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*FEATURE ARTICLE*

**“SAVE OUR STATE”  
AMENDMENT: DEAD ON  
ARRIVAL**

*by* ISMAEL T. SALAM

Since Sept. 11, 2001, a spotlight has been cast on one of the Abrahamic religions in particular: Islam. This attention has taken various forms, from hate crimes at one end of the spectrum<sup>1</sup> to community outreach programs at the other, programs at which Jewish, Christian and Islamic leaders attempt to find common ground.<sup>2</sup>

## Loyola Public Interest Law Reporter

The recent focus on Muslim Americans has sparked a discussion about the place of Sharia, or Islamic, law in U.S. courts.<sup>3</sup> Reacting to fears that judges are considering Sharia law in their decisions, state legislatures have proposed statutes and amendments to their state constitutions to prohibit state courts from considering Sharia law – or any foreign law, for that matter.<sup>4</sup>

On Nov. 2, 2010, State Question 755, also known as the “Save Our State” amendment (“SOS”), was put to public vote in Oklahoma.<sup>5</sup> SOS would amend Oklahoma’s constitution to limit the sources of law that courts could use in their decisions.<sup>6</sup> The amendment would prohibit state courts from upholding and adhering to the law of another state in the United States if that law “include[s] Sharia Law in making judicial decisions.”<sup>7</sup> Oklahoma courts shall specifically “not consider international law or Sharia Law.”<sup>8</sup> The SOS defines Sharia as Islamic law “based on two principal sources: the Koran and the teaching of Mohammed.”<sup>9</sup>

The Oklahoma Legislature passed the authorizing resolution with an overwhelming bipartisan margin: 82–10 in the House<sup>10</sup> and 41–2 in the Senate.<sup>11</sup> Similarly, more than 70 percent of Oklahoma voters voted in favor of SOS.<sup>12</sup> “Oklahomans should not have to worry that their rights could be undermined by foreign court rulings in countries that do not have our respect for individual liberty and justice for all,” said resolution co-author Rep. Rex Duncan.<sup>13</sup> “Oklahoma court decisions should be based on . . . our state and national laws — period.”<sup>14</sup>

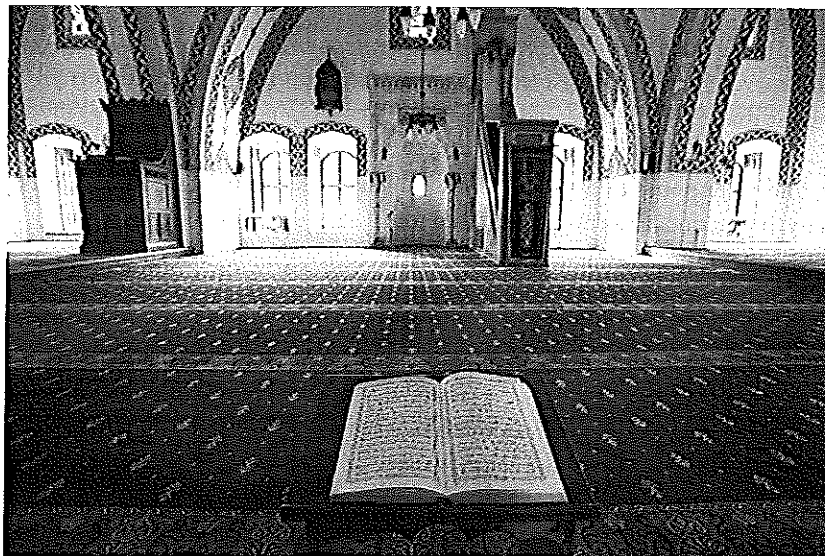
## PRIOR SHARIA CASES

Behind this “preemptive strike”<sup>15</sup> are court decisions in other states that have allowed cases to proceed under Sharia law.<sup>16</sup> On March 3, 2011, Florida Circuit Judge Richard Nielsen ruled that a dispute relating to the corporate governance of a Florida mosque “should proceed under Ecclesiastical Islamic Law.”<sup>17</sup> During the dispute, but prior to trial, the parties agreed to arbitrate their dispute in accordance with Islamic law.<sup>18</sup>

Similarly, in July 2010 a New Jersey trial court judge held that a husband did not have the criminal intent necessary for the court to find him guilty of the sexual assault of his wife.<sup>19</sup> The court ruled that the man, a Moroccan Muslim, “was operating under his belief . . . as the husband, his desire to have sex when

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and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited."<sup>20</sup> Though Sharia was not the basis for the ruling, it was considered evidence to help defeat the mens rea for the crime.<sup>21</sup>



However, an appellate court later reversed the decision. It held that the man's "conduct in engaging in nonconsensual sexual intercourse was unquestionably knowing [as required by the statute], regardless of his view that his religion permitted him to act as he did."<sup>22</sup>

Additionally, in May 2003 a Texas appellate court reversed a trial court's decision that denied a motion to compel arbitration between a Muslim couple.<sup>23</sup> The couple had agreed to settle disputes surrounding their divorce – including custody of their two children – according to Islamic law in the Texas Islamic Court, a private arbitration institution.<sup>24</sup> The appellate court held that the agreement was valid, and disputes arising under the agreement should be submitted to the Texas Islamic Court.<sup>25</sup>

## DEAD ON ARRIVAL

In their misguided attempt to protect their constitution, Duncan and Oklahoma voters may have violated the U.S. Constitution, “the fundamental document that binds us a people,” says Prof. Alan Raphael, an expert on constitutional law at Loyola University Chicago School of Law.<sup>26</sup> On Nov. 29, 2010, and in response to SOS, a federal judge granted Muneer Awad<sup>27</sup> a preliminary injunction preventing the Oklahoma State Board of Elections from certifying the voting results and amending the constitution.<sup>28</sup>

The defendant in the injunction suit, Paul Ziriaux, agency head of the Oklahoma State Board of Elections, argued that SOS was simply a choice-of-law provision limiting what laws a court could use.<sup>29</sup> The court, however, stated that SOS’s “primary effect inhibits religion and that the amendment fosters an excessive government entanglement with religion.”<sup>30</sup>

In rejecting the argument that the law was not aimed at any one religion, the court stated that a more reasonable construction of the amendment’s actual language found that it singled out Sharia law and, by extension, Muslims in general.<sup>31</sup> Therefore, the court held that there was a substantial likelihood that SOS violated the Establishment and Free Exercise Clauses of the First Amendment.<sup>32</sup>

Notably, the court also found that Sharia law “lacks a legal character” because “Sharia law is a set of religious traditions that differs depending upon the country in which the individual Muslim resides.”<sup>33</sup>

Sheik Kifah Mustapha of the Mosque Foundation in Bridgeview, Ill., offers a broader definition. He describes Sharia as “all that which God initiated of rulings through revelation to His Prophets and Messengers. The Torah revealed to Moses is Sharia, the Psalms revealed to David is Sharia, the [Evangel] revealed to Jesus is Sharia and the Quran revealed to Mohammad is Sharia. It includes the belief and the practice. In simple terms, all that which God told to do or not to do is Sharia in all areas of life.”<sup>34</sup>

According to Sheik Mustapha, any Muslim residing in a non-Muslim state like the United States “should respect the law of the land” because “being a citizen or a resident or a visitor means you have agreed to go with the law of the land

you accepted to be a part of."<sup>35</sup> While Islam requires that Muslims practice their religion, if there is a conflict between Islam and the law of the land then Muslims must adhere to the law of the land or immigrate to a country where they can practice freely.<sup>36</sup>

As a result of its permissive stance towards Sharia law, the *Awad* decision has been heavily criticized.<sup>37</sup> For example, during a televised debate in New Hampshire, Republican presidential candidate Herman Cain mistakenly referred to *Awad* as an attempt by Muslims "to influence court decisions with Sharia law."<sup>38</sup> In addition, one Oklahoma legislator has introduced a resolution calling for the impeachment of the judge that decided *Awad*, though no vote has taken place as of the writing of this article.<sup>39</sup>

However, SOS and its proponents have their critics as well. "Laws such as these are the product of misled xenophobic legislators who foist their equally misguided ideas on a public unnecessarily fearful of a person who belongs to a particular religion," said Michael Salem, counsel for *Awad*.<sup>40</sup>

#### NEW DEVELOPMENTS

Ziriax has since appealed *Awad* to the Tenth Circuit Court of Appeals, where a decision awaits.<sup>41</sup> *Awad* and the American Civil Liberties Union filed a response on May 9, 2011, urging the court to uphold the lower court's preliminary injunction.<sup>42</sup> In addition, the American Jewish Committee has also filed a brief calling SOS "flagrantly unconstitutional for violating the core nondiscrimination command of the Establishment Clause."<sup>43</sup>

On Sept. 12, 2011, the parties presented oral arguments before a three-judge panel of the Tenth Circuit in Denver.<sup>44</sup> Judge Scott Matheson, a member of the panel, asked why SOS was written to apply to just one religion.<sup>45</sup> "To avoid confusion," replied Oklahoma Solicitor General Patrick Wyrick.<sup>46</sup> During his questioning, however, Salem responded, "It will only take 50 percent plus one to ban the next religion."<sup>47</sup>

After oral argument, the court ordered the parties to file supplemental briefs by the first week in November on the possible application of 1982 U.S. Supreme Court case *Larson v. Valente*.<sup>48</sup> In *Larson*, the Supreme Court ruled 5-4 that a Minnesota statute violated the Establishment Clause because it singled out cer-

tain religious organizations that solicit more than 50 percent of their funds from non-members.<sup>49</sup>

#### INTERNATIONAL IMPLICATIONS

Aside from the First Amendment issues, SOS may be unconstitutional because of its conflict with international law and the Supremacy Clause. SOS prohibits state courts from using international law and defines it as the “law of nations” that “deals with the conduct of international organizations and independent nations [and] their relationships with each other.”<sup>50</sup> Included in the law of nations are “international agreements, as well as treaties.”<sup>51</sup>

Salem argued in his appellate brief that SOS would violate the Supremacy Clause. In effect, SOS would not recognize, for example, the New York Convention or the Convention on the International Sale of Goods.<sup>52</sup> However, the court did not need to address this issue because the issue was not before it.<sup>53</sup>

Nonetheless, the U.S. Constitution provides that “all Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby” regardless of any state law.<sup>54</sup> Simply put, “treaties preempt state law,” said Prof. Margaret Moses, director of the International Law and Practice Program at Loyola University Chicago School of Law.<sup>55</sup>

Generally, a court would apply foreign law in only two circumstances. One is when the parties have chosen a body of foreign law to govern their contract.<sup>56</sup> Alternatively, “in a case in which no law was chosen, the court would follow its own state’s conflicts-of-laws rules and determine that the foreign state’s relationship to the transaction was more reasonable than the law of a U.S. state,” said Moses.<sup>57</sup>

Even if SOS only limited the application of foreign law – another nation’s law – the implications may be profound. Telling other nations that state courts will not recognize their law “sounds pretty isolationist,” said Moses.<sup>58</sup> Many foreign courts will only recognize judgments if the issuing jurisdiction would recognize a similar judgment should it have been granted from the foreign court.<sup>59</sup>

## CONCLUSION

It is unclear whether SOS was intended to violate the U.S. Constitution or just narrow its interpretation. A willful violation of the Constitution "is very disturbing," said Prof. Raphael.<sup>60</sup> Most of the comments by SOS's co-authors suggest a genuine concern about Sharia law. Sykes, SOS co-author, stated that "Sharia law coming to the U.S. is a scary concept" and "hopefully the passage of this constitutional amendment will prevent it in Oklahoma."<sup>61</sup>

Likewise, another SOS co-author stated that SOS is a pre-emptive strike against Sharia law.<sup>62</sup> Sharia is a "cancer" in the United Kingdom, observed Duncan, where Sharia has been used in rulings in religious tribunals.<sup>63</sup> In response to the question of how Sharia is a threat in Oklahoma when only 1 percent of Oklahoma's population is Muslim, Duncan said, "It's a growing threat . . . a war for the survival of America."<sup>64</sup>

If SOS is found to violate the Constitution, what would its proponents gain? One answer is political support among their constituencies. Joseph Ignagni, a political science scholar at the University of Texas at Arlington, noted, "The literature in political science clearly indicates that the number one concern or goal of the vast majority of legislators is reelection. Therefore, it is not surprising that a legislator would vote for such a bill if he or she believed it would be popular with his or her constituents."<sup>65</sup>

Most Muslim Americans are content with their lives,<sup>66</sup> despite measures like SOS that contribute to the difficulty of being a Muslim in a post-9/11 America.<sup>67</sup> "I am fairly content with my community," said Hanna Barakat, a sophomore at the University of Texas at Arlington.<sup>68</sup> "As a female who wears the hijab, or head covering, I have not had any encounters with intolerance."<sup>69</sup>

The Tenth Circuit has not yet rendered an opinion in *Awad*. When it does, Wyrick may file a petition for rehearing to try and present his case before the entire Tenth Circuit.<sup>70</sup> Otherwise, his only option is to appeal to the United States Supreme Court. While the SOS may have been dead on arrival and never became part of the Oklahoma Constitution, its proposal is evidence of continued misunderstanding of Islam and its place in America under the U.S. Constitution.



## NOTES

- 1 See, e.g., Chris Wragge, *Tenn. Church, Islamic Center Embrace Post 9/11*, CBS NEWS, Sept. 8, 2011, <http://www.cbsnews.com/stories/2011/09/08/earlyshow/main20103317.shtml> ("Immediately after the September 11th attacks, Arab-American and Muslim Communities became hard targets for hate.").
- 2 *Muslims, Christians Begin Interfaith Initiative*, CAIR-CA (July 20, 2007, 12:00AM), <http://www.cair.com/ArticleDetails.aspx?mid1=777&&ArticleID=16956&&name=n&&currPage=1>; *Churches Open Doors to Muslim Worship*, FOXNEWS.COM (Feb. 18, 2011), <http://www.foxnews.com/us/2011/02/18/churches-open-doors-muslim-worship>.
- 3 *Did judge cite Islamic law in his decision?*, NAPLES DAILY NEWS (Fla.), May 12, 2011, at A3 (referring to a speech by Republican Senate Candidate, Adam Hasner, characterizing a Florida judge's decision to base a ruling on Islamic law as "not supporting the U.S. Constitution or the Constitution of the State of Florida"); William R. Levesque, *Judge Explains Use of Islamic Law*, ST. PETERSBURG TIMES (Fla.), Mar. 23, 2011, at 1B (discussing Florida judge who used Sharia law to decide arbitration issue); A.G. Sulzberger, *Voters Face Decisions on a Mix of Issues*, N.Y. TIMES, Oct. 6, 2010, at 17A (mentioning a New Jersey case in which the judge "cited a man's Islamic faith in denying a restraining order to a woman who said she had been raped by her husband"); Maxim Lott, *Advocates of Anti-Shariah Measures Alarmed by Judge's Ruling*, FOXNEWS.COM (Aug. 5, 2010), <http://www.foxnews.com/us/2010/08/05/advocates-anti-shariah-measures-alarmed-judges-ruling/> (discussing a New Jersey case and Texas case).
- 4 See, e.g., H.J. Res. 14, 84th Gen. Assemb., 2011 Sess. (Iowa 2011); H.B. 301, 126th Legis., Reg. Sess. (Miss. 2011); H.J. Res. 31, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); S.J. Res. 18, 50th Legis., 1st Sess. (N.M. 2011); H.J. Res. 8, 61st Legis., Gen. Sess. (Wyo. 2011); S.B. 1026, 49th Legis., 2d Reg. Sess. (Ariz. 2010); J. Res. 1387, 118th Gen. Assemb., 2d Reg. Sess. (S.C. 2009).
- 5 Save Our State Amendment, Enr. H.J. Res. 1056, 52d Legis., 2d Reg. Sess. (Okla. 2010).
- 6 Letter from Drew Edmondson, attorney general of Oklahoma, to Susan Savage, secretary of state of Oklahoma (June 24, 2010) (on file with author).
- 7 Save Our State Amendment, *supra* note 5.
- 8 *Id.*
- 9 Edmondson, *supra* note 6.
- 10 Save Our State Amendment, H.B. History, *available at* <http://www.oklegislature.gov/AdvancedSearchForm.aspx>.
- 11 Save Our State Amendment, S.B. History, *available at* [http://www.oksenate.gov/legislation/votes/votes\\_2010/02716.pdf](http://www.oksenate.gov/legislation/votes/votes_2010/02716.pdf).
- 12 H. Res. 1005, 53d Legis., 1st Reg. Sess. (Okla. 2011).
- 13 Save Our State Amendment, *supra* note 5; Patrick B. McGuigan, *State Question 755 would ban use of foreign judicial rulings*, CAPITALBEATOK (Sept. 2, 2010), [http://capitolbeatok.com/\\_webapp\\_3337864/State\\_Question\\_755\\_would\\_ban\\_use\\_of\\_foreign\\_judicial\\_rulings](http://capitolbeatok.com/_webapp_3337864/State_Question_755_would_ban_use_of_foreign_judicial_rulings).
- 14 *Id.*
- 15 *Sean Hannity Interview with Rex Duncan*, <http://www.youtube.com/watch?v=UM-mRXdDgFgI> (FoxNews broadcast) (discussing how "SOS is a pre-emptive strike").
- 16 See *infra* notes 17–25 and accompanying text.
- 17 *Mansour v. Islamic Educ. Ctr. of Tampa*, No. 08-CA-3497, slip at 4 (Fla. Cir. Ct. signed Mar. 22, 2011) (The case involved trustees suing a mosque for being improperly removed and control of \$2.2 million received from the state after the state used some of the mosque's property in a road project); William R. Levesque, *supra* note 3.

- 18 *Mansour*, *supra* note 17, slip at 2-4.
- 19 *S.D. v. M.J.R.*, 2 A.2d 412, 428 (N.J. Super. Ct. App. Div. 2010).
- 20 *Id.*
- 21 *Id.*
- 22 *Id.* at 432.
- 23 *Jabri v. Qaddura*, 108 S.W.3d 404, 413-14 (Tex. Ct. App. 2003).
- 24 *Id.* at 408.
- 25 *Id.* at 413.
- 26 Email interview with Alan Raphael, professor of constitutional law, Loyola University Chicago School of Law (Oct. 13, 2011).
- 27 Muneer Awad is an executive director of the Oklahoma division of the Council on American-Islamic Relations ("CAIR").
- 28 *Awad v. Zirriax*, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010).
- 29 *Id.*
- 30 *Id.* at 1306.
- 31 *Id.*
- 32 *Id.* at 1306-07.
- 33 *Id.* at 1306.
- 34 Email interview with Kifah Mustapha, imam and associate director, The Mosque Foundation (Oct. 12, 2011); *see* THE GRACIOUS QURAN: A MODERN-PHRASED INTERPRETATION IN ENGLISH 5:44-48 (Ahmad Zaki Hammad trans., Lucent Interpretations) (2009) (discussing the revelations to Moses, Jesus and Muhammad).
- 35 Mustapha, *supra* note 34.
- 36 Khaled Abou El Fadl, *Muslims and Accessible Jurisprudence In Liberal Democracies: A Response To Edward B. Foley's Jurisprudence and Theology*, 66 FORDHAM L. REV. 1227, 1229 (Mar. 1998).
- 37 *See infra* notes 38-39 and accompanying text.
- 38 Willoughby Mariano, *Cain's Claims About Sharia Law Barely True*, ATLANTA J. CONST., June 20, 2011, at B1 (Cain was alluding to the New Jersey case as discussed *supra* in notes 19-22 and accompanying text).
- 39 H. Res. 1005, 53d Legis., 1st Reg. Sess. (Okla. 2011), H.B. History, *available at* <http://www.oklegislature.gov/AdvancedSearchForm.aspx>.
- 40 Email interview with Michael Salem, co-counsel for Awad (Oct. 17, 2011).
- 41 *Awad v. Zirriax*, No. 10-6273 (10th Cir., May 9, 2011).
- 42 Pls.' Br. May 9, 2011, ECF No. 1018637144, *available at* <http://www.cair.com/9865207-Appellee-Respondent.pdf> (last accessed Oct. 15, 2011).
- 43 American Jewish Committee, *AJC Brief: Oklahoma Anti-Sharia Provision Unconstitutionally Targets Islam*, May 16, 2011, *available at* <http://www.ajc.org/site/apps/nlnet/content2.aspx?c=1J1T12PHK0G&b=849241&ct=10038057>.
- 44 Robert Boczkiewicz, *10th Circuit Court of Appeals Takes Up Oklahoma's Islamic Law Case - Judges question state's reason to ban Sharia law*, OKLAHOMAN, Sept. 13, 2011, at 2A; Salem, *supra* note 40.
- 45 Robert Boczkiewicz, *State's Shariah Law Ban Faces Tough Question in Appeals Court*, TULSA WORLD, Sept. 13, 2011, at A1.
- 46 *Id.*
- 47 *Id.*
- 48 Salem, *supra* note 40.
- 49 *Larson v. Valente*, 456 U.S. 228, 263 (1982).
- 50 Edmondson, *supra* note 6.

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51 *Id.*

52 Salem, *supra* note 40; *see also* Comm. on Foreign & Comparative, N.Y.C. Bar Ass'n., The Unconstitutionality of Oklahoma Referendum 755 – The “Save Our State Amendment” 4–6 (Dec. 2011) (discussing how Save Our State would violate the Supremacy Clause because the United States is a signatory to the Convention on the International Sale of Goods).

53 *Awad*, 754 F.Supp. at 1301.

54 U.S. CONST. art. 6 § 1 cl. 2.

55 Email interview with Margaret Moses, director of International Law and Practice Program, Loyola University Chicago School of Law (Oct. 12, 2011).

56 *Id.*

57 *Id.*

58 *Id.*

59 *See* Vishali Singal, *Preserving Power Without Sacrificing Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments*, 59 HASTINGS L.J. 943 (Mar. 2008) (“Given the magnitude of interaction between countries, either through private commerce, foreign relations between governments, or the treatment of one nation’s citizens by another nation, the world’s legal systems have become interconnected as well. Whether the laws of one nation dispense justice in accordance with that nation’s standards is now, in many circumstances, dependent upon whether the laws of another nation will recognize and enforce foreign judgments. As such, the strength of the American legal system is predicated in part upon the world’s receptivity to American judgments, which in turn is influenced by America’s receptivity to foreign judgments.”).

60 Raphael, *supra* note 26.

61 Mark Schlachtenhaufen, *Sharia law, courts likely on 2010 ballot*, EDMOND SUN, June 4, 2010, available at <http://www.edmondsun.com/local/x1996914371/Sharia-law-courts-likely-on-2010-ballot>.

62 *Hannity*, *supra* note 15.

63 *Id.* (discussing how the United Kingdom has allowed Islamic tribunals to decide on matters relating to issues arising under family law and arbitration).

64 *MSNBC Interview with Rex Duncan* (2010), [http://www.youtube.com/watch?v=ybvivrs\\_MH0&feature=relmfu](http://www.youtube.com/watch?v=ybvivrs_MH0&feature=relmfu).

65 Email interview with Joseph Ignagni, professor of political science at the University of Texas at Arlington (Oct. 17, 2011).

66 PEW RESEARCH CTR., MUSLIM AMERICANS NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM, 37–38 (Aug. 30, 2011).

67 *Id.* at 43.

68 Email interview with Hanna Barakat, sophomore at the University of Texas at Arlington (Oct. 17, 2011).

69 *Id.*

70 10th Cir. Fed. App. P. Rule 35 (2012).