

EXCERPT FROM “EFFECTS OF RECOGNITION OF SHARIA LAW IN UNITED STATES COURTS”

Submitted by Barbara Massie Mouly

This paper addresses selected court cases in the United States in which recognition of *sharia* law has been involved. Because *sharia* law differs from the common law of the United States in certain of its foundational principles and in many of its substantive and procedural rules, there are often stark incongruities when United States courts recognize *sharia* law.

Sharia law can enter into United States courts through various avenues, such as:

- 1) Comity
- 2) Choice of Law Rules
- 3) Application of Neutral Principles of Law
- 4) Assertion of a “Cultural Defense”
- 5) Arbitration Tribunals
- 6) Free Exercise or Establishment Clause claims

The excerpt below addresses comity and focuses on *Hosain v. Malik*, a leading Maryland case on comity.

A. COMITY

Article IV Section 1 of the U.S. Constitution states that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”¹ However “the Full Faith and Credit Clause of the Constitution, [does not apply] to judgments issued from foreign countries.”² A court “need only recognize the judgment of a foreign court to the extent that this recognition comports with principles of judicial comity.”³

Comity is defined in the seminal case *Hilton v. Guyot* as “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which [the U.S.] allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own [U.S.] citizens, or of other persons who are under the protection of [U.S.] laws.”⁴

In essence, comity operates much like a type of international claim preclusion. Comity gives claims adjudicated in other countries a preclusive effect to identical claims filed in U.S. courts. A court’s analysis of whether comity should be granted goes hand-in-glove with whether that court should exercise its jurisdiction over the case or controversy before them. If a court grants comity to a foreign judgment, then the court must refuse to exercise its own jurisdiction over the matter. Failure to do so would result in duplicative or conflicting judgments which would disrupt judicial economy and undermine the integrity of the judicial process.

Since a foreign judgment is not entitled to “full, faith, and credit” a court is entitled to refuse enforcement of that judgment on grounds that the judgment is contrary to that jurisdiction’s public policy.⁵ A violation of public policy is said to occur when there is a foreign judgment based on a claim so

¹ U.S. CONST. art. IV, § 1

² *Jaffe v. Accredited Sur. & Cas. Co.*, 294 F.3d 584, 591 (4th Cir. 2002).

³ *Id.*

⁴ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

⁵ Restatement (Second) of Conflict of Laws § 117 cmt. c (1971)

“repugnant to fundamental notions of what is decent and just” in the forum state that it will not be enforced.⁶

Courts also consider whether the foreign court afforded both parties involved due process when deciding whether to grant comity to a foreign judgment.⁷ Federal courts typically apply five factors in making this determination:⁸ (1) the foreign judgment must be rendered by a court of competent jurisdiction, which had jurisdiction over the cause and the parties, (2) the judgment must be supported by due allegations and proof, (3) the relevant parties must have had an opportunity to be heard, (4) the foreign court must follow procedural rules, and (5) the foreign proceedings must be stated in a clear and formal record.⁹ When the *Hilton* factors are satisfied in favor of rendering the foreign judgment enforceable, then the foreign judgment “...will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.”¹⁰

If an analysis of the comity factors renders the foreign judgment unenforceable and thus invalid, the exercise of jurisdiction by the U.S. court in the “second” suit is really the adversely affected party’s first chance at real justice.

B. COMITY IN CHILD CUSTODY DISPUTES

American courts have been asked to grant comity to foreign judgments where sharia rules have been used to decide child custody. In determining whether to grant comity to a foreign judgment on child custody, an American court must decide whether the court which entered that judgment applied the “best interests of the child” standard. It is doubtful that a judgment applying sharia rules as to parental preference authentically applies the “best interests” standard.

Child custody cases involving foreign law become adjudicated in American courts is through the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).¹¹ The act has been adopted and modified by almost all 50 states¹² and provides guidance for how to adjudicate custody disputes when one jurisdiction is deciding whether to honor a custody determination of another jurisdiction. Within the Act there is one provision that serves as the doorway for sharia law into the American courts.

Section 105 of the UCCJEA, subsection (a), provides that “A court of this state will treat a foreign country as if it were a State of the United States for the purpose of applying [Articles] 1 and 2.”¹³ Article 1 covers the “General Provisions” of the Act and Article 2 sets forth those provisions that cover “Jurisdiction”. Subsection (b) provides, “Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of the [Act] must be recognized and enforced under [Article] 3.” Section 105

⁶ *Id.*

⁷ *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589, 594 (5th Cir. 2003)

⁸ The court in *Int'l Transactions, Ltd.* reiterated the factors found in *Hilton* for comity within federal courts. Many state courts have their own unique factors that, although similar to those factors put forth for the federal judiciary, vary slightly. Most factors, however, operate to defend against the violation of due process by foreign courts.

⁹ *Int'l Transactions, Ltd.*, 347 F.3d at 594. *Accord*, Restatement (Second) of Conflict of Laws § 92 (1971).

¹⁰ Restatement (Second) of Conflict of Laws § 98 (1971)

¹¹ The UCCJEA, created in 1997, is endorsed and approved by the American Bar Association and is a piece of uniform legislation drafted by the National Conference of Commissioners on Uniform State Laws under the Uniform Law Commission. For more information on the Uniform Law Commission, the UCCJEA, and other uniform acts, visit <http://uniformlaws.org>.

¹² Per the Uniform Laws Legislative Fact Sheet on the Uniform Laws website (*see n. 12*), the UCCJEA has been adopted in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. The only state who has not adopted the UCCJEA is Massachusetts. However, the Massachusetts legislature is currently working to adopt the UCCJEA under House Bill 36 of the 189th General Court of the Commonwealth of Massachusetts.

¹³ UCCJEA, section 105.

states in subsection (c) that “A court of this state need not apply this [Act] if the child custody law of a foreign country violates fundamental principles of human rights.” Section 105 provides courts with the statutory authority to give deference to international courts that are in “substantial compliance”¹⁴ with the requirements of the Act. Since the UCCJEA is usually adopted within the larger family law statutory framework of a state, this means that deference can be given when the international court operates in “substantial compliance” to family law within the state.

The foreign court’s ruling regarding custody must comport with what the state requires for custody. Every state in the United States holds to a “best interest” standard for custody by either statute or common law.¹⁵ Courts typically consider a number of factors in applying the standard. For example, the Commonwealth of Virginia’s statute on child custody provides:

In determining the best interests of a child for purposes of determining custody [...] the court shall consider the following:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
2. The age and physical and mental condition of each parent;
3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
5. The role that each parent has played and will play in the future, in the upbringing and care of the child;
6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
9. Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse. If the court finds such a history, the court may disregard the factors in subdivision 6; and
10. Such other factors as the court deems necessary and proper to the determination.¹⁶

¹⁴ Comment to Section 106, UCCJEA

¹⁵ ALA. CODE § 30-2-40 (e) (1975); ALASKA STAT. ANN. § 25.24.150 (c) (West); ARIZ. REV. STAT. ANN. § 25-403; ARK. CODE ANN. § 9-13-101 (West); CAL. FAM. CODE § 3011 (West); COLO. REV. STAT. ANN. § 14-10-124 (West); CONN. GEN. STAT. ANN. § 46b-56 (b) (West); DEL. CODE ANN. tit. 13, § 722 (West); D.C. CODE § 16-914; FLA. STAT. ANN. § 61.13 (West); GA. CODE ANN., § 19-9-3; HAW. REV. STAT. § 571-46 (West); IDAHO CODE ANN. § 32-717 (West); ILL. COMP. STAT. ANN. 5/602 (West); IND. CODE ANN. § 31-17-2-8 (West); IOWA CODE ANN. § 598.41 (West); KAN. STAT. ANN. § 23-3201 (West); KY. REV. STAT. ANN. § 403.270 (West); LA. CIV. CODE ANN. art. 134; ME. REV. STAT. ANN. tit. 19-A, § 1653 (3); MASS. GEN. LAWS ANN. ch. 208, § 31 (West); MICH. COMP. LAWS ANN. § 722.25 (West); MINN. STAT. ANN. § 257.025 (West); MISS. CODE ANN. § 93-5-24 (West); MO. ANN. STAT. § 452.375 (West); MONT. CODE ANN. § 40-4-212 (West); NEB. REV. STAT. ANN. § 42-364 (West); NEV. REV. STAT. ANN. § 125.480 (West); N.H. REV. STAT. ANN. § 461-A:6; N.J. STAT. ANN. § 9:2-4 (West); N.M. STAT. ANN. § 40-4-9 (West); N.Y. DOM. REL. LAW § 240 (McKinney); N.C. GEN. STAT. ANN. § 50-13.2 (West); N.D. CENT. CODE ANN. § 14-04-04 (West); OHIO REV. CODE ANN. § 3109.04 (West); OKLA. STAT. ANN. tit. 43, § 109 (West); OR. REV. STAT. ANN. § 107.137 (West); 23 PA. CONS. STAT. ANN. § 5328 (West); R.I. GEN. LAWS ANN. § 15-5-16 (West); S.C. CODE ANN. § 20-3-160; S.D. CODIFIED LAWS § 25-4-45; TENN. CODE ANN. § 36-6-106 (West); TEX. FAM. CODE ANN. § 153.002 (West); UTAH CODE ANN. § 30-3-10 (West); VT. STAT. ANN. tit. 15, § 665 (West); VA. CODE ANN. § 20-124.3 (West); WASH. REV. CODE ANN. § 26.09.002 (West); W. VA. CODE ANN. § 48-9-102 (West); WIS. STAT. ANN. § 767.41 (West); WYO. STAT. ANN. § 20-2-201 (West); Maryland: Standard recognized by case law, not codified in statute.

¹⁶ VA. CODE ANN. § 20-124.3 (West)

No one factor is dispositive. Many states have added a provision qualifying the test as follows: “In making a determination under [the “best interests” factors] no party shall receive preference based upon gender in any award granted under this chapter.”¹⁷

Thus, the current “best interests” standard is generally a gender-neutral, factor based, standard that the court must consider in making any decision regarding the welfare and custody of a child. Its value cannot be understated and its consideration has been called of “transcendent importance.”¹⁸

As will be illustrated below in discussing *Hosain*, a U.S. court must determine that the foreign court was in compliance with that standard before the court refuses to exercise its own jurisdiction over the custody dispute. In the event that the court determines that the foreign court was in compliance with state’s standards, the court in refusing to exercise jurisdiction will acknowledge the foreign ruling as legitimate.

In *Hosain*, a dispute arose between a Pakistani couple regarding the custody of their eight-year-old daughter.¹⁹ After eight years of marriage, the mother left the father and took the child with her to live with her parents elsewhere in Pakistan.²⁰ Shortly before the father filed for custody in Pakistan, the mother fled the country for America, where she moved in with another man and had another child.²¹ At the child custody hearing in Pakistan, the mother was represented by counsel, but she did not appear in person.²² Custody was awarded to the father in Pakistan. The child was hidden by the mother, for almost two years.²³ Once the father discovered the child, the mother filed for custody of the child and requested a restraining order against the father in Maryland state court.²⁴ The Maryland trial court held that the Pakistani order granting custody to the father was not entitled to comity, that the mother was entitled to custody; the court granted the restraining order.²⁵

The father appealed.²⁶ The Maryland Court of Special Appeals remanded the case back to the trial court to determine if the Pakistani court had applied the “best interests” standard and if the Pakistani court had arrived at its decision by applying law contrary to the public policy of Maryland.²⁷ The court indicated that the order of the Pakistani court awarding custody to the father was presumed to be correct, and this presumption thus shifted the burden to the mother to prove by a preponderance of the evidence that (1) the Pakistani court did not apply the “best interest” standard, or that (2) in making the decision the foreign court applied a rule of law or evidence so contrary to that of the State’s public policy as to undermine confidence in the outcome of the trial. The court stated that if either were proven, then the court must deny comity on the grounds that it does not conform or comply with the state law. However, unless either is proven the court should decline to exercise jurisdiction and grant comity to the Pakistani order.²⁸

On remand, relying heavily on the father’s expert witness (a former Pakistani Justice) the trial court found that the Pakistani court had applied the “best interests” standard under the Pakistani Guardians and Wards Act of 1890.²⁹ The trial court concluded that the mother had not carried her burden by a preponderance of the evidence.³⁰

¹⁷ See, e.g., 23 PA. CONS. STAT. ANN. § 5328 (West)

¹⁸ Dietrich v. Anderson, 43 A.2d 186, 191 (Md. 1945).

¹⁹ *Id.* at 288.

²⁰ *Id.* at 289.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 289-90.

²⁷ *Id.* at 290.

²⁸ *Hosain v. Malik*, 108 Md. App. 284, 302-03 (1996).

²⁹ *Id.* at 291-293.

³⁰ *Id.* at 293.

The mother appealed the latter ruling. The primary issue was whether the trial court had erred in determining that she had failed to prove the foreign ruling was not in substantial conformity with Maryland law.³¹

The Maryland Court of Appeals held that the trial court's ruling that the Pakistani court had used the "best interests" standard was not "clearly erroneous".³² The court reasoned that since the Pakistani court orders "unambiguously" stated that the welfare of the child standard was applied, the trial court need not look beyond the express language of the order.³³ The court held that the trial court had properly determined the best interest standard by applying relevant Pakistani customs, culture, and mores.³⁴ Furthermore, the court was explicit in stating "this case is not about... whether Pakistani religion, culture, or legal system is personally offensive to us or whether we share all the same values, mores, and customs, but rather whether the Pakistan courts applied a rule of law ... so contradictory to Maryland public policy as to undermine confidence in the trial."³⁵

The Pakistani court had included in its reasoning the fact that the mother had lost her right of "Hazanit"³⁶ in that that the mother had taken the child out of the country, and was currently residing in a "non-Islamic" society.³⁷

The dissenting judge would have reversed, holding that the Pakistani court did not *apply* the "best interests" standard and thus the Maryland trial court should not have granted comity to the Pakistani custody order.³⁸ In reaching this opinion, the dissent indicated that although the Pakistani opinions (there were several) contained "phraseology that *sounds* like a best interests standard," a review of the orders showed that the courts did not actually apply that standard.³⁹ The dissent relied on language in the Pakistani order granting custody to the father to the effect that the basis for its ruling was that the mother had removed the child to the U.S. and prevented the father from exercising "control" over the child.⁴⁰ The dissent also observed that the Pakistani order had no discussion or findings as to the fitness of either parent.⁴¹ The dissent further stated that there was no consideration in the order of the well-being of the child or the wishes of the child.⁴² The dissent also noted that there was no attorney for the child in the Pakistani court, a practice which "offends the procedure of Maryland courts."⁴³ The dissent further noted that the Pakistani court "failed to investigate, consider, or resolve the mother's serious allegations of [the

³¹ *Id.*

³² *Id.* at 310.

³³ *Id.* at 310-311.

³⁴ *Id.* at 288.

³⁵ *Id.* at 302.

³⁶ The court stated: "[T]he doctrine of Hazanit embodies complex Islamic rules of maternal and paternal preference, depending on the age and sex of the child. [...]:

Under the Islamic law, the Doctrine of Hazanit governs child custody. Under the Doctrine of Hazanit, the mother is entitled to custody of her male child up to the age of seven (7) and of her female child up to the age of puberty. However, the mother's right to Hazanit is subject to the control of the father who is the child's natural guardian. Moreover, if the father is unfit for custody once the child reaches the requisite age, the child's paternal male relatives, and not the mother, are given custody. Further, the mother can lose custody before the child reaches the requisite age if she is an "apostate" (wicked or untrustworthy). The mother can also lose custody before the child reaches the requisite age if she [cannot] promote the religious or secular interests of the child."

Hosain v. Malik, 108 Md. App. 284, 317 (1996).

³⁷ *Id.* at 314.

³⁸ *Id.* at 332.

³⁹ *Id.* at 343 (*emphasis in original*).

⁴⁰ *Id.* at 345.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 345-46.

father's] substance and domestic abuse", allegations which a Maryland court would likely investigate.⁴⁴ Finally, the dissenting judge observed that in the Pakistani court's discussion there was "no indication of a weighing of the various factors embodied in our best interests test. . . ."⁴⁵

(In addition, the dissenting judge found a discrepancy between the oral ruling and that of the written order; the trial court had stated orally that "the courts of Pakistan did not apparently apply the best interest of the child standard."⁴⁶ This conflict between the oral and written judgments, the dissent found, required a remand for clarification.⁴⁷)

The dissenting opinion in Hosain thus pointed out a crucial difference in the standard actually applied in the Pakistani order and the standard which the law of Maryland required: control by the father as opposed to the best interests of the child. This dissenting opinion in so doing revealed one of the stark incongruities that can arise when United States courts recognize sharia law.

C. COMITY DISCUSSION—APPLICATION TO NOOTBAR CONFERENCE THEME

The dissenting opinion in Hosain illustrates one of the themes of this 2016 Nootbar Conference: "When Helping Hurts." In attempting to help by recognizing the family law rules of another culture and religion, a court can produce harm to a vulnerable child. In addition, a court can damage one of the great principles of the common law tradition: a drive toward a system of laws that is uniform and predictable.

⁴⁴ *Id.* at 346.

⁴⁵ *Id.* at 350.

⁴⁶ *Id.* at 341.

⁴⁷ *Id.* at 343.