

The “anti-Shari‘ah” Legislation’s Adverse Human Rights Implications and Other Unintended Consequences

Engy Abdelkader, Esq.

“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections¹.”

In 2000, Layla and Ahmed were married in an Islamic religious ceremony in Egypt. Layla recently filed for divorce in New Jersey and her husband moved to throw out her complaint alleging that they were never legally married. The New Jersey judge must determine whether there is merit to the husband’s claim. To do so, the judge would require expert testimony about Egyptian family law, which is largely based on Shari‘ah. The recently enacted amendment to New Jersey’s state constitution bars the court from even considering Shari‘ah, however, when deciding cases. If the court fails to recognize the marriage, Layla may not be able to obtain equitable distribution of the marital assets the couple accumulated over the past eleven years (e.g. marital home, money in savings accounts, automobiles, etc.).

How can the family court judge possibly render a just decision without referring to Shari‘ah?

To make matters worse, Ahmed verbally and physically abused Layla during the marriage. The physical abuse was so bad that Layla was forced to seek medical treatment for her injuries at a nearby hospital where a nurse persuaded her to speak to the police and secure a restraining order against Ahmed. Incensed, Ahmed contacted the immigration authorities and informed the officers of Layla’s undocumented immigration status.

In response, Immigration and Customs Enforcement (ICE) agents arrested and detained Layla at a nearby immigration detention center. Following legal consultation with legal aid attorneys, Layla pursues legal permanent residency (e.g. “Green Card”) by filing the appropriate application with the immigration court pursuant to the Violence Against Women’s Act², which provides that a battered immigrant spouse married to a United States citizen abuser may be permitted to legal her status. To do so, Layla must provide evidence of her Shari‘ah-compliant marriage in Egypt to the immigration judge. Like the family court judge above, the immigration judge is prohibited from considering evidence regarding Egyptian family law, which is based on

¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

² In 1994, Congress passed the Violence Against Women Act (VAWA), which affords cancellation of removal as a defense to removal and has less rigid requirements if the applicant had been battered or abused. To be eligible, the applicant must: (1) have been battered or subjected to extreme cruelty in the United States by a United States citizen or lawful permanent resident spouse or parent, or is the parent in common with the abuser and the child has suffered abuse; (2) have been physically present in the United States continuously for at least three years; (3) has not been convicted of an aggravated felony; (4) is not inadmissible or otherwise removable due to criminal, document or marriage fraud, or security grounds; and (5) the removal would result in extreme hardship to the applicant, the applicant's child, or the applicant's parent. INA §240A(b)(2).

Shari‘ah. Layla runs the risk of losing everything she has in the United States as she is confronted with probable deportation to Egypt.

How can the immigration court judge possibly render a just decision regarding Layla’s application without referring to Shari‘ah?

In the meantime, a family friend helps Layla post bond to secure her temporary release from the immigration detention center while her case is litigated. Layla successfully applies for employment authorization to help financially support her family as she works to rebuild her life.

Layla responds to a job announcement for a sales floor representative with a large retail department store. The manager is impressed with Layla’s credentials but disapproves of Layla’s Islamic religious attire, or *hijab*. The manager informs Layla that she would have to remove her headscarf to land the job otherwise her dress may offend potential customers. Layla leaves the interview in tears.

After telling a friend about what happened at the job interview, Layla pursues an employment discrimination claim against the retailer. In order to prevail in her case, Layla must prove that she wears the *hijab* in accordance with a sincerely held religious belief. The court, however, is prohibited from considering any expert testimony regarding Shari‘ah.

How can the judge render a just decision on Layla’s employment discrimination claim without considering Shari‘ah?

While Layla and Ahmed are fictional characters, the circumstances detailed above are not. While no such anti-Shari‘ah measure has yet been introduced in New Jersey, such legislative initiatives have already passed in Oklahoma, Louisiana and Tennessee. Furthermore, the legal snapshots involving Layla above – divorce, immigration status, employment discrimination – are all too common ones both for the Muslim American community and our judicial structure.

There are of course many additional scenarios necessitating the courts’ consideration of Shari‘ah principles, such as recognizing custody decrees, probating wills that reference Shari‘ah principles, and applying contracts governed by principles of Islamic finance. Under the anti-Shari‘ah legislative initiatives, Muslims seeking relief from a court will have to ensure that their claims, defenses, evidence and legal arguments are devoid of all references to Shari‘ah and religious beliefs. Otherwise, courts will be unable to adjudicate their disputes or perform routine judicial functions as highlighted above.

The degree of disruption caused by any particular anti-Shari‘ah bill or amendment depends primarily on its language. Consider the language of Tennessee bill³ (SB 1028): As initially introduced, it would have provided that “[t]he knowing adherence to sharia and to foreign sharia\ authorities is prima facie evidence of an act in support of the overthrow of the United States government and the government of this state....” and would have made the support of any

³ 8 Tenn. SB 1028 (as initially filed, at <http://www.capitol.tn.gov/Bills/107/Bill/SB1028.pdf>) (last visited May 8, 2011); §39-13-902(13), §39-13-906(a)(1)(B).

“Shari‘ah organization” linked to terrorism a felony punishable “by fine, imprisonment of not less than fifteen (15) years or both.”

This proposed law would have rendered an American Muslim woman’s *hijab* a smoking gun for terrorism. Similarly, a Muslim woman’s ritual prayer or abstention from food and drink during the Islamic holy month of Ramadan would presumably serve as “evidence of an act in support of the overthrow of the United States government...” Indeed, if passed, this bill would have criminalized the peaceful practice of religion by millions of law abiding Muslims – men and women – around the country. Fortunately, this version of the bill failed but another anti-Shari‘ah law passed in Tennessee.

Anti-Shari‘ah laws also stigmatize the Muslim community in no uncertain terms as well as the tenets of Islam. This is because the laws embody official government condemnation of Islam as a threat, thereby causing Muslims to become outcasts and relegating them to inept players within the political community in their respective state.

It is worth noting that the Bill of Rights protects certain individual rights – including the freedom to worship freely – from being taken away by the will of the majority. Our nation was founded by men and women who fled religious persecution in their native lands with dreams and hopes of a more religiously tolerant tomorrow.

Today, more than 24 states have seen proposed laws that impose blanket prohibitions on consideration or use by courts or arbitral tribunals of an entire body of law or doctrine of a particular religion. While the specific language of these legislative initiatives may vary, the intent is uniformly informed by anti-Muslim hate and the result is un-American.

Engy Abdelkader is a Legal Fellow with the Institute for Social Policy and Understanding and a human rights attorney based in the New York/New Jersey area. With more than ten years of legal experience, Ms. Abdelkader has represented clients in a number of notable cases involving a variety of legal matters including civil rights, immigration, and foreclosure defense. She has also researched issues related to racial and ethnic justice, as well as the Muslim community and Islamic Law.

In February 2009, her immigration work with survivors of torture fleeing persecution from all parts of the world was recognized with an award from the International Institute of New Jersey.

Additionally, Ms. Abdelkader is a co-founder and the first president of the New Jersey Muslim Lawyers Association (NJMLA). As NJMLA's president, she met with then New Jersey Governor Jon S. Corzine's staff regarding diversity in the state judiciary and helped get the first Muslim American judge appointed to New Jersey's Superior Court.

With her legal background in civil and human rights, Ms. Abdelkader also serves on the Board of Directors of KARAMAH: Muslim Women Lawyers for Human Rights. In addition to this, she is on the Executive Board of the New Jersey Chapter of the American Arab Anti-Discrimination Committee (ADC-NJ) and is an active member of the American Bar Association as well.

In response to the backlash against American Muslims, Arab-Americans and South Asians in the wake of Sept. 11, Ms. Abdelkader worked as a cooperating attorney with the American Civil Liberties Union, the Arab-American Justice Project run by the American-Arab Anti-Discrimination Committee in New York, and the Center for Constitutional Rights, where she provided research on the case of Maher Arar — the first publicized case involving the practice of “extraordinary rendition,” where individuals are sent to other countries to be tortured.

During this time, she also volunteered with the U.S. Department of Justice Community Relations Service as a Cultural Competency Trainer on Islam, American Muslims and Arab Americans for state and federal law enforcement officials to prevent avoidable conflict and cultural misunderstandings.