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# OKLAHOMA'S ANTI-SHARIA AND OTHER ANTITRANSNATIONAL LAW PROPOSALS

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State court reliance on transnational law—foreign or international law—is a long-standing practice.<sup>1</sup> Foreign law has been part of the bread and butter of state court adjudication for more than two hundred years, since the first state courts were accorded decisional authority in the British common-law tradition.<sup>2</sup> International law is of more recent vintage, but many state courts have cited various forms of international law.<sup>3</sup>

State courts have used transnational legal authority in a number of contexts. Sometimes claims arise directly under international law.<sup>4</sup> Sometimes state courts are called upon to decide cases that implicate the foreign standing and treaty compliance of the United States.<sup>5</sup> At other times state courts may draw on transnational law for insight, ideas, persuasion, and inspiration as they deal with essentially domestic issues.<sup>6</sup> Domestic human rights advocates have used all of these approaches to push courts to examine state laws and policies in a global context.

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<sup>1</sup>Foreign law is the law of another nation, whereas international law governs the relationship between nations (BLACK'S LAW DICTIONARY 720, 892 (9th ed. 2009)). Transnational law encompasses both of these types of law (*id.* at 1638).

<sup>2</sup>Martha F. Davis, *Public Rights, Global Perspectives, and Common Law*, 36 FORDHAM URBAN LAW JOURNAL 653, 671–75 (2009).

<sup>3</sup>Opportunity Agenda, *Human Rights in State Courts: An Overview and Recommendations for Legal Advocacy* (2008), <http://bit.ly/nWnrr3>.

<sup>4</sup>See, e.g., *In re Parentage of C.A.M.A.*, 103 Wash. App. 1032 (Wash. Ct. App. 2000) (addressing claims brought under the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 (entered into force Dec. 1, 1983), <http://bit.ly/oy4LSv>); *In re David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991) (same).

<sup>5</sup>See, e.g., *Commonwealth v. Gautreaux*, 941 N.E.2d 616 (Mass. 2011).

<sup>6</sup>These approaches are discussed in Shirley S. Abrahamson, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA LAW REVIEW 273 (1997), and Margaret H. Marshall, "Wise Parents Do Not Hesitate to Learn from Their Children": *Interpreting State Constitutions in the Age of Global Jurisprudence*, 79 NEW YORK UNIVERSITY LAW REVIEW 1633 (2004).

Recently this practice, deeply woven into our legal system, has come under attack. The most high profile of these efforts was the successful campaign in November 2010 to amend the Oklahoma state constitution to forbid consideration of foreign and international law, as well as the Islamic system of laws known as Sharia, by Oklahoma state court judges.<sup>7</sup> The Oklahoma amendment has been enjoined on First Amendment grounds for the time being.<sup>8</sup> Yet many other state legislatures have proceeded to consider similar measures. Several such proposals are discussed below.

Here we put these recent developments into a larger perspective. First, we trace the antiinternational law sentiments expressed in Oklahoma to their earlier origins in proposed federal legislation. Second, we take a closer look at state measures that have been proposed in this recent wave of antitransnational law activity. Third, we examine the larger political and historical context for what is, essentially, an attack on the independence of state court judges. And, fourth, we review the strategic and ethical implications of these developments for domestic human rights advocates.

### The Federal Debate Concerning Transnational Law

The antiforeign law arguments being debated in many states ran their course in federal forums several years ago before migrating to more local venues. From 2004 to 2009, bills proposed in the U.S. Congress would have barred federal judi-

cial consideration of international or foreign law, with several proposals even suggesting that consideration of transnational law should be an impeachable offense.<sup>9</sup>

By some accounts, the U.S. Supreme Court itself triggered these legislative proposals. The controversy was most notably played out in three Supreme Court decisions, *Lawrence v. Texas*, *Roper v. Simmons*, and *Graham v. Florida*.<sup>10</sup> In each of these cases the Supreme Court's majority opinions cited transnational law as persuasive—a venerable practice in the U.S. Supreme Court.<sup>11</sup> Nevertheless the majority opinions were accompanied by vehement dissents and, in the instances of *Lawrence* and *Roper*, triggered federal legislation condemning courts' use of transnational law.

**Lawrence v. Texas.** While apparent in earlier cases as well as in public statements by the justices, the Supreme Court's internal debate over transnational law came to a head in the 2003 decision in *Lawrence v. Texas*, invalidating a Texas antisodomy statute.<sup>12</sup> In his opinion for the Court, Justice Anthony Kennedy discussed international law as persuasive support for the Court's conclusions. Justice Kennedy cited the decision of the European Court of Human Rights that laws proscribing homosexual conduct were invalid under the European Convention on Human Rights.<sup>13</sup> That was the first time a Court majority had ever cited a decision of the European Court. The majority's reasoning was denounced by Justice Antonin Scalia, who wrote that domestic constitutional entitlements do not "spring into existence ... because foreign nations decriminalize conduct."<sup>14</sup>

<sup>7</sup>Sharia is "[t]he body of Islamic religious law applicable to police, banking, business, contracts, and social issues. ... a system of laws, rather than a codification of laws, based on the Koran and other Islamic sources" (BLACK'S LAW DICTIONARY 1501 (9th ed. 2009)).

<sup>8</sup>See *Awad v. Ziriax*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010), appeal docketed, No. 10-6273 (10th Cir. 2010).

<sup>9</sup>H.R. Res. 473, 111th Cong. (2009); H.R. Res. 372, 110th Cong. (2007); H.R. Res. 97, 109th Cong. (2005); Constitution Restoration Act of 2004, S. 2323, 108th Cong. (2004); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004); Constitution Restoration Act of 2004, S. 2082, 108th Cong. (2004).

<sup>10</sup>*Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>11</sup>Sarah H. Cleveland, *Our International Constitution*, 31 YALE JOURNAL OF INTERNATIONAL LAW 1 (2006).

<sup>12</sup>*Lawrence*, 539 U.S. 558. See also *Printz v. United States*, 521 U.S. 898 (1997); Ashby Jones, "I Can Read What I Want," *Says Breyer on International-Law Debate*, WSJ LAW BLOG (April 2, 2010, 12:33 PM), <http://on.wsj.com/pvf1gl>.

<sup>13</sup>*Lawrence*, 539 U.S. at 573.

<sup>14</sup>*Id.* at 598 (Scalia, J., dissenting).

**Roper v. Simmons.** *Lawrence* was followed by *Roper v. Simmons*, in which the Court found that the death penalty for juveniles violated the Eighth Amendment.<sup>15</sup> Again writing for the Court, Justice Kennedy considered that the United States was the only country giving official sanction to the execution of juvenile offenders. Justice Kennedy carefully stated that the Court's holding simply "finds confirmation" in the international condemnation of the juvenile death penalty and that although foreign law is "not controlling," it is "instructive" for the purposes of interpreting the Eighth Amendment.<sup>16</sup>

Dissenting again, Justice Scalia took direct aim at this aspect of the majority's opinion. Criticizing Justice Kennedy's discussion of the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, Justice Scalia argued that the majority was operating under the false premise "that American law should conform to the laws of the rest of the world."<sup>17</sup> He went on to stress the ways in which the United States would regress if it were to adopt the positions of other countries on the use of illegally seized evidence against criminal defendants or on abortion access.<sup>18</sup>

**Spilling Over to Congress.** In early 2004 the debate moved to Congress, where bills were proposed in response to the *Lawrence* decision.<sup>19</sup> These bills prohibited federal courts from relying on

transnational law to interpret and apply the Constitution. They also divested the federal courts of jurisdiction over cases in which public officers invoked God as a source of authority (to prevent challenges to school prayer laws and similar practices).

The legislative momentum grew when Rep. Tom Feeney (R-Fla.) introduced a House resolution that judicial interpretations of the Constitution should not be based on transnational material, including laws or judgments of foreign nations.<sup>20</sup> Rep. Steve Chabot (R-Ohio) introduced a high-profile congressional hearing on the resolution by remarking that "the Supreme Court's reliance, or any court's dependence for that matter, on foreign judgments in the interpretation of our Constitution has no place."<sup>21</sup> Although the resolution enjoyed the support of eighty-four cosponsors, it did not reach the House floor for a full vote.<sup>22</sup>

The debate carried over into the confirmation hearings of Chief Justice nominee John Roberts in September 2005. During the hearings, Sen. Jon Kyl (R-Ariz.) questioned Roberts about the "troubling" use of foreign law in Constitutional interpretation.<sup>23</sup> He responded that the use of foreign judicial precedent was "a concern" because it gave foreign judges the power to shape U.S. legal precedent without being properly appointed and confirmed by the president and the Senate.<sup>24</sup> Roberts's implication was that foreign judges were not account-

<sup>15</sup>*Roper*, 543 U.S. 551.

<sup>16</sup>*Id.* at 575.

<sup>17</sup>*Id.* at 624 (Scalia, J., dissenting).

<sup>18</sup>*Id.*

<sup>19</sup>Constitution Restoration Act of 2004, S. 2323, 108th Cong. (2004); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004); Constitution Restoration Act of 2004, S. 2082, 108th Cong. (2004).

<sup>20</sup>H.R. Res. 97, 109th Cong. (2005).

<sup>21</sup>*House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Rep. Chabot, Chairman, Subcomm. on the Constitution of the H. Comm. on the Judiciary), <http://1.usa.gov/pAOyhD>.

<sup>22</sup>Similar legislation was introduced again in the 110th and 111th congressional sessions but did not make it out of committee (H.R. Res. 473, 111th Cong. (2009); H.R. Res. 372, 110th Cong. (2007)).

<sup>23</sup>Sheryl Gay Stolberg & Adam Liptak, *Roberts Fields Questions on Privacy and Precedents*, *NEW YORK TIMES*, Sept. 14, 2005, at A1.

<sup>24</sup>*Id.*

able to the U.S. public, whereas judges of the United States were. However, as Roberts himself later explained, our federal judicial system—which he noted was the envy of the world—was built on a theory of independence.<sup>25</sup>

In the end, Roberts stopped short of condemning the practice of looking transnationally. In response to questioning, he averred that citing transnational law did not violate the judicial oath to uphold the constitution.<sup>26</sup> Supreme Court nominee Samuel Alito similarly refused to condemn completely the use of foreign law in U.S. courts.<sup>27</sup> Justices Sonia Sotomayor and Elena Kagan stated that they were open to considering transnational materials for their persuasive value in appropriate cases. Indeed, Justice Sotomayor referred to considering transnational law as a way to get the “creative juices flowing” and noted its usefulness in determining unsettled legal questions.<sup>28</sup>

No justice has completely condemned the practice of looking abroad in appropriate cases. Even Justice Scalia accepts transnational law in cases where the Court is called upon to construe a treaty that has been the subject of interpretation by other signatory nations. For example, Justice Scalia joined the majority opinion in *Abbott v. Abbott*, a case under the Hague Convention on the Civil Aspects of Child Abduction; the case surveyed international practice regarding the convention.<sup>29</sup>

Perhaps because of the justices' refusal to condemn the practice outright and the

Court's majority in favor of considering transnational sources, the federal legislative effort seems to have ended. After the initial activity following the *Lawrence* decision, proposals to restrict judicial consideration of certain sources of law and legal ideas have not been reintroduced in Congress in recent years.

**Graham v. Florida.** Meanwhile, the Court majority continues to reference relevant transnational authority. In *Graham v. Florida* transnational law was again cited by a majority of the Court when it held that juveniles not convicted of homicide could not be sentenced to life without parole because such a sentence would violate the Eighth Amendment.<sup>30</sup> Writing for the majority, Justice Kennedy devoted several paragraphs to international law, explained the importance of examining global consensus, and made clear that foreign law was not binding.<sup>31</sup>

### The Shift to the States

Having reached an apparent dead end on the federal level, the attacks on the judiciary based on references to transnational law recently shifted to the state arena. A contributing event was the New Jersey case of *S.D. v. M.J.R.*, which involved allegations of domestic violence and criminal sexual conduct brought by a woman seeking a restraining order against her husband. Reasoning that the defendant's Islamic religion permitted him to act as he did, thus precluding the requisite intent, the trial judge denied the order.<sup>32</sup> This reasoning was summarily rejected on appeal.<sup>33</sup>

<sup>25</sup>Mark Tushnet, *The “Constitution Restoration Act” and Judicial Independence: Some Observations*, 56 CASE WESTERN RESERVE LAW REVIEW 1071 (2006); Press Release, U.S. Supreme Court, 2007 Year-End Report on the Federal Judiciary 2 (Jan. 1, 2008), <http://bit.ly/pV2Yp7> (“foreign nations ... look to the United States Judiciary as the model for securing the rule of law”).

<sup>26</sup>Confirmation Hearing on the Nomination of John G. Roberts Jr. to Be Chief Justice of the Supreme Court of the United States; Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005) (statement of John G. Roberts Jr., Supreme Court nominee).

<sup>27</sup>Confirmation Hearing on the Nomination of Samuel A. Alito Jr. to Be an Associate Justice of the Supreme Court of the United States, 109th Cong. 471 (2006) (statement of Samuel A. Alito Jr., Supreme Court nominee).

<sup>28</sup>Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States, 111th Cong. 464–65 (2009) (statement of Sonia Sotomayor, Supreme Court nominee).

<sup>29</sup>*Abbott v. Abbott*, 130 S. Ct. 1983 (2010).

<sup>30</sup>*Graham*, 130 S. Ct. 2011.

<sup>31</sup>*Id.* at 2034.

<sup>32</sup>*S.D. v. M.J.R.*, 2 A.3d 412, 428 (N.J. Super. Ct. App. Div. 2010).

<sup>33</sup>*Id.* at 440.

Although the trial judge in *S.D.* was admonished by the appellate court, this did not stop a national outcry in response to the lower court decision. Citing this decision as their sole data point, legislators around the country began introducing proposals that combined the earlier antitransnational law provisions with new, anti-Sharia provisions.<sup>34</sup>

**State Bills.** In 2010–2011, more than twenty states considered antitransnational or anti-Sharia legislation.<sup>35</sup> Oklahoma made the largest splash when 70 percent of state voters in November 2010 supported the “Save Our State” constitutional amendment.<sup>36</sup> That provision bans the Oklahoma state courts from even considering international law, foreign law, or Sharia in making decisions.<sup>37</sup> The author of the bill acknowledged that Oklahoma courts had never actually used Sharia in decisions, but he argued that Islamic law posed a threat as a “storm on the horizon in other states.”<sup>38</sup>

Oklahoma's new law was immediately challenged on federal First Amendment grounds. The plaintiff, a Muslim resident of Oklahoma, argued that the law inhibited his exercise of religion and promoted excessive entanglement between the government and religion because of its specific ban on the consideration of Sharia.<sup>39</sup> The district court issued a preliminary injunction against the certification of the results of the ballot measure; the injunction enjoined the implementation of the entire provision. The case has been appealed to the Tenth Circuit.

The federal injunction in Oklahoma has not, however, discouraged proposed legislation in other states. While not all of the legislation has seen success or even much support, the effort is still quite prominent across the nation. State anti-international law proposals and legislation can be loosely grouped into three categories. First, many of them are symbolic, for they merely echo the present limitations on the judicial use of transnational law (conflict-of-laws provisions). Second, some of the legislation goes further to prohibit entirely the use of transnational law in judicial decision making (complete prohibitions). Third, some of the proposed bans on the use of transnational law include anti-Sharia provisions. Anti-Sharia bills generally include prohibitions on the use of transnational law and thus may be seen as a subset of the second category.

**Conflict of Laws.** More than half of the recent state antitransnational law proposals fall into the conflict-of-laws category. The Arizona law, signed by Gov. Jan Brewer in April 2011, is an example.<sup>40</sup> The statute prohibits state courts from enforcing foreign law if that law would deprive individuals of state or federal constitutional or statutory rights. It does not otherwise prohibit judges' consideration of transnational law. In 2010 New Jersey introduced a similar bill prohibiting the application of foreign law when doing so would violate a state or federal constitutional right.<sup>41</sup> For the most part, these symbolic proposals simply codify,

<sup>34</sup>See, e.g., Tim Murphy, *Anti-Sharia Bill Sponsors Are Kind of Clueless*, MOTHER JONES (April 22, 2011, 9:44 AM), <http://bit.ly/pDHbFO> (citing legislator statements in North Carolina, Missouri, Alabama, Georgia, Alaska, South Dakota, South Carolina, and Oklahoma).

<sup>35</sup>This number is based on research in state legislative databases. The states represented are Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Maine, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. In all, forty-nine such bills were introduced during the 2010–2011 state legislative sessions (see Bill Raftery, *Bans on Court Use of Sharia/International Law: Michigan Becomes 22nd State to Consider, Texas House Tries Again to Get Senate to Adopt*, GAVEL TO GAVEL (July 5, 2011), <http://bit.ly/qLrvSO>).

<sup>36</sup>See Ariane de Vogue, *Federal Judge Bars Oklahoma Ballot Initiative on Sharia Law*, ABC NEWS (Nov. 29, 2010), <http://abcn.ws/nj22JK>.

<sup>37</sup>OKLA. CONST. art. 7, § 1(c).

<sup>38</sup>Joel Siegel, *Islamic Sharia Law to Be Banned in, ah, Oklahoma*, ABC NEWS (June 14, 2010), <http://abcn.ws/pwbqiK>.

<sup>39</sup>*Awad v. Ziriax*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010), appeal docketed, No. 10-6273 (10th Cir. 2010).

<sup>40</sup>ARIZ. REV. STAT. ANN. §§ 12-3101–3103 (2011) (West).

<sup>41</sup>A. 3496, 214th Leg. (N.J. 2010), <http://bit.ly/pqRy9M>.

but do not otherwise seem to alter, hierarchies governing state court adjudication. That states must honor federal and state constitutional baselines when enforcing judgments is well established.<sup>42</sup>

**Complete Foreign and International Law Prohibitions.** An example of a complete prohibition on considering transnational law is the Arizona Senate's concurrent resolution proposing an amendment to the state constitution.<sup>43</sup> The resolution states, "The courts shall not look to the legal precepts of other nations or cultures. The courts shall not consider international law."<sup>44</sup> This particular resolution mirrors several others around the country.

The legality of these measures has not yet been tested because the Oklahoma injunction against that state's complete prohibition was based solely on First Amendment grounds arising from the ban on considering Sharia. However, substantial legal questions have been raised concerning these measures based on the Federal Constitution's supremacy and full faith and credit clauses.<sup>45</sup>

**Anti-Sharia Provisions.** At least six states have proposed constitutional amendments or legislation specifically barring judges from considering Sharia in addition to foreign and international law.<sup>46</sup> An example of such a prohibition is Oklahoma's voter-approved constitutional amendment.<sup>47</sup> The Alabama

legislature has considered a similar proposed constitutional amendment, barring courts from considering "the legal precepts of other nations or cultures," "international law," or "Sharia."<sup>48</sup> Anti-Sharia constitutional amendments proposed in states as diverse as Iowa and New Mexico failed to move forward during the 2010–2011 legislative session.<sup>49</sup>

### Historical Context for the Current Attacks

Perhaps it goes without saying that the anti-Sharia provisions in these proposals represent another aspect of the anti-Islamic wave that swept the United States after the terrorist attacks of September 11, 2001. Hate crimes committed against Muslim Americans increased dramatically after the September 11 attacks, and the numbers remain above pre-September 11 levels.<sup>50</sup> This mindset has likely contributed to the upswing in anti-Sharia provisions, despite the lack of evidence that there is any serious issue concerning encroaching Sharia in the courts.<sup>51</sup> An extreme example of this anti-Islamic fervor found its way into proposed legislation in Tennessee. As initially introduced, Tennessee's House Bill 1353 stated that adherence to Sharia constituted prima facie evidence of criminal conspiracy to overthrow the United States.<sup>52</sup> The Tennessee bill was substantially amended prior to its enactment, and it now targets organizations

<sup>42</sup>Penny Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like It, Which Bar State Courts from Considering International Law*, CLEVELAND STATE LAW REVIEW (forthcoming 2011) (draft on file with Martha F. Davis).

<sup>43</sup>S. Con. Res. 1010, 50th Leg., 1st Reg. Sess. (Ariz. 2011), <http://1.usa.gov/nHdw4B>.

<sup>44</sup>*Id.*

<sup>45</sup>See Venetis, *supra* note 42.

<sup>46</sup>Aziz Huq, Op-Ed., *Defend Muslims, Defend America*, NEW YORK TIMES, June 20, 2011, at A27.

<sup>47</sup>OKLA. CONST. art. 7, § 1(c).

<sup>48</sup>S.B. 62, 2011 Reg. Sess. (Ala. 2011).

<sup>49</sup>See Bill Raftery, *Bans on Court Use of Sharia/International Law: 38 of 47 Bills Died or Rejected This Session; Only 1 Enacted into Law*, GAVEL TO GAVEL (June 3, 2011), <http://bit.ly/n2QBxq>.

<sup>50</sup>See Federal Bureau of Investigation, Uniform Crime Reports: Hate Crime Statistics (n.d.), <http://1.usa.gov/qR6yD>.

<sup>51</sup>Venetis, *supra* note 42 (Oklahoma state judiciary had never used word "Sharia" in published opinion, and federal courts in Oklahoma had used it only once, in an asylum case); James C. McKinley, *Oklahoma Surprise: Islam as an Election Issue*, NEW YORK TIMES, Nov. 15, 2011, at A12 (supporters of Oklahoma's amendment admit that Islamic law has rarely been used in state courts).

<sup>52</sup>H.B. 1353, 107th Gen. Assemb. (Tenn. 2011), <http://bit.ly/nfgvAM>.

that have the capacity and intent to commit terrorist acts.<sup>53</sup>

This political context informs the current efforts to bar judges from looking to transnational law. The United States has a long history of human rights exceptionalism, repeatedly taking the position that it has nothing to learn from the laws and practices of other nations.<sup>54</sup> For some members of the public, exceptionalist principles were reinforced by the events of September 11.<sup>55</sup> Yet, as Prof. Judith Resnik has observed, the currency of the judiciary is legal analysis and ideas.<sup>56</sup> In this information age, regardless of our nation's foreign policy positions, cross-border migration of ideas is unavoidable.<sup>57</sup>

These attacks on the independence of state courts also come at a time when the state judiciary is particularly vulnerable. In the same November 2010 election in which Oklahoma's Save Our State amendment was adopted, Iowa voters ousted three state supreme court justices running for retention—the first time in Iowa history that sitting justices were not retained.<sup>58</sup> The ousted Iowa justices, who had all voted to construe the Iowa state constitution to permit gay marriage, were apparently targeted for defeat by several well-funded out-of-state groups led by the American Family Association.<sup>59</sup>

The Iowa justices were not the only ones targeted in the 2010 elections.<sup>60</sup> The Brennan Center for Justice at New York University School of Law reports that spending on state supreme court elections has risen over the past ten years to \$207 million, with much of the increase coming from attack ads prepared by outside groups.<sup>61</sup> In the thirty-nine states that hold judicial elections, these developments have a profound effect, including a negative impact on the perceived legitimacy of the courts.<sup>62</sup>

Some of these attacks go beyond individual judges. In an example cited by Chief Justice Michael Wolff of the Supreme Court of Missouri, in 2006, South Dakota considered an initiative called “Jail for Judges,” which would have established special grand juries to indict judges making unpopular decisions.<sup>63</sup> Anti-Sharia and antitransnational law provisions constitute somewhat more subtle attacks on the judiciary; they rely on the innuendo that local judges are susceptible to capture by foreign influences.

About the incremental impact that these attacks have on the judges themselves and those who appear before the courts, Wolff writes:

<sup>53</sup>Tenn. Pub. Ch. No. 497 (codified as amended at TENN. CODE ANN. §§ 39-13-803, -807 (West 2011)), <http://bit.ly/qPWY3p>.

<sup>54</sup>See, e.g., Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 341 (1995).

<sup>55</sup>Robert Nolan, *Commentary: Reflections on 9-11 and American Foreign Policy*, FOREIGN POLICY ASSOCIATION (Sept. 11, 2002), <http://bit.ly/n8Yldk>.

<sup>56</sup>Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE LAW JOURNAL 1564 (2006).

<sup>57</sup>*Id.*

<sup>58</sup>A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, NEW YORK TIMES, Nov. 3, 2010, <http://nyti.ms/pfg1W5>. As in a number of other states, Iowa Supreme Court justices are initially appointed through merit selection, then subject to popular votes to determine whether they may hold their seats. In retention elections, there are no opponents; justices must simply garner more yes votes than no votes (*id.*).

<sup>59</sup>*Id.*; *Group Says Extremists Funding Attack on Iowa Courts* (KCCI television broadcast Oct. 13, 2010), <http://bit.ly/rosGeQ>.

<sup>60</sup>See, e.g., David Kidwell, *Attack Ads Target Illinois Supreme Court Justice*, CHICAGO TRIBUNE, Oct. 21, 2010, <http://bit.ly/qXy7vH>.

<sup>61</sup>Dan Eggen, *Special-Interest Spending Surges in State Supreme Court Campaigns*, WASHINGTON POST, Aug. 16, 2010, <http://wapo.st/eYNie>.

<sup>62</sup>James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AMERICAN POLITICAL SCIENCE REVIEW 59 (2008).

<sup>63</sup>Michael A. Wolff, *Law Matters: Attacks on the Courts Present Real Threats*, YOUR MISSOURI COURTS (Sept. 30, 2006), <http://1.usa.gov/p60dft>.

Judicial independence ... is a frequently misunderstood term. It is not about judges—it is really about all the citizens, groups and businesses that come before the courts. They expect the law to be applied equally and equitably as they seek prompt, fair and impartial resolutions to their disputes. They also expect the correctness and correctability of court decisions to be dictated by a rule of law that applies equally to everyone, not by a political process based on popularity.<sup>64</sup>

As attacks on the judiciary continue to snowball, they undermine judicial independence and threaten the goodwill that the public holds for state and local courts.

### Strategic and Ethical Implications for Human Rights Advocates

Taking all relevant factors into account, lawyers must make sound strategic decisions in the course of zealously representing a client. The antitransnational proposals outlined above may be considered in developing a legal strategy. At the same time these provisions in jurisdictions where they have been adopted must not be overread.

A majority of the proposals introduced around the country are conflict-of-laws provisions that do not actually bar citing human rights law at all. Rather, they simply indicate that transnational law cannot override constitutional protections. In jurisdictions where such provisions have been enacted, the measures have no effect on nonconstitutional private law disputes. Transnational law remains available, for example, to aid the construction of a contract or disposition of child custody.

Similarly the conflict-of-laws provisions would certainly not bar relying on international human rights law to lend persuasive support for a particular con-

struction of a statute or a state constitutional provision. For example, citing international human rights law to support a challenge to the state's death penalty law would be perfectly consistent with a state antitransnational law statute. The U.S. Supreme Court indicated that such an analysis was appropriate in death penalty litigation to aid in understanding the constitutional standard of "cruel and unusual punishment."<sup>65</sup> The advocate raising international law would not argue that state constitutional law should be ignored in favor of international standards, but the advocate would ask the court to construe the state provision consistent with both U.S. law and human rights norms. This principle would extend beyond the death penalty context to any situation where a state court was asked to consider human rights norms in construing a state constitutional or statutory provision.

Beyond these more benign state provisions, however, a few states have enacted or considered more intrusive measures that purport to bar any consideration of transnational law or Sharia. In those few states the issues are somewhat more difficult. The Sharia ban is certainly susceptible to a First Amendment challenge, as has been filed against the Oklahoma law. In states where the anti-Sharia law remains on the books, however, it will likely chill state judges from considering claims that validly raise Sharia issues, such as family law matters involving child custody or divorce, or probate matters that rely on Sharia to allocate an estate. Some agreements may also invoke Sharia as the law of the contract and may be impossible to enforce in the courts of states that have adopted this most extreme approach. Lawyers may want to inform clients that the courts of the state are essentially unavailable to enforce their private contracts that involve Sharia principles and will want to work with clients to develop approaches that avoid this problem.<sup>66</sup>

<sup>64</sup>*Id.*

<sup>65</sup>See, e.g., *Graham*, 130 S. Ct. 2011.

<sup>66</sup>See Michael Biesecker, *Bill Would Ban Courts from Using "Foreign Law,"* NEWS & OBSERVER, April 28, 2011, <http://bit.ly/pzavNc>.

These more extreme provisions seem at first blush to raise practical problems for those interested in making arguments based on transnational law. However, a closer look at these laws suggests a reading that may alleviate at least some of the challenges. The Oklahoma amendment, for example, mandates that state courts “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.”<sup>67</sup> Though not expressly stated, this list includes at least those international treaties that the United States has ratified. Thus any state judicial consideration of international law embodied in ratified treaties such as the Convention on the Elimination of All Forms of Racial Discrimination or the International Covenant on Civil and Political Rights is arguably simply consideration of U.S. law.

However, in some respects, the precise meaning of these provisions is beside the point. In states where such measures have been proposed, even if they were not enacted, state court judges will inevitably be chilled from relying on human rights norms for any purpose at all, even one that falls outside a narrowly defined statutory or constitutional restriction.

One final strategic and ethical question is, then, whether litigators should advance arguments based on international and foreign law when they face a judge who is reluctant to consider such arguments. On the one hand, advocates always make decisions about the interests and proclivities of the presiding judge and tailor their arguments accordingly; this would argue in favor of omitting these arguments when appearing before some judges and including them when appearing before others. On the other hand, at times a lawyer may feel ethically obligated to raise international law arguments even if the judge will likely reject

them and may even begrudge the litigant for raising such issues. For example, where the client's ends include domestic recognition of human rights norms such as a right to health or a right to shelter, the lawyer's obligation to the client would require referencing human rights arguments. Antitransnational laws may bar judicial consideration or citation of transnational laws, but lawyers are not prohibited from raising such arguments.



The problems raised by antitransnational law proposals are not insignificant. They are a direct attack on judicial independence at a time when state courts are under attack from many sectors. Should a critical mass of these laws succeed, the mode of judicial reasoning in state law will shift, affecting businesses and individuals in both private and public law settings. The most extreme state-level proposals will likely be modified or abandoned, but the negative rhetoric around these proposals may have the effect of chilling many state court judges from citing international or foreign law.

This climate raises strategic issues for domestic human rights lawyers in some states just as they are looking to incorporate a more inclusive, international frame into their work. Generally there will be no ethical bar to citing this material, and ample authority will support its consideration as a persuasive matter. Indeed, ethical dictates may press in favor of citing transnational law as part of a client-centered practice. Yet, even when citing transnational authority seems ill-advised in particular instances, these frameworks remain available as sources of ideas and inspiration for lawyers and judges dealing with domestic human rights issues.

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<sup>67</sup>See, e.g., OKLA. CONST. art. 7, § 1(c).



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