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# POLICY BRIEF

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## Should Shariah Law Be Banned? Not So Fast

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### Introduction

Speaking at a recent meeting of the Orlando Federalist Society, esteemed law professor David F. Forte advised that Shariah law should not be banned in the United States as such a ban would inhibit U.S. foreign relations and counterterrorism efforts. This bold statement in a room packed with conservative attorneys and policy makers was greeted with surprise, but as Professor Forte explained his reasoning, the audience eased up and embraced the idea that banning foreign law would be counterintuitive to U.S. domestic and overseas efforts. The room gave Professor Forte a standing ovation after his talk. Professor Forte is an expert, if not *the* expert on international law and Islam from the conservative vantage point.<sup>2</sup> So if he is saying that foreign laws, including Islamic legal principles, should not be banned in federal and state courts, the position is noteworthy.<sup>3</sup>

This paper will examine legislation regarding the ban of foreign and/or Islamic law currently pending in the state legislatures across the country and its intended and unintended consequences. However noble the goals of these proposed laws, the theory behind them is misguided. If passed, this legislation will be disastrous to the economy of these several states. It will clog an already congested court system. It will adversely impact international trade and commerce, cost American jobs and cause a steep decline in revenue for the U.S. This proposed ban on foreign law sacrifices the crux of religious liberty guaranteed by both the U.S. and state

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<sup>2</sup> Faculty Profile for David F. Forte, available at [http://facultyprofile.csuohio.edu/csufacultyprofile/detail.cfm?FacultyID=D\\_FORTE](http://facultyprofile.csuohio.edu/csufacultyprofile/detail.cfm?FacultyID=D_FORTE)

<sup>3</sup> See *id.* David F. Forte holds degrees from Harvard College, Manchester University, England, the University of Toronto and Columbia University. During the Reagan administration, Professor Forte served as chief counsel to the United States delegation to the United Nations and alternate delegate to the Security Council. He has authored a number of briefs before the United States Supreme Court, and has frequently testified before the United States Congress and consulted with the Department of State on human rights and international affairs issues. His advice was specifically sought on the approval of the Genocide Convention, on world-wide religious persecution, and Muslim extremism.

constitutions. Most alarming, these bills carry the stench of xenophobic sentiments that will place U.S. troops and overseas diplomatic missions in harm's way.

## Current State of the Law

Since the very founding of the United States, American courts have relied on foreign laws to interpret the law and provide reasoning for the courts' rationale. In fact, American law is derived from English common law which has been used across the world as result of the influence of the former British Empire. American law also carries vestiges of Spanish and French law because of those respective nations' influence in colonial and post-colonial America. While foreign law is not binding on the court citing it, foreign law can act as a guide especially in unchartered and murky waters. Further, U.S. courts have been respectful of American Indian Law, granting these indigenous populations their own tribunals.

This state of judicial affairs went largely untested until last year when Oklahoma voters passed a law banning the use of Islamic legal principles, but the federal court in Oklahoma enjoined the state from certifying the election results.<sup>4</sup> The Oklahoma law banning Islamic law will not pass constitutional muster.

In *Muneer Awad v. Paul Ziriak, et al.*, the federal court in Oklahoma was asked if the specific exclusion of Islamic law in a state constitutional amendment might conflict with the U.S. Constitution.<sup>5</sup> In *The Columbia Missourian*, David Rossman writes:

What the court must decide is this: If the rule of the majority is in conflict with the Bill of Rights, can the will of the people be wrong?

The short answer, at least for now: Yes, there is a conflict, and the people can be mistaken. In such cases, federal laws take precedence. Even with the 2010 approval by more than 70 percent of voting Oklahoma residents, the amendment to the state constitution appears to violate the letter and intent of the First Amendment's establishment clause, as well as Oklahoma's own Bill of Rights.

If the U.S. District Court's decision in *Awad v. Ziriak* holds, HJR 31 [similar legislation in Missouri] will meet the same fate. Awad is now in the U.S. 10th Circuit Court of Appeals, receiving opening written briefs.<sup>6</sup>

There are First Amendment issues by singling out one religion with respect to the Oklahoma law banning Islamic law as Oklahoma University law professor Taiawagi Helton pointed out in *The Norman Transcript*.<sup>7</sup> But Helton said the lesser-discussed language created by the state question that courts cannot look to the "legal precepts of other nations or cultures" could be problematic if it is applied to Indian tribal legal cases.<sup>8</sup> Helton, who specializes in American Indian law, said the "ambiguous" language could be interpreted in a way for the state to reject rulings based on tribal laws.<sup>9</sup> He said an "opportunistic" person could argue tribal laws do not apply in arbitration cases or when the state is called to resolve a dispute.<sup>10</sup>

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<sup>4</sup> *Awad v. Ziriak et al.*, No. 10-1186, 2010 WL 4814077, (W.D. Okla. Nov. 29, 2010).

<sup>5</sup> David Rossman, "Banning Sharia law is fear mongering and unconstitutional, *The Columbia Missourian*, April 6, 2011, available at <http://www.columbiamissourian.com/stories/2011/04/06/david-rosman/>.

<sup>6</sup> *Id.*

<sup>7</sup> Trevor Brown, "Tribes Feel Side Effect of SQ 255," *The Norman Transcript*, November 10, 2010, available at <http://normantranscript.com/headlines/x1110251934/Tribes-fear-side-effects-of-SQ-755>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

## Proposed Legislation Banning Foreign Law

Now state lawmakers from Alabama to Alaska seek to ban the application of foreign and/or Islamic law in the United States under the guise of patriotism to halt the intrusion of foreign law in the State.<sup>11</sup>

Anti-Shariah laws in the U.S. are NOT in response to any specific attempts by Muslims to introduce such legislation but the result of some politicians, activist judges, and special interest groups seeking to garner votes and push forward their own agenda. For example, in Tampa, Florida, Circuit Court Judge Richard A. Nielsen caused an uproar when he sought to enforce an arbitrator's award compelling the defendant in a contract dispute to what he termed, "Ecclesiastical Islamic Law."<sup>12</sup> Conservative talk radio host Steve Bussey at WMMB in Melbourne, Fla. notes:

I would like to know when and from where Judge Nielsen received his Islamic law education in order to determine if this case has proceeded in accordance with Islamic Law? No, Judge Nielsen found, according to his own ruling that "Islamic brothers " should submit to Ecclesiastical Islamic Law and the Qur'an – in his own words – his ruling!<sup>13</sup>

The majority of Muslims in the Tampa Bay area disagree with the Judge Nielson's ruling, which in many ways is patronizing to Muslims in that it instructs them on what their religious edicts should be. More troubling about Judge Nielson's ruling as Mr. Bussy indicates is that the Tampa case was about simple contract law, and the rules and law of the U.S. and Florida could have been used without the need to introduce any legal arguments based on Islamic principles.

With the rising tide of Anti-Muslim, anti-Hispanic, and anti-European emotion, some lawmakers are seeking to sneak in a bill that will harm the foundations of the right to freedom of religion and impede international trade and commerce. At present, numerous states have this copy-cat legislation pending. Incidentally, the actual motive behind these potential laws is a deep-seeded hatred of Islam and Muslims. The wording of the legislation focuses on foreign law, but that is only a front to ban religious personal freedoms of Muslims, freedoms constitutionally protected as long as they do not conflict with the U.S. Constitution and federal statutes. The legislation banning foreign law is a direct affront to religious liberty in America in that it would marginalize the rights of the Muslim minority.

The problem with these bills is that they are poorly-worded, creating a slippery slope. The logic behind this legislation is laughable, at best, and mean-spirited and dehumanizing, at worst. Would this law make the United Nations Charter illegal? Would the Hague Convention become a nullity in Florida? How far will it go?

The first option is to maintain the status quo and vote against the ban. Alternatively, legislators seeking to ban foreign law could vote in favor of the bill and arrest the intrusion of foreign law in American courts.

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<sup>11</sup> "David Yerushalmi: A Driving Force Behind Anti-Sharia Efforts in the U.S.," *Islamophobia Today*, March 25, 2011, available at <http://www.islamophobiatoday.com/2011/03/30/david-yerushalmi-a-driving-force-behind-anti-sharia-efforts-in-the-u-s/>.

<sup>12</sup> *Id.*

<sup>13</sup> Steve Bussy, "Breaking News: Tampa Sharia case Judge speaks out," March 23, 2011, available at <http://stevebussey.com/wp/2011/03/breaking-news-tampa-sharia-case-judge-speaks-out/>.

Lawmakers should tread cautiously when considering this law because of the long-term ramifications of any legislation that would ban foreign law. For example, Florida is now a recognized foreign jurisdiction in the United Kingdom, a privilege that could be rescinded at any time especially out of protest to these types of xenophobic laws.

When America should be gaining a stronger foothold in an increasing global economy, this type of legislation is two steps backward. Trade, tourism, and business would suffer negative impacts from these bills.

“Transnationalism” is not a dirty word as Rep. Sandy Adams of Florida asserted in *The Washington Times*.<sup>14</sup> Transnationalism impacts not only legal and political circles but it is the way business is now done. From Seattle to Seoul, Richmond to Riyadh, and from Miami to Moscow, transnational corporations are the thumping heart of business and commerce. Restricting the courts in utilizing aspects of foreign law in their interpretations and refusing to enforce arbitration awards would impede business in an unprecedented manner.

This anti-Muslim law also does not factor how religious personal laws would be turned on their head. State intestate inheritance statutes are vastly different than Islamic inheritance rules. International child custody agreements would be thrown out of court into left field. In turn, the decisions and judgments from American courts will lose weight and may not be given full faith and credit outside U.S. jurisdictions. Clauses relating to Islamic banking and finance in business agreements would be knocked out as well.

The intricacies of Islamic legal principles and how they are applied are beyond the scope of this piece, but it is critical to understand that Islamic law is well-defined and practical and can coexist harmoniously with American law and social systems.

What is most disconcerting about the proposed laws is that when state lawmakers should be focusing on balancing their budgets and creating more jobs, the state lawmakers are wasting taxpayer dollars to create irrational bills that fly in the face of 235 years of federalism in the United States.

## Origins of Legislation

The impetus behind the recent rash of anti-foreign law legislation comes from an obscure Arizona lawyer David Yerushalmi. His arguments sound fine in theory but when one looks at the nuts and bolts of these arguments they fall apart at the seams as stated above.

Mr. Yerushalmi, the founder of Society of Americans for National Existence (SANE), is behind an intricate web of white-supremacist propaganda endeavoring to root out Muslims’ religious freedoms. SANE runs toe-to-toe with the Public Policy Alliance, a coalition of known anti-Muslim hate groups. The Public Policy Alliance is the source of this legislation, and has been copied word-for-word from the language of the Public Policy Alliance’s website.<sup>15</sup> The Southern Poverty Law Center and the Anti-Defamation League have denounced both SANE and the Public Policy Alliance as extremist hate groups and justifiably so.

Mr. Yerushalmi has written, “The Muslim peoples, those committed to Islam as we know it today, are our

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<sup>14</sup> Sandy Adams, “Ban foreign law from courts,” *The Washington Times*, March 9, 2011, available at <http://www.washingtontimes.com/news/2011/mar/9/in-recent-years-supreme-court-justices-have-interj/>.

<sup>15</sup> See Public Policy Alliance website, available at [http://publicpolicyalliance.org/?page\\_id=38](http://publicpolicyalliance.org/?page_id=38).

enemies.”<sup>16</sup> He has reportedly advocated for a law making it a felony “punishable by 20 years in prison to knowingly act in furtherance of, or to support the, adherence to Islam.”<sup>17</sup>

Muslims are not the only ones who draw Mr. Yerushalmi’s ire. In a 2006 essay for SANE entitled, “On Race: A Tentative Discussion,” Mr. Yerushalmi argued that whites are genetically superior to blacks: “Some races perform better in sports, some better in mathematical problem solving, some better in language, some better in Western societies and some better in tribal ones.”<sup>18</sup>

Mr. Yerushalmi has suggested that whites are inherently more receptive to republican forms of government than blacks—an argument that’s consistent with SANE’s mission statement, which emphasizes that “America was the handiwork of faithful Christians, mostly men, and almost entirely white.”<sup>19</sup> And in an article published at the website Intellectual Conservative, Yerushalmi, who is Jewish, suggests that liberal Jews “destroy their host nations like a fatal parasite.”<sup>20</sup> Unsurprisingly, then, Yerushalmi offered the lone Jewish defense of Mel Gibson, after the actor’s anti-Semitic tirade in 2006.<sup>21</sup> Gibson, he wrote, was simply noting the “undeniable Jewish liberal influence on western affairs in the direction of a World State.”<sup>22</sup>

Also in the mix is ACT! for America (formerly American Congress for Truth), which operates under the leadership of Brigitte Gabriel, also known as Nour Semaan. Ms. Gabriel is a Lebanese American journalist of Ethiopian origin who according to the Center for International Policy “has made a post-9/11 career out of roundly denouncing Islam, decrying ‘political correctness,’ and promoting the concept of an existential clash of cultures.”<sup>23</sup> ACT! For America seeks to stop the penetration of Shariah law into America.<sup>24</sup>

SANE, the Public Policy Alliance, ACT! for America and a myriad of other ultra-conservative right-wing groups have formed a political conglomerate that lobbies lawmakers to restrict the religious freedoms of the Muslim minority in the United States.

## Understanding Islam

Instead of ducking it out in the halls of justice or the floors of congressional assemblies, American leaders would be better served if they realized Islam was not a threat to the American way of life. Lawmakers should try to understand Islam rather than condemn it from the get-go. No one wants to dupe anyone and impose Islamic legal principles in American courts. Islam at its very essence states that that there should be

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<sup>16</sup> Justin Elliot, “The sharia panic factory,” *Salon*, April 7, 2011, available at [http://www.salon.com/news/islam/?story=/politics/war\\_room/2011/04/07/sharia\\_nebraska\\_act\\_for\\_america](http://www.salon.com/news/islam/?story=/politics/war_room/2011/04/07/sharia_nebraska_act_for_america).

<sup>17</sup> *Id.*

<sup>18</sup> Tim Murphy, “Meet the White Supremacist Behind Leading the GOP’s Anti-Sharia Crusade,” *Mother Jones*, March 1, 2011, available at <http://motherjones.com/politics/2011/02/david-yerushalmi-sharia-ban-tennessee>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See “Brigitte Gabriel,” *Wikipedia*, available at [http://secure.wikimedia.org/wikipedia/en/wiki/Brigitte\\_Gabriel#cite\\_note-CIP-16](http://secure.wikimedia.org/wikipedia/en/wiki/Brigitte_Gabriel#cite_note-CIP-16).

<sup>24</sup> See ACT! For America’s website, available at <http://www.actforamerica.org/index.php/learn/current-issues>.

no compulsion in religion. Islamic legal theory respects that U.S. Constitution and federal statutes are the supreme law of the land. Any conflict between Islamic law and U.S. law would tilt in favor of U.S. law. The Muslim way of life is congruous with American ideals and belief systems.

Foreign laws and legal doctrines do not run anathema to American constitutional ideals instead foreign laws are fused into the spirit and letter of the law. Islam is a religion of unity and action with safeguards for individual rights and liberties.<sup>25</sup> The influence of Islamic jurisprudence on the democratic ideals of the Founding Fathers is evident in creating the Union and in drafting the United States Constitution.

The Charter of Madinah drafted by the Muslims in Madinah under the leadership of Prophet Muhammad was the first written constitution in the world and was arguably the first constitutional law in society.<sup>26</sup> American history is replete with references to Islamic law:

... Islamic constitutional precedents played a part in the constitutional debates in the United States. For example, Alexander Hamilton argued for giving the federal government the right to impose taxes by referring to the example of the Ottoman empire. He noted that the sovereign of that empire had no right to impose a new tax. As a consequence, the Ottoman sovereign permitted the governors of the provinces to impose these taxes, and then squeezed out of the governors the sums he required for his and the state's expenses. Hamilton concluded, "who can doubt that the happiness of the people in both countries would be promoted by competent authorities in the proper hands . . . ?"

In the debates of 1787, Anti-Federalists, using what they judged to be the example of the despotic Turkish government, argued against a strong central government, and demanded guarantees of individual liberties and religious freedom. In particular, Daniel Webster, Patrick Henry and Patrick Dollard spoke of the evils of Turkish despotism. Alexander Hamilton, on the other hand, saw deeper into the Turkish example, recognizing a complex power structure. He argued that, from one perspective, the Turkish sultan was in fact weak and had limited powers. Hamilton then concluded that a strong central government would protect people from oppressive local governments.<sup>27</sup>

Thomas Jefferson and George Washington and other Framers incorporated some Islamic principles into the American Constitution. The idea of religious freedom and *shura* (decision-making by consensus) along with other legal rights were drawn up in the Charter of Madinah by Prophet Muhammad. Many European thinkers at the time of the American Revolution were incorporating the principles from the Charter of Madinah in their writings.

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<sup>25</sup> Muhammad Hamidullah, *The Muslim Conduct of State*, (Lahore, Pakistan: Hafeez Press, 1977) p. 41.

<sup>26</sup> Yetkin Yildirim, "Peace and Conflict Resolution Concepts in the Madina Charter," available at <http://www.interfaithathens.org/article/art10171.asp>

<sup>27</sup> Azizah Y. Al-Hibri, "Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing," 1 *University of Pennsylvania Journal of Constitutional Law* 492, 512 (1999).

## Conclusion

The drafters of the bills aim to thwart the influence of Islamic law in the United States but they ignore the issue that their proposal infringes on the basic constitutional right of freedom of religion. The Proposed Shariah ban and anti-foreign law bills will pander to anti-Islamic and anti-Muslim biases, isolate moderate Muslims, contribute to further radicalization extremist factions. Such sentiment would endanger U.S. interests around the world and threaten the safety of U.S. troops abroad. Foreign diplomacy would be in shambles.

From the standpoint of public relations, these proposed anti-foreign laws are a nightmare. One of the reasons slavery was abolished in America was because continuing the slave trade would harm U.S. overseas interests.<sup>28</sup> A ban on foreign law is similarly situated.

The proposed foreign law ban is a misguided public policy rooted in xenophobia, bigotry and ignorance rather than any sense of justice or appreciation for international trade and commerce and more importantly The Constitution of The United States.

Tell your elected officials to stand up for the religious liberty and American values and to reject the politics of fear and xenophobia. Tell them to reject the anti-Shariah and anti-foreign law copycat legislation “American Laws for American Courts.”

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<sup>28</sup> Derrick Bell, *Ethical Ambition: Living a Life of Meaning and Worth*, (New York: Bloomsbury, 2002).

A UNITED VOICES POLICY BRIEF

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