Recent Developments

Pluralism in British Islamic Reasoning: The Problem with Recognizing Islamic Law in the United Kingdom. By Sameer Ahmed

_Difference amongst my community is a sign of the bounty of Allah._
—Saying of the Prophet Muhammad

I. Introduction

In February 2008, Archbishop of Canterbury Rowan Williams, the leader of the Church of England, gave a lecture in London arguing that legal recognition of _shari’a_ law in Britain “seems unavoidable.” Then, “all hell broke loose.” Trevor Phillips, the chairman of the Equality and Human Rights Commission responded, “Raising this idea in this way will give fuel to anti-Muslim extremism and dismay everyone working towards a more integrated society.” Others had more visceral reactions. Stephen Green, the director of Christian Voice, said, “This is a Christian country with Christian laws. If Muslims want to live under sharia law then they are free to emigrate to a country where sharia law is already in operation.” Columnist Yasmin Alibhai-Brown, a “modern Muslim woman,” added, “What Rowan Williams wishes upon us is an abomination.”

Williams’s remarks were the latest in a debate among the British political elite and media on how best to accommodate the religious practices of the two million Muslims residing in the United Kingdom. Those who share Williams’s view contend that adopting parts of Islamic family law would help maintain social cohesion in the United Kingdom, even if the Islamic practices were contrary to more liberal British norms. On the other hand, the vast majority who oppose Williams argue, often in a knee-jerk fashion, that Islamic law as a whole is intolerant, oppressive, and misogynistic, and therefore has no place in the United Kingdom. This Recent Development will address two significant issues that are conspicuously absent from the British debate: First, what aspects of Islamic family law do British Muslims want to implement in the United Kingdom? Second, how do British Islamic scholars believe these family law issues should be implemented in the United Kingdom? Only after considering these questions can one develop a principled approach to accommodating British Muslims, an approach that will do justice to the diversity of both Islamic legal thought and the British Muslim

community. Precisely because of these diversities, the United Kingdom should be wary of legally recognizing aspects of Islamic family law. If the British government enshrines one interpretation of Islamic family law into its legal apparatus, it will confer authority over that interpretation while excluding others, undermining the pluralism inherent in Islamic jurisprudence.

II. British Muslims’ Practice of Islamic Family Law

Before analyzing the applicability of Islamic law in the United Kingdom, one must first understand what is meant by the term “Islamic law.” Islamic law usually refers to the entire collection of fiqh (Islamic legal rulings). While some writers use Islamic law interchangeably with the shari'a, the two can have significantly different meanings. The British Muslim scholars referred to in this Recent Development use the term shari'a in different ways. While some view shari'a in its most legalistic sense (almost synonymous to fiqh or Islamic law), others consider shari'a in a more general sense—as a way of life a Muslim must follow to reach “the Source” (God).

Those British Muslims who support legal recognition of Islamic law are almost universally referring only to Islamic family law—the fiqh pertaining to marriage, divorce, inheritance, child custody, and other family-related issues. The reasons for preserving aspects of Islamic family law in the United Kingdom have both historical and practical significance. Left relatively untouched by colonial rulers in the late nineteenth century, family law remains one of the only areas of law in many Muslim-majority countries still based on centuries of Islamic jurisprudence. While many of the twentieth-century postcolonial Muslim states adopted European criminal and commercial laws, most developed their own family law codes inspired by Islamic legal rulings. Thus British Muslims, many of whom immigrated to the United Kingdom since the 1960s, have attempted to adapt their Islamic family law traditions to their new surroundings, and have encountered difficulties when religious customs conflict with state law.

One problem British Muslims have encountered is the issue of “limping” marriages, which are considered valid by one legal system, but dissolved by another. Because some Islamic scholars believe a British civil divorce is not religiously valid, many British Muslims divorce twice—civilly and Islamically. However, a problem exists when a Muslim man divorces his wife in a civil proceeding, but not according to Islamically accepted procedures. Since the couple would still be considered married under some

---

6. Recent data gives mixed views as to whether British Muslims would prefer official recognition of Islamic family law. On the one hand, a report on British Muslims published in 2002 claimed that the majority of Muslims would oppose the idea. See Humayun Ansari, Muslims in Britain 23 (2002). On the other hand, a 2004 Guardian/ICM poll found that sixty-one percent of British Muslims want Islamic law courts in civil cases “so long as the penalties did not contravene British law.” Alan Travis & Madeleine Bunting, British Muslims Want Islamic Law and Prayers at Work, GUARDIAN (London), Nov. 30, 2004, at 1.


9. See id. at 80.

10. Traditionally, under Islamic law, there are three ways to dissolve a marriage. First, talaq is where a man unilaterally and extrajudicially divorces his wife without showing cause, and in return, the
interpretations of Islamic law, they would be in a limping marriage. Since polygyny has historically been allowed in Islamic law, under these circumstances the husband is still able to remarry both civilly and Islamically. In contrast, the wife is held hostage, unable to remarry because, in the eyes of many in the Muslim community, she is still married. Furthermore, she has no recourse to British state law because the couple is legally divorced. Some Muslim men have, therefore, been able to blackmail their wives by withholding an Islamic divorce unless their wives agree to favorable settlements on financial compensation, property, and child custody.  

Since the U.K. legal system has very few remedies to adequately resolve the limping marriages problem, British Muslims have developed their own formal dispute settlement processes: shari’a councils. These have been established by British Muslim leaders who have recognized the need to create an unofficial Islamic family law system that would allow Muslim women to divorce their husbands “Islamically” without the risk of being blackmailed. The primary function of shari’a councils is to act as qadis (Islamic judges) and issue “Islamic divorces” to Muslim women trapped in limping marriages, allowing them to leave their former husbands without fearing religious consequences.  

III. The British Islamic Scholars’ Debate over Legal Recognition of Islamic Family Law

British Islamic scholars differ over whether shari’a councils, which are currently not recognized by the British legal system, are the best way of resolving Muslims’ marital disputes and implementing Islamic family law in the United Kingdom. For the most part, they have taken one of three positions on the issue: (1) the United Kingdom needs a legally enforceable Islamic family law system; (2) unofficial shari’a councils are adequate to meet the needs of British Muslims; or (3) shari’a councils are unnecessary, because Muslims can solely follow British law and still adhere to the principles of the shari’a. The next three Sections elaborate on each of these stances.

This diversity of viewpoints among Muslim scholars is the latest illustration of the long-standing Islamic legal doctrine of ikhtilaaf, the recognition of the validity of different interpretations of usul al-fiqh, or Islamic legal reasoning. Since the first centuries of Islam, Muslim jurists discerned that while revealed texts such as the Qur’an are infallible, human interpretation of these texts remains fallible. Although scholars can and do debate the strengths and weaknesses of different methods of interpretation, in

wife is able to keep her full mahr (dower). Second, khula is where a woman extrajudicially divorces her husband and grants him financial compensation, usually the return of her mahr, in exchange for the divorce. Third, a faskh (annulment) or tafiq is where a woman can petition a qadi, an Islamic judge, for a divorce on various grounds, such as physical and emotional abuse, desertion, sexual impotency, and failure to financially support her. See David Pearl & Werner Menski, Muslim Family Law 280-86 (1998).


theory they cannot deny each other the right to reach different legal rulings. In order to maintain this pluralism inherent in Islamic law, the British government should be wary of privileging any one of the three positions over another.

A. Legal Recognition Needed

Scholars who believe British Muslims require a legally enforceable system of Islamic family law argue that the *shari‘a* consists of a specific set of rules distinct from British state laws. They contend that the best way of resolving the conflicts between Islamic and British family laws is to legally recognize Islamic family law in the United Kingdom. These scholars have suggested two main ways of incorporating Islamic law into the British legal system: (1) to create a legally enforceable Islamic faith-based family law arbitration system, or (2) to allow British judges to apply Islamic family law for Muslim litigants.

Some British Muslim leaders have proposed establishing an arbitration council to settle family law disputes using Islamic principles that would issue awards which could be enforced by the British courts. However, Parliament would need to amend the 1996 Arbitration Act to make this type of religious arbitration enforceable. Currently, the Act does not allow Islamic arbitrators to displace the jurisdiction of British courts to decide child custody issues or to issue “Islamic divorces.” Other scholars have suggested the British government make decisions issued by shari‘a councils legally enforceable. One proposed that Parliament create a registration system for shari‘a councils in order to maintain high standards and procedural safeguards. Once registered, shari‘a council decisions would be legally binding.

Another model of legally recognizing Islamic family law supported by some scholars is to have British judges adjudicate matters using Islamic family law for Muslim litigants. They suggest adopting the Indian approach, where recognized religious communities—Muslims, Christians, Zoroastrians, Jews, Hindus, Buddhists, and Sikhs—are governed by their own family laws as applied by the state court system. One scholar has even drafted a 162-clause Islamic family law code—based on a book by famed Syrian scholar

---

13. See YILMAZ, supra note 8, at 31-35.
14. For example, one scholar stated, “Islam gives us a set of rules in all aspects of life, including family law. Islam has its own rules on marriage, divorce, child custody, etc. The British legal system also has its own set of rules. If you are a practicing Muslim, you have to obey Islam’s set of rules.” Interview with the Leader of an Institute of Islamic Jurisprudence, in Leicester, Eng. (May 9, 2006) (name and affiliation withheld).
16. Arbitration Act, 1996, c. 23 (Eng.).
17. See id.
19. Archana Parashar, The Concept of Religious Personal Laws, in TOWARDS LEGAL LITERACY: AN INTRODUCTION TO LAW IN INDIA 147, 147 (Kamala Sankaran & Ujjwal Kumar Singh eds., 2008).
Recent Developments

Mustafa Al-Suba’i—that the British courts could follow when adjudicating family law issues for Muslims.  

B. Unofficial Shari’a Councils Are Adequate

British Islamic scholars who contend that unofficial shari’a councils are adequate to meet the needs of Muslims also view the shari’a as a set of rules that may conflict with British state law. However, these scholars further insist that Muslims have a religious obligation to obey the laws of their resident countries, unless they are forced by law to commit a sin. Moreover, they stress that following the shari’a is voluntary, and for the most part, Islamic law does not need to be enforced by the state. For these reasons, they argue that Muslims should find ways of solving conflicts between British state law and the shari’a without demanding a separate system of Islamic family law. For example, they support measures like the Divorce (Religious Marriages) Act of 2002, which attempts to solve the problem of limping marriages by allowing a court to require the dissolution of a religious marriage before granting a civil divorce. In theory, the Act could grant British judges discretion to require that a Muslim couple have an “Islamic divorce” at a shari’a council before issuing them a civil divorce.

C. Shari’a Councils Are Unnecessary

Finally, British Islamic scholars who argue that shari’a councils are unnecessary view the shari’a in a less legalistic way than their counterparts described above. Believing the shari’a should reflect its literal definition as a “path to the source,” they contend that British Muslims should rethink Islamic practices in terms of the broader principles of the Qur’an and the shari’a, an approach referred to in Islamic legal theory as the maqasid al-shari’a (the objectives of the shari’a). Thus, they argue that if British state law espouses the main objectives of the shari’a—upholding mercy, justice, and educating the individual—Muslims do not need to follow a separate Islamic family law largely inherited from abroad. Using this reasoning, they contend that in most areas of family law, Muslims only need to follow British civil law. For

22. Interview with Sec’y, a Shari’a Council, in London, Eng. (Mar. 7, 2006) (“[O]bedience to shari’a law is a voluntary choice. If the parties do not accept our decision, and decide to break shari’a law, they will be accountable in the eyes of God.”) (name and specific affiliation withheld).
23. Divorce (Religious Marriages) Act, 2002, c. 27 (Eng.).
24. Although the Act was established primarily to resolve Jewish limping marriages (the Act specifically states that it is responding to “Judaism and other religions”), in theory, it could also apply to Muslims. See id.
26. See, e.g., TARIQ RAMADAN, WESTERN MUSLIMS AND THE FUTURE OF ISLAM 94 (2005) (“[T]o apply the shari’a for Muslim citizens or residents in the West means explicitly to respect the legal and constitutional framework of the country of which they are citizens.”).
example, they believe there is no need to have a separate “Islamic divorce” in a shari’a council because a British civil divorce already fulfills the general objectives of the shari’a. Moreover, some suggest that a civil divorce even satisfies the requirements of a more legalistic interpretation of an Islamically valid divorce. Because the grounds for civil divorce a woman must prove in a British court—desertion, physical or emotional abuse, adultery, etc.—echo grounds available to a Muslim woman who petitions a qadi or shari’a council for an Islamic divorce, these Muslims argue that a shari’a council divorce is redundant.

Another reason why some British Muslim scholars are wary of shari’a councils is because many councils follow interpretations of Islamic law they believe are unfair towards women. These shari’a councils give women fewer rights than Islamic family law courts in several Muslim-majority countries. For example, while a Muslim woman in Pakistan or Egypt can automatically receive a divorce after she repays her mahr to her husband, some shari’a councils force women to go through an approximately one-year process to obtain a divorce certificate. Furthermore, some councils do not accept a Muslim woman’s petition to divorce on grounds of dharar (harm) or niza’a wa shiqauq (discord and strife), and will require her to give up her mahr in exchange for a divorce. Some scholars even argue that many of the family laws used by shari’a councils should no longer be valid in twenty-first century Britain. They contend that women hold different positions in society today than when those laws were created, and Muslim scholars need to reinterpret the sources of Islam while keeping the maqasid in mind.

IV. Conclusion

As the British Muslim scholars’ diverse viewpoints regarding legal recognition of Islamic family law demonstrate, monolithic fears that implementing the shari’a in the United Kingdom will automatically lead to repressive, antiwomen practices are unfounded. However, for this very reason, the British Parliament should be wary of establishing a system in which Islamic family law is legally enforceable by the state. If the British government recognizes only certain interpretations of Islamic family law—either those of specific shari’a councils or of a codified list to be enforced by British judges—it will confer authority on those interpretations, while excluding other equally legitimate interpretations. This could exacerbate intracommunal tensions because various shari’a councils would compete with each other for government recognition and British Muslims would be

27. Interview with Professor, Al-Mahdi Inst., in Birmingham, Eng. (May 11, 2006) (name withheld) (stating that a British civil divorce is Islamically valid in all circumstances because the shari’a recognizes all local customs (‘urf) if they do not contradict the maqasid).
28. CARROLL, supra note 11, at 9, 16.
29. Interview with Muslim Chaplain, a university, in London, Eng. (May 16, 2006) (stating that the way the majority of shari’a councils implement Islamic law puts “everything in the man’s favor”) (name and affiliation withheld).
31. See, e.g., RAMADAN, supra note 26, at 140-42.
Recent Developments

32. These intra-communal tensions are prevalent among Muslims in India, which legally recognizes Islamic family law. For example, many Muslims have criticized the All India Muslim Personal Law Board, a private organization established to preserve Islamic family law in India, of "consolidating its position as the only arbiter of Muslim destiny in secular, republican India." Ayub Khan, The Fear of Shariah, MILLI GAZETTE, July 1, 2005, available at http://www.milligazette.com/Archives/2005/01-15July05-Print-Edition/011507200506.htm.
Succession Law in the Persian Gulf. By Scott R. Anderson

I. Introduction

The powerful generation of rulers that brought the Arab monarchies of the Persian Gulf into the oil age is gradually passing away. In their wake, elites are being forced to revisit the divisive question of royal succession, and when and how power will pass to a new generation. Given the region's delicate global economic and political position, skeptics have reasonably begun to question whether the ambiguous traditions that have governed succession in the past remain up to the task. This Recent Development surveys how three of these countries—the United Arab Emirates (UAE), Kuwait, and Saudi Arabia—have dealt with the challenge of modern succession. In each, the royal family's discretion in selecting an heir appears to have been constrained by other actors on the basis of new or newly interpreted constitutional powers—a trend that may provide a window into the future of constitutionalism in the Gulf region.

II. Historical Background

The sovereign largely remains the center of political authority in the Arab monarchies. While all of the Gulf countries have adopted constitutions (often called Basic Laws) that legally frame the rights and responsibilities of government, they do little to curb royal prerogative. Recently implemented consultative councils and quasi-legislatures provide a degree of public input but rarely have much independent authority. By appointing members of their family throughout government, Gulf monarchs have instead been able to keep numerous facets of the state in the control of relatives with a vested interest in the survival of their regime. When paired with more typical patronage networks and fortified through oil wealth, this has generally allowed them to retain stable, centralized control.

Succession poses a natural challenge to these regimes. The region's history and traditions provide no clear rules on to whom authority should pass after a monarch dies. Pre-twentieth-century tribal leaders often let their surviving relatives select an heir, while more contemporary monarchs have selected their own. Many families embrace patrilineal seniority, passing the throne from brother to eldest brother, while others use primogeniture, transitioning from father to eldest son. The monarch typically exercises a great deal of discretion, oscillating between patterns and skipping over undesirable candidates to suit their political needs. To ensure that their preferences are followed, they often appoint their heirs to high positions in the cabinet, military, or governorates to build an independent base of support. The monarchs also compensate potential competitors with less influential

---

1. The portion of the Arabian Peninsula bordering the Persian Gulf contains twelve traditional monarchies. These are: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the seven individual monarchies that compose the United Arab Emirates.
2. See NATHAN BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD 54-61 (2002).
3. For a theoretical account of this strategy of "dynastic monarchy," see MICHAEL HERB, ALL IN THE FAMILY (1999).
appointments, increased subsidies, and favored marriages to encourage their continued loyalty and cooperation.\(^5\)

That said, some heirs and new monarchs are inevitably inept, unpopular, or face challengers intent on making their own claims to the throne. Historically, such conditions often led to dispute, revolt, or assassination. To avoid these outcomes, royal families have adopted a mediating role, collectively shifting their support and control over the state bureaucracy behind the candidate who makes the most persuasive case, after informally debating the matter internally and reaching some rough consensus. This strategy has deterred many challengers and resulted in fewer, mostly bloodless coups in recent years. But it has also established the royal family as a counterweight to the monarch’s authority, requiring him to maintain a consensus within the family on his rule and policies or else risk usurpation.\(^6\)

Despite its apparent success, doubts remain whether this opaque system of royal consensus can stay stable into the future. Generational divides, exponential growth, and schisms within many royal families have complicated meaningful coordination and produced numerous potential heirs. Meanwhile, the Gulf countries’ need to economically diversify beyond the oil industry requires regulatory and spending adjustments that will no doubt prove unpopular among royals accustomed to high privilege. Both trends pose challenges for regional political stability and invite questions as to whether regional succession practices are in need of revision.\(^7\)

\section*{III. Recent Developments in Succession Law}

The Gulf region’s constitutions generally endorse the monarch’s traditional right to choose an heir in consultation with the royal family, and what few checks on this power they establish have historically been marginal.\(^8\) But as the UAE, Kuwait, and Saudi Arabia have faced succession crises in recent years, this trend has changed. As described below, innovative political actors have used nuances of their constitutional systems to legitimate new claims of authority. This has in turn allowed them to hold royal families more accountable, and have a greater bearing on succession outcomes.

\subsection*{A. The United Arab Emirates}

The UAE faced its first major succession crisis in November 2004, with the death of the Emir (or King) of Abu Dhabi Zayed al-Nahyan.\(^9\) Having been the primary force behind the UAE’s formation in 1971, Zayed was also the one and only President of the UAE’s Supreme Council of Rulers, a governing body consisting of the monarchs of each of the UAE’s seven constituent kingdoms, or emirates. As the most powerful emirates, Abu Dhabi and Dubai generally receive the positions of President and Vice President on the
Supreme Council, and possess a veto over Council decisions. But the rules of succession that determine who sits on the Council remain predominantly local and are decided within each emirate.  

Abu Dhabi’s hegemony over the country’s armed forces and oil wealth have allowed it to play a decisive role in smaller emirates’ succession disputes, as in 2003 when it helped stabilize the small emirate of Ras al-Khaimah following a minor succession-related uprising.  

But Zayed’s death had no such easy solution. Though the King’s eldest son Khalifa was Crown Prince, many observers expected his popular younger brother Muhammad, commander-in-chief of the national military, to challenge his claim. Some saw Zayed’s recent elevation of Muhammad to the new position of Deputy Crown Prince as an effective endorsement, and favored Muhammad as a stronger bulwark against Dubai’s growing influence.  

Despite these fears, Khalifa ascended to the throne. His position was fortified almost immediately by the Supreme Council of Rulers, which unanimously elected him the new President. The Council’s swift action departed somewhat from their constitutional role, which allowed for up to a month-long waiting period before a new President was elected, apparently to allow succession disputes to be resolved locally. Instead, the Council’s move secured Khalifa’s ascension and effectively deterred further debate on the matter within Abu Dhabi’s royal family. No subsequent challenge emerged from Muhammad, who accepted a position as the new Crown Prince.  

This pattern repeated itself in January 2006, when the Emir of Dubai died and his newly ascended successor was quickly elected Vice President. Seemingly bolstered by the Council’s check on familial resistance, the new Emir shifted succession from his brother to his son in February 2008, a sign of autonomy that Khalifa may yet imitate. In both cases, the Council’s support seems likely to serve as a bulwark for both rulers against efforts to effect change from within their respective families.

B. Kuwait

Kuwait faced an even more difficult transition upon the death of its Emir, Jaber al-Sabah, in January 2006. Jaber’s elderly heir, Sa’ad al-Sabah, was nearly incapacitated by illness and widely seen as unfit to rule. But the royal family seemed unable to settle on an alternative. Family tradition held
Recent Developments

that the throne should alternate between the rival Jaber and Salem branches of the family, but next in line after Sa’ad was the Prime Minister Sabah al-Sabah, who was of the same Jaber branch as the deceased Emir. Indecision prevailed, leaving the throne unoccupied for over ten days.\(^\text{17}\)

Kuwait’s partially elected National Assembly, established by the country’s 1962 Constitution, had a limited official role in this quagmire. Its constitutional powers regarding succession were relatively minor: receiving an oath of investiture from any new Emir, and vetting their choice of heir.\(^\text{18}\) Despite these limitations, stalemate within the family pushed the Assembly towards action. Seizing upon rumors that Sa’ad was physically incapable of taking the oath of investiture, Assembly members associated with the deceased King’s cabinet began debate on a motion finding Sa’ad unable to meet the requirements of office, and endorsing Sabah as successor. Neither of these acts were clearly within the Assembly’s constitutional authority, as Sa’ad’s inability to recite the oath did not clearly disqualify him, let alone give the Assembly the right to nominate an heir without input from the royal family. Yet the threat alone was sufficient to provoke action: before the motion could be voted upon, a letter was received from Sa’ad officially abdicating in favor of Sabah.\(^\text{19}\)

The National Assembly’s actions demonstrated its limited appetite for political uncertainty, and will likely discourage the al-Sabah family from permitting such uncertainty in the future. Furthermore, its maneuver appears to have bolstered Sabah, giving him a fortified position that was quickly demonstrated by his appointment of his half-brother Nawwaf, also of the Jaber branch, as heir, in violation of family protocol. The Assembly’s approval of this choice further reinforces Sabah’s autonomy from broader family preferences.\(^\text{20}\)

C. Saudi Arabia

In part to avoid internal competition, the throne of Saudi Arabia has passed horizontally between the sons of the nation’s founder, Ibn Saud, since his death in 1953. Consequently, the current King Abdallah inherited the throne in August 2005 at the estimated age of eighty-two, while his Crown Prince Sultan, already selected as part of a family power-sharing arrangement, was eighty-one. The similarly advanced ages of siblings next in succession made it difficult to ignore the country’s brewing generational crisis.\(^\text{21}\) But calls for Abdallah to appoint someone of the next generation as the Sultan’s successor faced two difficulties: first, selecting an heir from Ibn Saud’s dozens of eligible grandsons; and second, overcoming opposition from

---

Abdallah’s surviving brothers, many of whom were not ready to abandon their claims to the throne. As a result, the future of succession remained unclear until October 2006.22

That month, King Abdallah issued a radical new edict dubbed the Allegiance Institution Law, and incorporated it into the country’s Basic Law. The Institution itself was formed a year later, with the issuance of governing bylaws and appointment of thirty-five initial members.23 It consists of each of the surviving sons of Ibn Saud, or one of their male descendents if the individual is dead or unable to participate.24 This body has the ability to vet the King’s nominees for heir, and even submit and eventually select its own nominee if the King’s are deemed unsuitable.25 In addition, if both the King and Crown Prince are found to be incapable of keeping the throne, the Institution may establish an emergency transitional government and even elect a new king from Ibn Saud’s descendants.26 And to ensure that the Institution’s decisions are not disputed, detailed minutes of its secret meetings are kept and stored for future reference.27

This landmark reform embeds succession processes in a formal political institution and provides the documentation necessary for disputes to be resolved quickly and legally. The natural generational shift in the body’s representation over time seems to make intergenerational transfers of power not only possible but inevitable, and emergency provisions seem well suited to ensure political stability even in times of crisis.28 Similarly, future monarchs are likely to benefit from clearer standards of when they risk losing power, limiting their reliance on a broad family consensus. The primary loser in this arrangement is the broader royal family, whose voice on succession is limited to that expressed through relatives on the Institution, and consequently is likely to carry less weight.

IV. Analysis

Royal families in each of the above countries have seen their discretion over succession affected by either the innovative actions of existing political institutions or the creation of new ones. Law seems to have been significant in each case, giving political actors a textual basis from which to draw legitimacy for their actions, or in which to embed their innovations. While by no means liberal or democratic, this constitutional activity nonetheless reflects the ability of actors to reinterpret and draw authority from the law, allowing

24. Allegiance Institution Law, supra note 23, art. 1; Allegiance Institution Bylaws, supra note 23, art. 1.
26. Id. arts. 10, 12-13.
27. Id. arts. 21-23; Allegiance Institution Bylaws, supra note 23, art. 13.
28. See al-Badi, supra note 22, at 7-8.
them to hold other powerful actors, if not the monarch himself, accountable to some degree. 29

Determining why this trend has emerged is more difficult. Some actors may have been concerned by the shadow that potential political instability casts over their privileged position in society. Others may have worried that chaotic successions would hinder business activities and economic development through unfavorable foreign investor reactions and credit ratings. 30 Embedding succession in a more politically accountable or institutionalized process may be seen as limiting its unpredictability, promoting policy continuity, and reducing outside perceptions of political risk. Similarly, clearer procedures for securing succession and maintaining legitimate authority may reduce a current monarch’s reliance upon broad familial consensus, providing him an incentive in the form of greater autonomy in exercising his political authority. 31

The immediate relevance of this trend to the other Gulf states is difficult to discern. Bahrain’s constitution limits the space available for succession disputes by embracing primogeniture and establishing the eldest son as a default heir unless overruled by the King. 32 Qatar’s Basic Law similarly embraces primogeniture but has no default rule, 33 leaving greater ambiguity that could prove problematic given its history of usurpation 34 and recent succession controversies. 35 Oman’s situation is the most ambiguous, as the current Sultan Qaboos has no living brothers, children, or proclaimed heirs. The Omani Basic Law currently gives his family three days to select a successor upon his death. If they fail to agree, then the country’s military leaders are supposed to enforce a secret order of succession issued by Qaboos before his death, 36 a possibility that leaves significant room for dispute, conflict, and a possible military oligarchy. 37

Even if the trend described above continues, wealth, status, and positions in the bureaucracy will provide royal families with significant power in the Gulf monarchies for years to come. Some may accept their marginalization as a necessary sacrifice to retain their overall privileged status. But others may resist, upsetting the familial consensuses that have helped preserve regional stability for decades. Whatever comes to pass, these future developments should speak volumes on the Gulf’s future interactions with the world, and the

29. For one account of this “Arab constitutionalism,” see BROWN, supra note 2, at 197-200.
30. See, e.g., Moody’s Upgrades Five Gulf Countries, AL-BAWABA, July 25, 2007 (“The strength of domestic institutions in the [Gulf] tends to lag that of highly rated countries in other regions and there are questions regarding the path of political succession within the ruling families . . .”).
31. See Peterson, supra note 4, at 184-85.
degree to which law can still carry some weight in even the most autocratic states.
Due Process and Sanctions Targeted Against Individuals Pursuant to U.N. Resolution 1267 (1999). By Johannes Reich*

I. Piercing the Veil of Statehood
Sanctions imposed by the United Nations Security Council have served as an essential instrument to influence and alter the behavior of national leaders in order to maintain international peace and security. Since the first mandatory nonmilitary sanctions regime was established in December 1966 against the white minority government of Southern Rhodesia, the targets of these coercive means have traditionally been states or their representatives. In contrast, the legal framework established pursuant to Resolution 1267 (1999) and subsequent decisions by the Security Council represents a move to pierce the veil of statehood. Under this new regime, individuals not necessarily associated with states or state actors are subject to sanctions. This shift in focus raises pressing issues of constitutional law, not least because the current system lacks basic guarantees of fair trial and effective remedy. Nevertheless, this framework built upon the U.N. Charter is, despite its deficiencies, the only one capable of coping with challenges such as international terrorism which exceed the reach of the nation-state. This Recent Development explores the question: what strategy would both strengthen the rule of law within the U.N. sanctions regime and preserve the international mechanism addressing the most pressing collective challenges to peace?

II. The Emergence of a Barely Checked Supranational Administrative Agency
The “primary responsibility for the maintenance of international peace and security” is vested in the Security Council.¹ That body enjoys wide, if not unlimited, discretion to determine whether a certain event amounts to a “threat to the peace, breach of the peace, or act of aggression.”² Such a determination allows the Security Council to “make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.”³ The Security Council is specifically entitled to “decide what measures not involving the use of armed force are to be employed.”⁴ However, all such decisions made under Chapter VII of the U.N. Charter “shall be carried out by the Members of the U.N. directly and through their action in the appropriate international agencies of which they are members.”⁵ Consequently, the resolutions of the Security Council, including sanctions, are not self-executing. They require a national enforcement mechanism. In the United States, U.N. sanctions are usually enforced through Executive Orders.

* I would like to thank Professor W. Michael Reisman, Michael Thad Allen, and Jedidiah J. Kroncke for their criticisms and comments on earlier versions of this piece as well as the responsible editors, Peter Harrell, Jonathan Finer, and Vivek Krishnamurthy, for their most valuable support and suggestions.

¹. U.N. Charter art. 24, para. 1.
³. Id.
⁴. U.N. Charter art. 41.
⁵. U.N. Charter art. 48, para. 2.
On October 15, 1999, the Security Council adopted Resolution 1267 (1999) acting under Chapter VII. In order “that the Taliban turn over Usama bin Laden” it imposed an air embargo on the Taliban and froze “funds and other financial resources” owned or controlled by the Taliban. The scope of these sanctions was considerably expanded by Resolution 1333 (2000), adopted on December 19, 2000, to include “Usama bin Laden and individuals and entities associated with him . . . including those in the Al-Qaida organization.” The Security Council decided that the member states shall freeze financial assets of these individuals (asset freeze), prevent them from entering or traveling through their territory (travel ban), and impose an arms embargo on the designated individuals and entities. The administration of these sanctions was delegated to a special committee of the Security Council comprised of representatives of all Security Council members.

This Committee registers individuals and entities associated with Osama bin Laden or the Qaeda organization in “an updated list, based on information provided by States and regional organizations.” This so-called “Consolidated List” catalogues the subjects against whom the sanctions to be enforced by the member-states apply. Each member of the United Nations is entitled to propose individuals or entities to be included on the Consolidated List. The sanctions imposed as a result of the listing constitute a mere “preventive measure in combating terrorist activity.” They “are not reliant upon criminal standards set out under national law.” Consequently, neither a criminal charge nor a conviction is a precondition to be proposed or listed. The Committee makes its decisions whether or not to include a person or entity in the Consolidated List unanimously. Each member-state of the Committee therefore has a veto; issues on which the Committee fails to reach a consensus are submitted to the Security Council.

The current framework provides for two different procedures for an individual or an entity to seek to be de-listed directly (the so-called “focal point process”) and for a state of residence or citizenship to request removal. The “focal point process” allows affected individuals or entities to access the United Nations directly through its “focal point,” an agency within the U.N. Secretariat designed to receive de-listing requests. The focal point, however,
engages neither in factfinding nor in applying laws.\textsuperscript{18} It merely informs the government that initially requested the listing and the government of citizenship and residence of the individual or entity’s request for de-listing.\textsuperscript{19} At least one of these states is required to endorse such a request in order for it to be placed on the Committee’s agenda.\textsuperscript{20} The request is deemed to be rejected if, after a limited period of consultation, none of the members of the Committee explicitly ask for the de-listing. Since decisions are made unanimously, the petition is also dismissed if one or more of the fifteen members opposes the request.\textsuperscript{21} Moreover, the state of residence or citizenship is entitled to request that a person or entity be removed from the Consolidated List.\textsuperscript{22}

This mechanism, which installs the Committee as a supranational agency administering sanctions imposed on individuals, is problematic on several grounds. The procedure outlined above might be apt to cope with measures intended to be “preventive in nature,”\textsuperscript{23} but it fails to provide appropriate legal standards for measures which practically amount to criminal sanctions. For example, in the case \textit{Nada v. SECO}, discussed below, the Security Council has frozen assets of and imposed a travel ban on an individual for more than six years. Moreover, none of the resolutions adopted to date provide a clear legal standard as to whether or not an individual or entity is entitled to be removed from the Consolidated List. The current framework only provides factors which the Committee may or may not take into consideration.\textsuperscript{24} Consequently, even a mistake in identity or the death of a listed subject would not necessarily result in a de-listing. Moreover, the state that initially requests a listing acts as an \textit{iudex in causa sua} reviewing its own decision. Finally, the consensual decisionmaking process is strongly biased toward preserving the status quo. The mechanism accepts that a person or entity may remain on the Consolidated List for years based on mere hearsay or intelligence that the listed person had no opportunity to challenge.

\textbf{III. Blacklisted: \textit{Nada v. State Secretariat for Economic Affairs}}\textsuperscript{25}

A case recently decided by the Swiss Federal Supreme Court highlights the legal problems associated with this sanctions regime. Youssef Mustapha Nada, an Italian national born in Egypt, has been a resident of Campione d’Italia, a small Italian enclave roughly half a square mile in size fully surrounded by Swiss territory. Mr. Nada, a member of the Egyptian Muslim Brotherhood, was a cofounder and co-owner of Al Taqwa Management SA (later renamed “Nada Management Organization”), a financial network with subsidiaries and branches in Europe, the Maghreb, and the Caribbean. In a radio address on November 12, 2001, U.S. President George W. Bush referred

\begin{itemize}
  \item \textsuperscript{18} S.C. Res. 1730, \textit{supra} note 16, annex.
  \item \textsuperscript{19} \textit{Id}.
  \item \textsuperscript{20} \textit{Id}.
  \item \textsuperscript{21} \textit{Id}.
  \item \textsuperscript{22} \textit{See Guidelines, supra note 14, ¶ 8(e)}.
  \item \textsuperscript{23} \textit{Id.} ¶ 6(e).
  \item \textsuperscript{24} S.C. Res. 1735, \textit{supra} note 11, ¶ 14 (emphasis added).
  \item \textsuperscript{25} Bundesgericht [BGer] [Federal Court] Nov. 14, 2007, 133 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 450 (Switz.).
\end{itemize}
Mr. Nada was thus named a "Specially Designated Global Terrorist" by the U.S. Treasury. Consequently, at the request of the United States, on November 9, 2001, Nada appeared as "QI.E.53.01" on the U.N Security Council's so-called "blacklist," the Consolidated List of the U.N. Security Council.

In order to enforce the Security Council's non-self-executing sanction, the Swiss Federal Council (Switzerland's executive branch) added Mr. Nada's name to the appendix of a decree three weeks later. As a consequence, Mr. Nada was barred from leaving the enclave of Campione d'Italia, and his assets were frozen. An investigation launched by the Office of the Attorney General of Switzerland was closed after more than three years, finding insufficient evidence to bring the case to the Swiss Federal Criminal Court. Thereafter, Mr. Nada filed a petition with the State Secretariat for Economic Affairs (SECO), the administrative agency responsible for the domestic enforcement of the sanctions, asking that the constraints be lifted. SECO, however, dismissed the petition, arguing that Switzerland was bound by the resolutions of the Security Council made pursuant to Chapter VII of the U.N. Charter and that SECO was not allowed to review such decisions. On administrative appeal, the Federal Department of Economic Affairs reached the same conclusion.

The Swiss Federal Supreme Court dismissed Mr. Nada's petition on November 14, 2007, holding that Switzerland was, according to the U.N. Charter, obliged to enforce decisions of the Security Council. The Court further stated that member-states could only annul resolutions made by the Security Council when they would conflict with jus cogens norms. As the guarantees invoked by the petitioner would not qualify as such peremptory norms of international law, the court refused to indirectly review the Security Council's resolutions by annulling the federal decree.

Despite their apparent tension with fundamental human rights (such as the guarantee of a fair trial) these judicial decisions are far from unique. Nada v. SECO might dramatically illustrate the legal concerns associated with the current regime as the geographical particularities of the case resulted in a situation that "comes close to house arrest." However, the Court of the First Instance of the European Communities also refused to review indirectly U.N. sanctions on similar grounds. Furthermore, U.S. courts have consistently refrained from annulling economic sanctions imposed or enforced by the

federal government. In light of the apparent deficiencies of the legal framework established pursuant to Resolution 1267 (1999), this reluctance of national courts, however, is unlikely to persist. The looming possibility of a clash between national courts and the international regime should encourage the member states to press for an overhaul of the current sanctions regime.

IV. Providing for Fair Trial and Effective Remedy

An effective response to the challenges posed by international terrorism, in particular the attempt to eliminate the financial networks supporting such activities, transcends the reach of individual nation-states. This became apparent when the Security Council adopted Resolution 1373 on September 28, 2001, obliging all member-states to criminalize the funding of terrorist acts. This resolution grants the Security Council wide discretion to define both the elastic notion of a “threat to peace" (which trigger measures according to Chapter VII of the U.N. Charter) and the member-states’ obligation to carry out these decisions. According to these unambiguous texts, member-states are neither entitled to invoke conflicting international obligations nor domestic law in a bid to avoid enforcing such resolutions.

The Security Council is, indeed, bound by “the Purposes and Principles of the United Nations.” In particular it must heed “human rights.” The fact that legal constraints bind the Security Council does not, however, establish jurisdiction of international or national authorities to review whether the Security Council does, in fact, meet its obligations. As opposed to the court-centered legal framework of most contemporary nation-states, the U.N. Charter established a system built around the Security Council as a political body checked through its own decisionmaking mechanism, namely the veto power of its permanent members. Consequently, the International Court of Justice has refrained from reviewing the resolutions made by the Security Council.

In order to hold the Security Council at bay, legal scholarship has elaborated two distinctive concepts. Acts of the Security Council taken clearly

---


34. U.N. Charter art. 39.

35. See, e.g., S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992) (stating that Libya's refusal to extradite the subjects suspected of the bombing of PanAm flight 103 over Lockerbie, Scotland years after the attack amounted to a “threat to peace”).

36. See U.N. Charter art. 48; see also id. art. 1, para. 1.


outside its competence (manifestly ultra vires) are not legally binding.\(^4^2\) Moreover, resolutions violating norms of jus cogens are held to be void.\(^4^3\) Given the Security Council’s wide discretion in determining whether and how it should act under Chapter VII, decisions made clearly beyond its competence almost never occur. Furthermore, the substance of jus cogens norms—that is, a provision “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”\(^4^4\)—is narrow and contrasts with the broad powers of the Security Council. In sum, neither of these concepts could effectively check the Security Council.

Whereas the inherent checks imposed on the Security Council through its process of decisionmaking might, in general, have prevented the Council from losing sight of the principles and purposes of the U.N. as far as state and state elites were concerned, these checks are far less effective in cases involving targeted individuals. This lack of effective constraint invites national and regional international courts to provide basic guarantees. The European Court of Human Rights, in particular, stated in a precedent issued in 2005 that it would only defer to national acts enforcing the Security Council’s resolution as long as the mechanism controlling the observance of fundamental rights can be considered “at least equivalent” to that provided by the guarantees enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms.\(^4^5\) Apart from the fact that such an approach is hardly consistent with the “supremacy clause” of the U.N Charter,\(^4^6\) such a development risks seriously undermining the U.N.’s already fragile ability “to take effective collective measures”\(^4^7\) in the face of challenges which exceed states’ legal and economic resources. Judicial review of Security Council resolutions by national courts would open Pandora’s box and result in the fragmentation of U.N. resolutions along the borders of national and supranational jurisdictions.\(^4^8\) Hence, the U.N. itself must provide for an independent administrative mechanism to review both the listing and de-listing decisions made by the Committee. Only a mechanism at the level of the U.N. can, at the same time, preserve the crucial framework of international implementation of collective measures and also validate the core principles of the rule of law. Such a review mechanism should build upon the principles set forth by the Security Council in Resolution 1617, which imposes sanctions as

\(^{42}\) See, e.g., Jochen Frowein, The UN Anti-Terrorism Administration and the Rule of Law, in COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 785, 790 (Pierre-Marie Dupuy et al. eds, 2006).


\(^{44}\) Vienna Convention on the Law of Treaties, supra note 37, art. 53.


\(^{46}\) U.N. Charter art. 103. See also Vienna Convention on the Law of Treaties, supra note 37, art. 30 para. 1.

\(^{47}\) U.N. Charter art. 1, para. 1 (emphasis added).

a "preventive measure in combating terrorist activity." Consequently, such measures would have to be imposed for a limited duration only based upon, inter alia, the level of complexity present in a criminal investigation. Such a time limit would justify the listing decision being based upon prima facie evidence not necessarily meeting the standards of criminal proceedings. The time limit could, furthermore, provide incentives to launch formal investigations and criminal proceedings in absentia if unavoidable. De-listing requests should be addressed to an independent panel within the U.N. framework consisting of independent experts.

The perseverance of the international system comes at the price of delay, as adapting international law through the channels of international politics is often a painstakingly slow process. In order to adjust the balance between the long-held interest of protecting the international legal order for the sake of individual liberty, member states should, in the meantime, make use of the leeway granted them for humanitarian needs on a case-by-case basis. After all, as Max Weber famously stated, "[p]olitics is a strong and slow boring of hard boards. It takes both passion and perspective."