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Kiss of Death: Application of Title VII's Prohibition Against Religious Discrimination in the Kingdom of Saudi Arabia

I. INTRODUCTION: WILL THE FOREIGN LAW EXCEPTION MAKE A DIFFERENCE?

Last spring a friend, Pete,¹ applied for a position with a U.S. firm doing business in the Kingdom of Saudi Arabia.² The ideal candidate for this position had to possess an unusual range of professional, technical and cultural experience. Pete's resume made him the ideal candidate. He spoke French and English and, as an additional bonus, also spoke Arabic—a language he acquired some years earlier while serving in the U.S. military. He had an undergraduate degree *magna cum laude* from Brigham Young University and the requisite number of years work experience in the field. His track record with previous employers was solid. Upon considering these credentials, the interviewer from this firm told Pete he was a strong candidate for the job.

As he worked his way down Pete's resume, however, the interviewer's attitude began to change. Slowly but noticeably, the look on his face went from one of interest to one of concern. The furrows on his forehead deepened. He hesitated, took a breath, and then uneasily advanced this question: "You graduated from BYU. You speak two languages other than English. You seem to fit the profile of an ex-Mormon missionary. You wouldn't happen to be a Mormon would you?"

"Yes, I am a Mormon," Pete replied.

"And did you chance to go on one of those two year missions for the Mormon Church?"

1. "Pete" has consented to my telling his story in this forum on condition that facts be altered to conceal identities of concerned parties. Quoted material has not, however, been altered, but is taken directly from the conversation on which this story is based.

2. For present purposes, it doesn't matter greatly which of the Arab Gulf States it was, since every one of these states is profoundly committed to Islam. And, the point I make with this anecdote (and in this Comment, more generally) regards Title VII implications of doing business in countries profoundly committed to Islam.

"Well, yes I did. But what are you driving at?" Pete wondered aloud.

In response, the interviewer explained that another Western firm doing business in the Kingdom had recently suffered what might in business terms amount to "the kiss of death"³ after a U.S. employee with evangelical Christian convictions gave a Bible to a Muslim co-worker. When authorities discovered this . . . well, to put it mildly, it wasn't pleasant for anyone. "Not very good for business, you understand," the interviewer observed, "not very good at all."

Pete quickly agreed and assured the interviewer that among the things he learned on his religious mission was when and how to avoid the subject of religion and that he would do nothing to compromise the firm's position in the Kingdom. Happily, Pete was convincing on this point and went on to secure the position. But Pete's job-hunting success is not the point here. The point here is simple: U.S. employers of U.S. employees working in profoundly Islamic countries sometimes find compelling reasons to discriminate on the basis of religion in their employment practices.

Nevertheless, we may wonder what would have happened had Pete not only failed to secure the position, but had the firm hired a less qualified, less religiously objectionable candidate. Had this happened, Pete could have filed a claim against the firm under Title VII of the Civil Rights Act of 1991⁴ (Title VII)—an act which prohibits U.S. employers from discriminating on the basis of religion in their hiring practices. Filing such a claim, however, might raise this question: Can U.S. employers discriminate on the basis of religion when hiring U.S. employees in the United States for work in countries with unique or heightened religious sensitivities? Or, more generally, under what circumstances and to what extent may U.S. employers claim exception to Title VII's extraterritorial application? For answers to Title VII extraterritorial application questions such as these, we may, as this Comment does, look to Title VII's foreign law exception.⁵

This Comment considers the usefulness—and possible uselessness—of Title VII's foreign law exception, particularly in the context of religiously motivated Title VII-violative policies

3. Hence, my title.

4. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. 1992).

5. *Id.* § 2000e(f).

and practices involving a profoundly Islamic country, the Kingdom of Saudi Arabia. First, this Comment provides a brief historical overview of Title VII, its extraterritorial application, and the foreign law exception to that application. It also provides, by way of example, an overview of the law of the Kingdom, with a particular view to understanding how that law compares with Title VII in matters related to religious discrimination. This Comment then illustrates difficulties in applying the foreign law exception with three hypotheticals. Each hypothetical is factually connected with the Kingdom and the foreign law exception's failure to fulfill its functions—functions that include: (1) protecting U.S. employers of expatriate U.S. employees from unpreventable and indefensible Title VII claims, (2) avoiding offensive application of U.S. law beyond U.S. borders, and (3) forestalling accusations of U.S. cultural imperialism. Finally, this Comment briefly considers possible legislative reformulations of Title VII's foreign law exception.

II. BRIEF OVERVIEW OF TITLE VII: EXTRATERRITORIAL APPLICATION AND THE FOREIGN LAW EXCEPTION

To advance the rights guaranteed by the Fourteenth Amendment,⁶ to remedy past discrimination on the basis of religion, national origin, gender, race, and color, and to discourage future like discrimination in both public life and the private sector, Congress passed Title VII of the Civil Rights Act of 1964.⁷ In passing Title VII, Congress created a federal claim against U.S. employers who discriminate in their employment policies and practices on the basis of religion, national origin, gender, race or color.⁸

Title VII recognizes that, under appropriate circumstances, religion, national origin, and gender may serve as *bona fide*

6. U.S. CONST. amend XIV, § 1.

7. 42 U.S.C. §§ 2000e-e17 (1988).

8. *Id.* In a Title VII action, the claimant files a claim with the Equal Employment Opportunity Commission (EEOC). *Id.* § 2000e-5(b). The EEOC is a governmental agency created especially for the purpose of handling employment discrimination claims. *Id.* § 2000e-4. Once the claimant files a claim with the EEOC, the EEOC may investigate, facilitate conciliation between claimant and employer and, if conciliation fails, litigate the claim on behalf of the claimant. *Id.* § 2000e-5(b). Alternatively, the EEOC can give the claimant a letter declaring the claimant's right to sue directly. *Id.* 2000e-5(f). Potential claimants under Title VII may include persons seeking employment by discriminatory employers as well as persons already, or at one time, employed by discriminatory employers.

occupational qualifications (BFOQ).⁹ For example, a Mennonite church in Central California looking to hire a new pastor may discriminate against pastors of other faiths by excluding them from the hiring process, if such an exclusion would be "reasonably necessary to the normal operation of that particular . . . enterprise."¹⁰ But, the Mennonite church could not discriminate against, say, an African-American or an Asian-American pastor of the Mennonite faith on BFOQ grounds, since the BFOQ exception does not allow discrimination on the basis of race or color.¹¹ And, in any case, one must remember that the BFOQ exception has been integrated as "an extremely narrow exception to the general prohibition against discrimination."¹²

Until 1991, whether expatriate U.S. employees of U.S. employers were entitled to the protections of Title VII was unclear.¹³ In 1991, however, the Supreme Court held that, absent an express legislative statement authorizing Title VII's extraterritorial application, Title VII would be limited in scope to discrimination occurring within the territorial jurisdiction of the United States.¹⁴ This meant, for example, that a U.S. citizen employed by a U.S. employer and working in the Kingdom of Saudi Arabia would not be allowed to recover for his employer's religiously motivated employment discrimination.¹⁵ During that same year, however, the express legislative state-

9. *Id.* § 2000e-2(e) (providing that "it shall not be an unlawful employment practice for an employer to hire and employ . . . on the basis of his [or her] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

10. *Id.*

11. *Id.*

12. *Dothard v. Rawlinson*, 433 U.S. 321, 355 (1977).

13. See generally Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990); Janelle M. Diller, Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 GEO. L. J. 1465 (1985); Adam M. Mycyk, Comment, *United States Fair Employment Law in the Transnational Employment Arena: The Case for the Extraterritorial Application of Title VII of the Civil Rights Act of 1964*, 39 CATH. U. L. REV. 1109 (1990).

14. *Equal Employment Opportunity Comm'n v. Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244 (1991). For discussion of this holding see Keith Highet & George Kahale III, *International Decision: Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 85 AM. J. INT'L L. 552 (July 1991); Robert A. LaBerge & Thomas G. Eron, *Employment Law*, 43 SYRACUSE L. REV. 295, 302 (1992); Louise Weinberg, *Against Comity*, 80 GEO. L. REV. 53, 73-76 (1991); *The Supreme Court, 1990 Term: Leading Cases*, 105 HARV. L. REV. 177, 369-79 (1991).

15. *ARAMCO*, 499 U.S. at 244.

ment the Court was looking for but found missing in the 1964 version of Title VII—a statement indicating Congress' clear intent to make Title VII applicable abroad—was included in the 1991 version of Title VII.¹⁶

Realizing the difficulties Title VII's extraterritorial application might present, Congress provided an exception—the foreign law exception.¹⁷ Congress commanded U.S. employers of expatriate U.S. employees to comply with Title VII, except when compliance would cause the U.S. employer to violate the laws of the foreign country in which its U.S. employees work.¹⁸

Does the foreign law exception, as formulated here, address the kinds of difficulties U.S. employers of expatriate U.S. employees faced prior to 1991, i.e., prior to Congress making Title VII extraterritorially applicable? As this Comment will point out, the foreign law exception apparently ignores at least two significant questions U.S. employers of expatriate U.S. employees faced prior to 1991: first, whether the U.S. employer may, with the blessings of the exception, implement Title VII-violative policies or practices in order to prevent U.S. employees from themselves breaking the laws of the foreign country in which they work;¹⁹ and second, whether the foreign law exception applies to a U.S. employer's Title VII-violative policies or practices which occur entirely within the territorial boundaries of the United States, but which are aimed exclusively at pre-

16. 42 U.S.C. § 2000e(f) (1988 & Supp. 1992) (defining "employee" as a U.S. citizen who works "in a foreign country" under the employ of a U.S. employer); see also *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302 (N.D. Cal. 1992); *Joyner v. Monier Roof Tile, Inc.*, 784 F. Supp. 872 (S.D. Fla. 1992); *Connerly v. CVN Companies*, 785 F. Supp. 810 (D. Minn. 1992) (each noting that ARAMCO was superseded by the 1991 update to Title VII).

17. 42 U.S.C. § 2000e-1(b) (Supp. 1992).

18. 42 U.S.C. § 2000e-1(b) (Supp. 1992) states:

It shall not be unlawful [under the sections of Title VII which regulate employment practices] for an employer (or a corporation controlled by an employer), labor organization, employment agency or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

In other words, if compliance with Title VII would mean that the U.S. employer would be in violation of the work-site country's laws, then the U.S. employer is excused from compliance with Title VII. *Id.*

19. See, e.g., *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983).

venting the violation of the laws of the foreign country in which the U.S. employee works or is to be stationed.²⁰ A third deficiency in the foreign law exception, a deficiency perhaps not adequately suggested by relevant jurisprudence, is the exception's exclusive focus on foreign "law." Surely, U.S. employers require the flexibility to take account of significant non-legal factors, such as prevailing culture, morality, and/or tradition, when formulating company policy regarding foreign operations, especially when these non-legal factors, at least for practical purposes, carry the weight of law.²¹

By recourse to three hypotheticals, this Comment will analyze the foreign law exception's failure to address these three questions. Because all three hypotheticals are factually connected with the Kingdom, a brief overview of the law of the Kingdom, especially as regards religious commitments and discrimination, will at this point prove useful.

III. THE LAW OF THE KINGDOM OF SAUDI ARABIA AND RELIGIOUS DISCRIMINATION: A BRIEF OVERVIEW

The Kingdom is, according to its recently promulgated Basic System,²² governed by the Shari'a ("the Islamic law"),²³

20. See, e.g., *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986).

21. Another deficiency in the foreign law exception, one that will not be further addressed in this Comment, but which nonetheless deserves mention, is the exception's failure to limit its scope to discriminatory situations involving only religion, national origin or gender. Suffice it to say here, that, for the same reasons Congress expressly prohibited use of the BFOQ exception in cases involving discrimination based race or color, it should probably also have prohibited use of the foreign law exception in cases involving discrimination based on race or color.

22. THE BASIC SYSTEM OF GOVERNMENT OF THE KINGDOM OF SAUDI ARABIA, Royal Decree No. A/90 (Sha'ban 27, 1412; March 1, 1992) [hereinafter BASIC SYSTEM]; see also *Saudi Basic Law of Government Issued*, SPA & BBC SUMMARY OF WORLD BROADCASTS (British Broadcast Corp. March 3, 1992) available in LEXIS, MDEAFR Library, TEXTLINE File. For his interpretations of the Basic System, the author relies exclusively on the official Arabic text, generously provided to him by the Office of Legal Counsel at the Royal Saudi Embassy in Washington, D.C.

For commentary on the Kingdom's new Basic System see Rashed Aba-Namay, *The Recent Constitutional Reforms in Saudi Arabia*, 42 INT'L & COMP. L.Q. 295 (1993); A. Michael Tarazi, Note, *Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government*, 34 HARV. INT'L L.J. 258 (1993).

23. BASIC SYSTEM arts. 8 & 23. The Shari'a encompasses an extremely broad range of legal topics—family, property, personal injury, and criminal law, to name but a few. While the content of the Shari'a is relatively predictable in some matters, a more profound analysis shows that the Shari'a is a process, a jurisprudential methodology developed during the Middle Ages and intended, not as a defin-

a law deduced some eleven centuries ago from the Holy Qur'an and the *sunna* ("tradition") of the Prophet Muhammed²⁴ (*pbuh*).²⁵

We sent down to you the Book which possesses the Truth so that you could judge between people according to that which Allah has shown you²⁶

No, by your Lord, they believe not until they make you [Muhammed (*pbuh*)] judge in all disputes that arise between them and find no resistance in their souls against your judgments, accepting them wholeheartedly.²⁷

itive list of offenses, but as a guide to *al-Qadi* ("the judge") in the determination of legal questions. The Shari'a is not a code of offenses. It does not concern itself with *stare decisis*. See David J. Karl, Note, *Islamic Law in Saudi Arabia: What the Foreign Attorney Should Know*, 25 GEO. WASH. J. INT'L L. & ECON. 131 (1991) (discussing the Shari'a process as applied in the Kingdom). The Shari'a is much less tangible than a civil code or common law-*stare decisis* legal regime.

24. There are five recognized primary sources of Shari'a. They are known as *usul al-fiqh* ("origins of understanding" or "of jurisprudence"). They include: (1) the Holy Qur'an, the literal word of Allah as revealed to Muhammed (*pbuh*) which is, therefore, the highest and most authoritative source of law; (2) the *sunna* of the Prophet (*pbuh*), which includes *hada'ith* ("sayings")—which vary widely in authenticity and, therefore, in authority—about the life of the Prophet (*pbuh*); (3) *al-ijma'* ("the consensus" of the Muslim nation), a source of law which, it is said, if based on true unity, cannot error; (4) *al-qiyas* ("the analogy")—an analogue method of deriving legal theories from the above sources; and, finally, (5) *al-ijtihad* ("the striving" or "the endeavor"), a struggle for understanding in accordance with the first three sources. It is, of course, beyond the scope of this Comment to say much more than this about these sources of the Shari'a. For a more detailed account of Shari'a sources see generally ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION (1990); S.H. AMIN, MIDDLE EAST LEGAL SYSTEMS 325-27 (1985); N.J. COULSON, A HISTORY OF ISLAMIC LAW (1964); THE ISLAMIC CRIMINAL JUSTICE SYSTEM (M. Cherif Bassiouni ed., 1982); ISLAMIC LAW AND JURISPRUDENCE (Nicholas Heer ed., 1990); ISLAMIC LAW: SOCIAL AND HISTORICAL CONTEXTS (Aziz Al-Azmeh ed., 1989); MATTHEW LIPPMAN ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION (1988).

25. "*Pbuh*" is an abbreviated form of the Arabic invocation *sala allahi 'alai he wa sallim*, meaning "may Allah's peace and prayers be upon him." To the ear of the Muslim, it is a sign of irreverence to mention the name of the Prophet Muhammed (*pbuh*) or that of any of the other holy men of the Judeo-Christian tradition (*pbuh*) without uttering this invocation. This Comment will offer this invocation wherever appropriate both as a sign of reverence for the Prophet (*pbuh*) and as an expression of respect for Muslim etiquette.

26. HOLY QUR'AN 4:105. All quotations from the Holy Qur'an are based on the author's own translation. For alternative translations, see THE HOLY QUR'AN: TEXT, TRANSLATION AND COMMENTARY ('Abdullah Yusuf 'Ali, trans. 1989); THE QUR'AN (Muhammad Zafrulla Khan, trans. 1991). While these texts provide alternative translations, it must be noted that the only authentic language for Qur'anic interpretation and discourse is, of course, Arabic.

27. HOLY QUR'AN 4:65.

The Shari'a may properly be understood as being generally geared to discriminate on the basis of religion. Under it, there are Muslims and there are non-Muslims; the former are to be preferred and the latter tolerated, but only if submissive to Islamic rule and custom.²⁸ More specifically, under the Shari'a there are non-Muslims who are "People of the Book"²⁹—Christians and Jews—and there are non-Muslims who are "People of the Fire"³⁰—atheists, pagans, and idolaters (or all non-Muslims who are not either Christians or Jews).³¹ Again, the Holy Qur'an prefers submissive People of the Book to submissive People of the Fire.³² In short, and in contradis-

28. From the first days of the Islamic Revelation some thirteen centuries ago, Muslims have faced the question of how to treat the unbelievers living in their midst. In response to this question, the Prophet Muhammed (*pbuh*) directed Muslims to

[f]ight those among the People of the Book who do not believe in Allah, [who do not believe] in the Last Day, who do not forsake what Allah and His Prophet forbid, and who do not abide in the True Religion . . . until such a time as they submissively render the *jizyah*.

HOLY QUR'AN 9:29. The *jizyah* was a poll tax that non-converting Christians and Jews paid in token of their willing submission to Islamic rule and custom. See ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 35, 134, 139-40, 217-218 (1992) (noting that, whereas Muslims paid no regular taxes, non-converting Christians and Jews were made to pay a poll tax—*jizyah*—from the earliest days of the spread of Islam). Christians and Jews who not only failed to convert to Islam, but who also failed to submit to Islamic rule and custom by willingly paying the *jizyah* were to be treated as enemies.

In more recent times, the Kingdom of Saudi Arabia, "a sovereign Arab Islamic state," has asked itself the same question—how properly to treat the unbelievers within its borders. BASIC SYSTEM art. 1. Following the cue of the Prophet, the Kingdom takes the approach of treating unbelievers within its borders with kindness and justice, so long as they submit to Islamic rule and custom; for "Allah does not forbid you from treating with kindness and justice those who do not fight with you over religion . . . for Allah loves those who are just." HOLY QUR'AN 60:8. This is not to say that the unbeliever who refuses to submit to Islamic rule and custom will be treated unkindly or with injustice while in the Kingdom (although some reports indicate the contrary). The disrespectful unbeliever, the unbeliever who fails to abide by the Kingdom's Islamic laws or who fails to observe the Islamic values of Saudi society, will be invited to leave. See, BASIC SYSTEM art. 41 (requiring non-citizen residents to abide the laws, observe the values, and respect the traditions of Islamic Saudi society).

29. HOLY QUR'AN 5:12-18.

30. See, e.g., HOLY QUR'AN 9:113 (defining "People of the Fire").

31. HOLY QUR'AN 5:82 (informing the Muslim that "[y]ou will find that the strongest in enmity towards those who have believed are Jews and idolaters, also, you will find that closest to those who have believed are Christians, among whom are learned and pious persons who are not arrogant").

32. HOLY QUR'AN 9:3-4. In practice, and for regional, geo-political, and historical reasons, the Kingdom has made a point of discriminating against Jews even though they are People of the Book. If the Israeli-Palestinian peace process suc-

inction to the purposes of Title VII, the Holy Qur'an expressly identifies discrimination on the basis of religion as a divine commandment. "Oh you who believe, take not in except your own kind; for [the unbelievers] will spare nothing to corrupt you. They wish for your destruction. The aspersions of their mouths [against you] have already been manifest and what is yet hidden in their bosoms is worse still" ³³ The Kingdom strictly obeys this commandment. ³⁴

ceeds, this kind of discrimination may begin slowly to subside. Already, the Kingdom has begun, albeit very cautiously, to pay less attention to the restrictions of the Arab Boycott and tentatively to explore business and investment possibilities with Israeli entities. Generally speaking, Jews are not presently allowed to travel or to work in the Kingdom.

33. HOLY QUR'AN 3:118-9.

34. For example, the Kingdom is not a signatory to the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Resolutions, part 1, at 71, U.N. Doc. A/810 (1948). Nor is the Kingdom a signatory to the 1981 U.N. Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36 Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1981). Nor is the Kingdom a party to any of the several international agreements announcing religious liberty or prohibiting religiously motivated discrimination. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. The Kingdom is not ashamed of this fact, but feels instead that it has faithfully pursued the course most consistent with its constitution—i.e., the Holy Qur'an and the *sunna* of the Prophet (*pbuh*). The Kingdom has refrained from signing or ratifying these agreements, because they are not in accordance with Shari'a mandates, e.g., limiting the freedom of religion. A discussion of some of these limitations accompanies the hypotheticals in the text below. See, e.g., Abdul Wahab Bashir & Khaled Al-Suhail, *Saudi Arabia: Shari'a Protects Society and Human Rights*, Naseef Says, MONEYCLIPS & ARAB NEWS (August 2, 1993) available in WESTLAW, INT-NEWS-C database (discussing how the Consultative Assembly's Deputy Minister defends the Kingdom's Islamic stance on and record in the area of universal human rights); *Islam Guarantees Human Rights*, Says Saud, MONEYCLIPS & THE RIYADH DAILY (June 17, 1993) available in LEXIS, NEXIS Library, WIRES File (giving full text of Saudi Foreign Minister Saud Al-Faisal's speech to the World Conference on Human Rights, a conference which concluded in June, 1993); *Dubai: Saudi Arabia Criticizes Western Media*, REUTER TEXTLINE (May 24, 1993) available in LEXIS, NEXIS Library, WIRES file (covering Saudi Interior Minister Nayf Ibn Abd Al-Aziz's defense of the Kingdom's human rights record, a defense which came on the heels of attacks on the Kingdom in the Western media); *Dubai: Saudi Arabia Denies Human Rights Abuses*, REUTER TEXTLINE (May 15, 1993) available in LEXIS, NEXIS Library, WIRES File (covering Saudi Interior Minister Nayf Ibn Abd Al-Aziz's denial of, *inter alia*, U.S. State Department allegations of pervasive human rights violations); cf. *Charles Condemns Iraq, Calls for Understanding of Islam*, REUTER NEWSWIRE (October 27, 1993) available in LEXIS, NEXIS Library, WIRES File (covering Prince Charles' call for tolerance and understanding of Islamic faith and culture); Mustafa Mahmoud, *A Campaign Against Islam*, MONEYCLIPS & AL-AHRAM WEEKLY (November 4, 1993) available in LEXIS, NEXIS Library, WIRES File (claiming that the West, headed by the United States, is religiously using democratic and human rights rhetoric to undermine Islam).

One example of the extent to which the Kingdom is committed to Islam (literally to "submission" or "surrender" to the will of Allah) and to the Islamic Shari'a, which expressly prescribes discrimination on the basis of religion, is the Kingdom's Basic System. By way of comparison to Title VII's stance against religious discrimination, the Kingdom's Basic System indicates a legal preference for Islamic doctrine, customs, and values as well as for persons of Islamic faith. No fewer than 28 of 83 total articles in the Kingdom's Basic System express devotion and duty to Islam, its doctrines, practices, holy texts, and

All of this is not to say that the Kingdom is not committed to human rights. The Kingdom is committed to human rights as understood in Islamic doctrine. BASIC SYSTEM, art. 26. As examples of the Kingdom's commitment to human rights, consider the following. The Kingdom grants political asylum in cases required to serve the public interests. *Id.* art. 42. The Kingdom prohibits unlawful searches and invasions of privacy, including official entry into the home without owner's consent or other statutory authority. *Id.* art. 37. The Kingdom limits confiscation, delay, reading, or listening to telegraphic, telephonic, postal and other communications to cases specified in the regulations. *Id.* art. 40. The Kingdom prohibits *incommunicado* and other forms of unlawful detention. *Id.* art. 36. The Kingdom prohibits *ex post facto* criminal provisions and prosecution of crimes not catalogued either in the Shari'a or in the regulations. *Id.* The Kingdom recognizes the rights of all individuals, whether citizens of or residents in the Kingdom, to address their public authorities, including the King and the Crown Prince. *Id.* art. 43. The Kingdom recognizes the rights of all individuals to litigate their claims in the courts of the Kingdom. *Id.* art. 47. The Kingdom recognizes freedom of the press ("free speech in the media"), except as limited by: express regulatory requirements; the precept of *kalima tayyiba* ("courteous word"); and the expectation that the media contribute to the education of the *Ummah* ("nation," meaning the Islamic nation) and bolstering of the *Ummah's* unity. *Id.* art. 39 (further stating that "[a]ll acts [presumably by the media] that invite sedition or division or that are harmful to state security and public relations or that take away from the dignity and rights of man are forbidden"). Finally, the Kingdom recognizes the positive rights of citizens to health care, public education, work, and, in cases of emergency, illness, or disability, to social security. *Id.* arts. 31, 30, 28 & 27.

The Kingdom has long been a supporter of the Arab League's several efforts to formulate an Arab expression of human rights. A. H. ROBERTSON & J. G. MERRILLS, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 196-200 (3d ed. 1992). In the past, the Arab League's efforts to formulate such an expression have focused largely on Israeli human rights abuses in the Levant. More recently, the Kingdom has concerned itself with human rights abuses committed by non-Muslims against Muslims in Hebron, Kashmir and war-torn Bosnia-Herzegovina. Should the Kingdom ever ratify an international or regional human rights accord, the Basic System would commit the Kingdom to abide thereby. BASIC SYSTEM art. 81.

Shari'a.³⁵ For illustrative purposes, a brief overview of these

35. Another example of the Kingdom's profound commitment to Islam and the Islamic Shari'a may be observed in the several Islamic limitations placed on governmental power. According to its recently promulgated Basic System, the Kingdom is an Islamic monarchy. BASIC SYSTEM arts. 1, 5-8, 44; see also AMIN, *supra* note 24; Jeanne Asherman, *Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law*, 16 INT'L L. 321 (1982).

From the earliest days of its establishment, the power to govern the Kingdom has been and continues to be vested in the King, the Protector of the Faith, the Imam, the Keeper of the Two Holy Shrines. AMIN, *supra* note 24; Aba-Namay, *supra* note 22; Tarazi, *supra* note 22; Karl, *supra* note 23.

The King is the origin of judicial, executive and regulatory power in the Kingdom. BASIC SYSTEM art. 44. The King is also commander-in-chief of the Kingdom's armed forces and, as such, has the power to declare states of emergency, general mobilizations and war. *Id.* arts. 55, 60 & 61. Also, the King has the power to take and to prolong "urgent measures" when the safety or territorial integrity of the Kingdom is threatened, or when the security or other interests of its people are at risk. *Id.* art. 62.

The King's power to govern is limited in just one important respect: the King does not and cannot make law; for, there is but one Lawmaker, and Muhammed (*pbuh*) is His Prophet. See HOLY QUR'AN 7:54 (stating that "[i]t was your Lord God who created the heavens and the earth in six days and then established Himself on the throne. [It was He that] covered the day in night, and caused the day to follow night quickly. The sun, the moon and the stars are subject to His command. Is it not His place to create and to command? Blessed be Allah, the Lord of the Worlds." (emphasis added)); see also Karl *supra* note 23; Peter D. Sloane, *The Status of Islamic Law in the Modern Commercial World*, 22 INT'L LAW 743, 751-2 (1988). This proposition rules out the need for a legislature, since law-making is not for mortals, but is exercised only by the Divine.

The King may make whatever regulations are necessary to govern the Kingdom effectively. BASIC SYSTEM art. 55. In practice, these regulations have the force of law, but the King's ability to make regulation is limited. Under Islamic jurisprudence, human activity falls into five basic categories: (1) activity which Holy Writ expressly commands or requires; (2) activity about which Holy Writ expresses some preference or recommendation; (3) activity about which Holy Writ is silent or indifferent; (4) activity about which Holy Writ expresses some aversion or reprobation; and (5) activity which Holy Writ expressly forbids. The King's ability to regulate human activity is generally understood to be limited to the third category. Fortunately for the King, many of the contemporary regulatory concerns of the Kingdom (e.g., admiralty law, commerce and company law, oil and gas law, mining law, immigration and naturalization law, tax law, and environmental law) fall largely into this category.

If the King makes regulation contrary to divine law, as expressed in the Holy Qur'an and the *sunna* ("tradition") of the Prophet (*pbuh*) or in other specified Islamic jurisprudential texts, then such regulation is not enforceable. AMIN, *supra* note 24, at 312-3 (citing the Royal Constitutional Decree, art. 6 (1926)); see BASIC SYSTEM arts. 7-8, 23, 25 (illustrating the constraint placed on the King's rule by Islamic law). This discussion illustrates why it may be proper to think of the Kingdom's system of government as an absolute monarchy. The true sovereign is Allah, the Absolute Ruler of the Universe; the temporal King is Allah's vicegerent on earth. Such reasoning rings true in Qur'anic verse. HOLY QUR'AN 42:49 (declaring that "[t]o Allah does the sovereignty belong, both in the heavens and on earth"); *id.* 3:26 (commanding the faithful: "Declare this: 'Oh Allah, Lord of Power,

28 articles is provided below.

The Basic System identifies "the Book of Allah," that is, the Holy Qur'an, and the *sunna* of the Prophet (*pbuh*) as the Kingdom's constitution.³⁶ The Basic System declares that the power to govern arises from the and the *sunna* of the Prophet (*pbuh*).³⁷ The three bases of government in the Kingdom are justice, consultation, and equality as understood in the Shari'a.³⁸ The Kingdom assumes the duty of applying the Shari'a, of ordering that which is good, of forbidding that which is abominable.³⁹

The Basic System declares the Saudi judiciary⁴⁰ complete-

you give the power [to govern] to whomsoever you will and wrest that power from whomsoever you will; you honor those who it is your pleasure to honor and humiliate those who it is your pleasure to humiliate. Indeed, over all do you have power"); *id.* 2:30 (instructing the believer: "Behold, your Lord declared to the angels: 'I will provide a vicegerent on earth'"); *id.* 38:26 (reminding all that "[t]hen did we say, 'David, we make you vicegerent in the land: rule then with justice and succumb not to lusts'").

The specified Islamic jurisprudential texts which bind the King, in addition to the Holy Qur'an and *sunna* of the Prophet (*pbuh*) are: THE COMMENTARIES AD-DALIL; THE COMMENTARIES OF AZ-ZAD; AL-BAHUTI, MANSUR IBN YUNUS IBN IDRIS AL-HANBALI (ca. 1641 C.E.), KASHSHAF AL-QINA AN MATN AL-IKNA; AL-BAHUTI, MANSUR IBN YUNUS IBN IDRIS AL-HANBALI (ca. 1641 C.E.), SHARH MUTAHA AL-IDARAT; and IBN QUDAMA AL-MAQDISI, MUWAFFAQADDIN ABU MUHAMMED 'ABDULLAH BIN AHMED BIN MUHAMMED (ca. 1223 C.E.), AL-MUGHNI, 10 vol. (Cairo, 1970 C.E.).

If the Holy Qur'an, the *sunna* of the Prophet (*pbuh*), or all of these five texts fail to give a clear legal answer, then the King and the courts may recur to other specified Hanbali legal manuals and to the authorities of the other three main schools of Sunni jurisprudence. AMIN, *supra* note 24, at 312-3 (citing the Royal Constitutional Decree, art. 6 (1926)). In cases of sufficient extremity, if the King steps outside the strictures of Islamic law when making regulations, the King may be deposed. Asherman, *supra* note 35, at 324; see BASIC SYSTEM arts. 7 & 8 (declaring the basis and source of governmental power and legitimacy in the Kingdom to be the Holy Qur'an, the *sunna* of the Prophet, and Islamic Shari'a and implying that governmental acts or decisions contrary to these undermine governmental authority and legitimacy).

36. BASIC SYSTEM art. 1.

37. *Id.* art. 7.

38. *Id.* art. 8.

39. *Id.* art. 23.

40. Disquisition on the subject of the Kingdom's judiciary is beyond the scope of this paper. The following sketch of the Kingdom's judiciary may nonetheless be helpful in further illustrating the pervasive effect Islam has on the Kingdom. For disquisition, see AMIN, *supra* note 24; Karl, *supra* note 23; Mark Jones, *Islamic Law in Saudi Arabia: A Responsive View*, 16 INT'L J. COMP. & APPLIED CRIM. JUST., No. 1., 43-56 (Spring 1992); Richard N. Merenbach, *Religious Law and Religious Freedom in Saudi Arabia and Israel: A Comparative Study*, 12 HASTINGS INT'L & COMP. L. REV. 235-60 (1988); Richter H. Moore, *Courts, Law, Justice, And Criminal Trials in Saudi Arabia*, 11 INT'L J. COMP. & APPLIED CRIM. JUST., No. 1., 61-7 (Spring 1992).

The Kingdom, as prescribed by the Ministry of Justice, has a three-tiered, inquisitorial arrangement of courts, composed of Shari'a courts, appellate Shari'a courts and a Supreme Judicial Council. Judges at all levels in this three-tiered arrangement are "independent" in their rulings, findings, etc., except as limited by the Shari'a and applicable Shari'a-consistent regulations. Judges in the Kingdom don't make law. The law exists objectively. It is decreed from on high. Judges must confine themselves to the law as already decreed. Innovation is sorely frowned upon.

The Kingdom's "independent" judiciary is indirectly appointed by, and answerable ultimately, to the king. BASIC SYSTEM arts. 46, 50-52, 55. Upon completion of traditional Islamic training, selected applicants for judicial appointments receive three additional years of legal training at the Ministry of Justice's Higher Judicial Institute in Riyadh.

There is no provision in Shari'a law for trial by jury. There is no official or regularly published case reporter in the Kingdom. By U.S. standards, the Kingdom's judiciary provides a somewhat scant set of general procedural rules. Individual Shari'a courts do not publish local procedural rules. One reason a more technical set of procedural rules might be less desirable is that traditionally all litigants (except those, for example, who do not speak Arabic) represent themselves personally, sometimes through a respected relative (usually a non-lawyer). Any overly technical set of procedural rules could upset the Shari'a preference for self-representation. Such a set of procedural rules could also disturb the substantive concerns of the Shari'a.

The substantive rigors of the Shari'a apply to citizens of the Kingdom—Muslims—as well as to non-citizen subjects of the Kingdom, whether Muslim or non-Muslim.

The Shari'a courts are divided into courts of limited jurisdiction and courts of general jurisdiction, the distinction being largely based on the gravity of offense or the amount in controversy. For example, a Shari'a court of limited jurisdiction can take cases involving the relatively minor Shari'a offense of intoxication (the punishment for which is flogging), but it may not hear cases calling for capital punishment or dismemberment. Such cases fall within the jurisdiction of Shari'a courts of general jurisdiction. The Shari'a court is usually presided over by a single judge. However, in cases calling for capital punishment or dismemberment, a three-judge panel is required.

The Shari'a appellate court has jurisdiction of appeals brought within 15 days of final judgment and of any and all issues raised on appeal, regardless of whether those issues were raised in the Shari'a court. The Shari'a appellate court can summon new witnesses and has mandatory jurisdiction of appeals from decisions calling for capital punishment or dismemberment. The Shari'a appellate court may remand cases to Shari'a courts for retrial. It may not, however, reverse Shari'a court rulings or findings. A Shari'a court may refuse to rehear a remanded case or to alter its ruling or finding. In this case, the Shari'a appellate court may vacate the recalcitrant Shari'a court's rulings or findings and send the case before another Shari'a court for retrial. The Shari'a appellate court is usually presided over by a three-judge panel. However, a five-judge panel is necessary in order to invoke capital punishment or dismemberment. In the most serious instances, the Shari'a appellate court may choose to hear an appeal *en banc*. When this happens, the Supreme Judicial Council cannot review the Shari'a appellate court's decision.

The Supreme Judicial Council is the highest authority in the Kingdom's Shari'a court system. The council is composed of a chairman, who holds the rank of minister, and ten members. This council reviews sentences involving capital punishment or dismemberment. However, the council is not a court *per se*. If it disagrees with a judgment of the Shari'a court of appeals, it merely refers judgment back to the

ly independent in its judgments, except with respect to the demands of the Shari'a.⁴¹ The courts must apply the Shari'a in accordance with the Holy Qur'an and the *sunna* of the Prophet (*pbuh*).⁴² The source of *fatwa* ("formal legal opinion") is the Holy Qur'an and the *sunna* of the Prophet (*pbuh*).⁴³ The courts must give force to the King's decrees, so long as those decrees are consistent with the Holy Qur'an and the *sunna* of the Prophet (*pbuh*).⁴⁴

According to the Basic System, the King carries out policies consistent with the judgments of Islam and oversees the application of the Shari'a.⁴⁵ The King's ministers are also responsible for the implementation the Shari'a.⁴⁶ The regulatory power must be used to pursue the best interests of the Kingdom in accordance with the Shari'a.⁴⁷

Under the Basic System, the Kingdom protects human rights in conformity with the Shari'a.⁴⁸ For example, no crime

Shari'a court of appeals for another hearing. The council administers the affairs of the Shari'a court system and also addresses in *fatawa* ("formal legal opinions") any questions of Shari'a law put to it by the King or the Minister of Justice.

A party to an action in any Shari'a court may approach the King *vis a vis* his open door policy and petition for royal clemency, pardon or intervention. In a sense, this makes the King's court the court of last resort in the Shari'a court system.

In addition to the Shari'a court system and in response to the demands of large-scale internal modernization, a sizeable foreign workforce, and voluminous international complex commercial transactions, tribunals of special expertise have been established. These specialized tribunals are referred to as the administrative courts. They include the likes of a Board of Grievances to hear claims to which the Kingdom is a party, an International Center for the Settlement of Investment Disputes, a Commission for the Settlement of the Commercial Disputes of Companies, and a multi-tiered Committee for the Settlement of Labor Disputes. These administrative courts tend to have published, formal procedures. Given the formalities adhered to in these courts, it generally takes much longer for cases to clear the docket than is true in the Shari'a court system. A well-regulated system of voluntary arbitration is also available in the Kingdom as a vehicle for solving commercial disputes.

In the more remote parts of the Kingdom, many of the structures described above are not readily available. In such places, local *umara'* ("princes"), in addition to their municipal functions, act as judges in common disputes.

41. *Id.* art. 46.

42. *Id.* art. 48.

43. *Id.* art. 45.

44. *Id.*

45. *Id.* art. 55.

46. *Id.* art. 57.

47. *Id.* art. 67.

48. *Id.* art. 26.

may be charged, neither may punishment be assessed in the absence of either Shari'a or other statutory authority.⁴⁹

The Kingdom, under the Basic System, assumes the duty of protecting "the Islamic doctrine" and of undertaking to further the *da'wa* ("missionary call") to Allah.⁵⁰ The Kingdom must maintain "Islamic values."⁵¹ The Kingdom's society is said "to cling to the strength of Allah" and to cooperate in bringing about *al-birr* ("piety").⁵² The Kingdom is to protect Islamic heritage and contribute to Islamic civilization.⁵³ To this end, education in the Kingdom aims at teaching the Islamic doctrine to the youth.⁵⁴

Under the Basic System, the family is the foundation of Saudi society, a society in which family members are to be raised on the basis of the Islamic doctrine, and in faith and obedience to Allah and the Prophet (*pbuh*).⁵⁵ The Basic System charges every citizen of the Kingdom with the duty of defending the Islamic doctrine.⁵⁶

The Kingdom, as dictated by the Basic System, works towards the fulfillment of the hopes of the Islamic *Ummah* ("nation"—comprised of all Muslims everywhere).⁵⁷ The Kingdom takes upon itself the duty of edifying and serving the Two Holy Shrines—located at Mecca and Medina—and of providing safety and care during the *Hajj* ("Pilgrimage").⁵⁸ The Kingdom raises and equips the military forces with a view to defending the Islamic doctrine, the Two Holy Shrines,⁵⁹ the society and the homeland.⁶⁰

The Basic System states that the right to succeed to the throne belongs to the *aslah* ("most righteous" or "most suitable") of the descendants of King Abd Al-Aziz Ibn Abd Ar-Rahman Al-Faisal Al Saud.⁶¹ Determining which of the approximately 500 eligible descendants is the *aslah* must be ac-

49. *Id.* art. 38.

50. *Id.* art. 23.

51. *Id.* art. 10.

52. *Id.* art. 11.

53. *Id.* art. 29.

54. *Id.* art. 13.

55. *Id.* art. 9.

56. *Id.* art. 34.

57. *Id.* art. 25.

58. *Id.* art. 24.

59. HOLY QUR'AN 9:28.

60. BASIC SYSTEM art. 33.

61. *Id.* art. 5.

complished in light of the teachings of the Holy Qur'an and the *sunna* of the Prophet (*pbuh*).⁶² The citizen's duty of allegiance to the King is to be understood by reference to the Holy Qur'an and the *sunna* of the Prophet (*pbuh*).⁶³

The Basic System attributes the wealth of the Kingdom to Allah.⁶⁴ Property, capital, and '*aml*' ("work" or "labor") are personal rights which serve social ends under the Shari'a.⁶⁵ Under the Basic System, every citizen must pay *zikat*, a special, religiously mandated form of "alms," and the Kingdom must then distribute the monies collected as *zikat* in an appropriate manner.⁶⁶

The Basic System identifies the *Hegira* calendar, a lunar calendar which began July 16, 622 C.E. when the Prophet (*pbuh*) took flight from Mecca to Medina, as the Kingdom's official calendar.⁶⁷ The two highest Muslim holidays, '*Aid al-Fitr*' (the breakfast feast which follows the month-long fast of Ramadan) and '*Aid al-Adha*' (the day of sacrifice, a feast following the breakfast feast by about three months) are the official state holidays.⁶⁸ The Basic System describes the Kingdom's flag as a green field, a color reserved in the Muslim world exclusively for the descendants of the Prophet; upon that green field are the words, *la ilaha ila Allah wa Muhammed rusul*

62. *Id.* Each of the approximately 500 sons and grandsons of the Kingdom's founder, King Abd Al-Aziz Ibn Abd Ar-Rahman Al-Faisal Al Saud, is a potential heir to the throne. *Id.* When the present ruler, King Fahd Ibn Abd Al-Aziz Al Saud, passes away, the 500 or so potential heirs will convene something resembling an electoral college. *Id.* arts. 5(b) & (e) (the phrase "the act of allegiance" apparently refers to the traditional electoral college process). From that electoral college one of the many potential heirs will emerge as the new king. The Crown Prince, the King's hand chosen heir apparent, does not necessarily emerge from the electoral college as the new king. *Id.* art. 5(c). In fact, the role of the Crown Prince, with respect to succession, is to serve as an interim king until such a time as the electoral college reaches its decision regarding who will succeed to the throne. *Id.* art. 5(e). Of course, whoever happens to be Crown Prince at the time of the present king's death would arguably be in a stronger position than most other would-be successors. This would be true for two reasons. First, the electoral college will feel some sense of respect for or loyalty to the decedent King's Crown Prince selection. Second, the Crown Prince/Interim King will have the powers and favors of state at his disposal at the time the electoral college is making its decision.

63. *Id.* art. 6.

64. *Id.* art. 14.

65. *Id.* art. 17.

66. *Id.* art. 21.

67. *Id.* art. 2. There are only 354 days in each lunar year of the *Hegira* calendar; which translates to approximately 103 Anno Hegiræ years to every solar (Gregorian) century.

68. *Id.*

Allah ("There is no god but Allah, and Muhammed is his Prophet!").⁶⁹

As this brief overview of the Basic System indicates, the Kingdom may be best understood in terms of a theocracy in which there is but one Lawgiver—Muhammed (*pbuh*) is His Prohphet.⁷⁰ The Shari'a, the divinely dictated law governs in the vast majority of cases. The King, as temporal ruler, makes regulations (*amr* or *nizam*), which regulations are not enforceable if inconsistent with the Shari'a. The King is subordinate to the supreme will of Allah. Both King and Kingdom are Muslim, "submissive." Both King and Kingdom have "surrendered" to the Most Merciful, the Most Benevolent. It may be safely asserted that the Kingdom is committed to Islam in a way sufficient to dispose it to discrimination on the basis of religion.

IV. THREE HYPOTHETICALS ILLUSTRATING THE INADEQUACIES OF THE FOREIGN LAW EXCEPTION

A. *May a U.S. Employer Invoke the Foreign Law Exception to Prevent a U.S. Employee Working Abroad from Violating Foreign Law?*

Suppose that the Kingdom of Saudi Arabia contracts with a U.S. helicopter company to provide support to the Kingdom in connection with the yearly religious pilgrimage of millions of Muslims to Islam's Two Holy Shrines at Mecca and Medina.⁷¹ According to the contract, the helicopter company's will have two primary missions: first, to provide general pilgrimage route surveillance; second, to assist in fighting the periodic tent fires that erupt along the pilgrimage route.⁷²

In order to get the job done right, the company sets up operational centers in three key Saudi cities—the capitol city of Riyadh, the Arab Gulf city of Dhahran, and the Red Sea city of Jedda. Each of these operational centers will service a length of the pilgrimage route. Only the operational center in Jedda will

69. *Id.* art. 3. This expression, known commonly as the *shahada* or "testimony," is the first of the Five Pillars of Islam, and is the one confession required of every Muslim.

70. See COULSON, *supra* note 24, at 9-20 (describing the concept of Islamic legislation and lawmaking).

71. This hypothetical is based loosely on *Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983).

72. The pilgrims—many of whom are city folk—sometimes build fires too close to their tents, occasionally resulting in tent fires.

service sections of the pilgrimage route located within the area of the Two Holy Shrines. This is important, because the area of the Two Holy Shrines is *haram* (forbidden) for non-Muslims. Non-Muslims who trespass the *haram* of the Two Holy Shrines commit capital trespass, that is, trespass punishable by beheading.

In order to prevent its pilots (most of whom are non-Muslim, U.S. citizens) from *themselves* trespassing the *haram* of the Two Holy Shrines, the helicopter company adopts an ostensibly Title VII-violative policy of requiring pilots in its Jeddah office to be Muslims or, if not already Muslims, to convert to Islam. The reasons for adopting this policy seem obvious enough: to avoid risking the heads of its pilots and to avoid annoying royal sensitivities or irritating the Muslim community. But, despite these reasons, the company cannot say that Saudi law requires the adoption of such a policy. For, in fact, it does not. The helicopter company would not *itself* break any Saudi law by declining to adopt such a policy for Title VII reasons.⁷³ Nonetheless, the helicopter company adopts the policy, thereby raising this question: does the foreign law exception apply to the helicopter company's Title VII-violative Islamic conversion policy, even though the helicopter company would itself violate no foreign law by declining to adopt that policy? Or, more abstractly, may a U.S. employer implement Title VII-violative policies or practices with the blessing of the foreign law exception in order to prevent its U.S. employees from themselves breaking the laws of the foreign country in which they work, even when the U.S. employer would not itself be in violation of the foreign country's laws by declining to adopt such policies or practices?

Looking at Title VII's plain language—non-compliance with Title VII is lawful, if compliance would cause the U.S. employer to break the laws of the foreign country in which the U.S. employee works⁷⁴—it appears that the foreign law exception does not apply to the helicopter company's Title VII-violative conversion policy. For if the company complies with Title VII by refraining from adopting the religiously discriminatory policy, it

73. In *Dynallectron*, 577 F. Supp. at 1196, the facts were as described above, when Mr. Wade Kern, a Christian of the Baptist denomination, contracted (albeit indirectly) to fly helicopters for Dynallectron in the Kingdom. Mr. Kern's assignment was to the Jeddah office. In order to start work there, company policy required that he convert to Islam. When he refused to convert, however, he was sent back to the United States. No conversion to Islam meant no job.

74. 42 U.S.C. § 2000e-1(b) (Supp. 1992).

does not itself violate the laws of the Kingdom. Additionally, a prospective violation of the foreign country's law, in this case violation of the law of the Kingdom, is what the foreign law exception expressly requires. If the helicopter company, instead of adopting the religiously discriminatory Islamic conversion policy, were to comply with the religious nondiscrimination requirements of Title VII, it would merely be leaving open the possibility that one of its U.S. employees (specifically, one of its non-Muslim pilots working out of the Jedda office) could unlawfully fly over Islam's Two Holiest Shrines, thereby committing capital trespass. But why shouldn't the helicopter company be allowed to take some measures, even if religiously discriminatory, to prevent the potential disaster of sending home the beheaded remains of an *haram*-trespassing pilot?

Assuming it desires to perform its contract with the Kingdom, the helicopter company has two alternatives at this juncture. First, it could argue that the foreign law exception applies. It could make a good faith, albeit risky, argument that because of the intimate relationship between the company's enterprise (servicing the Two Holy Shrines area of the Kingdom) and the potential unlawful activities of its non-Muslim, Jedda office pilots (violating the Two Holy Shrines area of the Kingdom), the company's failure to adopt and execute a conversion policy would be tantamount to violating the law of the Kingdom. Of course, such an argument might require the company to make some showing that Saudi law provides for vicarious corporate criminal liability with respect to violation of the Two Holy Shrines. The Kingdom's law apparently makes no such provision. Criminal liability in the case described above would lie only against natural persons. And, in any case, such an argument would require stretching the language of the foreign law exception; something the helicopter company shouldn't bank on a court's being willing to do. After all, the courts have only grudgingly recognized the other main exception to Title VII, the BFOQ exception.⁷⁵ Why would the helicopter company expect the courts to allow a liberal construction of the foreign law exception?

Second, the helicopter company could admit that the foreign law exception doesn't apply and argue instead that its

75. *Dothand v. Rawlinson*, 433 U.S. 321, 355 (1977) (stating that the BFOQ exception is "an extremely narrow exception to the general prohibition against discrimination").

conversion policy fits the requirements of the BFOQ exception.⁷⁶ Since the Kingdom, on pain of death, forbids non-Muslims from entering the *haram* of the Two Holy Shrines, being a Muslim could rightly be called a necessary occupational qualification for working in, around and—in the case of helicopter pilots—*over* that *haram*. Being a Muslim is, in this case, more than a mere business convenience. The lives and safety of non-Muslim U.S. employees are at stake, to say nothing of the helicopter company's business viability in the Kingdom. This line of argument doesn't require stretching the language of the foreign law exception. But it also doesn't take account of the U.S. employer-employee, master-servant, principle-agent relationship in matters of violating foreign law, nor does it offer the helicopter company much assurance; for, as already indicated, the courts seldom acknowledge the BFOQ exception.⁷⁷

B. May a U.S. Employer Discriminate Against a U.S. Employee Within the Territorial Boundaries of the United States in Order to Avoid Violating the Law of the Foreign Country in Which the U.S. Employee Works or Is to Be Stationed?

Suppose now that a private U.S. medical school specializing in organ transplants makes special arrangements with the Kingdom of Saudi Arabia to station and to maintain an organ transplant surgical team at one of the royal hospitals in Riyadh.⁷⁸ The medical school has two purposes for taking this action: first, the medical school will be able to provide a needed service to the Kingdom; second, the medical school will be able to expose its surgeons to a larger number of transplants than would otherwise be possible.

Of course, the medical school makes participation in the Saudi program completely voluntary. But, given the opportunities created by being able to perform an extraordinarily high number of transplants while in the Kingdom, participation in

76. *Id.* at 1199-1203; see *supra* notes 9-12 and accompanying text. The court in *Kern* seemed somewhat surprised that Dynalectron failed to make this argument, although it was available at the time. See *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974) (both cases allowing the BFOQ defense in order to protect third parties).

77. *Dothard*, 433 U.S. at 355.

78. This hypothetical is a distillation of *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986).

the program quickly becomes a career "must" for doctors at the medical school. Soon a consistent pattern develops at the medical school whereby those doctors who participate in the Saudi program are promoted earlier and given greater responsibilities than those who "choose" not to participate. In this way, the program becomes something less than "voluntary."

It is at this point that problems begin to arise. The medical school receives Saudi program applications from two very qualified Jewish doctors. Since the medical school is not in the habit of making religion an issue in its employment policies and practices, it tentatively accepts the Jewish doctors into the program. Some time later, however, the medical school recalls that the Kingdom does not grant work visas to Jewish persons. Not wanting to upset its special relationship with the Kingdom, the medical school then decides not to advance the employer clearance necessary for the Jewish doctors' Saudi work visas. Effectively, the medical school eliminates the Jewish doctors from the Saudi program. Soon enough, the Jewish doctors learn the reason for the medical school's action and file Title VII charges with the EEOC. Can the medical school successfully claim the foreign law exception to Title VII as a defense to the Jewish doctors' charge? Will the foreign law exception apply to a U.S. employer's discriminatory, Title VII-violative acts which take place entirely within the territorial borders of the United States, but which nonetheless are aimed at preventing the violation of the laws of the foreign country where the U.S. employee works or is to be stationed?⁷⁹ Unfortunately, the for-

79. The anecdote which I related in the introduction to this Comment about my friend's Middle Eastern job-hunting raises this same question, since my friend's job interview (and potentially any Title VII discrimination involved in that interview) occurred entirely within the territorial jurisdiction of the United States.

If the set of facts given in this hypothetical are not enough to confuse the issue of whether the foreign law exception applies, a number of more confounding iterations of this same scenario (the "non-extraterritorial extraterritorial application" scenario) can easily be envisioned. The religiously motivated effective elimination of the Jewish doctors from the Saudi program could have been made by the organ transplant team coordinator (an employee of the medical school) in Riyadh, making it so that the discriminatory act occurred without the territorial jurisdiction and, arguably, within the protection of the foreign law exception. Or, in my friend's situation, the job interview could have taken place over the phone, with the interviewer (turned Title VII discriminator) being located in the Kingdom while my friend was at his home in Provo, Utah. Or, what might have happened, had the medical school made its discriminatory decision offshore, but in a country which didn't legally require such a decision, about U.S. employees presently located in the United States, but who were (like our Jewish doctors) to be stationed in a country

eign law exception does not provide answers or guidance to the medical school. And, the same could be said for the BFOQ exception.⁸⁰

So, what is the U.S. medical school to do? Assuming the Jewish doctors choose not to reveal their religious convictions on their visa applications, should the medical school endorse the visa applications of the Jewish doctors without revealing the doctors' religious background? Or, should the medical school violate U.S. equal employment law by failing—on religious grounds alone—to allow the Jewish doctors to participate in the career-essential program?

Besides being antithetical to good foreign relations, the first option will, if discovered, jeopardize the medical school's opportunity to send other doctors to the Kingdom. The second option is similarly undesirable. It places the medical school in the odious position of either (1) denying the applications of all qualified Jewish doctors and facing indefensible Title VII discrimination charges, (2) denying the applications of all qualified Jewish doctors and fabricating non-discriminatory reasons in defense for so doing, (3) discriminating against Jewish doctors in a more discrete, subtle way, probably in the initial hiring process, or (4) terminating its highly beneficial relationship with the royal hospital in Riyadh. Whatever option the medical school chooses in this case, it is plain that the foreign law exception, which could and probably should have been structured to give guidance in such situations, is thoroughly unhelpful.

A third option may be available to the U.S. medical school: it could grant the Jewish doctors' applications and leave the direct discrimination to the Saudi consulate. This solution may work. It avoids the rigors of Title VII and maintains good relations with the Kingdom; presuming, that is, that the Saudi

that did require that decision? The answer to questions such as this one is that, as of yet, there is no answer. No case law on this point has developed. However, it seems appropriate here to pose the possibility that the foreign law exception will not apply in "non-extraterritorial extraterritorial application" cases. Courts may be unwillingly to play cat and mouse with the *situs* of international employment discrimination. Furthermore, this *situs* analysis would seem to allow, if not encourage, U.S. employers to travel the globe, when desirable, in order to discriminate against certain classes of employees or potential employees.

80. The same could probably be said of the BFOQ exception. One reason for believing that the courts would not be willing to apply the foreign law exception in "non-extraterritorial extraterritorial application" cases is that the courts are accustomed to interpreting the BFOQ exception—one of the only other exceptions to Title VII in a very restrictive way. See *supra* notes 9-12 and accompanying text.

consulate won't mind perhaps constantly having to play the bad guy on the medical school's behalf.

There are at least two problems with this third option. First, it operates on the faulty assumption that the medical school wants to sacrifice some of its best doctors to the expediencies of the Saudi program—that the medical school wants to discriminate. The opposite is more likely to be true. The medical school would likely want the best of its doctors, regardless of religious background, to be among those who receive the benefits of the Saudi program. Second, this last option is only applicable in the unique situation suggested by this particular hypothetical—situations where the U.S. employer has some foreign governmental agency to hide behind. But what of situations such as the one described in the opening anecdote, where the U.S. employer pursues a Title VII-violative employment policy or practice in the United States in order to avoid violation of foreign country law with no willing foreign governmental agency to hide behind? In the opening anecdote, the U.S. firm was seeking to avoid a possible violation of foreign anti-proselyting law. Other than merely potentially implicated foreign law, the U.S. firm would have no place to hide.

C. Should the Foreign Law Exception Take Account Not Only of Foreign "Law" but also of Significant Non-Legal Factors such as Prevailing Culture, Moral and Traditional Expectations?

Suppose that a Lebanese-American by the name of Bashir works for a U.S. based multinational enterprise with branch offices in Dhahran, Saudi Arabia.⁸¹ After several years experience working in this company's U.S. offices, Bashir requests a transfer to the company's Dhahran offices. Sometime after his transfer-request is granted, Bashir moves with his family to Dhahran.

When Bashir goes to work for the first time after arriving in the Kingdom, a Saudi superior notices that Bashir is wearing a small crucifix. When the superior cautiously points out to Bashir the inappropriateness of wearing this Christian symbol to work, Bashir objects, telling the Saudi superior that in all

81. This hypothetical is genuinely hypothetical, although its facts may in some remote ways resemble those of *Equal Employment Opportunity Comm'n v Arabian American Oil Co.*, 499 U.S. 244 (1991).

the years he's worked for the company he's never heard of any company policy prohibiting the wear of religious symbols. The Saudi superior, trying not to be defensive, gently explains to Bashir the prohibition against wearing or otherwise displaying non-Muslim religious symbols is local company policy aimed at keeping good relations between Muslims and non-Muslims in the office as well as between the company and the predominantly Muslim local community and clientele. Wishing to avoid a scene and not wanting to be on his new superior's bad side, Bashir removes his crucifix, and returns to work.

For several months following this incident, Bashir doesn't wear his crucifix to work. During this time, Bashir's Muslim co-workers befriend Bashir. Soon enough, Bashir feels at ease in his new work environment. Slowly, but subtly, however, Bashir's new friends begin to "pressure" him about religious matters. "Come to noon prayer with us, Bashir. You are Arab, you believe in God. Come on." Of course, Bashir's Muslim co-workers mean Bashir no harm—in their view they are doing him an eternal favor. Bashir, nevertheless, begins to feel increasingly defensive about his religious convictions.

The whole matter comes to something of a head, however, for Bashir on the day he arrives at work and finds a copy of the Holy Qur'an sitting on his desk. Bashir takes the book to his Saudi superior and asks that such religious items not be placed on his desk. When his Saudi superior, in Bashir's view, responds indifferently to this request, Bashir makes a decision. The next day, Bashir comes to work wearing his crucifix. A confrontation occurs. Bashir quits before his Saudi superior can fire him. Bashir, now unemployed, returns with his family to the United States.

Shortly after returning to the United States Bashir files a Title VII charge with the EEOC. The company responds and invokes the foreign law exception, arguing, *inter alia*, that even if local company policy prohibiting wear of non-Muslim religious symbols is not motivated by an express Saudi law requiring such a policy, it is motivated by a Basic System concern. The Kingdom's Basic System, the company points out, requires non-citizen residents to "observe the values of the Saudi society and respect its traditions and feelings,"⁸² something Bashir failed to do when he wore a crucifix to work that second time.

82. BASIC SYSTEM art. 41.

In the face of this set of hypothetical facts, a court might follow one of the following approaches. First, a court might say that the foreign law exception does not apply absent some specific law requiring companies to prohibit employees from wearing or otherwise displaying non-Muslim religious symbols. A court taking this position might argue that the Values, Traditions and Feelings Clause of Article 41 is overly broad and does not march up to U.S. or international standards of legality. Moreover, a court taking this position might reason that, if allowed so easily to negate Title VII duties in this case, the Values, Traditions and Feelings Clause could be used by other U.S. employers of U.S. employees in the Kingdom to justify almost any Title VII-violative policies. Although this position has some persuasive power, it is not the only tenable position. And, it may be an undesirable position in so far as it presumes that the only kind of "law" is the kind we are used to.

Second, a court might take the opposite position, holding that the foreign law exception does apply; in effect, holding that the company's otherwise Title VII-violative policy of disallowing its employees from wearing or otherwise displaying non-Muslim religious paraphernalia was aimed at complying with the Values, Traditions and Feelings Clause. Support for this position could be taken from other provisions of the Kingdom's Basic System which make it a state duty⁸³ and the duty of every Saudi citizen⁸⁴ to defend the Islamic doctrine—a doctrine which regards as a "monstrous" blasphemy the Christian belief that Jesus Christ (*pbuh*) was the son of God⁸⁵ and as fiction the New Testament account of the crucifixion of Jesus Christ (*pbuh*).⁸⁶ A court taking this second position might agree with the first position: that the company's Title VII-violative policy was not intended to prevent the company from breaking any "law" in the U.S. or international meaning of the term. But at this point, the court would go on to say that, because the policy was intended to foster compliance with the command of the Values, Traditions and Feelings Clause, the foreign law exception to Title VII does apply. The position here would be, in effect, that, if it is "law" for the Kingdom, it's law for the purposes of the foreign law exception. The Kingdom,

83. *Id.* art. 33.

84. *Id.* art. 34.

85. HOLY QUR'AN 19:88-92.

86. HOLY QUR'AN 4:157-8.

after all, very consciously chose to adopt the Values, Traditions and Feelings Clause along with 28 other Basic System articles expressing duty and devotion to Islam. By consciously adopting the Shari'a as its constitution, the Kingdom consciously adopted a religiously discriminatory legal framework and, therefore, U.S. employers of U.S. employees working in the Kingdom should be given broad latitude to function within that framework, even if this means allowing such employers to discriminate in ways that would not be tolerated at home.

But these two approaches only hint at a larger problem. The foreign law exception does not respect or give deference to prevailing culture, morality or tradition in foreign countries, apparently even if such carries the weight of law. If it did, this hypothetical would likely be meaningless. By not giving such respect, by failing to defer to applicable prevailing foreign custom and practice, Title VII requires that U.S. employers disregard such. In this respect, Title VII is culturally insensitive, if not imperialistic. In fact, one might wonder what would happen if the shoe were on the other foot; if the Kingdom was in the business, say, of making Saudi employers insure the religious purity of their expatriate Saudi employees working in the United States; of requiring Saudi employers to insure that their female Saudi employees and spouses of male Saudi employees wore the veil and that no Saudi employees, male or female, become Americanized. To be sure, we would find such a policy to be an intolerable imposition on our tolerant society.

V. REFORMULATIONS OF THE FOREIGN LAW EXCEPTION

This Comment has pointed out three difficulties in applying the foreign law exception to Title VII. First, the exception contemplates cases where a U.S. employer adopts Title VII-violative policies affecting expatriate U.S. employees with the aim of personally complying with the law of the foreign country in which the U.S. employees work, but fails to contemplate the U.S. employer's occasional compelling need to adopt Title VII-violative policies in order to discourage its expatriate U.S. employees from themselves violating foreign country law. Second, the exception provides the courts no direction regarding whether, and to what extent, the exception ought to be applied in cases where U.S. employers pursue Title VII-violative policies and practices within the territory of the United States with the sole intent of complying with the law of the foreign country where affected U.S. employees work or are to be stationed.

Third, the exception presumes that the only foreign country concerns worthy of Title VII exception are legal concerns. This overlooks the reality that other countries express values worthy of legislative or judicial concern in the United States in very non-legal terms—other countries might have non-legal functional equivalents to what we regard as law.

Tentative legislative solutions to problems one and three may prove the easiest to formulate. As to problem one, it might be suggested that the language of the foreign law exception be reframed as follows:

It shall not be unlawful [under the sections of Title VII which regulate employment practices] for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located. *Such employer (or such corporation), such organization, such agency, or such committee may also recur to this exception, when taking actions reasonably calculated and intended solely to discourage such employee from violating the law of the foreign country where the workplace is located.*⁸⁷

As to problem three, it might be suggested that the language of the foreign law exception be redrafted as follows:

It shall not be unlawful [under the sections of Title VII which regulate employment practices] for an employer (or a corporation controlled by an employer), labor organization, employment agency or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of *the functional equivalent of law in* the foreign country in which such workplace is located. *Functional equivalents of*

87. 42 U.S.C. § 2000e-1(b) (Supp. 1992) (suggested revisions in italics).

*law in a foreign country may include overwhelmingly pervasive cultural, moral, or traditional custom or practice.*⁸⁸

As to problem two, no easy solution seems readily apparent. Conflicts of law doctrines could prove useful in solving the localization. But such doctrines vary from state to state and, therefore, uniformity of result will suffer. If nothing else, however, the localization doctrines found in the corpus of conflicts of law may serve as a well-considered starting point for congressional inquiry into the solution of this problem. But the consideration of the conflicts aspects of this problem are sadly beyond the scope of this Comment.

VI. CONCLUSION: THE FOREIGN LAW EXCEPTION IS TOO NARROWLY DRAWN

Title VII applies extraterritorially to U.S. employers of expatriate U.S. employees, except when compliance with Title VII would cause the U.S. employer to violate the law of the foreign country in which the U.S. employees work.

This foreign law exception fails to fulfill its intended functions, not the least of which is the protection of U.S. employers of U.S. employees abroad from "Catch 22" situations—situations where, on the one hand, compliance with foreign country law means failure to comply with Title VII and,

88. *Id.* (suggested revisions in italics). Assuming the suggested solutions to problems one and three were simultaneously adopted, the solution to problem one would need to be further adjusted as follows:

Such employer (or such corporation), such organization, such agency, such committee may also recur to this exception when taking such actions, so long as such actions are reasonably calculated and intended solely to discourage such employee from violating the law of *or the functional equivalent of law in* the foreign country where the workplace is located.

Id. (suggested revision in italics).

The author would also add the following modifications clarifying the scope and operation of the reformulation:

For the purposes of this section, determinations respecting any such functional equivalents of foreign law may be made on judicial notice taken on the same grounds and in the same manner as is the case with foreign law. The mere presence of law or a legal system in the foreign country will not necessarily preclude recurrence to a functional equivalent under this section, unless such law or legal system is patently contrary to the imputed functional equivalent.

Other rational reformulations of the exception could, of course, be conceived. The author does not suppose these suggested reformulations to be anything more than a first effort at reformulation.

on the other hand, compliance with Title VII means failure to comply with foreign country law. The foreign law exception fails in this regard because it is overly simplistic. It incorrectly assumes that international discriminatory conduct happens either here or there. It naively fails to contemplate the problem of localizing international discriminatory conduct.

The exception fails, because it does not indicate whether the U.S. employer may invoke the exception to prevent U.S. employees from violating the laws of the foreign country in which they work. The exception presumes that the only conduct which U.S. employers have a vested interest in regulating is their own, and not that of their expatriate U.S. employees. This failure puts U.S. employers of U.S. employees abroad in the uncomfortable position of not knowing when the exception will apply and when it will not.

Finally, the foreign law exception fails, because it contemplates only foreign *legal* concerns as concerns worthy of Title VII exception; it fails to respect even the most significant foreign cultural, moral, traditional concerns, thus creating the specter of cultural imperialism. Of course, one could argue the desirability of making U.S. employers bite the bullet abroad and apply Title VII, even when giving offense is the result. The point of Title VII is, or so the argument would go, the guarantee of what are internationally recognized human and civil rights. In the hypotheticals examined above, for example, the right to freedom from discrimination on the basis of religion is a right of this genre. On the other hand, by reaching beyond our borders and into the borders of the Kingdom, even into the *haram* of the Two Holy Shrines, perhaps Title VII violates one of its own highest values—the value of being religiously tolerant. Could it be that *vis a vis* its extraterritorial application, Title VII exposes an even higher form of intolerance? One might call it, the intolerance of the tolerant.

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