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# February 9, 2011: What Does it Mean to Ban State Courts Use of Sharia or Other Foreign Law?

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2/9/2011—According to recent reports, at least 13 States have introduced bills against the use of Sharia or more generally foreign law in State courts. This past November Oklahoma adopted a statute by voter referendum that barred “state courts from considering international or Islamic law when deciding cases.” (The law has since been enjoined by a federal judge on Establishment Clause grounds. No final decision has yet been reached.)These efforts raise the question of when foreign law is usually utilized in State courts. Obviously, the overwhelming majority of cases in State court involve the enforcement of federal or State rights and thus the application of federal or State law, including federal or state constitutional law. Any kind of foreign law would come up in only a limited number of circumstances. One use of foreign law probably unaffected by these anti-Sharia laws is through analogy or support. For example, in 2005, in Roper v. Simmons, the United States Supreme Court found that the execution of murderers whose crime were committed before they were 18 violated the Eighth Amendment’s ban on cruel and unusual punishments. Justice Kennedy wrote for the majority that the United States “is the only country in the world that continues to give official sanction to the juvenile death penalty.” It is unclear whether this kind of comparative reasoning can be the subject of any sort of ban under the separation of powers.Foreign law also arises when State courts obtain jurisdiction over cases involving actions that took place outside the U.S. A party injured in an accident in Great Britain might sue a British company in a State court. In such cases, and other cases, “choice of law” doctrines often require the use of foreign law, in this instance British law. This might become forbidden but it is hard to imagine what law would be substituted.But the majority of cases in which foreign law is now used, especially religious law, involve contract actions in which the parties have agreed beforehand to utilize some specified legal source in resolving any disputes. In commercial disputes, this is often the law of some foreign jurisdiction. In divorces and other family law contexts, the courts might use Sharia to resolve custody and property division issues as per the parties’ prenuptial agreement. This is probably the context that the authors of these laws are thinking about. But the question is, why block use of Sharia when that is what the parties have previously agreed to?Aimed only against Sharia, these laws are a sign of religious bigotry. But written more generally to avoid Establishment Clause issues, these laws threaten ordinary commercial litigation.