²⁷ Awad, *supra*

¹²⁸ Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 Wis. Int’l L. J. 108, 137 (2010)

ever using the “talaq” divorce in Maryland.¹²⁹ In Aleem, the court found that because a “talaq” could be performed by a man at will while women needed permission from the husband, this type of divorce violated the Equal Rights Amendment in Maryland, and thus violated public policy.¹³⁰ They further explained that, in a divorce proceeding, “property interests of the spouses should be adjusted fairly and equitably.”¹³¹ This decision manipulates the notion of “public policy” in order to dismiss private actions agreed to by consenting Muslim parties.

The better alternative in an ideal Western constitutional setting is to give religious arbitration its due consideration, so long as the result does not negatively affect any third parties. As an ideal case in family law, Lieberman represents the proper path for adjudicating Islamic Law properly into a constitutional fabric. In Lieberman, the Kings County Supreme Court upheld an arbitration award for a husband in a divorce proceeding in all aspects (custody, visitation and economic considerations) except for those that threatened the best interests of their child (namely, the forced sale of the house in which the child resided).¹³² An arbitration arrangement such as this would allow Muslims to utilize their preferred law without encroaching into other citizens’ values and practices. This approach embraces laissez faire adjudication between parties, while ensuring that no negative externalities are imposed on others by the arrangement.

Although it is preferable to afford considerable leeway for arbitration panels regarding commercial and marriage contracts, sovereign entities should be diligent in ensuring that arbitration panels do not enter the realm of criminal law. Far from being hands off, the ideal constitutional framework would allow for direct oversight over arbitration decisions to ensure that the only religious law implemented in the sovereign is that contractually agreed to and

¹²⁹ Aleem v. Aleem, 404 Md. 404, 422 (2008)

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Lieberman v. Lieberman, 149 Misc. 2d 983 (Sup. Ct. 1991)

affirmed by arbitration courts in a strictly civil context. This would avoid courts entertaining a Sharia defense to a crime, as was seen in S.D. v. M.J.R.¹³³ Proponents of the “Save Our State” Amendment would have their fear of Sharia encroachment (slightly) ameliorated because, in this design, there is no chance that Sharia Law could affect their lives, barring their direct acquiescence to it.

Western nations should not fear the reach of Sharia Law into their societies. This ideal constitutional structure illustrates a way in which Muslims can practice their faith without encroaching onto the rights of other citizens to live as they wish. Restricting Sharia Law to contracts made freely by consenting parties should reassure fearful Westerners that their traditional notions of justice are safe, while protecting Muslims from overarching fears of their religious practices. While social and political concerns – some of which may be irrational – cloud the prospects of Sharia Law arbitration panels getting their due consideration in Western jurisprudence, carving out a niche for Sharia Law while giving proper oversight ensures constitutional protections for all members of Western society.

¹³³ S.D. v. M.J.R., 415 N.J. Super. At 427.