

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
AUGUST 8-9, 2011

RESOLUTION

RESOLVED, That the American Bar Association opposes federal or state laws that impose blanket prohibitions on consideration or use by courts or arbitral tribunals of foreign or international law.

FURTHER RESOLVED, That the American Bar Association opposes federal or state laws that impose blanket prohibitions on consideration or use by courts or arbitral tribunals of the entire body of law or doctrine of a particular religion.

REPORT

I. INTRODUCTION

Over the last year or so, an increasing number of state constitutional amendments and legislative bills have been proposed seeking to restrict or prohibit, in varying degrees, state courts' use of laws or legal doctrines arising out of international, foreign, or religious law or legal doctrines (the "Bills and Amendments"). Some such provisions have already been enacted, such as Tennessee's "American and Tennessee Laws for Tennessee Courts" bill, which was signed into law on May 13 2010,¹ and Oklahoma's "Save Our State Amendment,"² which was approved by a majority of the state's voters on November 2, 2010, but which has not yet been certified due to a federal court's preliminary injunction based on the likelihood of its unconstitutionality.³ In approximately 20 states, some form of legislation that would impact the use or consideration of international, foreign or religious law has been introduced or is being considered for introduction in the state legislatures.⁴

The language of these Bills and Amendments varies, often considerably, from state to state. Some, like the amendment in Oklahoma, seek explicitly to forbid courts from considering "international law" or a particular religious legal tradition, most often "Sharia law."⁵ Others refer more generally to the use of "foreign law" or "religious or cultural law" in judicial decisions.⁶ Some refer only to "any law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the U.S. and [state] Constitutions."⁷ One proposed law, another Tennessee bill (SB 1028), as initially introduced, would have provided that "[t]he knowing adherence to sharia and to foreign sharia authorities is prima facie evidence of an act in support of the overthrow of the United States government and the government of this state...." and would have made the support

¹ 2010 Tenn. Pub. Acts 983. Similar legislation has been signed into law in Louisiana, 2010 La. Acts 714.

² Okl. Enr. H.J.R. 1056 (2010).

³ *Awad v. Ziriax*, 2010 WL 4814077 (W.D. Okla. Nov. 29, 2010).

⁴ *The Law of the Land*, ABA JOURNAL 14 (Apr. 2011).

⁵ U.S. courts may be called up to interpret Sharia in certain limited circumstances. For instance, suppose a W and H married religiously in Egypt. The Maryland resident wife files for divorce in Maryland; her husband moves to dismiss her complaint alleging that they were never legally married. The Maryland judge – based on conflicts of law – must determine whether the parties' marriage was valid where it was contracted in Egypt. As such, the court would require expert testimony about Egyptian family law, which is based on Sharia. Other situations requiring the consideration of Sharia principles might involve the recognition of foreign divorces and custody decrees, probating wills that reference Sharia principles, applying contracts governed by principles of Islamic finance, or where the parties to a cross-border commercial contract have chosen the law of a jurisdiction that applies Sharia principles (such as Saudi Arabia and Malaysia) to govern their contract. Of course, American courts are not required to recognize or enforce any foreign law, including Sharia law, that would violate American public policy. As discussed in Section III of this Report, this is the established jurisprudence for more than 100 years.

⁶ See, e.g., Ten. Pub. Acts 983, La. Acts 714, Georgia HB 45 (all referencing "foreign law"); Arizona HB 2582 (2011) (referencing "foreign law" and "religious sectarian law"); Texas HJR 57 (2011) (referencing "any religious or cultural law").

⁷ This provision, which has already passed in Tennessee and Louisiana, and has been proposed in Florida, Georgia, Mississippi, Texas and a number of other states, is based on a model law drafted by a group called the Public Policy Alliance, which touts it as a way to preserve "individual liberties and freedoms which become eroded by the encroachment of foreign laws and foreign legal doctrines, such as Shariah". http://publicpolicyalliance.org/?page_id=38 (last visited May 9, 2011)

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of any “sharia organization” linked to terrorism a felony punishable “by fine, imprisonment of not less than fifteen (15) years or both.”⁸

While not expressly referring to Sharia, many of these legislative initiatives are aimed at Islamic law.⁹ For instance, HB 45, which was introduced in Georgia (but not enacted), made no reference to Sharia, stating that “it shall be the public policy of this state to protect its citizens from the application of foreign laws when the application ... will result in the violation of a right guaranteed by the Constitution of this state or of the United States.”¹⁰ But the sponsor of the bill stated that the legislation was intended to “ban the use of Sharia law in state courts.”¹¹ Florida’s legislation (SB 1294) was copied almost verbatim from the “model legislation” posted on the website of a group called the American Public Policy Alliance.¹² The group’s website indicates that the model legislation was “crafted to protect American citizens’ constitutional rights against the infiltration and incursion of foreign laws and foreign legal doctrines, especially Islamic Sharia Law.”¹³

Despite the differences in terminology used, on the whole these Bills and Amendments purport to protect state citizens from perceived risks to their constitutional rights or to prevent legal decisions that would run counter to the state’s public policy. Some well-publicized decisions have understandably raised concerns. For instance, a trial court in New Jersey ruled that a husband, who was a Muslim, lacked the criminal intent to commit sexual assault upon his wife because “his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited.”¹⁴ Others have observed that certain Sharia rules governing divorce, child custody, and inheritance, as applied in certain jurisdictions or interpreted in certain schools of Islamic thought,¹⁵ may discriminate

⁸ Tenn. SB 1028 (as initially filed, at <http://www.capitol.tn.gov/Bills/107/Bill/SB1028.pdf>) (last visited May 8, 2011); §39-13-902(13), §39-13-906(a)(1)(B). The legislation has since been amended to remove any specific reference to Sharia and is now facially neutral. See SB 1028 (as amended, at <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1028>) (last visited May 8, 2011).

⁹ *The Law of the Land*, ABA JOURNAL 14 (Apr. 2011) (noting that in “South Dakota, state Rep. Phil Jensen says he learned from the Oklahoma decision to omit the word *Shariah* in similar legislation he sponsored. ... In South Carolina, state Sen. Michael Fair, a sponsor of an anti-Shariah bill in his state, says that he too has heeded the tactical wisdom to ‘keep it bland’”).

¹⁰ Ga. HB 45 (<http://www.legis.ga.gov/Legislation/en-US/History.aspx?Legislation=32048>). The legislation remained in committee.

¹¹ Kathleen Baydala Joyner, *Lawyers Speak Against Ga. Bill That Bans Use of Foreign Laws in State Courts*, FULTON CO. DAILY REP. (Feb. 7, 2011).

¹² http://publicpolicyalliance.org/?page_id=38 (last visited May 8, 2011).

¹³ *Id.*

¹⁴ *S.D. v. M.J.R.*, 2 A.3d 412, 428 (N.J. Super. 2010).

¹⁵ Sharia “law” is only “law” in the colloquial sense. The textual sources of the Sharia are the Quran and the Sunna. The Quran is the Muslim holy scripture. The Sunna is essentially the sayings and conduct of Mohammad, who is believed by Muslims to have been divinely guided. After these two primary sources, the two main secondary sources of Sharia are: (1) *ijma* (consensus of scholars and jurists), and (2) *qiyas* (reasoning by analogy to one of the higher sources). There is no single authoritative compilation of Sharia, or any judicial or legislative body with jurisdiction over all or even most Muslims. As recently noted, “[t]he amorphous nature of Sharia law can be difficult to appreciate as one often reads that a product is ‘Sharia-compliant’, or that a state applies ‘Sharia law’. In fact, the term Sharia no more denotes a cohesive, codified law than the term ‘natural law’ does.” Paul Turner & Robert Karrar-Lewsley, *Arbitration, Sharia & the Middle East*, 6 GLOBAL ARB. REV. (July 2011). As stated by one U.S. judge with respect to the indefinite nature of “Islamic law”: “It is not possible to open up law books and read

against women in ways that would not be sanctioned by -- and indeed would often be illegal under -- the laws of this country.¹⁶

Yet that very fact highlights the point that the Bills and Amendments are duplicative of safeguards that are already enshrined in federal and state law. American courts will not apply Sharia or other rules (real or perceived) that are contrary to our public policy, including, for instance, rules that are incompatible with our notions of gender equality. Indeed, the New Jersey trial court decision referenced above was reversed by the Superior Court of New Jersey, which “soundly rejected” the lower court’s “perception that, although defendant's sexual acts violated applicable criminal statutes, they were culturally acceptable and thus not actionable.”¹⁷ In so ruling, the Court relied on long-standing precedent that the government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.”¹⁸

While legislative initiatives that target specified conduct may be proper even if they run counter to the principles of a particular religion, such initiatives that target an entire religion or stigmatize an entire religious community, such as those explicitly aimed at “Sharia law,” are inconsistent with some of the core principles and ideals of American jurisprudence. Thus, while the Supreme Court upheld the conviction of a Mormon on a polygamy charge in 1898 (at a time when polygamy was an accepted tenet of Mormonism), the law in question did not embody a broader “anti-Mormon” legislative initiative, but rather one aimed at specified conduct that was deemed socially harmful.¹⁹

Moreover, as further discussed in Section III of this Report, the provisions in these Bills and Amendments that seek to ban the use of international, foreign or customary law in U.S. state courts are unnecessary, as existing law and judicial procedure have already proven sufficient to deal with the concerns that such Bills and Amendments were designed to address.

Significantly, language in these Bills and Amendments dealing with “international law” or “foreign and customary law” is likely to have an unanticipated and widespread negative impact on business, adversely affecting commercial dealings and economic development in the states in which such a law is passed and in U.S. foreign commerce generally. Choice of law is a critical

cases to discern [Islamic] law.” *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 2003 WL 22016864 (Del. Supr.).

¹⁶ Farrah Ahmed, *Personal Autonomy & the Option of Religious Law*, 24 INT’L J. L. POL’Y & FAM. 222, 231 (2010); Vivian E. Hamilton, *Perspectives on Religious Fundamentalism and Families in the U.S.*, 18 WM. & MARY BILL RTS. J. 883, 884 (2010).

¹⁷ *S.D. v. M.J.R.*, 417, 2 A.3d 412 (N.J. Super. 2010).

¹⁸ *Id.* at 437 quoting *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 885, 110 S.Ct. 1595, 1603, 108 L.Ed.2d 876, 889-90 (1990) (holding that the Free Exercise Clause did not require Oregon to exempt the sacramental ingestion of peyote by members of the Native American Church from Oregon's criminal drug laws).

¹⁹ *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878). See also *Cleveland v. United States*, 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 12 (1946) (affirming the conviction of defendant practitioners of polygamy under the Mann Act upon a determination that they transported their wives across state lines for immoral purposes and a rejection of defendants' claim that, because of their religious beliefs, they lacked the necessary criminal intent).

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term in the negotiation of international business deals. Some of the Bills and Amendments take that bargaining chip off the table or limit the latitude of negotiations. Companies from states that enact such Bills or Amendments are unable to freely negotiate the choice of law term with a foreign company that would insist on the application of the law of its own jurisdiction to govern the contract. This places the U.S. company at a competitive disadvantage with companies from foreign jurisdictions that are not similarly hampered in such negotiations. In addition, the Bills and Amendments create a perception that the courts of those states with such enactments are hostile to the application of foreign law, even if freely negotiated by the parties, which makes it more difficult to negotiate for a domestic forum. Thus, a foreign company that would otherwise be willing to agree to a U.S. forum, subject to the application of the law of its own jurisdiction, will be more inclined to insist on a foreign forum. Moreover, a harsh attitude by states in this country toward the application of foreign law will likely harden the attitude of foreign jurisdictions with regard to the application of U.S. law. In short, the Bills and Amendments create unnecessary barriers to the conclusion of business deals. As stated by one court, “[w]e cannot have trade and commerce in world markets ... exclusively on our terms, governed by our laws.”²⁰

Moreover, many of the Bills and Amendments would infringe federal constitutional rights, including the free exercise of religion and the freedom of contract, or would conflict with the Supremacy Clause and other clauses of the Constitution. Even those versions of these laws that have been carefully crafted so as to be facially neutral, and avoid any mention of religious law in general or Sharia law in specific, are nonetheless liable to face constitutional scrutiny to the extent that the effect of such proposals is to prohibit all practice of Sharia law, to prohibit parties’ freedom to contract, or to interfere with the powers of the Executive and the Senate to negotiate and ratify treaties.

II. CONSTITUTIONAL ISSUES

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)

These various state Bills and Amendments, in all their incarnations, are attempting to do precisely what our founding fathers sought to prevent when they crafted our Constitution and Bill of Rights: deny fundamental rights to a group of citizens based on the vote of a state legislature or the results of a state-wide referendum. As set forth below, such legislation are unconstitutional because they violate the following provisions of the U.S. Constitution: the Supremacy Clause,²¹ the Contracts Clause,²² the First Amendment’s free exercise of religion clause,²³ and the Full Faith and Credit Clause.²⁴

²⁰ *Laminoirs S.A. v. Southwire Co.*, 484 F.Supp. 1063, 1069 (N.D. Ga. 1980).

²¹ “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and

A. Violation of the Supremacy Clause

Under the Supremacy Clause of the U.S. Constitution, all treaties are “the supreme Law of the Land.” Any provisions in the Bills and Amendments that bar state courts from considering “international law,” as in Oklahoma’s amendment, run afoul of the Supremacy Clause because of their effects on U.S. treaty obligations. Treaties are an important source of law applicable in state courts. For example, the United Nations Convention on Contracts for the International Sale of Goods (CISG)²⁵ is a treaty that applies directly to citizens or residents of a state who enter into a contract for the sale or purchase of goods with a party in another Contracting State, which includes such likely trading partners as Canada, Mexico and China. To illustrate, under the Supremacy Clause, a state court faced with a sale of goods dispute governed by the CISG between a state resident and a supplier in, say, France must apply the CISG unless the parties expressly opted out of it, and any state constitutional amendment or statutory provision that prohibited this outcome would violate the Supremacy Clause, which provides that, as a treaty, the provisions of the CISG are “supreme” over state law.

The Supreme Court of the United States has recognized that there are times to recognize and enforce foreign judgments and international arbitration agreements.²⁶ Yet the Bills and Amendments would call into question states’ willingness to recognize and abide by treaties, many of which have a very direct effect on economic investment in the United States and overseas, as well as on protecting American business interests overseas. Businesses negotiate contract terms assuming the backdrop protections of these treaties and agreements, and to prohibit their consideration could undermine the legal foundation of such contracts.

B. Violation of the Contracts Clause

The constitutionally protected right of contract is threatened by language in these provisions that seeks to limit choice of law. The Contracts Clause of the U.S. Constitution provides that “[n]o State shall...pass any...Law impairing the Obligation of Contracts.” One generally recognized

the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. Art. VI, § 1, Cl. 2.

²² “No State shall ...pass any...Law impairing the Obligation of Contracts,.... U.S. Const. Art. I, § 10, Cl. 1.

²³ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” U.S. Const. Amend. 1.

²⁴ “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. Const. Art. IV, § 1.

²⁵ There is a distinction between self-executing treaties, which are to be automatically given effect of law in domestic courts, and non-self-executing treaties, which must be implemented through legislation. *Medellin v. Texas*, 552 U.S. 491, 504-505 (2008). The CISG, which was ratified by the United States in 1986 and implemented in 1988, is generally considered to be a self-executing treaty and therefore directly applicable in state courts without implementing legislation. *See, e.g., Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d. 1024, 1027 (2d Cir. 1995).

²⁶ *See e.g., Medellin v. Texas*, 128 S. Ct. 1346, 1365; 522 U.S. 491, 519-520 (“Our holding does not call into question the ordinary enforcement of foreign judgments or international arbitral agreements. Indeed, we agree with *Medellin* that, as a general matter, ‘an agreement to abide by the result’ of an international adjudication--or what he really means, an agreement to give the result of such adjudication domestic legal effect--can be a treaty obligation like any other, so long as the agreement is consistent with the Constitution.”); *see also id.* at 1364 (citing dissent at 1379-1380) (referencing numerous cases where the Supreme Court found a treaty to be self-executing and thus directly enforceable in U.S. courts without domestic implementing legislation).

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right of contract is the right to choose the law that governs that contract. Courts, including the U.S. Supreme Court, generally honor the parties' choice of law, unless such law is contrary to public policy,²⁷ even if doing so results in an outcome contrary to the laws that would otherwise apply.²⁸

Provisions barring courts from using foreign, international or religious law gut the constitutional protection of the Contracts Clause. It is common practice for commercial contracts to include a choice of law provision, especially in the cross-border context. As previously discussed, choice of law is often a hotly negotiated provision of the contract that can significantly affect the substantive terms of the parties' business deal. To varying degrees under the various proposed Bills and Amendments, state courts would be prohibited from applying foreign laws governing the parties' contracts, thereby "impairing the Obligation of Contracts"²⁹ and encouraging foreign parties to either avoid the U.S. party's preferred forum or to impose a high price in connection with some other term of the business deal in exchange for agreeing to resolve future disputes in the U.S. The more broadly worded Bills and Amendments might also affect not only Muslims seeking to resolve disputes using Sharia principles, but also Jews utilizing rabbinic tribunals, Christians resolving disputes through Christian Conciliation, and members of other religious groups participating in faith-based dispute resolution fora. They might also impact the enforcement in state courts of international arbitral awards decided on the basis of foreign law, and of child custody agreements that were negotiated overseas, but that a parent seeks to enforce in the United States.

Such provisions are therefore unconstitutional infringements of individual's right to contract that will seriously impede business and stymie economic development. As discussed in more detail in Section III below, they are also unnecessary as the protections they seek to provide are already present in existing law.

C. Violations of the First Amendment's Free Exercise Clause

Laws or amendments that explicitly seek to ban "Sharia Law" from being considered by a state court, as in the Oklahoma amendment voted on in November 2010, violate the First Amendment's Free Exercise Clause because they place a substantial burden on individuals' religious practices. A law imposes an unconstitutional burden on the free exercise or religion when it (1) prevents individuals from performing religious acts or rituals that are (2) religiously motivated, (3) based on a sincerely held religious belief, and (4) the acts or rituals in question do not endanger the health or safety of other individuals and therefore present a substantial burden on individual's free exercise rights.³⁰ Laws that create such burdens must meet different levels of judicial scrutiny, depending on whether or not they are facially neutral, and must be narrowly

²⁷ *Lauritzen v. Larsen*, 345 U.S. 571, 588-589 (1953) ("Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply."); *see also* 16 Am. Jur. 2d Conflict of Laws § 81. Courts may also refuse to give effect to a choice of law provision if made in bad faith or with the purpose of evading the law of the place where the contract was made. *Id.*

²⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

²⁹ U.S. Const., Art. 1, § 10.

³⁰ The federal government is prohibited "from substantially burdening a person's exercise of religion, unless the Government 'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest." *Gonzales v. O Centro. Esp. Benef. Uniao do Vege*, 126 S. Ct. 1211, 1216 (2006).

tailored to advance the asserted government interest. Most of the Bills and Amendments fail to pass these constitutional hurdles.

Those that either specify Sharia or other religious law, or which reference “international” or “foreign” law, clearly burden religious practice.³¹ For example, many Muslims, such as the plaintiff who sought an injunction to prohibit the certification of the Oklahoma amendment, have wills that incorporate specific elements of Sharia law to determine the distribution of their estates. It will be impossible to probate such wills in states that ban the application of Sharia or religious law where their provisions do not endanger the health or safety of other individuals. Furthermore, as the validity of marriages and divorces, whether performed in the U.S. or in another country, may be based on Sharia or other religious law, banning such law from being “used” or “considered” by courts will prevent judges from considering evidence of such marriages or divorces, whether performed in the U.S. or abroad.³² Most of the provisions are therefore likely to be found to create unconstitutional burdens on religious practice. This was the case in Oklahoma, where a federal district court issued a preliminary injunction based on its finding of a “substantial likelihood of success on the merits” of the plaintiff’s Free Exercise Claim.

Provisions like the one in Oklahoma or Tennessee’s SB 1028 that single out Sharia law are the most clearly unconstitutional; because they are not neutral on their face, they will only pass constitutional scrutiny if they are “justified by a compelling interest and narrowly tailored to advance that interest.”³³ This will be a difficult case for states to make, because as demonstrated in Section III, the interests these provisions are designed to protect are already more than adequately covered through existing law. Moreover, prohibiting or singling out the lawful and peaceful religious practice of millions of U.S. citizens and residents is certainly not narrowly tailored to advance any state interest.

Provisions that refer to “religious law” more generally, such as Arizona’s House Bill 2582, are likewise unconstitutional, because they are also not neutral – their discrimination simply extends

³¹ The Free Exercise Clause also works to protect an individual’s right to avoid the imposition of religious law unless he or she has voluntarily agreed to be subject to such a law or doctrine. A court can determine whether the parties voluntarily agreed to appear before a religious tribunal, such as a Jewish rabbinic tribunal, or to be bound by religious law or principles by using “neutral, objective principles of secular law.” *See, Stein v. Stein*, 707 N.Y.S.2d 754, 759 (N.Y. App. Div. 1999); *see also Avitzur v. Avitzur*, 446 N.E.2d 136, 138 (N.Y. 1983) (citing *Jones v. Wolf*, 443 U.S. 595, 602 (1979)).

³² The Constitution, however, also prevents courts from interpreting religious law or canon or deciding disputed questions of religious doctrine. For example, anti-fraud ordinances regulation the use of kosher designations have been found invalid under the Establishment Clause of the First Amendment when they would require courts to interpret and determine religious law (i.e., whether the food represented to be kosher was, in fact, kosher), as such a determination would result in “excessive entanglement” with religion. *See, e.g., Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1349-50 (4th Cir. 1995) (Wilkins, J., concurring). As stated by Justice Brennan in *Serbian Eastern Orthodox Diocese v. Milivajevich*, 426 U.S. 696, 709 (1976), “[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.”

³³ *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

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to *all* religious beliefs.³⁴ Even facially neutral provisions that do not refer to religious law at all may also be unconstitutional if their object is to restrict or infringe on religious practices.³⁵ Otherwise, neutral provisions will pass First Amendment scrutiny only if they are found to have a rational basis and to be narrowly tailored.³⁶ However, as discussed further in Section III, they remain unnecessary additions to existing law.

D. Violation of the Full Faith and Credit Clause

Finally, such Bills and Amendments violate the Full Faith and Credit Clause of the U.S. Constitution to the extent that they seek to refuse to enforce a judgment from another state court if that state includes religious law, “foreign” law, or “international” law in making judicial decisions. This is the case in Oklahoma’s amendment, which would permit its state courts to uphold the decisions of courts in other states only “provided the law of the other state does not include Sharia law, in making judicial decisions.”³⁷

It is unclear how, after enactment, a court in the states with the new legislation would determine whether another state’s law “included” prohibited “Sharia,” “foreign,” or “international law,” and how broadly these terms might be interpreted. Would a state in which a will was probated that allowed for the distribution of the estate in accordance with a religious legal tradition (such as Sharia or a Rabbinical court ruling) be considered to “include” “foreign” law in its judicial decisions for purposes of these amendments? Would a marriage recognized under New York law because it was solemnized according to Sharia, Christian canon, or rabbinical rules be recognized? Would billions of dollars worth of sovereign wealth funds that operate around the world but were organized under New York state law and recognized Sharia legal principles have to be restructured? While the exact parameters and processes under which such a determination would be made are unclear, and the law in this area remains unsettled,³⁸ a state’s refusal to respect the judicial decisions of another state is a serious matter that may in many cases give rise to a constitutional violation.

III. Existing Law Already Provides Adequate Protections

Proponents of the Bills and Amendments argue that they are necessary to protect constitutional rights, preserve U.S. law and prevent that application of religious or foreign legal principles which are considered unfair, discriminatory or offensive to basic American values. That is not so; U.S. citizens are already protected by existing law.

It is a general principle of U.S. law that our courts will not give effect to foreign or religious laws or to rights based on such laws if doing so would be contrary to the settled “public policy” of the forum, would violate good morals or natural justice, or would otherwise be prejudicial to the

³⁴ *Id.* at 532 (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”).

³⁵ *Id.* at 534.

³⁶ *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990).

³⁷ Okl. Enr. H.J.R. No. 1056, Section C.

³⁸ The area in which this is most clearly seen is in interstate conflicts regarding the recognition of same-sex marriages and civil unions.

forum state or its citizens.³⁹ Our courts (both state and federal) have more than sufficient legal tools to permit them to reject foreign or religious law and refuse to enforce foreign judgments that do not meet our fundamental standards of fairness and justice. Constitutional rights (such as those contained in the Bill of Rights) protect everyone in the United States, and all courts throughout the country are bound to respect them. Under our Constitutional order, these rights cannot be infringed, even where foreign or religious law has been chosen by the parties (for example by contract) or is otherwise applicable to them (for example, foreign law because of their foreign citizenship). This is true of all laws. Long ago, for example, the Connecticut Supreme Court held that the courts of Connecticut “will not enforce the law of another jurisdiction, nor rights arising thereunder, which are injurious to our public rights, or to the interest of our citizens, nor those which offend our morals or contravene our public policy, or violate our positive laws.”⁴⁰ It is the same in Colorado, where foreign law will not be enforced where it is “contrary to public policy.”⁴¹ As will be seen, the laws of many other states are consistent.

This is a proper application of the doctrine of comity, which the U.S. Supreme Court has described as:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.⁴²

Under our law, courts will decline to enforce the choice of a foreign law where the result would violate state or federal public policy. In this context, public policy is generally understood to include fundamental social values and morals, principles of justice, and public welfare; this concept permits a court to disregard the parties' choice of law and apply local law (the *lex fori*) instead when necessary to protect the policies and interests of the forum. For example, under California's choice-of-law principles, an agreement designating a foreign law will not be given effect if it would violate a strong California public policy or result in an evasion of a statute of the forum protecting its citizens.⁴³ Under Florida law, courts will not enforce choice-of-law provisions where the law of the chosen forum contravenes strong public policy.⁴⁴ Georgia law is similar: “[e]nforcement of a contract or a contract provision which is valid by the law governing the contract will not be denied on the ground of public policy, unless a ‘strong case’ for such action is presented.”⁴⁵

³⁹ See *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 201 (N.Y. 1918) (enforcement not required when it “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal”).

⁴⁰ *Christilly v. Warner*, 87 Conn. 461, 88 A. 711 (1913).

⁴¹ *Gray v. Blight*, 12 F.2d 696 (10th Cir. 1940), cert. denied 311 U.S. 704 (1940).

⁴² *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

⁴³ See *Kaltwasser v. Cingular Wireless LLC*, 543 F.Supp.2d 1124 (N.D. Cal. 2008), *aff'd* 350 Fed.Appx.108 (9th Cir. 2009).

⁴⁴ See *Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337 (11th Cir. 2005).

⁴⁵ See *Terry v. Mays*, 161 Ga.App. 328, 329 (1982).

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A similar rule applies in respect of torts. As a matter of principle, U.S. courts will not consider actions based on a foreign cause of action the enforcement of which would be contrary to the strong public policy of the forum, nor will they apply foreign law to determine the outcome of a case when it would violate some prevalent conception of good morals or fundamental principle of natural justice or involve injustice to the people of the forum state.⁴⁶ In South Carolina, for example, the Supreme Court will not apply foreign law if it violates the public policy of South Carolina.⁴⁷

Under U.S. law, judgments rendered in foreign nations are not entitled to the same “full faith and credit” protection that sister-state judgments receive under the U.S. Constitution. Thus, a state of the United States is free to refuse enforcement of a foreign judgment on the ground that the original claim on which the judgment is based is contrary to its public policy.⁴⁸ A foreign judgment need not be enforced, for example, if it was rendered under a system which does not provide impartial tribunals or procedures compatible with due process of law” or if the defendant did not receive notice of the proceedings in sufficient time to enable him to defend.⁴⁹ Versions of these uniform acts are in force in a majority of states, including Colorado (C.S.R. A. § 13-62-104 (“the judgment or the claim for relief on which the judgment is based is repugnant to the public policy of this state or of the United States”), Georgia (O.C.G.A. § 9-12-114), New York (McKinney’s CPLR § 5304) and North Carolina (N.C.G.S.A. § 1C-1853).

Recognition of foreign marriages in the United States is for the most part governed by the principle that if the marriage is valid where performed or celebrated, it is valid in the U.S. unless violative of the public policy of the forum.⁵⁰ Some states provide for this result by statute.⁵¹

Courts will also refuse to enforce decisions made by religious tribunals when such decisions violate public policy or involve matters considered non-arbitral on public policy grounds, such as questions involving child custody.⁵² Public policy considerations will also prevent courts from confirming awards by religious tribunals that would deprive a party of his or her constitutional rights or that attempt to usurp the state’s prerogative in criminal matters.⁵³

⁴⁶ See Restatement (2d), Conflicts of Law §116.

⁴⁷ *Boone v. Boone*, 345 S.C. 8, 546 S.E.2d 191 (S.C. 2001).

⁴⁸ See Restatement (2d) Conflicts of Law §117.

⁴⁹ See *Hilton v. Guyot*, 159 US 113 (1895); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir.1995), cert. denied, 516 U.S. 989 (1995); *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2nd Cir.2000). See generally the 1962 Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. pt. II, at 39 (2002) and the 2005 Uniform Foreign-Country Money Judgments Recognition Act, 13 U.L.A. pt. II, at 5 (Supp. 2007).

⁵⁰ See, e.g., *Hesington v. Estate of Hesington*, 640 S.W.2d 824, 826 (1982).

⁵¹ See Cal. Civ. Code Ann., § 63 (West 1998); Idaho Code Ann. § 32-209 (1997); Kan. Stat. Ann. § 23-115 (1997); Ky. Rev. Stat. Ann. § 402.040 (Michie 1984); Neb. Rev. Stat. § 42-117 (Revised 1995); N.M. Stat. Ann. § 40-1-4 (Michie 1994); S.D. Codified Laws § 25-1-38 (Michie 1992); Utah Code Ann. § 30-1-4 (1995).

⁵² In many states, for example, custody and visitation issues are considered inappropriate for resolution by arbitration, religious or otherwise, although courts may sometimes support arbitral decisions on such issues unless they are found not to be in the child’s best interest. See generally Elizabeth A. Jenkins, Annotation, *Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters*, 38 A.L.R.5th 69 (1996).

⁵³ See, e.g., *Hirsch v. Hirsch*, 774 N.Y.S.2d 48, 50 (N.Y. App. Div. 2004) (court refused to enforce rabbinic tribunal’s decision directing wife to withdraw pending criminal complaint against husband).

III. Conclusion

Legislation that bars courts from considering foreign or international law or the entire body of law of a particular religion impose unconstitutional burdens on various constitutional rights, threaten to impinge American commercial interests, and are unnecessary additions to existing law. Accordingly, the American Bar Association should oppose the enactment of such laws.

Respectfully Submitted,

Salli A. Swartz
Chair

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GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Mike Byowitz and Josh Markus, Delegates, Section of International Law

1. Summary of Resolution(s).

This Resolution opposes federal or state laws imposing blanket prohibitions on the consideration or use of foreign or international law or the entire body of law or doctrine of a particular religion.

2. Approval by Submitting Entity.

Yes.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

This Resolution does not affect any existing policies of the Association.

5. What urgency exists which requires action at this meeting of the House?

As indicated in the April 2011 issue of the ABA JOURNAL, legislators in 20 states are considering more than 40 bills that would ban or restrict the consideration or use of foreign, international or religious law in state courts. *The Law of the Land*, ABA JOURNAL 14 (Apr. 2011).

6. Status of Legislation. (If applicable)

More than 40 bills are now pending in various stages of the legislative process.

7. Cost to the Association. (Both direct and indirect costs)

None.

8. Disclosure of Interest. (If applicable)

N/A.

9. **Referrals.**

This resolution is being provided to other ABA entities for support.

10. **Contact Name and Address Information.** (Prior to the meeting)

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11. **Contact Name and Address Information.** (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution opposes federal or state laws imposing blanket prohibitions on consideration or use of foreign or international law and the entire body of law or doctrine of a particular religion.

2. Summary of the Issue that the Resolution Addresses

Over the last year or so, an increasing number of state constitutional amendments and legislative bills have been proposed seeking to restrict or prohibit, in varying degrees, state courts' use of laws or legal doctrines arising out of international, foreign, or religious law or legal doctrines. Some such provisions have already been enacted, such as Tennessee's "American and Tennessee Laws for Tennessee Courts" bill, which was signed into law on May 13 2010, and Oklahoma's "Save Our State Amendment," which was approved by a majority of the state's voters on November 2, 2010, but which has not yet been certified due to a federal court's preliminary injunction based on the likelihood of its unconstitutionality. In approximately 20 states, some form of legislation that would impact the use or consideration of international, foreign or religious law has been introduced or is being considered for introduction in the state legislatures.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Legislation that bars courts from considering foreign or international law or the entire body of law of a particular religion impose unconstitutional burdens on various constitutional rights, threaten to impinge American commercial interests, and are unnecessary additions to existing law. The Policy would oppose the enactment of such laws.

4. Summary of Minority Views

Many of these legislative initiatives are aimed, either explicitly or implicitly, at Islamic or Sharia law. Some well-publicized decisions have understandably raised concerns. For instance, a trial court in New Jersey ruled that a husband, who was a Muslim, lacked the criminal intent to commit sexual assault upon his wife because "his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited." Others have observed that certain Sharia rules governing divorce, child custody, and inheritance, as applied in certain jurisdictions or interpreted in certain schools of Islamic thought, may discriminate against women in ways that would not be sanctioned by -- and indeed would often be illegal under -- the laws of this country.

Yet that very fact highlights the point that these anti-Sharia initiatives are duplicative of safeguards that are already enshrined in federal and state law. American courts will not apply Sharia or other rules (real or perceived) that are contrary to our public policy, including, in particular, rules that are incompatible with our notions of gender equality. Indeed, the New Jersey trial court decision referenced above was reversed by the Superior Court of New Jersey, which “soundly rejected” the lower court’s “perception that, although defendant's sexual acts violated applicable criminal statutes, they were culturally acceptable and thus not actionable.” *S.D. v. M.J.R.*, 417, 2 A.3d 412 (N.J. Super. 2010). In so ruling, the Court relied on long-standing precedent that the government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.” *Id.* at 437 quoting *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 885, 110 S.Ct. 1595, 1603, 108 L.Ed.2d 876, 889-90 (1990) (holding that the Free Exercise Clause did not require Oregon to exempt the sacramental ingestion of peyote by members of the Native American Church from Oregon's criminal drug laws).

While legislative initiatives that target specified conduct may be proper even if they run counter to the principles of a particular religion, such initiatives that target an entire body of religious doctrine or stigmatize an entire religious community, such as those explicitly aimed at “Sharia law,” are inconsistent with the core principles and ideals of American jurisprudence.