



Application of Religious Law in U.S. Courts: Selected Legal Issues

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Summary

Controversy has surrounded attempts by several state legislatures to limit the consideration of Islamic religious law (commonly referred to as *sharia*) or religious law generally, in domestic courts. In one of the most publicized examples, Oklahoma voters definitively approved a state constitutional amendment that prohibited state courts from considering “sharia law,” but the amendment has not taken effect pending the outcome of a lawsuit challenging its constitutionality. Other states have introduced variations of this limitation, with some generally prohibiting the use of religious principles in domestic courts.

Critics have questioned the constitutionality of several recently proposed or enacted measures under the religion clauses of the First Amendment of the U.S. Constitution. The Establishment Clause prohibits the government from establishing an official religion or showing preference among religions or between religion and non-religion. The Free Exercise Clause prohibits the government from burdening an individual’s ability to exercise his or her religious beliefs if the burden does not arise from neutral law of general applicability but instead infringes upon a particular set of beliefs. Any bill that would specifically ban sharia may be challenged as a disapproval of Islam in violation of the Establishment Clause or as an infringement on the ability of Muslims to freely exercise their beliefs under the Free Exercise Clause. Broader proposals that address religion generally would not necessarily comport with the First Amendment either, however.

This report discusses proposals to limit the consideration by domestic courts of religious principles in general, and Islamic law in particular. It explains the role that religious law and beliefs may play in U.S. courts and analyzes the constitutional protections for religion in the First Amendment. Finally, the report also addresses the role of foreign and international law generally in U.S. courts and potential unintended consequences of restrictions on the consideration of religious or foreign law.

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Over the past year, several state legislatures have proposed measures that would restrict the consideration of religious law in domestic courts. In November 2010, voters in Oklahoma definitively approved a state constitutional amendment that would prohibit the use or application of Islamic law (sharia) in state courts,¹ which led to a lawsuit challenging the constitutionality of the amendment under the First Amendment of the U.S. Constitution.² Numerous other states have proposed a variety of state constitutional amendments or statutory provisions with similar goals of limiting the legal recognition of sharia and religious law generally.³

Religious law binds the followers of a particular religion. Although the First Amendment bars the government from adopting religious law as binding legal authority, religious law nonetheless may apply in certain legal scenarios. Parties to private agreements or civil transactions (e.g., contracts, arbitration agreements, domestic relations agreements or settlements) may provide that religious law would apply to the terms of the agreement or in the case of a dispute or breach of the agreement. In such instances, the application of religious law can only be included if each of the parties to the agreement knowingly consents to such terms. Religious law may be invoked in the public law context as a defense to certain actions or violations of criminal prohibitions under certain scenarios. It cannot be a defense to laws of general applicability that only tangentially affect religious exercise, but it may be used if a particular law is deemed to target religious exercise.

This report will discuss various legal issues related to the role of religious law in U.S. courts. It will provide a brief discussion of religious law and the role it may play within the United States and its judicial system. It also includes a broader analysis of the First Amendment concerns that may be triggered by government actions that attempt to limit religious practices in the United States. Finally, the report explains the role that foreign law generally may have within the U.S. legal system and potential unintended consequences that may arise from restrictions on the consideration of religious and foreign laws.

Religious Law and Its Application in U.S. Courts

Various religions have developed their own set of precepts to guide the actions and behaviors of their particular religious community and followers. For the purposes of this report, these precepts are generally referred to as religious law—that is, the rules of a particular religious community, as opposed to secular law, which would be laws adopted by the government of a particular state or nation. *Sharia*—often translated as Islamic law, which encompasses rules, norms, processes, and practices to be followed by Muslims, has been of particular interest recently.⁴ However, it is not the only religious legal structure that might intersect with issues before U.S. courts. For example, in Judaism, the Halakhah and Haggadah comprise the norms by which individuals of the Jewish faith are governed.⁵ Similarly, canon law is a body of law that applies to certain sects of

¹ H.J. Res. 1056, 52nd Leg., 2nd Sess., State Question No. 755, available at http://www.ok.gov/elections/documents/sq_gen10.pdf.

² *Awad v. Ziriax*, No. CIV-10-1186-M (W.D. Okla. 2010).

³ Examples of these proposals are included in the **Appendix** of this report.

⁴ Nathan J. Brown, *Shari'a and State in the Modern Muslim Middle East*, 29 INT'L J. OF MIDDLE EAST STUDIES 359, 363-64 (August 1997).

⁵ "Halakhah and Haggadah," *Encyclopedia of World Religions*, ENCYCLOPEDIA BRITANNICA 406-07 (2006).

Christianity.⁶ These bodies of religious law may play as relevant a role in certain legal actions as sharia might play in others.

In the United States, these religious laws have no legally binding effect on U.S. citizens because religious laws cannot be adopted by federal, state, or local governments under the First Amendment. Rather, individuals who identify with a particular religious group may voluntarily subject themselves to such religious laws by their association with the community.⁷ For example, if a particular religious sect or denomination requires its members to dress modestly, and an individual who is a member of that particular group does not comply with the dress code, that individual would be in violation of that group's religious law. The individual's belief in the religion's precepts would guide his or her individual actions, with any sanction for non-compliance generally remaining a private matter between the individual and the religious group. The individual would not be subject to any penalty by the government because the government does not enforce such a dress code. Interestingly, this distinction between religious and secular laws can become complicated when an action might be governed by both religious law and secular law. For example, many religious denominations' beliefs prohibit murder under their religious code. Both federal and state laws also prohibit murder. Thus, an individual who commits murder would be in violation of both a religious law and a secular law and may be sanctioned by the religious group, the government, or both.

The First Amendment's protections for religious exercise are not limited to traditional notions of worship, but extend to other behaviors that may be motivated by religious beliefs.⁸ Religious law often times is not limited to traditional worship or religious activities. Rather it may extend to day-to-day practices and behaviors. That is, Christianity may require attendance of religious services on Sunday but it also instructs its followers to perform charitable acts toward other individuals. Under Christian religious law, an individual's exercise of Christian beliefs may include both going to church and assisting one's neighbors. Similarly, in compliance with sharia, Muslims should not only observe daily prayers, but also conduct financial dealings consistent with their religious law.⁹ This understanding of the broad scope of many religious laws is significant when considering how these laws may intersect with the secular legal system.

Consideration of Religious Law by U.S. Courts

Various commentators have expressed concern that the legal concepts embodied in sharia would influence domestic judicial decisions.¹⁰ There are several areas of law in which concerns about the consideration of sharia or other religious law in U.S. courts may arise. Although application of religious principles as a part of the U.S. legal system would generally be inconsistent with the First Amendment, certain legal scenarios may invoke valid consideration of religious principles.¹¹

⁶ "Canon Law," *Encyclopedia of World Religions*, ENCYCLOPEDIA BRITANNICA 181-82 (2006).

⁷ See *Watson v. Jones*, 80 U.S. 679 (1872) ("All who united themselves to such a body [the general church] do so with an implied consent to [its] government, and are bound to submit to it.").

⁸ *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

⁹ See CRS Report RS22931, *Islamic Finance: Overview and Policy Concerns*, by Shayerah Ilias.

¹⁰ For instance, former Speaker of the House Newt Gingrich has touted the necessity of a federal law banning the use of sharia by federal courts. Sharron Angle, while campaigning for a Nevada seat in the U.S. Senate, claimed that two American cities were already under the control of sharia law. See, e.g., *Sense About Sharia*, *ECONOMIST*, October 14, 2010, available at http://www.economist.com/node/17251830?story_id=17251830&.

¹¹ Although courts cannot use the dictates of a religion to determine their decisions, courts may consider evidence of a (continued...)

For example, parties to a contract enjoy a great deal of leeway to establish binding agreements requiring contractual disputes to be submitted to arbitration.¹² In their arbitration agreement, the disputing parties can bind themselves to use a particular arbitrator.¹³ Courts have held that arbitration agreements providing for what is commonly referred to as “biblically based mediation” (relying on specified principles of the Christian Bible) are enforceable.¹⁴ Likewise, courts have also dealt with arbitration agreements specifying that Islamic arbitrators, relying on sharia or sharia-based law, govern the dispute settlement. For instance, a Texas state appellate court recognized a signed arbitration agreement providing for arbitration by the Texas Islamic Court as valid and enforceable and compelled submission of all claims to the Texas Islamic Court.¹⁵ In Minnesota, a state appellate court upheld an arbitration award from an Islamic arbitration committee applying Islamic law.¹⁶ Though some of the legal ramifications of these Islamic arbitration agreements are still unclear, courts have in most respects treated them no differently than other arbitration agreements.¹⁷ Such agreements reflect the mutual consent of the parties to use Islamic principles and institutions in subsequent disputes.

Another example of the influence of sharia in domestic courts is *S.D. v. M.J.R.*, a New Jersey domestic violence case.¹⁸ In that dispute, a Muslim wife filed for a restraining order against her husband after several instances of physical abuse and non-consensual sexual intercourse.¹⁹ Though the trial court found that the defendant had engaged in sexual acts that were clearly against his wife’s wishes, it did not grant a final restraining order because the husband lacked the

(...continued)

particular party’s religious beliefs when reaching their conclusion under secular laws. This scenario often arises in criminal cases, where a party relies on his or her religious beliefs to disprove some element of a crime, and has been raised in the context of a variety of cultures. For examples and a broader discussion of these types of cases, see Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. Rev. 101 (1997); Kent Greenawalt, *Commentary: The Cultural Defense: Reflections in Light of the Model Penal Code and the Religious Freedom Restoration Act*, 6 Ohio St. J. Crim. L. 299 (2008).

¹² According to the Federal Arbitration Act, “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. §2 (2006). Many states have similar provisions.

¹³ See, e.g., 9 U.S.C. §5 (“If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed.”).

¹⁴ *Woodlands Christian Academy v. Weibust*, No. 09-10-00010-CV (Tex. App. October 7, 2010); *Easterly v. Heritage Christian Schools*, 107 Fair Empl. Prac. Cas. (BNA) 173 (S.D. Ind. 2009).

¹⁵ *Jabri v. Qadurra*, 108 S.W.3d 404 (Tex. App. 2003). It should be noted that the case revolved around the question of whether the agreement applied to all of the disputes between the parties, not the Islamic nature of the mediators. *Id.* at 411.

¹⁶ *Abd Alla v. Mourssi*, 680 N.W.2d 569 (Minn. Ct. App. 2004).

¹⁷ For instance, in *In re Aramco Services*, No. 01-09-00624-CV (Tex. Ct. App. March 19, 2010), the Texas Court of Appeals faced a disagreement between the parties about the appointment of an arbitrator. The Arbitration Agreement specified that the law of Saudi Arabia would apply and required that the arbitrators would be Saudi nationals or Muslim foreigners. Using traditional contract interpretation techniques, the Court of Appeals overturned the lower court’s decision to appoint arbitrators because the Court of Appeals interpreted the agreement to require that a Saudi court handle such appointment. However, it specifically refused to address the question of whether, had the lower court been empowered to appoint the arbitrators, it would have been bound to appoint only Saudi nationals or Muslim foreigners.

¹⁸ *S.D. v. M.J.R.*, 2 A.3d 412 (N.J.Super.A.D. 2010).

¹⁹ *Id.* at 415-17.

requisite criminal intent to commit sexual assault.²⁰ This decision was based on the theory that the defendant acted based on his religious belief that a husband may demand to have intercourse with his wife whenever he desired.²¹ On appeal, the New Jersey Appellate Division overturned the trial court's decision and remanded the case to the lower court for entry of a final restraining order.²² Noting that the case involved "a conflict between the criminal law and religious precepts," the appellate court held that the defendant knowingly engaged in non-consensual sexual intercourse and thus could not be excused for his religious beliefs.²³

These examples of cases in which sharia and other religious law have been raised represent only two of the scenarios in which religious law might be considered by a court. Courts generally appear willing to allow private parties to private agreements to consent to obligations of religious law that they may choose to apply to a particular agreement. However, there are situations that may arise where the application of religious law may be contrary to public policy or raise other general concerns. Thus, there is a tension between the permissibility and potential desirability of allowing individuals to seek application of religious law under private agreements as a matter of free exercise of their religion and the potential unforeseen risks of such application of religious law in a broader context.

Consider, for example, an individual who validly executes a will for the distribution of his assets after death. That individual knowingly and willingly creates a legal document in accordance with his wishes. If the individual provides that the assets be distributed according to his religion's law, it may appear clear that he wishes to comply with his religious obligations and according to traditional interpretation of wills, the intent of the decedent is paramount. However, without further instruction as to what that particular individual believes the religion's law to include, the court that probates the will would then face questions about the content of religious law, a subject that courts tend to avoid. Had the individual specifically provided the principles of religious law that he wished to be applied, the court may be able to objectively probate the will according to his wishes for religious law, without facing the constitutional obstacles associated with probing religious doctrine. This example illustrates the difficulty of reconciling the various tensions associated with drafting a limitation on the role of religious law in U.S. courts. On one hand, the constitutional right of free exercise suggests that such a restriction might contravene a public policy of independence to follow one's one religious conscience. On the other hand, the constitutional prohibition on interference of the government in religious matters suggests that consideration of religious law by domestic courts might undermine the public policy of ensuring that an individual's religious conscience is indeed self-determined. A legislative restriction, whether on specific religious law or religious law generally, is likely to create numerous unforeseen risks and potential unintended consequences.

²⁰ *Id.* at 418.

²¹ *Id.*

²² *Id.* at 413.

²³ *Id.* at 422.

Overview of Sharia

Although a comprehensive explanation of sharia is beyond the scope of this report, a brief overview of sharia is necessary to understand the context in which it may arise in courts. *Shari'a* is an Arabic word often translated to “Islamic law,” and can be defined as the legal and moral code of Islam.²⁴ Sharia generally is explained as a compilation of various sources of religious principles which are in turn interpreted to provide guidance on religion, politics, economics, banking, business, law, and other aspects of Muslim life. The two primary sources of sharia are the Quran and the Sunna, which refers to the actions and words of Muhammad (the central prophet of Islam).²⁵ Historically, sharia served as one reference point for judicial decision making and dispute resolution in many predominantly-Muslim societies. Over time, many of these societies adopted secular legal codes that in some instances replaced and in other instances absorbed established sharia principles and practices.

The interpretation of sharia principles is referred to as *fiqh*.²⁶ Fiqh has been explained as “Islamic jurisprudence,” essentially the application of sharia principles to various scenarios.²⁷ As one scholar explains,

Four methods, often called sources of law by Muslim writers, for deducing and establishing fiqh-based law are universally recognized by Islamic jurists. They are: (1) the extraction of Qur'anic injunctions and principles based on interpretations of it; (2) the application of the principles reflected through the Hadith of Prophet Muhammad; (3) the consensus of opinion from among the companions of Muhammad or the learned scholars (*ijma*); and (4) analogical deduction (*qiyas*). . . . Both Muslim and non-Muslim scholars regard these four methods of law as the roots of Islamic jurisprudence.²⁸

Like other legal codes, the interpretation of sharia has been a subject of scholarly debate. As is the case in any legal system, religious or secular, the recognized sources of law likely do not address every problem that may arise. Various schools of interpretation have developed to fill in the gaps over time and individuals may choose to associate themselves and their communities with one or more of these schools of thought. As in other religions, individuals have a range of views about the appropriateness and desirability of using religious law and principles to decide important questions. Some Muslims reject the use of long-standing sharia practices and traditions for resolving judicial and personal matters. For others, reference to sharia may be an important part of their personal faith or an important marker of their perceived identity. Opinions also vary widely on the proper role of any government in protecting, interpreting, or enforcing sharia.

²⁴ “Shari’a,” *Encyclopedia of World Religions*, ENCYCLOPEDIA BRITANNICA 991 (2006).

²⁵ The Sunna are reported in what is known as the Hadith. See Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origins and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 33 (2002).

²⁶ *Id.* at 36.

²⁷ *Id.*

²⁸ *Id.* at 36-37.

First Amendment Issues Related to Prohibitions on Religious Laws in Courts

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”²⁹ These clauses are commonly referred to as the Establishment Clause and the Free Exercise Clause. Potential limitations on particular religious beliefs may run afoul of the Free Exercise Clause if they impose restrictions on the ability of individuals to practice their religious faith. Alternatively, such limitations may raise concerns under the Establishment Clause if they may be deemed to target one religion but not place similar limitations on other religions.

Restrictions on Free Exercise of Religion

The Free Exercise Clause prohibits governmental regulation of religious beliefs.³⁰ However, actions motivated by religious beliefs may be subject to regulation in certain circumstances.³¹ Government regulation of religiously motivated behavior may be constitutional if the challenged regulation is “a valid and neutral law of general applicability.”³² Such laws may incidentally burden the religious practices of some individuals. In order for a neutral law of general applicability to be deemed constitutional, the law must be related to a legitimate government interest.

Certain governmental actions may specifically address religion, however.³³ Laws that provide an accommodation of individual religious exercise have been upheld in a number of cases.³⁴ However, if a law specifically targets one religion’s practices or religiously motivated practices generally, the Court has held that it is subject to a heightened standard of constitutional review. Such laws must be related to a compelling government interest and be narrowly tailored to advance that interest.³⁵ The Court has explained that a law is not neutral if its object “is to infringe upon or restrict practices because of their religious motivation.”³⁶ At a minimum, in order to be neutral, a law cannot explicitly restrict a set of religious practices—that is, it must be facially neutral. Of course, some laws that appear facially neutral may still not comport with constitutional requirements, as “the Free Exercise Clause protects against governmental hostility which is masked as well as overt.”³⁷ Attempts to regulate certain religiously motivated practices

²⁹ U.S. CONST. amend. I.

³⁰ See *Sherbert v. Verner*, 374 U.S. 398 (1963).

³¹ See *United States v. Lee*, 455 U.S. 252 (1982); *Gillette v. United States*, 401 U.S. 437 (1971); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Reynolds v. United States*, 98 U.S. 145 (1878).

³² *Employment Div., Oregon Dep’t of Human Resources v. Smith*, 494 U.S. 872, 879 (1990) (internal quotes omitted).

³³ The First Amendment does not wholly bar the government from addressing religion, and the Court has allowed the government to accommodate individuals’ free exercise rights without violation of the prohibition on establishment. One example of such accommodation is chaplains’ corps in the armed forces. See CRS Report R41171, *Military Personnel and Freedom of Religion: Selected Legal Issues*, by R. Chuck Mason and Cynthia Brougher.

³⁴ See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

³⁵ *Church of Lukumi Babalu Aye*, 508 U.S. at 533.

³⁶ See *id.*

³⁷ *Id.* at 534.

without specifically mentioning the targeted religious beliefs have been held in some cases to be “religious gerrymandering” in violation of the First Amendment.³⁸ If a law proscribes more religious conduct than necessary to achieve the intended result, it may be deemed in violation of the Free Exercise Clause.³⁹

Establishment of Religion

The Establishment Clause prohibits the government from taking actions that would benefit one religion or religion generally.⁴⁰ The U.S. Supreme Court has used a variety of tests to determine whether a particular legislative measure would violate the Establishment Clause, but it has traditionally relied upon the tripartite *Lemon* test most often. The *Lemon* test requires that a challenged law 1) have a secular purpose, 2) have a primary effect that neither advances nor inhibits religion, and 3) not foster excessive entanglement with religion.⁴¹ The Court has accorded deference to stated legislative purposes, but has also required that the stated purpose “be sincere and not a sham.”⁴² It has explained that a neutral effect may be evidenced if the challenged law impacts “a broad spectrum of citizens,” for example, a tax deduction available for sectarian educational expenses that is also available to secular educational expenses, such that the law does not provide a distinct benefit available based on religion.⁴³ Finally, the Court has required that laws cannot create a relationship between government and religious entities that would cause one to interfere in the internal affairs of the other.⁴⁴

The Court has applied modified versions of this test in some cases and abandoned it in other cases, but it has not announced a new test that it has applied consistently in place of the *Lemon* test. One relevant modified version of the *Lemon* test is commonly referred to as the endorsement test, which examines whether the purpose or effect of the challenged law conveys a message that certain religions are preferred or disfavored over others.⁴⁵ The endorsement test forbids “government endorsement or disapproval of religion.” The Court has noted that the government is prohibited “from making adherence to a religion relevant in any way to a person’s standing in the political community.”⁴⁶ It explained that “endorsement sends a message to nonadherents that they are outsiders ... and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”⁴⁷

Another variation of the *Lemon* test that the Court has used focuses on neutrality as the governing principle in Establishment Clause challenges. Under this interpretation, the critical determination is whether the law is neutral between religions and between religion and non-religion.⁴⁸ The

³⁸ *Walz*, 397 U.S. at 696; *Church of Lukumi Babalu Aye*, 508 U.S. at 535.

³⁹ *Church of Lukumi Babalu Aye*, 508 U.S. at 537-38.

⁴⁰ See *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

⁴¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

⁴² *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987); see also *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring in the judgment).

⁴³ *Mueller v. Allen*, 463 U.S. 388, 397-99 (1983).

⁴⁴ *Walz v. Tax Commission*, 397 U.S. 664 (1970).

⁴⁵ *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O’Connor, J., concurring).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

Court has held that the government does not act constitutionally if it proscribes some action “for the sole reason that it is deemed to conflict with a particular religious doctrine.”⁴⁹ The Court declared that the prohibition on adopting public programs or practices that aid or oppose any religion is absolute, and emphasized that the prohibition included both support of a particular doctrine or prohibition of theory “deemed antagonistic to a particular dogma.”⁵⁰

At times, the Court has attempted to distinguish its constitutional analysis based on the type of special treatment received. For example, the Court has appeared to make a distinction between laws that benefit religion generally and those that discriminate against a particular religion. In *Larson v. Valente*, the Court struck down a charitable organization registration provision because its exception for religious organizations distinguished among religions, depending on whether a particular religious organization received a certain amount of donations from its members.⁵¹ Under the *Larson* test, strict scrutiny must be applied to laws granting such a preference, meaning that the preferential law must be justified by a compelling governmental interest and must be “closely fitted” to further that interest.⁵² The Court explained that *Lemon* would “apply to all laws affording a uniform benefit to *all* religions, and not to provisions ... that discriminate *among* religions,” which should be considered under the *Larson* test.⁵³ It appears that the Court may have been attempting to distinguish between challenges to laws that show *preference toward* religion and laws that show *discrimination against* religion. However, the infrequency of laws that specifically discriminate among religions has meant that *Larson* has rarely been applied in cases before the Court, leaving questions as to its proper application.⁵⁴

Additionally, the Supreme Court has even questioned the applicability of the Establishment Clause in cases involving public acts constituting disapproval of religion, noting that few laws specifically target religious belief or practice.⁵⁵ Rather, it has indicated that such cases may fall outside the purview of the Establishment Clause and may be better understood under a Free Exercise analysis. In 1993, the Supreme Court considered the constitutionality of legislation passed by a Florida town that limited the ability of practitioners of Santeria to carry out the animal sacrifices that their religion required.⁵⁶ The Court noted its long-standing principle in Establishment Clause cases “that the First Amendment forbids an official purpose to disapprove of a particular religion....”⁵⁷ However, the Court explained that Establishment Clause

⁴⁹ *Id.* at 103.

⁵⁰ *Id.* at 106-07.

⁵¹ *Larson v. Valente*, 456 U.S. 228 (1982).

⁵² *Id.* at 246-47.

⁵³ *Id.* at 252.

⁵⁴ Although the Court attempted to draw a distinction between favor and animus in *Larson*, it seems possible that a court could analyze an action that appears to promote something with religious significance under a *Lemon* framework because the action favors religion generally over non-religion, or under a *Larson* framework because the action has shown preference to one religion among many. *Cf. McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005) (challenge to a county requirement to display the Ten Commandments in county courthouses). On one hand, it may be argued that *McCreary* should be considered under *Lemon* because the county has recognized a religious symbol rather than a secular symbol. On the other hand, it may be argued that *Larson* could apply because the county chose a symbol of Christianity, rather than one of another religion. The Supreme Court applied *Lemon* without mentioning *Larson*, which may indicate that even where a particular religion is being promoted, if the challenge is to its religious nature, *Lemon* is the more appropriate analysis.

⁵⁵ *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

⁵⁶ *Id.*

⁵⁷ *Id.* at 532.

jurisprudence typically involved cases that allegedly benefited some religion and that challenges to laws that allegedly disfavor religion are more appropriately addressed by the Free Exercise Clause, as a government action that infringes upon the exercise of the targeted religion.⁵⁸

Selected Proposed Prohibitions on Application of Religious Law

Numerous states have proposed measures that would restrict consideration of sharia law or other religious law in state courts. These proposals have taken the form of state constitutional amendments, statutory limitations on state courts, and generally applicable criminal statutes. The following provides a general framework for analysis of the various issues that may arise in proposals that would limit religious law. The **Appendix** of this report provides a more detailed discussion of the particular language that certain states have proposed in their respective efforts to curtail the influence of Islamic legal traditions and other religious law in the U.S. judicial system.

Avoidance of Matters of Religious Doctrine

As discussed earlier in this report, religious laws are the rules of a particular religious community, set by the governing authority of that community, and are distinct from secular laws of the federal, state, and local governments of the United States. These religious laws have no legally binding authority in the United States, except to the extent to which members of a particular religious community have bound themselves to the governing religious authority. Religious laws tend not to be codified in the sense that secular laws are recorded and may vary from one religious community to another, even if those communities fall under the same nominal umbrella organization, as some religious sects are more tightly connected by their doctrines than others. Proposals to ban sharia raise a serious dilemma for legal scholars and jurists because the composition of sharia remains debated among various Islamic sects and scholars. Without an authoritative body of law with specific parameters, courts may find themselves faced with a need to determine the precise principles of sharia and thus offer judgment on the content of a religious doctrine, which is generally impermissible under the First Amendment.⁵⁹

The Supreme Court has maintained an understanding that “courts should refrain from trolling through a person’s or institution’s religious beliefs.”⁶⁰ The Court has recognized that churches and other religious institutions have a right under the Free Exercise Clause to address their internal matters independently and without interference from government institutions. Furthermore, such action by courts would entangle the legal system in an inquiry of religious authority and doctrine, suggesting the type of probing interference contemplated by the entanglement prong of the *Lemon* test. Accordingly, the Court has barred interference in religious practices through decisions prohibiting the government from deciding disputes concerning religious authority or policies.

⁵⁸ *Id.*

⁵⁹ *See, e.g., Awad*, No. CIV-10-1186-M (W.D. Okla. 2010).

⁶⁰ *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

In 1872, the Court recognized that matters of religious doctrine should be determined within the authority of the particular church and should be separate from any secular legal interpretation:

The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . . All who united themselves to such a body [the general church] do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.⁶¹

Thus, the Court established the principle that determinations of church doctrine and practice were to be free of government control well before it had even developed other aspects of its First Amendment jurisprudence. That general principle has since been cited by the Court in a number of First Amendment cases involving challenges of government interference in internal church matters.

In 1952, noting its historic recognition of a prohibition on government interference in matters of religion, the Court reiterated its earlier understanding of “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”⁶² The Court accordingly granted federal constitutional protection for the independent choice of churches for self-governance “as a part of the free exercise of religion against state interference” when it held that a legislature was constitutionally barred from determining the proper religious authority of the Russian Orthodox Church.⁶³

On a number of occasions, the Court has reiterated the limits of the First Amendment on government authority to decide matters of church internal disputes and practices. Just as it invalidated the legislature from doing, it has also limited courts from overstepping their constitutional authority in making civil determinations of the propriety of church actions or the validity of church beliefs.⁶⁴ The Court has held that “because of the religious nature of [disputes related to control of church property, doctrine, and practice], civil courts should decide them according to the principles that do not interfere with the free exercise of religion in accordance with church polity and doctrine.”⁶⁵

⁶¹ *Watson v. Jones*, 80 U.S. 679 (1872), quoted in *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 446 (1969). *See also* *Gonzalez v. Archbishop*, 280 U.S. 1 (1929) (“In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.”).

⁶² *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

⁶³ *Id.* The constitutional right to select clergy under the Free Exercise Clause is often referred to as the “ministerial exception” in some civil rights cases. The nature of the ministerial exception has been addressed by a number of federal appellate courts and will be argued before the Supreme Court in its 2011-2012 term. *See Hosanna-Tabor Church v. EEOC*, Docket No. 10-553, cert. granted March 28, 2011).

⁶⁴ *See, e.g., Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) (courts may not transfer control of church from general body of the Russian Orthodox Church); *United States v. Ballard*, 322 U.S. 78 (1944) (holding that the First Amendment precludes civil bodies from determining the verity of religious doctrines or beliefs).

⁶⁵ *Jones v. Wolf*, 443 U.S. 595, 616 (1979). *See also* *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church*, 393 U.S. 440.

Recognizing that the authors of the First Amendment understood that “establishment of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity,” the Court has interpreted the Establishment Clause to prohibit laws from fostering an “excessive entanglement” between government and religion.⁶⁶ The Court has explained the bar on entanglement as an inquiry of whether the disputed government action would “establish or interfere with religious beliefs and practices or have the effect of doing so” or would create “the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.”⁶⁷

Courts have generally exercised this avoidance of matters involving religious doctrine quite carefully. Absent detailed statutory guidance on the substantive nature of sharia, courts would be exceeding their constitutional authority by passing judgment on matters involving religious doctrine. However, detailed legislative guidance on the specific parameters of sharia would likewise exceed the legislature’s constitutional authority. These restrictions may therefore be interpreted as rendering prohibitions on the application or interpretation of sharia or other religious law by U.S. courts moot, given existing constitutional protections.

Perceived Treatment Toward Different Religious Beliefs

Much of the controversy over various proposals to restrict religious law in courts has been rooted in a debate over the purported motivation to propose such actions. Many advocates of such restrictions assert that the proposals would ensure that the U.S. judicial system remains free of the influence of religious dictates. Opponents argue that the proposals are driven by efforts to target only one religion. The First Amendment analysis of such proposals must confront this suggestion of perceived animus toward Islam.

The first prong of the Court’s predominant Establishment Clause test, the *Lemon* test, requires that a law have a secular purpose. A number of secular purposes may apply in legislative efforts to restrict the role of religious law within government actions. For example, it may be argued that these proposals are removing purportedly religious elements from the process of judicial decision making. Likewise, for broader proposals that ban foreign law or laws of other cultures (which may include religious law), it may be argued that such proposals would ensure that American law be the exclusive authority of U.S. courts and thereby uphold the integrity of our democratic system. However, one may counterargue that such alleged purposes may be masking covert religious animus, particularly for proposals that specify certain religious laws to be banned, rather than addressing religious laws generally. The Court has looked at the broader context for a particular law’s enactment, not just the stated purpose for the law, and in some cases has found that the legislature’s motivations implied a bias regarding religious views.⁶⁸

Regardless of whether these proposals are deemed to have a secular purpose, they must also have a neutral effect with regard to religion under a *Lemon* analysis. The effect may be considered

⁶⁶ *Walz*, 397 U.S. at 668, 674.

⁶⁷ *Id.* at 669-70.

⁶⁸ *See, e.g.*, *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005) (finding that a public courthouse religious display had a clearly religious purpose despite officials’ efforts to justify it on secular grounds); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (finding that the placement of a creche in a city’s holiday display had a legitimate secular purpose for its historic value to the holiday season).

neutral if it does not advance or inhibit religion.⁶⁹ Some have argued that pending proposals to restrict religious laws would only establish a rubric for choice of laws. Choice of laws refers to a threshold issue in legal disputes that determines what law would apply in a given case. The answer may be fairly straightforward, particularly in criminal cases where the law of the state in which the crime occurred has jurisdiction over the case. Other cases may be more complicated or may allow the individual parties to agree to which law would apply, as in contract disputes where the contractual agreement includes a provision for what law would govern the dispute in case of breach. For the purposes of this report, broader proposals that address religion generally rather than singling out particular religious views may have a greater likelihood for success under this argument. Generally applicable restrictions may be less likely to appear to be advancing religion or inhibiting religion because they have addressed religion categorically.

However, it is important to remember that the First Amendment not only protects against laws that provide separate treatment of a particular religion compared to others, but also protects against laws that provide separate treatment of religion generally over non-religion.⁷⁰ Government actions that would make a benefit available or place a restriction on only certain religions have been construed as violations of the Establishment Clause.⁷¹ However, laws that do not specify particular religions but treat religion generally may raise constitutional questions nonetheless if they provide preferential treatment to individuals with religious beliefs, but not to similarly situated individuals who might seek similar treatment on philosophical, moral or ethical grounds.⁷²

The proposals by various states to ban sharia specifically also may raise serious constitutional concerns under the endorsement test. Restrictions on one particular religion, like benefits to a particular religion, suggest a bias in the government's treatment of religious groups. The government, according to the endorsement test, cannot imply that certain religions are favored over another. Banning one faith's religious law, while allowing the religious law of other faiths to be considered, arguably demonstrates disapproval of the singled out religion—in this case, Islam. Although the apparent bias reflected in bans on specific religious laws may seem to be corrected by broadening the ban to religious laws generally, the ban would have to be crafted in a way that did not reflect a religion-specific impetus. That is, even if a law appears neutrally applicable, courts may find that the intent or effect of the law has a particular impact on one religion more than others, raising constitutional suspicions.⁷³

Determining whether a ban targets one religion will affect not only the Establishment Clause analysis, but also any Free Exercise challenges that may be brought. Courts apply different standards of review depending on whether the challenged law targets religious exercise or whether it is neutral and generally applicable, having only an incidental effect on religious exercise. Laws specifically forbidding the use of sharia or other named religious laws may be

⁶⁹ *Lemon*, 403 U.S. 602.

⁷⁰ *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

⁷¹ *See Bd. of Edu. of Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994); *Church of Lukumi Babalu Aye*, 508 U.S. 520.

⁷² As an example, these concerns have been raised in the context of exemptions for mandatory health care programs (e.g., vaccination requirements), to which some individuals oppose based on religious beliefs and others oppose on philosophical, ethical, or moral grounds. *See, e.g.,* *McCarthy v. Boozman*, 212 F.Supp. 2d 945 (W.D. Ark. 2002). The Supreme Court's understanding of whether the First Amendment should treat moral and ethical beliefs similarly to religious beliefs has varied. *See* *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Welsh v. United States*, 398 U.S. 333 (1970); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Board*, 450 U.S. 707 (1981).

⁷³ *Church of Lukumi Babalu Aye*, 508 U.S. 520.

evaluated under a strict scrutiny standard because they target a particular religion. In challenges deemed to target religion, the government would have to demonstrate a compelling governmental interest in treating that particular religion differently from others and also show that the allegedly required disparate treatment was achieved in a manner that would create the least restrictive burden on that group's religious exercise. Some have argued that proposed bans on sharia imply undertones of animus towards Islam and could suggest an "illegitimate government interest" in "harm[ing] a politically unpopular group."⁷⁴

On the other hand, some of the proposed legislation mentioning religious laws does not only ban specific religious laws for consideration by courts. Some proposals provide a list of positive sources of law that is religion neutral. Others propose broader bans on religious law or foreign law generally. These proposals might be interpreted as neutral laws of general applicability under Free Exercise analysis and therefore would require only that the proposed restriction be rationally related to a legitimate governmental interest. A court might find a rational basis in banning the laws of foreign nations or cultures to ensure that U.S. law remains the controlling authority in U.S. courts. However, the Supremacy Clause of the U.S. Constitution provides this guarantee regardless of any enactment of additional statutory or state constitutional restrictions:

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.⁷⁵

Accordingly, it may be argued that efforts to restrict the application of religious law or the law of foreign nations and cultures are superfluous to existing federal constitutional requirements. A related question arises regarding proposals that include both positive sources of law (i.e., a list of sources that courts may consider) and negative sources of law (i.e., a list of sources that courts cannot consider). Once courts are given a set of positive sources of law, it seems superfluous to additionally specify a ban on other sources of law. In other words, whatever sources are not included in the positive source list may be assumed to be banned without explicitly listing particular ones separately. This may lead one to argue that proposals providing a list of positive sources (which does not include any religious laws) that is paired with a ban on sharia or other religious laws, may actually be considered religiously neutral and lessening the degree of scrutiny under which courts consider any subsequent constitutional challenges.

Consideration of Foreign Law in Domestic Courts

Some proposals that would restrict the application of religious law ban foreign law or international law generally. Consideration of foreign and international law by domestic courts has been a controversial matter for various reasons in recent years.⁷⁶ The proposed restrictions

⁷⁴ Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction at 20, *Awad v. Ziriax*, No. 10-1186 (W.D. Okla. filed November 4, 2010); *see also* *Romer v. Evans*, 517 U.S. 620, 633 (1985) (striking down a state constitutional amendment passed by referendum that limited homosexuals' access to protection of antidiscrimination law because the breadth of the amendment and perceived animus against the class caused the law to fail rational basis review).

⁷⁵ U.S. CONST. art. VI, cl. 2.

⁷⁶ For a comprehensive discussion of the implications of foreign law, international law, and international agreements in the United States, see CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by (continued...)

discussed in this report appear to be attempting to prevent the application of the laws of foreign nations that have adopted religious law as the secular law of the national government. Extending a proposed restriction to include foreign law, rather than a specific religious law or religious law generally, may appear to avoid First Amendment issues. However, these proposals may, if enacted, prove to be inconsistent with basic constitutional precepts, including federalism and separation of powers, as well as with the principle of international comity, a guiding concept in U.S. court decisions for over a century.

Foreign law generally references the law of other countries and is not binding on U.S. courts. It is distinguishable from international law, which generally refers to agreements between nations and laws of international bodies. International law may be legally binding (regardless of state attempts to restrict its consideration) in the United States if it has been properly adopted by the federal government pursuant to constitutional authority to conduct foreign affairs. Bans on the consideration of foreign law or international law that has not been adopted or agreed to by the United States may raise various legal and policy concerns but might be valid depending on the circumstances. However, a general ban on international law may be a constitutional violation if that ban is interpreted to include restrictions on the consideration of treaties or other international agreements that the United States has entered or adopted pursuant to the U.S. Constitution.⁷⁷

Additionally, proposals to restrict the consideration of foreign law in courts might be viewed in some instances as an unconstitutional infringement on judicial authority, in the same way that there might be significant issues if a law required a court to follow a particular canon of construction when interpreting the Constitution. Under separation of powers principles, the judiciary has long been recognized to have the sole power to interpret the laws of the United States.⁷⁸ For a legislature to direct courts in how to exercise their judicial authority to determine the meaning and effect of various laws or judgments would violate these fundamental constitutional principles.

In some situations, a court may be faced with enforcement of a foreign judgment or arbitration award or with choice of law rules that would require application of foreign law in certain civil disputes taking place between private parties, such as when a private contract specifies that the parties agree to apply the governing principles of a particular country to any dispute between them. Except where preempted by federal law, state law governs the recognition and enforcement of foreign judgments in U.S. courts, so states may decide not to enforce foreign judgments in their courts if no federal law (including a treaty) requires recognition of a particular kind of judgment. No federal law provides uniform rules, nor is the United States a party to any international agreement regarding treatment of such judgments.⁷⁹ Although states generally must

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⁷⁷ The Supremacy Clause ensures that state laws cannot trump federal law, which includes treaties validly entered and adopted under the Constitution. U.S. CONST. art. VI, cl. 2.

⁷⁸ See *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is....”).

⁷⁹ In January 2009, the United States became a signatory to a the Hague Convention on Choice of Court Agreements, which requires its parties to recognize, with some exceptions, judgments rendered by a court in another signatory country that was designated in a choice of court agreement between litigants. Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98. Although 29 countries, including the United Kingdom under the auspices of the European Union, had signed the Convention as of August 17, 2010, the Convention will not enter force until at least two countries deposit (continued...)

recognize judgments from sister states under the Full Faith and Credit Clause of the U.S. Constitution, that requirement does not apply to judgments from foreign courts.⁸⁰ For that reason, even if one state enacts a law prohibiting its courts from enforcing foreign judgments, the judgment might be enforceable in another state. Broad restrictions on the role of judgments arising under foreign law raise the specter of a wide range of unintended consequences, including lack of comity in enforcing U.S. judgments abroad. Although the restrictions on foreign law discussed in this report appear to be crafted as neutral attempts to restrict the role of religious law that may have been adopted as foreign law, a broadly drafted restriction on foreign law would pose the risk that other foreign judgments unrelated to religious law could also not be enforced or that a contract governed by non-religious foreign law could not be enforced.

Unintended Consequences

A significant concern with a number of the pending proposals to restrict religious laws is the extent to which they may affect existing legislation. While a comprehensive assessment of the unintended consequences of these proposals is beyond the scope of this report, a number of potential issues are relevant to the consideration of these restrictions generally.

As discussed earlier in this report, there are a number of instances in which religious laws may overlap with secular laws; that is, murder may be prohibited by religious doctrine and also by statutory enactment. Examples of this overlap range across the legal code, particularly including criminal laws like those prohibiting theft, assault, or polygamy. Proposed bans on religious laws, depending on the statutory language, must be carefully drafted to ensure that these areas of overlap do not create unintended consequences. For instance, if a state enacts a constitutional amendment banning the application of sharia and both the state's criminal code and sharia include a ban on theft, the legislation might be read to preclude courts from enforcing the existing criminal ban on theft. Thus, proposals that do not provide precise guidance on the elements of sharia that were contemplated for the ban will raise a host of subsequent dilemmas for courts to consider.

However, as noted earlier, courts and legislatures are prohibited from defining the parameters of religious doctrine and therefore would likely encounter numerous difficulties in attempts to ascertain or declare the precise meaning of a ban on sharia or other religious laws. As a result, proposed bans on sharia may result in unintended consequences in a number of contexts in which individuals may seek to act in accordance with the mandates of their religion's laws while engaging in various private legal transactions. This issue may create problems with the administration of one's estate if his or her will provides for the estate to be divided according to a specified religious law. It may also affect contracts or financial transactions that include provisions for the application of religious law in cases of breach or renegotiation. Providing for the application of a particular set of laws in these scenarios is typically understood to be a personal choice and has been accepted because the particular parties affected have voluntarily

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instruments of ratification or accession with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, the designated depositary of the Convention. *Id.* at Arts. 27, 31. To see a list of parties and signatories as of August 17, 2010, visit http://www.hcch.net/upload/statmtx_e.pdf.

⁸⁰ U.S. Const. art. IV, §1 ("Full faith and credit shall be given in each *state* to the public acts, records, and judicial proceedings of every other *state*") (emphasis added). The exclusion of foreign judgments in a state's courts may raise due process concerns if there is no rational basis for the exclusion.

submitted themselves to be governed by the agreed upon set of laws. Bans on religious laws may restrict individuals' ability to exercise this autonomy in their private, personal affairs, even if the ban was not enacted for that purpose. However, parties to private legal transactions or agreements may avoid constitutional concerns by explicitly including the rules that they want to apply, rather than directing that the religious code govern. In doing so, courts may avoid reaching any conclusions about the content of religious doctrine and instead apply an explicit rule included in the governing legal document.

Appendix. Selected Examples of Pending and Proposed Prohibitions on Application of Religious Laws, Including Sharia

A number of states have proposed or enacted provisions related to the application of religious laws, including sharia. These provisions have taken a number of forms (e.g., constitutional amendments, statutory legislation, etc.) and may have been amended by the respective state governmental bodies. For the purposes of illustration, various approaches that have been used by states seeking to address the issue of religious law in U.S. courts are set forth below.

Constitutional Amendment Banning Sharia Law (Oklahoma)

In November 2010, Oklahoma voters considered Question 755, a constitutional amendment requiring state courts to rely only on federal or state law to decide cases. This amendment specifically would bar courts from considering international law or sharia in any case before the courts. The amendment provides that Oklahoma's state courts:

shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.⁸¹

The amendment thus provides a set of recognized legal sources, which include both federal and state laws and regulations, and it also provides a set of prohibited legal sources, which include international or sharia law.

The ballot proposing this amendment explained the amendment's effect:

This measure amends the State Constitution. It changes a section that deals with the courts of this state. ... It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law.

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states, and tribes. ... The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.

Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.⁸²

⁸¹ Okla. H.J. Res. 1056, 52nd Leg., 2nd Sess. (Okla 2010).

⁸² Okla. Exec. Proclamation, filed August 10, 2010, *available at* http://www.ok.gov/elections/documents/sq_gen10.pdf.

Question 755 passed with 70% of the vote, and two days later Muneer Awad, a Muslim man, challenged the constitutionality of the amendment, claiming it would invalidate his last will and testament, which incorporated aspects of sharia law.⁸³ The federal district court granted a preliminary injunction, which barred the certification of the election results until the court issued a decision on the merits of the case.⁸⁴ Although a decision on the merits of the case is still pending, the U.S. Court of Appeals for the 10th Circuit affirmed the preliminary injunction in the case in early 2012.⁸⁵ Applying the *Larson* test, the court explained that the state failed to satisfy the requirements of strict scrutiny and Awad “therefore made a strong showing that he is likely to prevail in a trial on the merits.”⁸⁶ The court noted that *Larson* has not been overturned and remains good law even if seldomly applied.⁸⁷ Given the 10th Circuit’s explanation of the proper analysis of the issues presented in the case, a decision on the merits in *Awad* appears likely to rest on a *Larson* analysis, but potential legal challenges filed in other jurisdictions on similar provisions may choose to apply other analyses.

Constitutional Amendment Banning Religious Law Generally (Texas)

In January 2011, the Texas state legislature proposed a state constitutional amendment for voters to consider that would generally prohibit the use of religious or cultural law in state courts. The proposed amendment states:

A court of this state shall uphold the laws of the Constitution of the United States, this Constitution, federal laws, and laws of this state. A court of this state may not enforce, consider, or apply any religious or cultural law.⁸⁸

Thus, the Texas proposal does not specifically address sharia law, but rather directs courts not to rely upon any religious law. This example also provides both a list of positive sources of law and a list of negative sources of law.

Constitutional Amendment Banning Laws Used or Applied in Non-U.S. Jurisdictions (Indiana)

The Senate of the state of Indiana proposed an amendment to the Indiana constitution in January 2011 that also does not specifically address sharia. Rather, it bars courts from enforcing laws from non-U.S. jurisdictions if enforcement would interfere with rights guaranteed by the U.S. or Indiana Constitutions:

A court may not enforce a law, rule, or legal code or system established and either used or applied in a jurisdiction outside the states of the United States, the District of Columbia, or

⁸³ *Awad*, No. 10-1186 (W.D. Okla. filed November 4, 2010).

⁸⁴ *Id.*

⁸⁵ *Awad v. Ziriya*, No. 10-6273 (10th Cir. filed January 10, 2012).

⁸⁶ *Id.* at 32-33.

⁸⁷ *Id.* at 26.

⁸⁸ Tex. H.J. Res. 57, 82nd Leg., Reg. Sess. (Tex 2011).

the territories of the United States if doing so would violate a right guaranteed by this constitution or the Constitution of the United States.⁸⁹

The amendment further instructs that contracts or agreements that provide for the application of non-U.S. law should be interpreted as necessary to preserve constitutional rights:

Unless a contract or agreement specifically provides that it is to be interpreted in accordance with a law established and either used or applied in a jurisdiction outside the states of the United States, the District of Columbia, or the territories of the United States, if:

(1) any contractual provision or agreement provides for the choice of a foreign law to govern its interpretation or the resolution of any dispute between the parties; and

(2) the enforcement or interpretation of the contractual provision or agreement would result in a violation of a right guaranteed by this constitution or the Constitution of the United States;

a court construing the agreement or contractual provision shall amend it to the extent necessary to preserve the constitutional rights of the parties.⁹⁰

Also, provisions that could not be amended to comport with constitutional rights would be void, absent an express choice of law clause:

Unless a contract or agreement specifically provides that it is to be interpreted in accordance with a law established and either used or applied in a jurisdiction outside the states of the United States, the District of Columbia, or the territories of the United States, any contractual provision or agreement incapable of being amended in order to preserve the constitutional rights of the parties in accordance with subsection (b) is void.⁹¹

In addition, the proposal includes similar language relating to venue or forum of particular disputes.⁹²

Constitutional Amendment Banning Sharia and Reference to Other State Laws That Apply Sharia (Wyoming)

In January 2011, Wyoming proposed an amendment to its state constitution that would bar courts from considering international law, sharia law, or the laws of other states if those states' laws include sharia law:

When exercising their judicial authority the courts of this state shall uphold and adhere to the law as provided in the constitution of the United States, the Wyoming constitution, the United States Code and federal regulations promulgated pursuant thereto, laws of this state, established common law as specified by legislative enactment, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia

⁸⁹ Ind. S.J. Res. 16, 117th Gen. Assembly, 1st Reg. Sess. (Ind. 2011).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

law. The courts shall not consider the legal precepts of other nations or cultures including, without limitation, international law and Sharia law.⁹³

Wyoming's proposed amendment may be the broadest reaching of the measures discussed because it may be interpreted to ban any of a particular state's laws from being considered, whether that law relates to sharia law or not, if the state has recognized sharia law to any extent.

Statute Restricting Judicial Determinations from Considering "Religious Sectarian Law" (Arizona)

In February 2011, Arizona proposed a ban on the use of "religious sectarian law" by its courts:

A court shall not use, implement, refer to or incorporate a tenet of any body of religious sectarian law into any decision, finding or opinion as controlling or influential authority. . . .

"Religious sectarian law" means any statute, tenet or body of law evolving within and binding a specific religious sect or tribe. Religious sectarian law includes sharia law, canon law, halacha and karma but does not include any law of the United States or the individual states based on Anglo-American legal tradition and principles on which the United States was founded.⁹⁴

Statute Making Support to "Designated Sharia Organizations" a Felony Offense (Tennessee)

Tennessee introduced a bill that would make knowing provision of material support to a "designated sharia organization" a felony offense under the state's criminal laws:

(A) Any person who knowingly provides material support or resources to a designated sharia organization, or attempts or conspires to do so, shall commit an offense.

(B) A violation of [the preceding paragraph] is a Class B felony, punishable by fine, imprisonment of not less than fifteen (15) years or both; provided, that if the death of any person results from a violation of [the preceding paragraph], then the offense is a Class A felony, punishable by imprisonment for life or imprisonment for life without possibility of parole.⁹⁵

In order to be convicted under the bill, a person must know that the organization is a designated sharia organization that engages or has engaged in certain acts of terrorism defined by state and federal law.

The bill authorizes the state attorney general to designate organizations as sharia organizations if the organization knowingly adheres to sharia; engages in, or retains the capability and intent to

⁹³ Wyo. H.J. Res. HJ0008, 61st Leg., 2011 Gen. Sess. (Wyo. 2011).

⁹⁴ Ariz. H.B. 2582, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

⁹⁵ Tenn. S.B. 1028, 107th Gen. Assembly, 1st Sess. (Tenn. 2011). (introduced February 17, 2011).

engage in, particular acts of terrorism defined by state law; and the act of terrorism threatens the security or public safety of Tennessee residents.⁹⁶ It defines sharia and sharia organization:

“Sharia” means the set of rules, precepts, instructions, or edicts which are said to emanate directly or indirectly from the god of Allah or the prophet Mohammed and which include directly or indirectly the encouragement of any person to support the abrogation, destruction, or violation of the United States or Tennessee Constitutions, or the destruction of the national existence of the United States or the sovereignty of this state, and which includes among other methods to achieve these ends, the likely use of imminent violence. Any rule, precept, instruction, or edict arising directly from the extant rulings of any of the authoritative schools of Islamic jurisprudence of Hanafi, Maliki, Shafi’I, Hanbali, Ja’afariya, or Salafi, as those terms are used by sharia adherents, is prima facie sharia without any further evidentiary showing;

(2) “Sharia organization” means any two (2) or more persons conspiring to support, or acting in concert in support of, sharia or in furtherance of the imposition of sharia within any state or territory of the United States.⁹⁷

In June 2011, Tennessee enacted a different version of the bill, known as the Material Support to Designated Entities Act of 2011, which was drafted without reference to sharia.⁹⁸

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⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Tenn. Code Ann. §39-13-807 (2011). The enacted language established a felony offense to provide material support or resources, or attempt or conspire to provide such support or resources to

(1) Any person known by the person providing such material support to resources to be planning or carrying out an act of terrorism in this state, or concealing or attempting to escape after committing or attempting to commit an act of terrorism; or

(2) A designated entity; provided, the person must have actual knowledge that the entity is a designated entity.

Id. The state statute also provides that “religious justification for violence or criminal activity prohibited by this part shall not be considered a justification or defense....” Tenn. Code. Ann. §39-19-809.