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Oklahoma Amendment is Unconstitutional: Barring Courts From Considering Shariah Law Violates the Supremacy Clause and the First Amendment

By Abed Awad

On Election Day, the Oklahoma voters passed an amendment to the Oklahoma Constitution that provides that the "Courts shall not look to the legal precepts of other nations or cultures. Specifically, the Court shall not consider International law or Sharia law," dictates the amendment.

This amendment is unconstitutional on its face, and a federal judge has issued a preliminary injunction against it pending a hearing on Nov. 22. While the scope of international law that derives from international custom -- general principles of law and treaties -- is subject to debate, Article IV of the U.S. Constitution -- the supremacy clause -- provides that treaties "shall be the supreme law of the land." Moreover, the Oklahoma amendment violates the First Amendment.

That a court shall not be permitted to consider a foreign law and/or the cultural context of a dispute or agreement is inconsistent with the established jurisprudence of the past 100 years in the United States regarding parol evidence and international comity. How could something so ridiculous happen in America?

It is common nowadays to hear or read pundits, politicians and average Americans warning of the threat of "shariah" to the U.S. Constitution, demanding that a law be passed to prohibit the recognition of shariah in U.S. courts before it usurps the U.S. justice system. These false and inflammatory statements continue to fuel the Islamaphobia that is spreading throughout our country. Alarmingly, such bigoted statements about Muslims have become an acceptable form of speech.

As an attorney, I have handled many cases with an Islamic law component, testified around the country as an Islamic law expert, for the past eight years taught courses in Islamic jurisprudence to American Law students at Rutgers School of Law and Pace Law School and lectured about Islamic law in American courts around the country. In other words, my perspective is the actual reality of the role shariah plays in American courts.

Shariah is more than simply "law" in the positive sense. It is also a methodology through which a jurist engages the religious texts to ascertain divine will or intent. As a jurist-made law, the out-

come of this process of ascertaining divine will is called fiqh (positive law), which is the moral and legal anchor of a Muslim's total existence, so to speak -- whether it is a commercial transaction or a divorce settlement.

Although the survival of the classical interpretive methodology of the shariah -- for all intents and purposes -- is absent in the Muslim world since the emergence of the nation-state, the modern manifestations of shariah continue to be either a source of legislation or actual nation-state law in the majority of Muslim countries. (Shariah never was a nation-state law in the premodern period.) For example, Islamic law is a primary source of the family law codes of Egypt, Jordan, Qatar and many other Muslim countries.

The world has become a global village where marriages and commercial transactions cross international borders. As such, U.S. courts are required to regularly interpret and apply foreign law -- including Islamic law -- to everything from the recognition of foreign divorces and custody decrees to the validity of marriages, the enforcement of money judgments or the damages elements in a commercial dispute.

Shariah is relevant in a U.S. court either as a foreign law or as a source of information to understand the expectations of the parties in a dispute. Suppose a New York resident wife files for divorce in New York; her husband files for annulment in Egypt claiming the parties were never validly married. The New York judge must determine whether he has jurisdiction and whether New York law governs this dispute. If the conflict of laws of New York requires that Egyptian law governs the issue of validity, the court would require expert testimony about Egyptian law that is based on Islamic law.

In one case, a Delaware court required expert testimony about an interpretation of Saudi law, i.e., Islamic law. The court held that Saudi law permits enhanced damages, awarding a \$300 million judgment in favor of the prevailing party.

U.S. law permits parties to designate the choice of law that would govern in the event of a dispute -- New York law, Saudi law or any other law.

In the end, our Constitution is the law of the land. Our institutions are deep-rooted, functioning to create a neutral system to resolve disputes and ensure liberty. This is the law of the land -- not French law, German law or Islamic law.

George Washington in his farewell address, on Sept. 17, 1796, insightfully intimated: "The Nation which indulges towards another a habitual hatred or a habitual fondness is in some degree a slave. It is a slave to its animosity or to its affection, either of which is sufficient to lead it astray from its duty and its interest."

Our founding fathers were ahead of their time then and they continue to be ahead of their time now.

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