

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

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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*” has been defined as “the divine law of Islam.”¹ It is a “complete code of living, combining the spiritual and the temporal.”²

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 United States 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.”³ However “the Full Faith and Credit Clause of the Constitution [does not apply] to judgments issued from foreign countries.”⁴ A court “need only recognize the judgment of a foreign court to the extent that this recognition comports with principles of judicial comity.”⁵

Comity in the international sense is defined in the seminal case of *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 United States] 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 [United States] citizens, or of other persons who are under the protection of [United States] laws.”⁶

In essence, comity operates as a type of international claim preclusion. 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.

A state is entitled to refuse enforcement of a foreign judgment on the ground that the judgment is contrary to that state’s public policy.⁷ A foreign judgment will not be enforced if it is based on a claim that is “repugnant to fundamental notions of what is decent and just” in the forum state.⁸

¹ JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 351 (2d ed. 1990).

² *Id.* at 1.

³ U.S. CONST. art. IV, § 1

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

⁵ *Id.*

⁶ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

⁷ Restatement (Second) of Conflict of Laws § 117 cmt. c (1971)

When deciding whether to grant comity to a foreign judgment, courts consider whether the foreign court afforded due process to the parties. Federal courts will grant comity to a foreign court's judgment when: (1) the foreign judgment was rendered by a court of competent jurisdiction, which had jurisdiction over the cause and the parties, (2) the judgment is supported by due allegations and proof, (3) the relevant parties had an opportunity to be heard, (4) the foreign court follows procedural rules, and (5) the foreign proceedings are stated in a clear and formal record.⁹ State courts may consider factors that vary slightly from the factors used by federal courts. The factors, however, operate to defend against the violation of due process by foreign courts. An articulation of the due process requirement for states generally is as follows: [a] *valid* judgment rendered in a foreign nation after a *fair trial* in a *contested proceeding* 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

In certain cases, American courts have been asked to grant comity to foreign judgments in which rules of *sharia* law 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.

Child custody cases involving foreign law reach American courts through the provisions of 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 potentially serves as a 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 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

⁸ *Id.*

⁹ *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589, 594 (5th Cir. 2003). *Accord*, Restatement (Second) of Conflict of Laws § 92 (1971).

¹⁰ Restatement (Second) of Conflict of Laws § 98 (1971)(*emphasis added*). *See also* Restatement (Second) of Conflict of Laws § 92 (1971)(defining a "valid" judgment).

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.

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” with 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 interests” 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

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

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)

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

In *Hosain v. Malik*, 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 left the country for the United States, 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 by the Pakistani court.

The child was hidden by the mother for almost two years.²³ The father, having been awarded custody in Pakistan, searched for and discovered the child in Maryland. The mother then 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, and 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 whether the Pakistani court had failed to apply the “best interests” standard and whether the Pakistani court had arrived at its decision by applying law (substantive, evidentiary, or procedural) contrary to the public policy of Maryland.²⁷ The court in this remand directed the trial court that the order of the Pakistani court awarding custody to the father was presumed to be correct, and that 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 trial court had to deny comity. However, unless either were proven, the trial court had to decline to exercise jurisdiction and grant comity to the Pakistani court’s order.²⁸

On remand, relying heavily on the father’s expert witness (a former Pakistani Justice) the Maryland 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

The mother appealed the latter ruling. On this appeal, the Maryland Court of Special Appeals required the parties to appear before the court *en banc* to address the following question: “[i]n deciding whether the Pakistani court applied the best interest of the child standard, should the trial court’s determination focus on the particular culture, customs and mores of Pakistan and the religion of the parties or, alternatively, is the best interest standard to be determined based on Maryland law, i.e. American cultures and mores?”³¹

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.

³¹ *Id.* at 288.

In its decision on this appeal, the Maryland Court of Special Appeals held that the trial court's decision that the Pakistani court had applied 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 contained in the Guardians and Wards Act 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 stated "this case is not about... whether [sic] 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 Pakistani 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 the mother had taken the child out of the country, and was currently residing in a "non-Islamic" society.³⁷ The Maryland Court of Special Appeals held that the Maryland trial court could reasonably have found that Hazanit was merely one factor in the Pakistani court's determination.³⁸

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.³⁹ In reaching this opinion, the dissenting judge 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.⁴⁰ The dissenting opinion relied on the language in the Pakistani order indicating that the basis for its ruling was that the mother had removed the child to the United States and prevented the father from exercising "control" over the child.⁴¹

The dissenting judge also observed that the Pakistani order had no discussion or findings as to the fitness of either parent.⁴² 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.⁴³ 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."⁴⁴ The dissent further indicated that the Pakistani court "failed to investigate, consider, or resolve the mother's serious allegations of [the father's] substance and domestic abuse," allegations which a Maryland court

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 317.

³⁹ *Id.* at 332.

⁴⁰ *Id.* at 343 (*emphasis in original*).

⁴¹ *Id.* at 345.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 345-46.

would likely investigate.⁴⁵ Finally, the dissenting judge, referring to the essence of the best interests test, pointed out that in the Pakistani court’s discussion there was “no indication of a *weighing* of the various factors embodied in our best interests test. . . .”⁴⁶

(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.”⁴⁷ This conflict between the oral and written judgments, the dissent found, required a remand for clarification.⁴⁸)

The dissenting judge in *Hosain* thus uncovered a crucial difference in the standard actually applied in the Pakistani order--control by the father--and the standard which the law of Maryland required--the best interests of the child. This dissenting judge in so doing revealed one of the stark incongruities that can arise when a United States court recognizes *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 working toward a system of laws that is uniform and predictable.

⁴⁵ *Id.* at 346.

⁴⁶ *Id.* at 350 (*emphasis added*).

⁴⁷ *Id.* at 341.

⁴⁸ *Id.* at 343.