

ASSESSING SHARIA IMPLEMENTATION IN THE ISLAMIC MILIEU: A HOLISTIC APPROACH

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ABSTRACT

A growing body of scholarship attempts to link sharia to international and domestic political outcomes. Much of this work relies on constitutions to assess state commitments to the implementation of sharia in domestic jurisdictions. Yet constitutions are, at best, first steps in creating a legal apparatus, and it is the entire legal system, including constitutions and sub-constitutional laws and practices, that determines the true balance of secular and sharia law within a given state. We contend that an empirical movement towards Islamic legal practice remedies the limitations of the existing scholarship by capturing the extent to which actors within a state are governed by distinctively Islamic institutions, constitutional or otherwise. Furthermore, Muslim majority states often employ customary law to complement and enrich the application of sharia – however interpreted by the government - in domestic legal systems, and thus custom plays a role in distinguishing different approaches to sharia implementation that is difficult to observe from constitutions alone. A series of brief studies of the Saudi Arabian, Pakistani, and Malaysian legal systems bear this argument out: only measures combining constitutional language with sub-constitutional legal practice and custom can yield accurate conclusions regarding levels of sharia implementation throughout the Muslim milieu.

INTRODUCTION

What makes a country more or less Islamic? Existing scholarship and the policymaking world have both struggled to develop a meaningful definition — one that accurately describes the design and everyday workings of an Islamic country. Is it sharia's presence in domestic laws? Or

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perhaps it is the depth of a population's religiosity? As Berger suggests, "labelling a state 'Islamic' therefore depends on various factors, and is mostly in the eye of the beholder."² This description implies that there are multiple dimensions of a state's "Islamicity," many of which are likely to have important consequences for the internal and external political dynamics of a country. The presence of Islamic law — however interpreted — in a state's domestic legal system is one of the most visible and vital of these dimensions, and one that affects the lives of millions on a daily basis.

Notwithstanding many decades of secularist expectations to the contrary, religion-based laws remain foundational to the overwhelming majority of legal systems in the Islamic milieu. In fact, the domestic legal systems of many of these countries are a marketplace for competition between secular laws and religious laws, a relationship that reveals the inherently contested nature of what it means to have Islam-based or Islam-inspired governance.³ Moreover, there is no evidence that the embeddedness of sharia in state-sanctioned laws will diminish or become uniform across the Muslim milieu any time soon. Indeed, countries that officially embrace a version of Islam as an intrinsic part of the state apparatus have a distinctive understanding of what state governance is, what values it should draw on, and what the relationship between secular law and religious law ought to be.

A substantial body of prior research connects sharia implementation within domestic legal systems in the Muslim milieu to political behavior at the domestic and international levels.⁴

² Maurits Berger, *Islamic Views on International Law*, in *Culture and International Law* 105-117 (Paul Meerts ed., 2008).

³In this context, it is important to note that we do not tackle the normative issue of whether Islam-based laws as integrated in state governance are the "true" sharia or whether it is even feasible for a state to enshrine principles of traditional Islamic law in its domestic legal apparatus. Importantly, one must recognize that, historically, there was a disconnect between the locus of legal authority and the state per se in the Islamic world. Neither are we seeking to discuss the exact meaning of terms "Islam" or "Islamic." See Iza R. Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State* (2016).

⁴ See Hossein Askari & Hossein Mohammadkhan, *Islamicity Indices* (2016); Jerg Gutmann & Stefan

However, much of this work rests upon the use of constitutional documents as accurate indicators of the presence of religious law in the legal system. Constitutions represent only one portion of a domestic legal apparatus, and it is the legal system as a whole — beyond constitutions — that determines the differences between constitutional ideals and implementation. Significantly, domestic legal frameworks, including customary institutions, interact with sharia in ways that may either constrain or sustain the de facto role of religious law. This reality is particularly important in the context of the Islamic milieu because many Muslim-majority countries have altered their constitutions to mimic Western and Western-inspired models. Thus, the only way to accurately assess the balance between religious and secular law in the Islamic milieu is via a combination of constitutionalism, laws of lower status, and customary institutions.

In this paper, we use official, state supported laws and institutions to assess the relationship between religious and secular laws in Islamic law states. Our contribution to the literature is twofold. First, an empirical shift towards Islamic legal practice, defined as the sharia-based regulations and procedures that routinely affect actors within a legal system, can improve upon past approaches by evaluating the extent to which actors within a state are actually governed by distinctively Islamic institutions. Second, by considering the influence of sharia in domestic jurisdictions in a holistic manner, we propose a nuanced method for measuring the variable strength of sharia implementation across states in the modern Muslim milieu.

DEFINING THE ISLAMIC LAW STATE

Voigt, *The Rule of Law and Constitutionalism in Muslim Countries*, 162 *Public Choice*, no. 3-4, 351-380 (2015); Emilia Justyna Powell, *Islamic Law States and Peaceful Resolution of Territorial Disputes*, 69 *Int'l Org J.* 777-807 (2015) [hereinafter Powell, *Territorial Disputes*]. Emilia Justyna Powell, *Islamic Law and International Law: Peaceful Resolution of Disputes* (forthcoming 2019).

An Islamic law state (ILS) is a state in which an identifiable, substantial segment of the domestic legal system is charged with obligatory implementation of Islamic law and where Muslims make up at least 50 percent of the population.⁵ Naturally, we recognize the disputed nature of this term.⁶ Determining whether a law or institution is “sharia-based” can be difficult due to the dynamic, contested nature of modern sharia, as well as the dynamic, evolving, and living nature of the Islamic legal tradition. Yet the ILS category still provides not only a useful theoretical concept but also a valuable and conceptually sharp empirical tool.⁷ The ILS category includes only countries that are linked by a common, officially sanctioned legal affinity for the Islamic legal tradition, a connection that spans ethnic, cultural, and geographic divisions within the Islamic milieu. Furthermore, this definition does not rely exclusively on the religious affiliation of a state’s population. Instead, it captures whether a state officially, directly, and in an obligatory way, attempts to apply sharia as a substantial part of personal, civil, commercial, or criminal law.⁸ The second component of the ILS definition simply ensures that a substantial portion of the population is

⁵ These countries currently qualify as Islamic law states: Afghanistan, Algeria, Bangladesh, Bahrain, Brunei, Comoros, Egypt, Gambia, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Mauritania, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen. Powell, *Territorial Disputes*, *supra* note 4 and Powell, *Islamic Law and International Law*, *supra* note 4.

⁶ Hallaq contends that the concept of Islamic governance “rests on moral, legal, political, social, and metaphysical foundations that are dramatically different from those sustaining the modern state,” thereby rejecting the idea of an “Islamic state” altogether. Wael Hallaq, *The Impossible State* 49 (2013).

⁷ Bowen supports this criticism by noting that, in Indonesia, “sharia can serve as an all-purpose term.” To illustrate further, when the Governor of the Aceh Province declared that his government would apply sharia throughout the province, lower level civil servants were uncertain of precisely what such a program would mean in substantive terms. John R. Bowen, *Islam, Law and Equality in Indonesia* 1 (2003).

⁸ To demonstrate, Turkey, a Muslim-majority state, applies an entirely secular body of domestic law based largely on the civil legal tradition. Comparing Turkey with, for example, Saudi Arabia or Bahrain would compare legal systems with qualitatively different approaches to the principles and practice of law, despite these countries’ demographic characteristics. Abdullahi Ahmed An-Naim, *Islam and the Secular State: Negotiating the Future of Sharia* (2008). See Powell, *Islamic Law and International Law*, *supra* note 4.

affected by the application of sharia within a particular state.

Most importantly, the ILS category is value-neutral. It does not contain a normative statement about whether a domestic legal system implements “genuine” or “true” sharia, nor does it seek to define the terms “Islam” or “Islamic” in any way. While our work is indebted to scholarship that considers these topics, our aims are primarily descriptive and positivistic. We wish only to provide future scholars with a framework for discerning the extent to which different countries allow principles and practices derived from the Islamic legal tradition to govern individuals and collectivities within their sovereign jurisdictions. Normative theorizing regarding the true nature of “Islamicity” and “sharia” is not our objective.⁹

ASSESSING SHARIA IMPLEMENTATION IN DOMESTIC LEGAL SYSTEMS

The extent to which a society or an economy adheres to the ideals of Islam — however interpreted — is a common research topic among scholars of the Islamic legal tradition.¹⁰ But the most consistently adopted approach to assessing commitments to sharia as embedded in a state’s governance involves constitutions.¹¹ Constitutional documents provide information regarding a state’s commitment to sharia implementation for multiple reasons. First, constitutions establish a

⁹ See Shahab Ahmed, *What is Islam? The Importance of Being Islamic* (2016); Marshall G.S. Hodgson, *The Venture of Islam. Conscience and History in a World Civilization* (1974).

¹⁰ See generally Imam Feisal Abdul Rauf, *Defining Islamic Statehood, Measuring and Indexing Contemporary Muslim States* (2015); Scheherazade S. Rehman and Hossein Askari, *An Economic Islamicity Index*, 10 *Global Economy Journal*, no. 3 (2010). See also Askari & Mohammadkhan, *Islamicity Indices*, *supra* note 4.

¹¹ For examples of this approach, see Dawood I. Ahmed & Moamen Gouda, *Measuring Constitutional Islamization: The Islamic Constitutions Index*, 38 *Hastings Int'l & Comp. L. Rev.*, no. 1 (2015); Gutmann & Voigt, *The Rule of Law*, *supra* note 4; Powell, *Territorial Disputes*, *supra* note 4. Fox’s approach to measuring the religion-state relationship is more comprehensive, but his focus is on religion, broadly construed, and is therefore likely to pass over some distinctive traits of sharia as applied within a state’s domestic legal framework. Jonathan Fox, *Building Composite Measures of Religion and the State*, 7 *Interdisciplinary J. of Research on Religion*, no. 8, 1-39 (2011).

state's sources of legitimate authority, form of government, and legal framework. Sub-constitutional legal institutions simply do not contain the guiding legal and political ideals of a state. Additionally, except for those constitutions that subordinate the entire legal system to a version of Islamic law, traditional constitutional theory posits the constitution itself as supreme law of the land.¹² This means that any analysis that purports to characterize an entire legal system without considering the constitution is, by definition, incomplete. Finally, on a more pragmatic level, constitutions are widely available, easily accessible sources of information regarding the character of a state's legal framework.

Yet constitutions alone cannot provide an accurate picture of the extent of sharia implementation within a state's domestic legal apparatus. Legal systems are interlocking hierarchies within which different laws are situated according to their importance, scope and content. Constitutions are placed at the pinnacle of these hierarchies, while laws of lower status, such as civil codes and criminal codes, sit at lower levels. Nevertheless, individuals and collectivities within a state are routinely affected by these narrower legal instruments, while constitutional clauses only rarely influence the conduct of such actors. For example, criminal statutes and basic judicial procedures are frequently used to guide and constrain actors within a legal system, while the often-rhetorical language of the constitution undergirds the legal system in a much broader manner. In a way, the use of constitutions as credible signals of "Islamness" to the exclusion of other legal institutions is an argument that what is observed at the highest levels of a state's legal system is representative of all levels of governance. Such a skewed approach ignores the sub-constitutional binding laws and

¹² See Ran Hirschl, *Constitutional Theocracy* 72 (2010). Also, not all constitutions are written. According to El Fadl, New Zealand and England are constitutional democracies without written constitutions. Khaled Abou El Fadl, *Centrality of Shari'ah to Government and Constitutionalism in Islam*, in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Grote Rainer & Tilmann Roder, eds., 2012).

customary institutions that have the power to alter sharia's de facto role in the state and society. Additionally, most ILS have standardized their constitutions to reflect trends in Western constitutionalism, a fact that may obscure deeper commitments to sharia implementation at the sub-constitutional level. However, a purely sub-constitutional approach to measuring sharia implementation in the Islamic milieu is also fraught with difficulty. Ignoring constitutional language presumes that strictly limited legal institutions can properly characterize all levels of state-sanctioned legal institutions en bloc. To summarize, sharia's influence – however interpreted - goes further than constitutional provisions, yet such provisions still represent a vital part of a state's legal framework that must be accounted for in any analysis of legal systems in the Islamic milieu.

There is one final aspect of domestic legal systems that cannot be ignored when measuring sharia implementation, namely, custom. From the beginning, sharia — however interpreted — has depended upon a cooperative relationship with customary law, defined as established patterns of behavior and practice found in a particular place that the inhabitants regard as law.¹³ In many cases, custom enriches or further supports the principles of Islamic law, or it provides guidance when the traditional sources of sharia are silent or unclear. For example, the intricate legal system of the Ottoman Empire depended upon the coexistence of sharia, as interpreted by Muslim jurists, and qanun, or the laws enacted by the sultan that were generally based on pre-Islamic Turkish customary law.¹⁴ Yet qanun could only hold precedence if the subject at hand was not governed by the superior precepts of sharia. Similarly, judges in modern Bahrain, Jordan, and Syria are legally allowed to use

¹³ See *Black's Law Dictionary* (10th ed. 2014).

¹⁴ Chibli Mallat, *Introduction to Middle Eastern Law* (2007). Indeed, custom eventually became recognized as an official source of law in the Mejlle, the Ottoman civil code. Aharon Layish, *Legal Documents from the Judean Desert* (2011).

custom to decide particular disputes, but only if sharia is silent on the matter at hand.¹⁵ Significantly, custom, and the extent to which it is intertwined with sharia, can introduce substantial variation in otherwise similar domestic legal systems. Whether custom is applied at all in state-supported courts or other adjudicative bodies, and whether custom is regarded as a subordinate or primary source of law can speak volumes about the methods of sharia implementation employed by a particular ILS. Perhaps even more importantly, it is extremely difficult to gauge the use of customary law within a legal system by examining the constitution alone. Only by analyzing sub-constitutional practice and even informal institutions can one truly grasp the nature of the relationship between secular law, custom, and sharia within a particular jurisdiction.

Therefore, taking into consideration not only constitutions but also sub-constitutional laws and custom is essential when evaluating state commitments to implementing Islamic law. Sharia is not simply a set of legal rules.¹⁶ Rather, it is considered to be an all-encompassing way of life, derived from the sacred texts and sources of the Islamic religion and applying to all believers. Attempting to understand and empirically capture the presence of Islamic law in a country merely by analyzing constitutional texts is simply inadequate. Historically, as well as in modern states, sharia — however interpreted — tends to appear not only in constitutional documents but also in laws of lower status. Consequently, we advance a holistic approach to assessing sharia implementation. Only by using information from all levels of a state's legal hierarchy — constitutional language, sub-constitutional laws, and customary norms/rules — can one accurately evaluate the extent to which a state charges

¹⁵ Interestingly, the reverse is the case in Egypt, Iraq, Kuwait, and Qatar. In these states, custom generally takes precedence. Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 Int'l & Comp. L.Q., no. 4, 761-787 (1989).

¹⁶ For more discussion of the nature of sharia, see H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th ed. 2014); Wael Hallaq, *The Origins and Evolution of Islamic Law* (2005). See also Mallat, *Introduction*, *supra* note 14.

its legal system with implementing sharia-based norms. By considering laws of lower status and custom, one can mitigate the biases intrinsic to purely constitutional analyses by capturing more accurately sharia's power to regulate the behavior of individuals. Thus, only the combination of constitutional clauses, sub-constitutional practice, and custom can depict sharia implementation in ILS domestic legal systems in a comprehensive manner.

CASE STUDIES: SHARIA IMPLEMENTATION IN PRACTICE

To illustrate the utility of our approach, we present three brief case studies. These studies demonstrate how constitutions, sub-constitutional legal practice, and custom must be considered together in order to evaluate levels of sharia implementation accurately. We consider Saudi Arabia, Pakistan, and Malaysia, three ILS where the presence of Islamic law goes beyond the constitutional texts and reaches deeply into the sub-constitutional legal landscape.

Saudi Arabia

Among ILS, Saudi Arabia is viewed by some as having some of the strongest commitments to sharia implementation within its domestic legal apparatus. Although it was only promulgated in 1992, Saudi Arabia's primary constitutional instrument, the Basic Law of Governance, strongly supports this assertion. Although the Basic Law functions as a de facto constitutional document, Article 1 declares that the true constitution of Saudi Arabia is "the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH)."¹⁷ Indeed, while the Basic Law is quite short, it mentions "Allah" 17 times and the words "Sharia" or "Islam"

¹⁷ Saudi Arabia Basic Law of Governance art. 1 [hereinafter Saudi Basic Law].

34 times.¹⁸ Article 1 definitively establishes Islam as the official state religion, and Article 6 connects citizenship to “[pledging] allegiance to the King on the basis of the Book of God and the *Sunnah* of his Messenger.”¹⁹ Commitments to implementing a version of sharia are present throughout, even in clauses that are similar to those present in Western constitutional instruments. For instance, while Article 26 declares the state’s desire to protect human rights, it also notes that these rights must be “in accordance with the Islamic *Shari’ah*.” Arguably, Article 23 provides the most compelling evidence of the Saudi state’s efforts at implementing sharia: “the State shall protect the Islamic creed, apply its *Shari’ah*, enjoin the good and prohibit evil, and carry out the duty of calling to God.”²⁰

Generally speaking, Saudi Arabia’s record of sub-constitutional legal practice does not contradict these constitutional aspirations. Currently, Saudi Arabia employs a host of legal regulations and procedures that sustain sharia’s role as the supreme source of legislation, including bans on alcohol for Muslim citizens, criminal penalties for apostasy, and prohibiting women from serving in the judiciary.²¹ The Saudi court system as a whole is tasked with implementing sharia — as interpreted by the state — in its judgments, and there are no completely secular courts.²² Even when some secular legal concepts are considered by the courts or in some legal pronouncements — as in the 2015 New Companies Law passed by the Saudi government in order to promote foreign investment — they must not contravene any principle of sharia as viewed by the Hanbali school of

¹⁸ Powell, *Territorial Disputes*, *supra* note 4. Also see Powell, *Islamic Law and International Law*, *supra* note 4.

¹⁹ Saudi Basic Law art. 1, 6.

²⁰ Saudi Basic Law art. 23, 26.

²¹ Powell, *Territorial Disputes*, *supra* note 4.

²² The Basic Law of Governance requires that “the courts shall apply to cases before them the provisions of Islamic Shari’ah, as indicated by the Qur’an and the Sunnah, and whatever laws not in conflict with the Qur’an and the Sunnah which the authorities may promulgate.” Saudi Basic Law art. 48.

jurisprudence espoused by the ruling family.²³ Setting aside discussions of what version of sharia is incorporated in the Saudi Basic Law, it is clear that the entire domestic legal system — at the constitutional and sub-constitutional levels — is saturated with references to sharia, or, more broadly, to the Islamic legal tradition. This conclusion is modified somewhat when customary law, or *urf*, is considered. Customary law, generally in the form of tribal laws and practices, is influential at many levels of the Saudi legal hierarchy.²⁴ The form of government employed by the Saudi monarchy is quintessentially tribal, based as it is on the authority and lineage of the tribe of Al Saud.²⁵ In addition, the Saudi state's Wahhabist ideology advances an approach to sharia implementation that incorporates many aspects of pre-Islamic Arab customary law into its jurisprudence.²⁶ At lower levels of the Saudi legal hierarchy and particularly in rural areas, tribal custom is often used in matters of personal status law, property law, criminal law, and dispute settlement. While official Saudi courts are required to apply sharia in individual cases, a substantial proportion of disputes arising in the tribal regions of Saudi Arabia are resolved outside of court according to local custom. While recent developments involving the modernization of the Saudi economy and the extension of state power into the tribal regions have somewhat reduced the role of custom in the lives of Saudi citizens, sharia and customary law have a symbiotic relationship with the state. It is thus impossible to comprehend the Saudi legal system in its entirety without considering the influence of sub-constitutional legal practice as well as custom.

²³ Saudi Arabia Companies Law 1437H/2015G; Saudi Basic Law art. 48.

²⁴ Hossein Esmaili, *On a Slow Boat Towards the Rule of Law: the Nature of Law in the Saudi Arabian Legal System*, 26 *Ariz. J. Int'l & Comp. L.*, no. 1, 1-47 (2009) [hereinafter Esmaili, *Rule of Law*].

²⁵ Indeed, the Basic Law of Governance explicitly requires that “governance shall be limited to the sons of the Founder King ‘Abd al-‘Aziz ibn ‘Abd ar-Rahman al-Faysal Al Sa‘ud, and the sons of his sons.” Such a provision is more reflective of tribal hierarchies than of any positive injunction found in the Quran or Sunna. Esmaili, *Rule of Law*, *supra* note 24; Saudi Basic Law art. 5.

²⁶ Esmaili, *Rule of Law*, *supra* note 24.

Pakistan

In contrast to the Saudi Basic Law's de facto status, the current Pakistani constitution, which was first ratified in 1973, functions as the formal constitution of the Pakistani state. However, like the Basic Law, the Pakistani constitution contains strong aspirations toward sharia implementation. For instance, the 1973 document, as amended to 2012, contains 42 references to "God" or "Allah" and 147 references to "sharia" or "Islam," although it is a much longer, more detailed document than the Saudi instrument.²⁷ While Pakistan is not a monarchy, the Pakistani head of state is constitutionally required to be a Muslim, and sharia is formally established as the supreme source of legislation. Indeed, the 1973 constitution declares Pakistan's commitment to sharia implementation from the very first clause of the Preamble, which reads, "Whereas sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust."²⁸ Article 31 of the same document expands upon this commitment by requiring the state to "enable the Muslims of Pakistan...to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah," thus making Islamic education compulsory.²⁹ Setting aside considerations of what version of sharia finds its way into the constitution, judging solely by constitutional standards, Pakistan's commitment to sharia implementation is relatively strong.

Yet the implementation of sharia in Pakistan is far more complex at the sub-constitutional

²⁷ Powell, *Territorial Disputes*, *supra* note 4. Also see Powell, *Islamic Law and International Law*, *supra* note 4.

²⁸ Pakistan const. preamble.

²⁹ *Id.* At art. 31 § 1, 2.

level. This is particularly the case with regards to the role of women in the judiciary. While many ILS, Saudi Arabia included, prohibit women from serving as judges, Pakistan does not.³⁰ Indeed, the first female justice was appointed to the Peshawar High Court in 1994.³¹ Additionally, Pakistan does not criminalize apostasy, a practice that is relatively common among other ILS.³² Beyond these particular practices, much of the Pakistani legal system outside of the constitution is drawn from British colonial law, including the bulk of the criminal code and procedural law.³³ Indeed, many sharia-based elements of Pakistani law, such as the 1979 Hudood Ordinances that allow for corporal punishment to be applied to citizens who commit hadd crimes and the Federal Shariat Court of Pakistan that was established in 1980 to ensure that new laws are in accord with sharia, are devices meant to “Islamize” parts of an otherwise secular, common-law-based legal system.³⁴ Customary law plays a significant part in the Pakistani legal system as well, particularly in rural areas where there is only limited government presence.³⁵ Throughout Pakistan, but particularly in the Federally Administered Tribal Areas, an intricate system of informal dispute resolution is used as a supplement to, or even a substitute for, the formal legal system. The state has attempted to regulate this system, which generally involves the use of groups of tribe or village elders to resolve disputes

³⁰ Powell, *Territorial Disputes*, *supra* note 4.

³¹ Arif Nizami, *Pakistan Gets First All-Female Bench*, Pakistani Times, <http://www.pakistantoday.com.pk/2013/05/03/national/pakistan-gets-first-all-female-bench/> (2013).

³² Powell, *Territorial Disputes*, *supra* note 4. Indeed, a bill that would have given males the death penalty and females life in prison for committing apostasy failed to pass the Pakistani Parliament in 2007. Library of Congress, *Laws Criminalizing Apostasy in Selected Jurisdictions*, <http://www.loc.gov/law/help/apostasy/apostasy.pdf> (2014).

³³ Martin Lau, *Sharia and National Law in Pakistan*, in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* 373-343 (Jan Michiel Otto ed., 2010).

³⁴ *Id.*

³⁵ Saleem Akhtar et al., *Study on Informal Justice System in Pakistan*, <http://www.waterinfo.net.pk/sites/default/files/knowledge/Report%20Informal%20Justice%20System%20in%20Pakistan.pdf>.

according to tribal or local custom. Interestingly, disputants frequently bring cases to the formal and informal settlement venues simultaneously. Nevertheless, particularly in smaller matters of personal status or property, custom applied by non-state actors continues to regulate the lives of many Pakistani citizens at the local level.

Consequently, Pakistan illustrates the potential pitfalls of relying on constitutions alone to gauge governmental efforts at implementing sharia within a country. Judging merely by constitutional references to Islamic law, the Pakistani legal system may appear as bearing more than a passing resemblance to Saudi Arabia in its commitment to implementing a version of Islamic law in its domestic legal system. However, a look at the sub-constitutional legal landscape reveals that the Pakistan's legal system is a complex hybrid of British colonial common law, a version of sharia, and local custom. Sharia implementation in Pakistan is not the relatively uniform affair that it is in Saudi Arabia. Rather, principles and institutions based on Islamic legal precepts are implemented in a piecemeal fashion, often being added onto existing, largely secular legal instruments. This distinction between the Saudi and Pakistani legal systems is only visible when one considers all levels of both state's legal hierarchies, including constitutions, sub-constitutional legal practice, and customary law.

Malaysia

Many elements of the current Malaysian constitution speak to a strong commitment to sharia implementation in Malaysia. Similar to Pakistan and Saudi Arabia, the head of state is required to be a Muslim, and Islam is established as the official state religion, even though Article 3 protects the

practice of other religions within all Malaysian jurisdictions.³⁶ Islamic holy oaths are mandated for some policymakers, though not necessarily for judges. Interestingly, however, the Malaysian constitution does not pronounce sharia as the supreme source of legislation, noting only that the constitution is the supreme law of the land.³⁷ Furthermore, the Malaysian constitution reflects Malaysia's federal system of government by allowing lower level regional governments, known in Malaysia as "states," to set their own laws governing Islamic practice and education.³⁸ Indeed, Article 12 reads that "every religious group has the right to establish and maintain institutions for the education of children in its own religion...but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions."³⁹ This article depicts sharia implementation in Malaysia as a limited endeavor pursued within a pluralistic religious context. Malaysia's legal landscape mirrors the country's hierarchical, federal system of governance, as well as Malaysia's complicated ethnoreligious demographics. Indeed, about 40 percent of Malaysian citizens are non-Muslim.⁴⁰

A brief analysis of sub-constitutional laws and institutions provides further insights into Malaysia's domestic legal system. As in Pakistan, British colonial practice influenced law in postcolonial Malaysia extensively. Most importantly, the British created parallel legal systems, one in which secular common law was applied and another in which sharia and the customary law of the Malay states, adat, was used.⁴¹ By and large, this system is still in place. A largely secular judicial

³⁶ Malaysia const. art. 3 § 1; Powell, *Territorial Disputes*, *supra* note 4.

³⁷ Malaysia const. art. 4.

³⁸ *Id.* At art. 11-12.

³⁹ Malaysia const. art. 12 § 2.

⁴⁰ Andrew Harding, *Sharia and National Law in Malaysia*, in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* 491-529 (Jan Michiel Otto ed., 2010) [hereinafter Harding, *National Law in Malaysia*].

⁴¹ Harding, *National Law in Malaysia*, *supra* note 40.

system still applies secular common law alongside sharia courts, although efforts have been made by the Malaysian state to limit jurisdictional overlap.⁴² Importantly, Malaysia charges its states, rather than the federal government, with implementing sharia within their limited jurisdictions.⁴³ This means that the level of sharia's presence in governance in Malaysia varies substantially by region. For example, the states of Kelantan and Terengganu have both passed laws criminalizing hudud crimes due to the dominance of the Pan-Malaysian Islamic Party (PAS) in their respective state governments.⁴⁴ The state of Perlis also maintains an anti-blasphemy law. Yet these laws apply only to these geographically limited territorial units, as many other regions of Malaysia have no such laws. Indeed, Harding notes that "one of the great tasks of Islamic law in Malaysia has been, and continues to be, the achievement of uniformity among the state jurisdictions," though these attempts have thus far failed.⁴⁵ It is simply difficult, if not impossible, to unify fourteen distinct state-level administrations and legal regimes that govern the application of sharia in divergent ways.

To complicate this reality further, Malaysia, along with Indonesia, is heir to a highly-developed system of indigenous customary law known as adat. The implementation of adat is largely a state matter in Malaysia: Article 90 of the Malaysian constitution protects certain aspects of adat land law in the states of Negeri Sembilan, Malacca, and Terengganu.⁴⁶ Article 4 of the Malaysian National Land Code, first passed in 1965, explicitly protects lands held under "customary tenure."⁴⁷

⁴² Maznah Mohamad, *The Ascendance of Bureaucratic Islam and the Secularization of the Sharia in Malaysia*, 83 *Pacific Affairs*, no. 3, 505-524 (2010).

⁴³ Andrew Harding, *Law, Government, and Constitution in Malaysia* (1996).

⁴⁴ Harding, *National Law in Malaysia*, *supra* note 40.

⁴⁵ Harding, *National Law in Malaysia*, *supra* note 40, 501. One such attempt was the Islamic Family Law Act of 1984, which applied only to the Federal Territories but was aimed at widespread adoption by the states. Many states did adopt this measure, but it was also deemed overly modernizing by many conservative Malaysian religious figures.

⁴⁶ Malaysia const. art. 90 § 1-3.

⁴⁷ Malaysia National Land Code (Act 56 of 1965) art. 4 § 2. The full text of the Malaysian 1965

Furthermore, there is a formal system of “Native Courts” applying local customary law to individuals in the Eastern Malaysian states of Sabah and Sarawak.⁴⁸ A system of similar courts, called penghulu’s courts after the local name for a Malay village head, applied local customary law in minor cases in the Western Malaysian states until 2013.⁴⁹ Importantly, the three distinctive legal systems of Malaysia, common law, sharia, and customary, are organized in order to limit jurisdictional overlap, but conflicts do occur.⁵⁰ Still, at the sub-constitutional level, Malaysia implements a version of sharia in a heavily localized manner, with each of the fourteen state-level governments applying sharia in a different manner and supplementing this application with adat customary law.

To summarize, it is impossible to assess sharia’s presence in Malaysia accurately without accounting for both the constitution and sub-constitutional legal practice. In contrast to Saudi Arabia’s comprehensive approach to implementing a version of sharia throughout the entire country, and in contrast to Pakistan’s dualistic hybrid legal system, Malaysia employs a heavily localized approach to the application of sharia. Indeed, Malaysia’s approach largely relies on regional authority and local custom. Sharia courts operate alongside secular common law courts and customary courts, occasionally with overlapping jurisdictions on similar cases. In many ways, this approach to sharia implementation reflects the multiethnic, religiously diverse makeup of Malaysian society. The legal system, complex as it is, has adapted to deeply-rooted local needs at the expense of uniformity of legal principles and practices. As such, simply examining the principles governing the

National Land Code, as amended to the present, is available at <http://www.kptg.gov.my/sites/default/files/article/NLC1956DIGITAL-VER1.pdf>.

⁴⁸ Malaysia Native Courts Enactment 1992 (Act 3 of 1992).

⁴⁹ These courts were abolished by the Subordinate Courts (Amendment) Act 2010 (Act A1382), which came into force in March of 2013.

⁵⁰ The Native Courts have jurisdiction over minor offenses and disputes, but only for ethnic Malays and only if the Sharia courts and civil courts do not already have jurisdiction. Harding, *National Law in Malaysia*, *supra* note 40; Isma’il bin Mat, *Adat and Islam in Malaysia: A Study in Legal Conflict Resolution* (1985).

highest levels of the Malaysian legal hierarchy does not give one a precise picture of geographical variation in the jurisdiction and application of sharia at lower levels of the Malaysian legal framework.

CONCLUSION

A large majority of modern states in the Muslim milieu attempt to employ a version of Islamic law as a fundamental source of legislation in their domestic jurisdictions. Assessing diversity and similarity in the context of this reality is vital, particularly as interactions between ILS and the rest of the world have become, arguably, a defining theme of the 21st century. Our holistic approach to evaluating the implementation of sharia at the constitutional and sub-constitutional levels refines prior approaches. Most importantly, however, our arguments illuminate the exceptional variance in sharia implementation throughout the Islamic milieu: no model of an “ideal Muslim polity” has been uniformly adopted by ILS, and the resulting state-level variation in sharia implementation is likely to affect myriad outcomes in law, politics, and even economic policy.

The Western model of state governance, widely used outside of the Islamic milieu, fundamentally embraces the idea that government and state are de jure and de facto “religion-neutral.”⁵¹ In contrast, sharia – however interpreted by the government - lies at the core of Islamic governance in many countries, and it has been, in some form or another, incorporated into the domestic legal systems of Islamic law states. Consequently, precepts of the Islamic legal tradition operate actively, not only on the individual level, but also on the state-level, with sharia-based institutions regularly influencing the lives of millions of individuals at the constitutional and sub-constitutional levels. Indeed, there is a vital difference in how religion and law communicate with

⁵¹ Mallat, *Introduction*, *supra* note 14, 136.

each other within the framework of state governance in Islam and in the West. Yet there is equally pronounced divergence in how Islamic law constrains and supplements secular legal institutions across ILS, a fact that must be captured and analyzed by future scholars of the Islamic legal tradition and its effects on the state and society.