Written by **Joe Wolverton, II, J.D.** on August 18, 2010

States Take Preemptive Strike Against Shariah

Wary of the increasing influence of Shariah law and its international adherents, lawmakers in several states are taking preemptive measures to protect their jurisprudence and infrastructure from what they see as the frightening ascendancy of a pernicious dogma.

In Louisiana, for example, the state legislature passed, and Governor Bobby Jindal (left) signed into law, Act 714, the so-called "American and Louisiana Laws for Louisiana Courts." The law's co-authors, state Representative Ernest Wooton and state Senator Danny Martin, cite the attempts by Muslim immigrants to cite tenets of Shariah law in courts across the nation as the impetus for enactment of the new legislation.

Shariah, which means "path" in Arabic, is the sacred law of Islam. The precepts of Shariah have two sources: the Koran and the writings of Mohammed. Shariah is the code that is responsible for the stoning of adulteresses; the caning of rape victims; and the restrictions on dress, rights of inheritance, and marital status of women. Institutional acceptance of this legal code has expanded rapidly, and frightfully to some, in Europe. The government of the United Kingdom, for example, has established five Shariah courts to settle disputes among Muslims. It is this level of deference that opponents on this side of the pond are seeking to avoid.

Specific instances of the references to Shariah law in the briefs of defendants are listed in an article written by Christopher Holton, the vice-president of the Washington, D.C. think tank, Center for Security Policy:

• *S.D. v. M.J.R.* in the state of New Jersey, a New Jersey judge saw no evidence that a Muslim committed sexual assault of his wife — not because he didn't do it, but because he was acting on his Islamic beliefs: "This court does not feel that, under the circumstances, that this defendant had a criminal desire to or intent to sexually assault or to sexually contact the plaintiff when he did. The court believes that he was operating under his belief that it is, as the husband, his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited."

Fortunately, an appellate court overturned this atrocious decision, and a Shariah ruling by a U.S. court was not allowed to stand.

• In a Maryland case, *Hosain v. Malik*, 108 Md.App. 284, 671 A.2d 988 (Md.1996), a Maryland Court granted comity and enforced a Pakistani custody order turning a child brought to the US by the mother over to the father. The Maryland Court held that: the burden was on the mother to prove the Pakistani

court did not apply law in "substantial conformity with Maryland law" by a preponderance of the evidence; the case was "not about whether Pakistani religion, culture, or legal system is personally offensive to us or whether we share all of the same values, mores and customs, but rather whether the Pakistani courts applied a rule of law, evidence, or procedure so contradictory to Maryland public policy as to undermine the confidence in the trial"; the best interest of the child should not be "determined based on Maryland law, i.e., American cultures and mores," but rather "by applying relevant Pakistani customs, culture and mores"; "a Pakistani court could only determine the best interest of a Pakistani child by an analysis utilizing the customs, culture, religion, and mores of … Pakistan"; "in the Pakistani culture, the well being of the child and the child's proper development is thought to be facilitated by adherence to Islamic teachings"; the Pakistani order was not the result of "a trial by fire, trial by ordeal, or a system rooted in superstition, or witchcraft"; the "longstanding doctrine [of Hazanit1] of one of the world's oldest and largest religions practiced by hundreds of millions of people around the world and in this country, as applied as one factor in the best interest of the child test, is [not] repugnant to Maryland public policy"; and, the granting of the order by the Pakistani Court without representation for the mother was not repugnant to Maryland public policy because although she may have been arrested for adultery if she returned to Pakistan for the custody proceedings and have been subject to "public whipping or death by stoning," such punishments were "extremely unlikely."

Louisiana residents may be interested in knowing that similar cases have arisen in the Bayou State, including a child custody case with fortunately a very different outcome from that in Maryland (again, thanks to Stephen Gele):

• In *Amin v. Bakhaty,* 01-1967 (La.10/16/01), 798 So.2d 75, the Louisiana Supreme Court refused to enforce an Egyptian custody order stating that: The only other forum that could possibly determine custody would be Egypt. However, the Egyptian Court is not compelled to consider the minor child's best interest. [The father] would have the absolute right to guardianship, as well as the right to physical custody. This Court believes that a parent's interest in a relationship with his or her child is a basic human right. Egypt follows Islamic family law, which structures some of the rights between family members based solely on gender. Under the Egyptian concept of "guardianship," the father has the absolute right to the guardianship and the physical custody of the minor child. [The father]'s affidavit when he petitioned for a civil warrant confirmed this structure in Islamic law, stating that by operation of Egyptian law, both the temporary guardianship and physical custody of [the child] rested exclusively with him. The unique circumstances of this case required more consideration for the best interest of this child than for the extension of comity toward the Egyptian/Islamic legal system.

Louisiana Act 714 obviates such scenarios from recurring (at least within the jurisdiction of the Bayou State). Relevant language from the measure reveals the purpose of the law:

> The legislature finds that it shall be the public policy of this state to protect its citizens from the application of foreign laws when the application of a foreign law will result in the violation of a right guaranteed by the constitution of this state or of the United States, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state.

Observers have culled two principal points of potential constitutional and cultural conflict from the full text of the act. First, the 14th Amendment's guarantee of the right of due process of law has been bootstrapped onto the law of the states. Basically, it is the freedom from the deprivation of life, liberty, or property without the due process of the justice system. A plaintiff, familiar by study or osmosis with

the general requirements of American civil or criminal procedure, likely will flounder if the strange corpus of Shariah law is imposed on the proceedings.

Second is the right of marriage. Essentially, while American family law views husband and wife as equals and indivisibly worthy of the full panoply of legal protection, Shariah takes a different approach. A person defending a charge of violence against another (typically, a husband charged with abusing his wife) may not assert the affirmative defense of his right to regulate his marriage according to the dictates of Shariah. Wives, whether a communicant of Shariah or not, are entitled to protection against abuse.

Similar considerations such as those cited by the Louisiana lawmakers have compelled legislators in Oklahoma to take nearly identical steps to shore up their state against the rising tide of Islamic fundamentalism and the concomitant attack on the Constitution and the history of Anglo-American rights.

The man named as the "chief architect" of the proposed amendment to the Oklahoma constitution is State Representative Rex Duncan. Duncan describes the amendment, called the "Save our State" amendment, as a "preemptive strike" against the invasion of Islamic law.

Duncan told ABC News, "I see this in the future somewhere in America. It's not an imminent threat in Oklahoma yet, but it's a storm on the horizon in other states."

Judging from the examples cited above by Christopher Holton, Mr. Duncan's forecast may be accurate.

The enactment of the proposed amendment is supported by a majority of Oklahomans and its approval is expected when the issue is put before voters in November.

While those opposing the actions of state officials to safeguard their citizens from the encroachment of Shariah into American law call the new laws "unconstitutional" and in violation of the separation of powers, proponents fear that Shariah and the field of fundamental Islam from which it springs may be one of those "ill humors" that the Founders warned might afflict the judiciary branch to the detriment of the soundness of our limited government.

Photo: Louisiana Gov. Bobby Jindal speaks to a joint legislative session, March 29, 2010 at the State Capitol in Baton Rouge, La: AP Images