Jurisdictional Exceptionalisms examines the legal issues associated with a parent’s forced removal of their children to reside in another country following relationship dissolution or divorce. Through an analysis of Public and Private International Laws, and Islamic law – historical and as implemented in contemporary Muslim Family Law States – the authors uncover distinct legal lexicons that centre children’s interests in premodern Islamic legal doctrines, modern State practice, and multilateral conventions on children. While legal advocates and policy makers pursue global solutions to parental child abduction, this volume identifies fundamental obstacles, including the absence of shared understandings of jurisdiction. By examining the relevant law and practice, the study exposes the polarised politics embedded in the technical legal rules on jurisdiction. Presenting a new, innovative method in comparative legal history, the book examines the beliefs, values, histories, doctrines, institutions and practices of legal systems presumed to be in conflict with one another.

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Editors: Kenneth Armstrong (University of Cambridge)
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JURISDICTIONAL EXCEPTIONALISMS

Islamic Law, International Law, and Parental Child Abduction

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University of Toronto

URFAN KHALIQ
Cardiff University
For our children: Amahl E., Armaan K., and Hafez E.
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PREFACE AND ACKNOWLEDGEMENTS

To tell the story of this book’s genesis is to recognise the various people along the way that helped make it a reality. That is why this is neither a preface nor an acknowledgements section, but instead is a combination of both. This book has been a labour of love for us. We began this project shortly after each of us became new fathers, a factor that made the subject matter of this study both immediate and personal. Though both of us are professors of law in Common Law jurisdictions (United Kingdom and Canada), this project did not originate as a purely academic one. It started from a conversation we had with William Crosbie, who was Legal Adviser to Global Affairs Canada at the time. Crosbie met with Anver at the University of Toronto to consider possible research endeavours that would assist Global Affairs Canada with the work of best representing Canadians abroad. At the time, Canada was co-chair with Pakistan of the Hague Conference’s Working Group on Mediation. The Working Group was borne out of extended debates amongst States, some of which were party to the 1980 Hague Abduction Convention and others that were not. A key issue that remained a point of ongoing deliberation was the refusal of Muslim Family Law States at that time to accede to the Convention. Crosbie, a senior government lawyer with a sharp and keen intellect, recognised that to bridge the chasm between the two sets of States, more had to be done to better understand the workings of Islamic Law both in the past and in the present.

The two of us had been thinking about the kind of detailed analysis that characterises this study for some time. Years ago, we were part of an international collaboration between the International Bar Association and the Salzburg Global Seminar on Islamic Law and Human Rights Law. That collaboration found its intellectual footing at a workshop sponsored by the Center of Theological Inquiry in Princeton, New Jersey. There, we worked closely with others to rigorously interrogate the aspirational and aphoristic, if not simplistic, term ‘common ground’, which dominated so much of the popular discourse amongst leaders of
faith, communities, and States in an era of increased securitisation of Muslims after the 11 September 2001 bombings in the United States. That project called into question the very possibility of 'common ground', given that, in most conversations on the topic, one legal tradition (usually Human Rights Law) remained constant – as if universal and outside of time – while the other was particularised by reference to a time long gone . . . and for some, better left behind. Bringing together scholars of Islamic Law and Human Rights Law, that project recognised that the promise of, or aspiration for, 'common ground' was illusory without greater epistemic humility about the claim that each tradition of law reasonably makes on truth, value, and judgment. In the aggregate, we recognised that before any search for 'common ground' could begin, we first needed to 'clear ground'. To clear ground implies recognising that each legal tradition was and remains built upon a history that imparts to each – often implicitly – certain political commitments that take shape in epistemic assumptions about the contours of the law as institution, doctrine, and legal practice.¹

As much as that project was an important intervention in the ongoing debate regarding Islamic Law and Human Rights Law, it was also limited. As our colleagues Mark Ellis and Benjamin Glahn quite rightly suggested, the limitations of that project lay in its inability to speak to the day-to-day operation of International Law, which ranges across, amongst others, maritime law, international banking regulations, and international environmental regulations. While Human Rights Law often assumes pride of place in debates on International Law and its claim to universality, the fact remains that Human Rights Law is only a fraction of the larger field of International Law. Moreover, the tendency to focus on substantive issues in Islamic and Human Rights Law ignores the institutional features that also give International Law its character.

With Crosbie’s invitation to reflect on parental child abduction and the 1980 Hague Abduction Convention, we had a chance to extend our work from the ‘common ground’ project to reflect on a highly important but different feature of International Law – broadly understood – namely, the area of Private International Law. The writing of this book has taken a number of years, and while that is to be expected, the detours, those we travelled with, and the routes taken have fundamentally

influenced the destination reached. The metaphor of a journey is an apt one for several reasons. This book started out as a series of conversations between us as we crafted a project to respond to the Canadian government’s request for expert analysis to engage with the 1980 Hague Abduction Convention. Early on, we knew that this project had to be co-authored. Far too often in the study of Islamic Law and International Law – and particularly in the area of parental child abduction to Muslim Family Law States – the scholarship is authored by one scholar, either a specialist in Islamic Law or International Law. This is to be expected in the humanities and social sciences, where professional advancement often disincentivises co-authorship. But that disincentive does a disservice to academic analysis of the complex intersection of issues in parental child abduction cases involving Muslim Family Law States. Our earlier project, coupled with our conversations on the complex dynamics of parental child abduction, convinced us that we had to bring our respective areas of specialisation together if we were to clear ground, let alone break new ground, in the academic and policy studies of parental child abduction and Muslim Family Law States.

Those initial conversations and related research in turn led to invitations to present on certain matters in intergovernmental fora and, in time, academic conferences in different parts of the globe including North America, Europe, the Middle East and Southeast Asia. We were privileged to work with highly capable diplomats and lawyers within Global Affairs Canada. Beatrice Maille and Ajmal Pashtoonyar blended fierce advocacy for children with the finesse of world-class diplomats. Pashtoonyar regularly included us in a number of international and intergovernmental fora to present our findings, and to engage government officials on the obstacles they faced domestically and internationally in either joining the 1980 Hague Abduction Convention or creating a model for resolving such cases. We are grateful for the opportunities to present our findings to officials from, amongst other nations, Jordan, India, Australia, Germany, France, Tunisia, Bahrain, Qatar, Saudi Arabia, The Netherlands, Malaysia, and Morocco. These intergovernmental fora helped us locate the appropriate register to make this academic project legible and accessible to a diverse range of diplomatic engagements, culminating in a presentation to State delegates at Malta IV in 2014.

We recognised, however, that as academics we made poor diplomats. The political tensions that take shape in and around the discourse on parental child abduction cannot be resolved by a more historically accurate narrative or a better formulated legal argument. After attending
our first few intergovernmental meetings, the realisation dawned upon us that, while the language and terminology being used by the national delegates was the same, the meaning attached to the language was different. Some of the terminology being used was the same because that is the standard translation whether the original term was in Arabic, French or English – the working languages of those present. The translators used the correct terms, but the delegates were in fact talking past, as opposed to with, one another. At the end of one particular intergovernmental meeting, a set of outcomes was proposed. We both fully expected to see the proposals rejected out of hand, as they bore no relation to facts on the ground. To our surprise, they were adopted by consensus with not a single murmur of dissent. Initially, we felt that it was our naïvety as ‘intergovernmental fora novices’ and that this was just the way of things. But it got us reflecting further on what happened. There had been multiple rounds of meetings, time and money were being invested, and there was discernible good faith in abundance. But over many years, very little came of all that in practical, real terms. Legal reform can be notoriously glacial in pace, but even the largest glacier eventually releases some fresh water. We soon realised that the fundamental assumptions, context, culture, history, and inaccuracy of equivalence were not being acknowledged. But we were unsure if this was known by those in the room(s) and, if it was, whether their silence on the issue was deliberate.

At some of the intergovernmental fora, numerous supplementary conversations were taking place in the margins between delegates and with us. We both recognised that, as racialised men with Muslim-sounding names raised in the West and educated in ‘Western’ liberal institutions, our expertise coupled with our diversity gave us unique perspectives that would not occur to others. Moreover, our specific areas of expertise allowed us to combine forces to ask questions and to pose interventions that neither of us individually could have mustered. But in far more fora than we expected, our diversity seemed to matter more than our actual expertise. As it was put to us, perhaps indelicately but perceptively, ‘you are two brown guys’, ‘you have Muslim names’, ‘you’re educated in the Western liberal academy’, ‘you can speak the language of everyone’, and ‘both sides relate to you’. In other words, our identity at times did more to facilitate dialogue than the content of what we were suggesting. As we further experienced this curious phenomenon at the intersection of academic research and diplomatic engagement, we began to interrogate the assumptions of the parties to the discussions, whether from Europe, North America, the Middle East or Southeast Asia. Clearly,
our identities allowed us to enter into side conversations to which we might otherwise not be invited. Moreover, as we brought our research findings to bear in these side conversations, our questions were met with fewer and fewer answers. Solutions we could think of met with variations of a standard answer: ‘nice idea but not politically acceptable’. When we asked to whom things were not acceptable, we were given the ambiguous ‘everyone’, though the reasons differed depending on the particularity of the ‘everyone’ in question. The inherent political sensitivities of all, the (often conflicting) assumptions on all sides around cultural and legal superiority, and the inability to properly understand, let alone see, the ‘legal Other’ – these interpersonal dynamics amongst State officials manifested themselves repeatedly. We could not help but identify across these fora the operation of different, distinct, and competing exceptionalisms on all sides of this issue – a phenomenon that we turn our critical gaze upon as a theme that structures this study.

We were asked to write a report, which we duly did. But the parameters of the report were such that almost everything we wanted to express had to be omitted and the final report was broadly factual. That left us both feeling that there was much more to be said. From across the Atlantic, we kept talking about the issues, and we then spent some weeks together in Toronto talking matters through in person. Over time, a substantial text evolved. Our thinking has continually evolved, and this monograph is not our last word on the topic. Continuing with our metaphor of a journey, there are routes to be mapped with an eye to moving the issues forward. We hope to do that in subsequent work, whether in intergovernmental fora or in working with some of the governments or organisations we have had the privilege to engage. This monograph does, however, mark the very distinct end of a phase of our journey. We have set out the law and situation as we understood it and based upon the documents available to us at the end of April 2020.

Before closing, we want to thank those who have contributed in various ways to this study. First and foremost are the highly talented and dynamic public officials of the Government of Canada who entrusted us to broach this area of research. William Crosbie, Ajmal Pashtoonyar, and Beatrice Maille served as our guides across diplomatic terrain on which neither of us had sure footing. Of course, it goes without saying – but say it we will – that nothing in this study reflects the views of these three gifted individuals or the Government of Canada. Mark Ellis and Benjamin Glahn, our colleagues in the ‘common ground’ project noted above were regular interlocutors as we pursued this project, as was the
Center of Theological Inquiry, which hosted the two of us in Princeton once again to share our preliminary findings. We are also grateful to the four anonymous reviewers for Cambridge University Press for their generous comments and feedback. Many thanks go to Tom Randall at Cambridge University Press for shepherding this book through the review and publication process. It was no easy feat, given that the process of review and publication took place during the COVID-19 pandemic, requiring him and his team to work remotely. Their professionalism during the pandemic was impressive and humbling. Siew Han Yeo, a gifted scholar in her own right, carefully reviewed the entire manuscript, helped us clarify ambiguous concepts, and heroically prepared an index designed to assist our varied reader communities. This book is better and more accessible to our varied readers than it would otherwise be thanks to her careful and diligent attention.

Each of us has a host of people we want to thank, so we will do so individually at this point, using the first person ‘I’, which is much more personal than the ambiguous ‘we’ used thus far:

Anver Emon: To undertake this project has involved pursuing insights across a range of continents, in conversation with people from different fields and professions, and at venues both near and far from my own spaces of comfort. I say this in large part because there have been so many people who have contributed to my thinking through this study, and I fear that I will not be able to properly thank them all in this limited acknowledgement.

At the start of the research for this project, I held the Canada Research Chair in Religion, Pluralism, and Rule of Law, which provided me initial funding to begin working through the archive of materials on both Islamic legal history and the history of the 1980 Hague Abduction Convention. Later, as a Guggenheim Fellow and a member of the School of Social Sciences at the Institute for Advanced Study, I further refined the research and on various occasions presented this project to historians and social scientists in residence in 2014–2015. I am especially grateful to Brian Connolly, Didier Fassin, Michael Hanchard, Marion Katz, Teemu Ruskola, Noah Salomon, Amy Singer, and Joan Scott. I recall with special fondness the regular chats I had with my office neighbour Noah, the coffee discussions with Brian, the forays into Islamic history with Amy and Marion, and the engaging discussions with Teemu about writing legal history. At the University of Toronto (U of T), various colleagues provided important feedback on Chapter 5: Doris Bergen, Mohammad Fadel, Ruba Kana’an, Karen Knop, Audrey
Macklin, Jennifer Nedelsky, Melanie Newton, Natalie Rothman, David Schneiderman, Alison K. Smith, Anna Su, Nhüng Tuyet Tran, Catherine Valcke, Mariana Valverde, Y. Yvon Wang, and Selma Zecevic. I have especially benefitted from the challenge Nhüng, Audrey, and David regularly provide me in thinking through narrative styles in the production of legal history. Though, it is their friendship and sense of humour most of all that sustains me in what can sometimes be the leviathan maze of the university. During a trip to Germany to lecture in Berlin, I was invited to share parts of this research with Nadjma Yassari’s impressive research group, Changes in God’s Law, at the Max Planck Institute for Comparative and Private International Law. I am especially grateful to Lena-Maria Möller for her interest in and support of this project; she is a remarkable colleague and a wonderful friend. At the U of T’s Institute of Islamic Studies, where I have served as director since 2018, regular conversations with the postdoctoral fellows and students have inspired me to revisit the registers in which to explain the complex legal histories about which I have written herein. I would like to thank Moska Rokay, Sarah Shah, and Youcef Soufi for their engaged curiosity and critical ear. And I would also like to thank the Institute’s administrator, Nambogga Sewali, for making sure that an academic administrator still blocks out time for research and writing each day. I am fortunate to work with a range of graduate students, whose interests do not necessarily dovetail with mine, but who collectively help me think outside my intellectual boxes. Many thanks go to Omar Sirri, Parnia Vafaeikia, and Siew Han Yeo for their indefatigable intellectual curiosity. Siew Han was especially central to finalising this book for publication, for which I am most grateful. Nadia Marzouki is one of my most steadfast interlocutors; and though this particular study is outside her specific field of enquiry, her keen insights and sharp intelligence have helped make this study better. Rumee Ahmed and Ayesha Chaudhry, colleagues and dear friends, have an impressive ability to make complex histories reverberate poignantly for modern readers. Their committed interest and engagement with my work over the years has forced me to develop modes of analyses and styles of expression that make a complex legal history resonate for contemporary readers – a talent that I fear remains an ongoing work in progress for me. My oldest friend, William Kwong, has been by my side for over three decades. A stalwart friend and companion through life’s ups and downs, he reminds me to see outside the sometimes-myopic tendencies of academe, and to appreciate the messiness of humanity – a messiness that ultimately lies at the heart of most parental abduction
cases. My parents, Akhtar and Rashida, have always been my staunchest supporters – in their mind, I can do no wrong. And while that is objectively untrue, it is the kind of unqualified love and support that makes possible a life of the mind. My sister Nora, brother-in-law Mikal, and niece Sarah remind me of the importance of family despite far-flung distances. My spouse, Allyssa, who has her own professional life as a lawyer, is one of my most important interlocutors and legal sparring partners. But most of all, she’s the person with whom I enjoy the present and its various permutations, even foibles, each and every day. On this project, she also ensured that our two children were well-cared-for during those times when I was at an academic or diplomatic conference sharing the findings of this study. Our two sons, Hafez and Amahl, are utter joys. Having children later in life is rather common amongst many of my colleagues in academe. Being an older parent, I like to think that I am wiser and more patient than I otherwise would be if I were a father at a younger age. But of course, that may simply be so much pious storytelling to make me feel better about the various aches and pains I have from chasing after them. But what is undeniable is that each day the two of them give me the gift of youthfulness – in mind, heart, and spirit. And for that, I am truly grateful. To them, I dedicate this book.

Urfan Khaliq: There are many I would like to thank. As Anver has noted, Tom Randall at Cambridge University Press and the reviewers whose insightful comments we tried to address were instrumental. I thank Cardiff University for the Research Fellowship which I was awarded for 2016–2017; it allowed me time to work on this project. I am also grateful to the School of Law and Politics for various grants that assisted me in completing this work. A number of colleagues read chapters or the Cambridge University Press proposal. First and foremost, amongst those, were my comrades in arms in the Coffee, Research and Pastries group – specifically, Rachel Cahill-O’Callaghan, Jess Mant, Katie Richards, Pauline Roberts, Stephen Smith, and Leanne Smith (now of Exeter University). Their candour, indeed brutality, and honesty were as refreshing as they were welcome, and forced me to rethink various assumptions. A body of work of this scope, which has taken the time that it has, entails many personal debts. Those who pay the highest price, ironically, are those we love the most. My siblings (through blood and marriage), nephews and nieces, mother, and father-in-law have seen less of me (and I of them) than I would like for quite some time. My wife, Mohini, and our son, Armaan, have seen me even less than was previously the case and have paid the heaviest price. This book is for them.
### ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AMLA</td>
<td>Administration of Muslim Law Act</td>
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<tr>
<td>BJP</td>
<td>Bharatiya Janata Party</td>
</tr>
<tr>
<td>CCP</td>
<td>Code of Civil Procedure (UAE)</td>
</tr>
<tr>
<td>CCT</td>
<td>Code of Civil Transactions (UAE)</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>CFI</td>
<td>Court of First Instance (Tunisia)</td>
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<tr>
<td>CII</td>
<td>Council of Islamic Ideology</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>DIFC</td>
<td>Dubai International Financial Center</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>ETS</td>
<td>European Treaty Series</td>
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<tr>
<td>FCO</td>
<td>Foreign and Commonwealth Office</td>
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<tr>
<td>FRCP</td>
<td>Federal Rules of Civil Procedure</td>
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<td>FRG</td>
<td>Federal Republic of Germany</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<tr>
<td>GCC</td>
<td>Gulf Cooperation Council</td>
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<tr>
<td>HCCH</td>
<td>Hague Conference on Private International Law (Conférence de la Haye de droit international privé)</td>
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<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
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<tr>
<td>HRW</td>
<td>Human Rights Watch</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>JAFZA</td>
<td>Jebel Ali Port Free Zone Authority</td>
</tr>
<tr>
<td>JPSL</td>
<td>Jordanian Personal Status Law</td>
</tr>
<tr>
<td>LRA</td>
<td>Law Reform (Marriage and Divorce) Act 1976 (Malaysia)</td>
</tr>
<tr>
<td>OAS</td>
<td>Organization of American States</td>
</tr>
<tr>
<td>OIC</td>
<td>Organisation of Islamic Cooperation</td>
</tr>
<tr>
<td>PILA</td>
<td>Private International Law Act</td>
</tr>
</tbody>
</table>
# List of Abbreviations

QFLA  | Qatar Family Law Act
UN   | United Nations
USCIRP | US Commission on International Religious Freedom
WTO  | World Trade Organization

## Conventions (Short Form)

<table>
<thead>
<tr>
<th>Year</th>
<th>Convention</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1972</td>
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