Shari‘ah Ban Violates Muslim, Jewish, and Christian American Civil Liberties

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I. Introduction

Since Oklahoma became the first state in the nation to pass anti-Shari‘ah legislation in July 2010, at least 20 more states passed, or attempted to pass, legislation banning Shari‘ah. Those trying to ban Shari‘ah consistently lack an understanding of exactly what is being banned. This paper demonstrates that these legislations violate fundamental Muslim-American civil liberties, and ironically, those rights of Jewish and Christian Americans as well.

II. What is Shari‘ah?

Before analyzing why anti-Shari‘ah legislation is a violation of Muslim American civil rights, we present a brief explanation of Shari‘ah. Shari‘ah is the law of the Qur'an. It literally means "a path to water," similar to *Yarrah* (i.e. the root of the Hebrew word Torah), which means precisely the same thing. Muslims consider the Qur’an absolutely binding in Islamic jurisprudence. While the Prophet Muhammad’s Sunnah[1] and Hadith[2] serve as crucial persuasive authority to interpret the Qur’an, they do not supersede the Qur’an.

Shari‘ah is not canonized in a single interpretation. Likewise, Muslims are not monolithic. In fact, several different schools of *fiqh*, or jurisprudence, interpret Shari‘ah differently. The many branches of jurisprudence that have been most influential throughout Islamic history include the Hanafi, Hanbali, Malaki, Shafi’i,

[1] The Sunnah are the Prophet Muhammad’s recorded actions.
[2] The Hadith are the Prophet Muhammad’s recorded sayings. Hadith vary in authenticity and veracity. While hundreds of thousands of Hadith have been recorded, the six most authentic books of Bukhari, Muslim, al-Nasai, Abu Dawood, Trimidi, and Ibne Maajaah are most heavily relied upon, while numerous other books are available as well.

Ja‘fari, Zaydi, ‘Ibadi, and Zahiri branches. This demonstrates the diversity and pluralism Islam encourages.

Shari‘ah is comprised of five main branches: *adab* (behavior, morals and manners), ‘*ibadah* (ritual worship), *i‘tiqadat* (beliefs), *mu'amalat* (transactions and contracts) and *'uqubat* (punishments). The first three categories, *adab*, *ibadah*, and *I’tiqadat*, or morals, worship, and beliefs, respectively, are strictly personal, between a Muslim and God. These personal beliefs absolutely qualify for protection under the First Amendment, which protects religious belief and freedom of conscience.

The fourth branch, *mu’amalat*, addresses contractual and transactional law. For example, family law (child custody, divorce, marriage), property issues, non-criminal court proceedings in general, inheritances, and wills fall into this category. *Mu’amalat* governs a society’s civil relationships, usually through mediation and arbitration. As long as a contract is not inherently against public policy or manifestly illegal, American law allows an individual to write a contract with generous flexibility. It stands to reason, therefore, that Shari‘ah *mu’amalat* transactions are constitutionally protected.

‘Uqubat, or punishments, is the fifth and final branch of Shari‘ah. It addresses the State response to all criminal acts, violent or non-violent. These criminal acts include murder, theft, assault, battery, rape, abuse, perjury, treason, obstruction of justice, fraud, or incitement to violence, among any list of crimes against society. Only a sovereign government may address these issues through due process. Anti-Shari‘ah advocates grossly misunderstand the *‘uqubat* branch, imagining it might somehow be implemented in America. While such advocates promote fear in claiming Shari‘ah seeks to enforce *‘uqubat* punishments in America, remarkably, they are unable to point to a single example where Shari‘ah punishments were held in

preference to the American penal code system. On the contrary, every example anti-Shari'ah advocates cite as proof of Shari'ah's alleged imposition in American courts refers only to contractual or *mu'amalat* matters, i.e. constitutionally protected behaviors.

Most bills are shifting from an outright ban on Shari'ah to a general ban on "all foreign laws." Some states are singling out only "religious law." Some states, like Arizona, are not only banning Shari'ah, but also Halacha and Karma. In general, virtually every state has clarified that courts may not refer to international, foreign, or cultural laws when opining on a non-business matter.

III. Violation of Fundamental Constitutional Rights

a. First Amendment Violations

"Where rights secured by the Federal Constitution are involved, there can be no rule-making or legislation which would abrogate them."[3] Anti-Shari'ah laws violate the First Amendment to the United States Constitution, which declares, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[4] The First Amendment ensures that Congress shall neither legislate in favor of, or against any religion. Americans understand this protection as the separation of church and state. Anti-Shari'ah laws infringe on this protection because they "prohibit" Muslim Americans from "the free exercise" of their religion, Islam. Peter Krug, an international law professor at Ohio University, commented on Oklahoma's anti-Shari'ah law known as SQ 755, explaining that "many transactions between companies rely on international treaties to uphold contracts" and "lawyers

[3] Miranda v. Arizona, 384 US 436 (1966).
[4] U.S. Const. First Amend. *available at* http://www.house.gov/house/Constitution/Constitution.html

could take advantage of the lack of clarity in the language to challenge cases."[5] Thus, a Shari'ah ban violates more than just the rights of Muslim Americans, but literally anyone who deals in international business.

Indeed, if Catholics faced similar restrictions as the anti-Shari'ah laws promote, Bishops could no longer, for example, read the Last Rites.[6] Jewish Rabbis, likewise, could not perform *Mohel*.[7] Jews also practice *Halacha* in America in their own civil court system known as Beth Din. A ban on Shari'ah or foreign law would necessarily crumble the entire Beth Din system. Furthermore, a ban on foreign law or Shari'ah would cripple business and commerce– particularly international business. Michael J. Broyde, a member of America's largest Jewish legal court– Beth Din of America– commented on Georgia's HB 45 anti-Shari'ah law known as American Law for American Court's Act: "[The bill would] incapacitate Georgia companies as they engage in international commerce."[8] Broyde made his assessment even though HB 45 does not mention "Shari'ah Law," but bans "foreign law" instead.[9] Thus, even "neutral" bans on all foreign laws violate fundamental civil rights.

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[5] http://thinkprogress.org/politics/2010/11/11/129512/oklahoma-sharia-native-americans/ (last visited on Nov. 21, 2011).

[6] The Last Rites are, "the very last prayers and ministrations given to many Christians before death. The Last Rites go by various names and include different practices in different Christian traditions. They may be administered to those awaiting execution, mortally wounded, or terminally ill. The term is used by some Christians outside the Roman Catholic Church, such as Anglicans…" http://en.wikipedia.org/wiki/Last_Rites (last visited on Nov. 20, 2011).

[7] For Jews, the Torah prescribes circumcision of their male infants is a religious obligation. "This is My covenant between Me, and between you and your offspring that you must keep: You must circumcise every male. You shall be circumcised through the flesh of your foreskin. This shall be the mark of the covenant between Me and you. 'Throughout all generations, every male shall be circumcised when he is eight days old…The uncircumcised male whose foreskin has not been circumcised, shall have his soul cut off from his people; he has broken My covenant.'" (Genesis 17:10-14)

[8] http://thinkprogress.org/politics/2011/02/08/142590/sharia-states/.

[9] Georgia HB 45 states, "A court, arbitrator, administrative agency, or other tribunal shall not enforce a foreign law if doing so would violate a right guaranteed by the Constitution of this state or of the United States."

b. Fourteenth Amendment Violations

A ban on Shari'ah is also unconstitutional because it violates the Privileges and Immunities Clause of the 14th Amendment.[10] This clause protects the fundamental rights of all American citizens, even when those citizens travel through different states. The Supreme Court held in 1868:

> It was undoubtedly the object of the [Privileges and Immunities] clause…to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.[11]

Then in 1873, the Supreme Court added that "[P]rivileges and immunities....are, in the language of Judge Washington, those rights which are fundamental."[12] This distinction of "fundamental rights" is important because States have the right to discriminate against non-fundamental rights like hunting and fishing.[13] The Supreme Court also explained what a State needs to do to restrict a fundamental right:

> Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all…[14]

The Supreme Court further explained in 1914:

> It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good

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[10] U.S. Const. Art. IV, Sect. 2, Cl. 1 states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This Clause prevents a State from treating citizens of other States in a discriminatory manner. *available at* *http://www.house.gov/house/Constitution/Constitution.html*

[11] Paul v. Virginia, 75 U.S. 168 (1868).

[12] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116 , 122 (1873).

[13] Baldwin v. Fish and Game Commission of Montana 436 U.S. 371 (1978).

[14] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116 , 122 (1873).

> order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise.[15]

One of the many major flaws with anti-Shari'ah laws, however, is that they restrict fundamental rights to Muslim-Americans' contractual transactions without offering any compelling State interest. For example, the Oklahoma SQ 755 Shari'ah ban forbids Muslims from contractual matters like *nikah* (marriage), *talaq* and *khula'* (divorce), wills and estates, inheritance, or even from paying the *zakat*.[16] Likewise, Muslim women would be stripped of the right to wear the *hijab*[17] and Muslim parents could no longer circumcise their male infant children.

Any state that wishes to ban Shari'ah must clearly demonstrate why, for example, banning Muslim-American couples from having a *nikah* is "necessary or proper for the mutual good of all,"[18] and is for the "…health, safety…or general welfare of the community."[19] Until this extremely high burden is met, any attempt to ban Shari'ah is an open violation of the United States Constitution.

c. Shari'ah Ban is Unnecessary Due to the Supremacy Clause

Next, a ban on Shari'ah is completely unnecessary because of Article VI, Clause 2 of the United States Constitution, otherwise known as the Supremacy

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[15] Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 558 (1914).

[16] *Zakat* is a tax the Qur'an enjoins upon wealthy Muslims. It is generally understood throughout various schools of jurisprudence as a means to ensure capital is not kept stagnant in one place, but in constant circulation. "And observe Prayer and pay the Zakat, and bow down with those who bow" (2:44).

[17] A *hijab* is a head covering Muslim women are enjoined to wear per the Qur'an 24:32 "And say to the believing women that they restrain their eyes and guard their private parts, and that they disclose not their natural and artificial beauty except that which is apparent thereof, *and that they draw their head-coverings over their bosoms*, and that they disclose not their beauty save to their husbands, or to their fathers, or the fathers of their husbands or their sons or the sons of their husbands or their brothers, or the sons of their brothers, or the sons of their sisters, or their women, or what their right hands possess, or such of male attendants as have no sexual appetite, or young children who have no knowledge of the hidden parts of women. And they strike not their feet so that what they hide of their ornaments may become known. And turn ye to Allah all together, O believers, that you may succeed." (emphasis added)

[18] *Slaughter-House Cases*, 83 U.S. 36 (1873).

[19] *Atlantic Coast Line*, 232 U.S. 548 (1914).

Clause. This Clause ensures that the United States Constitution and United States Treaties reign as "the supreme law of the land."[20] Likewise, it ensures that, "Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."[21] The Supreme Court employs the Supremacy Clause as often as needed to quash unconstitutional laws.[22] Thus, when, "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the Supremacy Clause invalidates that State law, anti-Shari'ah laws being no exception.[23] As demonstrated above, anti-Shari'ah laws clearly violate the First and Fourteenth Amendments. Therefore, the Supremacy Clause preempts and declares all anti-Shari'ah or anti-foreign laws unconstitutional. Likewise, the Supremacy Clause ensures that no foreign law, religious or secular, is ever applied as superior or in preference to the United States Constitution, rendering a Shari'ah ban completely unnecessary.

d. Supreme Court Precedent Violations

States trying to avoid usage of the word "Shari'ah" are instead trying to ban only "foreign law." This approach is still unconstitutional because it contradicts Supreme Court precedence, which has long referred to international law itself, and approved that lower courts refer to international law as persuasive authority in deciding cases.

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[20] US Const. art. IV cl. 2 states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *available at* http://www.house.gov/house/Constitution/Constitution.html

[21] Id.

[22] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Martin v. Hunter's Lessee, 14 U.S. 304 (1816); Cohens v. Virginia, 19 U.S. 264 (1821); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Cooper v. Aaron, 358 U.S. 1 (1958); Edgar v. Mite Corporation, 457 U.S. 624 (1982); California v. ARC America Corp., 490 U.S. 93 (1989); Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

[23] Id.

For example, international precedence was employed in 2002 when the Supreme Court ruled unconstitutional the execution of mentally retarded offenders in *Adkins v. Virginia*.[24] In *Lawrence v. Texas*, Justice Kennedy cited European Law to invalidate a Texas statute that banned sodomy.[25] If the United States Supreme Court may cite foreign law on complex issues like the death penalty, on what grounds may a state ban foreign law for private civil disputes? This demonstrates that the use of foreign law as persuasive authority is in conformity to the Supreme Court, and therefore in conformity with the United States Constitution. Any categorical ban on foreign law, therefore, is in fact categorically unconstitutional.

e. A Response to the Allegation of Shariah infiltration in New Jersey

Critics cite *S.D. v. M.J.R.,* a 2010 New Jersey domestic violence case between a married Muslim couple, as evidence of Shari'ah's alleged infiltration into American courts.[26] In this case, the lower court denied S.D. a final restraining order against M.J.R., her abusive husband, claiming no crime existed because M.J.R. was "operating under his [religious] belief [that] his practice…was…not prohibited."[27] The Appeals Court vociferously repudiated the lower court's ruling, holding that, "In resolving this conflict, the [lower court] judge determined to except [the] defendant from the operation of the State's statutes as the result of his religious beliefs. *In doing so, the judge was mistaken*."[28] The appeal explicitly clarified that religious belief can

[24] Adkins v. Virginia 536 U.S. 304 (2002).
[25] Lawrence v. Texas, 539 U.S. 558, 573 (2003).
[26] Shariah Law and American Courts: An Assessment of State Appellate Court Cases, CENTER FOR SECURITY POLICY at 468.
[27] S.D. v. M.J.R., 2 A.3d 412 (N.J. Super. Ct. App. Div. (2010).
[28] Id. (citing Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 (1878) (holding, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?") (emphasis added).

never supersede American law.[29] This case has nothing to do with Shari'ah, but has everything to do with a lower court judge who misapplied American law. Thus, *S.D. v. M.R.J.* is actually proof that America's checks and balances system works and the only sovereign law in the United States is that of the United States Constitution.

IV. Repudiating Fear Mongering Propaganda

A May 2011 document entitled, "Shari'ah Law and American Courts: An Assessment of State Appellate Court Cases" ("the document"),[30] baselessly alleges that KARAMAH: Muslim Women Lawyers for Human Rights is engaged in "supporting Shari'ah Law" in America as a means to infiltrate American courts. The document further lists seventy cases as examples of Shari'ah's alleged infiltration into American courts. The document states that its purpose is to "encourage an informed, serious and civil public debate and policymakers' engagement with the issue of Shari'ah law in the United States of America [because] organizations such as the Muslim Brotherhood and their salafist [sic] coalition partners state openly their intent to impose the Shari'ah State and Shari'ah law."[31]

The document is horribly flawed. It presents a wholly incorrect explanation[32] of Shari'ah and improperly confuses the state laws of nations like Pakistan with the Qur'an,[33] and claims—again unreferenced—that organizations like KARAMAH and Harvard Law School are "supporting Shari'ah Law."[34] The document only makes

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[29] Reynolds v. United States, 98 U.S. 166-67, 25 L. Ed. 244 (1878).
[30] Shari'ah Law and American Courts: An Assessment of State Appellate Court Cases, CENTER FOR SECURITY POLICY, May 20, 2011. *available at* www.centerforsecuritypolicy.org.
[31] Id. at 8.
[32] Id. at 8, (claiming in a conclusory manner, void of any references to support, that Shari'ah "includes legally mandated, recommended, permitted, discouraged and prohibited practices that are explicitly biased against women, homosexuals, non-Muslims, former Muslims and those designated as blasphemers.").
[33] Id. at 16-17.
[34] Id. at 20-21, (claiming, for example, that because Harvard Law School offers an Islamic Studies program, and KARAMAH: Muslim Women Lawyers for Human Rights, an organization Chaired by

bold assertions without any actual facts. For example, it provides no evidence that KARAMAH (or Harvard) is trying to impose Shari'ah in American courts to support its bold claim of such. Likewise, not a single one of the seventy cited cases provide evidence that Shari'ah is infiltrating America. Rather, each of the seventy cases is private, civil, family, or property matters that are deemed perfectly constitutional through American judicial precedent. This document is an affront to legitimate scholarship and only serves to foster fear and discord. In its 635 pages, it does not provide a single valid argument that demonstrates Shari'ah's actual infiltration into American courts.

In short, the First Amendment, Fourteenth Amendment, Supremacy Clause, and Supreme Court precedent demonstrate that anti-Shari'ah and anti-foreign laws violate fundamental civil rights for Muslim Americans, and Jewish and Christian Americans. Americans of all backgrounds are encouraged to conduct independent research, rather than falling prey to fear mongering propaganda. The above facts demonstrate that each of the twenty plus anti-Shari'ah legislations is unconstitutional, unnecessary, and nothing more than unfortunate wastes of taxpayer money.

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Dr. Azizah Y. al-Hibri, Commissioner on the U.S. Commission on International Religious Freedom, are supporting Shari'ah in America).