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Hannah Wilson

Alexander Blewett III School of Law

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LEGISLATIVE ANALYSIS; Senate Bill 97: Are Foreign Law Bans Helpful or Harmful for Montana?

Hannah Wilson

I. INTRODUCTION

Foreign law bans have grown increasingly prevalent in the United States in recent years. Alabama, Arizona, Kansas, Louisiana, Mississippi, North Carolina, Oklahoma, South Dakota, and Tennessee have all successfully passed anti-foreign law bills.¹ Dozens of other states have proposed similar legislation.² The Montana House and Senate passed Senate Bill 97 before Governor Steve Bullock vetoed it on April 6, 2017.³ Bills like Senate Bill 97 have undergone fine-tuning to avoid constitutional violations of the Free Exercise Clause and the Establishment Clause of the U.S. Constitution.⁴ These bills incite heated, emotional testimony from local constituents, including those at Montana's 2017 65th Legislative Session, and garner national attention. The "foreign law" mentioned in these bills should not be confused with "international law." Under the Supremacy Clause of the U.S. Constitution, international law accepted by the U.S. (through Senate and Presidential approval) becomes part of American law.⁵ Foreign law, in contrast, should never be considered part of U.S. law and may only be used if it does not violate public policy.⁶

II. MONTANA'S ATTEMPT TO BAN FOREIGN LAW IN STATE COURTS

Montana attempted to prohibit the application of foreign laws in state courts with Senate Bill 97. Senator Keith Regier of Kalispell sponsored the bill, which aimed to prohibit foreign law from being used where it would violate the state and federal constitutional rights of citizens.⁷ It does not prohibit foreign law in all circumstances. Instead, it would have allowed the practice of Sharia and other foreign law in situations where constitutional rights will not be infringed, recognizing

¹ *Idaho GOP Pushes Bill Banning Islamic Law in State Courts*, Fox News U.S. (February 1, 2017), <https://perma.cc/L7DL-5UY> (last visited May 10, 2017) [hereinafter "Idaho GOP"].

² *Id.*

³ *Detailed Bill Information*, 65th Leg. Sess., (Mont. 2017), <https://perma.cc/JC48-FR43>, (last visited May 7, 2017) [hereinafter "Detailed Bill Information"].

⁴ U.S. Const. amend. I.

⁵ U.S. Const. art. VI, cl. 2; Faiza Patel, et al., *Foreign Law Bans: Legal Uncertainties and Practical Problems*, Center for American Progress & the Brennan Center for Justice, 9 (May 2013), <https://perma.cc/FGA8-QLMQ> (last visited May 7, 2017). [hereinafter "Foreign Law Bans"].

⁶ Foreign Law Bans, *supra* note 5.

⁷ *Prohibit the Application of Foreign Law in State Courts*, S. 97, 65th Leg. (Mont. 2017) [hereinafter "S. 97"].

the “right to contract freely under the laws of this state.”⁸ If it had passed, Senate Bill 97 would have effectively voided contractual agreements that use foreign law in conflict with Montana or U.S. federal laws and Constitutions.⁹ The bill survived third readings in the Montana House and Senate before Governor Steve Bullock vetoed it on April 6, 2017.¹⁰

Much of the discussion about the bill revolved around the realities of its implementation.¹¹ Generally, opponents to the bill claimed it is “unnecessary,” and recognized the protection of our rights under the “robust” Montana and U.S. Constitutions.¹² Eamon Ormseth, a Missoula resident, cited Article 6, Clause 2 of the U.S. Constitution during his testimony:¹³

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 the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.¹⁴

Under this provision, the Constitution is the supreme law of the land, and the additional protections of rights that Senate Bill 97 might provide are unnecessary because foreign laws do not threaten constitutional rights. U.S. courts have always required that reliance on foreign law not violate public policy,¹⁵ and this is reiterated in the bill’s text.¹⁶ Others credit the present lack of application of foreign law to the judiciary already “applying the right laws in each situation,”¹⁷ rendering Senate Bill 97 even more unnecessary.

Senator Regier described the bill as a clarifying instrument for the court system to rely on when a case could implicate some foreign law.¹⁸ Rather than deferring to the judicial branch to prohibit the application of foreign law in Montana state courts, this bill preempts any choice of foreign law before the issue makes it to court. Regier assured the Judiciary Committee that “guaranteeing the freedoms that we have under the Montana Constitution and the U.S. Constitution [is the intent of the

⁸ *Id.*

⁹ *Id.*

¹⁰ Detailed Bill Information, *supra* note 3.

¹¹ *Prohibit the Application of Foreign Law in State Courts* : Hearing on S. 97 Before the Judiciary Comm., 65th Mont. Leg. (Jan. 24, 2017) [hereinafter “S. 97 Hearing”].

¹² *Id.*

¹³ *Id.* (testimony of Eamon Ormseth, Missoula resident).

¹⁴ U.S. Const. art. VI, cl. II.

¹⁵ *See Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 201 (N.Y. 1918) (establishing that enforcement of a law is 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”).

¹⁶ S. 97, *supra* note 7.

¹⁷ S. 97 Hearing, *supra* note 11 (Paraphrased testimony of S.K. Rossi, Advocacy and Policy Director, ACLU of Montana).

¹⁸ S. 97 Hearing, *supra* note 11.

bill].”¹⁹ From this perspective, the proposed law was characterized as a harmless clarifying instrument that would put Montana citizens at ease about the type of law being practiced in their state courts and reinforce the supremacy of Montana’s state law. This is typical of foreign law bans, as most are “crafted so that they seem to track the rules normally followed by courts when considering whether to apply foreign law.”²⁰ They are “duplicative of safeguards that are already enshrined in federal and state law.”²¹ Furthermore, many foreign law bans in the U.S. are proposed in states that cannot even cite a single instance of foreign law being applied in their home courts.²² Based on these facts and characterizations, foreign law bans in general seem unnecessary because judges already have sufficient tools to guard against unconstitutional abuses of foreign law in state courts.²³

III. CONSTITUTIONAL CONCERNS OF FOREIGN LAW BANS

The American Bar Association (“ABA”) opposes “federal or state laws that impose blanket prohibitions on consideration or use by courts or arbitral tribunals of foreign or international law”²⁴ because they infringe on constitutional rights.²⁵ Anti-foreign law legislation typically takes one of two formats: Sharia-specific and facially-neutral bills. These bills should always be constitutionally suspect because their breadth of scope varies.²⁶ This section will discuss Oklahoma’s navigation of these issues in *Awad v. Ziriya*²⁷ and the precedent it sets for other state foreign law bans, including Montana’s.

The Establishment Clause prohibits the U.S. government from favoring a particular religion.²⁸ If a state bans a set of laws that have religious ties, such as Sharia, it risks violating the Establishment Clause, as Oklahoma was found to have done in 2013.²⁹ In 2010, the Oklahoma House of Representatives introduced Joint Resolution 1056.³⁰ It included the following language: “Specifically, the courts shall not consider Sharia Law, international law, the constitutions, laws, rules, regulations, and

¹⁹ *Id.*

²⁰ Foreign Law Bans, *supra* note 5, at 3.

²¹ Salli A. Swartz, *113A: Report 3*, Washington: American Bar Association, 4 (2011), <https://perma.cc/XN7C-5VN3> (last visited May 7, 2017) [hereinafter “ABA Resolution”].

²² Foreign Law Bans, *supra* note 5, at 5.

²³ David L. Nersessian, *How Legislative Bans on Foreign and International Law Obstruct the Practice and Regulation of American Lawyers*, 44 ARIZ. ST. L.J. 1647 (2012).

²⁴ ABA Resolution, *supra* note 21.

²⁵ *Id.* at 2.

²⁶ Foreign Law Bans, *supra* note 5, at 15.

²⁷ 670 F.3d 1111, 1119 (10th Cir. 2012).

²⁸ U.S. Const. amend. I; *See Lemon v. Kurtzman*, 403 U.S. 602, 606 (1971).

²⁹ Ryan J. Reilly, *Oklahoma Anti-Sharia Constitutional Amendment Struck Down by Federal Judge*, Huffington Post (August 15, 2013), <https://perma.cc/T2ZL-CXJH> (last visited May 7, 2017); H.J.R. 1056, 52nd Leg., 2nd Sess. (Okla. 2013) [hereinafter “OK Amendment”].

³⁰ *Awad*, 670 F.3d at 1117.

decisions of courts or tribunals of other nations, or conventions or treaties, whether or not the United States is a party.”³¹ In response to the proposed amendment, Muneer Awad, a Muslim-American, claimed that because the amendment singled out Sharia law as a prohibited legal instrument in Oklahoma his rights were violated under both the Establishment Clause and the Free Exercise Clause.³²

Generally, the test for determining whether a generally applicable foreign law ban violates the Establishment Clause is the *Lemon* test.³³ In order to withstand challenges to the Establishment Clause, a foreign law ban must satisfy the elements of the *Lemon* test, because foreign law bans typically implicitly include the ban of religious legal systems.³⁴ The three prongs of the *Lemon* test require that: (1) the law must have a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion.³⁵ *Lemon* applies to “ laws affording uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions.”³⁶ Montana’s Senate Bill 97 was a generally applicable foreign law ban, because it did not specifically prohibit Sharia law.³⁷

However, instead of applying the *Lemon* test, the Court in *Awad* relied on the test from *Larson v. Valente*.³⁸ The *Larson* test requires strict scrutiny for laws that discriminate among religions.³⁹ Under *Larson*, if a law discriminates among religions, it can survive only if it is “closely fitted to the furtherance of any compelling interest asserted.”⁴⁰ The *Larson* test applies to foreign law bans like Oklahoma’s proposed amendment because the proposed amendment specifically singles out Sharia law as being prohibited, which presents even stronger “explicit and deliberate distinctions ” among religions than the provision that warranted strict scrutiny in *Larson*.⁴¹ Because the amendment discriminates among religions, it is “ suspect, ” and it failed the Court’s application of strict scrutiny.⁴²

The Free Exercise Clause may also be implicated by foreign law bans, though it was not applied in *Awad*.⁴³ To overcome a challenge based on the Free Exercise Clause, a law that burdens religious practice must

³¹ OK Amendment, *supra* note 29.

³² *Awad*, 670 F.3d at 1119.

³³ See 403 U.S. 602 at 612-13.

³⁴ *What is Sharia Law and How Does it Apply in America?*, HG.ORG, <https://perma.cc/K4WYY-DVDC> (last visited May 16, 2017).

³⁵ 403 U.S. 602 at 612-13.

³⁶ *Id.* at 606.

³⁷ S. 97, *supra* note 7.

³⁸ 456 U.S. 228 at 246 (1982).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ U.S. Const. amend. I.

be neutral and generally applicable.⁴⁴ If the law is both neutral and generally applicable, it does not require a compelling state interest. However, if the law is discriminatory, the state must have a compelling interest for the law and it must be narrowly tailored to that interest.⁴⁵ If a state seeks to prohibit a religious legal system, it must show a compelling interest in doing so because it effectively discriminates against a religious group without justification.⁴⁶ Oklahoma was unable to produce a compelling state interest for singling out and prohibiting Sharia law and the Tenth Circuit struck down the amendment in 2012.⁴⁷ Because the Oklahoma law was found to be in violation of the Establishment Clause, the Court provided no discussion about its relationship with the Free Exercise Clause.⁴⁸

Before the Tenth Circuit handed down the *Awad* decision, Alabama Republican Senator Gerald Allen sponsored the “Sharia Law Amendment” in his state in 2011.⁴⁹ The proposed amendment singled out Sharia law.⁵⁰ The amendment never reached the ballot due to constitutional issues similar to those in Oklahoma; it was struck down by the Alabama Supreme Court in 2011.⁵¹ However, three years later, its facially-neutral cousin, “Amendment One,” passed the Alabama legislature in 2014.⁵² Amendment One’s creators marketed it as “guidance to judges,” rather than an attack on Islamic law.⁵³ Because the amendment did not discriminate among religions, it only needed to overcome the *Lemon* test, not the strict scrutiny *Larson* test. Thus, it passed constitutional muster.

In response to the Tenth Circuit holding in *Awad* and the passage of Amendment One in Alabama, the American Public Policy Alliance created the “American Laws for American Courts” (“ALAC”), which provides model provisions for anti-foreign law bills.⁵⁴ The ALAC was “crafted to protect American citizens’ constitutional rights against the infiltration and incursion of foreign laws and foreign legal doctrines, especially Islamic Shariah Law.”⁵⁵ Its provisions carefully outline facially-neutral rules that can be modified and used by individual states. Facially-

⁴⁴ *Awad*, 670 F.3d at 1119.

⁴⁵ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

⁴⁶ *Awad*, 670 F.3d at 1129–30.

⁴⁷ *Id.*; see also Kimberly Karseboom, *Sharia Law and America: The Constitutionality of Prohibiting the Consideration of Sharia Law in American Courts*, 10 GEO. J.L. & PUB. POL’Y 663, 680 (2012).

⁴⁸ *Awad*, 670 F.3d at 1119.

⁴⁹ Sharia Law Amendment, S.R. 62 (Ala. 2012).

⁵⁰ *Id.*; see also Kay Campbell, *Amendment One to Outlaw ‘Foreign Law’ in Alabama? Not Such a Good Idea, Some Christians Say*, Alabama Media Group (October 30, 2014), <https://perma.cc/NDS8-P6CW> (last visited May 7, 2017) [hereinafter “Outlaw”].

⁵¹ Outlaw, *supra* note 50.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *American Laws for American Courts*, American Public Policy Alliance, <https://perma.cc/98DZ-X65T> (last visited May 7, 2017).

⁵⁵ *Id.*

neutral foreign law bans are designed to prevent judicial enforcement and application of foreign law only when the enforcement would violate public policy or constitutional protections.⁵⁶ They survive challenges to the Free Exercise Clause because they are facially-neutral, generally applicable, and do not target or discriminate against particular religious practices.⁵⁷

This type of strategic generalization and neutralization has permitted Alabama, Arizona, Kansas, Louisiana, Mississippi, North Carolina, Oklahoma, South Dakota, and Tennessee to pass anti-foreign law bills that prevent the use of Sharia law in their state courts by not specifically prohibiting it in the bill text, thus skirting violations of the Establishment Clause and Free Exercise Clause.⁵⁸ Montana's unsuccessful bid to join these states⁵⁹ was indicative of a greater trend in the U.S. in 2017. Nine other states also attempted to pass anti-foreign law bills in 2017.⁶⁰

Ultimately, facially-neutral bills are more constitutionally sound than specific Sharia law bans because they do not explicitly discriminate against a particular religion. This means that in order for the bills to be successful, the legislative intent (to ban Sharia law in state courts)⁶¹ must diverge from the textual message of the bill (that *all* foreign law should be banned in state courts). This complicates the application of the laws in court because legislative intent may be considered when applying a particular law.⁶² The meaning of "foreign law ban" will be ascertained by reviewing legislative debates and commission reports.⁶³

IV. A MORE GENERAL DISCUSSION ON FOREIGN LAW BANS: THE EFFECT ON GLOBALIZATION AND INTERNATIONAL LAW

Regardless of whether state foreign law bans are found to be constitutional, this type of legislation has profound impacts on diplomacy, foreign law practice, and globalization. If states like Montana enact foreign law bans, they essentially require U.S. lawyers, judges, and constituents to "pretend that foreign and international laws do not exist"⁶⁴ in the context of the state's legal framework.

Respecting foreign law is important for international relations. In the absence of foreign law ban legislation, "foreign law is

⁵⁶ Bradford J. Kelley, *Bad Moon Rising: The Sharia Law Bans*, 73 LA. L. REV. 601, 625, n.103 (2013).

⁵⁷ *Id.* at 627.

⁵⁸ Idaho GOP, *supra* note 1.

⁵⁹ S. 97, *supra* note 7.

⁶⁰ Idaho GOP, *supra* note 1.

⁶¹ Matt Volz, *Montana Legislature Set to Pass Anti-Sharia Law Bill*, U.S. News(March 20, 2017), <https://perma.cc/E7WR-ERVU> (last visited May 7, 2017).

⁶² Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 864 (1930).

⁶³ *Id.*

⁶⁴ Nersessian, *supra* note 23, at 1648.

honored in both federal and state courts as long as it does not conflict with public policy.”⁶⁵ States might consider implementing foreign law in a variety of situations, including contract disputes where parties have agreed to use the law of another nation as controlling in their case, or where a family law arrangement determined by another country is questioned.⁶⁶ This respect of foreign law fosters diplomatic international relations and peace by promoting international comity.⁶⁷ International comity is the “harmony arising out of respect demonstrated by judicial officers in one jurisdiction for legal determinations in another, particularly on matters involving the foreign state’s own laws.”⁶⁸ If U.S. states disregard comity and respect of foreign law, they could impact the federal interest of preserving good relations with foreign nations.⁶⁹ With comity also comes reciprocity, an essential element in determining sovereignty and independence among nation states.⁷⁰ This reciprocity serves a practical purpose: if the U.S. seeks to have U.S. law recognized in foreign countries, it should respect foreign law more in its state courts, even if in practice it is rarely or never used. As Chief Justice Fuller articulated in *Underhill v. Hernandez*, “our courts do not sit in judgment of the laws and values of other countries because we do not want foreign nations to pass judgment on our own.”⁷¹

Comparative law serves a valuable purpose in progressing and evolving the law. In 2002, Aharon Barak, then the Chief Justice of the Supreme Court of Israel, wrote that when U.S. judges turn a blind eye to comparative law, “[t]hey fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems.” As a result, he argued that the U.S. Supreme Court “is losing the central role it once had among courts in modern democracies.”⁷² U.S. law and the U.S. Constitution are being used less frequently as models for other countries’ constitutions and legal documents.⁷³

Foreign law bans could inhibit international law from working effectively. International law has been perceived as weak, unenforceable, and too idealistic for practical use, especially in a domestic law

⁶⁵ Foreign Law Bans, *supra* note 5, at 10.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.* at 10.

⁶⁸ Nersessian, *supra* note 23, at 1658.

⁶⁹ Foreign Law Bans, *supra* note 5, at 10 .

⁷⁰ See *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 411 (1964).

⁷¹ 168 U.S. 250 at 252 (1897).

⁷² Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 114 (2002); see also Jenny S. Martinez, *Who’s Afraid of International and Foreign Law*, 104 CAL. L. REV. 1579, 1588 (2016).

⁷³ David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012) (discussing how other countries more frequently model their constitutions and legal documents after Canada’s than the United States).

framework.⁷⁴ Conceivably, a foreign law ban could prevent international law from being executed effectively and consistently among jurisdictions, depending on how “foreign” is defined and interpreted by a state. A state’s definition of “foreign” could be so broad as to include aspects of international law.⁷⁵ This is another issue with the vagueness of many of the facially-neutral proposed and implemented foreign law bans. The ABA has discussed this problem, predicting that “uncertainty created by the relationship of foreign law bans to the application of international law in state courts ‘is likely to have an unanticipated and widespread negative impact on business.’”⁷⁶

There is a perception that states with foreign law bans “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.”⁷⁷ This may cause a foreign company to insist on a foreign forum for legal disputes instead of a U.S. legal forum which can apply the law of the company’s own jurisdiction. Foreign parties may be encouraged 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.”⁷⁸ Foreign companies’ reluctance to subject themselves to a jurisdiction which refuses to acknowledge foreign law could have an impact on commerce and negatively impact the ability of domestic companies to do business transnationally. Even if the law does not prohibit contractually-consented use of foreign law which does not violate public policy, the underlying directive against foreign actors is powerful because it sends a message that foreign laws will be viewed unfavorably in state courts.⁷⁹ This is a critically important consideration in today’s global economy. As stated by the Court in *The Bremen v. Zapata Off-Shore Co.*: “[w]e cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws.”⁸⁰

Furthermore, the implementation of these bills could signal a shift towards stricter anti-foreign law bills in the future. Foreign law bans are relatively new, having only been systematically introduced since 2010.⁸¹ Foreign companies may not want to take the risk of doing business in states where foreign law bans are indicative of a greater discriminatory trend against foreign countries themselves. These projections along with

⁷⁴ Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1178 (1999) (discussing how much of international law lacks centralized management and rulemaking, international law content tracks interests of powerful nations, and nobody really knows why nations comply with much of customary international law).

⁷⁵ ABA Resolution, *supra* note 21, at 4.

⁷⁶ *Id.*

⁷⁷ *Id.* at 5.

⁷⁸ *Id.* at 7.

⁷⁹ *Id.* at 5–7.

⁸⁰ 407 U.S. 1, 9 (1972).

⁸¹ *What is Sharia Law and How Does it Apply in America?*, *supra* note 34.

the effect of foreign law bans on international law and comity discourage transnational economic development in a rapidly-globalizing world.

V. CONCLUSION

The public hearings for Montana's Senate Bill 97 were emotionally-charged conversations with testimony from constituents from all over Montana. It is important to consider constituents' and legislators' genuine fear about an unknown body of law being used at the county courthouse. A foreign law ban may not be unconstitutional on its face, nor directly violate international law or consented-to agreements to use foreign law in a contract or dispute, but it has numerous residual impacts on society. It acts as a disincentive for foreign citizens or corporations to conduct business in the state where a ban exists. In addition, foreign law bans rob states of the benefits of using comparative law to progress and evolve their legal systems.

International trade is an important part of the U.S. economy, and as such international and foreign law is becoming more involved and entangled with U.S. domestic law. However, globalization and effective international cooperation may not fully develop while states enact such legislation as Senate Bill 97. States that have enacted foreign law bans should repeal them, and states considering legislative foreign law bans should reject them, as Montana did this year.⁸² It is possible to respect foreign law while simultaneously protecting the public policy of the U.S., simply by deferring to the judicial branch to determine when it is appropriate to use foreign law. Foreign law bans are unnecessary and have more unfavorable impacts than benefits to American society and commerce.

⁸² Foreign Law Bans, *supra* note 5, at 3.