insights

American Society of International Law

May 26, 2011 Volume 15, Issue 13

International Law and Foreign Laws in the U.S. State Legislatures

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Introduction

Beginning in 2010, legislators in half of the U.S. states proposed—and in two states adopted—a series of bills or state constitutional amendments designed to restrict the use of international law and foreign laws by state (and sometimes federal) courts. This *Insight* will summarize the trend in adopting legislation hostile to international law and foreign laws and briefly discuss its causes and consequences.

State Bills and Proposed Constitutional Amendments

In February 2010, a Republican Iowa State Representative introduced a bill to prohibit state judges from using "judicial precedent, case law, penumbras, or international law as a basis for rulings."[1] The same month, a Utah Republican state representative introduced House Bill 296, prohibiting enforcement of any foreign law, or any decision rendered by a foreign legal or governmental authority, if it would violate a person's state or federal constitutional rights.[2] Similarly, the bill would nullify or rewrite private contracts with a choice of foreign law clause, the enforcement of which would violate a constitutional right.

Utah H.B. 296 was not adopted, but it proved unexpectedly influential in other states. Soon after its introduction, the debate over the role of international law and foreign laws intensified dramatically. In March 2010, a spark spread the debate through state legislatures like a wildfire. The unlikely incendiaries were an obscure state court decision in a domestic violence case involving a Moroccan couple living in New Jersey and an "honor killing" by an Iraqi father in Arizona.[3]

The resulting New Jersey bill expanded on the Utah bill by requiring courts to refuse enforcement of a contractual forum selection clause designating a foreign forum if enforcement would foreseeably "result in a violation of any rights guaranteed by" the New Jersey or the federal constitution.[4] The same provision would have forbidden New Jersey courts to grant a "claim" of *forum non conveniens* if such grant "would likely lead to the

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violation of any right guaranteed by" the New Jersey or the federal constitution. Unlike the Utah bill, however, the New Jersey bill exempted from its provisions agreements to which a corporation or other legal person is a party.[5]

The New Jersey bill was not adopted either, but within a few months, legislators in seventeen more states introduced bills, more or less similar to the Utah or New Jersey efforts. Many bills, such as those introduced in Alaska,[6] Arkansas,[7] Florida,[8] Indiana,[9] Louisiana,[10] and Iowa, [11] substantially mimic the New Jersey bill (although seven do not exclude contracts involving business organizations[12]). Some of these bills define "foreign" laws, legal codes, and systems specifically to include decisions of "international organizations and tribunals."[13] An Idaho nonbinding concurrent resolution was passed in April 2010, stating that on "domestic" (presumably meaning non-foreign) issues, "no court should consider or use as precedent any foreign or international law, regulation or court decision."[14] Several bills and resolutions specify that foreign law includes "religious law" or "Sharia law." [15] A recent Iowa bill, for example, defines "foreign law" to include religious law, international or foreign judicial decisions, and international organization decisions or informal guidance.[16]

A few bills propose much more extreme changes to state law. In February 2011, two Arizona representatives and four senators (all Republicans) introduced a bill that threatens impeachment for any judge whose decisions "use, implement, refer to or incorporate a tenet of any body of religious sectarian law into any decision, finding or opinion as controlling or influential authority" or "use, implement, refer to or incorporate any case law or statute from another country or a foreign body or jurisdiction that is outside of the United States and its territories in any decision, finding or opinion" as either "controlling or influential authority" or "precedent or the foundation for any legal theory." The bill would also void any decision relating to a private agreement that relies on foreign or "religious sectarian law." The term "foreign body" is specifically defined to include the United Nations and its agencies, the European Union, an "international judiciary," various other intergovernmental organizations, and the Socialist International. "Foreign Law" is defined as "any statute or body of case law developed in a country, jurisdiction or Foreign Body outside of the United States, whether or not the United States is a member of that body, unless properly ratified as a Treaty pursuant to the United States Constitution."[17] Like the federal Constitution Restoration Act bills introduced in Congress in 2004-2005,[18] the Arizona bill carves out specific exemptions for statutes or case law inherited from Great Britain or based on an "Anglo-American legal tradition."[19]

Most of these bills have either died in committee or stand little chance of adoption, but they express misunderstanding and distrust of international law and foreign laws. Some bills, however, may actually be adopted in some states. Louisiana has, in fact, adopted its bill, [20] and the Indiana Senate recently passed a bill similar to New Jersey's A3496 by a roll-call vote of fifty to zero. The bill was referred to the Indiana House of Representatives on February 17 and awaits further legislative action.[21]

In addition to these bills, similar state constitutional amendments were proposed in late 2010 and early 2011 in Alabama, Arizona, Arkansas, Indiana, Iowa, Missouri, Oklahoma, and Wyoming. [22] Although a few proposed amendments, such as Indiana's, mainly reproduce the New Jersey bill, most specifically preclude courts from considering or applying international law, foreign laws, or "legal precepts of other nations or cultures." The Oklahoma "Save Our State" resolution (H.J.R. 1056) is typical:

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DOCUMENTS OF NOTE

U.S. Constitution

Awad v. Ziriax (Nov. 29, 2010)

The Paquete Habana

Sosa v. Alvarez-Machain

Lawrence v. Texas

Roper v. Simmons

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> The Courts [of the state] when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.[23]

State courts are also forbidden to consider international law, foreign laws, and Sharia law in the joint resolutions proposed in Alabama, Arizona, Missouri, and Wyoming.

The Oklahoma Constitutional Amendment and *Awad v. Ziriax*

Some of the proposed state constitutional amendments have proved popular. The Missouri joint resolution has 105 co-sponsors in the House of Representatives. The Oklahoma amendment was actually approved by a comfortable margin. On May 25, 2010, the Oklahoma House of Representatives adopted joint resolution 1056 to amend the state constitution. The resolution, presented to Oklahoma voters as State Question 755, was approved by 70% of the voters.[24]

The amendment was not immediately certified to the state supreme court because a resident of Oklahoma challenged it, *inter alia*,as contrary to the Establishment Clause of the U.S. Constitution. The Establishment Clause generally prohibits arbitrary government discrimination against any religion. [25] The federal district court for the Western District of Oklahoma, which interpreted the reference to “Sharia law” to apply to religious beliefs rather than a system of law, found that the plaintiff had made a “strong showing of a substantial likelihood of success” in proving that the amendment unconstitutionally stigmatized Muslims.[26] For now, the Oklahoma State Board of Elections is pursuing an appeal in the U.S. Court of Appeals for the Tenth Circuit.[27]

Measures Prohibiting Consideration of International Law

Under Article VI of the U.S. Constitution, treaties to which the United States is a party are the “supreme Law of the Land.” Any state law or constitutional provision barring courts from enforcing international treaty law would likely run afoul of the Supremacy Clause. Those state bills and joint resolutions prohibiting courts from considering or enforcing international law would be void.

The U.S. Constitution does not explicitly incorporate customary international law into federal law. However, the Supreme Court declared in *The Paquete Habana* (1900) that customary international law “is part of our law.”[28] More recently, in the context of suits against foreign citizens for serious human rights violations, the Court reaffirmed that at least some customary international law rules, if sufficiently well defined and widely accepted, are enforceable in U.S. courts as federal law. [29] To the extent that the state bills and constitutions would forbid courts to enforce the “narrow class” of customary international law directly enforceable under Supreme Court precedent, they too would

violate the Constitution.

Measures Prohibiting Consideration of Foreign Law

Whether excluding foreign law from state courts would violate the federal Constitution is a more complex question. Those bills subordinating foreign laws to fundamental state and federal constitutional rights, such as the adopted Louisiana Act No. 886, would have minimal effects in most states if reasonably interpreted.[30] However, bills and proposed state constitutional amendments forbidding judges to look to precepts of and to enforce foreign laws could conflict with a broad range of federal laws and policies. They would also require state courts to abandon the practice of citing to foundational English cases[31] and would preclude enforcement in state courts of federal laws that require recognition or enforcement of foreign judicial or arbitral decisions.

Several of the bills and proposed constitutional amendments, such as bills introduced in Arizona and Texas, and the Oklahoma Save Our State Resolution, could be interpreted to deny state government officials and courts the power to recognize foreign juristic persons, as well as marriages or child adoptions originating on foreign soil. Most would also nullify state laws that rely on recognition of foreign laws and court judgments.

Some bills, including the New Jersey, Florida, and Iowa bills, would require conflicts of law to be decided in favor of the forum state, or the case dismissed, whenever the law suit or arbitration would threaten a person's state or federal constitutional rights. Others would do the same regardless of whether a constitutional right is threatened.

Finally, the Arizona bill would nullify the choice of a foreign law or foreign forum in an agreement between private parties, and nearly all of the bills and proposed constitutional amendments would do the same when the choice of law or forum is perceived to threaten state or federal constitutional rights. Unless interpreted very narrowly, such limitations could not only foil the reasonable expectations of the parties in many cases, but defeat their clearly expressed intentions.[32] It is unclear what desirable policies these provisions would serve.

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Endnotes:

[1] H.F. 2313 (Iowa 2010) (introduced by Rep. Jason Schultz).

[2] The Bill reads, in relevant part:

> (2) It is the public policy of this state that a court, arbitrator, administrative agency, or other adjudicative, mediation, or enforcement authority may not enforce a law enacted or a decision rendered by any legislative, judicial, or other governmental authority of a foreign nation or power if the law enacted or the decision rendered violated or would violate a right of the party against whom enforcement is sought guaranteed by the constitution of this state or the United States including due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state. (3) If any contractual provision or agreement provides for the choice of a foreign law or legal code or system to govern its interpretation or the resolution of any dispute

> between the parties, and if the enforcement or interpretation of the contract or agreement would result in a violation of a right guaranteed by the constitution of this state or of the United States including due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state, it is the public policy of this state that the agreement or contractual provision is considered modified or amended to the extent necessary to preserve the constitutional rights of the parties under the laws of this state or the United States. Any agreement or contractual provision incapable of being modified or amended in order the [sic] preserve these constitutional rights of the parties is null and void.

H.B. 296 1st Sub. (Utah 2010) (introduced by Rep. Carl Wimmer). The reference to mediation is strangely misplaced; mediators by definition do not "enforce" law.

[3] In the New Jersey case, in late 2008 and early 2009, the husband allegedly raped his wife repeatedly. When she sought a restraining order to protect herself from future attacks, a New Jersey superior court judge found the order unnecessary, in part based on the theory that the defendant's belief in Islamic precepts, giving husbands an absolute right to coerce sex from their wives, negated the intent element of criminal sexual assault. S.D. v. M.J.R., 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010). In the Arizona case, an Iraqi man murdered his daughter in October 2009 for living with a man in the United States outside of her arranged marriage. He did not claim that Islam gave him any right to murder; he claimed instead that the killing was accidental. It was the prosecutors who characterized the murder as an "honor killing." *See* Nadya Labi, *An American Honor Killing: One Victim's Story*, Time, Feb. 25, 2011, *available at* http://www.time.com/time/nation/article/0,8599,2055445,00.html.

[4] A.B. 3496, § 3.b, 214th Leg. (N.J. 2010).

[5] *Id.* § 4. As worded, this provision seems to allow a business firm to seek enforcement of a foreign law or forum selection clause in New Jersey courts in violation of an individual's constitutional rights, while precluding another individual from doing the same.

[6] H.B. 88 (Alaska 2011).

[7] S.B. 97 (Ark. 2011), *as amended on* Feb. 1, 2011.

[8] S.B. 1294 (Flor. 2011); H.B. 1273 (Flor. 2011).

[9] H.B. 1078 (Ind. 2011); S.B. 520 (Ind. 2011).

[10] S.B. 460 (La. 2010); H.B. 785 (La. 2010), *adopted as* Act No. 886 (effective Aug. 15, 2010).

[11] H.F. 489 (Iowa 2011).

[12] S.B. 51 (Ga. 2011); H.B. 45 (Ga. 2011); H.B. 2087 (Kan. 2011); S.B. 308 (Mo. 2011); H.B. 708 (Mo. 2011); H.B. 768 (Mo. 2011); Legis. Bill 647 (Neb. 2011); H. 3490 (S.C. 2011); S. 444 (S.C. 2011); S.B. 201 (S.D. 2011); H.B. 911 (Tex. 2011); H.B. 3027 (Tex. 2011).

[13] *See e.g.*, S.B. 97 (Ark.).

[14] H.C.R. 44 (Idaho 2010), filed Feb. 17, 2010, adopted Mar. 29, 2010.

[15] *See e.g.*, H.F. 575 (Iowa 2011); H.B. 301 (Miss. 2011).

[16] H.F. 575 (Iowa 2011).

[17] "Religious Sectarian Law" refers primarily to Sharia law, but also includes canon law and other religious codes.

[18] H.R. 3799, 108th Cong., 2d Sess., tit. II § 201, tit. III §§ 301-02 (2004); S. 520, 109th Cong., 1st Sess., tit. I § 101, tit. II §§ 301-02 (2005).

[19] H.B. 2582 (Ariz. 2011).

[20] La. Act No. 886 (approved June 29, 2010; effective Aug. 15, 2010), *codified at* La. R.S. 9:6000.

[21] *See* Legislative Detail: IN Senate Bill 520 – 2011 1st Regular Session, http://e-lobbyist.com/gaits/IN/SB0520.

[22] S.B. 62 (Ala. 2011); S.C.R. 1010 (Ariz. 2011) & H.C.R. 2033 (Ariz. 2011); S.J.R. 10 (Ark. 2011); S.J.R. 16 (Ind. 2011); H.J.R. 14 (Iowa 2011); H.J.R. 31 (Mo. 2011); H.J.R. 1056 (Okla. 2010); H.J.R. 0008 (Wyo. 2011).

[23] H.J.R. No. 1056, at 2 (Okla.).

[24] *See* John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 105 Am. J. Int'l L. 123 (2011). The measure's sponsor is reported to have admitted that no Oklahoma court had ever cited Sharia, but he characterized the law as a "preemptive strike." Stephen Clark, *Group Launches Media Blitz in Oklahoma for Anti-Shariah Ballot Initiative*, Fox News, Oct. 20, 2010, *at* http://www.foxnews.com.

[25] *See* Gillette v. United States, 401 U.S. 437, 449-51 (1971).

[26] Awad v. Ziriax, Case No. CIV-10-1186-M, W.D. Okla., Nov. 29, 2010, __ F.Supp.2d __, 2010 WL 4814077. The case is quoted at greater length in Crook, *supra* note 24, at 123-24.

[27] Awad v. Ziriax, 10th Cir. Case No. 10-6273, App. Filed Dec. 2, 2010.

[28] The Paquete Habana, 175 U.S. 677, 700 (1900).

[29] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004). Although Justices Scalia, Rehnquist, and Thomas concurred in part and in the judgment, all three have been among those members of the Court most harshly critical of the reliance on international and foreign laws in Supreme Court opinions. Their opinions may have provided support or inspiration for the legislatives measures discussed in this *Insight*. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 586, 589 (2003) (Scalia, J., dissenting) (referring to discussions of foreign views on a question of constitutional rights as "dangerous"); Roper v. Simmons, 534 U.S. 551, 607 (2005) (Scalia, J., dissenting) (denigrating the Court's use and reference to foreign laws in its opinion).

[30] However, even relatively restrained bills, such as Louisiana Act No. 886, could be read to prohibit a contractual waiver of state or federal constitutional rights in an agreement governed by foreign law. For example, an agreement under foreign law not to reveal trade secrets, national security information, or data protected by the EU Data Privacy Directive could be interpreted as void for violating a contracting party's right of free speech. For this reason, some (but not all) bills specifically provide that waivers of such rights are enforceable.

[31] For reasons that are unclear, some bills allow citation to English precedents, which would nonetheless preclude reference to Scottish cases.

[32] Even nonbinding guidance by intergovernmental and nongovernmental organizations incorporated by the parties as essential terms in a contract would arguably be rendered unenforceable by some of the bills and proposed amendments. The International Chamber of Commerce's widely used Uniform Customs and Practices for Documentary Credits or its Incoterms could be rendered inoperable in contracts with a citizen of an affected state.