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

A Historico-Legal Analysis

Anver M. Emon and Urfan Khaliq

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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, blend historical doctrines from the Islamic legal past with the institutional and administrative processes of the modern state. Most studies have thus far framed this diplomatic encounter in terms of a "clash of civilizations." Human rights advocates see the Islamic law argument as a "cultural relativist" critique of the universalism of human rights. Critics of international law generally raise concerns that it can operate 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. Diplomats and others who claim that *Sharīʿa* precludes Muslim majority state accession to the 1980 Hague Abduction Convention, fail to appreciate both the complex debates on custody rules in early Islamic history, and how the Abduction Convention, as a private international law instrument, does not occasion a substantive conflict with Islamic law or modern statutory law in Muslim majority countries. Moreover, 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 protects 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 importance 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. For the specific recommendations, see the Conclusion to this report.

With a view to enhancing the knowledge and capacity of all sides to this debate, this 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, both in terms of their historical tradition and their place in international state practice and Muslim majority state legislation. Written for a diplomatic and policy audience, this 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 by pleading delineated exceptions in the Convention. 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, 1996), which addressed the limits in the 1980 Hague Abduction Convention. As will be suggested in the Conclusion, the 1996 Protection Convention offers an important Convention for Muslim majority states to join as

they pursue greater international legal cooperation in cases of international 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 can 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 operated 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.

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 will show

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*). The line that separated these two abodes also served jurisdictional purposes. 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. For Muslim jurists, this notion of sovereign legitimacy was not an operative political presumption given their conflation of legitimacy (whether political or legal) with an Islamic imperium.

….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.

This is not to suggest that modern Muslim majority states do not anticipate complex litigation with foreign elements. Nor is it that they refuse to implement jurisdictional rules. Rather, they do so quite frequently in, for example, aspects of commercial law. 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 we identify in the Conclusion as part of our 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 we do 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 political capital in doing so.

Introduction

Stories of children being abducted by one parent from the care of the other parent, and made to reside in a distant country, are by now all too familiar. In a context of relationships breaking down, children become unfortunate pawns between two parents who have fallen out of favour with each other and pursue resolution in the courts. It is precisely because children assume this vulnerable position between warring adults that attention is, and indeed must be, paid to their welfare and wellbeing. While we can disagree over what constitutes the welfare and wellbeing of children in these contexts, we can all agree that these children deserve our careful and studied attention. Indeed, this presumably shared interest among peoples and nations have for decades inspired multilateral action that creates institutional mechanisms to support the interests of children caught between two warring parents.

Various international instruments intersect on this issue, many of which will be addressed throughout this report. However, of central concern is the *Hague Convention on the Civil Aspects of International Child Abduction* (1980) (hereinafter, Abduction Convention). The convention was drafted and submitted for ratification by the Hague Conference on Private International Law, an inter-governmental institution committed to enhancing the cooperation between States by developing uniform private international law rules, or what some call "conflicts of law" rules. At the time of writing, 92 states are parties to this Convention.[1]

An ongoing challenge to the Abduction Convention's efficacy has been the non-accession of Muslim majority states. This is not to say that Muslim majority states have not acceded to the convention at all. Morocco (a member of the Hague Conference), acceded to the Convention in 2010, and Iraq (a non-member of the Hague Conference), acceded to it as recently as March 2014.[2] Moreover, Muslim majority states are not the only countries that have refused to accede to the Abduction Convention. But of interest in this report is to examine Muslim majority

states' general claim that their domestic legal adherence to Sharīʿa precludes their accession to the Abduction Convention. While these states offer other reasons for their non-accession, the role of Sharīʿa has been the central point of contention between signatories and non-signatories to the Convention. These different parties have had meetings, known as the Malta Process, to discuss the obstacles to accession and possible alternatives to the Convention framework, such as mediation. Yet the Convention still looms large as it begs fundamental questions about law, jurisdiction, sovereignty, and international cooperation at a time when moving across borders has never been easier.

This report will examine the Abduction Convention and address whether and to what extent the Sharīʿa is an obstacle to accession by Muslim majority states. This report will examine various historical Sharīʿa doctrines on issues of children and custody, map out their manifestation in contemporary state legislation, and reflect on whether, how, and to what degree the Abduction Convention and Sharīʿa (however interpreted or implemented by the state) conflict. As this report will suggest, both the Abduction Convention and domestic legislation of historical Sharīʿa doctrines operate on a presumption of the best interests of the child (Arabic: *ḥaẓẓ al-walad*). In other words, the rules themselves operate as default provisions that can be defeated if they are shown to work adversely to the child's interests. The fact that both the Abduction Convention and historic Sharīʿa doctrines are legal edifices built upon the foundation of the child's best interest begs an important question for legislators in Muslim majority states about whether and to what extent justice lies in formal adherence to historical doctrines, or substantive analysis of what upholds the benefits of children today.

However, such a choice is not as stark as one might suggest. Rather, one way forward is to inquire whether and to what extent premodern Muslim jurists considered that the removal of a child from his or her home and residence constitutes a harm that needs to be regulated, forestalled, and immediately reversed. As this report will show, premodern Muslim jurists were fully aware that

unilateral removal of children from the care and comfort of their domicile (and, by implication, the custodial parent) constitutes a harm that must be avoided, and even reversed. This premodern debate is not often featured in contemporary discussions of the Abduction Convention and Muslim majority state accession. This report introduces this early debate for purposes of bridging the automatic return device of the Abduction Convention and the commitment Muslim majority states have to implementing Sharīʿa in family law matters as a core feature of their public order function.

….AN EXCLUSIVE PREOCCUPATION WITH ISLAMIC FAMILY LAW DOCTRINES IS A RED HERRING THAT MISDIRECTS ATTENTION FROM A MORE SYSTEMIC CHALLENGE CONCERNING PREMODERN ISLAMIC LAW AND MODERN STATE LEGISLATIVE SYSTEMS: THE ABSENCE OF A ROBUST PRIVATE INTERNATIONAL LAW REGIME IN PREMODERN ISLAMIC LAW, AND THE IMPLICATIONS OF THAT ABSENCE FOR MUSLIM MAJORITY STATE LEGAL PRACTICE.

And yet, despite all this analysis of premodern Islamic law, there is a more fundamental problem that Muslim majority states must face if they are to consider accession to conventions such as the Hague Conference's children's conventions. Certainly, a discussion of premodern Islamic law and contemporary state legislation is part of any analysis-to-date on Islamic law and international child abduction. But as this report will show, an exclusive preoccupation with Islamic family law doctrines is a red herring that misdirects attention from a more systemic challenge concerning premodern Islamic law and modern state legislative systems: the absence of a robust private international law regime in premodern Islamic law, and the implications of that absence for Muslim majority state legal practice.

….THIS REPORT OFFERS A PRIVATE INTERNATIONAL LAW SOLUTION TO MUSLIM MAJORITY STATES THAT DOES NOT REQUIRE THEY AMEND THEIR FAMILY LAW CODE, BUT DOES REQUIRE THAT THEY RECOGNIZE THEIR PLACE IN AN INTERNATIONAL SYSTEM OF STATES WHERE BORDER CROSSINGS ARE COMMON, EASY, AND ROUTINELY ABUSED

It is not that Muslim majority states do not have private international law agreements in areas like commercial law, for instance. Indeed, states like the UAE demarcate a zone of Dubai's city center as a separate, independent judicial district where financial matters are subject to UK law. Family law, however, remains an exceptional site that has collapses adherence to Sharīʿa with the political legitimacy of the state-as-form in light of a history of Islamic political theory that idealizes the imperial caliphate. Uncoupling the two is not the subject of this report. Rather, bypassing the complex politics of that coupling, this report offers a private international law solution to Muslim majority states that does not require they amend their family law code, but does require that they recognize their place in an international system of states where border crossings are common, easy, and routinely abused. The value of this solution lies in the logic of private international law – a logic that is not commonly appreciated across various audiences in both the Muslim majority world and elsewhere. Consequently, this report will offer a background discussion on private international law, focusing on the Abduction Convention, before it turns to analyzing the historical tradition of Sharīʿa and proffering private international law reform as a proactive enhancement of state governance in an international state system.

Part I: Private International Law and the Hague Conference

Private international law is a curious phrase, one that has more salience in Europe and other civil law countries. In Arabic, the relevant phrase is *al-qānūn al-duwalī al-khāṣṣ*, and is the subject of Tunisian legislation.[3] In North America, it often falls under the rubric of "conflicts of law", a field of law that is seldom featured as part of the standard curriculum in law schools. Because of the salience of "private international law" as a framing device for the Abduction Convention, this section will be devoted to explaining the phrase and how it has animated the work of the Hague Conference since its earliest inception.

Generally, private international law is legally relevant when a court in a particular domestic jurisdiction is "faced with a claim that contains a foreign element."[4] That foreign element might be a foreign legal judgment or order that bears upon the facts and legal decision of the current case in controversy. Each jurisdiction will have its own domestic legal regime governing legal conflicts of this nature. Importantly, therefore, private international law is distinct from the substantive doctrine of a particular area of law, such as the law on child custody. Private international law hovers in the backdrop of domestic adjudication, ready to be implemented at the sign of a possible conflict between a domestic legal rule and a foreign one that collide in a particular legal contest or claim before a court. "Private international law...is that part of law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system."[5]

This limited, but highly important function, of private international law reflects the legal pluralism of our global community. "The *raison d'être* of private international law is the existence in the world of a number of separate municipal systems of law — a number of separate legal units — that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life."[6] These separate legal units might be the national legal order, or some sub-

unit within it, depending on which unit within a (federal) state has jurisdiction to regulate a particular legal area. In other words, divisions of power between a federal and provincial or state government contribute to the highly pluralistic, if not fractured, legal reality that emphasizes the salience and significance of private international law.[7]

A. Why Unify Private International Law? Sovereignty, Cooperation, and the Fulfillment of Justice

Of course, one might query whether and to what extent a state needs to recognize the law of another, foreign, state? The principal of sovereignty certainly entitles a state to refuse to entertain or recognize a foreign legal order or judgement entirely. This, however, ignores the way in which justice is tied to the claimants before the court, and relatedly, how the claimants themselves cross borders openly and freely. For instance, the post-WWII reality of displaced persons in Europe created certain factual conditions that informed the desire of European nations to cooperate as domestic courts in one part of Europe redressed claims by litigants with connections to another part of Europe.[8] The need for such modes of redress has only increased as our world has become increasingly interconnected. Writing in the 1980s about the need for cooperation concerning children and the family, George Droz and Adair Dyer, then-Secretary General and First Secretary (respectively) of the Hague Conference, wrote about the basis for the Conference's work:

> The main criterion, with the millions of displaced persons of the late 1940's and early 1950's giving way to the mass commercial and touristic displacements of persons of the 1960's and 1970's was to be the pressing social need. These latter developments, which show every indication of accelerating during the 1980's, are bringing problems of international family law more and more to the door of the average practitioner. In particular, the large numbers of families moving abroad for definite or indefinite tours of

> commercial activity make the family problems of employees a growing subject of concern for multinational corporations and their counsel.[9]

In this changing, transnational context, foreign legal elements arise in a courtroom because a contract under dispute was formed in one country but was carried out in a second country, which is now the forum where the legal case has arisen. A marriage may have occurred in one country, but the parties may now divorce in a different country, which has different rules on marriage and divorce. "It is the existence of such foreign elements as these that has caused the courts to frame a number of different *rules for the choice of law* which demonstrate the most appropriate legal system to govern the issue that has arisen."[10]

Of course, the existence of these various regimes of private international law raises a fundamental question, namely why have them at all? One could imagine a state simply invoking the principal of territorial sovereignty to justify recourse only to its domestic legal regime, without regard to any foreign legal element. This is indeed the case with many Muslim majority countries in cases of parents who cross borders internationally to avoid an unfavourable court decision in one jurisdiction. However, as many have already suggested, such a legal move could seriously impair the justice due to a litigant. Moreover, from the perspective of international relations, how a court in one jurisdiction acts with respect to a foreign court order, may unsettle diplomatic relations its state authorities and the regimes of other states. For various reasons ranging from access to justice across legal regimes to comity and diplomatic calm between states, private international law both recognizes transnational movement and activity, and respects the various interests at play, whether individual, doctrinal, institutional, or national. In this respect, by virtue of its *raison d'etre*, private international law effectuates a formal legal pluralism by which courts, lawyers, and scholars can pursue justice without yielding to political (and politicized) claims of sovereignty, or the all-too-often polemical claims about the superiority of one legal system over another.

Given the functional importance of private international law, each nation-state must decide whether and how to handle the presence of such foreign legal systems that arise within their jurisdiction. Indeed, this task increasingly falls within the purview of a domestic legislature since private international law is increasingly the subject of harmonizing international conventions that require domestic implementation upon ratification or accession. This turn to harmonizing international conventions has been the subject upon which the Hague Conference has institutionally committed itself since the late 19th century, and which also characterizes the underlying aim of the Abduction Convention.

B. The Hague Abduction Convention (1980): History, Operation, and Analysis.

The drafting history of the Abduction Convention began in the 1970s when the Permanent Bureau of the Hague Conference recognized a need for international cooperation on the increasing number of cases in which a parent abducted a child across international borders. The rise in child abduction cases correlated with the displacement of peoples during WWII. Moreover, as Adair Dyer wrote in 1978, the post-war period witnessed "great improvements in international transportation and communications....freer crossing of borders, fewer visa requirements and decreasing rigour of passport control."[11] As for the conditions that made child abduction a reality, Dyer provided the following account:

(a) "an international family" with two parents and one or more children, where the parents' relationship is in a state of deterioration or instability;
(b) "significant cultural differences" between the two parents, such as different nationalities;
(c) fear or frustration by the *non-custodial* parent regarding limited access to the child;
(d) the opportunity to abduct;

(e) the abductor must believe there is something to gain by abduction, namely that the country of refuge will provide the protections he or she cannot get in the country of habitual residence.[12]

Whether these factors are in fact conducive to international child abduction is a matter of some debate. As many have remarked, the above assumptions generally lead to the impression that the abducting, non-custodial parent was the father.[13] But as Beaumont and McEleavy noted in 1999, "the stereotype of the non-custodial father removing or retaining his children bears no resemblance to reality in the context of the Hague Convention."[14] Rather, empirical data concerning child abductions suggest that more often than not, *the abducting party is a custodial mother*. As Beaumont and McEleavy suggest, there are cases where "a mother moves abroad for purposes of marriage, or to be with her husband [and children], only subsequently to grow homesick" and return "home", leaving the father without access to his children.[15]

Despite this critique of the sociological assumptions underlying the Abduction Convention, its principal efficacy lies in its legal presumption that cross border child abductions are *per se* contrary to the "best interests" of children. Dyer's initial report emphasized the negative impact abduction has on children:

> [T]he true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.[16]

Though Dyer recognized that, in some cases, abduction might actually improve the child's situation—such as in cases of domestic violence—he nonetheless presumed that abductions of this nature were *per se* against the "best interests" of children. [17]

This presumption served two drafting purposes. First, it served to justify and legitimate the automatic return mechanism. Second, it allowed the drafters to secure agreement on a process-oriented approach that avoided entanglements with domestic substantive law. Indeed, on this second point, Dyer recognized that most state parties to the Hague Conference had adopted in their domestic laws a standard of "best interests of the child" to determine custody arrangements as between parents who separate or divorce. However, that standard was not (and could not be) universal across all possible jurisdictions. As Dyer remarked:

> On a worldwide scale, however, a large number of countries retain the more traditional legal standards for assignment of custody, which range from establishment of a presumption or an irrefutable right in favour of the parent of one sex or the other to systems where the legal dispute over custody centers around the 'fitness' or 'unfitness' of one of the parties, usually the mother, based on allegations of sexual conduct which may have little or nothing to do with the actual suitability of the parent to exercise the custody over the care of the child.[18]

Consequently any Convention, to maximize international participation and cooperation, had to tread carefully to avoid alienating potential signatory countries by inadvertently (or even overtly) commenting on their underlying domestic family law regime. Moreover, given the Hague Conference's historical commitment to uniform rules of private international law and its successful development of mechanisms to avoid substantive legal conflicts, it was within its institutional spirit to endorse a convention that avoided substantive legal entanglements.

But why the automatic return mechanism? Were there no other options to consider? At the time of drafting, there were three options to consider only one of which was the automatic return mechanism. One possibility was to create a convention on the enforcement of foreign judgments. Furthermore, such a model would have accorded well with The Hague Conference's history of developing

choice of law instruments.[19] However, as the Hague Conference was considering its approach, the Council of Europe considered, and subsequently adopted in 1980, the *Council of Europe Convention on the Recognition and Enforcement of Custody of Children and on Restoration of Custody of Children*. The Council of Europe Convention is "primarily a recognition and enforcement of judgments Convention, providing for reciprocal recognition between Contracting States."[20] The European Council's approach, which was in the spirit of formal private international law, had significant limits, though. For instance, it would only apply when there has been a violation of a *pre-existing* custody order. In other words, if potential abductors abducted their children *before* an enforcement order was awarded, they could bypass the European Council's convention entirely. Moreover, even with the existence of an order (whether pre-existing or an after-the-fact chasing order), the abducting parent could make a series of defenses before a court in the country of refuge, and thereby delay the return of the child.[21] As the Canadian representative to the Hague Conference remarked, the European Council's approach effectively allowed courts in countries of refuge

> to take into account a large number of questions which represent as many means of control of the foreign decision: was the defendant aware of the proceedings in the State of origin, did the court in the State of origin have jurisdiction; are there any incompatible decisions...The [Hague Conference] Commission did not adopt this model since it did not wish, justifiably, to increase the number of ways of impeding the child's return.[22]

A second possibility was to create an international tribunal to settle and resolve such family disputes. However, Dyer quite rightly noted that the principal difficulty with such a model would be to define for the various judges on the tribunal "the perspective that should be used...in appreciating the merits of cases in which the interests of persons of different nationality or residence (from the court) are involved, among which predominantly the 'welfare' of the child."[23] Additionally, the national delegates to the Conference found such a model

objectionable. The Permanent Bureau polled state parties to the Conference about their preferred approach to child abduction, including the option of an international tribunal. Various respondents considered the model cumbersome, costly, and inefficient, not to mention potentially in conflict with their domestic constitutional law.[24] Norway, for instance, was sceptical of the idea: "Experience shows that it is difficult to create international tribunals with sufficient authority and efficiency."[25] Likewise, Canada not only echoed Dyer's concerns but also noted the "inevitable delay that would ensue which would equally inevitably give rise to an arguable change of circumstances of the child."

A third possibility, which was ultimately accepted, was to create a convention that expedites the speedy return of the child. In comparison to the previous two models, this third option "would have the advantage of avoiding the delays which would come with the normal hearing on enforcement of a custody decision, since it is difficult to avoid the hearing on a custody decision from getting involved with the reconsideration of the merits, the 'welfare' or 'best interests' of the child."[26] Of course, some were concerned that the speedy automatic return mechanism might appear to domestic judges to encroach on their jurisdiction. Dyer recognized this concern:

> [t]he difficulty with formulating this proposal in an international treaty is that, to the extent to which it restricts the capacity of the judge to hear the case on its merits, it makes him appear as a 'rubber stamp' rather than a judge. Judges persist in believing that they are trained and paid to judge, and it may be difficult for some of them to accept that when a child in dispute is presented before them they should abstain from considering the child's interests.[27]

Nonetheless, this model was the one he felt had the most merit, and "might ultimately provide the best available remedy."[28]

The initial draft of what became the Abduction Convention aimed to maximize *international cooperation* by presuming that the abduction of a child in these contexts was by its very nature against the child's best interests. As the Special Commission of March 1979 concluded, "[a]bduction of children is contrary to their interests and welfare."[29] As rapporteur Elisa Pérez-Vera explained: "the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child."[30] By making this presumption, there was no need to include reference to a "best interests" standard in the Convention. Instead, the Convention *implicitly* asserts that automatic return (with limited exceptions) by its very nature is in the best interest of the child. As such, the Convention neither offers rules governing jurisdiction, nor provides standards of analysis. It sets up a "bypass" by creating new institutions that cooperate with domestic ones to achieve a particular end-result: the return of abducted children without trying to reform domestic laws in accordance with some new international norm.[31]

In what sense does the convention attempt a bypass? Principally, it sets up specific institutions, the Central Authorities, to serve as coordinating hubs in each contracting country to support parents who have been left behind. Those Central Authorities coordinate with various institutions domestically and other Central Authorities internationally to locate abducted children and facilitate their return. Central Authorities are not fully autonomous however; they must coordinate their work with the work of domestic courts. Pérez-Vera noted that the Convention anticipates a "tight co-operation between the courts and administrative authorities of the Contracting States, through the operation of Central Authorities designated by each of them."[32] In cases where a child has been abducted from one contracting state to another contracting state, the courts of the latter country (country of refuge) are limited in their capacity to assume jurisdiction or to apply their domestic laws on children and custody. In such cases, the court must, in cooperation with its state's Central Authority, return the child to the country of habitual residence. This does not imply a final determination of the merits of a

prior custody order. The requirement of automatic return (or near-automatic return) was premised on the view that the question of custodial rights is best determined on the merits by the *courts* of the child's habitual residence. Again, as Pérez-Vera remarked, the aim of requiring near-automatic return was not to "settle, or seek to settle, the question of custodial rights. In actual fact, the argument on the merits may always be made brought [sic] before the competent authorities where the child habitually resided before his removal."[33] Indeed, the Convention was designed to operate as an emergency stopgap measure to maximize the child's welfare as parents sought to determine custody *in the courts of the child's habitual residence.*

C. Exceptions to Automatic Return

As much as the Hague Abduction Convention attempts a bypass, it also provides limited and narrowly construed exceptions. On the basis of these limited exceptions, courts in states of refuge can refuse to return a child who has been abducted from his or her habitual residence. In these limited cases, there must be evidence to show that returning a child in this context would be "gravely prejudicial to the interests of the child."[34]

The exceptions to the 1980 Hague Abduction Convention were subject to considerable controversy and debate among delegates at the 14th session of the Hague Conference in 1980. Although there are various exceptions to the Convention, two are most pertinent here, namely the grave risk provision (Article 13) and the so-called "public policy" provision of Article 20.

C.1. Grave Risk

To understand the implication of the exceptions, in particular the grave risk exception, the relevant portions of the Convention are reproduced below (i.e., Articles 3, 12 and 13):

Article 3

The removal or the retention of a child is to be considered wrongful where—

a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (*a*) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment...

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that —

a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
b. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views....

This set of provisions outlines when an abduction is wrongful; sets forth the conditions under which automatic return is required; and offers particular exceptions to the requirement of automatic return. These exceptions reveal a limit to the underlying presumption of the 1980 Hague Abduction Convention, namely that automatic return might not always be in the best interest of a child. As Peréz-Vera noted, there may be "circumstances in which the return of the child may not be an adequate remedy."[35] As such, whether or not one agrees with the presumption about abduction as *per se* against a child's best interests, it nonetheless operates as a *rebuttable presumption*, with the burden of rebuttal falling upon the abducting party who opposes return.[36]

Of particular interest herein is the "grave risk" exception of Article 13. This exception was hotly debated at the time of drafting. If the value of the Convention is its automatic return mechanism, this exception could undermine the efficacy of that mechanism. For instance at the time of drafting, the Federal Republic of Germany (FRG) was concerned that the "wider and vaguer the provision is worded, the greater the margin for the 'abductor' successfully to resist the return of the child. In the interest of an effective 'functioning', therefore, the exceptions should be restricted as closely as possible and only the situations really worthy of an exception should be provided for."[37] The United States was even more emphatic, stating that the "very objects of the Convention may be defeated if this article is adopted in its present form."[38] It was especially concerned that the "grave risk" exception was so "excessively broad" that it would permit courts in countries of refuge to (re)assess the merits of competing custodial claims. It would "turn virtually every return proceeding into an adversary contest on the merits of the custody question," thereby forgoing the automatic return mechanism, and thus undercutting the operation of the very presumption that gave the Convention any teeth.[39]

Given the fraught debates on the "grave risks" exception in the drafting process, rapporteur Pérez-Vera was careful to clarify and ensure the narrowness of the exception. The operating presumption that abduction is *per se* against the best interests of the child was primary.[40] But it operates as a rebuttable presumption that requires a very narrow showing of a particular kind of harm to the child. The primacy of the presumption "gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation."[41] To be specific, she stated that the grave risks exception

> designates a serious risk which may be objectively verified, but it does not comprise the idea of 'immediate' risk; this latter interpretation was in the end discarded. As to *psychological harm*, the Special Commission intended it to cover both the mental harm and a certain aspect of the moral harm, but it has

knowingly avoided the latter expression which is too vague and which could even be interpreted as encompassing religious convictions. Having regard to what must be understood by an *intolerable situation*, the Special Commission had in mind an objective case; a proposal to replace the word 'intolerable' by 'unacceptable' was rejected because this latter word comprises an element of subjective evaluation which had to be avoided. Moreover, the Special Commission thought that the exception would not apply if the child's return was thought to be prejudicial to his economic or educational future.[42]

Peréz-Vera emphasized that the exceptions to automatic return were to be construed as narrowly as possible. The exception does not apply to concerns about religious upbringing and convictions, educational possibilities, and economic wellbeing. [43] To exclude these outright controls for prejudices that favour developed societies and certain religious and cultural values.

Peréz-Vera's express guidance has played out in domestic jurisdictions applying the Convention framework. As different studies have confirmed, the "grave risk" exception has generally been narrowly interpreted in the domestic courts of Contracting States.[44] The ostensible ambiguity of these phrases is, on this reading, an inevitable feature of drafting a Convention designed to maximize future international participation and cooperation. But the ambiguity has not impeded the operative presumption that justifies the automatic return mechanism of the Abduction Convention.

C.2. The Article 20 "Public Policy" Exception

Article 20 of the Convention provides:

> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested

> State relating to the protection of human rights and fundamental freedoms.[45]

This provision was another matter that was hotly debated during the drafting of the Convention. The Special Commission of March 1979, which introduced the Draft Convention, concluded that any abduction convention might need to permit a reservation "under which the courts of the requested State might undertake a full consideration of the child's interests on the merits in order to determine a change in custody if, *under the law of the State of origin, it was not possible for the court to take account of the interests of the child in determining custody*."[46] In other words, this narrow exception would apply only when the courts in the child's habitual residence did not apply a "best interests of the child" test. This particular provision lead to highly charged debates given the paradox of presuming automatic return was in the best interests of a child, while allowing an exception to automatic return if "best interests" did not inform the substantive law of the domestic courts in the child's habitual residence.

Members of the Special Commission were nonetheless conflicted about whether and how to draft such a provision, which they often described as a "public policy" limitation clause. Pérez-Vera considered such a provision neither necessary nor advisable, because:

> It would introduce an escape clause which is very dangerous in a convention that purports to be an instrument of dissuasion for would-be 'abductors'; furthermore, as the Convention is not a convention on the law applicable to custody, it is difficult to imagine the working of a public policy exception when there was a peaceful and legal situation *de facto* in the other State.[47]

Despite the drafters' desire to avoid such a provision, various country delegates pressed for its inclusion. For some civil law countries, the importance of such a public policy exception had to do with domestic constitutional concerns requiring the law conform to principles of public order, or *ordre public.* For instance, the

Italian delegation submitted a proposal allowing Contracting States to disregard the Convention it if would require something "manifestly contrary to *public policy*" (manifestement incompatible avec *l'ordre public*).[48] The terms "public policy" and "*ordre public*", in the context of conflicts of laws, refer to overlapping legal concepts of different legal pedigrees (e.g. common law and civil law), which permit judges to refrain from enforcing foreign laws "perceived to be injurious or harmful."[49] The principle of public policy or *ordre public*, in a private international law context, signals a domestic "forum's reserved right to set aside conflicts rules in order to reach a decision more compatible with justice or morality as locally conceived."[50] Though the Civil Law concept of *ordre public* and the Common Law concept of "public policy" are not identical, they share considerable analytic significance in the private international law field. "Public policy in private international law functions to reject foreign laws repugnant to the forum's sense of morality and decency, to prevent injustice in the special circumstances of the parties before the court, and to affect choice of law."[51] A public order exception is a legal device that protects the integrity of the state and the values it upholds. "[N]o country can afford to open its tribunals to the legislatures of the world without reserving for its judges the power to reject foreign law that is harmful to the forum."[52]

Given this understanding of public policy/*ordre public*, Peréz-Vera was rightfully concerned it might undermine the automatic return mechanism of the Abduction Convention. Likewise, the German delegate to the drafting process argued that such a provision would be redundant at best, counterproductive at worst. Given that the Central Authorities are domestic institutions, the German delegate presumed that such institutions "have to follow their national laws and it goes without saying that they cannot act against fundamental principles of their own law."[53] He felt that the proposal for a public policy/*ordre public* provision was an attempt at "dangerous perfection" that would "invite embarrassing counterargumentation...[and] would be contrary to the spirit of the Convention." Moreover, as the delegate from France noted during the drafting process, a public

order exception would be inapposite given that the Abduction Convention was not a typical private international law convention.[54] Ultimately, the delegates voted against including a public policy/*ordre public* provision.

But the Italians were not alone in proposing a public order exception. Denmark submitted a proposal to allow judges the option to refuse automatic return if such a return "is manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed."[55] Denmark's representative, Mr. K. Hjorth, then-Deputy General Prosecutor, argued that such a provision would "operate in only the most exceptional circumstances."[56] Specifically, he was concerned about the domestic constitutional validity of automatic return when the courts in the abducted child's habitual residence did not utilize a "best interests" test when deciding on custody:[57]

> [T]he fact had to be faced that situations would arise in which courts would be unable to return a child *e.g.* where a prior decision on custody in the State of the child's habitual residence was not based on the principle of the child's welfare. In this regard, he referred to States that required that custody always be given to one parent or the other, and he stated that Danish courts would be unable to return a child to a State which had based a prior custody order on such a principle.[58]

This proposal was discussed at the October 15, 1980 meeting of delegates, and generated considerable frustration. The US delegate Ms. J.M. Selby, then attorney-advisor to the State Department, considered the language in the Danish proposal "superfluous and disturbing."[59] The language was superfluous given that principles relevant to the child would of course relate to the family. They were "dangerous because they referred to principles (e.g., State laws concerning the family) which were much less fundamental than constitutional provisions, with the result that the exception could be used with regard to questions that did not assume sufficiently constitutional significance."[60] Moreover, if Mr. Hjorth's

hypothetical example were indeed the case (which Ms. Selby considered exceptional), such countries should be excluded from the Convention anyway.[61]

The Israeli and UK delegates were, however, open to such a provision, but only as a reservation to the Convention, and not included among the narrow set of exceptions to automatic return. For both delegates, the advantage of including such a provision as a reservation was to allow for as many countries to ratify the Abduction Convention, and maximize the scope of international cooperation on international child abduction. As the UK delegate suggested, "the failure of a number of States to ratify the Convention would be much more injurious to the interests of children than anything likely to result from the insertion of reservations."[62] In other words, the Israeli and UK delegate were less committed to the underlying substantive law standard implicit in the Danish proposal, and instead were focused on maximizing international cooperation through the Convention mechanism.

Both the Italian and Danish proposals were rejected. However, when the Danish proposal was revised as a reservation, it was approved by a vote of 11 in favour, 10 against, and 3 abstentions.[63] By the time the Convention was fully drafted and approved, the Danish proposal was transformed into Article 20 of the current Convention.

Pérez-Vera explained in her report that placing this language at the end of the Convention was meant to emphasize its exceptional nature. Moreover, Article 20 places a heavy onus on the party invoking it as a basis for refusing return. As she wrote:

> [T]o refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles.[64]

At the time of writing, Article 20 has "nearly faded without trace" and has not borne the risks that its detractors had predicted.[65] That does not change the fact, though, that Article 20 remains an ever-present exception that may be increasingly utilized as new countries with different legal systems decide to accede to the Convention. For instance, Beaumont and McEleavy state outright that Article 20 may be of "greater importance if the Convention succeeds in gaining further ratifications (sic) among countries which enforce laws or traditions found unacceptable in modern Western democracies."[66] Likewise, Schuz suggests that there are already "indications that courts might become more willing to use the Article 20 defense if countries with non-Western religious and cultural norms join the Convention."[67]

D. The 1996 Hague Convention on Parental Responsibility and the Protection of Children

Fears that the exceptions to automatic return in the 1980 Hague Abduction Convention would undermine its fundamental aim are arguably overstated given the jurisdictional rules of the 1996 *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter, Protection Convention). Historically, the objective of drafting the Protection Convention was to overcome the limitations of the much earlier 1961 Convention on the Protection of Minors,[68] especially in light of new developments introduced by the 1989 Convention on the Rights of the Child, which entered into force in 1990. Nevertheless, the 1996 Protection Convention also fills certain gaps left by the Abduction Convention.

The Abduction Convention was a departure from the more traditional forms of private international law conventions that The Hague Conference has promoted throughout its existence. The Protection Convention, on the other hand, reflected a return to the earlier model of private international law by focusing on a uniform set of jurisdictional rules where foreign elements appear before domestic courts.[69] In this sense, the 1980 Hague Abduction Convention and 1996 Protection Convention can operate in tandem or separately, without prejudice to the aims and operation of each other.[70] Indeed, Article 50 of the 1996 Protection Convention specifically states:

> This Convention shall not affect the application of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.[71]

Certain provisions of the Protection Convention, specifically Articles 5 and 7, intersect with the aims and subject matter of the 1980 Hague Abduction Convention, and raise important questions about the interrelation of the two Conventions. Those two Articles provide as follows:

Article 5

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 7

(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a. each person, institution, or other body having rights or custody has acquiesced in the removal or retention;

or

b. the child has resided in that other State for a period of at least one year after the person, institution, or other body having rights or custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

(2) The removal or retention of a child is to be considered wrongful where—

a. it is in breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of

the State in which the child was habitually resident immediately before the removal or retention; and

b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State

(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.[72]

These provisions are designed to limit the competition between jurisdictions in cases involving children and custody. As rapporteur Paul Lagarde explained, "[t]he general idea is that the Contracting States accept considerable limitation on the jurisdiction of their authorities. The new Convention was intended to eliminate in principle all competition between the authorities of different States in taking measures of protection for the person or the property of the child."[73] A prime example is Article 5, which resolves conflicts of jurisdiction in favour of the authorities of the child's habitual residence, with limited exceptions.[74] Everything, therefore, turns on the factual finding of habitual residence. When the habitual residence of the child changes, so too do the authorities that may take measures to protect children and their property.

Changing Habitual Residence. Incidentally, the possibility that the habitual residence might change potentially conflicts with the aims of the Abduction Convention. For instance, if a left-behind parent does not redress the abduction

quickly, an abducting parent in the state of refuge can argue that the child's habitual residence has changed, even though occasioned by a wrongful removal. Throughout the drafting process, this remained a principal concern. Many delegates wanted to ensure that a wrongful removal did not change the child's habitual residence.[75] As Paul Lagarde stated: "the person who makes a wrongful removal should not be able to take advantage of this act in order to modify to his or her benefit the jurisdiction of the authorities called upon to take measures of protection for the person, or even the property, of the child."[76]

However, the drafters recognized that a child who remains in the state of refuge for a certain period of time may become so accustomed to it that an automatic return to the original habitual residence may not be in that child's best interests. In other words, the Abduction Convention presumed that wrongful removal was *per se* against the best interests of the child, and therefore demanded an automatic return. The Protection Convention, though, recognizes that even with a wrongful removal, the best interests of the child must account for the fact that as time passes and the child becomes increasingly acclimatized to his or her new environment, there are important reasons for the new State and its judicial officers to assume responsibility (and hence jurisdiction) for this child. As Lagarde recognized, "the wrongful removal, if it persists, is a fact that cannot be ignored to such a point as to deprive the authorities of the new State, which has become that of the new habitual residence of the child, of this jurisdiction over protection.[77] On this approach, the issue was not whether the habitual residence could change, but rather when and under what circumstances, and with what consequences for a court's jurisdiction.

Abduction, Public Order, and Foreign Judgments. Articles 5 and 7 of the Protection Convention also offset concerns about the exceptions to automatic return in the Abduction Convention, such as the Article 20 public policy exception.[78] While that Article has become nearly defunct, some commentators have raised concerns about its future use. For instance, suppose a large number of Muslim majority countries accede to both the Abduction and Protection Conventions. As discussed above,

there may be reason to worry that judges in certain states might increasingly invoke Article 20 to avoid automatic return under the Abduction Convention.[79] However, even in such a case, the Protection Convention would limit the effect of any potentially expansive use of Article 20. Under the Protection Convention, authorities in the State of habitual residence just prior to the abduction retain jurisdiction. Even if the state of refuge refuses to return the child under the exceptions to the Abduction Convention, the Protection Convention reserves jurisdiction over the child's wellbeing in the courts of the child's habitual residence. This of course assumes that the state of refuge and state of habitual residence are parties to both Conventions. Consequently, a state that is party to both conventions might not benefit from the complementarity described above if the state of refuge is only party to the Abduction Convention. Nonetheless, the complementarity of the two Conventions ought to quell fears among potentially new signatory countries from the Muslim majority world that they would not enjoy a substantial degree of international comity that these Conventions seek to establish.

Part II: Islamic Law and Child Custody: Between Tradition and the State

As noted above, the Malta Process on international child abduction has brought contracting states of Europe and North America together with non-contracting Muslim majority states[80] to discuss modes of cooperation in the absence of Convention-based mechanisms. These non-Contracting states have not acceded to the Abduction Convention because of the presumed conflict[81] between it and Islamic law. This characterization of the Malta Process raises important questions about what Sharīʿa is and how it operates in modern Muslim majority states.

In a lecture to the Hague Conference's Working Party on Mediation, Kamaruddin conclusively remarked:

> In spite of the fact that many Muslim countries are considered safe haven for child abduction for obvious reasons, parental abduction is not in any way supported by the Sharīʿah. In the real sense of it, prohibition of access to a caring parent violates one of the major five higher objectives of the Sharīʿah.[82]

As much as Kamaruddin's point reflects the highest of aspirations toward maximizing international comity between Muslim states and others, more conservative elements in the Muslim world will not be so easily persuaded by her reference to the purposes of Islamic law (e.g. *maqāṣid al-sharīʿa*). There is a vast literature on the aims and purposes of Islamic law, and many progressives in the Muslim world invoke that concept to substantiate reforms of Islamic law. Indeed, the device of *maqāṣid al-sharīʿa*, since the early 20th century, has been politically coded as reformist, progressive, and politically left-leaning. Invoking *maqāṣid* arguments is often a signal to conservative Muslim authorities to push back and press against the claims being made.

... MUCH LIKE THE ABDUCTION CONVENTION'S AUTOMATIC RETURN MECHANISM, PREMODERN ISLAMIC RULES ON CUSTODY WERE MECHANISMS WHOSE LOGIC AND JUSTIFICATION WAS PREMISED UPON THEM MAXIMIZING THE CHILD'S INTERESTS (ḤAẒẒ AL-WALAD). RATHER THAN BEING BLACK LETTER RULES, THEY WERE LEGAL PRESUMPTIONS THAT COULD BE REBUTTED IF EVIDENCE SHOWED THEY OPERATED AGAINST THE CHILD'S INTERESTS. WE WILL EXAMINE HOW THE PRESUMPTIONS WORKED AND HOW JURISTS ALLOWED THEM TO BE REBUTTED.

To avoid both the polemics of the Huntington thesis, and the aspirational hopes of others that remain subject to considerable critique, Part II of this report will survey in summary fashion key issues in Islamic family law and their presence in modern state legislation in Muslim majority states. It will concentrate principally on the rules of custody, and the distinction between legal guardianship (*wilāya*) and physical custody (*ḥiḍāna*). The aim of this analysis is not so much a rehashing of well-worn debates, but rather a re-framing of them in light of the often-underappreciated logic of Islamic legal reasoning. In short, while the child custody rules are criticized for their underlying patriarchy, this report shows that underlying the default rules are certain presumptions about what modern jurists might articulate as the "best interests of the child." In other words, much like the Abduction Convention's automatic return mechanism, premodern Islamic rules on custody were mechanisms whose logic and justification was premised upon them maximizing the child's interests (*ḥaẓẓ al-walad*). Rather than being black letter rules, they were legal presumptions that could be rebutted if evidence showed they operated against the child's interests. We will examine how the presumptions worked and how jurists allowed them to be rebutted.

This approach to the historical doctrine is not meant to side step the fact that these and other premodern rules run afoul of the egalitarian norms (both gender and confessional) that underlie the Abduction Convention. However, any reform of those doctrines as implemented in domestic legislation is a matter that lies outside the scope of this research and requires domestic officials and leaders to debate internally. Implicit in this analysis, however, is a critique of the status quo

framework of debate on Islamic law and the Abduction Convention. When Muslim majority state diplomats emphasize the distinctiveness of Sharīʿa and, when Western state diplomats concentrate on the inegalitarian content of these rules, they fundamentally miss the larger and more technical feature of Hague Conference generally, and its particular conventions specifically, namely the context of private international law. Rather, as this report will show, the historical Sharīʿa does not pose the obstacle to accession and implementation that many Muslim majority state diplomats suggest. The real problem lies in these states limited private international law legislation, and challenges in judicial and administrative capacity. Indeed, if there is a Sharīʿa problem at all, it is that historically there was little by way of Islamic private international law that can help modern Muslim majority states, and their judicial officers, recognize the importance of international comity in construing jurisdictional rules. As this report will suggest, the absence of such a regime of private international law in historical Islamic doctrine is the silence that has thus far gone unnoticed or unaddressed in the dialogues (diplomatic, scholarly, and otherwise) on the Abduction Convention.

A. What and Where is Sharīʿa?

Sharīʿa or Islamic law is a discipline within the historical tradition of Islam. When considering what Islam requires of Muslims in terms of orthopraxy or right conduct, Islamic law takes center stage because it is the field of study from which rules of worship and right conduct developed. Muslim jurists throughout the centuries compiled voluminous texts of legal norms. Those norms, called *fiqh* in Arabic, address a wide range of legal topics, spanning what modern lawyers consider the public and the private, the religious and the secular. These *fiqh* compendia give considerable content to the scope and detail of Islamic legal requirements, with the Qurʾān and prophetic traditions (*ḥadīth*) serving as authoritative source-texts to ground and delimit the scope of legal interpretation.[83]

As jurists developed their own interpretations, groups of students would rally around certain esteemed jurists and their corpus of doctrine. Gradually, these groups turned into what are now called "schools" (*madhhab*) organized around a particular corpus of doctrine. There are different (and sometimes competing) "schools", each organized around a different corpus of doctrine. Importantly, in the aggregate, all are authoritative. There are today four Sunnī schools and three Shīʿa schools, each of which is dominant in particular geographical locations, and continue to influence in varying degrees how Muslims of certain regions understand their identity, both as Muslims and as citizens of a state in a particular region.[84]

The Sunnī schools, and the regions where they are predominant, are as follows:

- The Ḥanafī School: South Asia and Turkey
- The Mālikī School: North Africa
- The Shāfiʿī School: Southeast Asia and Egypt
- The Ḥanbalī School: The Gulf region.

The Shīʿa schools, and the regions where they are predominant, are as follows:

- The Jaʿfarī School: Iran
- The Ismaʿīlī School: diasporic, but with a strong presence in Canada and the UK.[85]
- The Zaydi School – Yemen, where Zaydi law (*hadawi*) is officially recognized.[86]

Since the 18th century, Islamic law was consistently rolled back by colonial powers to make room for what became the institutional and legal underpinnings of modern state bureaucracies. Colonial agents and later Muslim leaders in newly independent Muslim majority states replaced much of Islamic law with modern codes of European inspiration.

While modern Muslim states such as Jordan, Pakistan, and Qatar adopt contemporary codes in the area of property, obligations, and criminal procedure, one statutory area that remains tied to the Islamic legal tradition is family law, or what is often called Personal Status Law (*al-aḥwāl al-shakhṣiyya*). Since the early 20th century, legal reforms in the Muslim world often resulted in the codification of family law. The provisions of such codes draw upon the historical *fiqh* sources, but are also informed by other state obligations, such as international law.[87] Preserving this narrow space for Islamic law in contemporary states arguably placated Islamists who felt threatened by the modernization of law, and considered the preservation of traditional Islamic family law to be necessary to maintain an Islamic identity in the face of an encroaching modernity. But for the purpose of this report, it is important to recognize that when Muslim majority states apply Islamic law, more often than not they are applying a historical Islamic legal tradition as legislated in formal state-based statutory format in light of their other legal obligations, whether domestic or international. Moreover, by codifying family law into modern statutory form, they transform the historical *fiqh* doctrine into

modern legislative enactments that anticipate or presume state institutions and functionaries who will carry out and fulfill the underlying aim and purpose of the legislation.

B. Islamic Legal Rules on Custody

Historically, the Islamic legal framework concerning the care and support of children revolved around two key terms of art, namely *ḥiḍāna* and *wilāya,* which find their way into state legislation today. Because the historical tradition exists within a modern state-based framework, this report will examine both the historical Islamic legal doctrines on *wilāya* and *ḥiḍāna,* and state legislation on family law. Specifically, the report will address the Islamic legal doctrines as they take shape in the jurisdictions of Jordan, Pakistan, and Qatar. These three country studies will illuminate the dynamics of Islamic law and the state legislative and judicial functions in crafting custody rules in these Muslim majority countries, and what such state functions imply about these countries' non-accession to the 1980 Hague Abduction Convention.

When a child is born to married parents[88] who subsequently divorce, pre-modern Islamic legal rules varied about how to allocate the responsibility for the child's welfare to mothers and fathers. At issue was the day-to-day care and wellbeing of the child, which would evolve as the child passed through the stages of infancy to toddlerhood, and beyond. Additionally, the legal rules had to allocate responsibility for the child as a legal subject who may have property or assets that would require management and oversight. Generally, these two sorts of responsibilities are captured by the terms *ḥidāna* and *wilāya*.

B.1. Ḥiḍāna

In books of *fiqh,* jurists addressed the grant of *ḥiḍāna* by asking who has the better claim or entitlement to the child (*man aḥaqq bihi*).[89] Generally, they held that mothers were best suited to assume physical custody of young children.[90] For

instance, the Ḥanafī Badr al-Dīn al-ʿAynī (d. 855/1451) held that mothers were appropriately granted *ḥiḍāna* because of their gentle demeanour for child-rearing (*li rifqihā fī dhālik*) along with their affection for the child. Moreover, mothers, he argued, are better placed to play this role given that they stay at home and are generally more affectionate (*li-luzūmihā al-bayt wa kawnihā ashfaq*).[91] The Ḥanbalī Ibn Qudāma allocated the *ḥiḍāna* for a young child to the mother by reference to a *ḥadith* on the matter. That *ḥadīth,* in the collection of Abū Dawūd, reported that a woman approached the prophet inquiring about her child and her entitlements to him. The prophet replied: "You are most entitled to him as long as you do not marry [another]" (*anti aḥaqq bihi mā lam tankaḥī*).[92]

B.2. Wilāya

Wilāya on its face concerned the financial support of children, and was presumed to fall upon the shoulders of fathers. Indeed, fathers were presumptively guardians of their children for purposes of financial maintenance and other legal concerns. For instance, the Ḥanbalī jurist Ibn Qudāma noted that the Qurʾān, Sunna of the Prophet and the consensus of jurists (*ijmāʿ*) supported the view that the father is obligated to provide financially for his children: "obligatory upon the male (*marʾ*) is the support of his young children who have no property of their own (*nafaqat awlādihi al-aṭfāl alladhīna lā māl lahum*).[93] Moreover, Ḥanafī jurists held that the father has the obligation to provide financially for his children, especially when they are young and small, and especially if they are poor.[94]

Some jurists, especially Ḥanafī jurists, expressly invoked gendered considerations to distinguish between *ḥiḍāna* and *wilāya*. As noted above, the Ḥanafī jurist al-Kāsānī directly linked the father's obligation to provide financial support (*nafaqa*) to his exercise of *wilāya* in regard to his children.[95] Additionally, Ibn Nujaym remarked that *wilāya* over the child's financial affairs was held by the father and/or grandfather because they were presumably more discerning (*abṣar*) and suitable (*aqwam*) in business matters (*al-tijāra*) than women, whereas women

were granted *ḥiḍāna* because they were more discerning and suitable in protecting young children than men (*abṣar wa aqwam ʿalā ḥafẓ al-ṣibyān min al-rijāl*).[96] Badr al-Dīn al-ʿAynī remarked that the *wilāya* to manage the affairs of the child (*wilāya al-taṣarruf*) is granted to the father because of his discerning capacity alongside the financial support he provides (*quwwa raʾihi maʿa al-nafaqa*). For Ḥanafī jurists, it would seem, the distinction between *wilāya* and *ḥiḍāna* was necessary to express at the outset, so as to avoid confusing physical custody of a young child with legal management of the child's financial and other affairs.

C. Limiting the Mother's Exercise of Ḥiḍāna: Remarriage and Religion

Though Sunnī jurists generally allocated *ḥiḍāna* to the mother when her child was young, they also imposed conditions that the mother had to meet in order to exercise custodial authority. For the jurist, the conditions were framed in terms of what they assumed was the interest of the child or what they called in Arabic the *ḥaẓẓ al-walad*.

As an example of those conditions, the Ḥanbalī jurist Ibn Qudāma offered the following list.[97]

- She could not herself be a child (*ṭifl*) or mentally incompetent (*maʿtūh*);[98]
- She could not be a corrupt individual (*fāsiq*), since such a person might not look after the interest of the child (*ḥaẓẓ al-walad*);[99]
- She must be free and not a slave, though some jurists disagreed;[100]
- She could not be an unbeliever (*kāfir*) exercising *ḥiḍāna* over a Muslim child, though jurists disagreed;[101]
- She must not remarry someone who poses no kin relation to the child, or in other words is not *maḥram* to the child.[102]

Some of these conditions are unexceptional, such as requiring full mental capacity. Others, such as the restriction on slave mothers, reflect the historical period during which this *fiqh* doctrine was developed. The conditions concerning belief and remarriage, however, are of particular interest herein as they remain part of contemporary personal status codes in the Muslim majority world. A discussion of both these conditions follows.

C.1 The Remarriage Limit on the Mother's *Ḥiḍāna*

In a *ḥadīth*, a mother asked the Prophet about the custody of her children upon her divorce from their father. The prophet responded, "you have the better claim to him, as long as you do not marry" (*anti aḥaqq bihi mā lam tunkaḥī*).[103] Jurists relied on this *ḥadīth* both to grant mothers primary claim to *ḥiḍāna,* and to limit a mother's *ḥiḍāna* if she remarries. If a mother remarries, she loses her custodial authority over her children. If she later divorces her second husband, various jurists argued she automatically is entitled to regain *ḥiḍāna* over her child. In other words, the remarriage rendered her *ḥiḍāna* void, but if the subsequent marriage terminated, she could reassume her claim of *ḥiḍāna.*[104]

Jurists offered various explanations justifying this limitation on *ḥiḍāna.* Some worried that the new husband/step-father would not treat the child with the generosity one would expect of a parent. The stepfather might give very little to the child (*shayʾ qalīl*), and may view the child with distrust (*shazr; naẓara ilayhi bi muʾakhkhar ʿaynayhi*).[105] Given such factual presumptions, jurists were concerned that the purpose of *ḥiḍāna* would be frustrated, namely ensuring an environment of affection and intimacy for the child (*al-shafaqa, al-iltifāt*).[106]

Other jurists, on the other hand, were concerned that the mother would be so preoccupied with her newly acquired wifely duties that she would neglect her children from the prior marriage. As one jurist put it, she would be preoccupied with fulfilling the demands and interests of her new spouse (*li ishtighālihā bi*

ḥuqūq al-zawj).[107] The reason she would be so preoccupied with her wifely duties, however, had everything to do with operating presumptions about marriage. For example, al-Nawawī likened the situation of a remarried mother exercising *ḥiḍāna* to a slave woman exercising *ḥiḍāna*.[108] In both cases, the pleasure of the husband or master (*raḍy al-zawj, raḍy al-sayyid*) is presumptively paramount, and thus frustrates the aims of *ḥiḍāna*.[109]

Though the mother's *ḥiḍāna* was restricted, this limiting condition did not apply to all marriages. If the second husband she married was related to her existing child within a certain degree of kinship (*maḥram*), she could retain her *ḥiḍāna*. For instance, Badr al-Dīn al-ʿAynī said that where a divorce mother remarries someone who is among the child's kinship network, she retains her custodial authority of *ḥiḍāna*. The rationale for this exception to the limitation relied on a presumption about such step-fathers. If the step-father were among the child's kinship network, jurists presumed that he would be committed to the child's well-being and would provide the necessary affection (*shafaqa*) to satisfy the aims of *ḥiḍāna*.[110]

The remarriage limit on the mother's *ḥiḍāna* relied on certain presumptions about marriage and step-parents, which could be rebutted in limited circumstances. Pre-modern jurists assumed that a step-father unrelated to the child would not uphold the child's wellbeing. If the stepfather were related to the child, that operative presumption failed, and the mother could retain her *ḥidāna* upon remarriage. Moreover, jurists commonly presumed that a wife's position relative to her husband is analogous to a slave's position relative to her master. For jurists, this raised concerns about the mother's ability to care for her children in a context of remarriage. Understanding the operation of this remarriage limitation on *ḥiḍāna* reveals the centrality of the child's interest in the juristic analysis.

Of course, this analysis raises fundamental questions about whether the operative presumptions about wives and step-fathers have validity today. As products of a certain culture —social, economic, historic and legal— the pre-modern doctrines on

ḥiḍāna are often criticized for their inegalitarian nature. Indeed, the current presence of these rules in contemporary codes raises considerable clamours for reform in the Muslim majority world. Some might find this analysis of the underlying presumptions of the *ḥidāna* rules as a poorly hidden critique of the now well-known known patriarchy in Islamic family law. That critique, though, is hardly novel given the scholarly literature that exists already.[111] Moreover, the image of the unkind, or even wicked step parent, is a longstanding stereotype and trope in literature and across cultures.[112]

Likewise, to regard wives as analogous to slaves is to perpetuate a gendered hierarchy in the name of an Islamic legal order. As Kecia Ali notes, the legal trope of the "slave" was an important one in pre-modern juristic analysis. The analogy they made between marriage and slavery was "unexceptionable to early Muslim audiences, for whom both life and law were saturated with slaves and slavery...Domestic slavery was common...The omnipresence of slaves in legal texts owes not only to their social presence, but also to their utility in legal discussions: slaves are useful to think with."[113] Of course, for modern audiences, the analogy is entirely objectionable, which is in large part the impetus for reflecting on the continuity of such rules in the legislation of contemporary Muslim majority states.

However, the contribution of this analysis is to suggest that to revisit those presumptions is not merely geared toward ensuring gender equality. Certainly, to give such dated presumptions such powerful legal effect calls out for greater attention to substantive justice considerations. But for the purpose of this report, the analysis of the historical rules reveals the centrality of "best interests" as a historical standard that animated juristic rule-development in the first place. To recognize these rules as legal presumptions is to see in their legal logic the underlying imperative to maximize the best interests of children, whose vulnerability is hardly denied and whose wellbeing resounds as a universal imperative. Indeed, the global concern for children is evident in the terms and spirit of the Convention on the Rights of the Child, to which all Muslim majority

states are party. Just as the early jurists fashioned these custodial rules with the interests of children in mind, it would seem that they can and should be revisited where the underlying assumptions that informed the doctrines no longer prevail—all in the interests of children whose capacity to decide for themselves is often limited by law or culture, or both.

C.2. Religious Faith as Condition of *ḥiḍāna*

Pre-modern jurists held that for the mother to exercise *ḥiḍāna* over a Muslim child she must also be a Muslim. The need for this rule stemmed from the license Muslim men had to marry women who were not Muslim. Muslim jurists presumed the children would be Muslim given the prevailing presumption that the child's faith followed the father's (*in kāna al-ṭifl muslim bi islām abīhi*).[114] But where a Muslim father and non-Muslim mother divorce, jurists were concerned about the effect of the non-Muslim mother's different faith on the Islamic faith of the presumably Muslim children if she were to exercise *ḥiḍāna* over them.

For Shāfiʿī and Ḥanbalī jurists, a non-Muslim mother (*kāfira*) was generally not permitted to exercise *ḥiḍāna* over a Muslim child.[115] The Ḥanbalī jurist Ibn Qudāma specifically worried that a non-Muslim mother might wreak havoc on the child's faith commitments by instilling disbelief in the child (*yuftinuhu ʿan dīnihi wa yukhrijuhu ʿan Islām bi taʿlīmihi al-kufr*).[116] Framing the limitation in terms of the interests of the child (*ḥaẓẓ al-walad*), Ibn Qudāma did not permit something that might lead to the child's ruin, namely the destruction of faith (*halāk dīnihi*).[117]

Interestingly, the Ḥanafīs allowed non-Muslim mothers (i.e., *dhimmīs*)[118] to exercise *ḥiḍāna* over their children as long as the children were incapable of understanding the significance of faith, and there was no fear the children might prefer disbelief.[119] As Ibn Nujaym argued, *ḥiḍāna* was premised upon affection or compassion (*shafaqa*). For children of a certain young age, the mother was in the best position to provide the needed affection and care, regardless of her religious

beliefs.[120] However, once those children were able to appreciate the meaning and significance of faith, Ḥanafī jurists invalidated the non-Muslim mother's custodial authority out of concern for the possibility of harm (*iḥtimāl al-ḍarar*) that may befall the child.[121] Ḥanafīs worried that, once children reached an unspecified, but nonetheless legally relevant, age of discernment, a non-Muslim mother might habituate her Muslim children to the values of disbelief (*akhlāq al-kufra*), which Ḥanafīs considered to be an injury to the children's interests (*wa fīhi ḍarar ʿalayhima*).[122]

D. Changing Custody and the Child's Agency (takhyīr)

As noted above, Sunnī jurists generally held that when children are young (*ṣaghīr*), mothers have principal custodial authority over their children.[123] However, jurists also limited the duration of her custodial authority depending on the age of her children. Their limitation on the mother's custodial priority rests on a presumption that at a certain age, the needs and interests of children sufficiently change such that their father is presumably the better custodial caregiver. However, as will be analysed below, the shift of *ḥiḍāna* to the father was *a legal presumption that could be defeated by the child's own expressed wishes.* Far from serving as an automatic cut-off date for the mother's custodial authority, the stipulated ages of the children were legal tropes that stood for the moment when children's agency legally mattered in determinations of their interests, including who would exercise custodial authority over them.

D.1. Automatic Transfer of Custody or Proxy for Children's Agency: Age as a Legal Trope

For most jurists, the issue of the child's age had everything to do with whether a child can, upon reaching that stipulated age, choose which parent exercised custodial authority. In other words, rather than occasioning an automatic transfer of custody, the stipulated ages simply defeated the presumption that the mother ought to have custodial priority. These specific ages delineated a new factual

setting in which a judge had to reconsider who was best suited as custodial authority to maximize the children's interests. But in making this determination, they considered whether children themselves could exercise their agency by choosing which parent exercised custodial authority. In other words, the legal doctrines concerning the age of children and custodial authority were intimately linked to legal debates on children's capacity to choose (*takhyīr*) their custodial authority.[124] The specific ages that defeated a mother's presumptive custodial authority varied among jurists.[125] Moreover, they vary in contemporary state legislation in Muslim majority countries. The specific age, though, is less relevant for this analysis than appreciating what "age" as a concept represented, namely the capacity of children to discern their best interests.

The Shāfiʿī jurist al-Qaffāl al-Shāshī (d. 507/1114) offered a useful summary of distinct positions:

> Suppose two spouses separate and they have a son who is seven or eight years of age, and [he] has the capacity of discernment (*wa huwwa mumayyiz*). [Furthermore, both parents] dispute over who would provide better custodial care. While still a child, the boy chooses one of them. If he chooses his mother, he is in her custody at night and his father takes him during the day to go to school or work. If the boy chooses his father, he remains [with the father] day and night, but the latter cannot prevent [his] son from visiting his mother[126]....Aḥmad [b. Ḥanbal] held that if the child is a boy, he has the power to choose. But if [the child] is a girl, she does not have the power to choose and her mother has the better claim [to custody over her]. Abū Ḥanīfa and Mālik [b. Anas] held that no such choice is allowed. Abū Ḥanīfa said that if the child is a boy, he remains with his mother until he is self-sufficient (*yastaqillu bi nafsihi*). When he dresses by himself, eats by himself, and can keep himself safe, then his father has the better claim to [custody over him] (*al-ab aḥaqq bihi*). If the child is a girl, then [her mother exercises custody] until she marries or begins

> menstruating. Malik [b. Anas] said that if [the child] is a boy, his mother has a better claim to him (*fa al-umm aḥaqq bihi*)...[Mālik] reportedly said [the mother's custody continues] till he reaches majority (*ilā al-bulūgh*). If the child is a girl, the mother has a better claim to her for as long as [the daughter] does not marry and/or her spouse does not consummate [the marriage].[127]

Examining this passage reveals a clear debate between jurists about whether children of a certain age ought to have a voice in selecting which parent with whom to live. Whether the child has a choice or not will depend on the following:

- The school of Islamic law
- Whether the child is a boy or a girl,
- Marital status in the case of girls

Some jurists, particularly Ḥanafī and Mālikī ones, refused to let children choose their custodial parent generally holding that the period of the mother's custody ended when boys reached the age of seven or thereabouts.[128] At this age, jurists presumed, a young son could feed himself, dress himself, and according to some jurists, perform ritual ablutions by himself. Inferred from all of these activities is that the son has reached a degree of capacity such that he can take care of himself (*al-istinjā'*).[129] Upon reaching this state of capacity, such jurists required an automatic transfer of custody over boys to the father. Girls on the other and would remain with their mothers. On the Ḥanafī and Mālikī reading of the rule, it is not a legal presumption, but rather a hard and fast rule of custodial allocation between mother and father.

Of particular interest to this analysis is why Ḥanafīs and Mālikīs denied children the power to choose. Concerning boys, they argued that when boys reached this level of capacity, they were in need of education; the cultivation of a masculine ethic (*al-takhalluq bi akhlāq al-rijāl*); and the acquisition of various virtues. In such matters, the father was in a better position to provide for this sort of training

than the mother. If the father neglected this role (or alternatively, if the boy chose to remain with his mother), the boy would espouse a more feminine ethic (*takhallaqa bi akhlāq al-nisāʾ*). Moreover, the boy would become accustomed to women's nature or characteristics, which would constitute an injury to the young boy (*wa fihi ḍarar bihi*).[130] Since this dilemma did not present itself to young girls who remained in their mother's care, it was appropriate to differentiate custodial rules pursuant to the gender of the child.[131] In other words, the jurists imported into their legal analysis a certain gendered sense of upbringing that coupled custody of boys with an Arab ethic of *murūʾa,* which refers to a sense of virtue and chieftainship that collapses into an ethic of manliness.[132]

Ḥanbalī and Shāfiʿī jurists, by contrast, granted the child a choice upon reaching a certain age.[133] The Ḥanbalī jurist Ibn Qudāma provided an impressively insightful analysis of this issue. He concerned himself with boys (*ghulām*) who reached the age of seven, which for him was the date at which the presumption of the mother's custodial priority ended. He argued that as long as the child is not mentally disabled (*laysa bi maʿtūh*), the child could choose between his contending parents. Whoever the child selects has the primary claim to custody (*fa huwwa awlā bihi*).[134] The rationale justifying this view concerns capacity to account and provide for the child's interests. As Ibn Qudāma reminded, custodial authority lies with the person most capable to prioritize and enhance the child's well-being (*li anna ḥaẓẓ al-walad ʿindahu akthar*).[135] But the content of the child's well being is not static; it varies over time: "We talk about affection in terms of context since addressing it in a vacuum is not possible" (*wa iʿtabarnā al-shafaqa bi maẓannatihā idhā lam yumkin iʿtibāruhā bi nafsihā*).[136] Consequently, when a young boy reaches the stage when he can express himself clearly; can distinguish between generosity and stinginess (*al-ikrām wa ḍiddihi*); and can assess who is best capable of enhancing his well-being, his preference has evidentiary weight in determining who is best suited as custodial authority (*dalla ʿalā annahu arfaq bihi wa ashfaq ʿalayhi*).[137]

Ibn Qudāma recognized the counter arguments against the Ḥanbalī and Shāfiʿī position. For instance, some might argue that a young boy would actually choose as custodial authority whoever plays with him, neglects to educate him, or indulges his every whim (*yumkinuhu min shawātihi*)—all of which would lead the child to a state of corruption (*fasād*).[138] Ibn Qudāma countered against this overt paternalism by emphasizing the respect due to the child's autonomy. He granted that as the child has the capacity to change custodial authority indefinitely (*hākadha abadan*) as his desires and interests change. As he reminded, the boy of a certain age (e.g. seven years) is best positioned to determine his welfare and interests (*li ḥaẓẓ nafsihi*). "He will pursue what he desires, just as he pursues what he desires to eat or drink."[139] Or, as the Shāfiʿī jurist al-Khaṭīb al-Shirbīnī (d. 977/1570) put it, "the one with discernment best knows his interests" (*al-mumayyiz aʿraf bi ḥaẓẓihi*).[140] If for whatever reason the boy does not exercise his choice or chooses both parents, then custody is determined by ballot system (*bi al-qurʿa*) since neither parent has a particular advantage over the other, and both cannot simultaneously exercise *ḥiḍāna* in the context of a divorce.[141]

From a gender perspective, it is worth noting the variable approaches that treat boys and girls differently. The Shāfiʿīs granted a choice to girls just as they did to boys.[142] Abū Ḥanīfa, on the other hand, held that the girl's mother was most entitled to exercise *ḥiḍāna* until the girl married or began menstruating. Mālik b. Anas also held that the mother was most entitled to *ḥiḍāna* over her daughter, at least until she married or when her marriage was consummated. The Ḥanbalīs, however, held that the father was best suited to uphold his daughter's interests at this transitional age because, as Ibn Qudāma claimed, a seven-year old girl is potentially marriageable. Given that the legal doctrine on marriage designates her father as her guardian in setting a marriage, he ought also to exercise custodial authority when she reaches the minimum age of marriage.[143] This link between the rules on marriage and guardianship fundamentally justified treating boys and girls differently with respect to exercising a choice over custodial authority:

"Analogizing her to the young boy is invalid because [the boy] does not need the custodial care and marital guardianship as she does."[144]

This overview of the significance of age provides three important insights about Islamic law and child custody. *First*, jurists consistently maintained that the impetus behind the custody rules had to do with the interests of the child (*i.e. ḥaẓẓ al-walad*). Indeed, the phrase *ḥaẓẓ al-walad* recurs repeatedly across various schools and sources, suggesting it formed a key concept in considering custodial arrangements. This is an important point considering the early history of the Abduction Convention, in which a "best interest" standard was consciously omitted on the assumption that it would rankle certain normative traditions that inform domestic legal systems.

THE REFERENCE TO A CHILD'S AGE, THEREFORE, IS A REMINDER THAT THE MOTHER'S CUSTODIAL PRIORITY WAS FOR MANY PREMODERN JURISTS A REBUTTABLE PRESUMPTION THAT BECAME WEAKER AS THE CHILD AGED AND BECAME MORE CAPABLE OF ASSERTING HIS NEEDS AND INTERESTS.

Second, the debate about choice reveals that the all-too-common view that Islamic law requires custody to automatically shift to the father without considerations about the child's interests is inaccurate at best. There is an internal debate among Sunnī schools of law about the child's voice that vacillates between competing ethics of paternalism and autonomy/freedom. Underlying the varying rules is a concern about what and who best serves the interests of the child as that child increasingly becomes an autonomous moral agent. To recall Ibn Qudāma, determining those interests cannot be done in a vacuum. The reference to a child's age, therefore, is a reminder that the mother's custodial priority was for many premodern jurists a rebuttable presumption that became weaker as the child aged and became more capable of asserting his needs and interests. That is not the same thing as denying her custody over her children.

Third, the reference to a specific age served as a legal trope or proxy for juristic considerations about paternalism and autonomy in the case of children. Certainly

modern readers might balk at the suggestion that a child of seven years can determine his or her own interests. But we must recall that in the pre-modern or medieval period, infant mortality was high and the average life expectancy far lower than it is now. For children to reach the age of seven or older was an important marker of their capacity to survive the harsh conditions of life in those varying contexts. It would be a mistake to disregard this legal discussion merely because of the reference to the specific age of seven. Viewing it as a proxy for considerations about autonomy, paternalism, and capacity makes the debate alive to our concerns today.

E. Moving the Child's Residence

The above discussion emphasized how underlying the various custody rules was a core commitment to the interests of the child, however defined. The rules operated as presumptions or mechanisms that, despite having a black-letter quality, nonetheless were premised upon their capacity to maximize child welfare and benefit. In this sense, the premodern rules and the Abduction Convention operate on similar legal logics.

This similarity, though, begs an important question – namely whether premodern Muslim jurists also saw removal of a child as adverse to the child's best interests? How they answered this question will allow us to assess whether and to what extent Sharīʿa and the Abduction Convention are inconsistent.

Premodern jurists addressed the issue of removal by asking whether one parent can travel with or relocate his or her child to a different town, temporarily or permanently, thereby adversely affecting the left-behind parent's access to the child. On the surface, jurists framed the issue of relocation as an injury to the left-behind parent, especially if that left-behind parent was the father.[145] This parent-centered framework stands in contrast to the Abduction Convention, which views abduction as an injury to the child. But once we delve beneath the surface of the

premodern debates on removal, we will discover that the apparent focus on the left-behind parent was actually a proxy for the child's best interests. In other words, their focus on parental injury in cases of removal ultimately, though indirectly, emphasized the primacy of the child's interest in any determination of custodial authority.

THE ḤANBALĪ JURIST, IBN MUFLIḤ, ASSERTED UNEQUIVOCALLY THAT IF THE REMOVING PARENT PRINCIPALLY AIMED TO INJURE THE LEFT-BEHIND PARENT (MAḌĀRR AL-ĀKHAR), THE REMOVAL WAS NOT NECESSARY (LAM YAJIB ILAYHI) AND REMOVAL WAS NOT PERMITTED.

To address this issue, jurists used different hypotheticals to highlight their concerns about removal. In one example, they asked whether removal was permitted when a parent claimed he or she *needed* (*ḥāja*) to travel with the child, but would later return to the same town of the left-behind parent (*muqayyim*). Of course, this raises the question of what constitutes a "need." The Ḥanbalī jurist, Ibn Mufliḥ, asserted unequivocally that if the removing parent principally aimed to injure the left-behind parent (*maḍārr al-ākhar*), the removal was not necessary (*lam yajib ilayhi*) and removal was not permitted. In any other instance, removal had to uphold the child's interests (*ʿamala mā fihi maṣlaḥat ṭifl*).[146]

But under what circumstances was removal in the child's interests? The Ḥanbalī jurist Ibn Qudāma addressed this by reflecting on the ways a child's interests would be affected. For instance, he held that the left-behind parent (*al-muqayyim*) has a greater claim to custody because travel inherently involves risk or danger to the child (*fī al-musāfira bi al-walad iḍrār bihi*).[147] Travel can be dangerous, and thereby pose a threat to the wellbeing of a child. Moreover, the treacherousness of travel would pose an obstacle to the left-behind parent who would want to visit the child. For instance, suppose one parent wanted to resettle in a different land (*balad*), but traveling there was dangerous (*makhūf*) or the land to which he wanted to resettle was itself dangerous. Not only would this pose a danger to the child, it would also hinder the left-behind parent's ability to visit the child.

Consequently, Ibn Qudāma held that the *muqayyim* parent had a superior claim to *ḥiḍāna* over the parent who chose to relocate. Ibn Qudāma went so far as to say that even if the child expressly wanted to travel with the relocating parent, a judge must refuse any travel grant. Such travel, in these circumstances, was deemed legally unnecessary (i.e. not *ḥāja*) given the risk to the child's wellbeing (*fihi taghrīr bihi*).[148] In this hypothetical, even though it was framed in terms of which parent can claim custody, it was answered by reference to the child's interest.

This is not to suggest that a parent could never relocate with a child. However, when jurists permitted such relocation, they did so in terms of what they understood to be the child's best interests. For instance, suppose the relocating parent wanted to move to a land that could be safely accessed and posed no danger to the child. Ibn Qudāma granted the father custodial priority whether or not he was the one traveling to the new land or residing in the old residence.[149] He justified his position by reference to a highly gendered conception of parenting in which the father is responsible for educating boys into a culture of manhood and overseeing a daughter's future marriage. According to the Shāfiʿi al-Nawawī, the long term interests of boy children, which specifically fall within the father's presumed competence, included preserving and upholding the child's kinship networks (*iḥtiyāṭ li al-nasab*); education and learning (*maṣlahat al-taʾdīb wa al-taʿlīm*); and material wellbeing.[150] What this gendered approach to parenting in mind, one can appreciate the logic of Ibn Qudāma's explanation: "The distance prevents [the father] from observing [the child], prevents [the father] from training him, educating him, and preserving his wellbeing" (*al-buʿd alladhī yamnaʿuhu min ruʾyatihi yamnaʿuhu min taʾdībihi wa taʿlīmihi wa marāʿāt ḥālihi*).[151] Even if the child is young and would generally remain with his mother, concern about the future wellbeing of the child—which was deemed to fall within the father's competence—entitles the father (whether or not he is the traveling parent) to *ḥiḍāna*. The child's mother, whether she is left behind or the traveling parent, can still visit the child since the travel between her and the child is supposed to be easy.

But this rule on removal clearly works against the default presumption of the mother's custodial priority over young children.[152] Though the example above is drawn from the work of the Ḥanbalī Ibn Qudāma, the Mālikīs[153] and Shāfiʿīs[154] shared a similar legal analysis.

The Ḥanafīs had a different approach. Their hypothetical situation generally involved a divorced mother[155] who exercised *ḥiḍāna* over her child, and wanted to relocate. Whether she retained *ḥiḍāna* depended on various inquiries about the destination to which she was moving.[156] If the distance between the father's residence and the mother's new one was short, such that the "father could visit his son and return to his home before nightfall," the mother retained *ḥiḍāna* when she relocated.[157] In this case, the legal presumption was that the father (and by implication, the child) did not suffer a major (future) harm from the relocation (*kabīr ḍarar al-naql*).[158]

However, suppose the custodial mother wants to relocate to a more distant land?[159] According to al-Kāsānī, one must consider the harm that would arise from separating the child from his father (*li anna al-mānīʿ huwa ḍarar al-tafrīq baynahu wa bayna waladihi*).[160] However, whether or not there was any harm had a lot to do with the marital history of the couple. Al-Kāsānī offered a range of hypotheticals in order to posit two conditions,[161] which if satisfied, would grant a mother the authority to remove (*wilāya al-naql*) her child to a new land that is far away from the father's residence:

a) The land to which she wants to remove herself and her children is her own homeland (*baladahā*).
b) The marriage between the parents of the child/children took place in her homeland.[162]

According to most Ḥanafīs, if she wants to relocate to her homeland where her marriage took place (*wa qad waqaʿa al-nikāḥ fihi*), she can do so and retain *ḥiḍāna*.[163] The Ḥanafis relied on a contractual principle of implicit consent: when

the father married his wife in her homeland, he implicitly consented to any later born children living there.[164] But if she were to relocate to any other land, she would be precluded from retaining custody.[165]

The Ḥanafī approach is comparatively unique because it emphasized the father's and mother's privileges and harms by virtue of their marital contract. But the issue for all the Sunnī schools reviewed above concerned the impact of removal on the future wellbeing of the child. As much as they seem to frame removal in terms of parental injury and hardship, the hardship was a function of the parents' respective duties to raise their children in a manner that tracked gendered presumptions about parenting and growing into adulthood. Controlling for these presumptions allows a deeper appreciation for how removal was a point of concern for jurists eager to ensure that children receive the upbringing they deserve, in light of the operative assumptions about children and parenting that proliferated in the premodern period.

This short analysis of removal is significant because at the very least, it highlights that within the body of Sharīʿa, removal or abduction of a child is by definition suspect. Moreover, as much as jurists were concerned about ensuring a particular upbringing that was father-centric, the Ḥanafī approach undercuts that approach by holding fathers and mothers to their earlier actions – actions that were taken presumably with a degree of affection that upon divorce is no longer present. Lastly, it should be emphasized, as the Ḥanbalī Ibn Mufliḥ did, that removal of children in the hopes of harming the left behind parent is in no one's interests, least of all the children's. That is not merely the view of modern international law, or proponents of the Abduction Convention. It is a more transcendent view that finds expression among jurists articulating the corpus of Sharīʿa.

F. Case Studies on Custody and Guardianship: Jordan, Pakistan and Qatar

This research on Islamic custody law coincides with recent legislative activity in the area of family law in some Muslim majority states. Countries such as Jordan, Qatar, and the UAE have revised their personal status legislation, often due to pressure on these governments to uphold their commitment to the 1989 Convention on the Rights of the Child, which all states, with the exception of the USA, have ratified. As these countries draft new family law legislation, it should be remembered that such legislation often follows the "overall approach of the [historical] *fiqh* texts,"[166] including the gendered ideals of motherhood and fatherhood. As Lynn Welchman has observed, the "distinct duties of mother (custodian) and father (guardian) reflect gendered assumptions of 'ideal-type' social and familial roles in the care and upbringing of children."[167] Despite this continuity with the past, Muslim majority state practice on family law ought not to be merely or easily reduced to the historical tradition discussed above. As an analysis of custodial authority in Jordan, Pakistan, and Qatar will illustrate, the state mediates between a historic Islamic legal order and the demands of a modern state with varying and, at times, conflicting domestic and international obligations.

F.1. Jordan

Under the Jordanian constitution, Islam is the religion of the state.[168] It has a diversified court system of regular courts, religious courts, and special courts.[169] Regular courts (*niẓāmiyya*) are the most prevalent; they exercise jurisdiction in civil and criminal matters, except for those areas subject to the jurisdiction of the other two courts.[170] As for special courts, Lynn Welchman has noted that they have jurisdiction over matters that do not fall within the ambit of regular courts, and are "in many cases military or quasi-judicial bodies" and often lack the kinds of protections one would expect in the regular courts.[171]

The religious courts are vestiges of earlier Ottoman institutional practices. These courts are subdivided into both Sharīʿa courts and tribunals for other religious communities.[172] As Welchman remarks, "Jordan, like most of the Arab lands formerly included in the Ottoman Empire, gives the *Sharīʿa* courts exclusive jurisdiction in matters of personal status and 'blood money' (*diyya*) where the parties are Muslim, and Islamic *waqf*."[173] Moreover, Article 106 of the Jordanian Constitution provides that the Sharīʿa courts "shall in the exercise of their jurisdiction apply the provisions of the Sharīʿa law,"[174] though what that means is not specified in the Constitution.

On a general reading of these constitutional provisions, and without further clarification, it might appear that Jordan's Sharīʿa courts would apply the *fiqh* doctrines on matters of child custody discussed above. However, the modern state and its institutional agencies regularly intervene through their legislative and regulatory power to mediate what Sharīʿa means in states like Jordan. In the case of Jordan, the governing legislation on child custody is its legislation on personal status law, the most recent of which was enacted in 2010.

Jordan's Personal Status Law of 2010

Jordan was the first independent Arab state to issue a personal status law in 1951.[175] Since then there have been various legislative reforms and initiatives.[176] The most recent legislative initiative, though, was Law No. 36 of 2010, or Jordan's Personal Status Law of 2010 (JPSL).[177] Given Parliament's suspension at that time, the law was passed as a temporary law.[178] Containing 327 articles, 141 of which were new, the 2010 law certainly differed from its 1976 predecessor.[179] The changes to the custody and guardianship provisions, though, were minor and mostly affected the age limits for custody.

In the JPSL the legal distinction between *ḥiḍāna* and *wilāya* remains, with the father exercising *wilāya,*[180] and the mother having primacy over *ḥidāna* till the child reaches 15 years of age. When the child reaches 15 years of age, he or she has

the right to choose (*ḥaqq al-ikhtiyār*) to remain with the mother or not until reaching the age of majority (*sinn al-rushd*).[181] If the mother is not a Muslim, however, her custodial authority ends when the child reaches the age of seven.[182]

To exercise *ḥiḍāna,* the custodial agent must have reached the age of majority (*bāligh*), have full mental capacity (*ʿāqil*), and have no major communicable diseases.[183] The custodial agent must be capable of educating and safeguarding the child in matters of faith, character, and health (*qādir ʿalā tarbiyyatihi wa ṣiyānatihi dīn wa khalq wa ṣiḥḥa*), and must not be an apostate from Islam (*wa an lā yakūna murtadd*).[184] Moreover, if the custodial agent is a woman, she must not marry someone who falls outside a set kinship network in relation to the child (*ghayr maḥram min al-ṣaghīr*).[185] These last two conditions parallel discussions above on the limitations to a mother's custody in premodern Islamic legal debates.

The JPSL also regulates the extent to which the guardian and custodial agent (i.e. *walī* and *ḥāḍin*) can travel with their child (specifically, Arts 175-177). Article 175 provides that either the *walī* or custodial authority (*ḥāḍin*) can travel with the child to a city within the Kingdom of Jordan without any adverse effect on legal custody, as long as there is no effect on the overall wellbeing of the child (*rajḥān maṣlaḥa al-maḥḍūn*).[186] However, if such travel does have an effect on the child's wellbeing (*maṣlaḥa al-maḥḍūn*), the child cannot travel, and the custody of the child temporarily is assigned to the next in line to exercise *ḥiḍāna* over the child.[187]

Certain complications arise in the case of international travel, especially if the child holds Jordanian nationality. Article 176 specifically limits a mother or other female custodial agent (*ḥāḍina*) from traveling with the child outside the Kingdom to set up residency in a different country. If she wishes to do so, she must first obtain the *walī's* agreement and show that international relocation upholds and protects the child's interests (*al-taḥaqquq min taʾmin maṣlaḥa al-maḥḍūn*).[188] Article 177(b) allows the father who exercises both the power of guardian and custodial authority to travel with the child outside of the Kingdom of Jordan to establish a new

residence. However the father's license to travel and relocate is subject to certain statutorily defined conditions associated with visitation rights and guarantees to the court.[189]

In the case of both domestic and international travel, we can certainly raise concerns about the gendered framework of custody and freedom. But for the purpose of this analysis, we can also appreciate how modern legislation emphasizes the centrality of the child's interest in the issue of travel and removal. Whereas the premodern debates focused on the parents and their harm as a proxy for the child's long term well being, the JPSL requires no such proxy, and instead suggests forcefully that any case of travel or removal directly affects the child's interests.

F.2. Pakistan

In Pakistan, *The Guardians and Ward's Act, 1890* concerns guardianship and custodial issues, jurisdiction over which the *Family Courts Act*, 1964 invests in specialized family law courts. *The Guardians and Wards Act, 1890* makes very little reference to Islamic legal precepts, and instead emphasizes the welfare of the child. However, when articulating standards to determine the best interests of children, the legislation grants specialized family law judges considerable discretion. Consequently, judges might invoke Islamic law in custody disputes decided under the Act. A brief discussion of recent case law suggests that while historical Islamic legal rulings on *ḥiḍāna* inform the judicial determination of a child's welfare, those rules are not determinative and can be overridden when the welfare of the child requires another custodial arrangement

The *Guardians and Wards Act, 1890* applies to the whole of Pakistan without differentiating between people of different faith traditions.[190] It applies to "minors of all creeds and races" and provides that "in the selection of guardians and other matters; regard shall be had to the personal law of the minor."[191] Of particular interest here is Section 17 of the Act, which addresses the various circumstances

the court must consider when appointing a guardian. Section 17 provides in relevant part:

> (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, *appears in the circumstances to be for the welfare of the minor*.
> (2) In considering what will be for the welfare of the minor, the Court shall have regard to the *age, sex, and religion* of the minor, *the character and capacity of the proposed guardian* and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.
> *(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.*[192]

The section emphasizes the primacy of the minor's welfare, while invoking the minor's religion as one among a range of circumstances for judges to consider when deciding custodial arrangements.

It is noteworthy that the Supreme Court of Pakistan in *Akhtar v. Attock*, held not only that the primary consideration in custody cases must be the child's welfare, but also that the child's welfare is not coterminous with the child's religious tradition.[193]

In *Akhtar*, the father and mother of a daughter named Shazia divorced after four years of marriage. The father was required to pay child support but failed to do so. Suit was brought on behalf of the daughter against the father for recovery of unpaid sums, to which the father counter claimed under the *Guardians and Wards Act* seeking custody of the minor on the grounds that since the mother had remarried, Islamic doctrine required that he assume custodial authority. The trial court dismissed the father's petition and held the child's interests were best served by

remaining in her mother's custody. The appellate court reversed on the grounds of Islamic legal doctrine: since the mother had remarried a person "who was a stranger to the minor" (i.e. not within the appropriate degree of kinship), the minor's should be in the custody of her father, her "natural guardian" (i.e. *walī*).[194] The mother successfully appealed to the High Court of Lahore, and the case was heard before the Supreme Court of Pakistan.

Elsewhere and much earlier than the *Akhtar* case, the Pakistani Supreme Court noted that the welfare of the child "means his material, intellectual, moral and spiritual well-being."[195] The Supreme Court in *Akhtar* recognized that the main issue concerned whether and to what extent the child's welfare is captured by reference to Islamic legal rules on custody. The father argued that the remarriage exception was absolute and "cannot be defeated on the pretext of welfare of minor."[196] The Supreme Court of Pakistan, however, disagreed based on a more context-specific understanding of the child's welfare:

> The right of custody of minor[s] is not an absolute right rather it is always subject to the welfare of minor[s]. The Court, in light of the law and facts of the case, in the light of law on the subject and facts and circumstances of each case considers the question of custody on the basis of welfare of minors and there can be no deviation to the settled principle of law that in the matter of custody of minor[,] the paramount consideration is always the welfare of minor.[197]

> No doubt the general principle of Muhammadan Law is that a Muslim father being the natural guardian of the minor, has the preferential right of custody of [the] minor but this rule is always subject to the welfare of minor which is the prime consideration in determination of the question of custody... The Courts, subject to the welfare of minor, always determine the question of custody of minor child in the light of the governing principle of Muhammadan Law but mere fact that the father becomes entitled to get

> custody of minor or mother has lost the right of Hizant [i.e. *ḥiḍāna*], is not a sole criteria to decide the question of the custody of minor.[198]

In other words, not only does Pakistani case law emphasize the importance of the child's welfare, it determines that welfare by reference to the factual circumstances of the particular case. The Court's factual analysis revealed that the father's claim for custody was punitive. When the parties divorced, the mother took custody of their daughter and the father agreed to pay 600 rupees per month. Further, the custodial order stipulated that if the father failed to pay his child support, and the mother remarried, the mother would retain custody of the child. In other words, the parties negotiated a settlement that bypassed the remarriage exception in Islamic law. The father failed to pay child support, which prompted the original suit. Rather than admitting his failure or making back-payments, the father counter-claimed for custody. The court was cognizant of the fact that the father "neglected his minor daughter so much so he did not even bother to discharge his legal and moral duty of payment of her maintenance allowance."[199] That he now wanted custody of her, under these circumstances, raised the Court's suspicion of the father's motives.

In addition to giving primacy to the child's welfare, Pakistani law recognizes that the child may be in the best position to determine his or her own interests. Section 17(3) of the *Guardians and Wards Act* allows Pakistani courts to consider the minor's preference when determining custody, provided that "the minor is old enough to form an intelligent preference."[200] Determining that threshold age, however, is unclear. In *Rukhsana Malik v Abdul Aziz*, subsequent to a divorce, the custodial mother had remarried and the father sought custody of his teenage sons who were then in their mother's custody. The High Court of Lahore ruled that the minors had reached the "ages of discretion"; indeed, in the case of the eldest son, the court held that custody "cannot be given against his will".[201] While the eldest son was permitted to determine the extent of his relationship with his father, the court required the younger son to meet with his father periodically.[202]

The cases analyzed above have involved domestic disputes between parties who both reside in Pakistan. They have been analyzed here in order to show the central role of "best interests of the child" in Pakistani case law, even to the point of overriding historical doctrines of Sharīʿa. The issue of international child abduction, however, poses a different set of challenges, some of which require more diplomatic efforts than merely legal.

In recent years, for instance, Pakistan established a special judicial memorandum of understanding between Pakistani and United Kingdom judges known as the UK-Pakistan Protocol on Children's Matters (2003). According to Justice Tassaduq Hussain Jillani, of the Supreme Court of Pakistan, the Protocol lays out basic principles that Pakistani judges are to consider when faced with a custody issue involving a British parent with a custody order from a UK court. As he wrote in The Hague Conference's *Judges' Newsletter on International Child Protection*:

> If the child is removed without the consent of the parent with a custody order from the court of the child's habitual place of residence, the judge of the country to which the child has been removed shall not ordinarily exercise jurisdiction over the child, save in order to return the child to the country of his habitual residence.[203]

Furthermore, he wrote that despite not having any bilateral arrangements with the United States, in one Pakistani case, a mother from the United States with a custody decree from a New Jersey court, was awarded custody of her children by a Pakistani judge. This single instance, though, should not be regarded as determinative of future legal outcomes. Rather, in that case, the New Jersey custody order had less to do with awarding the mother custody, and more to do with finding the father guilty of abduction under Pakistani law.

The United Kingdom-Pakistan Protocol has its limits, however. In the same issue of *The Judges' Newsletter*, the Right Honorable Lord Justice Mathew Thorpe, (then) Judge of the Court of Appeal and Head of International Family Law at the

Royal Courts of Justice in London (United Kingdom) stated that the Protocol does not provide any real guarantee of effective redress for UK citizens seeking the return of their children to the United Kingdom. He wrote:

> the most serious deficit in the function of the Protocol lies not in the United Kingdom but in Pakistan. As was emphasised by the judicial delegation which the Chief Justice brought to London in February 2006 it is vital that the Protocol be incorporated in the domestic law of Pakistan. In contrast to the position in the United Kingdom the principles underlying the Protocol are not of general application in the courts of Pakistan in transnational cases. There is abundant anecdotal evidence that judges in the District Court in Pakistan, and even in the High Court, question the force and effect of an agreement reached between the Senior Judiciary rather than between our respective Governments. Indeed we have as yet to identify any decided case in Pakistan in which the judge has expressly applied the Protocol as the foundation of judgment. Hopefully as soon as circumstances permit plans for the delivery of a focused conference in Islamabad can be reopened.[204]

Notably, Justice Jillani did not disagree with Lord Justice Thorpe.

F.3. Qatar

The State of Qatar is an unusual country in the Gulf. Though its neighbours such as Saudi Arabia are often associated with highly patriarchal forms of Islamic law and practice, Qatar has created a reputation for bucking certain trends. With its backing of *al-Jazeera,* its efforts to host international conferences, its investment in education and research development, and its initiatives to engage the international community,[205] it sits in an uneasy position as a country that negotiates between traditional attitudes and cultures, on the one hand, and, on the other, a cosmopolitan outlook. And in the area of women's rights, some even view Qatar as a "beacon of light...in the Middle East."[206] As Lynn Welchman has written, new family law statutes in the Middle East and North Africa, such as

Qatar's, have sought to extend a woman's custodial rights beyond what were provided in traditional Islamic legal doctrines (*fiqh*). In other words, as much as they may draw upon pre-modern Islamic legal doctrines, Qatar's legislative efforts extend the scope of women's custodial rights. "In addition, they have increasingly included statutory references to the concept of the 'interest of the child' on which the judge may modify...parts of the law, including primary allocation of custody rights."[207]

Under the Constitution of Qatar (issued in 2004), Islamic law is an official source of law for legislation (Art 1). But what this means, as would be the case in any constitutional provision, is a subject of further analysis into legislation and judicial determinations. In other words, this provision by itself means very little and cannot be taken on face value to imply anything with respect to whether or not the full scope of pre-modern *fiqh* rules are or are not incorporated into the state's legal infrastructure.[208] Article 35 of the Constitution provides for the equality of people before the law, regardless of gender, origin, language or faith. Indeed, the theme of equality between men and women was a theme expounded upon by Shaykha Muʿza bt. Nasser al-Misnad, the wife of the former emir of Qatar, Ḥamād b. Khalīfa Āl Thānī, who in 2013 handed leadership to their son Shaykh Tamīm b. Ḥamād Āl Thānī. As Bahry and Marr have said, Shaykha Muʿza played a "pivotal role in improving conditions for Qatari women, especially in education. Most important, she has provided an example of a woman who is gradually stepping out into the public domain...to participate in turning Qatari society in a more modern and liberal direction."[209] Moreover, under the reign of the previous Emir, the legal system was reformed in various ways to create a more egalitarian image of the state.

Among the formal developments in Qatar are a series of reforms (legislative and institutional) to the regime of family law. Prior to 2006, parties to a marriage would have taken their family disputes (e.g., divorce and custody) to a court of first instance (*al-maḥkama al-ibtidāʾiyya*) that, under Law No. 10 of 2003, had

jurisdiction over family law matters (*masāʾil al-usra*).[210] However, in 2006, Qatar issued its first family law statute. Many of its provisions parallel those in found in the model Personal Status Law issued by the Gulf Cooperation Council, known as the Musqat Document (*wathīqat musqat*).[211] Qatar's *Family Law Act*, Law No. 22 of 2006 (QFLA) represents its first attempt at a comprehensive family law statute. Drafted in 2000 by a committee led by Qatar's Sharīʿa court, with the support of the Supreme Council for Family Affairs,[212] the QFLA was promulgated in 2006 after considerable debate on its various provisions. According to Qatar's state report to the Committee on the Elimination of Discrimination Against Women, "no law has ever been discussed as extensively as the Family Act."[213] Lynn Welchman noted that Qatari women were actively involved in the act's development: "In Qatar, where the drafting committee was constituted of judges, the circulation of the resulting draft provided a forum for review and intervention *inter alia* by Qatari women, with the governmental National Committee for Women's Affairs submitting amendments for the consideration of the drafting committee."[214]

The 2006 law contains 301 articles,[215] and covers the following: marriage, dowry, maintenance, separation, custody, and wills and inheritance.[216] Article 3 of the QFLA provides that the dominant position (*al-raʾy al-rājiḥ*) of the Ḥanbalī School of law[217] is to be followed when the statute is silent on a personal status issue. However, if no prevailing Ḥanbalī position exists on the issue under consideration, the judge may apply rules from the other Sunnī schools of jurisprudence.[218]

Interestingly, the QFLA only applies to "those subjected to the Hanbali School of law" (*ʿalā man yuṭabbiqu ʿalayhim al-madhhab al-ḥanbalī*). Others, including Muslims subscribing to other schools of jurisprudence and non-Muslims, do not fall under the purview of the QFLA.[219] Non-Muslims, in particular, have special provisions on family law issues. That said, "the provisions of the [*Family Act*] apply if the parties so request it or if they do not share the same religion or denomination."[220] How and to what extent Muslims following other schools of jurisprudence may opt out of the *Family Act*'s provisions is unclear.[221]

Custody in Qatari law involves both physical custody (*ḥiḍāna)* and guardianship (*wilāya*). As addressed above, the former concerns the custodial parent who has physical custody of the children. The latter involves overall responsibility for the wellbeing of the children, in particular financial responsibility. The QFLA defines custody (*ḥiḍāna*) in terms of preserving and supporting the child (*ḥifẓ al-walad*), raising and educating him (*tarbiyyatuhu wa taqwīmuhu*), and caring for him in terms of what upholds his interests (*raʿāyatuhu bi mā yuhaqqiqu maṣlaḥatahu*).[222]

The QFLA provides that custody lies with the mother until her children reach certain stipulated ages. For boys, the age is 13 year old; for girls, it is 15 years old (Art 173). However, though the mother's presumptive custody ends once her children reach these ages, she can nonetheless retain custody for a period of years thereafter. Article 173 provides that even after children reach these ages, a judge may award the mother continued custody of her children if doing so is in their best interests (*maṣlaḥat al-maḥḍūn*). This extended custody will continue for boys until they reach 15 years of age, and for girls until they marry. Alternatively, with the approval of the disputing parties, the judge can allow the children to choose their custodial arrangement.

For the mother to retain custody, she must fulfill certain conditions. The statute lists various conditions that anyone (male or female) must satisfy in order to exercise *ḥiḍāna,* such as having reached the age of majority (*bulūgh*), being mentally competent (*al-ʿaql*) and in good health, and so on.[223] But a woman exercising *ḥiḍāna* must also meet an additional condition, one that is taken straight out of the pre-modern *fiqh* tradition. Namely, she must not remarry someone who would fall outside the requisite scope of her children's kinship network (*zawj ajnabī ʿan al-maḥḍūn*).[224] Interestingly, however, the statute does allow a court to make an exception to this condition, where doing so supports the child's interests (*khilāf dhālik li maṣlaḥat al-maḥḍūn*).[225] Moreover, the QFLA stipulates that if a male exercises *ḥiḍāna,* he must share the child's faith, and that he must share his

custodial responsibilities with a woman from his family who can assist in fulfilling the various requirements of exercising *ḥiḍāna*.[226]

The pre-modern tradition revealed a dispute about whether the custodial mother also had to be Muslim if she were to exercise *ḥiḍāna* over a Muslim child. The QFLA preserves a woman's custodial authority even if she is not a Muslim. Article 175 states that as long as she is not an apostate from Islam (*murtadda*), a non-Muslim woman retains her claim to *ḥiḍāna*. However, echoing one line of pre-modern *fiqh* analysis, the period of *ḥiḍāna* is determined by reference to when the child develops the capacity to understand what faith and religion mean (*ḥattā yaʿqilu al-ṣaghīr al-adyān*). However, the statute permits the non-Muslim woman to retain *ḥiḍāna* of a child beyond this age as long as there is no fear that the child might pursue a faith other than Islam. In either case, though, her custodial authority does not exceed the child's seventh birthday.[227]

Notably, the above discussions of the QFLA, when juxtaposed with the pre-modern *fiqh* debates above, showcases how the language of "best interests of the child" finds its way into modern legislative enactments in the region. Indeed, this focus on the child's interest is among the novelties of the QFLA. As Welchman has written, consideration of the child's interests "is also increasingly required in codifications across the region in assessing the otherwise normative assignment of the function —or right— of custody to an identified succession of relatives."[228] The emphasis on the child and his or her best interests is further evident in Art 166, which provides that "custody is a right shared between the custodial agent and the child, but the right of the child is stronger" (*al-ḥiḍāna ḥaqq mushtarak bayna al-ḥāḍin wa al-ṣaghīr wa ḥaqq al-ṣaghīr aqwā*).[229]

When applying the best interests of the child in custody determinations, the QFLA offers statutory guidance to the judge. Article 170 provides that to uphold the interests of the child (*maṣlaḥa al-maḥḍūn),* the judge must consider, for instance:

- The custodian's affection (*al-shafaqa*) for the child and ability to raise him or her;
- The provision of a sound environment in which the child can be brought up and 'protected from delinquency',
- The ability to provide the best education and medical care, and
- The ability to prepare the child in terms of morals and customs for the time that he or she is ready to leave the custody of women (*ʿinda bulūghihi sinn al-istighnāʾ ʿan ḥiḍāna al-nisāʾ*).[230]

The interests of the child feature prominently in two points of Qatari law that echo pre-modern *fiqh* debates, namely the debates on relocation of the child and the remarriage of the mother. These two issues are intertwined in the QFLA. Article 180 defines the custodial residence (*makān al-ḥiḍāna*) as the town of the one who exercises *wilāya* over the child (*balad walī al-maḥḍūn*). The exception to this rule is the situation of a mother (or other female custodian)[231] who remarries but nonetheless resides in Qatar. In such a case, the judge has the discretion to preserve the mother's custody over the child, as long as doing so upholds the interests of the child.[232] In other words, as long as the parties remain in Qatar, the woman exercising custody can still do so even if she remarries someone, whether or not he is within the prescribed kinship relations of the child.

Article 183, however, addresses the instances when a person's custodial power will be rescinded. Of the three situations, the third of is of particular interests here. It provides that custodial authority shall be rescinded when the father or *walī* is unable to uphold his responsibilities toward the child (*wājibāt al-maḥḍūn*), such as education and training, because the mother (i.e. *ḥāḍina*) has, without the *walī's* permission, taken up residence with the child in a town (*balad*) that is hard to reach. However, even this situation is subject to judicial scrutiny and override if the mother's continued custodial authority upholds the child's benefit (*maṣlaḥat al-maḥḍūn*).[233]

Thus far the analysis has focused on a dispute between people who live in Qatar but may relocate to different regions *within* the country. The statute further addresses the possibility of international travel by either party, and thereby of the children. To control for such travel, Article 176 states that the legal guardian (*walī*) shall keep and hold the child's passports (*li al-walī al-iḥtifaẓ bi jawāz al-safar*). However the court may permit a woman exercising custody (*ḥāḍina*) to hold the passports if it the *walī* may stubbornly refuse to give them to her when she needs them. Aside from the passports, though, the woman exercising custody holds all other papers and documents that are specific to the child, such as birth certificate and so on.[234]

This is not to suggest that a child cannot travel, or that a mother exercising *ḥiḍāna* cannot travel internationally with her children. But it does raise a question about who has the greatest license to travel with children, father or mother, a male guardian or a female custodian. Article 185 addresses specifically the situation of a mother who wishes to travel with her children. As long as her reasons for doing so are reasonable (*sabab maʿqūl*), she should be free to do so, unless there is possible harm that might fall upon the child (*ḍarar bi al-maḥḍūn*).[235] If the *walī* prevents her from such travel, she can petition a court, which can authorize her travel if it seems that the *walī* has exercised his authority recklessly or unjustly.[236] If the woman exercising custody (e.g. a mother) is a foreigner (*al-ḥāḍina ajnabiyya*), and her travel is temporary (*ʿaraḍī*) and not for establishing residence in her own country (*li ghayr iqāma ilā waṭanihā*), then the judge can seek a guarantor who can ensure that she will return with the child. But if the *walī* has reasonable grounds (*mubayyin asbāb maʿqūl li dhālik*) to fear that the foreigner exercising custody and traveling abroad might not return with the child, a court can prevent her from traveling with the child.[237]

The above analysis focused on custodial mothers. The male guardian, on the other hand (i.e., the father or grandfather) can travel with a boy-child who has reached the age of seven for a reasonable amount of time. If the *walī* and custodial agent

(e.g. mother) disagree on the amount of time, they can petition the court to decide the matter.[238] But other than the father and grandfather, no other *walī* or paternal relative can travel with the child during the period of *ḥiḍāna* without the custodial parent's permission. If the custodial parent refuses, a judge can nonetheless authorize such travel if there are good reasons to permit it.[239] In other words, if a Qatari mother wants to travel with her child, she needs to get permission from the child's father, who is the presumptive *walī*. If the father wants to travel with his son, who is above the age of seven (and thus still under the custodial care of his mother), the father can do so by petitioning a court to override the mother's refusal.

Part III: Islamic Law, Private International Law, and the Modern State System

THE PROBLEM IS NOT CIVILIZATIONAL; IT IS JURISDICTIONAL

As much as it may be tempting to reduce the contest over accession to the Abduction Convention to the "clash of civilizations" rhetoric, this report suggests that this Manichean view is unduly reductive. Rather, the real difficulty is the absence of effective private international law statutes in Muslim majority countries to address cases involving foreign elements. The problem is not civilizational; it is jurisdictional. As William Duncan reflected during the Third Malta Process, parties on all sides of this issue must establish "agreed rules on jurisdiction." In particular he wrote, "[i]t is not enough to say that we should respect each other; or that we should recognise each other's judgements, unless we can agree on a common jurisdictional standard."[240] As much as Muslim majority countries might fear that the 1980 Hague Abduction Convention subverts their domestic personal status law, their fear is overstated and based on a misunderstanding of private international law more generally. Private international law generally, and the 1980 Hague Abduction Convention specifically, create a bypass around domestic substantive law in the interest of preserving and enhancing international cooperation. Such legal devices are not designed to counter or contradict domestic law. Rather, private international law offers a legal framework that enhances international cooperation without requiring domestic judges to play the role of foreign diplomat when cases involving a foreign element (party or legal issue) come before their court.

RATHER THAN REQUIRING SUCH STATES TO MODIFY OR REFORM THEIR PERSONAL STATUS ACTS, ACCEDING TO THE ABDUCTION CONVENTION AND PROTECTION CONVENTION WOULD SIMPLY REQUIRE THE JUDGE TO IDENTIFY THE EXISTENCE OF FOREIGN ELEMENTS IN THE CASE (E.G. FOREIGN ENFORCEMENT ORDER, OR FACTUAL DISPUTE ABOUT HABITUAL RESIDENCE), AND THEREBY APPLY A DIFFERENT LEGAL REGIME INFORMED BY THE STATE'S TREATY OBLIGATIONS AS IMPLEMENTED INTO DOMESTIC LAW. WHETHER SUCH 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.

The more complicated, though more easily rectified, issue for Muslim majority countries is to recognize that the substantial absence of a premodern discourse on private international law in Islamic law has been principally responsible for obstructing such countries from acceding to the Abduction Convention and creating domestic legislation that directs judges to apply, in limited cases, a different legal regime than their Personal Status Law. Rather than requiring such states to modify or reform their personal status acts, acceding to the Abduction Convention and Protection Convention would simply require the judge to identify the existence of foreign elements in the case (e.g. foreign enforcement order, or factual dispute about habitual residence), and thereby apply a different legal regime informed by the state's treaty obligations as implemented into domestic law. Whether such 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 section offers preliminary reflections on that Islamic past. In particular, it shows that the reality of international cooperation in this area of law—and the mutual responsibility between states that it implies—changes the imagined political space that informs the content of the law. Pre-modern Muslim jurists imagined a political space of empire as they developed their *fiqh* on a wide range of

issues. Their legal rulings on issues of jurisdiction, as will be suggested below, were informed by the political assumptions they made about the legitimacy and respect due to political and legal Others (e.g. foreign jurisdictions). Indeed, the absence of a robust private international law regime in early Islamic law is perhaps best explained as resulting from an imperial logic that viewed the political Other as opponent or soon-to-be-subdued, rather than with the formal mutuality, equal status and respect that characterize the modern state system. As empire has yielded to the international state system, with its fundamental principles of equality, sovereign integrity and non-intervention in the internal affairs of each other, modern Muslim state elites must reconsider the implications of this relatively novel political formation in the history of Islamic thought on those portions of their domestic law where Islamic law provides legislative content. In the case of international child abduction, this report suggests that such countries ought to carve out a narrow legal space that limits the application of domestic Personal Status Law in the interest of international cooperation in a system that premodern jurists did not (and perhaps could not) imagine. In other words, far from suggesting that Muslim majority countries ought to revise their personal status codes, the aim here is to suggest that personal status codes can be framed by a more dynamic conflicts of law regime that anticipates the reality of contemporary multi-national or multi-faith families and the law needed to effectively regulate, across borders, aspects of those relationships.

A. The Dominance of Empire, the Absence of States

Muslim jurists had a monist, imperial vision of the enterprise of governance, which was captured by reference to Islamic lands as "the abode of Islam" (*dār al-Islām*). Everything outside of that was the world of not-Islam or the *dār al-ḥarb* (lit. abode of war). Pre-modern Muslim jurists held an ideal of governance as led by a single authority, the caliph. As H.A.R. Gibbs argued, pre-modern Muslim jurists imagined a governing enterprise "in which all political authority was centered in the caliph-imām, and no authority was valid unless exercised by delegation from him, directly or indirectly."[241] As much as the empire might expand, so it was argued, it was always to be ruled by a single caliph. Remarking on the early history of the Islamic ruling authority, Muhammad Hamidullah noted, "[a]lthough the Muslim empire soon spread far and wide outside its birthplace, Arabia, yet practically for more than a hundred years the unity of the Muslim remained intact."[242]

The possibility that the Muslim world might be fractured into territorial polities was a form of non-ideal politics that jurists considered unworthy of the Islamic mandate. That non-ideal politics became a reality in the 10th century, when three rulers proclaimed themselves caliphs of the Muslim world—the ʿAbbasid caliphate in Baghdad, the Fatimid caliphate in Egypt, and the Umayyad caliphate in Spain. Moreover, caliphates such as the ʿAbbasid one in Baghdad began to lose effective control of its lands as princely rulers gradually gained and exercised greater control of the once-caliphal territory, rendering the caliph more a symbolic office holder than effective executive.[243]

The juristic imagination of a monist, imperial governance system ruled by a single caliph ultimately confronted regional fracturing of political authority. In some cases, jurists distinguished between spheres of authority held by different office holders, whether caliph or sultan.[244] In other cases, they held that regional princes exercised legitimate claims to authority by virtue of caliphal delegations of authority, or by virtue of their adherence to the Sharīʿa as devised by jurists.[245]

But what remains important for our purposes is to appreciate the significance of this monist, imperial vision as an ideal politics that renders contemporary state practices as non-ideal forms of governance. The political thought of the pre-modern jurist al-Juwaynī (d. 1085) offers an example of this imperial vision. For al-Juwaynī, the singular caliphate represented the aspirational model of leadership for the Muslim *umma* writ large. He conceived of its legitimacy by reference to historical precedents, and a theory of politics that had to check against princely rulers whose authority was based more on their coercive force.

Al-Juwaynī, who lived in a context of three caliphal contenders, argued against the appropriateness of having more than one caliph. Al-Juwaynī stating that in cases where a single *imām* can observe, manage, and control Muslim lands from the east to west, no second *imām* is permitted.[246] Reflecting on the post-prophetic history of the first four caliphs of Islam, al-Juwaynī claimed that the *imāmate* is singular, not plural; any other position is based on ignorance (*baʿīd al-fahm*).[247] He believed a single caliph was necessary to maintain social order: "polities become unstable as princely rulers become partisan, opinions diverge, and desires compete."[248] The caliph, on the other hand, offers a uniting thread by which to guide regional rulers. If regional rulers "do not have a rope to follow, [and] a particular aim to which to adhere, they will compete, become insolent, struggle with each other, vie against each other, and indulge the desires for conquest and regal authority. They will jockey with each other without paying any heed to the ruin of the multitudes and masses."[249]

Although al-Juwaynī was unflinching in his advocacy of the monist, imperial political ideal, he also recognized it as a form of ideal theory from which reality all-too-often departed. "It may be," he suggested, "that a group of people reside on a portion of land to which the [caliph's] oversight does not reach."[250]

But even in this case, al-Juwaynī rejected the possibility of two caliphs. His rationale, more than his specific answer, is especially important for appreciating

the power and significance of this imperial vision on Muslim jurists' imagination. He held that a governor (*amīr*) may rule over certain regions. But the *amīr* would not assume the title of caliph. Rather, the office of the *amīr* is an administrative position that provides order and stability for Muslims outside the control of the ruling caliph. Moreover, if there is no caliph, and instead Islamic lands are divided into smaller units—such as perhaps, the modern state system—al-Juwaynī argued that the people of those regions can appoint *amīrs* to govern each area. In this case, the imperative to appoint an *amīr* is a matter of necessity (*ḍarūra*), for without an *amīr,* chaos prevails. But at no point can the *amīr(s)* presume to hold the title of caliph. There may be many *amīrs,* but none can claim to be the caliph, since the latter is strictly understood by al-Juwaynī as the one around whom all Muslims are linked and united. As al-Juwaynī said: "I do not reject the permissibility of establishing [two *amīrs*] according to what is needed, and enforcing their commands in accordance with the demands of the law. But [that] is a time without an *imām*[251] . . . If the *imām* is agreed upon, then the two amīrs must submit to him."[252] Territorial leadership does not render one an *imām*. Rather the office of the *imām* has a significance that goes beyond mere control of territory; the office is about community leadership in a manner that transcends territorial boundaries.

This review of al-Juwaynī's monist imperial outlook illustrates how he negotiated between the ideal and the real, the aspirational and the pragmatic, the first best and the second best. His theory accounts for the realities of regional polities, and for the exercise of power for the sheer purpose of order and stability. In his doctrine of the *amīr,* al-Juwaynī revealed both his willingness to be pragmatic, as well as his commitment to an ideal theory that cautions against granting too much legitimacy to multiple sovereign powers. The plurality of polities is a reality he could not avoid. But their existence should not be mistaken as evidence of the legitimacy of their authority over the *umma*. Ruling a territory is one thing; governing and guiding the Muslim *umma* is another. The latter carries with it a type of legitimacy and authority that the former cannot and does not have.

Certainly the *amīr* has coercive authority; but that is different from the kind of sovereignty the caliph exercises in al-Juwaynī's theory. In this sense, al-Juwaynī is not against political pluralism but instead is cautious to ensure that the various claimants to worldly, territorially-based authority not mistake the circumstances of their power and dominance for the constitutive features of legitimacy and authority that extend beyond the borders of their control.

The ideal theory of an imperial monist form of governance directly affected how jurists imagined legal doctrines, and the possibility of jurisdictional conflict. If legitimacy runs from the singularity of the caliphal office and not from the *amīr* or *sultan*, then how might this affect the way jurists imagined the existence of competing jurisdictions? In a context of diverse regional authorities, Muslim jurists crafted a legal tradition that relied on an imagined imperial mode of governance. Doing so allowed them to create unity among Muslims through law where politics had failed to create such unity. However as the next section will show, unity through law precluded their recognition of competing jurisdictions of law that did not fall under Islamic suzerainty. Certainly there may be different regions with different rules. But the legitimacy of those legal rules was premised upon whether the region itself fell inside or outside the imperial Muslim regime. A Manichean world-view of politics, we argue, informed a legal tradition that did not make substantial allowances for multiple, equally legitimate, but at times competing jurisdictions of law.

B. From Manichean Politics to Manichean Jurisdictional Rules: The Foreign(er) in an Islamic Court

To appreciate how an imperial vision of Islamic law precluded a robust private international law regime requires understanding how pre-modern Muslim jurists classified possible litigants. There were four possible categories: Muslim, *mustaʾmin, dhimmī*, and *ḥarbī*. Each of these terms will be described below, after which will follow a brief analysis of the jurisdictional issue they posed to jurists.

"Muslim" denotes the person who is most closely considered part of the Islamic "us" or "we" for the purposes of Islamic law and its application. Whether the Muslim is located inside the Muslim polity or outside, he or she falls under the legal authority of Sharīʿa. There are of course differences among Muslims—e.g., gender or age—that might alter the degree to which any particular person is subject to the law fully.[253]

Dhimmī refers to the non-Muslim permanent resident in Muslim lands. Premodern jurists developed a wide range of rules to govern the affairs of these permanent residents. Those rules are often referred to as the *dhimmī* rules. According to Islamic legal doctrines, the *dhimmīs* would enter a "contract of protection" (whether express or implied) with the ruling Muslim authorities. That contract permitted them to maintain their distinct faith traditions and to live in peace under Muslim rule. Under the terms of this contract, *dhimmīs* agreed to live by certain conditions in return for peaceful residence in Muslim lands. The *dhimmī* rules were those conditions. Hence, the *dhimmī* rules were part of the political compromise made between the ruling Muslim authorities and the minority religious groups, and which rendered the latter as both insiders and outsiders to the Muslim polity.[254]

Ḥarbī refers to the person who resides in what jurists called the *dār al-ḥarb*, literally translated as the Abode of War. As many scholars have noted already, Muslim jurists viewed the world in a nearly dichotomous fashion, comprising the Abode of War and the Abode of Islam (*dār al-islām*).[255] Many also write about a third region, namely the Abode of Treaties (*dār al-ṣulḥ*), or regions that have treaties of peace with the Muslim empire.[256] On first appearance, the language of these terms seems to imply a state of perpetual war, and by implication, imperial expansion. Indeed, those implications have been used by many to characterize Islam and Muslims as intolerant of religious others;[257] as incapable of enjoying

meaningful peace with other nations and peoples;[258] and as set in an interminable clash with the non-Muslim West.[259] However, from a legal perspective —and with specific interest in matters of jurisdiction— the *ḥarbī* is the quintessential foreigner who lives under a foreign law, and whose presence in an Islamic court in Islamic lands posits a foreign element that we in the contemporary context might frame in terms of jurisdiction and private international law. For that reason, this report will depart from a literal translation of *ḥarbī* and instead cast him or her as a foreigner subject to a foreign law.

The final term, *mustaʾmin*, refers to someone who has a temporary license (*amān*) to reside in a land not his own. The *amān* could be understood as the pre-modern analog to a visa. "Technically, the term *amān* signifies a safe conduct or pledge of security given by a Muslim to a non-Muslim alien upon the termination of hostilities or, more often, to an outsider visiting the Abode of Islam (*dār al-Islām*) for a limited period of time."[260] Generally, any *ḥarbī* who wishes to enter Muslim lands can do so safely as long as he or she has an *amān*. As much as the *ḥarbī* was the quintessential outsider to the world of Islam, the *ḥarbī* might still engage in various sorts of relationships with people in the Abode of Islam. The *ḥarbī* may be a foreigner or a stranger, but that did not preclude relationships that might have attendant legal dimensions to them, such as contracts of trade and exchange.

Muslim jurists, as they developed legal doctrines, imagined an Islamic empire seeking to expand on the basis of a universalist message that made the entire world the potential (and aspired to) dominion of an Islamic imperium. They divided the world into what we might call a "domestic" Islamic jurisdiction (e.g. *dār al-Islām*) and a foreign jurisdiction (e.g. *dār al-ḥarb*), and imagined potential litigants as occupying those jurisdictions with different capacities and status. Consequently, as they determined whether an Islamic court had jurisdiction over a case, the status of the litigant in relation to the Manichean imaginary of the world informed their decisions. To explore this complex dynamic, we review legal disputes on hypotheticals that involve a foreign element (either foreign law or a foreigner)

before an Islamic (domestic) court. The examples are drawn from a premodern treatise that many consider a work on "international law", specifically the Ḥanafī jurist al-Sarakhsī's (d. 483/1090) commentary *Sharḥ Kitāb al-Siyar al-Kabīr*. This particular text is a commentary on the early Ḥanafī text *al-Siyar al-Kabir* by Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805). It is offered here as an example of the nature of the pre-modern debates that bear upon the present inquiry in private international law.[261] Given space limitations in this report, two examples will be addressed below for illustrative purposes. The two examples reflect distinct areas of law where foreigners and their foreign law might come before a Muslim judge in the Islamic empire. The first area concerns marriage law, and whether the foreign status (*ḥarbī*) of the one of the parties precludes the court from assuming jurisdiction. The second area concerns trade and contract law, and whether a judge sitting in the Islamic empire can adjudicate the terms of an agreement made in foreign lands.

The Marriage Law Example

Upon Whom is Islamic Law Operative?

Hypothetical 1: Suppose a *ḥarbī* husband had two wives who were also sisters. Subsequently the husband converted to Islam, as did his wives. Under Islamic law, while a man can have up to four wives, he cannot marry sisters simultaneously, thus putting this new Muslim husband in a legal predicament with respect to his two wives. Ḥanafī jurists disagreed on the resolution. One approach, associated with the jurist Abū Ḥanīfa, focused on the nature of the marital contract. If the original marriages were conducted pursuant to a single contract, the entire contract is void and the marriages to the two sisters are invalid. But, if the original marriages were contracted through two separate contracts, then the one whom he married first will remain his wife, and the marriage to the second sister is void. The second approach, propounded by al-Shaybānī, was to require the husband to

choose which wife to retain and which to divorce, without reference to the marital contracts.

To harmonize the difference within the Ḥanafī School, al-Sarakhṣī related a second hypothetical about the *dhimmī*. Suppose a *dhimmī* husband residing in Islamic lands was married by separate contracts to two sisters (neither of whom were Muslim at the time of marriage). Later all three of them convert to Islam, and thus raise the question of the marital restriction. According to al-Sarakhsī, the *dhimmī* would be held to Abu Ḥanīfa's first-in-time rule, while the *ḥarbī* would exercise a choice pursuant to al-Shaybānī's rule. The reason for the discrepancy between the *dhimmī* and *ḥarbī* in this case had to do with what it means to be obligated under the law. The *dhimmī* entered into a contract of protection (*ʿaqd al-dhimma*) that permitted him to retain his distinctive faith and remain secure in Muslim lands. That contract also required him to abide by the laws of Islam. In other words, the *dhimmī* husband was always and at all times subjected to Islamic law (*li anna al-dhimmī multazimu aḥkām al-islām*) when he got married to the two sisters through the two separate contracts. Islamic law prohibits being married to two sisters simultaneously, and thus the second contracted marriage was legally void from the outset, even though none of the parties were Muslim when they married. The *ḥarbī* on the other hand was never obligated to the laws of Islam (*fa amma ahl al-ḥarb fa hum ghayr multazimīn ḥukm al-islām*) at the time he entered the separate contracts of marriage with the two sisters. Consequently, for the *ḥarbī* who later converted to Islam, he had the power to simply choose which wife to divorce: the original contracts were never subject to the laws of Islam, the second contract was not void at the outset, and the issue of validity and invalidity only arose because the *ḥarbīs* converted to Islam.

Of particular importance in this discussion is the way in which jurists such as al-Sarakhsī understood the scope to which Islamic law was applied and to whom. The foreigner was never obligated to the laws of Islam. As a foreigner, he was the

quintessential outsider who was governed by a different, foreign law—Sharīʿa's Other—which precluded any *post hoc* application of Sharīʿa upon him.

When can an Islamic court assume jurisdiction over a case with a foreign element?

Hypothetical 2: Suppose a *ḥarbī* married couple temporarily entered Muslim lands, such as for trading and business purposes. Neither the husband nor the wife were Muslim, but the wife was a Jew or Christian (*min ahl al-kitāb*). Later, the husband converted to Islam, while the wife did not alter her faith. After a certain period, the wife wanted to leave the Islamic lands to return to her home in foreign lands (i.e. the *dār al-ḥarb*), but the husband refused. According to al-Sarakhsī, the wife cannot leave and the husband's wishes are vindicated. Drawing upon a highly gendered mode of legal reasoning, he argued that under Islamic law the wife is presumed to follow the husband (*tābiʿa li zawjihā*), thus precluding separate travels. But this legal conclusion is only possible because the husband converted to Islam and thereby "domesticated" himself sufficiently for the court to take jurisdiction and apply Islamic law.

Suppose, on the other hand, the husband did not convert to Islam, and the wife, who wanted to return to her homeland over her husband's objection, said that they were never married at all. On these facts, al-Sarakhṣī precluded an Islamic court from taking jurisdiction of the case. "The judge does not judge between two temporary visitors in accordance with underlying claims that apply in foreign lands" (*fa lā yaqḍī al-qāḍī bayna al-mustaʾminayn bi ḥuqūq muʿāmala jarat fī dār al-ḥarb*).[262] In this modified scenario, two foreign elements appear. The first is the fact that both parties are deemed foreigners. The second is that the two are disputing whether they were ever married at all, by reference to a marriage that would have occurred in a foreign jurisdiction under foreign law. It is not simply that the two parties are foreigners, but also that their dispute relies on a legal

regime that is utterly foreign, and thus outside the purview of the Sharīʿa court in Islamic lands.

The Trade and Contract Law Example

Foreigners, Foreign Law, and Islamic Courts

Hypothetical 1: Suppose a sale of goods occurs in foreign lands between parties who are not Muslim. Later, all the parties convert to Islam and travel to Islamic lands. While residing in Muslim lands, the original purchaser finds a defect in the product he purchased. Can the purchaser claim that the contract was breached, return the defective property, and get his money back? According to al-Sarakhsī, in this case the Muslim judge in Islamic lands cannot take jurisdiction of the case because the transaction occurred in foreign lands Not only did the dispute originate in a foreign land, the contracting parties were not even subject to the laws of Islam when they entered the original agreement.[263]

Muslims in Foreign Lands and "Domestic" Courts

Hypothetical 2: Suppose two Muslims contract for an exchange of good while visiting foreign lands, and later upon their return to Islamic lands one of them filed suit against the other for breach of their agreement. According to al-Sarakhsī, the court can assume jurisdiction because Muslims are subject to the laws of Islam wherever they might be. Despite entering into the agreement in a foreign jurisdiction, the two parties' Muslim identity renders the foreign venue irrelevant for purposes jurisdiction. "Their [legal] situation in non-Islamic lands is like their [legal] situation in the lands of Islam" (*kāna ḥāluhumā fī dār al-ḥarb ka-ḥāluhumā fī dār al-islām*).[264] Whether in Muslim lands or non-Muslim lands, when Muslims engage in a transaction with each other, their actions remained governed by and subject to Islamic law (*fa al-muʿāmala fī dār al-ḥarb wa dār al-islām siwāʾ fī ḥaqq al-muslim li-annahu multazam ḥukm al-islām haythumā yakūnu*), such that a court in Islamic lands could take jurisdiction of their dispute,

wherever it originated.[265] In this example, we see the universalist ethos of an Islamic empire inform a jurisdictional rule concerning Muslims abroad.

Conclusions

In these two sets of examples, we consistently find a limit to an Islamic court's capacity to assume jurisdiction when a foreign element is present. That foreign element is not merely the fact that a particular person or claimant is foreign (i.e. a *ḥarbī*). Rather, the foreigner is presumed to be subject to a law other than the Sharīʿa, and the Muslim judge (*qāḍī*) is not the appropriate officiant to resolve the conflict and settle the dispute. Institutionally and substantively, the *qāḍī's* court is the wrong forum.

It is not the case that the *qāḍī* cannot *factually* inquire into a law other than Sharīʿa. Indeed, an early example from the Prophet Muḥammad's life attests to the fact that he adjudicated a matter of Jewish law concerning a case of two alleged adulterous Jews.[266] But his inquiry into the Jewish tradition was to determine, as a *matter of fact*, what the Jewish law on adultery was so that he could apply, as Muslim jurists argued, the Islamic law on adultery. The inquiry into Jewish law was not to be viewed as an elevation of a "foreign" law to the same or equivalent status of Sharīʿa.

The imperative to ensure the primacy of Sharīʿa (coded here as "domestic law") is consistent with al-Sarakhsī's judicial restraint exercised above in examples involving foreign law. If a *qāḍī* court is going to assume jurisdiction, an imperial logic demands that Sharīʿa be applied. If that was not possible, then jurisdiction should be denied. In other words, implicit in these hypotheticals is a zero-sum, Manichean conflict of laws regime that also tracks the Manichean world-view of the abode of Islam and foreign lands in the service of an imperial politics. Counterfactually, if a *qāḍī* assumed jurisdiction only to apply foreign law, the *qāḍī's* court would implicitly be serving the sovereign interests of a foreign regime, and thus recognizing its validity and legitimacy. Consequently, when al-Sarakhsī held

that courts must refuse jurisdiction in cases involving foreign elements, it is unlikely that the reason had to do with judicial incompetence or inability to know or understand foreign law. Rather, what was at stake was the sovereign integrity of the institutions of an Islamic empire, in particular its legal ones, as against all other foreign entities.

Ironically, this interest in the sovereign integrity of Islamic law and legal institutions is not unique to Islamic law. It is a feature of any domestic legal enterprise, which comes into stark relief when faced with yielding jurisdiction. The challenge, therefore, is to determine whether and to what extent issues of comity might also feature as part of the broader legal inquiry by judges when deciding about law and jurisdiction when a foreign law (the domestic law's Other) is at issue.

Conclusion: Developing a Jurisdictional Rule

….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 the relatively recent arrival of the inter-state system in Muslim majority regions, Muslims today must contend with a different political logic than that which animated pre-modern Muslim jurists when they developed legal doctrines on jurisdiction. Moreover, their doctrines on custodial authority can no longer presume that courts today can immunize themselves from the legal ordering principles of other, foreign jurisdictions. 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 without the kinds of exceptions that threaten to undermine the 1980 Hague Abduction Convention's automatic return mechanism. This works to the advantage of nationals of Muslim majority countries who travel with their families abroad for education or work. In this sense,

Muslim majority countries can explain their accession to the 1996 Protection Convention as fundamentally upholding the integrity of their legal system, which in turn protects citizens who travel abroad to take advantage of the global economic market.

- Muslim majority countries, which have not done so already, should subsequently accede to the 1980 Hague Abduction Convention despite the concerns about that Convention addressed in this report. 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 trade and development. For instance, Gulf countries such as Qatar, the UAW and Bahrain have a demographic challenge given the vast number of migrant labourers that outnumber ethnic nationals. These two groups inter-marry frequently, creating an increasingly complex mixed marriage phenomenon. Mixed marriages in the Gulf can become exceedingly complicated if the non-national spouse abducts children to countries outside the Gulf. Countries on all sides of this phenomenon (e.g. Gulf Countries, India, Pakistan, Bangladesh, The Philippines) all have an interest in protecting their nationals in those cases where employment and labour intersect issues of family and children.

  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.

- 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". That rule should instruct judges adjudicating custody issues with foreign elements (e.g. foreign enforcement order or factual claims of a foreign habitual residence) that they should not apply the prevailing Personal Status Law, but rather the domestic legislation that implements the Abduction Convention and/or Protection Convention. 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.

- *Second*, Muslim majority countries retain sovereign control and oversight of their Personal Status Law.

These first two objectives ultimately uphold the state's commitment to Islamic law and its recognition of the importance of international cooperation across a range of legal issues. Legal cooperation in this area requires a robust private international law regime. In the form of private international law instruments, that cooperation does not require a politically costly domestic process of legal reform of family law. 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, Latin America, Europe and others of a European cultural heritage to decide whether the concerns about Article 20 of the 1980 Hague Abduction Convention can be overcome in the pursuit of the Convention's universal aspiration. 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. But if it does not, then this will reveal the failure of the Abduction Convention to operate outside a European inspired cultural context. Consequently, if the international community is committed to the universality of the Abduction Convention, then once more Muslim majority countries accede to the Convention and implement it as suggested above, the political and moral onus will be on the Hague Conference states to decide whether and to what extent the Abduction Convention can overcome any of its possible European parochialisms.

- *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.

Notes

[1] Incidentally, 67 of the 76 members of the Hague Conference have ratified or acceded to the 1980 Hague Abduction Convention. See, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (accessed July 24, 2014). The 1980 Hague Abduction Convention uses the term ratification in a manner different as to how that term is normally understood in multi-lateral treaties. Under Article 37 of the 1980 Convention, ratification is limited only to those states who were members of the Hague Conference at the time of its 14th session. Turkey is the only Muslim majority State to have ratified the Convention. By the terms of Article 38, any other state (whether a member of the Hague Conference or not) may accede to the 1980 Hague Abduction Convention.

[2] The following Muslim majority States have ratified or acceded to the 1980 Hague Abduction Convention: Albania, Gabon, Guinea, Iraq, Kazakhstan, Morocco, Turkey, Turkmenistan and Uzbekistan

[3] For the Tunisian legislation, see Law No. 97 of 1998, which will be discussed below.

[4] J.J. Fawcett and J.M Carruthers, eds. *Cheshire, North & Fawcett [on] Private International Law*, 14th ed. (Oxford: Oxford University Press, 2008), 3.

[5] Fawcett and Carruthers, *Private International Law*, 5.

[6] Fawcett and Carruthers, *Private International Law*, 4.

[7] For an example of how a federal system complicates the private international law regime, see the discussion on the US implementation of the Convention on abolishing "legalization" of documents, George A.L. Droz and Adair Dyer, "The Hague Conference and the Main Issues of Private International Law for the Eighties," *Northwestern Journal of International Law and Business* 3 (1981): 155-210, 171-172.

[8] Droz and Dyer, "The Hague Conference," 201.

[9] Droz and Dyer, "The Hague Conference," 201.

[10] Fawcett and Carutthers, *Private International Law*, 5.

[11] Adair Dyer, "Report on international child abduction by one parent ('legal kidnapping')," in *A&D14 de la Quatorzième session: Tome III Elèvement d'enfants, Child Abduction* (The Hague: Hague Conference on private international law, 1982) (hereinafter *A&D14*), 9-58, 18.

[12] Dyer, "Report," 20.

[13] See for instance, Paul R. Beaumont and Peter E. McEleavy, *The Hague Convention on International Child Abduction* (Oxford: Oxford University Press, 1999), 8-9; Rhona Schuz, *The Hague Child Abduction Convention: Critical Analysis* (Oxford: Hart Publishing, 2013), 54-5.

[14] Beaumont and McEleavy, *The Hague Convention*, 9.

[15] Beaumont and McEleavy, *The Hague Convention*, 10.

[16] Dyer, "Report," 21.

[17] Dyer, "Report," 22.

[18] Dyer, "Report," 22.

[19] Dyer, "Report," 46.

[20] Schuz, *Hague Child Abduction Convention*, 18.

[21] Schuz, *Hague Child Abduction Convention*, 18; Dyer, "Report," 46.

[22] "Comments of the Governments on Preliminary Document No. 6: Preliminary Document No. 7 of September 1980)" *A&D14*, 232-3. It should be recalled that a Canadian delegate was a member of the initial team tasked with drafting a model Convention for delegates to consider. See also, Elisa Pèrez-Vera, "Report of the Special Commission," in *A&D14*, 177, who revealed the early concern that such a model could prolong legal proceedings to the detriment of the primary aim of speedy return of abducted children. On the early drafting history of the Convention, see Beaumont and McEleavy, *The Hague Convention*, 18.

[23] Dyer, "Report," 47.

[24] See for instance the remarks by Denmark, "Replies of the Governments," at 82.

[25] "Replies of the Governments to the Questionnaire: Preliminary Document No. 2 of February 1979," in *A&D14*, 112.

[26] Dyer, "Report," 48.

[27] Dyer, "Report," 48.

[28] Dyer, "Report," 48.

[29] "Conclusions drawn from the discussion of the Special Commission of March 1979 on legal kidnapping: Preliminary Document No 5 of June 1979," in *A&D14*, 165. See also Peréz-Vera, "Report of the Special Commission," 182.

[30] Pérez-Vera, "Explanatory Report," in *A&D14*, 431.

[31] We would like to thank Mariana Mota Prado for introducing us to this term, though our use of it may not accord with her own utilization of this term in the context of law and development studies.

[32] Pérez-Vera, "Report of the Special Commission," 178.

[33] Pérez-Vera, "Report of the Special Commission," 178.

[34] "Conclusions drawn from the discussion of the Special Commission of March 1979 on legal kidnapping: Preliminary Document No 5 of June 1979," in *A&D14*, 163-4.

[35] Perez-Vera, "Report," 202.

[36] Perez-Vera, "Report," 202-3.

[37] "Comments of the Governments on Preliminary Document No. 6: Preliminary Document No. 7 of September 1980," in *A&D14*, 217.

[38] "Comments of the Governments on Preliminary Document No. 6: Preliminary Document No. 7 of September 1980," in *A&D14*, 242.

[39] "Comments of the Governments on Preliminary Document No. 6: Preliminary Document No. 7 of September 1980," in *A&D14*, 242-243.

[40] In light of the 1989 Convention on the Rights of the Child we can also appreciate how this underlying presumption about abduction applies to children as a characteristic feature of them being children, who nonetheless lie at the center of a conflict between two parents. Indeed, Article 11 of the CRC anticipates a convention such as the Abduction Convention, when it states: "(1) States Parties shall take measures to combat the illicit transfer and non-return of children abroad. (2) To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements." For text of treaty, see http://www.ohchr.org/en/professionalinterest/pages/crc.aspx (accessed June 19, 2014)

[41] Perez-Vera, "Explanatory Report," 433.

[42] Perez-Vera, "Report," 203 (para 97) (underlining added). See also the comments of the Government of Canada to the draft convention, "Comments of the Governments on Preliminary Document No. 6: Preliminary Document No. 7 of September 1980," in *A&D14*, 232-234.

[43] Pérez-Vera, "Explanatory Report," 461 (footnotes omitted). During the Fourteenth Session, proposals were submitted and discussions had on precluding judges from using the "grave risk" exception to account for issues of economic and educational future and wellbeing. Indeed, in the discussions on Tuesday, October 14, 1980, revealed an interest among various state parties to preclude economic or educational disadvantages as a ground for refusing to return a child who had been internationally abducted. See "*Procès-verbal* No. 8," in *A&D14*, 301.

[44] Beaumont and McEleavy, *The Hague Convention*, 141-156; Schuz, *Hague Child Abduction Convention*, 270-316.

[45] Hague Abduction Convention, Art. 20.

[46] "Conclusions drawn from the discussion of the Special Commission of March 1979," in *A&D14*, 164.

[47] Peréz-Vera, "Report of the Special Commission," 204.

[48] "Working Documents Nos. 36-40," in *A&D14*, 289 (No. 36) (emphasis added). Notably, the Moroccan delegate supported the inclusion of an *ordre public* provision, stating that in his country, custody is granted to the mother such that any order granting custody to the father would be contrary to the public order of Morocco. "Procès-verbal No 9," in *A&D14*, 305. Interestingly, in response, the delegate from the Holy See suggested that given Morocco's conception of *ordre public* and the possibility of a Moroccan judge refusing to return a child on this ground, another government "might retaliate by recalling its Ambassador from the State

concerned." "Procès-verbal No 9," in *A&D14*, 305. This exchange is interesting to note in order to better appreciate the relationship between conflicts of law, the 1980 Hague Abduction Convention, the larger international context of comity and cooperation. Indeed, this is the very point that is ignored or missed by more recent commentators advocating for more substantive amendments to the 1980 Hague Abduction Convention. See for instance, Smita Aiyar, "International Child Abductions Involving Non-Hague Convention States: The Need for a Uniform Approach," *Emory International Law Review* 21 (2007): 277-320, who ignores not only the drafting history around the *ordre public* proposal, but also the larger salience of private international law for purposes of construing the underlying intent and aim of the Hague Abduction Convention.

[49] Kent Murphy, "The Traditional View of Public Policy and *Ordre Public* in Private International Law," *Georgia Journal of International and Comparative Law* 11 (1981): 591-615, 591.

[50] Murphy, "Traditional View," 593.

[51] Murphy, "Traditional View," 607.

[52] Murphy, "Traditional View," 596.

[53] "Procès-verbal No 9," in *A&D14*, 305

[54] "Procès-verbal No 9," in *A&D14*, 304.

[55] "Working Documents Nos 26-31," in *A&D14*, 281 (No. 31).

[56] "Procès-verbal No. 9 (Meeting of Wednesday 15 October 1980 (morning))," in *A&D14*, 303.

[57] See specifically, his comment at "Procès-verbal No. 9 (Meeting of Wednesday 15 October 1980 (morning))," in *A&D14*, 306, where the minutes report him as stating that the exception his government proposed "should be confined to those cases where the best interests of the child would not be regarded in the State of the child's habitual residence."

[58] "Procès-verbal No. 9 (Meeting of Wednesday 15 October 1980 (morning))," in *A&D14*, 303.

[59] "Procès-verbal No. 9 (Meeting of Wednesday 15 October 1980 (morning))," in *A&D14*, 304.

[60] "Procès-verbal No. 9 (Meeting of Wednesday 15 October 1980 (morning))," in *A&D14*, 304.

[61] "Procès-verbal No. 9 (Meeting of Wednesday 15 October 1980 (morning))," in *A&D14*, 304.

[62] "Procès-verbal No. 9 (Meeting of Wednesday 15 October 1980 (morning))," in *A&D14*, 305.

[63] *Countries in favor*: Czechoslovakia, Denmark, Finland, Ireland, Israel, Italy, Netherlands, Norway, Sweden, United Kingdom, Venezuela. *Countries against*: Austria, Belgium, Canada, France, Federal Republic of Germany, Greece, Luxemburg, Portugal, Spain, Switzerland. *Countries abstaining*: Australia, Japan, United States. "Procès-verbal No. 9 (Meeting of Wednesday 15 October 1980 (morning))," in *A&D14*, 307.

[64] Perez-Vera, "Explanatory Report," in *A&D14*, 462.

[65] Beaumont and McEleavy, *Hague Convention*, 172.

[66] Beaumont and McEleavy, *Hague Convention*, 176. They of course mean accession in the context of the 1980 Hague Abduction Convention.

[67] Schuz, *Hague Abduction Convention*, 355; Maxwell, "Disparity in Treatment," 127.

[68] For the text of the 1961 convention, see http://www.hcch.net/index_en.php?act=conventions.text&cid=39 (accessed June 4, 2014).

[69] See for instance, "Conclusions of the first Special Commission meeting on the protection of minors and incapacitated adults: preliminary document no. 4 of October 1994," *Actes et documents de la Dix-huitième session 30 septembre au 19 octobre 1996* (The Hague: SDU Publishers, 1998) (hereinafter *A&D18*), 85-95, 95; Adair Dyer, "Rapport sur la revision de la Convention de La Haye de 1961 en matière de protection des mineurs—Première partie [*Dyer Report*]" *A&D18*, 10-57, 21; "Procès-verbal No 4, 2 octobre 1996," in *A&D18*, 324, where the US representative Ms. DeHart treated "the Abduction Convention as a summary return convention and this [Protection] Convention as a jurisdiction convention."

[70] See, Article 50 of the *Protection Convention*. See also, Item 10 of "Checklist of provisions which might be included in the revised Convention," *A&D18*, 59-65, 61; DeHart, "Relationship," 90.

[71] *Protection Convention*, Art. 50, in *A&D18*, 527.

[72] *Protection Convention*, Arts 5 and 7.

[73] Paul Lagarde, "Explanatory Report," in *A&D18*, 541 (hereinafter *Lagarde Report*).

[74] *Lagarde Report*, 553.

[75] See for instance, "Procès-verbal Nos 4 & of October 2, 1996, in *A&D18*, 319-332.

[76] *Lagarde Report*, 557.

[77] *Lagarde Report*, 557.

[78] *Lagarde Report;* DeHart, "Relationship".

[79] For instance, recall the Danish concern in its working document, namely that it would encounter, "States which required that custody always be given to one parent or the other". "Procès-verbal No. 9 (Meeting of Wednesday 15 October 1980 (morning))," in *A&D14*, 303. This may have been an implicit reference to Muslim majority states that utilize features of Islamic law in their family law codes. Indeed, given the politics of immigration and multiculturalism in Denmark in the 1970s and onward (and increasingly today), one cannot ignore the image of Muslim immigrants in the often heated Danish debates on integration. Karen Fog Olwig and Karsten Paerregaard, eds., *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2011); Peter Hervik, *The Annoying Difference: The Emergence of Danish Neonationalism, Neoracism, and Populism in the Post-1989 World* (New York: Berghahn Books, 2011); Martin Bak Jørgensen and Trine Lund Thomsen, "Crisis Now and Then — Comparing Integration Policy Frameworks and

Immigrant Target Groups in Denmark in the 1970s and 2000s," *International Migration and Integration* 14 (2013): 245-262.

[80] It should be noted that not all countries in which Sharīʿa informs domestic family law have refused to ratify/accede to the 1980 Abduction Convention. Morocco was among the first to sign the 1996 Protection Convention, and acceded to the Abduction Convention in 2010. As of 2014, Iraq became one of the most recent Contracting States to the Abduction Convention. Singapore, which through its Administration of Muslim Law Act, allows Muslims to marry and divorce under Islamic Law, nonetheless acceded to the Abduction Convention in 2010. On Singapore's institutionalization of Islamic law, see Debbie S.L. Ong, "Parental Child Abduction in Singapore: The Experience of a Non-Convention Country," *International Journal of Law, Policy and the Family* 21 (2007): 220-241; Anver M. Emon, "Conceiving Islamic Law in a Pluralist Society: History, Politics and Multicultural Jurisprudence," *Singapore Journal of Legal Studies* (December 2006): 331-355.

[81] The ongoing stalemate between non-Contracting Muslim majority states and North Atlantic Contracting States gives fodder to those who promote Samuel Huntington's "clash of civilizations" thesis. Speaking directly to Huntington's adherents in the Spring 2010 issue of *The Judges' Newsletter* about the Third Malta Judicial Conference, then-Secretary General of the Hague Conference made explicit and disapproving reference to Huntington's (in)famous phrase.Hans Van Loon, "Opening Speech," *The Judges' Newsletter* (Spring 2010), 4, available online at http://www.hcch.net/index_en.php?act=publications.details&pid=5173 (accessed June 27, 2014). While many have criticized Huntington's argument as unduly reductive, some nonetheless invoke it to explain the status of Muslim-majority countries as non-Contracting States to the Abduction Convention. The political polemics of that phrase do nothing to help the situation but they certainly stoke passions around this issue. As an example of that passion, see the remarks of US Congressman Dan Burton, speaking at the Committee on Government Reform concerning "International Child Abduction: The Absence of Rights of Abducted Americans in Saudi Arabia" (Hearing: June 9, 2003) and "Investigations into Abductions of American Children to Saudi Arabia" (Hearings: June 12, October 2 & 3 and December 4 & 11, 2002).

[82] Zaleha Kamaruddin, "Islamic Legal Perspectives on Cross-Border Family Disputes Involving Children," a keynote presentation to the Hague Conference's Working Party on Mediation, available online at http://www.hcch.net/upload/wop/gap2014id04en.pdf (accessed June 27, 2014) (footnotes omitted).

[83] For introductions to Islamic legal history, see Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (Oxford: Oxford University Press, 2005); N.J. Coulson, *A History of Islamic Law* (1964; reprint. Edinburgh: Edinburgh University Press, 1997).

[84] One school not listed above is the Ibadi School. Its history is linked to the early rebel movement known as the *khawārij* (sing. *khārijī*), although the Ibadis are considered a moderate offshoot of that group. Their doctrines resemble the Sunnī doctrines, especially those of the Mālikī School, but they are nonetheless distinct from the Sunnīs, as well as the Shīʿa. For that reason, I do not include them above. The Ibadiyya, today, are present in Oman, East Africa, and Southern Algeria. For more on the Ibadiyya, see T. Lewicki, "al- Ibāḍiyya," *Encyclopedia of Islam*, Second Edition, eds. P. Bearman , Th. Bianquis , C.E. Bosworth , E. van Donzel and W.P. Heinrichs (Leiden: Brill, 2010) [Brill Online]

[85] On the Ismāʿīlī branch of Shīʿism, see Farhad Daftary, *The Ismailis: Their History and Doctrines* (Cambridge: Cambridge University Press, 1990).

[86] For more on the Zaydi school, see W. Madelung, "Zaydiyya," *Encyclopaedia of Islam*, Second Edition, eds. P. Bearman , Th. Bianquis , C.E. Bosworth , E. van Donzel and W.P. Heinrichs (Leiden: Brill: Brill Online).

[87] This pattern has been witnessed since 1917, when the Ottoman Empire issued the Law of the Rights of the Family, which codified the law of marriage and divorce for Muslims, Christians, and Jews, whereby each was governed by the law of their respective faith traditions. Dawoud Sudqi El Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (The Hague: Kluwer Law International, 1996), 37.

[88] This study will focus on children born to parents who are married. The issue of children born to parents who are not legally married does not present the same issues of custody and access in Islamic legal history, given that children born out of wedlock were generally attributed to their mother and not their father, thus precluding pre-modern legal discussions of the kinds of conflicts over custody that often inform and underlie modern international child abduction cases. See Zahraa and Malek, "Concept of Custody," 164-5.

[89] This particular phrasing appears in Ḥanafī legal texts. See, for instance, Abū al-Ḥasan al-Marghīnānī, *al-Hidāya Sharḥ Bidāyat al-Mubtadiʾ*, ed. Muḥammad ʿAdnān Darwīsh (Beirut: Dār al-Arqam, n.d.), 1: 325; Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:644. The Ḥanbalī jurist Ibn Qudāma used similar language (*man aḥaqq bi kafāla al-ṭifl*). Ibn Qudāma, *al-Mughnī,* 7:612. Mālikī jurists such as Khalīl b. Isḥāq and Ibn Rushd al-Ḥafīd did not use the language of claims or entitlements (*ḥaqq*), but instead used the preposition *li* to denote a similar idea of claim, belonging, and entitlement. Khalīl b. Isḥāq, *Mukhtaṣar Khalīl,* ed. Aḥmad ʿAlī Ḥarakāt (Beirut: Dār al-Fikr, 1995), 167 (*wa ḥaḍāna...li al-umm*); Ibn Rushd (al-Ḥafīd), *Bidāyat al-Mujtahid wa*

Nihāyat al-Muqtaṣid (Beirut: Dār Ibn Ḥazm, 1999), 439 (*li man takūnu ḥiḍāna al-ṣaghīr*). Shāfiʿī jurists such as al-Nawawī used both. Al-Nawawī, *Rawḍat al-Ṭalibīn*, 9:98, 103.

[90] See, Khalil b. Isḥāq, *Mukhtaṣar Khalīl,* 167; Ibn Rushd (al-Hafid), *Bidayat al-Mujtahid,* 439; al-Nawawī, *Rawḍat al-Ṭālibīn,* 9:103; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*, eds. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 5:205; al-Marghīnānī, *al-Hidāya,* 1:325; Ibn Mufliḥ, *al-Furūʿ*, ed. Abū Zahra Ḥāzim al-Qāḍī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 5:465; Ibn Nujaym, *al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 4:280; Abū Isḥāq al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiʿī,* ed. Zakariya ʿAmīrāt (Beirut: Dār al-Kutub al-ʿIlmiyya, 1995), 3:165; al-Nawawī, *Rawḍat al-Ṭālibīn,* 9:98; al-Ḥaṭṭāb al-Raʿīnī, *Mawāhib al-Jalīl li Sharḥ Mukhtaṣar al-Khalīl,* ed. Zakariya ʿAmīrāt (Beirut: Dār al-Kutub al-ʿIlmiyya, 1995), 5:593; al-Qaffāl al-Shāshī, *Ḥilyat al-ʿUlamāʾ fī Maʿrifa Madhāhib al-Fuqahāʾ*, ed. Yāsīn Aḥmad Ibrāhīm Darādikah (Amman: Maktabat al-Risāla al-Ḥadītha, 1988), 7:435.

[91] Badr al-Dīn al-ʿAynī, *Al-Bināya,* 5:644.

[92] Ibn Qudāma, *al-Mughnī,* 7:614. Other sources also cite to this hadith as an authoritative source for this allocation of custodial authority. See, Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:644.

[93] Ibn Qudāma, *al-Mughnī* (Beirut: Muʾassasāt al-Taʾrīkh al-ʿArabī, n.d.), 7: 582-3. See also, Ibn Mufliḥ, *al-Furūʿ*, 5:452, who also held that fathers must provide for their children (*nafaqa*). Notably, there was a dispute within the Shāfiʿī school about whether mothers were also required to provide financially for their children. See generally, al-Shīrāzī, *al-Muhaddhab,* 3:158; al-Nawawī, *Rawḍat al-Ṭalibīn,* 9:83-87.

[94] Ibn Nujaym, *al-Baḥr al-Rāʾiq,* 4:340; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:178.

[95] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:178.

[96] Ibn Nujaym, *al-Baḥr al-Rāʾiq,* 4:280.

[97] Ibn Qudāma, *al-Mughnī,* 7:612-614.

[98] See also, al-Shīrāzī, *al-Muhadhdhab,* 3:164; al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj,* 5:195; Ibn Nujaym, *al-Baḥr al-Rāʾiq,* 4:282; al-Nawawī, *Rawḍat al-Ṭālibīn,* 9:99.

[99] See also, al-Shīrāzī, *al-Muhadhdhab,* 3:164; al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj,* 5:195; ; al-Qaffāl al-Shāshī, *Ḥilyat al-ʿUlamāʾ*, 7:434; Ibn Nujaym, *al-Baḥr al-Rāʾiq,* 4:282; Ibn Mufliḥ, *al-Furūʿ* 5:467; al-Nawawī, *Rawḍat al-Ṭālibīn,* 9:100.

[100] For others who also adopted this condition, see al-Shīrāzī, *al-Muhadhdhab,* 3:164; al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj,* 5:195; al-Qaffāl al-Shāshī, *Ḥilyat al-ʿUlamāʾ*, 7:434; Ibn Nujaym, *al-Baḥr al-Rāʾiq,* 4:283; Ibn Mufliḥ, *al-Furūʿ*, 5:466; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:212; al-Nawawī, *Rawḍat al-Ṭālibīn,* 9:99.

[101] See also, al-Shīrāzī, *al-Muhadhdhab,* 3:164; al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj,* 5:195; ; al-Qaffāl al-Shāshī, *Ḥilyat al-ʿUlamāʾ,* 7:434; Ibn Mufliḥ, *al-Furūʿ* 5:467; al-Nawawī, *Rawḍat al-Ṭālibīn,* 9:98. For examples of Ḥanafī scholars who held differently when the mother was a *dhimmī,* see al-Marghīnānī, *al-Hidāya,* 1:326; Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:651; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 5:212. However, Ḥanafī scholars adamantly denied *ḥiḍāna* to a mother who was an apostate (*murtadda*). Ibn Nujaym, *al-Baḥr al-Rāʾiq,* 4:282; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 5:211-212

[102] See also, al-Shīrāzī, *al-Muhadhdhab,* 3:164; al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj,* 5:196; al-Qaffāl al-Shāshī, *Ḥilyat al-ʿUlamāʾ,* 7:434; al-Marghīnānī, *al-Hidāya,* 1:325; Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:647; Ibn Nujaym, *al-Baḥr al-Rāʾiq,* 4:283; Ibn Mufliḥ, *al-Furūʿ* 5:467; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 5:210-211; al-Nawawī, *Rawḍat al-Ṭālibīn,* 9:100. However, it is reported that the jurist al-Ḥasan al-Baṣrī did not consider a mother's remarriage to disqualify her from exercising *ḥiḍāna.* Al-Qaffāl al-Shāshī, *Ḥilyat al-ʿUlamāʾ,* 7:435; Ibn Qudāma, *al-Mughnī,* 7:619; Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:647.

[103] This *ḥadīth* was narrated by Abū Dawūd. For its use in debates on *ḥiḍāna,* see Ibn Qudāma, *al-Mughnī,* 7:614; al-Shīrāzī, *al-Muhadhdhab,* 3:164; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 5:211; Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:644 (who relates this and a different version that was narrated by ʿAbd Allāh b. ʿAmrū)

[104] Badr al-Dīn a-ʿAynī, *al-Bināya,* 5:648, who notes that this was also the position of al-Shāfiʿī, Aḥmad b. Ḥanbal, and Mālik b. Anas. However, he also noted a different view from Mālik who said that, even if she divorced her second husband, she may not exercise *ḥiḍāna* because the possibility of reconciliation of the marriage (al-rajʿī) remained an obstacle, at least until she completed her waiting period after divorce (*al-ʿidda*).

[105] Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:648.

[106] Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:648.

[107] Al-Nawawī, *Rawḍat al-Ṭalibīn,* 9:100. See also, al-Shīrāzī, *al-Muhadhdhab,* 3:164.

[108] Al-Nawawī, *Rawḍat al-Ṭalibīn,* 9:100. See also, Ibn Qudāma, *al-Mughnī,* 7:619.

[109] Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:648; al-Nawawī, *Rawḍat al-Ṭālibīn,* 9:100; Ibn Qudāma, *al-Mughnī,* 7:619.

[110] Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:648.

[111] See, Amina Wadud, *Qur'an and Women: Rereading the Sacred Text from a Woman's Perspective* (Oxford: Oxford University Press, 1999); Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islamic Law* (Reading, MA: Addison-Wesley, 1991); Ziba Mir Hosseini, *Islam and Gender* (Princeton: Princeton University Press,

1999); Ayesha S. Chaudhry, *Domestic Violence and the Islamic Tradition*. Oxford Islamic Legal Studies Series (Oxford: Oxford University Press, 2014).

[112] Christy Williams, "Who's Wicked Now? The Stepmother as Fairy-Tale Heroine," *Marvels & Tales*, 24, no 2 (2010): 255-271; Christina Hughes, *Stepparents: Wicked or Wonderful?* (Aldershot, UK: Avebury, 1991).

[113] Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge: Harvard University Press, 2010), 6-7.

[114] Al-Nawawī, *Rawḍat al-Ṭālibīn,* 9:98.

[115] Al-Nawawī, *Rawḍat al-Ṭālibīn,* 9:98-99; al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj,* 5:195; al-Qaffāl al-Shāshī, *Ḥilyat al-ʿUlamāʾ*, 7:434; al-Shīrāzī, *al-Muhadhdhab,* 3:164; Ibn Qudāma, *al-Mughnī,* 7:613; Ibn Mufliḥ, *al-Furūʿ*, 5:467.

[116] Ibn Qudāma, *al-Mughnī,* 7:613. The Shāfiʿī jurist al-Shīrāzī used nearly identical language to explain the rationale of this condition. Al-Shīrāzī, *al-Muhadhdhab,* 3:164.

[117] Ibn Qudāma, *al-Mughnī,* 7:613.

[118] It is worth noting the different terms used. For the Shāfiʿis and Ḥanbalīs, the term is *kāfira,* meaning unbelieving woman. For the Ḥanafīs, the term is *dhimmī,* which denotes permanent non-Muslim resident in Islamic lands. The terms represent different starting points for the schools, with *kāfira* representing a religious/theological outlook only, whereas *dhimmī* reflects a religio-political reference, given that *dhimmīs* are presumed to enter a contract of protection to reside in Muslim lands, where they assume responsibilities and enjoy benefits under the Sharīʿa. On the *dhimmī* rules generally, see Anver M. Emon, *Religious Pluralism and Islamic Law: Dhimmīs and Others in the Empire of Law* (Oxford: Oxford University Press, 2012).

[119] Al-Marghīnānī, *al-Hidāya,* 1:326.

[120] Ibn Nujaym, *al-Baḥr al-Rāʾiq*, 4:289.

[121] Al-Marghīnānī, *al-Hidāya,* 1:326.

[122] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:212. See also, Ibn Nujaym, *al-Baḥr al-Rāʾiq,* 4:289, who was concened about the possibility of harm in such a situation (*iḥtimāl al-ḍarar*).

[123] Ibn Rushd, *Bidāyat al-Mujtahid*, 439. The mother's custodial priority is emphasized in a *ḥadīth* in which the Prophet Muḥammad sternly said: "whoever separates a mother and her child, God will separate him from what he most desires on the Day of Judgment." See, Ibn Rushd, *Bidāyat al-Mujtahid*, 439.

[124] Ibn Rushd, *Bidāyat al-Mujtahid*, 439.

[125] For example, those who fix the boy's age at seven years argue that this is the age when the law of prayer first addresses outright the role of children in engaging in the ritual prayer. Ibn Qudāma,

al-Mughnī, 7:615. In other words, there is nothing inherent to the age itself; it serves as a proxy for something else, in particular the capacity to take care of one's basic needs.

[126] See also, al-Shīrāzī, *al-Muhadhdhab,* 3:168, for this description of the custodial consequences of choosing either the mother or the father.

[127] al-Qaffāl al-Shāshī, *Ḥilyat al-ʿUlamāʾ,* 7:442-444.

[128] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 5:213. See also, Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:649, who noted how some considered nine years of age to be the appropriate moment whereas others identified the moment as when the boy attains puberty.

[129] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 5:213. See also, Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:649.

[130] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 5:213-214. See also, Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:649.

[131] Notably, al-Kāsānī held that the father's custody over the child extended from this period of self-sufficiently to the age of majority (*al-bulūgh*). Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ,* 5:214. In other words, there are three periods of time in a child's life that are legally relevant for purposes of custody. First, the period when he is a young child (*ṣaghīr*); second, the period when he is self-sufficient and can care for himself (*al-istinjāʾ*); and lastly, the age of majority (*al-bulūgh*), when he no longer needs to be in someone's care.

[132] B. Fares, EOI[2] s.v. "*Murūʾa*".

[133] See for instance, al-Shīrāzī, *al-Muhadhdhab,* 3:168; Ibn Qudāma, *al-Mughnī,* 7:615;

[134] Ibn Qudāma, *al-Mughnī,* 7:614. As justification, Ibn Qudāma referred to the *ḥadīth* in which the Prophet responded to a mother's complaint about her husband taking their child away by saying to the child: "This is your father. This is your mother. Take the hand of whichever of them you wish" (*hādha abūka wa hādhahi ummuka, fa-khudh bi yadd iyyihima shiʾta*). Ibn Qudāma, *al-Mughnī,* 7:615. According to Ibn Qudāma, this *ḥadīth,* which is well known and respected (*fī maẓannat al-shuhra*) provided the bases for a consensus among the companions of the Prophet (*ijmāʿ al-ṣaḥāba*), many of whom ruled in exactly this fashion. Ibn Qudāma, *al-Mughnī,* 7:615.

[135] Ibn Qudāma, *al-Mughnī,* 7:615.

[136] Ibn Qudāma, *al-Mughnī,* 7:615.

[137] Ibn Qudāma, *al-Mughnī,* 7:615.

[138] Ibn Qudāma, *al-Mughnī,* 7:614-615.

[139] Ibn Qudāma, *al-Mughnī,* 7:615. For a similar position from a Shāfiʿī jurist, see al-Shīrāzī, *al-Muhadhdhab,* 3:168-169.

[140] Al-Khaṭib al-Shirbīnī, *Mughnī al-Muḥtāj ilā Maʿrifat Maʿānī Alfāẓ al-Minhāj,* eds. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʿIlmiyya, 2000), 5:198.

[141] Ibn Qudāma, *al-Mughnī,* 7:615-616. See also al-Shīrāzī, *al-Muhadhdhab,* 3:168, for similar language and argument.

[142] For instance, the Shāfiʿī jurist al-Shīrāzī remarked that a young girl can exercise such a choice. When she does so, however, she remains with that custodial parent both day and night, contrary to boys. The other parent can visit the daughter for short periods, and the custodial parent cannot prevent such visits. Al-Shīrāzī, *al-Muhadhdhab,* 3:168. See also, al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj,* 5:198.

[143] While we might find the marriage of seven year old girls preposterous, it would be anachronistic to impose that reading on Ibn Qudāma. Across different regions and traditions in the medieval period, it was common that girls were married at young ages. See for instance, Fiona Harris Stoertz, "Young women in France and England, 1050-1300," *Journal of Women's History* 12, no. 4 (2001): 22-45.

[144] Ibn Qudāma, *al-Mughnī,* 7:615.

[145] Al-Marghīnānī, *al-Hidaya,* 1:328; Badr al-Dīn al-ʿAynī, *al-Binãya,* 5:655; Ibn Qudāma, *al-Mughnī,* 7:618. For instance, Ḥanbalī, Shāfiʿī, and Mālikī jurists tended to restrict the mother's ability to travel or relocate her children, especially if that meant limiting the father's access. Ḥanafī jurists, on the other hand, granted a limited license to the mother who relocates her children. See below for more discussion.

[146] Ibn Mufliḥ, *al-Furūʿ,* 5:469.

[147] Ibn Qudāma, *al-Mughnī,* 7:618. See also, Ibn Mufliḥ, *al-Furūʿ,* 5:468

[148] Ibn Qudāma, *al-Mughnī,* 7:618. See also, al-Shīrāzī, *al-Muhadhdhab,* 3:169.

[149] See also, Ibn Mufliḥ, *al-Furūʿ,* 5:468

[150] Al-Nawawī, *Rawḍat al-Ṭalibīn,* 9:106-107. See also, al-Shīrāzī, *al-Muhadhdhab,* 3:169; al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj,* 5:201.

[151] Ibn Qudāma, *al-Mughnī,* 7:618.

[152] There is one exception to this grant of *ḥiḍāna* to the father, where travel is easy. Suppose that residing between the two lands where the mother and father live are the father's relatives. If the father can regularly see or visit these relatives, then they undercut the cost of his travel back and forth to visit his child. In other words, under these narrow circumstances, whether the father is the one who travels or is left behind, his young child will remain with the mother. Ibn Qudāma, *al-Mughnī,* 7:618. The future wellbeing of the child is not undermined given that the father will have access to his family and their resources to ensure and facilitate his responsibilities toward his child.

[153] See for instance, Abū ʿAbd Allāh Muḥammad b. Yūsuf al-Mawāq, *al-Tāj wa al-Iklīl li Mukhtaṣar Khalīl,* in the margins of al-Ḥaṭṭab al-Raʿīni, *Mawāhib al-Jalīl,* 5:599.

[154] Al-Nawawī, *Rawḍat al-Ṭalibīn,* 9:106-107. See also, al-Shīrāzī, *al-Muhadhdhab,* 3:169; al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj,* 5:201.

[155] Specifically, she was a divorced mother who had completed her *ʿidda* period. Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:217. See also, Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:655.

[156] Though the Ḥanafīs address this situation in a context of both a married and divorced couple, this report will only focus on their discussion concerning the divorced couple. For discussion on married couples, see for instance al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:217.

[157] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:218.

[158] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:218.

[159] Specifically, he used these categories to address the situation where the distance between the two lands was great (*idhā kānat al-masāfa bayna al-baladayn baʿīda*). Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:218.

[160] Indeed, managing the harmful effects of such travel and relocation (*iḍrār*) was a key feature of the debate among the Ḥanafīs about whether and to what extent the child could be removed from his father's vicinity. See, for instance, Ibn Nujaym, *al-Baḥr al-Rāʾiq,* 4:290.

[161] Al-Kāsānī noted some disagreement within the Ḥanafī school. For instance, he noted that Abū Yūsuf, an important early figure in the Ḥanafī school, only required the mother to be moving to the land where the marriage took place (*makān al-ʿaqd*), regardless of whether it was her homeland or not. Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:218. See also, al-Marghīnānī, *al-Hidāya,* 327.

[162] Al-Kāsānī, *al-Badāʾiʿ al-Ṣanāʾiʿ*, 5:218.

[163] See also, Ibn Nujaym, *al-Baḥr al-Rāʾiq,* 4:290.

[164] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:217-218. See also, Badr al-Dīn al-ʿAynī, *al-Bināya,* 5:655, who remarked that this presumption prevails by virtue of both custom and law. Customarily (*amma al-ʿurf*; *ʿāda*) the husband resides in the place where he contracted his marriage. Legally, a contract is entered in a particular location, which thereby gives that location significance for the contract (*makān al-ʿaqd*). Children born of that marital contract are thereby connected to that location.

[165] There was a narrow set of exceptions having to do with the distinction between urban and rural environments that, while interesting, do not add to the aim and objective of this report. Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5:218-219.

[166] Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsteram: Amsterdam University Press, 2007), 133.

[167] Welchman, *Women and Muslim Family Laws in Arab States,* 134.

[168] *The Constitution of the Hashemite Kingdom of Jordan*, Ch. 1, Art. 2, available online at http://www.kinghussein.gov.jo/constitution_jo.html (accessed July 25, 2014).

[169] *The Constitution of the Hashemite Kingdom of Jordan*, Ch 6, Art 99, available online at http://www.kinghussein.gov.jo/constitution_jo.html (accessed July 25, 2014).

[170] Lynn Welchman, "The Development of Islamic Family Law in the Legal System of Jordan" *International and Comparative Law Quarterly* 37 (1988):868-886, 869.

[171] Lynn Welchman, "The Development of Islamic Family Law in the Legal System of Jordan" *International and Comparative Law Quarterly* 37 (1988):868-886, 869.

[172] *The Constitution of the Hashemite Kingdom of Jordan*, Ch 6, Art 104, available online at http://www.kinghussein.gov.jo/constitution_jo.html (accessed July 25, 2014).

[173] Welchman, "Development of Islamic Familiy Law,"870.

[174] *The Constitution of the Hashemite Kingdom of Jordan*, Ch 6, Art 106, available online at http://www.kinghussein.gov.jo/constitution_jo.html (accessed July 25, 2014).

[175] Welchman, "Development of Islamic Family Law," 871.

[176] See for instance, Welchman, "Development of Islamic Family Law".

[177] Rana Husseini, "New Personal Status Law Strengthens Jordanian Families" *The Jordan Times* (28 September 2010) (Lexis).

[178] Lynn Welchman, "Musawah, CEDAW, and Muslim Family Laws in the 21st Century," in *Islamic Law and International Human Rights Law*: *Searching for Common Ground?* eds. Anver M. Emon, Mark S. Ellis and Benjamin Glahn (Oxford: Oxford University Press, 2012), 309-321, 314.

[179] Rana Husseini, "Debate Continues Over Personal Status Law" *The Jordan Times* (20 October 2010) (Lexis).

[180] JPSL, Art 223. However, as Article 224 states, a non-Muslim cannot serve as a *walī* over a Muslim. Interestingly, as much as the pre-modern *fiqh* allocated certain responsibilities of education and training to the father/*walī* on the grounds that he was best suited to undertake this parental responsibility, Article 184 of the JPSL states that on both the *walī* and female custodial caregiver (*ḥāḍina*) is the need to provide for matters of training and educational direction (*al-ʿināya bi-shuʾūn al-maḥḍūn fī al-taʾdīb wa al-tawjīh al-dirāsī*). However, that comes after the same Article provides expressly that as a matter of legal capacity and right, the *walī* exercises supervision (*al-ashrāf*) of the child's education and other matters, all of which must occur in the area in which the child resides with his custodial caregiver, such as his mother. JPSL, Art 184.

[181] *Jordanian Personal Status Law* (JPSL), Law No. 36 of 2010, Art 170, 173.

[182] JPSL, Art 172 (b).

[183] JPSL, Art 171.

[184] JPSL, Art 171.

[185] JPSL, Art 171.

[186] JPSL, Art 175.

[187] JPSL, Art 175. For the statutory delineation of the order by which someone can exercise *ḥiḍāna* over the child, see JPSL, Art 170.

[188] JPSL, Art 176.

[189] JPSL, Art 177. On visitation requirements, see JPSL, Arts 181 et seq.

[190] *Guardians and Wards Act* (Pakistan), Section 1(2).

[191] *The Guardians and Wards Act*, 1890, available online in this early format at: http://www.law.yale.edu/RCW/rcw/jurisdictions/assc/india/India_Guard_Act.pdf (accessed July 31, 2014).

[192] *The Guardians and Wards Act, 1890*, Sec 17. Available online in its original form when promulgated by the British government at: http://www.law.yale.edu/RCW/rcw/jurisdictions/assc/india/India_Guard_Act.pdf (accessed July 31, 2014) (emphases added).

[193] *Akhtar v. Attock et al*, 2004 SCMR 1839.

[194] *Akhtar v. Attock*, 2004 SCMR at 1842.

[195] *Feroze Begum v. Muhammad Hussain*, 1978 SCMR 299, 302. In this case, the Court considered the petition of a father seeking custody on the principal ground that he was literate and financially secure, while the mother was illiterate and poor. The Court held that the mother's poverty was not sufficient grounds to deny her custody of her children, especially when the law requires the father to provide financial maintenance anyway. The Court reiterated its position on the mother's poverty in 2004 in *Razia Bibi v. Riaz Ahmad*, 2004 SCMR 821.

[196] *Akhtar v. Attock*, 2004 SCMR at 1842.

[197] *Akhtar v. Attock*, 2004 SCMR at 1842.

[198] *Akhtar v. Attock*, 2004 SCMR at 1843. See also, *Feroze Begum v. Muhammad Hussain*, 1978 SCMR 299, 302, where the Pakistani Supreme Court again held that despite the requirements of Islamic rules on *wilāya* and *ḥiḍāna*, the "overriding and paramount consideration always is the welfare of the minor. Indeed this is the sole consideration that must prevail in the final analysis and the fact that the father is the lawful guardian [under Islamic law] of his minor children does not compel the Court to pass an order in his favour unless it is in their welfare to do so." See also, *Rukhsana Malik v Abdul Aziz*, 2004 PLD (Lah.) 801, where the High Court of Lahore rejected the argument that Islamic law requires a transfer of custody to the father in the event the mother marries a man who is not within the relevant range of kinship to her children.

However, the holding may only apply to cases where the children are male. If the children are female, the Lahore High Court allowed for the transfer of custody to the father because they "may not be allowed to life in the custody of the mother while a step-father is in the house." 2004 PLD (Lah) at 814. But the High Court did not assert this as universally applicable; rather it called for a case-by-case analysis.

[199] *Akhtar v. Attock*, 2004 SCMR at 1843.

[200] *Guardians and Wards Act*, s. 17(3).

[201] *Rukhsana Malik v Abdul Aziz*, 2004 PLD (Lah.) 801, 808.

[202] *Rukhsana Malik v Abdul Aziz*, 2004 PLD (Lah.) 801, 814-5.

[203] Hague Conference on Private International Law, The Judges' Newsletter on International Child Protection XVI (Spring 2010): 51 (accessible at: http://www.hcch.net/upload/news2010.pdf).

[204] Hague Conference on Private International Law, The Judges' Newsletter on International Child Protection XVI (Spring 2010): 73 (accessible at: http://www.hcch.net/upload/news2010.pdf).

[205] In fact, Article 7 of Qatar's Constitution provides "The foreign policy of the State is based on the principle of strengthening international peace and security by means of encouraging peaceful resolution of international disputes; and shall support the right of peoples to self-determination; and shall not interfere in the domestic affairs of states; and shall cooperate with peace-loving nations." For the constitution, see http://portal.www.gov.qa/wps/wcm/connect/5a5512804665e3afa54fb5fd2b4ab27a/Constitution+of+Qatar+EN.pdf?MOD=AJPERES (accessed August 1, 2014).

[206] Michael B. Dye, "Qatar: The Pearl of the Middle East and Its Role in the Advancement of Women's Rights," *University of Detroit Mercy Law Review* 84 (2006-7): 747-763, 747.

[207] Lynn Welchman, "Gulf States: Bahrain, Qatar, United Arab Emirates: First Time Family Law Codifications in Three Gulf States," *International Survey of Family Law 2010*, ed. Bill Atkin (London: Jordans, 2010): 163-178. Available online at: http://eprints.soas.ac.uk/10899/ (accessed December 15, 2012).

[208] For studies on constitutional provisions that include such language, see Anver M. Emon, "The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law," in *Constitutional Design for Divided Societies*, ed. Sujit Choudhry, 258-286 (Oxford: Oxford University Press, 2008); Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt* (Leiden: Brill, 2006).

[209] Louay Bahry and Phebe Marr, "Qatari Women: A New Generation of Leaders?" *Middle East Policy* 12, no. 2 (2005): 104-119, 107. See also, Dye, "Qatar," 750.

[210] Law No. 10 of 2003 Promulgating the Law on Judicial Authority (*iṣdār qānūn al-sulṭa al-qaḍāʾiyya*), Art. 11 (available online at

http://www.almeezan.qa/LawArticles.aspx?LawTreeSectionID=13437&lawId=4052&language=ar) (accessed November 12, 2014).

[211] *Wathīqat Musqat,* available online at: http://sites.gcc-sg.org/DLibrary/index.php (accessed July 25, 2014). This document can be found on the GCC website, whose history extends back to 1996.

[212] The Supreme Council for Family Affairs was created in 1998 as a high-level and independent organization, one that would support the role of families in Qatari society and "formulate and follow up on the implementation of strategies, policies and plans." See Qatar's report to CEDAW immediately below.

[213] Qatar, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women – Initial Report of States Parties*, UNCEDAWOR, 2012, UN CEDAW Doc C/QAT/1 at para 413-4.

[214] Lynn Welchman, "Gulf Women and the Codification of Muslim Family Law" in Amira El-Azhary Sonbol, ed, *Gulf Women* (Bloomsbury Qatar Foundation Publishing: Doha, 2012), 373.

[215] Welchman, "Gulf Women and the Codification of Muslim Family Law," 378.

[216] For an English translation of the Qatari Family Law Act, see the online version: Al Meezan – Qatary Legal Portal (trans.) "Law No. 22 of 2006 Promulgating 'The Family Law' 22/2006." Available via University of Zurich at http://www.rwi.uzh.ch/oe/cimels/law/countries/qatar/Law_22_2006_2558.pdf (accessed July 31, 2014). All translations of the QFLA in this report are by the author working from the original Arabic version.

[217] QFLA, Art 3. Qatar is the first of the Middle Eastern countries to have based its personal status laws on the Ḥanbalī school.

[218] QFLA, Art 3. The legislation does not specify the order in which the other Sunni schools of jurisprudence ought to be followed. If the four Sunnī schools of jurisprudence are silent or inconclusive on the issue under consideration, the judge may the various interpretive principles (*al-qawāʿid al-fiqhiyya*) of the Islamic legal tradition.

[219] QFLA, Article 4.

[220] QFLA, Art 4. See also, Qatar, *Consideration of Reports*, para. 416.

[221] Welchman, "Gulf Women and the Codification of Muslim Family Law," 375. Welchman says that further research on this issue is required.

[222] Qatar Family Law Act, Law No 22 of 2006, Art 165 (hereinafter QFLA)

[223] QFLA, Art 167.

[224] QFLA, Art 168.

[225] QFLO, Art 168.

[226] QFLA, Art 168.

[227] QFLA, Art 175.

[228] Welchman, "Gulf States."

[229] QFLA, Art 166.

[230] Welchman, "Gulf States," translating Article 170 of Qatar's Law No. 22 of 2006. See also, QFLA, Art. 170.

[231] There are a wide range of possible custodians of children, with the mother taking priority. The statutory language applies to any woman, but for ease of analysis, the discussion herein will focus on mothers.

[232] QFLA, Art 180.

[233] QFLA Art 183.

[234] QFLA, Art 176.

[235] QFLA, Art 185.

[236] QFLA, Art 185.

[237] QFLA, Art 185.

[238] QFLA, Art 185.

[239] QFLA, Art 185.

[240] William Duncan, "Purpose of the Malta Process," *The Judges' Newsletter* 16 (Spring 2010): 12.

[241] H.A.R. Gibb, "Constitutional Organization," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington DC: Middle East Institute, 1955), 17.

[242] Hamidullah, *Muslim Conduct of State,* 46.

[243] See generally, Anver M. Emon, "On Sovereignties in Islamic Legal History," *Middle East Law and Governance,* 4 nos 2-3 (2012): 265-305.

[244] Gibb, "Constitutional Organization," 20.

[245] Patricia Crone, *God's Rule: Government and Islam: Six Centuries of Medieval Islamic Political Thought* (New York: Columbia University Press, 2004), 233.

[246] Al-Juwaynī, *al-Ghiyāthī: Ghiyāth al-Umam fī Iltiyaṭh al-Ẓulam*, ed. Khalīl Manṣūr (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 80.

[247] Al-Juwaynī, *al-Ghiyāthī,* 80.

[248] Al-Juwaynī, *al-Ghiyāthī,* 80.

[249] Al-Juwaynī, *al-Ghiyāthī,* 80.

[250] Al-Juwaynī, *al-Ghiyāthī,* 81.

[251] Al-Juwayni's use of "imam" coincides with the usage of caliph in this report.

[252] Al-Juwaynī, *al-Ghiyāthī,* 82.

[253] See for instance, Anver M. Emon, "The Paradox of Equality and the Politics of Difference: Gender Equality, Islamic law and the Modern State," in *Gender and Equality in Islamic Law: Justice and Ethics in the Islamic Legal Tradition*, eds. Ziba Mir-Hosseini, Kari Vogt, Lena Larson and Christian Moe (London: IB Tauris, 2013): 237-258.

[254] For an extended study on the *dhimmīs* and the *dhimmī* rules as symptoms of the larger challenge of governing a diverse polity, see Anver M. Emon, *Religious Pluralism and Islamic Law:* Dhimmīs *and Others in the Empire of Law* (Oxford: Oxford University Press, 2012).

[255] For a discussion of this dichotomous world view and its limitations, see Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourses on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society* 1, no 2 (1994): 141-187.

[256] See for instance, Labeeb Ahmed Bsoul, *International Treaties (Muʿāhadāt) in Islam* (New York: University Press of America, 2008).

[257] For a discussion of this literature, see Emon, *Religious Pluralism*, chapter 1.

[258] Meena Sharify-Funk, "Pervasive Anxiety about Islam: A Critical Reading of Contemporary 'Clash" Literature," *Religions* 4 (2013): 443-468.

[259] Of particular note here is the well-known "clash of civilizations" thesis in Samuel P. Huntington, "Clash of Civilizations?" *Foreign Affairs* 72, no 3 (Summer 1993): 22-49; idem., *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996), though Huntington was less interested in pre-modern Islamic intellectual history and more interested in geo-political predictors.

[260] Hasan S. Khalilieh, "Amān," *Encyclopaedia of Islam, Three*, eds. Kate Fleet, Gudrun Krämer, Denis Matringe, John Nawas, Everett Rowson (Brill Online, 2014. Reference. University of Toronto. 19 August 2014): <http://referenceworks.brillonline.com.myaccess.library.utoronto.ca/entries/encyclopaedia-of-islam-3/aman-SIM_0048>

[261] For an overview of the field of *siyar* in Islamic law and history, and its invocation as an "Islamic law of nations", see Labeeb Ahmed Bsoul, "Historical Evolution of Islamic Law of Nations/Siyar: Between Memory and Desire," *DOMES* 17, no 1 (Spring 2008): 48-67.

[262] Al-Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabir*, 1:97.

[263] Al-Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabir*, 1:129.

[264] Al-Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabir*, 1:129-130.

[265] Al-Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabir*, 1:132.

[266] For a more extensive analysis of his case, see Emon, *Religious Pluralism and Islamic Law*, ch. 4.