

Islamic Law, Private International Law & Cross-Border Child Abduction

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Executive Summary

This report provides an in-depth analysis of complex legal issues concerning The 1980 Hague Abduction Convention and the fact that most Muslim majority states have not acceded to it. As is often noted, Muslim majority states have not acceded to the 1980 Abduction Convention because of a presumed incompatibility with Islamic law (or *Sharīʿa*), specifically its child custody rules. Those rules are legislated in statutory form across the Muslim majority world. Specific legislation in these countries, variously called family law or personal status law (Arabic, *al-aḥwāl al-shakhṣiyya*), blend historical doctrines from the Islamic legal past with the institutional and administrative processes of the modern state. Studies and commentators on both sides of the divide have framed this diplomatic encounter, in various terms, such as a “clash of civilizations”, universalism or cultural relativism, neo-imperialism versus self-determination, and so on. For some on both sides of the issue, international law is suspected as a pretext for ongoing forms of a European cultural domination of the global south.

This report argues rejects all of the above arguments as misdirection. The common perception that *Sharīʿa* precludes Muslim majority state accession to

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the 1980 Hague Abduction Convention, fails to appreciate the complex debates on custody rules in early Islamic history. Moreover, they are mistaken in presuming that the Abduction Convention, as a private international law instrument, necessarily involves a substantive conflict with Islamic law or modern statutory law in Muslim majority countries. On the other hand, those who describe this issue as a site of civilizational conflict neither understand the historical Islamic legal doctrine, nor appreciate the important developments in the Muslim majority world in furtherance of more robust legal regimes that protect the interests of children.

This report shows that a way forward on the issue of international child abduction and Islamic law is to emphasize the need in Muslim majority states of more robust jurisdictional rules that guide judges in cases where foreign elements present themselves in domestic litigation. Such elements may be a foreign court order, or a foreign party claiming that an abduction has occurred from a habitual residence located across jurisdictional borders. The report and this summary offer specific recommendations that explain the above legislative program.

With a view to enhancing the knowledge and capacity of all sides to this debate, the full report provides an overview of private international law, Islamic custody and jurisdictional rules, and the domestic jurisprudence of select Muslim majority countries. Divided into three parts, it offers a frame of analysis for a systemic dialogue between experts of private international law and Islamic law in terms of, the history of each legal tradition, and their place in state legislation and international practice. Written for a diplomatic and policy audience, the full report does not assume the reader will be conversant in either or both legal traditions. Indeed, the aim is to bring both together in a single report in order to highlight how ongoing debates on this issue have been fundamentally misdirecting.

Part I addresses private international law with a specific focus on the drafting history of the 1980 Hague Abduction Convention. In particular, the report emphasizes how the 1980 Abduction Convention was drafted on the assumption

that automatic return was in the best interests of the child. The Convention's drafters purposely did not define "best interests"; instead they asserted that automatic return is *presumptively* in the best interests of the child. The presumptive quality of automatic return can, like most presumptions in law, be defeated. Part I will explore jurisprudence on certain exceptions to the automatic return mechanism for which the Abduction Convention is widely hailed as a success. Part I also addresses the 1996 Hague Convention on Parental Responsibility and the Protection of Children (the Protection Convention), which addressed the limits in the Abduction Convention. As will be suggested in the Conclusion, the Protection Convention offers an important instrument for Muslim majority states to join as they pursue greater international legal cooperation in cases of cross-border child abduction.

Part II introduces the reader to early Islamic legal doctrines and debates on child custody. It offers an overview of the relevant terms of art concerning guardianship (*wilāya*) and custodial authority (*ḥiḍāna*). The review of various custodial rules reveal that the historical doctrines operated as *legal presumptions* that sought to maximize the best interests of the child, or what premodern Muslim jurists called in Arabic the *ḥaẓẓ al-walad*. With this in mind, the premodern rules on child custody operated under a legal logic akin to the Abduction Convention's automatic return provision – they are all legal presumptions that may be defeated if they do not uphold the best interests of the child. The report examines the operation of these presumptions by reference to three examples, (a) the remarriage limitation on a mother's custodial authority, (b) the religious affiliation limitation on a mother's custodial authority, and (c) the significance of the child's age in determining custodial authority.

What follows from this analysis? If both the Abduction Convention and the premodern rules operate as legal presumptions in the service of the child's best interests, do they share similar concerns about whether unilateral removal of a child is ever in the best interests of that child? The report will examine closely a premodern debate on this very issue, where jurists recognized that removal of

children from their residential setting raises fundamental concerns about the interests of the child. That premodern debate parallels the spirit underlying the Abduction Convention, thereby suggesting greater confluence between the premodern Islamic legal regime and the modern international legal establishment. In other words, there is support within the Sharīʿa to develop private international law rules and to promote international cooperation on child abduction issues between Muslim majority states and other state parties, whether Muslim majority or not.

The shared concern on removal suggests that contemporary debates on Islamic law and child custody, which are often framed around human rights or gender equality, misdirect our attention from the real challenge underlying international child abduction and the Muslim majority state.

The real challenge, as Part III shows concerns the absence in early Islamic legal history of a robust private international law doctrine. Pre-modern jurists framed their legal doctrines by reference to an imperial vision of the Islamic polity that divided the world into the abode of Islam (*dar al-Islam*) and the abode of war (*dar al-harb*). Modern commentators often see this Manichean divide as evidence of an Islamic intolerance of religious difference, or an underlying ethic of war and conquest in Islam (i.e. *jihād*). However, the line that separated these two abodes also served jurisdictional purposes. When viewed through the lens of jurisdiction instead of *jihad*, these two abodes are more akin to the *domestic* and the *foreign*. Importantly for the purpose of the report, when premodern Muslim jurists addressed complex cases of jurisdiction over “foreign” matters they opted for two course of action, either to refuse jurisdiction entirely, or assume jurisdiction while imposing “domestic law” (i.e. Sharīʿa) as the rule of decision. Their decision often turned on whether the parties were Muslim before or after the transaction, whether the transaction originated outside the abode of Islam, and so on. At a minimum, the idea that a different, foreign legal system might inform the legal determinations of a “domestic” Islamic court would have been perceived as undermining the imperial dynamic of the Sharīʿa.

In short, the premodern notion of “private international law” was little more than a zero-sum game that applied jurisdictional rules in light of an imperial ethic. This approach contrasts decisively with the history and function of private international law, which presumes a modern state system of equal and distinct sovereign states, each of which exercises sovereignty legitimately. But for premodern Muslim jurists, the notion of a sovereign state did not inform how they saw the world or the borders that divided it into regional parts.

In more recent history, the Muslim majority world had little reason to develop a private international law regime in matters such as child custody because it was not a substantial issue that they dealt with in courts. On the other hand, the 20th century witnessed considerable international investment in the region, which created incentives to establish robust jurisdictional rules in areas of commerce, finance, and trade. Indeed, in some cases, in the absence of a private international law statute, they might even yield their jurisdiction to the law of a foreign regime. The Dubai International Financial Center is one example of how the UAE demarcates a physical part of its territory as a separate, independent legal jurisdiction subject to UK law, for purposes of enticing investment and finance in the country.

The turn to private international law offers a slate of options going forward that the report identifies in the Conclusion as recommendations to Muslim majority countries that implement Islamically inspired family law acts and have thus far refused to accede to the Abduction Convention. *Importantly, one thing the report does not recommend is that Muslim majority countries reform their domestic family law.* This absence may surprise those who have come to expect a human rights and/or gender justice framework in any conversation about Islamic family law. **This report argues, instead, that the best chance to secure Muslim majority states’ cooperation in cases of international child abduction involves an accession package of the 1980 Abduction Convention and the 1996 Protection Convention, implemented as domestic law with legislative directives to judges concerning cases in which a “foreign element” is**

present. We believe such a narrowly tailored legislative approach, without fundamental change to domestic family law, has the greatest chance of success because it will permit Muslim majority states to accede to the two Hague Children's conventions without expending considerable domestic political capital in doing so.

Recommendations and Rationale

Legislators in Muslim majority states today must contend with a different political logic than that which animated premodern Muslim jurists when they developed legal doctrines on jurisdiction. Rather, in a global context in which legal issues travel across jurisdictions, the pre-modern zero-sum game approach to jurisdiction and legal analysis runs against principles of cooperation and mutual respect that animate not only international relations but also represent the very core of private international law. With regard to international child abduction, we recommend the following:

- Muslim majority countries that have not already done so should first accede to the 1996 Hague Protection Convention, a more traditional private international law convention that concerns, among other things, foreign orders and awards. There are two virtues of acceding to the 1996 Protection Convention. *First*, Muslim majority states, with limited capacity or expertise to develop private international law statutes of their own in this area of law, will benefit from the model that the 1996 Protection Convention offers. *Second*, acceding to the 1996 Protection Convention will also ensure reciprocity between signatory states. This works to the advantage of nationals of Muslim majority countries who travel with their families abroad for education or work. Muslim majority countries that accede to the Protection Convention effectively uphold the integrity of their

legal system, which in turn protects their citizens' custodial interests when their children travel abroad.

- Muslim majority countries, which have not done so already, should subsequently accede to the 1980 Hague Abduction Convention. The virtue of the Abduction Convention is the importance of the automatic return mechanism for Muslim majority countries whose citizens are vulnerable to the vicissitudes of global migration, trade and development. Families face cross-border disputes that are natural due to migration, resettlement and dual nationalities between Gulf countries and other majority Muslim countries in the broader region, such as Lebanon and Egypt.

Acceding to both conventions can be represented to their domestic constituency as an "Accession Package" that in the aggregate, reflects the responsibility of the state to protect the familial interests of its citizens when they travel abroad, and protect their interests in cases of mixed marriages between nationals of different countries. The 1996 Protection Convention will protect the interests of domestic residents when they are abroad participating in the global economy. The 1980 Hague Abduction Convention, when implemented domestically, signals the state's protection of the choices each citizen makes in an environment of demographic diversity. Moreover, both Conventions are reflective of state obligations to children under the Convention on the Rights of the Child

- Muslim majority states that accede to the 1980 Hague Abduction Convention and the 1996 Protection Convention, and implement them legislatively, should also legislate directions to their domestic judges in custody cases involving "foreign elements" (e.g. foreign enforcement order or factual claims of a foreign habitual residence). That rule should instruct judges adjudicating custody issues with foreign elements that they should not apply the prevailing Personal Status Law, but rather the domestic legislation that implement the Abduction and

Protection Conventions. By adopting this approach, Muslim majority countries do not need to modify or amend their Personal Status Law rules on custody. Rather, they legislatively implement the two conventions with express directives to judges concerning when to decide a custodial issue pursuant to different legislation. The virtue of this model is that Muslim majority states will avoid the internal and no doubt intense political contest that would necessarily arise in any attempt to reform their personal status laws.

By acceding to both the 1980 and 1996 Hague Conventions, implementing both through domestic legislation, and providing legislative directives to judges in custody cases having foreign elements, Muslim majority countries achieve four key outcomes.

- *First*, domestic courts preserve jurisdiction in all cases; the only issue will be which law they must apply and whether the court will refer the case to the state's Central Authority as delineated under the Hague Conventions.
- *Second*, Muslim majority countries retain sovereign control and oversight of their Personal Status Law.

These first two objectives uphold the state's commitment both to Islamic law and international cooperation across a range of legal issues. Legal cooperation in this area requires a robust private international law regime. But as explained in the full report, that cooperation does not require a politically costly domestic process of family law reform. Far from suggesting that Muslim majority countries ought to revise their personal status codes—an internal point of domestic law subject to varying demands among divergent parties and interests—this approach suggests that personal status codes exist *alongside and parallel with* a more robust private international law regime that anticipates the reality of an interstate system of equal sovereigns.

- *Third*, this particular approach will force states in North America, Europe and others of a European cultural heritage to more effectively engage and integrate global legal traditions into the universal application of the 1980 Hague Abduction Convention. The proposal preserves intact the personal status laws of Muslim majority countries. It offers a private international law bypass in limited custody cases where a foreign element is involved. This private international law work-around, which is framed by the domestic incorporation of the Abduction and Protection Conventions, ought to survive an Article 20 challenge under the Abduction Convention.
- *Fourth*, and most importantly, the children whose lives have been ruined by warring parents and competing sovereign states will no longer be pawns in a game that is played on their bodies. Indeed, in the discussions about sovereignty and legal orders, it is easy to forget that the claims of states are shamefully hoisted on the backs of children.

Whether Muslim majority states can anticipate such a legislative move will in part depend on how they come to terms with the Islamic past and its hold on their legislative present. This report reflects on that past for those states that may consider accession to the Abduction and Protection Conventions. In particular, it shows that international legal cooperation in this field—and the mutual responsibility between states that it implies—changes the imagined political space that informs the content of the law. Premodern Muslim jurists imagined a political space of empire as they developed their *fiqh* on a wide range of issues. The absence of a robust private international law regime in early Islamic law is best explained as resulting from an imperial logic that viewed the political other as opponent or soon-to-be-subdued, rather than with the mutuality and respect that characterize the modern inter-state system.

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