RECOMMENDATIONS RESPECTFULLY SUBMITTED TO THE TRUMP ADMINISTRATION REGARDING THE CONSIDERATION OF FOREIGN LAW BY COURTS IN THE UNITED STATES

Over the last decade, there have been legislative bills introduced in over 20 states seeking in one form or another to limit the use of either Islamic law principles (usually misidentified as "Shariah law") or foreign or international law generally. The New York City Bar Association ("City Bar") opposes, as unconstitutional, unwise and unworkable, any efforts to prohibit or impede courts – through legislation or judicial litmus tests - from considering or applying foreign, international[1] or Sharia law. Such efforts have almost universally been the result of poor legal scholarship driven by Islamophobia.

The apex of the effort to ban courts from considering foreign, international or Sharia law was the successful referendum in 2010 in the State of Oklahoma on its "Save Our State Amendment" to its State Constitution. In December 2010, the City Bar's Committee on Foreign and Comparative Law issued a report, "The Unconstitutionality of Oklahoma Referendum 755 – The 'Save Our State Amendment'."[2] In addition, on May 13, 2011, the City Bar submitted an *amicus curiae* brief to the United States Court of Appeals for the Tenth Circuit in Oklahoma's appeal of the district's court's injunction of the amendment.[3] Both the Report and Brief focused on the numerous Clauses of the United States Constitution that the Oklahoma Amendment patently violated. The City Bar's concerns and arguments with respect to the Oklahoma constitutional amendment are set forth in detail in those documents and apply with equal force to other efforts that might be made to interfere with courts' application of foreign, international or Sharia law.

---

[1] A common error in this area is the conflation of "foreign law" with "international law." As set forth more fully below, the former is the law applicable in one or more non-U.S. jurisdictions, such as French law, Canadian law, EU law, etc. It is by definition NOT binding in American courts; although there have been a number of recent United States Supreme Court decisions, as well as some of lower courts, that have looked to various foreign laws for guidance. By contrast, "international law" is the law between or among nations, and the United States is party to much, but not all, of it. Once an element of international law becomes embodied in a ratified treaty of the United States, it is *ipso facto* the "supreme law" of the United States. Otherwise, it may be binding as "customary law." The City Bar is therefore not stating that "foreign law" should be binding is American court proceedings, but that it is often the appropriate law to apply to specific transactions and disputes where the choice of law by traditional norms, and Federal and State law, would so indicate.

[2] *Available at* http://www.nycbar.org/pdf/report/uploads/20072027-UnconstitutionalityofOklahomaReferendum755.pdf.

[3] *Available at* http://www2.nycbar.org/pdf/report/uploads/20072117-AmicusBriefAwadvZiriaxUSCourtofAppealsTenthCircuit.pdf.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street, New York, NY 10036
212.382.6600 | www.nycbar.org

Courts in this country have long considered, debated and applied foreign law, whether in reference to the interpretation of our Constitution, as selected by contractual parties to govern their contracts or otherwise. Courts have also applied international law in the form of treaties or international conventions to which the United States is a party. There is no evidence that any court has applied any foreign or international law, or any of the rules that constitute "Sharia law," in derogation of the public policy of this nation or any of its states, except in a few isolated cases where lower court judges have been quickly and fully reversed. This rule that law cannot be applied in violation of our public policies is sufficient protection in these isolated instances.

The overarching principle in our law and in all our courts is to support the freedom to contract and apply non-U.S. law as the parties deem appropriate. Thus, to interfere with the established functioning of the courts is unnecessary and, as discussed below, a dangerous interference with our Constitution and the personal lives and commercial interests of our citizens. Efforts to appoint only judges who will commit to such radical approaches to jurisprudence are also unwise and dangerous.

The Tenth Circuit upheld the preliminary injunction of the Oklahoma constitutional amendment that would have forbidden Oklahoma courts from considering "international law" or "Sharia law" because the amendment likely violated the Establishment Clause of our Constitution. *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012). Since the decision, efforts have been made to ban courts' use of foreign or international law without explicit reference to "Sharia law," presumably in an attempt to avoid violating the Establishment Clause, as well as the Free Exercise and Equal Protection clauses. Certainly, a law that singles out the religious rules and dictates of a particular faith for prohibition violates those provisions of our Constitution. However, even a seemingly even-handed effort to ban consideration of "foreign" or "international" law is disturbing.

First, parties habitually make their contracts subject to foreign law, whether that law is the law of the United Kingdom, Egypt, Japan or any other nation, or the law of states or provinces within other nations. To forbid a court from applying such foreign law frustrates commerce and business and constitutes an interference with contract in violation of Article I, Section 10 of our Constitution. Second, "international law" typically includes international conventions and treaties. Banning courts from using international law, could thus, for example, prohibit a court from considering the U.N. Convention on Contracts for the International Sale of Goods ("CISG"), which could wreck havoc in a case between a U.S. party and one in Mexico who had ordered their affairs and agreements with CISG in mind. In addition, treaties to which the U.S. is a party are part of the supreme law of the nation, as provided in Article VI, Clause 2 of our Constitution, and courts must be able to consider, apply and enforce them. Third, to the extent that "foreign law" includes religious law (even without explicitly referencing it) banning courts' consideration of foreign law could cause all manner of difficulties. Consider, for example, purchasers of kosher or halal beef, who require in their purchase contracts that parties in the supply chain adhere to the relevant rules. Forbidding a court to consider those rules and whether a seller followed them would frustrate the purpose of the contracts.

It is also very important to our individual and corporate citizens that they be allowed to require that their relationships and contracts are governed by and construed in accordance with our law. Many major financial transactions around the world purport to be governed by the law of the State of New York.[4] Were our Federal government or states to prohibit the use of foreign law, we can expect wide-spread like-minded retribution.

Further, any efforts to ban consideration of Sharia law explicitly, in addition to the problems outlined above, raises serious vagueness and Due Process Clause issues because "Sharia" is not a body of law so much as a group of rules developed over the centuries that differ from country to country and believer to believer. To forbid courts from considering "Sharia" law is unconstitutionally vague, and it leaves believers uncertain whether and to what extent they can explain their conduct or order their affairs by reference to their religious beliefs. For example, if a person wishes to draft her will in accordance with Islamic principles, a court might be barred from enforcing that will because of a prohibition on using Sharia law.

In conclusion, there is no need to ban courts from considering foreign, international or Sharia law, and to do so violates our Constitution and harms our people in the conduct of their personal lives and commercial activities. Requiring that judges refuse to consider that law is equally unwise.

John S. Kiernan
President, New York City Bar Association

Maria M. Patterson
Chair, Foreign & Comparative Law Committee

January 2017

[4] New York has even included in its General Obligations Law, at §§5-1401 and 1402, express provisions permitting its courts to interpret and enforce contracts involving at least a certain dollar amount that choose New York law and New York courts to govern those contracts, even if there is no other connection to New York State.