OKLAHOMA'S SAVE OUR STATE AMENDMENT: TWO ISSUES FOR THE APPEAL

JOHN T. PARRY*

In November 2010, 70% of Oklahoma voters approved the "Save Our State Amendment," a referendum that was drafted and referred to the voters by the state legislature.[1]

The primary purpose of the amendment was to add the following language to article VII, section 1 of the Oklahoma Constitution:

> The Courts provided for in subsection A of this section, when exercising their judicial authority, 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.[2]

Almost immediately, the executive director of the Oklahoma chapter of the Council on American-Islamic Relations filed suit in federal district court to block the amendment.[3] The court agreed with the plaintiff's Establishment and Free Exercise Clause claims and entered a preliminary injunction against certification of the election results for the amendment on November 29, 2010.[4] Although the

---

* Professor of Law, Lewis & Clark Law School. My thanks to Bill Funk, Jenny Logan, and Ruth Miller for their help with this essay.

1. *Summary Results: General Election – November 2, 2010*, OKLA. STATE ELECTION BD., http://www.ok.gov/elections/support/10gen.html (last visited Sept. 19, 2011). The Oklahoma Constitution authorizes legislative referenda as part of its broader initiative and referendum provisions. *See* OKLA. CONST. art. V, § 2.

2. H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010), *available at* https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HJ/1056.pdf.

3. *State Question 755 Resource*, COUNSEL ON AM.-ISLAMIC RELATIONS, OKLA., http://ok.cair.com/index.php?option=com_content&view=article&id=353&Itemid=186 (last visited Oct. 26, 2011).

4. Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010).

plaintiff challenged only the amendment's references to "Sharia Law,"[5] the injunction against certification prevents any of the amendment from going into effect.

The state's appeal to the Tenth Circuit is pending. Oral argument was held on September 12, 2011.[6]

Most of the national reaction to the amendment has focused on legal and political issues relating to the ban on "Sharia Law." For some observers, passage of the amendment is a welcome development that strengthens similar efforts in other states.[7] Other commentators worry that the amendment reflects "xenophobic hysteria,"[8] "prey[s] upon the electorate's post-9/11 fears and insecurities,"[9] and, but for the actions of the federal courts, threatens to deny constitutional rights to Muslims in Oklahoma.[10] I have no desire to praise the amendment, which is misguided for reasons that include but are not limited to its treatment of "Sharia Law." But neither am I interested in castigating Oklahoma voters as "insecure" or "hysterical" – although it seems clear to me that the arguments made in favor of the amendment focused on unsubstantiated accounts of the harms that Islamic law could cause - arguments that at the very least approached prejudice against Muslims and Islam.[11] I also agree that the amendment raises serious Establishment and Free Exercise concerns.

---

5. *See* Complaint Seeking a Temporary Restraining Order and Preliminary Injunction, Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010) (No. Civ-10-1186-M).

6. *See* Robert Boczkiewicz, *Judges Asks [sic] Why Oklahoma's Law on Sharia Applies to Only One Religion*, NEWSOK.COM (Sept. 13, 2011), http://newsok.com/judges-asks-why-oklahomas-law-on-sharia-applies-to-only-one-religion/article/3603557.

7. *See* Guy Rodgers, *Oklahoma Voters Overwhelmingly Say "No" to Sharia Law*, ACT! FOR AMERICA (Nov. 3, 2010), http://www.actforamerica.org/index.php/learn/email-archives/ 2149-oklahoma-voters-overwhelmingly-say-no-to-sharia-law-. For discussion of similar efforts, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 320-21 (2011); Penny M. Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like It, Which Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. (forthcoming 2011).

8. Symeonides, *supra* note 7, at 321.

9. Venetis, *supra* note 7, at 3.

10. *See, e.g., Muneer Awad v. Paul Ziriax, Oklahoma State Board of Elections et al.*, ACLU.ORG (Sept. 15, 2011), http://www.aclu.org/religion-belief/muneer-awad-v-paul-ziriax-oklahoma-state-board-elections-et-al.

11. One can, of course, be a believing Muslim without being particularly interested in Islamic law; however, I read the published comments of the amendment's supporters as evidence of unease with and in some cases fear of Islam and Muslims. These feelings of unease and fear, I would argue, are not very far from and can easily develop into prejudice. For a sustained argument that the focus of the amendment was to attack Islam, including quotations from many supporters of the amendment, see Brief of Amici Curiae the American Jewish Committee, et al. at 9-18, Awad v. Ziriax, No. 10-6273 (10th Cir. May 16, 2011).

Important as these topics are, the Save Our State Amendment raises a host of other issues. In a later article that will also appear in the *Oklahoma Law Review*, I approach the amendment from a conflict of laws perspective, and I analyze its implications for choice of law and recognition of judgments in Oklahoma courts.[12] This short essay, by contrast, focuses on two issues that relate to the pending appeal. Both issues risk being overlooked amidst the understandable emphasis on the Establishment and Free Exercise Clause issues that are the subject of the district court's opinion and the briefing on appeal.

I. Are the Save Our State Amendment's "Sharia Law" Provisions Severable from the Rest of the Amendment?

On the merits, the plaintiff challenges only the amendment's references to "Sharia Law" and relies only on the Establishment and Free Exercise Clauses to support his challenge. Yet the Save Our State Amendment consists almost exclusively of two choice of law catalogs: one of permitted sources of law for Oklahoma courts and one of forbidden sources. "Sharia Law" appears twice in these lists, but most of the amendment's provisions are not explicitly linked to those references. The obvious question, then, is what to do with the rest of the amendment if the plaintiff is correct that the references to "Sharia Law" violate one or both of the religion clauses.

Oklahoma law provides a presumption of severability for statutes.[13] The presumption can be overcome only if (1) "the valid provisions or application of the act are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one," or (2) "the remaining valid provisions or applications of the act, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent."[14]

In *Local 514 Transport Workers Union of America v. Keating*, which involved a legislative referendum, the Oklahoma Supreme Court cited the severability statute and held that "constitutional provisions are entitled to the same presumption of validity as legislative provisions."[15] Although the court

---

12. *See* John T. Parry, *Oklahoma's Save Our State Amendment and the Conflict of Laws*, 65 OKLA. L. REV. (forthcoming Summer 2012). A draft of this article is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1893707.

13. 75 OKLA. STAT. § 11a(1) (2001).

14. *Id.* For application of the statute, see Liddell v. Heavner, 180 P.3d 1191, 1202-03 (Okla. 2008); Conaghan v. Riverfield Country Day Sch., 163 P.3d 557, 565 (Okla. 2007) ("A cardinal principle of statutory construction is to save and not destory.").

15. 83 P.3d 835, 839 (Okla. 2003).

determined that it did not need to conduct a severability analysis, it included an extensive quotation from a Florida Supreme Court opinion that did apply a severability analysis to a state constitutional amendment.[16] Thus, the best interpretation of Oklahoma law is probably that a severability analysis applies to the remaining portions of the amendment if the references to "Sharia Law" are invalid.

Applying the two tests quoted above, the rest of the amendment appears to be severable from the "Sharia Law" provisions, at least as a textual matter. Stripped of references to "Sharia Law," the amendment still provides a catalog of permitted and forbidden sources of law that is "capable of being executed" by Oklahoma courts (although some items in the forbidden category raise additional constitutional issues). Nor is the rest of the amendment – again, at least as a textual matter – "essentially and inseparably connected with, and so dependent upon" the ban on "Sharia Law."

The best response to this analysis – and it is a significant response – is that the ban on "Sharia Law" was the central purpose of the amendment, the focus of the amendment's drafters and proponents, and the issue to which the attention of voters was repeatedly directed.[17] That is to say, without the "Sharia Law" language, there is at least some doubt whether the legislature would have bothered to adopt the referendum at all.[18] This response, while powerful, sidesteps rather than answers the assertion that the rest of the amendment could go into effect without the "Sharia Law" language.

Given the strong argument in favor of severability, why did the district court enjoin the entire amendment without conducting a severability analysis? One answer is that the state did not press the point in the district court. Nor has it done so on appeal.[19] A second answer turns on the nature of the relief that the plaintiff sought. Because the plaintiff claimed that the very presence of the

---

16. *Id.* at 840 (quoting Ray v. Mortham, 742 So. 2d 1276, 1281 (Fla. 1999)). The three concurring justices in *Local 514* would have held that the remaining portions of the referendum were severable. *Id.* at 851 (Summers, J., concurring). The court long has applied a severability analysis to proposed initiatives, although it has not always found that the remaining portions are severable, and it sometimes has stressed the presence of a severability clause. *See, e.g.*, *In re* Initiative Petition No. 358, 870 P.2d 782, 786-87 (Okla. 1994); *In re* Initiative Petition No. 349, 838 P.2d 1, 7-8 (Okla. 1992); *In re* Initiative Petition No. 347, 813 P.2d 1019, 1030 (Okla. 1991); *In re* Initiative Petition No. 190, 207 P.2d 266 (Okla. 1949).

17. *See* Brief of Amici Curiae, *supra* note 11, at 9-18.

18. Note, however, that the Oklahoma House of Representatives passed a bill on March 17, 2011 that would limit the ability of courts to rely on "foreign law," although it does not go nearly as far as the Save Our State Amendment. H.R. Res. 1552, 52d Leg. (Okla. 2010).

19. Perhaps the state's lawyers have little interest in saving the remnants of a constitutional amendment that threatens to play havoc with Oklahoma choice of law doctrine.

"Sharia Law" language in the Oklahoma constitution would harm him, he sought to prevent the language of the amendment from being incorporated into the constitution. The way to do that, he asserted, was to prevent certification of the election results.[20]

On the one hand, this form of relief may be necessary to address this specific harm to the plaintiff. On the other hand, most of the amendment's provisions do not harm the plaintiff's rights under the religion clauses. By granting the relief that the plaintiff sought, the district court allowed a facial challenge to one part of the amendment to prevent the entire amendment from going into effect, even though the rest of the amendment, while certainly open to as applied challenges on other grounds, was not vulnerable to a facial attack based on the religion clauses.

For opponents of the entire amendment, this is certainly a felicitous result. The district court's embrace of this broad remedy would be more convincing, however, if it were accompanied by some explanation of how such a remedy is appropriate in light of plaintiff's limited attack on the amendment. The question now is what the Tenth Circuit should do if it agrees with the district court on the merits. Should it also affirm a remedy that prevents the unchallenged portions of the amendment from going into effect? Should it instead rewrite the amendment to remove the objectionable portions?

The answer, I believe, is to certify these issues to the Oklahoma Supreme Court. The *Local 514* case provides a precedent for this approach. In that case, the Tenth Circuit was unsure what to do with the referendum once it had ruled on various preemption issues, so it certified two questions concerning severability to the Oklahoma Supreme Court.[21] Because the scope of the remedy in the Save Our State litigation turns so much on state law, the Tenth Circuit should do the same here. It should ask the Oklahoma Supreme Court, first, whether the remaining provisions of the amendment are severable and, second, if those provisions are severable, whether the unconstitutional language can be excised from the amendment before the amendment becomes part of the Oklahoma

---

20. *See* Complaint, *supra* note 5, ¶¶ 12, 19. The relationship between the claim for relief and the harms claimed by the plaintiff has standing implications. Plaintiff's claim that the presence of the amendment in the constitution would be an official condemnation of his faith clearly relates to the relief sought. *See id.* ¶¶ 19-22. But his claim that the amendment would be interpreted and applied to invalidate the provisions of his will that refer to Islamic law is not as close because, although preventing certification would certainly forestall adverse applications, it is also a remedy that is much broader than what is necessary to solve the probate problem. *See id.* ¶¶ 24-28; *cf.* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

21. Local 514 Transp. Workers Union of Am. v. Keating, 358 F.3d 743, 755 (10th Cir. 2004).

constitution, or whether the entire amendment must remain under injunction even if the remaining language is severable.

II. What Does It Mean to Hold That "'Sharia Law' Lacks a Legal Character"?

The district court's opinion states that, at the hearing on the preliminary injunction, the plaintiff "presented testimony that 'Sharia Law' is not actually 'law,'" "that the obligations that 'Sharia Law' imposes are not legal obligations but are obligations of a personal and private nature dictated by faith," and "that 'Sharia Law' differs depending on the country in which the individual Muslim resides."[22] Based on this testimony, the court reached the following conclusion: "the Court finds that plaintiff has shown 'Sharia Law' lacks a legal character, and, thus, plaintiff's religious traditions and faith are the only non-legal content subject to the judicial exclusion set forth in the amendment."[23] The court reiterated its finding in the next paragraph: "Sharia Law is not 'law' but is religious traditions that differ among Muslims."[24]

Oklahoma courts consult the text of the official ballot title when interpreting constitutional amendments.[25] The ballot title for the Save Our State Amendment provides, "Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed."[26] Thus, the district court's finding of fact can be restated as a finding that Islamic law is not law.

It is difficult to know what to make of this apparent finding of fact.[27] There is certainly a problem with the amendment's reference to "Sharia Law." But the problem is not whether "Sharia Law" refers to "legal" or "religious" obligations. Rather, it is the vagueness and incompleteness of the definition. Even a schematic summary of standard scholarly accounts provides a much richer picture than the ballot title's unadorned reference to "the Koran and the teaching of Mohammed": "Within Muslim discourse, *sharīʿa* designates the rules and

---

22. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010).

23. *Id.*

24. *Id.*

25. *See* Sw. Bell Tel. Co. v. Okla. State Bd. of Equalization, 231 P.3d 638, 642 (Okla. 2009); Venetis, *supra* note 7, at 5.

26. H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010).

27. Perhaps the most one can say with certainty is that this finding tends to prove the plaintiff's point that the Save Our State Amendment's references to "Sharia Law" violate the excessive entanglement prong of *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971), because "in order to 'not . . . consider Sharia Law', a judge must consider Sharia Law to determine what is and what is not 'Sharia Law.'" Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Preliminary Injunction at 10, Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010) (No. Civ-10-1186).

regulations governing the lives of Muslims, derived in principal from the Kur'ān and *hadīth*. In this sense, the word is closely associated with *fikh*, which signifies academic discussion of divine law"[28] or, more simply, "jurisprudence." *Fikh*, in turn, has two primary components: *ijmā* (consensus), and *ijtihad* (scholarly interpretation), of which one of the most common forms is *qiyās* (roughly, analogical reasoning).[29] Further, because fikh – jurisprudence or "the interpretive activities of scholars" – "is in practice the only access to the law, the two words [Sharia and fikh] are sometimes used synonymously."[30]

But hadith scholarship, *ijma*, and *ijtihad* are not fixed concepts. There are competing collections of hadith and different schools of thought among scholars on how to evaluate them and other sources of law, not to mention differences between Sunni and Shia approaches to the various materials and interpretive activities – all of which, of course, generates different rules for or solutions to various legal issues.[31] Indeed, since at least the nineteenth century, national codes in several countries have purported to codify aspects of "Sharia," even as the specific provisions of those codes differ from country to country.[32] In short, despite the importance of the Quran and collections of hadith, Islamic law is not limited to these sources, and it is not a static, unitary, or unchanging tradition.

Importantly, Islamic law is also not, as the district court described it, simply a set of "obligations of a personal and private nature dictated by faith."[33] The topics covered by Islamic law include, for example, commercial transactions, constitutional issues, and criminal law.[34] Even more to the point, the Save Our

---

28. 9 THE ENCYCLOPAEDIA OF ISLAM, NEW EDITION 321 (C.E. Bosworth et al., eds. 1997) [hereinafter 9 THE ENCYCLOPAEDIA OF ISLAM]. A hadith is "an account of what the Prophet said or did, or of his tacit approval of something said or done in his presence." 3 THE ENCYCLOPAEDIA OF ISLAM, NEW EDITION 23 (B. Lewis *et al.*, eds. 1986) [hereinafter 3 THE ENCYCLOPAEDIA OF ISLAM].

29. For discussion, see 3 THE ENCYCLOPAEDIA OF ISLAM, *supra* note 28, at 1023, 1026; 10 THE ENCYCLOPAEDIA OF ISLAM, NEW EDITION 930 (P.J. Bearman et al., eds. 2000); 2 THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD 452 (John L. Esposito ed. 1995); *see also* RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARĪ'A) 288-89 (2011).

30. 9 THE ENCYCLOPAEDIA OF ISLAM, *supra* note 28, at 322; *see also* THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD, *supra* note 29, at 450.

31. 9 THE ENCYCLOPAEDIA OF ISLAM, *supra* note 28, at 322-25; THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD, *supra* note 29, at 450-53; *see also* BHALA, *supra* note 29, at 289-90.

32. THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD, *supra* note 29, at 455; *see also* 9 THE ENCYCLOPAEDIA OF ISLAM, *supra* note 28, at 325.

33. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010), *appeal docketed*, No. 10-6273 (10th Cir. Dec. 1, 2010).

34. For discussion of the wide range of topics, see BHALA, *supra* note 29. Of the filings before the Tenth Circuit, the amicus brief filed by the Foundation for Moral Law comes the

State Amendment quite clearly addresses itself to sources of law that courts might be tempted to consider; it does not reach out to include rules that govern a person's religious observances in circumstances that are outside the reach of American civil or criminal law. Thus, although the term "Sharia Law" is vague, the district court's factual finding that it refers only to religious obligations and not to legal obligations is incorrect.

Presumably, the plaintiff made this assertion, and the district court accepted it, to bolster the conclusion that the "Sharia Law" references violate the religion clauses.[35] But even though Islamic law relates to both religious and legal obligations, the ban on "Sharia Law" remains objectionable as an attack on a specific religious tradition. Put differently, the Tenth Circuit can affirm the conclusion that this part of the amendment is unconstitutional without upholding or relying upon the district court's finding of fact.

Not only should the Tenth Circuit avoid the factual finding that Islamic law "lacks a legal character," it should repudiate that finding. Although the court made its finding about Islamic law to support its ruling in favor of the constitutional rights of Muslims, the premises that underlie that finding also confirm the arguments of the amendment's supporters. Implicit in the district court's finding is the idea that real law and legal obligations are secular and linked to territorial sovereignty; they are not religious and free-floating.[36] Those premises lead to a devaluation of "Sharia Law" relative to municipal law, precisely because "Sharia Law" varies from place to place and is more associated with the beliefs of individuals and a religious community than with the rules of a single discernable sovereign.

---

closest to articulating an adequate definition of Islamic law. It argues that Islamic law "is, or at least can be, a legal system," although it does so only in an effort to define the scope of the supposed threat that Islamic law poses. Brief Amicus Curiae of Foundation for Moral Law on Behalf of Defendant-Appellants, in Support of Reversal at 15-18, Awad v. Ziriax, No. 10-6273 (10th Cir. Apr. 4, 2011). The brief for the Association of the Bar of the City of New York addresses the inadequacy and vagueness of the term "Sharia Law," recognizes that Islamic law covers such things as commercial transactions, and stresses the diversity of Islamic law. Amicus Curiae Brief in Support of Plaintiff-Appellee Submitted by the Association of the Bar of the City of New York and the Islamic Law Committee of the American Branch of the International Law Association at 19-21, Awad v. Ziriax, No. 10-6273 (10th Cir. May 13, 2011).

35. Perhaps, too, plaintiff made this assertion about the character of Islamic law to counter claims that it poses a political threat.

36. The Association of the Bar of the City of New York presents the point more clearly than the district court when it asserts that "there has never been either a single authoritative compilation of Shari'a, or any judicial or legislative body with jurisdiction over anything remotely constituting even a majority of Muslims." Amicus Curiae Brief in Support of Plaintiff-Appellee, *supra* note 34, at 20. But couldn't one make roughly the same point about the common law for most of its history and for customary international law today?

Although supporters of the amendment and similar proposals in other states contend – contrary to the district court – that Islamic law "is, or at least can be, a legal system,"[37] their rhetoric also assumes – consistent with the district court – that Islamic law is not bounded in space, that it travels with individual Muslims, and that it easily spreads across borders. The only difference is the further insinuation by supporters of the amendment that these qualities make Islamic law similar to a virus or contagion.[38]

Conclusion

Just as the district court did not analyze the nature of the remedy that it approved, it also did not consider the implications of its finding that Islamic law is not law. The Tenth Circuit should certify the question of remedy to the Oklahoma Supreme Court and it should disavow the district court's factual finding that Islamic law is not law.

37. Brief Amicus Curiae of Foundation for Moral Law, *supra* note 34, at 18.

38. For a useful analysis of similar rhetorical moves in Turkish political discourse, see Ruth A. Miller, *Violence, Corruption and Neo-Imperialism: The Centrality of Islamic Law in Turkish Political Discourse*, 27 TURKISH STUD. ASS'N J. 53 (2003).