

# The Crisis of Secular Liberalism and the Constitutional State in Comparative Perspective: Religion, Rule of Law, and Democratic Organization of Religion Privileging States

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Religion has returned to the secular state; does crisis result? Conflating variations of Marxist-Leninist states, whose godless communism” of the 20th century sought to marginalize religion as a political adversary, with the Westphalian state that sought to avoid sectarian conflict by separating the institutional state from the apparatus of religion, modern secular liberal theory has long problematized the role of religion in modern “secular” states. Critics of secular liberal modernity never fully accepted its premises and “post” modernists have sought to undo to “reform” the structures of secular liberalism to provide for a larger space for “religion” in politics and economics. This Article considers the issue of the “return” of religion from a comparative constitutional perspective. Its central premise is that where institutional religion is both protected and engaged in political life through which it seeks to harmonize institutional state and religious government, the resulting system tends to advantage a privileged religion in political life over its political rivals. This has implications for the way in which the fundamental ordering premises of liberal societies are understood and applied—rule of law, direct democracy, popular sovereignty, the protection of foreigners and the approaches to the interpretation of constitutional text. These implications contain lessons that might be considered by the United States as it seeks to carve a privileged role for religion while protecting its status as something special that cannot be touched by politics. The Article develops this thesis by weaving together several stories from developing and developed states where religion has acquired a more privileged role. These illustrate the ways that blasphemy and apostasy laws and the incorporation of religious values skew the

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nature and application of the rule of law, the nature and limits of direct democracy, the relationship between apostasy and treason, the language of interpretation and the power to participate in that dialogue, and the role of the foreign or minority. The effect is especially pronounced in states formally organized on global secular liberal principles of neutral and tolerant process and values neutrality. It suggests a context for the insight, at the center of secular liberalism's solicitude for religion, that where the apparatus of institutional religion seeks to enter into the political life of a state its religious beliefs ought not to be accorded any particular deference. It will suggest the nature of the shocks to the constitutional settlement of the U.S. Constitution and its now misunderstood model of secularism, which touches on the construction of a shadow religious state within American secular liberalism. To that end the Supreme Court decision in *Hobby Lobby* is considered in light of the prior discussion. The Article concludes that for secular liberalism the price of preserving the privileging of the practices and autonomy of religion in a multi-religious state is the disbarring of institutional religion (though not religious values) from organized political life. The alternative, privileging (institutional) religion and permitting it a broad institutional right to participate in politics, is very much in evidence abroad.

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## Introduction

For a long time before the modern era, the relationship between religion and politics was well-settled and easy to understand. While the religious establishment was formally distinct from the political apparatus of government,<sup>1</sup> and each was organized according to its own logic, it was undisputed that every political unity was expected to and could be legiti-

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1. Government is understood as an apparatus in the sense described in Giorgio Agamben, *What is an Apparatus?*, in *WHAT IS AN APPARATUS? AND OTHER ESSAYS* 1–24 (David Kishik and Stefan Pedatella, trans., Werner Hamacher, ed., Stanford University Press, 2009)

mated only through an official religious establishment.<sup>2</sup> That religious establishment also was woven into the government of a state and provided substantive constraints on governmental power.<sup>3</sup> But all began to change with the great wars of religion in Europe, and accelerated with the establishment of the United States and Republican France in the late 18th century.<sup>4</sup>

“The result of this disestablishment is a deep and enduring deprivileging of Religion as a normative basis for decision making. Religion is relegated to object. As such, it is inconceivable to think of Religion as part of the grammar of law. ‘If an unspoken and irregular but nonetheless powerful prohibition excluding religion from public and especially legal discourse has been in effect for some time, then those of us who are interested in “law and religion” need to pay attention to that phenomenon.’”<sup>5</sup>

Today, Western-style democratic republics pride themselves on a normative structure for political organization grounded in the formal disestablishment of religion and protection of religious belief, practices, sensibilities, and institutions within these democratic polities.<sup>6</sup> In one form or another, this forms the basic template for national and international human rights, whether in national constitutions<sup>7</sup> or in international instruments.<sup>8</sup>

Yet the disestablishment-privileging project of secular liberalism is breaking down. There have been tremendous efforts over the last half-century to re-privilege religion and religious values as an integral part of democratic discourse, while also strengthening the privileging the institutions of religions and religious belief within the organization of the state and its

2. See, e.g., Robert J. Barro & Rachel M. McCleary, “Which Countries Have State Religions?” *QUARTERLY J. OF ECON.*, 2005, available at [http://scholar.harvard.edu/files/rachelmccleary/files/state\\_religion.pdf](http://scholar.harvard.edu/files/rachelmccleary/files/state_religion.pdf).

3. Thus ancient states were constituted from its three estates, clergy, nobility and everyone else. See, e.g., J. RUSSELL MAJOR, *THE DEPUTIES TO THE ESTATES GENERAL IN RENAISSANCE FRANCE* (1974). These together constituted not just the political, but the social order itself. The U.K. Parliament represents an advanced form of this approach. See, e.g., Gavin Drewry and Jenny Brock, *Prelates in Parliament*, *PARLIAM AFF* 24(3): 222-50 (1971).

4. See, e.g., Boisi Cntr. Papers on Religion in the United States, *Separation of Church and State*, 1, available at [http://www.bc.edu/content/dam/files/centers/boisi/pdf/bc\\_papers/BCP-ChurchState.pdf](http://www.bc.edu/content/dam/files/centers/boisi/pdf/bc_papers/BCP-ChurchState.pdf); Hosack, Kristen A. (2010) “Napoleon Bonaparte’s Concordat and the French Revolution,” *Constructing the Past: Vol. 11: Iss. 1, Article 5*. Available at: <http://digitalcommons.iwu.edu/constructing/vol11/iss1/5>

5. Larry Catá Backer, *Religion as Object and the Grammar of Law*, 81 *MARQ. L. REV.* 229, 229-30 (1998) (citing in part Steven D. Smith, *Legal Discourse and the De Facto Disestablishment*, 81 *MARQ. L. REV.* 203, 227 (1998)).

6. See, e.g., Jose Casanova, *Rethinking Secularization: A Global Comparative Perspective*, *THE QUARTERLY J. OF ECON.*, (Spring / Summer 2006), available at <http://www.iasciculture.org/THR/archives/AfterSecularization/8.12CCasanova.pdf>.

7. See, e.g., *GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND* (Basic Law), Oct. 2010, BGBl. 1-20 (Ger.), translated by Christian Tomuschat & David P. Currie.

8. See, e.g., Universal Declaration of Human Rights, Dec. 10, 1948. For a contemporary account see H. Lauterpacht, *The Universal Declaration of Human Rights*, 25 *BRIT. Y.B. INT’L L.* 354 (1948).

political life.<sup>9</sup> Modern critics of secular liberalism have long condemned two trends that in different ways effectively limited the role of religion in modern “secular” states. The first was variations of “godless communism” of the 20th century, producing states that marginalized religion and religious values as something autonomous, competitive, and alien to the state and to the project of state building.<sup>10</sup> The second was grounded in a conflict avoidance premise of secular liberalism extracted from notions of the Westphalian state that sought to avoid sectarian conflict by separating the institutional state from the apparatus of religion.<sup>11</sup>

In addition, even as the last half-millennium has seen the progressive detachment of religion from politics, it has also seen the rise in liberal democratic states of a growing movement to permit active participation of institutional religion in politics.<sup>12</sup> Moreover, Western liberal democracies have contributed their militaries and national wealth to the creation of states, democratic in form, in which the core political and substantive values are grounded in the religious beliefs and practices of religion—that is of a dominant religion.<sup>13</sup> Simultaneously, in both democratic Western-style states and theocratic democracies, an equally strong movement has emerged that means to extend the traditional protection of religion against attack, even when religious institutions directly participate in political debate.<sup>14</sup> Grounded in the West on the horrors of religious persecution of Jews in Europe, the normative systems of protection of religion appear now to have become an instrument to protect (usually majority) religions in their political activities in many secular liberal states.<sup>15</sup> In the West, this movement has been used more and more to insulate religion and religiously based agendas from criticism, even as organized religion more aggressively participates in political life cloaked in the protections afforded to “religion.”<sup>16</sup>

These activities point to an important version of the existential crisis of secular liberalism, its angst, and the emergence of transitions away from

9. See, e.g., Rajeev Bhargava, *States, Religious Diversity, and the Crisis of Secularism*, OpenDemocracy.net, available at <https://www.opendemocracy.net/rajeev-bhargava/states-religious-diversity-and-crisis-of-secularism-0>, last visited 11/17/2014.

10. And perhaps there was something to this. See, e.g., Jane Barnes and Helen Whitney, *John Paul II and the Fall of Communism*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/pope/communism/>.

11. Famously, in the United States, see, e.g., *Everson v. Board of Education*, 330 U.S. 1 (1947).

12. See, e.g., Peter H. Schuck, *The “Paradoxical” Relationship Between Religion and Liberal Democracy in the United States*, available at [http://www.law.yale.edu/documents/pdf/sela/SELA11\\_Schuck\\_CV\\_Eng\\_20110413.pdf](http://www.law.yale.edu/documents/pdf/sela/SELA11_Schuck_CV_Eng_20110413.pdf).

13. See Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Legal Global Ordering*, 16(1) *IND. J. GLOBAL LEGAL STUD.* 85–172 (2009).

14. See, e.g., *id.* at 163–64.

15. See GEOFFREY LAYMAN, *THE GREAT DIVIDE, RELIGIOUS AND CULTURAL CONFLICT IN AMERICA* (2001); Paul A. Djupe I & J. Tobin Grant, *Religious Institutions and Political Participation in America*, 40(2) *J. SCI. STUD. RELIG.* 303–14 (2001).

16. For a criticism, see *Using Religion to Discriminate*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/using-religion-discriminate>. See Adam Serwer, *Arizona Passes Law Allowing Discrimination*, MSNBC (Feb. 21, 2014), <http://www.msnbc.com/msnbc/arizona-passes-law-allowing-discrimination>.

the model.<sup>17</sup> On the one hand, Western elites continue to cultivate a broad solicitude for religion—not merely as individual belief but as an organized force with institutional life.<sup>18</sup> On the other, the West is increasingly willing to admit to (or unable to prevent) the participation of religion in political life—but protects religion against political attack even as organized religion actively injects itself into the give and take of political contests.<sup>19</sup> At the international level, this is evidenced in the continuing efforts to develop a consensus among the community of states that would constitutionalize religious solicitude in the form of prohibitions against insulting or blaspheming religion and its sacred objects and habits.<sup>20</sup> At the domestic level, it is evidenced by a greater willingness to permit the secular state to be organized within frameworks of religious values.<sup>21</sup> It has produced a profound, and profoundly disturbing national discussion on the nature of the U.S. military intervention abroad and its character within the nation as it pursues a national security agenda.<sup>22</sup> Indeed, the existential crisis has proceeded to the stage of an inversion of sorts, where it appears to have

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17. As a recent conference overview describes it:

The “return of religion” has resulted in an existential crisis for secular liberalism. Vigorous debate now centers on what it means for the state and the law to be “secular” or even whether secular neutrality is possible. Critical perspectives on law have put into question the professed neutrality and universality of law, but discussion of the “secular” and secularism focus mainly on redefining those terms without considering the historical connection between law and religion, without defining religion, and without reexamining the nature of law and human rights. In other words, even with these widespread debates, contemporary conceptions of law and human rights remain essentially untouched and intact.

Conference, *Law and Human Rights in a Post-Secular World*, Mississippi College School of Law (Mar. 28–29, 2014), <http://lbackerblog.blogspot.com/2014/03/report-on-conference-law-and-human.html>.

18. See, e.g., Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. 21B (1993).

19. See PIPPA NORRIS AND RONALD INGLEHART, SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE 3–4 (2012).

20. See *Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread*, PEW RESEARCH CENTER (Nov. 21, 2012), <http://www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/>.

21. See, e.g. *Was America Founded as a Christian Nation?*, FORBES MAGAZINE (Sept. 25, 2012), <http://www.forbes.com/sites/billflax/2012/09/25/was-america-founded-as-a-christian-nation/3/>.

22. Consider this in the context of the controversy in early 2015 about the religious character of the objects of the U.S. struggle against terrorism. See, Kevin Liptak, *War on Islam vs. War on the Islamic State: In Obama’s Words*, CNN, Feb. 19, 2015, available <http://www.cnn.com/2015/02/19/politics/isis-obama-islamic-terror/index.html> (“The White House is also following precedent: in the immediate aftermath of the 9/11 terror attacks, former President George W. Bush said he wasn’t waging a “campaign against the Muslim faith.” “Ours is a campaign against evil,” he said. Obama echoed those words Wednesday when he said the U.S. is “not at war with Islam, we are at war with those who have perverted Islam.””). Within these contexts, religion is bounded by its conformity to a set of behavior parameters, and those that fall outside of them are recast as violent ideologies that can spring form a variety of normative premises. See, *Idea that West Is at War with Islam an ‘Ugly Lie’, Obama Says*, FRANCE 24, Feb. 19, 2015, available at <http://www.france24.com/en/20150219-obama-war-islam-ugly-lie-extremism-summit-white-house/> (“The talks were aimed at establishing ways to stop violent ideologies from taking root in vulnerable communities across the world - from the growth of Boko Haram in Nigeria to Islamic extremists in the Middle East and Asia.”).

produced an age in which the global order determines the legitimacy of religion by their suitability for engagement in global politics.<sup>23</sup> This movement is not confined to Western secular liberal democracies.<sup>24</sup>

This Article considers the issue of the “return” of religion from a comparative constitutional perspective. Its central premise is that where institutional religion is both protected and engaged in political life, and where institutional religion seeks to harmonize institutional state and religious government, religion tends to advantage a privileged religion in political life over its political rivals. This has implications for the way in which the fundamental ordering premises of liberal societies are understood and applied—rule of law, direct democracy, popular sovereignty, the protection of foreigners, and the approaches to the interpretation of constitutional text. These implications contain lessons that the United States might consider as it seeks to carve out a privileged role for religion while also protecting religion’s status as something special that cannot be touched by politics.<sup>25</sup> This Article declines to consider faith as held by the individual, but rather focuses on the institutional and rule making structures of organized religion as institutional actors in the political arena that can simultaneously appear as an object of state protection, and as an important subject of political organizations.<sup>26</sup>

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23. Compare Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC March 2015, available at <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/> with Murtaza Hussain, *The Atlantic Ignores Muslim Intellectuals, Defines ‘True Islam’ as ISIS*, THE INTERCEPT, Feb. 20, 2015, available at <https://firstlook.org/theintercept/2015/02/20/atlantic-defines-real-islam-says-isis/>.

24. The Constitution of Pakistan was amended, effective January 7, 2015, to exclude from certain constitutional protections in criminal trials for persons who “claims or is known, to belong to any terrorist group or organization using the name of religion or a sect.” Constitution (Twenty-First Amendment) Act, 2015, Passed by the National Assembly: January 6, 2015, Passed by the Senate: January 6, 2015, Presidential Assent Received: January 7, 2015 available at <http://www.pakistani.org/pakistan/constitution/amendments/21amendment.html>.

25. The problem, as it has been framed in the United States, requires creating a wall of separation between the people who act in the name of or under their belief in a way of engaging with religion, with the religion itself, understood as a system autonomous of its adherents. That was the point President Obama sought to press in recent discussions about the religious nature of engagement with theocratic groups seeking political power. “No religion is responsible for terrorism – people are responsible for violence and terrorism,” Obama told delegates at the White House Summit on Countering Violent Extremism.” David Jackson, *Obama: No Religion is Responsible for Terrorism*, USA TODAY, Feb. 18, 2015, available at <http://www.usatoday.com/story/news/nation/2015/02/18/obama-white-house-summit-on-countering-violent-extremism-speech/23631625/>. The process is just emerging and quite controversial. The question of the character of political speech, is of course, at the heart of the problem. “The terrorists do not speak for a billion Muslims,” Obama said.” *Obama Says US at War with Those ‘Perverting Islam’*, AL JAZEERA, Feb. 19, 2015 available <http://www.aljazeera.com/news/2015/02/obama-islam-extremism-conference-150218213833133.html>. But do they speak for themselves and their community? As Muslims? As criminals? As something else? Ought that characterization to matter? These are the questions residing at the edges of the problem explored in this article.

26. Cf. Backer, *supra* note 5, at 229-54.

Specifically, the Article examines the ways that blasphemy<sup>27</sup> and apostasy laws,<sup>28</sup> affect the incorporation of religious values as a privileged political obligation. The Article develops this thesis by weaving together several stories from developing and developed states where religion has acquired a more privileged role. These stories illustrate the ways that blasphemy and apostasy laws and the incorporation of religious values skew the nature and application of the rule of law, the nature and limits of direct democracy, the relationship between apostasy and treason, the language of interpretation and the power to participate in that dialogue, and the role of the foreign or minority. The effect is especially pronounced in states that value neutrality and are formally organized on global secular liberal principles of neutral and tolerant process.<sup>29</sup> It suggests, taking into account secular liberalism's solicitude for religion, that where the apparatus of institutional religion seeks to enter into the political life of a state, its tenets ought not to be accorded any particular deference.

The interactions of blasphemy, democracy, hierarchy, and religion are the subjects of this Article. They serve as expressions of functional effects of privilege, especially in states formally constituted under global constitutionalist principles. But this Article's object is to consider their effects on key constitutionally tinged principles that are foundational in the United States—rule of law, direct democracy, treason, interpretation, foreigners, and representation in multi-religious polities.<sup>30</sup> At the center is the organized institutional expression of religion, rather than individual expressions of religious belief autonomously applied to political participation. Related is the privilege accorded not to individual belief but to religious belief institutionalized within organized religious communities. The purpose of this

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27. Blasphemy laws were once common. Since the middle of the 20th century they have been abandoned in most of the West although they still linger in some places, and resonate in the structures of speech and religious liberties. See, e.g., Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297 (1988). Blasphemy laws are currently far more common and more vigorously enforced in Muslim majority states. See, e.g., Osama Siddique & Zara Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INTL L. 303 (2008). For a discussion of blasphemy laws in contemporary Australia, see Bede Harris, *Pell v. Council of Trustees of the National Gallery of Victoria—Should Blasphemy Be a Crime—The Piss Christ Case and Freedom of Expression*, 22 MELB. U. L. REV. 217 (1998). Blasphemy laws can be understood as the cluster of regulation designed to ensure a privileged role for religion in society.

28. Apostasy remains a religious crime but over the last century has effectively ceased to be an object of civil regulation in most developed states. Like blasphemy, apostasy retains an important role in the legal structures of some Muslim majority states. See, e.g., S.A. RAHMAN, *PUNISHMENT OF APOSTASY IN ISLAM* (2006). Even in states where apostasy is no longer a matter for state authorities, its political implications can be acute. See, e.g., DAVID G. BROMLEY, *THE POLITICS OF APOSTASY: THE ROLE OF APOSTATES IN THE TRANSFORMATION OF RELIGIOUS MOVEMENTS* (1998); Rudolph Peters and Gert J.J. de Vries, *Apostasy in Islam*, 17(1/4) DIE WELT DES ISLAM, New Series, 1-25 (1976-77).

29. See *infra* Part I.

30. See *What is the Rule of Law?*, ABA DIVISION FOR PUBLIC EDUCATION, [http://www.americanbar.org/content/dam/aba/migrated/publiced/features/Partv1DialogueROL\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/publiced/features/Partv1DialogueROL_authcheckdam.pdf).

Article is to frame the existential dilemma of secular liberalism within the international normative house it has created by knitting together a series of related vignettes, each of which is meant to serve as a starting point for understanding the way that specific sorts of privilege tend to change the political dynamics between religion and its rivals in a state's political spaces. These are meant to frame issues rather than suggest answers.

Part I considers the effect on rule of law when religion is privileged through the protections of blasphemy laws. The context is Pakistan and the highly controversial efforts to condemn a Christian peasant woman for insulting Islam and its Prophet. Part II then considers the effects of privilege on democratic foundations of Pakistan. Again the context is blasphemy law and the assassination of a government minister who sought to reduce blasphemy law's privileging effects in Pakistan. Part III then considers similar privilege in the relationship between direct political action, the state, and foreigners. Now the context moves to Sudan and its interrelations with foreigners. Part IV then considers the way that religious privileging may change the framework of inclusion and exclusion from a political community by examining the effects of privileging on apostasy and treason. The context is Afghanistan and the efforts to condemn a man for conversion to Christianity. This is particularly significant because the Afghani constitution is in part a product of the Western intervention that replaced the Taliban regime with something else. Part V moves to an examination of the effect of privilege on the ways in which constitutional and legal texts are interpreted, and the constraints on those within the polity now legitimately able to engage in such interpretive projects. The context is Iran. Part VI brings the analysis back home to the West by considering the ways in which these privileging mechanics may be finding their way into the debates over the extent of religious privileging, and the use of that privilege by religion when it engages in direct political activity. That, of course, is the context in which one can better understand the crisis of secular liberalism and the contests over the relationship between religion and the state—the discourse moves from the original one, the way in which the state could protect religion from itself and from other religions,<sup>31</sup> to one that considers the extent to which religion may keep its privilege and protection against attack even as it inserts itself, as religion, in the political contests central to the operation of Western democracy.

Though the main focus is on developments in Muslim majority states, one should emphasize that this is not a situation unique to Islam. Indeed, other large well organized and dominant religious institutions, institutional

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31. Its international expression was memorialized in Article 18 of the Universal Declaration of Human Rights General Assembly resolution 217 A (III) *available at* <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement> (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”).



Christianity<sup>32</sup> and Buddhism,<sup>33</sup> for example, have also begun to move in similar directions. The Article thus ends where it began, with the existential crisis of the West, recently made manifest in the U.S. by the demand of economic for-profit corporations seeking to assert religious rights of shareholders to determine the shape of healthcare and other employee benefits for a labor force that they employ.<sup>34</sup> These point to the real crisis of secular liberalism in the early 21st century. There exists a desire to extend a solicitude for expressions and practices of religious faith including those exercised through the governance organs of institutional religion and their law systems while simultaneously encouraging these religions, whether or not exercised within institutionalized communities to participate in the political life of a polity made up of many communities, not all religious, while preserving the privileges of religion in the political sphere.<sup>35</sup> At the constitutional level, it portends the deepening of a new normative framework to succeed the framework of the 18th Century American Republic.<sup>36</sup> Should international law also protect the political rights of religion through these privileging devices, the effects might well be profound for transnational constitutionalism,<sup>37</sup> and for the state.<sup>38</sup> Privileging religion, as the illustrations in this Article suggest, can substantially affect the way in

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32. Larry Catá Backer, *Law: Benedict XVI and the Constitution of Political States Law at the End of the Day*, June 30, 2007, available at <http://lbackerblogger.blogspot.com/2007/06/law.html>.

33. Larry Catá Backer, *Theocratic Constitutionalism: Buddhist Constitutionalism in Sri Lanka, Law at the End of the Day*, (June 1, 2008), <http://lbackerblogger.blogspot.com/2008/06/theocratic-constitutionalism-buddhist.html>.

34. See, e.g., *Sebelius v. Hobby Lobby Inc.*, Nos. 13-354 & 13-356 (Whether the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb et seq., allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners). See also Jaeah Lee, *It's Not Just Hobby Lobby: These 71 Companies Don't Want to Cover Your Birth Control Either*, MOTHER JONES, (Apr. 2, 2014), <http://www.motherjones.com/politics/2014/04/hobby-lobby-sebelius-contraceptive-for-profit-lawsuits>.

35. I have elsewhere suggested that “we are stuck on the horns of a dilemma of our own creation. We conceived of the separation of Church and State, of the treatment of formal Religion and its values as *res* at a time when religious consensus made these religious sentiments an unconscious and almost inextricable part of the legal dialogue. We have entered an age when this unconscious acceptance of underlying religious Christian norms is contested. . . . the essay suggests that this is a dangerous enterprise.” Larry Catá Backer, *Religion as Object and the Grammar of Law*, 81 MARQ. L. REV. 229, 254 (1998).

36. See, e.g., Michel Rosenfeld, *The Challenges of Constitutional Ordering in a Multilevel Legally Pluralistic and Ideologically Divided Globalized Polity*, in *THE LAW OF THE FUTURE AND THE FUTURE OF LAW* 109 (Sam Muller, Stavros Zouridis, Morly Frishman, Laura Kistemaker, eds. 2011).

37. See Peer Zumbansen, *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational legal-Plural Order*, 1 GLOBAL CONSTITUTIONALISM 16-52 (2012); W. Werner, *The Never Ending Closure: Constitutional and International Law*, in *TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS* (Nicholas Tsagourias, ed. 2007). The traditional relationship has been to protect religion against the political process. See, e.g., Daniel Augenstein, *Religious Pluralism and National Constitutional Traditions in Europe*, in *LAW, STATE AND RELIGION IN THE NEW EUROPE* (C. Ungureanu & L. Zucca, eds. 2011).

which a polity approaches and its constitution reflects the ideals of rule of law, of direct democracy, of the legitimacy and forms of interpretation, of treason and of membership in the polity itself. Where these political settlements are made in multi-religious states the difficulties of unequal citizenship might well follow.

### I. Social Will Through Law, Rule of Law, and Religion—Blasphemy Law in Pakistan<sup>39</sup>

Rule of law ideology masks the possibility of inversion inherent in the law-state and law-norm framework on which the “rule of law” reality has been built—*social will through law*. This inversion is better revealed when religion is thrown in the mix, that is where rule of law is understood through the prism of a constitutional system in which a specific and dominant religion is privileged.<sup>40</sup> If law is used in the service of the dignity of one religion against others, then the “rule” of law is that of the religion whose dignity is the object of the domestic legal order.<sup>41</sup> The form of a secular rule of law system, then, masks its functional objective to protect the privilege of a dominant religious group.<sup>42</sup> Theocracy can, then, adapt the structural forms of rule of law systems in its own service.<sup>43</sup>

It has long been supposed that law—understood as binding pronouncements from some apparatus of state legitimately vested with the power to make and enforce such pronouncements—is successfully implemented only with the collusion of the population that is the object of its command.<sup>44</sup> Theories of non-violent revolution are grounded on this insight.<sup>45</sup> The study of the management of the legitimacy of law, and its relationship to the management of the legitimacy of the state apparatus has long been popular among political and legal theorists.<sup>46</sup> That, in part, might be a function of the popularity, in turn, of the instrumentalist view of law, and the insistence on a connection, sometimes an exclusive connection, between law and the state apparatus.<sup>47</sup>

Yet the collusive element of law remains under-appreciated. Part of the difficulty may lie in the connection between popular collusion and custom-

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38. See, e.g., Katrin Langewiesche, African Catholic Missionary Networks between Africa and Europe, in: *The African Christian Presence in the West* (Frieder Ludwig, ed. 2009) (on the authority of transnational religions missions).

39. Larry Catá Backer, *Ruminations 35: Blpheming Law, LAW AT THE END OF THE DAY* (Dec. 4, 2010), <http://lbackerblog.blogspot.com/2010/12/ruminations-xxxv-blaspheming-law.html> (an earlier version).

40. Backer, *Theocratic Constitutionalism*, *supra* note 13, at 85-172.

41. *Id.*

42. *Id.*

43. *Id.*

44. Carl Watner, *Quod Omnes Tangit: Consent Theory in the Radical Libertarian Tradition in the Middle Ages*, *JOURNAL OF LIBERTARIAN STUDIES* 67, 67-85 (2005).

45. *Civil Disobedience*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Dec. 20, 2013), <http://plato.stanford.edu/entries/civil-disobedience/>.

46. Backer, *supra* note 39.

47. Developed more fully in Larry Catá Backer, *Reifying Law—Government, Law and the Rule of Law in Governance Systems*, 26 *PENN ST. INT'L L. REV.* 521 (2008).

ary norm structures. As laudable as the Enlightenment idea of progress may be, and it remains a potently valuable insight for human organization and development, those who embrace progress tend to be embarrassed by their origins.<sup>48</sup> Much like the well-educated and conventionally successful children of working class parents in mid-twentieth century England, who viewed their parents as a source of embarrassment and the embodiment of what had been overcome,<sup>49</sup> Enlightenment-grounded law theorists view custom as primitive and unscientific.<sup>50</sup> Customary systems of law are the sort of state organization that progress impels society to grow out of.<sup>51</sup> Organic and reflective, customary law systems cannot serve the instrumental and managerial purposes necessary to the appropriate functioning of the scientifically structured law-state.<sup>52</sup> It is not for nothing that even purported traditionalists like the American Supreme Court Justice Antonin Scalia could declare that Common Law has no place within the legal structures of the American Republic.<sup>53</sup>

The collusive element of law is also problematic because it suggests that law cannot live up to its own conceptual framing. The idea of the law standing alone as a positive instrument of the state apparatus deployed for the management of the masses, under whatever political theory that management is understood, is deeply embedded in the political construction of law.<sup>54</sup> Law is understood as self-referencing, as sufficient of itself to suggest its own meaning and the obligations imposed by its command.<sup>55</sup> Law expresses both authority and its operation.<sup>56</sup> Law both constitutes the state and serves as the legitimating form through which the state acts.<sup>57</sup> Outside of law there is nothing but behaviors, habits, morals, and other systems that may be potential objects of management through law, but are not themselves law.<sup>58</sup> As “not law,” these rule systems are not privileged, unless they are superior to law, in which case law is ruled thereby and must reflect its premises and substantive framework.<sup>59</sup>

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48. See Backer, *supra* note 39.

49. Well explained in GEORGE BERNARD SHAW, *PYGMALION* (New York: Brentano, 1916). (See MSL Comment).

50. Backer, *supra* note 39.

51. *Id.*

52. *Id.*

53. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann, ed., 1997).

54. Iredell Jenkins, *The Matrix of Positive Law*, NAT. L. FORUM. Paper 58 (Jan. 1, 1961), [http://scholarship.law.nd.edu/nd\\_naturallaw\\_forum/58](http://scholarship.law.nd.edu/nd_naturallaw_forum/58). See also Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 *CARDOZO L. REV.* 533 (1992-1993) *Rule of Law in China : China With Legal Characteristics*, *THE ECONOMIST*, Nov. 1, 2014. Available <http://www.economist.com/news/leaders/21629383-xi-jinping-invoking-rule-law-thats-risky-him-and-good-china-china-legal>.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. For a discussion of the way in which this “not law” may serve in this role, see MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE, 1975-1976 80-114 (David Macey, trans., Mauro Bertani, Arnold I. Davidson, François Ewald & Alessandro Fontana, eds., reprint 2003).

Yet that simplistic view, as complex and nuanced as its various theoretical expositions have become, over the course of the last two centuries, masks the possibility of inversion inherent in the law-state and law-norm framework on which the “rule of law” reality has been built. Even conceding that law can be understood in its positivist and instrumentalist form, it is also possible to understand that, perhaps more often than not, the reverse is also true: that social will represented through custom and usage has a positivist and instrumental character that is merely memorialized by “law.”<sup>60</sup> Rule of law might as usefully be understood as social will through law, providing the formal structure within which customary law can be embedded and practiced within and beneath the law-state.<sup>61</sup> Law serves as a formal construction through which the customary framework of social organization can be furthered.<sup>62</sup> Law is a veil that provides an occasionally thin cover over, and protection for, the implementation of social norms.<sup>63</sup>

The secular liberal framework, grounded in protection both of and from religion in pluri-religious states and founded on rule of law principles, stands on a fragile foundation where social will is not committed to neutrality and where one political stakeholder—a dominant institutionalized religious community—participates in political action on par with non religious political parties. This fragility is especially apparent in a state with a single large religious majority whose sensibilities are protected by law. In a state with this dynamic, “[t]he law creates [the] legal infrastructure which is then used in various informal ways to intimidate, coerce, harass and persecute.”<sup>64</sup> In Pakistan, the story of Asia Bibi and the law against blasphemy is a useful illustration. The point of the story is lost on the reporters and actors who have been playing important roles in the progress of events.<sup>65</sup> The specific context is blasphemy, but the insight is broader.

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60. See generally Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Courts, Law and the Interpretive Process*, 20 B.C. THIRD WORLD L.J. 291 (2000).

61. Larry Catá Backer, *Whose Crisis? Secular Liberalism, the Theocratic State and the Political Consequences of Privileging Religion for Multi-Religious States*, LSA Annual Meeting 2013, LAW AT THE END OF THE DAY (May 31, 2013), <http://lcbackerblog.blogspot.com/2013/05/presentation-at-2013-annual-meeting-law.html>.

62. *Id.*

63. See generally Backer, *supra* note 60.

64. Karin Brulliard, *Both sides in blasphemy case pressure Zardari*, WASH. POST, Nov. 26, 2010 at A6, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503585.html> (quoting Ali Dayan Hasan, senior South Asia researcher for Human Rights Watch).

65. See discussion, *infra*, text and notes 96–108. As the story unfolds its focus is entirely on the consequences of offending majority religion. The events that produced that possibility appeared incapable of also producing insults against the minority religion. Within this context a hierarchy of privilege begins to emerge and one that is unconsciously taken up by those who cover the events, one in which one dismisses, as irrelevant even the possibility of mutuality of protection. Note for example, Amnesty International, Document—Pakistan: Pakistani Christian woman sentenced to death: Aasia Bibi, 18 Nov. 2010, available at <http://www.amnesty.org/en/library/asset/ASA33/011/2010/en/6907ef41-7350-414a-a45e-488df34654c0/asa330112010en.html> (which called for action to save Ms. Bibi but no mention of investigation as to the potentially criminal conduct of the Muslim women involved in the argument, starting with the initial insult to the minority Christian woman at the well).

Pakistan occupies the dynamic space between transnational theocratic constitutionalism and the formal structures of secular liberal transnational substantive constitutionalism.<sup>66</sup> Pakistan appears to incorporate the best of both worlds; yet it has also embraced some of their excesses. Pakistan derives its political order from a divine source; to be exercised within limits prescribed by God, as understood by Muslims and is organized to observe “principles of democracy, freedom, equality, tolerance and social justice.”<sup>67</sup> Pakistan is structured to be a territorially defined political space where “Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah.” That political space also calls for “adequate provision [to] be made for the minorities freely to profess and practice their religions and develop their cultures.”<sup>68</sup> These principles provide the foundation for the legal structure of the Pakistani state apparatus. Islam is the state religion.<sup>69</sup> Simultaneously, “the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.”<sup>70</sup> The protection of rights to profess, practice and propagate religion is broad,<sup>71</sup> yet it is “[s]ubject to law, public order and morality.”<sup>72</sup>

The nature of that limitation is made clearer through the criminal law of Pakistan, a legislative edifice that is formally neutral yet particularly focused on the concerns of Sunni Islam. Pakistan’s criminal code, with relevant portions enacted well before independence and the constitution of the modern Pakistani state,<sup>73</sup> provides a legal basis for the management of this law-state structure. Chapter XV, Section 295 the Penal Code of Pakistan criminalizes injuring or defiling places of worship or sacred objects of any religion with the intent of insulting religion.<sup>74</sup> What is more interesting is that the crime extends to those who are imputed to have knowledge that that any class of persons “is likely to consider” such destruction or defilement an insult.<sup>75</sup> Section 295-A is grounded in the sensibilities of Islam; it criminalizes deliberate and malicious acts intended to outrage religious feeling by insulting religion or religious beliefs “either spoken or

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66. See Larry Catá Backer, *Theocratic Constitutionalism*, *supra* note 13, at 154.

67. PAKISTAN CONST. Preamble.

68. *Id.*

69. PAKISTAN CONST., art. 2.

70. *Id.* art. 4(1).

71. *Id.* art. 20(a)

72. *Id.* art. 20.

73. Act XLV of 1860, PAK. PENAL CODE, ch. XV.

74. *Id.*

75. PAK. PENAL CODE, ch. XV, § 295 (“Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction damage or defilement as an insult to their religion. shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”).

written, or by visible representations.”<sup>76</sup> Sections 295-B and 295-C make what is implicit in Section 295-A explicit. Section 295-B criminalizes any defilement of the Qur’an,<sup>77</sup> and 295-C criminalizes the defilement of Mohamad.<sup>78</sup> Section 296 extends these interdictions to religious assemblies<sup>79</sup> and Section 297 further extends them to burial places.<sup>80</sup> Lastly, Section 298 extends criminal liability for a number of distinct acts of speech: uttering words or making gestures that wound religious feelings;<sup>81</sup> engaging in any speech acts that defiles the name of the wife or family members of Mohamad, the so-called righteous Caliphs or Mohamad’s companions;<sup>82</sup> misusing epithets titles of descriptions of certain holy personages;<sup>83</sup> and in the case of Quadianai or Ahmadi Muslims, engaging in any proselytizing activities by suggesting that these individuals are Muslim.<sup>84</sup>

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76. *Id.* § 295-A (“Whoever, with deliberate and malicious intention of outraging the ‘religious feelings of any class of the citizens of Pakistan, by words, either spoken or written, or by visible representations insults the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.”).

77. *Id.* § 295-B (“Whoever willfully defiles, damages or desecrates a copy of the Holy Qur’an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.”).

78. *Id.* § 295-C (“Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.”).

79. *Id.* § 296 (“Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.”).

80. *Id.* § 297 (“Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sculpture, or any place set apart for the performance of funeral rites or as a, depository for the remains of the dead, or offers any indignity to any human corpse or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.”).

81. *Id.* § 298 (“Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year or with fine, or with both.”).

82. *Id.* § 298-A (“Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, directly or indirectly, defiles the sacred name of any wife (Ummul Mumineen), or members of the family (Ahle-bait), of the Holy Prophet (peace be upon him), or any of the righteous Caliphs (Khulafa-e-Rashideen) or companions (Sahaaba) of the Holy Prophet (peace be upon him) shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”).

83. *Id.* § 298-B.

84. *Id.* § 298-C (“Any person of the Quadiani group or the Lahori group (who call themselves ‘Ahmadis’ or by any other name), who directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims shall

Regardless of the merit of these provision, the structure of these prohibitions provide a privileged context within which inter-religious conflict can be mediated—not through the Constitution, but through the criminal law. The criminal law serves traditional purposes of law as positive and instrumental. Beyond its proscriptions, Pakistan appears to have an obligation to protect all parties.<sup>85</sup> But the reality of “law” in Pakistan paints a different picture. The Penal Code is merely the first layer of a multilayer system of law: the Penal Code provides the context and language, but neither its substance nor its limit. The collusive element of the blasphemy law provides its extraordinary popular support<sup>86</sup> and shapes the “rule” by which the “law” is constructed and implemented.<sup>87</sup>

Thus the story of Asia Bibi: a story in which legal formalism hides the customary norm framework that changes the structures of protection. Shabaz Bhatti,<sup>88</sup> a Roman Catholic and Pakistan’s Minister of Minorities Affairs, argues that religion and the criminal law are the means for ordering the organization and operation of small rural communities.

According to Bhatti, Bibi drew the ire of fellow farmhands after a June 2009 dispute where they refused to drink water she collected and she refused their demands to convert to Islam.

Her fellow farmhands reported the incident to a cleric, who concluded that Bibi had committed blasphemy who then gathered a crowd to force her to the police station. The police did not investigate the claim and four months later a court, without hearing Bibi’s full account, handed down a death sentence.

Bhatti believes that Bibi, a mother of five who has been in prison 17 months, never criticized Islam and is innocent. Bibi’s husband and children are now in hiding. Bibi’s husband, Ashiq Masih, a brickmaker, told reporters that he and his family “are frightened” and are “receiving threats, especially from clerics.”<sup>89</sup>

In the case of blasphemy, even the mediation of law does not suggest the process of law. Rather, the law-state framework provides the structure within which customary norms are applied. For example, people accused of blasphemy in Pakistan are frequently so threatened that they must leave their towns, and several convicted blasphemers have been killed in jail.<sup>90</sup> Blasphemy laws are applied generously, and are acted upon rapidly. And,

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be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.”).

85. See generally PAK. PENAL CODE, *supra* note 75.

86. See *What are Pakistan’s Blasphemy Laws?*, BBC, Nov. 6, 2014, <http://www.bbc.com/news/world-south-asia-12621225>.

87. See generally David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT’L L. 27, 28 (1994) (arguing that the law against blasphemy has become a weapon against religious minorities in Pakistan and as reinforcement of an Islamic construction of the laws).

88. See *Shahbaz Bhatti, a Catholic, is the new minister for the defense of minorities*, ASIA NEWS, Nov. 4, 2008, <http://www.asianews.it/news-en/Shahbaz-Bhatti,-a-Catholic,-is-the-new-minister-for-the-defense-of-minorities-13664.html>.

89. Brulliard, *supra* note 64.

90. *Id.*

indeed, the process of law moves rapidly from the sophisticated structures of 20th century law-state sensibilities to other forms. Police officers are supposed to investigate cases, but in practice, “accusers must do little more than gather an intimidating group to lodge an allegation with police, who then typically make an arrest to avert an uprising.”<sup>91</sup> Moreover, procedural protections themselves are subject to the blasphemy laws. When a seventeen year old charged with blasphemy for statements made on a school exam, police said they “[could not] report exactly what was written in the exam paper as doing so would also amount to blasphemy.”<sup>92</sup> Thus, process itself is subordinated to the normative sensibilities of the privileged religion.

That privilege moves inter-religious relations, and the resolution of their conflict, to expression in and through the language and structures of law. One gets a better sense of this from another version of the story reported in the Western press:

Asia Bibi was convicted of insulting Islam’s prophet, Mohammed, while working in a field with several Muslim women in a village southwest of Lahore.

She told them the Quran was “fake” and made comments about one of Mohammed’s wives and about his health in his final days, the police complaint against her said.

She said that “the Quran is fake and your prophet remained in bed for one month before his death because he had worms in his ears and mouth. He married Khadija just for money and after looting her kicked her out of the house,” local police official Muhammad Ilyas told CNN.

“The initial complaint against Bibi was filed on June 14, 2009, by a Muslim cleric, Ilyas said.”<sup>93</sup> The cleric, Qari Muhammad Salim, filed the police report after Muslim women reported the incident to him.<sup>94</sup> He claims Bibi confessed to him and apologized.<sup>95</sup> By 2015, Bibi remained in jail, though there were rumors of her impending release. That appeared complicated by the religious politics of Pakistan, and might require the family to flee Pakistan.<sup>96</sup>

The story is interesting as much for what was not done as well as for what was. The story focuses on the issue of Bibi’s criminal activity—centering against Islam by a non-believer. Completely ignored, of course, was the

91. *Id.*

92. *Pakistan: Drop Blasphemy Charge Against 17-Year Old*, HUMAN RIGHTS WATCH, Feb. 2, 2011, <http://www.hrw.org/news/2011/02/02/pakistan-drop-blasphemy-charges-against-17-year-old>.

93. *Pakistan: Drop Blasphemy Charge Against 17-Year Old*, Human Rights Watch, Feb. 2, 2011, available at <http://www.hrw.org/news/2011/02/02/pakistan-drop-blasphemy-charges-against-17-year-old>.

94. *Id.*

95. *Id.*

96. Madeleine Davies, *Bibi: Release Expected But Ready to Flee*, CHURCH TIMES, Feb. 20, 2015, available at <http://www.churchtimes.co.uk/articles/2015/20-february/news/world/bibi-release-expected-but-ready-to-flee> (“He is convinced that, if his wife is released, the family will have to flee the country: “It is not safe for her after her release to stay in Pakistan, because they will kill her. I do not have any idea where we will go.” *Id.*).



criminal offense of the Muslim women under Criminal Code Section 295A and Section 298.<sup>97</sup> Blasphemy is as much an instrument of majority will—and the disciplining of minority behaviors in the face of the religious hegemon, as it is meant to be some sort of Western style means to setting ground rules of keeping the peace among religious equals.<sup>98</sup> As reported by the Telegraph, “The court heard she had been working as a farmhand in fields with other women, when she was asked to fetch drinking water. Some of the other women—all Muslims—refused to drink the water as it had been brought by a Christian and was therefore ‘unclean,’ according to Mrs. Bibi’s evidence, sparking a row.”<sup>99</sup> The “uncleanliness” insult has old roots among ethnic majorities within the *dar al Islam*.<sup>100</sup> For example, in the Ottoman Empire, it was common for local communities to demand that Jewish residents stay indoors when it rained for fear that their “uncleanliness” would wash onto Muslims.<sup>101</sup> Likewise, the comments of the farmwomen were meant deliberately to insult the religious sensibilities of Ms. Bibi—an easy prejudice expressed in a disgusting manner.<sup>102</sup> These Muslim women also insulted “the religion or the religious beliefs” of Ms. Bibi.<sup>103</sup> Yet none of that mattered. The social norms of the community, rather than the legal norms of the law-state, have found expression through the apparatus of state.

Where, then, within this complex, can one find the law-state?<sup>104</sup> It, like the formal structures of law, is firmly anchored within national political and juridical institutions.<sup>105</sup> But political power is not entirely embedded within the state constitution, and indeed appears to function more as a gateway to normative law structures which are then applied through the formal (but empty) structures of law.<sup>106</sup> Pakistan appears as a bifurcated state. At the local level, social norm systems take precedence, even if they

97. PAK. CRIM. CODE, Chapter XV, Sections 295A and 298.

98. See Doug Bandow, *Doug Bandow: Pakistan’s Persecution*, ORANGE COUNTY REGISTER (July 18, 2014, 5:24 PM), <http://www.ocregister.com/articles/blasphemy-629241-religious-pakistan.html>.

99. Rob Crilly and Aoun Sahi, *Christian Woman Sentenced to Death in Pakistan for ‘Blasphemy’*, THE TELEGRAPH (U.K.), Nov. 9, 2010, available at <http://www.telegraph.co.uk/news/religion/8120142/Christian-woman-sentenced-to-death-in-Pakistan-for-blasphemy.html>.

100. Larry Cata Backer, *Ruminations 35: Blasphemy Law*, LAW AT THE END OF THE DAY (Dec., 04, 2010), <http://lcbackerblog.blogspot.com/2010/12/ruminations-xxxv-blaspheming-law.html>.

101. *Id.*

102. The comments were made, if proven, with deliberate intent to wound religious feelings, and knowing that they would wound. See PAK. CRIM. CODE, Chapter XV, Sections 295 and 298.

103. A criminal offence under Section 295A. See *id.* at 295A.

104. This analysis draws on earlier theoretical work. See, Larry Catá Backer, *On the Tension between Public and Private Governance in the Emerging Transnational Legal Order: State Ideology and Corporation in Polycentric Asymmetric Global Orders* (April 16, 2012), available at SSRN: <http://ssrn.com/abstract=2038103> or <http://dx.doi.org/10.2139/ssrn.2038103>.

105. PAKISTAN CONST. § 8.

106. “Sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him

are now forced to express their structures through the language of the law codes.<sup>107</sup> This is the realm of custom, of the precedence of religion, religious law, and institutions. It is the space where custom prevails, however expressed.<sup>108</sup> At the national level, law systems are well maintained—at least as a formal matter.<sup>109</sup> Functionally, the Pakistani law-state must exist in a constant state of compromise with the social-norm state atop which it sits. It is for that reason that Ms. Bibi may be pardoned but never vindicated.<sup>110</sup> And it is even more likely that her fate will be tied to her willingness to accept exile rather than awaiting her neighbor's acceptance.<sup>111</sup> But that is precisely the thrust of the social norms within which she fell. It is likewise for that reason that the Muslim women who insulted Ms. Bibi's religion will never feel the sting of the Pakistani Criminal Code. Pakistan's law-state is quite distinct and subordinate to its norm-state.

Indeed, this is neither a new development in Pakistan, nor one whose double purpose is unknown. The very minister who was then reviewing the Asia Bibi affair rose to power in part on the basis of opposition to the double use of blasphemy law. "Shahbaz Bhatti founded the Christian-inspired APMA movement in 1985. One of his first battles was against the law on blasphemy, introduced in 1986 and used to repress religious minorities in the country, with particular focus on the Christian community, the one hardest hit by the new norm."<sup>112</sup> But as the incarnation of a portion of the Pakistani law-state, Bhatti's fidelity is to the formal structures of the law-state.<sup>113</sup> And that requires a mediation between the law-state and the

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is a sacred trust" PAKISTAN CONST. Preamble, available at <http://www.pakistani.org/pakistan/constitution/preamble.html>

107. See text and notes *supra*, 96-199.

108. *Id.* "Although no-one convicted under the law has been executed, more than 30 accused have been killed by lynch mobs." *Pakistan Minorities Minister Shahbaz Bhatti Shot Dead*, BNBC NEWS ONLINE, March 2, 2011, available at <http://www.bbc.com/news/world-south-asia-12617562>.

109. See text and notes 68-85, *supra*.

110. Asia Bibi's Husband Urges Pakistan President to Grant Blasphemy Pardon: Ashiq Masih Writes Open Letter After Appeal Is Rejected, CATHOLIC HERALD, NOV. 20, 2014, available at <http://www.catholicherald.co.uk/news/2014/11/20/asia-bibis-husband-pleads-to-pakistan-president-for-blasphemy-pardon/>. The Pakistani President has been vested with a power to pardon "any sentence passed by any court, tribunal other other authority." PAKISTAN CONST. Art. 45.

111. Davies, *supra* note 96.

112. Shahbaz Bhatti, *A Catholic, Is the New Minister for the Defense of Minorities*, ASIA NEWS, April 11, 2008, available at <http://www.asianews.it/news-en/Shahbaz-Bhatti,-a-Catholic,-is-the-new-minister-for-the-defense-of-minorities-13664.html>.

113. Bhatti thus fought for a change in the blasphemy laws within the procedural and normative structures of Pakistani law. His opponents deployed social norm counter-narratives to characterize these efforts at legal reforms into religious insults themselves impossible to maintain under the law. Karin Brulliard and Shaiq Hussain, *Shahbaz Bhatti, Pakistan's Sole Christian Minister, Is Assassinated in Islamabad*, THE WASHINGTON POST, March 2, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/01/AR2011030101394.html> ("The assassination came as a severe blow to Pakistani liberals, who are increasingly being silenced by Muslim hard-liners willing to use violence against those who do not share their views. Bhatti's death removed one of the few leaders still openly advocating the reform of laws that make insulting Islam a capital crime. . . . Bhatti said [these laws] were used as tools to settle

social-norm state of Pakistan, which in the case of Minister Bhatti had a fatal outcome.<sup>114</sup>

The Federal Minister stated that Quaid-i-Azam Muhammad Ali Jinnah had given a clear vision for a democratic, moderate, and progressive Pakistan, where minority and majority would live in peaceful co-existence under the one green and white national flag. “Minorities are sons of the soil, Pakistan belongs to them and they belong to Pakistan[;] they have made sacrifices and shed their blood for the creation and development of Pakistan.”<sup>115</sup> Shahbaz Bhatti further said that the white in the Pakistani flag represents the minorities and to protect the life and property of the minorities is the constitutional obligation of the Government.<sup>116</sup> Yet, the logic of privileging may necessarily lead to a different result.

Bhatti decried the application of norm-state values, especially to members of his own faith community,<sup>117</sup> but he will serve as the instrument of its application in his role as representative of the state. He indirectly applied the substantive norms of the majority community expressed through Pakistan’s formal law structures, even as he sought to use the ultimate power of the law-state to militate the effects of the application of the social-norm State of Pakistan,<sup>118</sup> as did Bibi’s lawyers.<sup>119</sup> For even as the law-state seeks to manage its population through its own system, the norm-state will apply its own rules; rules consonant with the norm system to which even the State has agreed to submit. The bifurcated Pakistani system

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vendettas and persecute members of religious minorities. The Pakistani news media and a broad spectrum of clerics have repeatedly turned that characterization around, equating its proponents with blasphemers.”)

114. “At its heart the Bhatti murder, like that of Taseer, is about the abdication of government responsibility in the face of mob and political violence crudely justified as defence of Islam.” Mustafa Qadri, *Shahbaz Bhatti: A Victim of Mob Rule*, THE GUARDIAN, March 2, 2011, available at <http://www.theguardian.com/commentisfree/belief/2011/mar/02/shahbaz-bhatti-pakistan-violence>.

115. *Federal Minister for Minorities condemns Announcement of Reward to Kill Asia Bibi*, Online Library, available at <http://www.thefreelibrary.com/Federal+Minister+for+Minorities+condemns+Announcement+of+Reward+to...-a0243750607>.

116. *Id.*

117. *Id.*

118. ““Within the Government, the Minister for Religious Minorities has been approved, but his work will be rather difficult: “What can Minister Shahbaz Bhatti do to change the controversial blasphemy law, if his Government has openly said that it does not intend to lift a finger?” Haroon Barket Masih, president of the Masihi Foundation told Fides. “Therefore, there is a stalemate.” “ASIA/PAKISTAN - Asia Bibi and the Anti-blasphemy Campaign: the UN and Obama “Follow the Pope”, AGENZIA FIDES, March 14, 2011, available at <http://www.fides.org/en/news/28332?idnews=28332&lan=eng>. Yet, even as Bhatti sought to reform the Pakistani blasphemy laws he took measures to protect the family of Asa Bibi in 2011 before his assassination. See Free Asa Bibi, available at <http://freeasiabibi.com/who-is-asia-bibi>.

119. “Confidence in the outcome of the retrial, confidence in Pakistani justice, confidence in being able to demonstrate the complete innocence of Asia Bibi: these are the premises and impressions with which Asia Bibi’s lawyers are preparing for the first hearing of the appeal process, at the High Court of Lahore, which has not yet set a date but that “could be very soon,” the lawyers told Fides.” *Asia Bibi’s Lawyers Confident*, COLUMBANS IRELAND, available at <http://www.columbans.eu/index.php/news/pakistan/215-asia-bibis-lawyers-confident>.

is much in evidence in the efforts in the state apparatus to control the norm state. “Minister for Minorities, Mr Shahbaz Bhatti, has strongly condemned the announcement of reward for the killing of Asia Bibi by a Cleric in Peshawar. The Minister said the announcement made is unethical, immoral, unjust, and irresponsible, which should be condemned in the strongest possible manner, as no one had the right to issue the degree of killing against anyone[.] [H]e further stated that this is not a jungle and we will not allow jungle rule.”<sup>120</sup> Which of the states, law-state or social-norm state, of Pakistan will prevail remains to be seen. But with the assassination of Bhatti, it appears that the social-norm state may well be supplying normative content to the law-state in Pakistan.

Indeed, this point is still quite powerfully made through the dual centered law regime of blasphemy in Pakistan—the ideology of rule-of-law-states belies the reality of its embedding within norm systems that exist within the state, and in the form of religion and ethnic communities, across national borders. To understand blasphemy within rule-of-law-state systems, one must understand the way in which multiple systems of law-norms co-exist, sometimes unpleasantly within any territorially constituted political unit.<sup>121</sup> Yet it is important to understand that this phenomenon is not merely a function of the operation of Islam through law-states in Asia, or the problem of mediating religion and ethnic disputes through the state system. Rather, blasphemy provides a window on a larger phenomenon: law is neither the beginning nor the end of regulatory mechanisms within governance systems. Even within states, governance operates through multiple systems that assert authority in a variety of ways.<sup>122</sup> The ability to identify and mediate between them, to harmonize their operation, to the extent possible, will mark the frontiers of “rule of law” in this century.<sup>123</sup> Pakistan reminds us that law and justice, not autonomous from religion, can create a safe space for the hegemonic faith, but an altogether different reality for those faiths neither tolerated nor suppressed. Law, formally secular, effectively religious, tends to move the center of constitutional legitimacy and the substantive norms it protects from one centered on the individual, to one centered on the protection of the institution of religion and its adherents.<sup>124</sup> It is to that contradiction, one with substantial lessons for the religiously infused experimentation by overenthusiastic reli-

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120. *Federal Minister for Minorities condemns Announcement of Reward to Kill Asia Bibi*, Online Library, available at <http://www.thefreelibrary.com/Federal+Minister+for+Minorities+condemns+Announcement+of+Reward+to...-a0243750607>.

121. Discussed in Larry Catá Backer, *Governance Polycentrism Or Regulated Self-Regulation—Rule Systems for Human Rights Impacts of Economic Activity Where National, Private and International Regimes Collide*, CONTEST, available at <http://www.columbans.eu/index.php/news/pakistan/215-asia-bibis-lawyers-confident>. ED COLLISIONS: INTERDISCIPLINARY INQUIRIES INTO NORM FRAGMENTATION IN WORLD SOCIETY (Kerstin Blome, Hannah Franzki, Andreas Fischer-Lescano, Nora Markard and Stefan Oeter, eds., Cambridge University Press, forthcoming 2015).

122. See Larry Catá Backer, *Theocratic Constitutionalism*, *supra* note 13, at 151–55.

123. See *id.*

124. See, Larry Catá Backer, *Theocratic Constitutionalism*, *supra* note 13, at 85–172.

gionists in the United States, which this Article considers next.<sup>125</sup>

## II. Popular Democracy and Religion—Pakistan<sup>126</sup>

Beyond the rule of law, the privileging and engagement of religion and the scope of that privilege also shapes the nature of direct democracy and democratic rights. Indeed, if the tensions between law-state and norm-state are powerful in the context of fashioning rule of law regimes within religion privileging states, those tensions are even more palpable where the law-norm state confronts direct democracy. Democracy has been much in the air lately.<sup>127</sup> People living in developed states and their representative have been talking about direct democracy, usually well managed affairs through which segments of the masses may be mobilized by well organized groups, to initiate a process of law making that is heavily regulated and constrained by the states within which these efforts are directed, and subject to overall constitutional and normative constraints executed by the governments outside of the processes of which direct democracy is supposed to operate.<sup>128</sup> The people ought to speak authoritatively and government officials ought to listen. That, of course is the essence of direct accountability that supplements the indirect accountability of elections, but one that may not work as well where the governance architecture of a putative democracy are fragile.<sup>129</sup>

But direct democracy might also manage the form and operation of government itself. This was the essence of the “Arab Spring,” and it provided legitimacy for the West to overthrow the ruling governmental apparatus.<sup>130</sup> At the start of the second decade of the 21st century, global society embraced popular democracy and the power of the people, when properly massed and successfully engaged, to affect the form and policy of the government under which they might consent to be ruled.<sup>131</sup> Egypt and Tunisia show us the potentially transformative face of modern mass democratic movements at its triumphant moment, or perhaps on the verge of it,

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125. Larry Cata Backer, *Democracy Part XXII: Vox Populi in Pakistan and Substantive Values in Constitutionalism*, LAW AT THE END OF THE DAY (January 31, 2011), <http://lbackerblog.blogspot.com/2011/01/democracy-part-xxii-vox-populi-in.html>.

126. *Id.*

127. *See id.*

128. Cf. Arthur Lupia and John G. Matsusaka, “Direct Democracy: New Approaches to Old Questions,” *Annual Review of Political Science* 7: 463–82 (2004); Commission of the European Communities, Green Paper on a European Citizens’ Initiative, COM(2009) 622 final (Nov. 11, 2009), available at [http://ec.europa.eu/dgs/secretariat\\_general/citizens\\_initiative/docs/enel\\_position\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/enel_position_en.pdf).

129. See Jayshree Bajoria, Pakistan’s Fragile Foundations, Council on Foreign Relations, March 12, 2009 available at <http://www.cfr.org/pakistan/pakistans-fragile-foundations/p18749>.

130. Elaine Ganley, *Dictatorship to Democracy? Tunisia’s Risky Venture*, MSNBC (Jan. 29, 2011), <http://www.thehindu.com/news/international/dictatorship-to-democracy-tunisia-risky-venture/article1137418.ece>.

131. *See id.*

through a movement that might fade away.<sup>132</sup> The effects of this movement have reached beyond Muslim majority states, which has been problematic for the imperialism it has encouraged.<sup>133</sup> Yet, everyone applauds, and American elites seek to advance their own agendas abroad and perhaps bring the lessons of that engagement back home.<sup>134</sup> Although most agree that the essence of secular liberal state system is democracy and popular engagement for accountability, there are some that dispute this claim.<sup>135</sup>

Mass democratic movements present another face through which it exercises its sovereign authority when it is intertwined with religious privilege. Perhaps Pakistan shows us the face of popular democracy triumphant, the “day after.” The recent popular execution of former Punjab governor Salman Taseer,<sup>136</sup> a high government official opposed to the severe application of the blasphemy laws in the Islamic Republic,<sup>137</sup> reminds us that popular democracy, and the will of the people, raises fundamental issues of sovereign will and universal values to which no consen-

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132. See *id.*; See Toby Cadman, *Egypt Comes Full Circle: The End of The Arab Spring*, AL JAZEERA (Mar. 31, 2014), <http://www.aljazeera.com/indepth/opinion/2014/03/egypt-comes-full-circle-end-ar-2014329161913398399.html> (discussing history of Egypt from the overthrow of the Mubarak dictatorship to the election of Mr. Mosri to his overthrow by the military is telling).

133. Laura Smith-Spark, Nina Dos Santos, and Frederik Pleitgen, *Ukraine Signs EU Trade Pact as Russia Finalizes Crimea Annexation*, CNN WORLD (Mar. 21, 2014), <http://www.cnn.com/2014/03/21/world/europe/ukraine-crisis/>.

134. Monique el-Faizy, *Obama Disengaged over Succession in Egypt*, MASRESS, (Oct. 26, 2010), <http://www.masress.com/en/bikyamasr/19330>. (“With the issue of succession looming over the Egyptian political landscape and the Obama administration seemingly disengaged, a bipartisan group of American academics and former government officials has been diligently working behind the scenes to focus the attention of decision makers here in the U.S.”).

135. See, *Color Revolutions Will Not Bring about Real Democracy (from GLOBAL TIMES)*, CHINA DAILY FORUM (Jan. 30, 2011), <http://blog.chinadaily.com.cn/thread-691165-1-1.html>. (“In general, democracy has a strong appeal because of the successful models in the West. But whether the system is applicable in other countries is in question, as more and more unsuccessful examples arise. In the West, democracy is not only a political system, but a way of life. Yet some emerging democracies in Asia and Africa are taking hit after hit from street-level clamor. Democracy is still far away for Tunisia and Egypt. The success of a democracy takes concrete foundations in economy, education and social issues. As a general concept, democracy has been accepted by most people. But when it comes to political systems, the Western model is only one of a few options. It takes time and effort to apply democracy to different countries, and to do so without the turmoil of revolution.”).

136. Pamela Constable, *Mumtaz Qadri Pleads Guilty to Pakistan Slaying of Salman Taseer*, WASHINGTON POST (Jan.10, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/10/AR2011011002576.html>. (“Salman Taseer, the razor-tongued governor of Punjab province, was killed Tuesday in Islamabad. Thousands of Pakistanis braved high security to attend his funeral Wednesday.”); *Salman Taseer Murder: Mumtaz Qadri Sentenced to Death*, BBC NEWS ONLINE (Oct. 1, 2011), available at <http://www.bbc.co.uk/news/world-south-asia-15135502>. (“The assassination divided Pakistan, with many hailing Qadri as a hero. Qadri was part of Mr Taseer’s protection team but opened fire on the governor as he was about to get into his car in the capital, Islamabad, on 4 January.”)

137. See *id.*

sus appears likely.<sup>138</sup>

The repercussions have been severe and overtaken by the mass democratic mobilizations that have emerged around both the blasphemy law and governmental suggestions that it might be softened for infractions against Islam (no one speaks of the effects of blaspheming or insulting Christianity, Baha'i, Hinduism, Buddhism, Judaism or the like), and popular action against government officials who support this change in the blasphemy laws (or defend the Christian peasant women condemned to death for insulting Islam).<sup>139</sup> "The blasphemy laws have been in the spotlight since the murder last week of Salmaan Taseer. . . who was shot by a member of his security detail. The shooter, Mumtaz Qadri, later said he killed Taseer because of the politician's opposition to the laws. Taseer was a member of the Pakistan People's Party, which runs the governing coalition, and was close to President Asif Ali Zardari."<sup>140</sup>

The democratic aspects of the conversation about the blasphemy laws, the condemnation of the Christian peasant under its terms and the execution of a political figure opposed to the law that led to that condemnation is well-evidenced in Pakistan, following a pattern of popular demonstration widely and positively regarded recently when effected against the governments of Egypt and Tunisia.<sup>141</sup> The democratic process has been invoked to ensure that while religion can participate in politics, it is insulated from attack ostensibly on religious grounds. The same, was true, and to good political effect, of Catholicism deployed against the Marxist-Leninist regimes in Poland, especially in the 1980s,<sup>142</sup> and has been used effectively as an intermediary in Cuba.<sup>143</sup>

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138. Mohammed Hanif, *Pakistan Viewpoint: Who is to Blame for Taseer's Death?* BBC NEWS ONLINE (Jan. 6, 2011), <http://www.bbc.com/news/world-south-asia-12129770> (describing foundational structures that produced the murder).

139. See Bad Mouthing: Pakistan's Blasphemy Laws Legitimate Intolerance, *The Economist* Nov. 29, 2014, available at <http://www.economist.com/news/asia/21635070-pakistans-blasphemy-laws-legitimise-intolerance-bad-mouthing>.

140. Zahid Hussain, *Islamists Rally for Pakistan's Blasphemy Laws*, WALL STREET JOURNAL ASIA, (Jan. 10, 2011), <http://online.wsj.com/articles/SB10001424052748704482704576071701535155530>.

141. See Elaine Ganley, *Dictatorship to Democracy? Tunisia's Risky Venture*, MSNBC (Jan. 29, 2011), <http://www.thehindu.com/news/international/dictatorship-to-democracy-tunisia-risky-venture/article1137418.ece>; see Toby Cadman, *Egypt Comes Full Circle: The End of the Arab Spring*, AL JAZEERA (Mar. 31, 2014), <http://www.aljazeera.com/indepth/opinion/2014/03/egypt-comes-full-circle-end-ar-2014329161913398399.html>; *Salman Taseer Murder: Mumtaz Qadri Sentenced to Death*, BBC NEWS ONLINE (Oct. 1, 2011), available at <http://www.bbc.co.uk/news/world-south-asia-15135502>. But Egypt remains more problematic as it continues to embrace the norms of Islam but not political organizations, like the Muslim Brotherhood, that appear to institutionalize religious privilege within an apparatus autonomous of the state.

142. Mirella W. Eberts, *The Roman Catholic Church and Democracy in Poland*, 50 EUROPE-ASIA STUDIES 817-42 (1998).

143. John L. Allen, Jr., *A Victory for the Vatican's Line of Détente*, CRUX, Dec. 17, 2014, available at <http://www.cruxnow.com/church/2014/12/17/us-cuba-breakthrough-is-a-victory-for-the-vaticans-line-of-detente/>; *Pope Francis as Castro-Obama Intermediary*, WORLD AFFAIRS, Dec. 22, 2014, available at <http://www.worldaffairsjournal.org/blog/roland-flamini/pope-francis-castro-obama-intermediary>.

Participation and privilege invert mass democracy *from object to method*. This was much in evidence in the use of the techniques of direct democracy to protect religion from the democratic engagement, which is the tool of that effort. About 40,000 people rallied in Pakistan's eastern city of Lahore on Sunday in the latest protest against proposed reforms of a controversial blasphemy law, police said.

Religious groups have held protests in several Pakistani cities since former Punjab governor Salman Taseer vowed to amend the law, that was recently used to sentence a Christian woman to death Taseer's stance enraged the country's increasingly conservative religious base and he was assassinated on January 4 by his own security guard, who has said he killed the governor over his support for reform. Under intense pressure from religious parties, Pakistan's government has since said it had no intentions to amend the law. Demonstrators from religious parties Jamaat-e-Islami, Jamiat Ulema-e-Pakistan and Jamaat-ud-Dawa, a charity linked with 2008 Mumbai terrorist attacks, held banners in support of Mumtaz Qadri—the police commando who shot dead Taseer. Participants chanted slogans including “Free Mumtaz Qadri,” “We are ready to sacrifice our lives for the honour of Prophet Mohammad,” and “Changes in blasphemy law not accepted.” An AFP reporter saw activists carrying effigies of Pope Benedict XVI and Pakistani Minority Affairs Minister Shahbaz Bhatti shouting slogans “Allah-o-Akbar.”<sup>144</sup>

The popular mobilizations of sovereign will suggest at least two issues. The first touches on the nature of constitutional democracy and the role of the popular sovereign. Westerners, and especially Americans, tend to view popular sovereignty in a peculiar way. It is that great spark that extinguishes one set of government and imposes on itself another. Thereafter, and until it acts again, it is constrained by the government it has created, and acts only indirectly—in the election of individuals who represent the popular will.<sup>145</sup> Sometimes both the popular sovereign and its representatives are constrained by substantive norms that are beyond their power to overcome. For example, slavery could not be reinstated in the United States, the central value of human dignity could not be overcome in Germany, and socialist values could not be rejected in China, without destroying the constitutional order itself.<sup>146</sup>

But an older constitutional tradition does not recognize constraints on

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144. *Thousands Rally in Pakistan over Blasphemy Law*, SIFINEWYS.com (Jan. 30, 2011), <http://www.sify.com/news/thousands-rally-in-pakistan-over-blasphemy-law-news-international-lb4sucajhcb.html>.

145. Cf. Arthur Lupia and John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, ANN. REV. OF POLITICAL SCIENCE 7, 463-82 (2004).

146. See, e.g., Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251 (1995-1996); Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663 (2010-2011); Yaniv Roznai, *The Theory And Practice Of 'Supra-Constitutional' Limits On Constitutional Amendments*. 62(3) INT'L & COMP. L.Q. 557-97 (July 2013).



popular will other than those self-imposed.<sup>147</sup> In that case, either the people, through plebiscite or through their legislature.<sup>148</sup> In that case, democratic mass mobilization on the streets, or pressure on representatives (acting as the proxy for the popular will) could impose a substantive regime that reflects the current will of the masses.<sup>149</sup> In that case, the popular will could impose anything from the political disability of inhabitants because of religion (France under the Vichy regime), and their segregation and extermination (Nationalist Socialist Germany) as long as the process was lawful and reflected the majority will.<sup>150</sup>

Pakistan suggests an older face of democratic constitutionalism, one in which process merely directs the mechanics of the expression of mass democratic will without constraint. This older approach remains, in vestigial form, in constitutions that may be easily amended by popular action.<sup>151</sup> Describing the participation of an Islamic group, the Sunni Ittehad Council, in support of the assassin of Mr. Taseer:

Barelvis, who are dominant in Punjab, did not support the holy war against Soviet rule in Afghanistan. As terrorist attacks have surged in Pakistan, several prominent Barelvis have issued decrees condemning suicide bombing and other violence. Islamist insurgents have responded with major bombings at Sufi shrines and mosques.

Over the past two years, the sect has formed an alliance that, leaders say, intends to field candidates for political office to promote peaceful Islam and the authority of the state. The group, the Sunni Ittehad Council, is staunchly anti-American, but also fervently anti-Taliban, on grounds that killing innocents cannot be justified under Islam.

“This is a very basic concept. If you kill an innocent person, it means you are killing all humanity,” said Mohammed Ziaul Haq, a council spokesman and author whose new book is titled “WikiLeaks: America’s Horrendous Face.” “Islam is a religion of peace and love, and it asks its followers to restrain themselves.”

But killing in response to blasphemy is another matter, he said, making it “totally different from terrorism.” The government had done nothing to silence Taseer’s criticism of the blasphemy ban, he said, or his support for a Christian woman sentenced to death for the law, which he said had made Taseer an “indirect” blasphemer himself. “Ninety percent of people in Pakistan think Mumtaz Qadri is a hero.”<sup>152</sup>

There is an echo here of the sentiments supporting a greater role for direct popular democratic action in the United States as well, though of course from a vastly different substantive and structural perspective.

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147. Larry Catá Backer, *God(s) over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 *MISS. C. L. REV.* 11, 20 (2007).

148. *See id.*

149. *See id.*

150. *See id.*

151. Karin Brulliard, *For Moderate Majority, A Hard Line*, *THE WASHINGTON POST* (Jan. 30, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/29/AR2011012904095.html>.

152. *See id.* at A-8 (“Ziaul Haq said, ‘If it’s a democracy, the government should think about that.’”).

Conventional wisdom now holds that Article V is the only way to amend the Constitution. Article V is how the government amends the Constitution, not how the people do it. If the people had to use Article V to amend the Constitution they would need permission from two-thirds of the Congress and three-fourths of the state legislatures. This would mean that the creator of our government, the people, would have to get permission from their elected representatives. . . . to amend the Constitution. This logic is ludicrous if power remains in the people. The constituent power of the people--the source of all political power--cannot be subject to the power of its creation. James Madison had it right when he said that the people could just do it.<sup>153</sup>

This approach suggests an older form of constitutionalism, one in which the popular will, manifested either through mass mobilization, the monarch, ruling elite or legislature, is unconstrained in the scope of power to impose political rules, as long as it is done through a legitimating process.<sup>154</sup> Substantive values are supplied by the common traditions of the people or from some other source.<sup>155</sup>

The second issue focuses on social will--preserving customary systems against even the limits and constraints of rule of law based substantive limits. It might be possible to suggest an alternative analytical approach. The second issue that the Pakistani mobilization suggests is not so much mass democratic instincts run riot, but the critical role of the masses in guarding the most fundamental normative structures of the constitutional systems under which it has consented to be governed. "Speakers at the Karachi rally sought to justify Mr. Taseer's assassination, saying the killer fulfilled his obligation as a Muslim."<sup>156</sup> The people of Pakistan have declared the fundamental Muslim character of the state and its institutions.

That is not merely an incantation fetish but a shorthand for a set of substantive values and approaches to law, governance and relationships among people grounded in the normative rules of Islam.<sup>157</sup> Jayshree Bajoria notes: "Establishing Islam as the state ideology was a device aimed at defining a Pakistani identity during the country's formative years, wrote Haqqani."<sup>158</sup> But that conflict does not suggest the arbitrariness of the

153. Mike Gravel, *The National Initiative for Democracy, A Populist Concept of Democracy*, [http://www.mikegravel.us/national\\_initiative](http://www.mikegravel.us/national_initiative).

154. See, e.g., WESTEL W. WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 29-31; 35-39; 312-15 (New York: Macmillan, 1924); HIROBUMI ITO, *COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN* 9 ((2d ed Tokyo: Chu-O Daigaku, 1906) (reprinted Greenwood Press, 1978). For criticisms of variations of these forms of *kaiserreichstaat* see, Charles J. Friedrich, *REBUILDING THE GERMAN CONSTITUTION*, I, 43 AM. POL. SCI. REV. 461, 463-64 (1949).

155. See, Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1 (1998); Nobushige Ukai, *The Individual and the Rule of Law Under the New Japanese Constitution*, 51 NW. U.L.REV. 733, 735-37 (1956).

156. Hussain, *supra* note 140.

157. See Backer, *Theocratic Constitutionalism*, *supra* note 13.

158. Jayshree Bajoria, *Pakistan's Fragile Foundations*, COUNCIL ON FOREIGN RELATIONS (Mar. 12, 2009), <http://www.cfr.org/pakistan/pakistans-fragile-foundations/p18749#>. (referencing Husain Haqqani, "The Role of Islam in Pakistan's Future", The Washington

actions so much as the somewhat large abyss separating the normative values of constitutional societies within and outside of Pakistan (or at least some of them). Looking at the popular mobilizations in this respect, one can see them as a force for the protection of the organizing values on which the state is founded against the efforts to undermine that normative framework by the importation of values and sensibilities that are alien to and may threaten the normative structure of Islamic Pakistan, at least as the masses mobilized understand that. We can still goad the butchers on from the fences. For those of us who call ourselves liberal Muslims there is always the option of turning away and holding our noses.”<sup>159</sup> If Islam defines the state’s normative parameters as well as its social, cultural, and political values, then popular mobilizations defending it are legitimate and necessary for the state to remain true to its normative constitutional constraints.<sup>160</sup>

However, this also suggests a wide range between those values and the normative constitutional values emerging from international organizations and recognized, to some extent, by international law.<sup>161</sup> Instead of arbitrariness, this range of values indicates a large gap between the normative values of constitutional societies in and outside of Pakistan. Popular mobilizations then may protect the state’s organizing and foundational values. This may also protect against efforts to undermine this normative framework by importing values that may threaten Islamic Pakistan’s normative structure. This is at least how the mobilized masses understand the conflict. Furthermore, expressions of mass will are important in defining a popular sovereign’s belief system.<sup>162</sup> This is disheartening for Westerners and those looking to expand the reach of value systems grounded in international consensus. The internationalist master’s tools are being used to dismantle the master’s house and rebuild it in another image. Alternatively, it suggests a need for a limit on legitimizing popular and mass mobilizations. But managing and constraining popular democracy would undermine or redirect the political movement’s trajectory, now over two hundred years old.<sup>163</sup>

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Quarterly 28(1): 85–96 (2004–05)) available <http://www.cfr.org/pakistan/pakistans-fragile-foundations/p18749#p7>.

159. Mohammed Hanif, *Pakistan Viewpoint: Who is to Blame for Taseer’s Death?*, BBC NEWS (Jan. 6, 2011), <http://www.bbc.com/news/world-south-asia-12129770>.

160. See generally DEMOCRATIZING DEMOCRACY: BEYOND THE LIBERAL DEMOCRATIC CANON (Boaventura de Sousa Santos ed., 2005).

161. See *id.*

162. See *id.*

163. See, e.g., Peer Zumbansen, *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-pluralist Order*, 1(1) GLOBAL CONSTITUTIONALISM 16–52 (2012); Neil Walker, *Taking Constitutionalism Beyond the State*, 56(3) POLITICAL STUDIES 519–43 (2008); Poul F. Kjeaar, *The Concept of the Political in the Concept of Transnational Constitutionalism: A Sociological Perspective*, in AFTER GLOBALIZATION—NEW PATTERNS OF CONFLICT AND THEIR SOCIOLOGICAL AND LEGAL RECONSTRUCTION 285–321 (Christian Jorges & Tommi Ralli, eds., Oslo: Arena Report Series, 2011); Gunther Teubner, *Constitutionalising Polycontextuality*, 20 Social and Legal Studies 209–52 (2010); Backer, *supra* note 148, at 11–65 (2008).

A potentially greater and immediate issue is that a common language about democracy, in fact, divides rather than unites the various systems purporting to adhere to some or another version.<sup>164</sup> For example, speakers referring to “democracy”, “democratic values”, “vox populi”, and “substantive values” to manage masses<sup>165</sup> do not understand or hear each other.<sup>166</sup> People may use the same words and mean different things.<sup>167</sup> Furthermore, the West’s fixation with using the right words<sup>168</sup>—terms to memorize and recite, but not analyze—advances appearances, but also fails to meet its purpose.

As a result, some suggest that Westerners should understand displays of popular will as signs of weakness in Pakistan’s democracy.<sup>169</sup> Ironically, this analysis can also lead to the opposite conclusion. Popular mobilizations may serve as a sign of Pakistan’s strength as a direct democracy. However, the values that democratic movement represents are not necessarily compatible with the West’s values. As Karin Bruillard reported:

The notion of a moderate but silent Pakistani majority has also been undermined by the stance taken by the nation’s young black-suited lawyers, who three years ago led massive pro-democracy strikes but this month showered rose petals on Mumtaz Qadri, the killer of Punjab governor Salman Taseer.<sup>170</sup>

Bruillard also noted, “Civilian and military officials have responded with little more than tepid disapproval to the killing.”<sup>171</sup> This raises political, moral, and religious issues. It also shows the peak of an existential crisis for secular liberalism. The only way to tolerate these contradictions is with

164. See generally Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 101 (2008).

165. See Larry Catá Backer, *Democracy Part XXVI: Democratic Accountability—From Voter to Managed Mob, Law at the End of the Day*, (June 3, 2012), available at <http://lcbackerblog.blogspot.com/2012/06/democracy-part-xxvi-democratic.html>.

166. See Larry Catá Backer, *Crafting a Theory of Socialist Democracy for China in the 21st Century: Considering Hu Angang’s Theory of Collective Presidency in the Context of the Emerging Chinese Constitutional State*, 16(1) ASIAN-PAC. L. & POL’Y J. 29-82 (2014). Cf. Richard Bellamy, *Republicanism, Democracy and Constitutionalism*, in *REPUBLICANISM AND POLITICAL THEORY* 159-189 (Cécile Laborde and John Maynor, 2008)

167. *Id.* (considering endogenous versus exogenous democracy theory). See also Jiunn-Rong Yeh, *The Emergence of Asian Constitutionalism: Features in Comparison*, 4 N.T.U L. REV. 39 (2009) (considering evolving paradigms of constitutionalism).

168. See Backer, *supra* note 166, at 149.

169. See Ali Dayan Hasan, Op-Ed., *An Assassination in Pakistan*, N.Y. TIMES (Jan. 6, 2011), [http://www.nytimes.com/2011/01/07/opinion/07iht-edhasan07.html?\\_r=1&](http://www.nytimes.com/2011/01/07/opinion/07iht-edhasan07.html?_r=1&). (“In this tense, hate-filled atmosphere, the political courage to stand up for Asia Bibi – and Pakistan’s fragile democracy – is short supply.”)

170. *Roses for Pakistan Governor’s Alleged Killer*, WASH. POST (Jan. 5, 2011), <http://www.washingtonpost.com/wp-dyn/content/video/2011/01/05/VI2011010504540.html>.

171. Karin Bruillard, *For Moderate Majority, A Hard Line*, WASH. POST, (Jan. 30, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/29/AR2011012904095.html>. However, there were significant expressions of popular support for the slain minister. See *Pakistani Governor Salman Taseer Assassinated*, WASH. POST (Jan. 5, 2011), <http://www.washingtonpost.com/wp-dyn/content/gallery/2011/01/04/GA2011010403151.html>.

a combination of wishful thinking and formalism without substance, but embracing formalism produces contradictions. For example, Islam is a major influence on a state committed to democratic expression. However, the state also protects religious and political players through blasphemy and other religious privileging laws. This, in turn, reinforces religious hierarchy at a local level.<sup>172</sup>

### III. Popular Democracy, Religion, and Tolerating the Foreigner—Sudan<sup>173</sup>

With secular liberal ideals, there are more complex issues when mass democracy and popular expression focus on “the stranger” or the religious and political minority. Governing elites point to “happy” citizens voting as democracy’s essence.<sup>174</sup> Another hallmark of democratic governance is public expression or public assemblies to express popular will.<sup>175</sup> The purpose of that expression is to pressure the State to align its actions with the people’s will.<sup>176</sup> Western countries recognize this as good.<sup>177</sup> For example, during the Ukraine’s Orange Revolution, citizens acting en masse caused an unresponsive government to take action.<sup>178</sup> However, these expressions also have martyrs. The West continues to applaud the 1980 crowd in Tiananmen Square that the State dispersed.<sup>179</sup> It also recognizes as democratic expression the Eastern European citizens who assembled in defiance of the state conduct that went against their collective wishes. For example, this occurred in Hungary in 1956 and in the former Czechoslova-

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172. Cf. Jayshree Bajoria, *Pakistan’s Fragile Foundations*, COUNCIL ON FOREIGN RELATIONS (Mar. 12, 2009), <http://www.cfr.org/pakistan/pakistans-fragile-foundations/p18749#>. (“The political use of Islam by the state “promotes an aggressive competition for official patronage between and within the many variations of Sunni and Shia Islam, with the clerical elites of major sects and subsects striving to build up their political parties, raise jihadi militias, [and] expand [madrassa] networks,” said a 2005 International Crisis Group report.”).

173. Larry Catá Backer, *Democracy Part IV: Managing Popular Expressions and the Democratic Impulse in Sudan*, LAW AT THE END OF THE DAY (Nov. 25, 2007, 3:03 PM), <http://lcbackerblog.blogspot.com/2007/11/democracy-part-iv.html>.

174. Larry Catá Backer, *Democracy Part II: Voting Among the Unruly Masses*, LAW AT THE END OF THE DAY (Nov. 16, 2007, 10:01 PM), <http://lcbackerblog.blogspot.com/2007/11/democracy-part-ii.html>. This is not just a trend with citizens of Anglo-European democratic, constitutional states. See Fidel Castro, *Reflections by the Commander in Chief* (Oct. 19, 2007 6:12 PM), <http://www.cuba.cu/gobierno/discursos/2007/ing/f191007i.html>. (“Having more than 90 per cent of all citizens voting in the elections and school children guarding the ballots is an unheard of experience; it’s hard to believe that this occurs in one of the “dark corners of this world,” a harassed and blockaded country named Cuba. That is how we exercise the vigorous muscles of our political awareness.”)

175. See Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949, 953–54 (2014).

176. See *id.*

177. See *id.*

178. See Adrian Karatnycky, *Letter From Kiev: On Independence Square*, 74 AM. SCHOLAR 6, 6–9 (2005).

179. See, e.g., *Tiananmen Revisited, 1989–2001*, CNN.COM (June 4, 2001).

kia in 1968.<sup>180</sup>

But not all manifestations of public expression are large scale. Any institution created to serve the masses according to their terms may face protests. In fact, the institution's members should be sensitive to the expressed will of those that they serve. Collectively, the public asserts their individual rights. These expressions may target either specific representatives or state bodies, whether or not they are representative. Thus, individuals' votes are an expression of their participation in a democratic state, even though this power is essentially passive. Individuals also express their collective will by taking to the streets.<sup>181</sup> Furthermore, they may join together to form political parties and other collectives, like civil society. But one must reconcile the state's law with the institutional order and political power based on individuals who are collectively the state.

One can anticipate this problem in many democratic states; some Western countries even produced documents to reason through this tension. For example, the United States' Declaration of Independence encourages assembly, yet the Federal Constitution then limits the Declaration of Independence's revolutionary implications.<sup>182</sup> Westerners measure the effects of large-scale expressions of social will by their loyalty to the original values of mass popular expression.<sup>183</sup> Yet the boundary between individuals who can form part of a popular sovereign and those cannot shifted dramatically in liberal democracies. This occurred even though the state's foundational principles did not change. For example, consider the changing position of individuals of African descent in the United States, from the Republic's founding through the 2008 presidential election.

Thus, for example, South Africa defines political rights under its constitution precisely: people have the right to make political choices, to vote in elections that are free and fair and stand for office.<sup>184</sup> Assembly is managed within a rule of law normative framework: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions."<sup>185</sup>

Still, since 1945 and the creation of the global informal governance system of the "community of nations," the West and global political elites (including lawyers and judges) have sought to naturalize these tropes of manifestations of popular will as central to the construction of legitimate democratic constitutional orders (if only as a sort of managed expression

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180. See GRZEGORZ EKIERT, *THE STATE AGAINST SOCIETY: POLITICAL CRISES AND THEIR AFTERMATH IN EAST CENTRAL EUROPE* 37-38, 121-23 (Princeton University Press, 1996).

181. Karatnycky, *supra* note 178, at 6-9.

182. See Larry Catá Backer, *Some Thoughts on the American Declaration of Independence and its Irish/European Connections at Century's End*, *LAW AT THE END OF THE DAY* (July 4, 2006 10:00 AM), <http://lcbackerblog.blogspot.com/2006/07/some-thoughts-on-american-declaration.html>.

183. See Adam Alexi Solomon, *Changing Colors: Ukraine's Orange Revolution*, 27 *HARV. INT'L REV.* 11, 11-12 (2006).

184. *S. AFR. CONST.*, art. 19, 1996.

185. *Id.*, at art. 17.

within “rule of law” constraints).<sup>186</sup> Within less democratic regimes, such less restrained expression might also serve as a manifestation of revolutionary will to move the nation to a system of ordered, well managed, democratic constitutional rule of law structures of governance.<sup>187</sup> It is thus for those reasons that the international community was so eager to stand behind the lawyers and judges who protested against the arbitrary actions of the President (and until November 2007, the General) Musharraf of Pakistan (whose actions they appeared to tolerate better before their own respective oxen were gored).<sup>188</sup> And regional human rights instruments also echo this popular notion.<sup>189</sup> Many in Western developed states were thus relieved to note that the exercise of this power of popular expression had been spreading rapidly to other parts of the world,<sup>190</sup> even when unsuccessful,<sup>191</sup> and especially in Muslim majority states.<sup>192</sup>

It was with these thoughts in mind that one might read stories of events that have been occurring in Sudan. It seems that a kindly woman, Gillian Gibbons, a citizen of the United Kingdom, took it into her head to travel to Sudan to do good. There she sought to teach children at a Sudanese primary school named the Unity High School.<sup>193</sup> It was in the course of her instruction that the events that prompted this reverie on democratic expression took place: “In September, Mrs. Gibbons allowed her class of primary school pupils to name the teddy bear Muhammad as part of a

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186. The foundation for this may be the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, art. 25, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, available <http://www.hrweb.org/legal/cpr.html>. It has not been universally embraced, and certainly not embraced in the same way by the community of states. See also Marcel Alexander Niggli & Tornike Keshelava, *Democratic Legitimacy and its Discontents*, 1969 REVUE GENERALE DE DROIT 127, 129 (2011).

187. See *id.*

188. See *Lawyers Protest Against Musharraf*, BBC NEWS (Mar. 12, 2007), [http://news.bbc.co.uk/2/hi/south\\_asia/6441133.stm](http://news.bbc.co.uk/2/hi/south_asia/6441133.stm).

189. See *id.*

190. See, e.g., Louis Jacobson, *Hilary Clinton Says in Iran in 1979 Extremists Hijacked a Broad-Based, Popular Revolution Against the Shah*, TAMPA BAY TIMES (June 11, 2014) available at <http://www.politifact.com/truth-o-meter/statements/2014/jun/11/hillary-clinton/hillary-clinton-says-iran-1979-extremists-hijacked/>.

191. See, e.g., Donya Alinejad, *The Death of the “Twitter Revolution” and the Struggle Over Internet Narratives*, ARSEHSEVOM, March 17, 2011, available at <http://www.arsehsevom.net/2011/03/the-death-of-the-twitter-revolution-and-the-struggle-over-internet-narratives-3/>; *Ukrainians Overthrow Dictatorship*, ORANGE REVOLUTION, 2004 available at <http://nvdatabase.swarthmore.edu/content/ukrainians-overthrow-dictatorship-orange-revolution-2004>; Oleg Karpyak, *Ukraine’s Two Different Revolutions*, BBC NEWS ONLINE, Dec. 3, 2013, available at <http://www.bbc.com/news/world-europe-25210230>; *Time-lines, Reforms in Myanmar*, BBC NEWS, Nov. 11, 2014, available at <http://www.bbc.com/news/world-asia-16546688>.

192. See, e.g., *The Arab Spring: A Year of Revolution*, NPR (Dec. 11, 2011) available at <http://www.npr.org/2011/12/17/143897126/the-arab-spring-a-year-of-revolution>. The Cornell University Library developed additional online resources. See Cornell Universities Library, *Arab Spring: A Research & Study Guide \* الربيع العربي*: Home, available at [http://guides.library.cornell.edu/arab\\_spring](http://guides.library.cornell.edu/arab_spring).

193. See *UK Teacher Jailed Over Teddy Row*, BBC NEWS (Nov. 20, 2007), <http://news.bbc.co.uk/2/hi/africa/7119399.stm>.

study of animals and their habitats. The court heard that she was arrested on Sunday after another member of staff at Unity High School complained to the Ministry of Education.<sup>194</sup> She was ultimately convicted of the generic catchall charge—insulting religion (that is Islam, since it does not appear that the provision extends beyond that construction of the offense in fact, if not in law).<sup>195</sup> “It is seen as an insult to Islam to attempt to make an image of Prophet Muhammad.”<sup>196</sup> Here, one moves from the protection of religious sensibility to the appropriation of the mechanisms of government to enforce privilege not only to those within the polity but to outsiders as well.

She was lucky, we are told. She might have been charged and convicted of graver offenses—inciting hatred (of Islam) or showing contempt (of Islam).<sup>197</sup> Justice was swift in accordance with its own internal logic in that place.<sup>198</sup> It helped that she was able to show the proper humility and deference to her hosts and their interpretation/application of their religion as translated into rules of law. “The BBC’s Adam Mynott, in Khartoum, said Mrs. Gibbons apologised to the court for any offence she may have caused.”<sup>199</sup> Gratitude for the kindness of the court abounded. “The school’s director, Robert Boulos, told the AP news agency: ‘It’s a very fair verdict, she could have had six months and lashes and a fine, and she only got 15 days and deportation.’”<sup>200</sup>

The English, of course, evidenced the appropriate concern. Their foreign ministry people wrung their hands effectively in public,<sup>201</sup> and their foreign office personnel did their duty in private.<sup>202</sup> But more than that, the British facilitated the intermediation of appropriately situated persons on its behalf. And who better than a couple of peers (class privilege) who are Muslim (religious privileging) to deal with their counterparts (the connection of extra-national community based on class and religion) to mediate difficulties in relations among the political communities?<sup>203</sup> In this fashion the English appear to have also tolerated the Sudanese President’s own insult to religion, which is not a criminal or civil offense in the United Kingdom. “Sources close to [the] Sudanese President Omar al-Bashir believe there will be more [chances] of securing [Mrs. Gibbons]’ release through a Muslim-led delegation than through the Foreign Office’s diplomacy efforts.”<sup>204</sup>

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194. See *id.*

195. See *id.*

196. See *Pupil Defends Sudan Row Teacher*, BBC NEWS (Nov. 28, 2007), <http://news.bbc.co.uk/2/hi/africa/7116401.stm>.

197. *UK Teacher Jailed Over Teddy Row*, *supra* note 193.

198. See *id.*

199. See *id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. See *UK Peers Visit Teddy Row Teacher*, BBC NEWS (Dec. 1, 2007), <http://news.bbc.co.uk/2/hi/africa/7122790.stm>.

204. *Id.*



Indeed, throughout, the proper deference was shown to the sensibilities of the native population, especially by the condemned. We are told that “John Gibbons, 27, from Liverpool, told Associated Press his mother was “holding up quite well” and did not want the situation to spark “resentment” towards [the] Muslims or the Sudanese people.”<sup>205</sup> And it appears the UK has little choice but to dance to the Sudanese tune. “Sudan’s leaders are rather used to the sound of western outrage - and have come to realise that, for them, it rarely amounts to much.”<sup>206</sup> Western outrage is an impotent rage, it seems.

Regardless, both the fate of Mrs. Gibbons and the issue of the use and misuse of efforts to privilege religion through the use of the state apparatus serve merely as a foundation for the more important focus of this Article. For whatever one might think of the unfolding events outside of Sudan, the Sudanese apparently felt that justice might not have been done.<sup>207</sup> Fearful that the Sudanese President would overturn the judgment of the courts and grant Mrs. Gibbons a pardon, people took to the streets to protest.<sup>208</sup> They expressed their disapproval of Mrs. Gibbons and her insensitivity to their religion.<sup>209</sup> “As witnessed during Friday’s protest, there was a minority who were baying for her blood. Some chanted threats against the 54-year-old primary school teacher from Liverpool. A group of men shouted: “She must be killed by the sword.”<sup>210</sup> Newspaper pictures of Mrs. Gibbons were burned on a makeshift stage at the heart of Martyrs Square.”<sup>211</sup> Those marching believe themselves at the forefront of the efforts to protect the rule of law in Sudan.<sup>212</sup> One would think that the West would cheer these events, yet the mass protests, rather than uplift spirits, caused trouble. We are reassured that the Sudanese masses protest on the basis of the same sentiments that perhaps Ukrainians or Americans might protest in the streets.<sup>213</sup> Thus, we are told, “this kind of sentiment seems to be coming from a small group of hotheads.”<sup>214</sup>

And so a series of ironies that are worth noting play out here. First, it appears that Ms. Gibbons might serve a symbolic role. She is a vehicle through which Sudanese society becomes more accustomed to individual political expression, thus leading to the development of democratic engagement with the state. From a *functional* perspective, there is very little that appears to separate this sort of mass mobilization for the rule of law with

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205. *See id.*

206. *See* Jonah Fisher, *Sudan Leaders Court Western Rage*, BBC NEWS (Dec. 1, 2007), <http://news.bbc.co.uk/2/hi/africa/7122007.stm>.

207. *See* *Sudan Demo Over Jailed UK Teacher*, BBC NEWS (Nov. 30, 2007), <http://news.bbc.co.uk/2/hi/africa/7121025.stm>.

208. *See id.*

209. *See id.*

210. *See* Amber Henshaw, *Sudanese Views Differ in Teddy Row*, BBC NEWS (Dec. 2, 2007), [http://news.bbc.co.uk/2/hi/uk\\_news/7123517.stm](http://news.bbc.co.uk/2/hi/uk_news/7123517.stm).

211. *See id.*

212. *See* *Sudan Demo Over Jailed UK Teacher*, *supra* note 207.

213. *See* Anup Shah, *Public Protests Around The World*, GLOBAL ISSUES (Nov. 7, 2011), <http://www.globalissues.org/article/45/public-protests-around-the-world>.

214. Henshaw, *supra* note 210.

that in European states or the United States for the same purpose;<sup>215</sup> the difference, of course, lies in the normative objectives.<sup>216</sup> The people of Sudan are uncowed, and so have become an integral part of Sudan's development as a theocratic rule of law state in which Muslims are privileged and all others are tolerated to the extent they conform to majority norms. For the American analog, there is Justice Scalia's reminder, in *Employment Division v. Smith*, of one version of the nature of American democracy.<sup>217</sup>

Second, this expression of political will is grounded on an expression of a rule of law system. Of course, the system appears, in its elaboration and application, substantially inconsistent with that of rule of law systems based on normative frameworks other than Islam (at least the form of Islam understood in Sudan, applied by its courts, and on that basis authoritative there as both religion and law). A higher law might suggest that this expression of law in Sudan is not legitimate on a number of grounds.<sup>218</sup> But that notion might be viewed as anti-democratic (imposing different normative systems on the Sudanese).<sup>219</sup>

Third, as a political matter, the treatment (fair) of Ms. Gibbons, ought not to be subject to the intermeddling of foreign powers, especially of one whose history of direct intermeddling in Sudanese affairs is still somewhat notorious.<sup>220</sup> Thus, the spectacle of the UK's interference in the rule of law system in Sudan might appear to be the product of colonial reflex. Even worse, however, it might appear to return us to those days when the civilized nations of the world acknowledged that, in the absence of the acceptance of the world ordering norms of Anglo-American-European ideals, systems were neither authentic nor legitimate nor subject to deference as sovereign.<sup>221</sup> And so it is unsurprising that expressions of Sudanese political will, of democratic values and the defense of the rule of law in its judicial proceedings, should spill out to the streets.

Fourth, the Gibbons affair makes clear to anyone willing to look that there is a managerialism inherent in the deployment of popular expression, even in its transnational context. Just as constitutions tend to contain and manage the internal expression of popular will,<sup>222</sup> so too does transna-

215. See, DONATELLA DELLA PORTA, *MOBILIZING FOR DEMOCRACY: COMPARING 1989 AND 2011* (Oxford University Press, 2014).

216. "Thousands of Sudanese, many armed with clubs and knives, rallied Friday in a central square and demanded the execution of a British teacher convicted of insulting Islam for allowing her students to name a teddy bear "Muhammad."" Associated Press, *Thousands in Sudan Call for British Teddy Bear Teacher's Execution*, Fox News, Nov. 30, 2007, available at <http://www.foxnews.com/story/2007/11/30/thousands-in-sudan-call-for-british-teddy-bear-teacher-execution/>.

217. *Employment Div. v. Smith*, 494 U.S. 872, 876-82 (1990).

218. See Tony Francis, *Separating Law From Morality*, MEDSCAPE BLOG (Aug. 21, 2013, 5:54 PM), <http://boards.medscape.com/forums/?128@@.2a593975!comment=1>.

219. V. Bradley Lewis, *Higher Law and the Rule of Law: The Platonic Origin of an Ideal*, 36 PEPP. L. REV. 631, 631 (2009).

220. See BRITANNICA ENCYCLOPEDIA, <http://www.britannica.com/EBchecked/topic/571417/Sudan/24316/The-British-conquest>.

221. See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 32-114 (Cambridge University Press, 2005).

222. See Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L. REV. 1133, 1139 (2014).

tional “etiquette” tend to contain and manage the effectiveness of national popular expression.<sup>223</sup> People are managed. Democratic expression is managed. The vote is managed. Everyone must behave. And thus, transnational “etiquette” creates a great source of discomfort as democracy plays itself out between systems of management that play by incompatible rules (internally). From this emerges transnational constitutionalism—a means of imposing some level of compatibility in the norm systems of internal governance.<sup>224</sup> But what is also deepened is the language of normative discourse on a global scale; it is this language that permits a discourse between the Sudan and the UK, rather than requiring discussion to occur at the point of a gun.<sup>225</sup> For this, democratic expression is tamed; its holders cede authority upward to small groups invested with authority to stand in for the ultimate power holders, and global groups of political managers develop systems for regularizing their intercourse.<sup>226</sup> This is a curious rule of law—the rule of law for a global *nomenklatura*,<sup>227</sup> constructed in the name of peace.

And so we reach the essence of democracy in Sudan. On the one hand, the West ought to cheer the expression of the power of people, spilling out into the street to express their solidarity with rule of law notions naturalized in their political community. Here is the sort of democratic expression that the West has encouraged, especially where it might deepen the popular participation in politics and engagement in governance.<sup>228</sup> On the other hand, the rule of law system within which Ms. Gibbons found herself enmeshed is not necessarily compatible with core notions of fair play, justice, fairness, and the like as developed.<sup>229</sup> From her perspective, there is no rule of law, and what is for the Sudanese a popular expression of democratic values, might appear to her to be mob rule, of the sort common in the Roman Republic in the days of Clodius and contributing in its own way to the managerialism of Roman Imperial rule.<sup>230</sup>

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223. See H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65, 67–80 (Greenberg, et al., eds., 1993).

224. See Larry Catá Backer, *Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671, 677 (2009).

225. *Id.* at 679.

226. See *Constitutions*, *supra* note 223.

227. For a classic discussion of the Soviet *nomenklatura* as the pattern to which this use references, see Michael Voslenski, *NOMENKLATURA: THE SOVIET RULING CLASS* (Eric Mosbacher trans., 1984).

228. See *Constitutions*, *supra* note 223.

229. *Id.*

230. See Larry Catá Backer, *Race, “The Race,” and the Republic: Reconceiving Judicial Authority After Bush v. Gore*, 51 CATH. U. L. REV. 1057, 1060–61 (2002).

#### IV. Apostasy, Treason, Political Community and Religion in Afghanistan<sup>231</sup>

If Sudan suggests the nature of the tensions with secular liberalism of a privileging model applied against foreigners, the issue of the political dimensions of apostasy suggests its internal dimensions. After its successful campaigns in Afghanistan and Iraq, the Americans, as leaders of a coalition of nations, also played a pivotal role in the making of new constitutions for Afghanistan and Iraq.<sup>232</sup> The Afghani Constitution was adopted in 2004 after the convening of a traditional Loya Yurga, presided by the former Afghani King, and a plebiscite on its adoption.<sup>233</sup> The Iraqi Constitution was adopted October 15, 2005 after the conclusion of unsuccessful three way negotiations between the largest ethnic and religious groups in the country - the Sunnis, the Shi'as, and the Kurds.<sup>234</sup> The Sunnis had refused to accept the proposal as ultimately adopted.<sup>235</sup> Regardless, the constitution was submitted to a vote of the nation on October 15, 2005 and lauded as a great democratic leap by the U.S. Defense department,<sup>236</sup> though its legitimacy appeared highly contested.<sup>237</sup>

These constitutions were different, in important respects, from the great constitutions the Americans helped craft a half a century earlier for Germany and Japan.<sup>238</sup> Like the German and Japanese constitutions, the Iraqi and Afghani constitutions are notable for a firm adherence to the ideal of constitutional legitimacy grounded in the rule of law as both process, (state rule through law), and substance (state organization framed by fundamental substantive principles and values).<sup>239</sup> Indeed, the Afghani

231. Larry Catá Backer, *Constitution and Apostasy in Afghanistan*, LAW AT THE END OF THE DAY, (Mar. 28, 2006), <http://lbackerblog.blogspot.com/2006/03/constitution-and-apostasy-in.html>.

232. See Saad N. Jawad, *The Iraqi Constitution: Structural flaws and Political Implications*, MIDDLE EAST CTR., 1, 7 (Nov. 2013).

233. See J. Alexander Thier, *The Making of A Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557, 570-71 (2007).

234. See Noah Feldman & Roman Martinez, *The International Migration of Constitutional Norms in the New World Order: Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 FORDHAM L. REV. 883, 886, 897-900 (2006).

235. *Id.* "Not only is the security situation tenuous in many Sunni areas, but also, two influential Sunni groups—the Iraqi Islamic Party and the Association of Muslim Scholars—are boycotting the elections." *Milestone elections begin in Iraq: Polls open in country's first free vote in a half-century*, CNN, Jan. 30, 2005, available <http://www.cnn.com/2005/WORLD/meast/01/29/iraq.main/index.html>.

236. "This is a very positive day for the Iraqis and, as well, for world peace. Democracies are peaceful countries. The vote today in Iraq stands in stark contrast to the attitudes and philosophy and strategy of al Qaeda and its terrorist friends and killers. We believe, and the Iraqis believe, the best way forward is through the democratic process." U.S. President George W. Bush's Statement on Oct. 16, 2005, quoted at United States Department of Defense, *Freedom to Vote, Iraqi Constitutional Referendum 2005*, available at <http://www.defense.gov/home/features/2005/Iraq-Referendum/>.

237. See Feldman & Martinez, *supra* note 234, at 886.

238. James Dobbins et al., *AMERICA'S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ* 21, 52-53 (2003) (showing American involvement in the German and Japanese Constitutions).

239. Backer, *supra* note 147, at 47.

constitution purports to incorporate the great principles of international human rights, providing in Chapter 1, Article 7 that the “state shall abide by the UN Charter, international treaties, international conventions that Afghanistan has signed and the Universal Declaration of Human Rights.”<sup>240</sup> The Iraqi Constitution, on the other hand, merely committed the state to the observation of its international treaty obligations.<sup>241</sup>

But unlike the German and Japanese constitutions of the mid-twentieth century, the new constitutions of Afghanistan and Iraq embraced a set of singular transcendent norms—those of Islam. The Iraqi Constitution declares Islam to be both the “official religion of the State” and, more importantly, perhaps, “a foundation and source of legislation.”<sup>242</sup> But then in a great twist of legerdemain it constrains that declaration in three ways: first, laws that contradict the “established provisions” of Islam are forbidden; second, laws that contradict the “principles of democracy” are also forbidden; and third, simultaneously, laws that contradict the rights and basic freedoms stipulated in this Constitution” are forbidden.<sup>243</sup> The Constitution guarantees protection of the Islamic *identity* of the majority, and of the *religious beliefs and practices* of everyone else.<sup>244</sup> Moreover, the Constitution appears to require the state to preserve Iraq’s place as “part of the Islamic world.”<sup>245</sup> It follows, of course, that the Iraq Constitution also requires that the members of the Supreme Court be “experts in Islamic jurisprudence, and legal scholars.”<sup>246</sup>

The Afghan Constitution also provides that “[i]n Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.”<sup>247</sup> This Constitution incorporates an ancient universal system of governance developed within a global community of believers, whose moral and ethical norms, it is argued, should limit the power of states over their subjects, whether or not these subjects are members of the community of believers, as the ultimate interpretive source of political authority.<sup>248</sup> In applying the law, the courts, including the Supreme Court, are obligated to apply the interpretations of a particular jurisprudential school of Islamic Shari’a to decide questions of law.<sup>249</sup> Article 131 of the Afghani Constitution (Chapter 7, article 15) provides that “while processing the cases, the courts apply the provisions of this Constitution and other laws. When there is no provision in the Constitution or other laws regarding

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240. CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), art. 7.

241. Article 8, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

242. *Id.* art. 2.

243. *Id.* art. 2 (First) (A) - (C). None of these key terms are defined, nor is an order of precedence specified.

244. *Id.* art. 2 (Second).

245. *Id.* art. 3.

246. *Id.* art. 92.

247. *Id.* art. 3.

248. Backer, *supra* note 147, at 14.

249. See J. Alexander Thier, *The Making of A Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557, 577-78 (2007) (explaining that the Afghani legal system is heavily influenced by the *sharia*).

ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence [one of the traditional schools of Islamic jurisprudence] and in a way to serve justice in the best possible manner."<sup>250</sup> In addition, Article 131 further provides that "Courts shall apply Shia school of law in cases dealing with personal matters involving the followers of Shia Sect in accordance with the provisions of law. In other cases if no clarification by this constitution and other laws exist and both sides of the case are followers of the Shia Sect, courts will resolve the matter according to laws of this Sect."<sup>251</sup>

Within this framework, apostasy assumes its political character as treason, precisely because religion is a trigger for political privilege, for belonging to the political class with the power to direct and develop the normative political values of the state. In essence, in much of the Muslim world, religious conversion does not just define one's personal beliefs but also one's legal category. "It's like saying you used to be Canadian and now you're Mexican," says Brown. "It's taken to be socially breaking your bond with your community and betraying one for another." The growing role of Islamic law—especially judiciaries' strict interpretation of sharia—is a matter of contention in secular states like Malaysia or Indonesia.<sup>252</sup> And indeed, in states such as Malaysia, which like Iraq and Afghanistan established Islam as the official religion of the state,<sup>253</sup> religious affiliation is used to determine status.<sup>254</sup> The religious character of a state, then may transform membership within a religious community into a marker of citizenship and a gateway defining the nature of the privilege of political participation. It follows that membership in a religious community might have political as well as faith based effects, and that those effects might be subject to control by the state and grounded in the religious framework of the faith based community whose governance structures perform a legal (and secular) function.<sup>255</sup>

Afghanistan provides some evidence of the emerging political character of religious apostasy that is now being considered. The context centers on the actions of the secular authorities in Afghanistan who sought to punish a citizen for the religious crime of apostasy. In a March 28, 2006 article published by the New York Times,<sup>256</sup> Sultan Munadi and Christine Hauser write that this saga began sadly but mundanely enough, when an Afghani

250. CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), art. 131.

251. *Id.*

252. Lionel Beehner, *Religious Conversion and Sharia, Backgrounder*, COUNCIL ON FOREIGN RELATIONS (June 8, 2007) at 3 (quoting in part Nathan Brown of the Carnegie Endowment for International Peace) available at <http://www.cfr.org/malaysia/religious-conversion-sharia-law/p13552#p3>.

253. CONST. OF MALAYSIA art. 3(1).

254. CONST. OF MALAYSIA art. 160 (defining a Malay, in part, as "a person who professes the religion of Islam, habitually speaks the Malay language, [and] conforms to Malay custom").

255. That consequence is explored as a theoretical matter in earlier work. See Backer, *supra* note 13.

256. Sultan Munadi & Christine Hauser, *Afghan Convert to Christianity is Released, Officials Say*, N.Y. TIMES, MAR. 26, 2006, AT A3.

man who had left the country and converted from Islam to Christianity returned to Afghanistan seeking custody of his daughters, only to have the family tell the authorities that he was an apostate. Though apostasy is not a subject of the Afghani civil law, it is a crime punishable by death under traditional Shari'a principles. Given the provisions of the Afghani constitution, it makes perfect sense for the state authorities to seek to enforce the religious law that serves as the foundation of state authority. Ironically, Afghanistan will not see this case through to execution. It seems that, bowing to pressure from Christian majority states, the Afghani courts would not see the case through to completion. Suggesting both procedural defects and the sense that only mental illness could explain apostasy (in the form of conversion from Islam to Christianity), the courts returned the case to prosecutors. This postpones but does not answer the question posed. It does, however, serve as a warning that theocratic democratic states will act in ways inconsistent with the norms of secular constitutional states in the West. While it may be possible to harmonize the *results* under different systems of constitution making, it is likely that the methodologies of constitutional interpretation and the basis on which similar results might be reached will be based on very different approaches to law. That stands to reason, of course, where harmonization is sought between systems whose foundational norm structures may be incompatible. In the case of an Islamic Republic, apostasy from Islam might be deemed the equivalent of a rejection of the fundamental ordering of the state, and, as such, as a political and not a religious act. The approach might have more in common with understandings of class within Marxist systems than with the human rights foundationalism of secular international institutional law.<sup>257</sup>

That this result is both understood by and a deliberate product of American constitutional ingenuity, or at least of its sponsorship, should also come as no surprise. People who listened closely to President Bush's second inaugural address would have heard an American willingness to permit experiments in democracy. As I have written elsewhere:<sup>258</sup> drawing from universal principles from the founding of the Republic, as well as the eternal "truths of Sinai, the Sermon on the Mount, the words of the Koran, and the varied faiths of our people," the rules of behavior between, among, and within nations will be grounded in human freedom and democracy. Democracy and human dignity provide a framework that limits the power of any political community—nation, state, international organization, or the like—to organize its society. Within that set of principles, it would follow that every nation has the right to choose its own path to freedom and democracy, and every other state has the authority to help its neighbors

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257. Mao Zedong, *On the People's Democratic Dictatorship*, Selected Works of Mao Zedong, June 1949, available at [http://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4\\_65.htm](http://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm).

258. Larry Catá Backer, *President Bush's Second Inaugural Address: A Revolutionary Manifesto For International Law in Chaotic Times*, LAW AT THE END OF THE DAY, April 1, 2006, available at <http://lbackerblog.blogspot.com/2006/04/president-bushs-second-inaugural.html>.

achieve and maintain compliance with these standards. But no community outside of the nation should have the power to choose or govern the choices made by any nation within the broad framework of liberty and democracy. Again, as President Bush once suggested: “[f]reedom, by its nature, must be chosen, and defended by citizens, and sustained by the rule of law and the protection of minorities. And when the soul of a nation finally speaks, the institutions that arise may reflect customs and traditions very different from our own. America will not impose our own style of government on the unwilling. Our goal instead is to help others find their own voice, attain their own freedom, and make their own way.” Although this must be read with a certain irony, the insight is useful. But the irony also functions as a mechanism through which the United States might expend great energy to establish and protect a set of normative premises for the organization of states around religion, and for the exercise of democracy within those constraints, that might be incompatible with the core political premises under which the United States itself is organized.

Perhaps Afghanistan provides a laboratory for a faith-based constitutionalism with implications for the future of constitutional interpretation in this country. Perhaps the United States was unprepared to advise a nation, heir to a complex and rich religion-based jurisprudence, on a means of blending those traditions with the modern traditions of international human rights norms that limit constitutional authority. Perhaps the social-norm state must inevitably prevail over a law-state set of system rules, as the two may be incompatible. There may be a strong relationship between the context in which Asa Bibi became entangled within the webs of the law-state/norm-state that were also encountered by Abdul Rahman. Whatever the context, it will only be a matter of time before another Abdul Rahman commits apostasy, or another person commits an offense against Islam where the punishment offends international notions of human rights.<sup>259</sup> More likely, however, may be the institutionalization of faith-based constitutionalism within constitutional structures of religious mechanisms for determining not merely apostasy, but also membership in religious communities. Thus, the answer to the issue of Abdul Rahman may not lie in the constraints of apostasy, but rather in the legalism of religious courts with authority to determine the religious status of individuals. This appears to be the way the Muslim majority Malay Federation appears to be fashioning its constitutional order. In a recent decision, Malay courts determined that the right of a Malay citizen to have her identity card changed to reflect a conversion was to be determined under the rules of the Islamic tribunals whose faith she had purportedly renounced.<sup>260</sup>

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259. For an interesting analysis in the context of Iraq, see Timothy G. Burroughs, Note: *Turning Away From Islam in Iraq: A Conjecture as to How the New Iraq will Treat Muslim Apostates*, 37 HOFSTRA L. REV. 517 (2008).

260. Lina Joy's conversion to Christianity not accepted by Malaysian court, Catholic News July 2007, available at [http://catholicnews.sg/index.php?option=com\\_content&view=article&id=2232:lina-joy's-conversion-to-christianity-not-accepted-by-malaysian-court&catid=100&Itemid=473](http://catholicnews.sg/index.php?option=com_content&view=article&id=2232:lina-joy's-conversion-to-christianity-not-accepted-by-malaysian-court&catid=100&Itemid=473) (“On May 30 the Federal Court, which is the highest



“You can’t at whim and fancy convert from one religion to another,” Federal Court Chief Justice Ahmad Fairuz Sheikh Abdul Halim said in delivering judgment in the case, which has stirred religious tensions in the mainly Muslim nation.

He said the civil court had no jurisdiction in the case and that it should be dealt with by the country’s Islamic courts.

“The issue of apostasy is related to Islamic law, so it’s under the sharia court. The civil court cannot intervene.”<sup>261</sup>

And thus, though the criminalization of apostasy may only provide the more extreme example of the issue, the Lina Joy case suggests that the fundamental nature of the importance of apostasy is as a civil matter, where states organize their political life around a privileged religion. In those contexts, it remains fundamental that religious affiliation and citizenship are closely tied.

## V. The Interpretive Community in Theocratic States—Iran and Its Priestly Caste<sup>262</sup>

Privileged participation has a further consequence, one hinted at in the apostasy case in Afghanistan; it tends to structure and constrain the way in which legal interpretation may be undertaken and further constrain those legitimately vested with a legitimate voice to engage in those efforts. The English word pretext is said to derive from the Latin word *praetextum*—to disguise. But *praetextum* is the neutered past participle of an action word—*praetexere*—a word suggesting a weaving as an act of disguise. Pretext thus embraces a notion of altering reality, of weaving a framework of reality for a particular purpose. That objective serves both as cloak that covers another reality and as its substitute. Pretext is history in action. It is the ultimate effort of humans to become the managers of their own history. And it is invariably a sloppy and badly managed affair. It is thus the ultimate *hubris* (ἕβρις)—both pathetic and inevitable among a certain group of people hurtling toward their own destiny. But that is a lesson that human social, political, ethnic, and religious communities tend to believe is the fate of others and not themselves. Each, in turn, weaves their own destiny (usually on the backs of their opponents), secure in the knowledge that they (unlike their predecessors) will “get it right.”

But *hubris* also suggests an intimate connection between the managed disguise inherent in “pretext” and impiety. Where religious communities engage in pretext, it, and especially its leaders, engage in an arrogance that is also sin. There is a certain arrogance against the Divine order when tak-

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civil court in Malaysia, decided that only the Islamic Court may remove the word “Islam” from her identity card.”).

261. Jalil Hamid & Syed Azman, *Malaysia’s Lina Joy Loses Islam Conversion Case*, REUTERS, May 30, 2007, available at <http://www.reuters.com/article/2007/05/30/us-malaysia-religion-ruling-idUSSP20856820070530>.

262. Originally *Pretext and Piety in Iran*, LAW AT THE END OF THE DAY, Dec. 11, 2009, available at <http://lbackerblog.blogspot.com/2009/12/pretext-and-impiety-in-iran.html>.

ing pretext in this context. It serves as a manifestation of the idea that humans can substitute themselves for the Divine in the ordering of the affairs of the world. Pretext serves as a challenge to God; as understood in these communities, it is the acting out of a challenge to the Divine representation in those sects that screams: "I know better than God what is or shall be."

It is thus especially poignant when the leaders of religious communities manipulate the pious, in the name of their Divinity, through pretext to sin, to become an insult to the community of believers and to the prophets whose words and lives they purport to uphold. The Iranian religious community had developed an interesting variation on constitutional government grounded in the religious principles of Shi'a Islam.<sup>263</sup> The Iranians are not unique. The Malays have also sought to weave impiety with corruption as the basic language of political discourse.<sup>264</sup>

Still, having spent three decades perfecting an alternative to the communal constitutionalism of the world community, it is now in danger of losing power to factions of the religious and pious who owe the progeny of the founders no personal loyalty. That is the essence of democracy, even theocratic democracy. But it appears that this consequence of the constitutional state that the religious elite created is now unacceptable to a portion of that very elite when deployed against its own grip on power. The consequence was an election of highly contested legitimacy, at least within Iran, which seemed to result in one faction keeping power.<sup>265</sup> This produced a crisis that pitted factions within the ruling clerical community and their adherents outside of that community against each other.<sup>266</sup> This crisis forced factions within the ruling clerical community and their adherents outside of that community against each other.<sup>267</sup> The religious elite thus constructed a constitutional state that incorporated the religious values that they purported to maintain.<sup>268</sup> The elite then faced the question of how they could retain power without appearing to overturn the constitutional order on which the legitimacy of their political authority (and thus also to some extent their religious authority) rested.

Pretext and impiety provide the answer. The story, as relayed by the BBC, suggests that dirty politics have a religious context in Iranian elections, and in a manner reshaped by the religious framework within which political tactics now fall:

Iran's Supreme Leader has accused the opposition of breaking the law by insulting the Islamic Republic's founder, Ayatollah Ruhollah Khomeini.

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263. See, Backer, *supra* note 13.

264. See Larry Catá Backer, *Emasculated Men, Effeminate Law in the United States, Zimbabwe and Malaysia*, 17 *YALE J. LAW AND FEMINISM* 1 (2005).

265. Paul Reynolds, *Iran: Where Did All the Votes Come From?*, BBC NEWS ONLINE, June 23, 2009.

266. *Iran Opposition Protestors Clash with Security Forces*, BBC (Dec. 7, 2009, 21:59 GMT), [http://news.bbc.co.uk/2/hi/middle\\_east/8398615.stm](http://news.bbc.co.uk/2/hi/middle_east/8398615.stm).

267. *Id.*

268. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN], ch. 1, art. 12, 13, 14, 1358 [1980].

Ayatollah Ali Khamenei urged opposition leaders to identify “those behind the insult to Imam Khomeini.” The remarks center on an alleged incident during which a poster of Imam Khomeini was torn up. Opposition leaders say the alleged incident - shown on state television - has been doctored. The opposition has been refusing to endorse the result of the presidential election in June which returned President Mahmoud Ahmadinejad to power for a second term. They allege the poll was widely rigged. The election dispute is now radicalising both sides,” says the BBC’s Tehran correspondent, Jon Leyne.<sup>269</sup>

The religious elite is set to use accusations of impiety against their political opponents.<sup>270</sup> Legal and constitutional discourse is now possible only through the veil of religious discourse. The Pakistani blasphemy model is inverted;<sup>271</sup> the priest has become the judge. Within Iran these religious judges, now presiding over legal discourse, would use a televised image of a ripped poster with the image of a man as the pretext for substantial misapplication of the constitutional structure that they purported to create. They appear driven to rip the Constitutional fabric of the Islamic Republic in the same way they ripped apart the image of the late Ayatollah. They intend to preserve their earthly power even as they weaken the theological underpinnings of the Republic created a generation ago. The Ayatollah Khamenei appears set to substitute the rule of individuals for the divine mandate that the country purportedly charges him with protecting. “In his remarks, broadcast on state TV on Sunday, Iran’s Supreme Leader said: ‘[s]ome people created riots and encouraged people to stand against the system . . . paving the way for our hopeless enemies to undermine the Islamic revolution.’ He urged opposition leaders to return to ‘the right path.’ His warning on the alleged insult to the republic’s founder was echoed by a statement issued by the Revolutionary Guards.”<sup>272</sup> He will tear the constitutional state in pieces to mirror the torn image of the late Ayatollah. There is irony as well as impiety in this warning, and this

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269. *Iran Opposition Accused of Insulting Founder Khomeini*, BBC (Dec. 13, 2009, 17:35 GMT), [http://news.bbc.co.uk/2/hi/middle\\_east/8410558.stm](http://news.bbc.co.uk/2/hi/middle_east/8410558.stm).

270. And not just in Iran. Consider the situation in Indonesia, which also adopted a blasphemy law overseen by an Islamist Board, Bakor Pakem, that sits in the Attorney General’s office during investigations of religious offenses. “In February 2006, 40 Sunni clerics and four police officers signed a public statement, declaring that Shia Islam was heretical. The statement mentioned two meetings with Shia clerics, in which the Shia were told to return to “real Islam” but refused to do so. The statement also asked law enforcement agencies to enforce the blasphemy law against Tajul Muluk.” *Indonesia: Shia Cleric Convicted of Blasphemy*, HUMAN RIGHTS WATCH (July 12, 2012), <http://www.hrw.org/news/2012/07/12/indonesia-shia-cleric-convicted-blasphemy>. Tajul Muluk, a Shia cleric, was then sentenced to two years in prison for blasphemy and the “Ministry of Religious Affairs in Sampang also declared they will ‘supervise’ hundreds of Shia to learn Sunni Islam.” *Id.* Atheists are not spared. “In Dharmasraya, West Sumatra, Bakor Pakem led the prosecution of Alexander An, an administrator of the ‘Minang Atheist’ Facebook group. He was eventually acquitted of blasphemy but in June 2012 the Sijunjung court sentenced him to two-and-a-half years in prison and a fine of IDR100 million (around US\$11,000), for inciting public unrest via his Facebook account.” *Id.*

271. See discussion *supra* Part I.

272. *Iran Opposition Accused of Insulting Founder Khomeini*, BBC (Dec. 13, 2009, 17:35 GMT), [http://news.bbc.co.uk/2/hi/middle\\_east/8410558.stm](http://news.bbc.co.uk/2/hi/middle_east/8410558.stm).

dynamic was captured well by Grand Ayatollah Montazeri, an opponent of the ruling religious clique, when he suggested that, “[t]he current decisions, which are being taken by the minority faction that is in power, are mainly against the interests of the country, and are not in keeping with Islamic principles and values.”<sup>273</sup> But more importantly, the Supreme Leader’s statement suggests that a legitimately constitutional theocratic state may not be possible, even on its own terms.

The torn image of the face of the late Ayatollah Khomeini suggests pretext, hubris, impiety, and blasphemy. But whose pretext, hubris, impiety, and blasphemy is at issue here? As the Iranian state turns its governmental apparatus against its own, it continues down a path that risks deepening the crisis of legitimacy in a thirty year-old experiment in theocratic constitutional ordering.<sup>274</sup> And so the Iranian clerical class practices pretext, weaving together action and symbol, processed through law, to disguise a less worthy set of objectives behind a facade of lawfulness. With this *praetextum*, certain elements of the Iranian ruling caste have taken their destinies in their own hands. As the Greeks remind us, the hubris implicit in political pretext can only end badly.<sup>275</sup> Those who seek to control destiny through this weaving will find themselves woven into a greater design whose parameters are both beyond their control and in which their fates are in part determined by their pretexts. This problem of pretext is situated within a larger one—the conflation of sexual and religious corruption as a mechanism for engaging in political contests.<sup>276</sup> The battles within the Muslim Malay political elite—especially the battle between the then current prime minister and his then putative successor, Anwar Ibrahim, who accused the government of Mahatir of corruption—played out within the pretext of sexual misconduct grounded in notions of religious corruption.

In Malaysia, we come closest to the old connection between the form of religious confession within Islam and that of social confession within the judicial field. The Anwar trail was notorious for the fervor with which the government sought to extract confession and impose penance. Law, in the form of the courtroom, served as the site of a great morality play in which corruption was exposed in all of its manifestations, in which the tie between moral and political corruption was highlighted, and in which the value of appropriate conduct was emphasized, while the fate of the transgressor was magnified. Anwar provided the perfect victim for this ritual. Anwar was exposed precisely because he reflected critical contradictions -

273. Edward Stourton, *Ahmadinejad’s Theological Foes*, BBC (Oct. 19, 2009, 12:59 GMT), [http://news.bbc.co.uk/2/hi/middle\\_east/8314126.stm](http://news.bbc.co.uk/2/hi/middle_east/8314126.stm)

274. See, e.g., *Abdul Qader Fayeze Report: The Iranian Presidential Elections: Internal Challenges*, Critical Issues, AL-JAZEERA CTR. FOR STUDIES, (March 24, 2013), available at <http://studies.aljazeera.net/ResourceGallery/media/Documents/2013/3/24/2013324103038205734Iranian%20Presidential%20Elections.pdf>.

275. See, e.g., Euripides, *Electra* (written 420-410 B.C.E.) (E.P. Coleridge, trans., Classics, MIT) available at [http://classics.mit.edu/Euripides/electra\\_eur.html](http://classics.mit.edu/Euripides/electra_eur.html) (relying on the sanctity of motherhood to trample it).

276. See Backer, *supra* note 264.

a moralist in a government he accused of immorality, a man committed to Islam condemning intolerance in religious matters. The trial was theater of a sort—as effective a means of communicating norms as the posting of judicial stories on the Internet.<sup>277</sup>

Within these contexts, what becomes clear is the way that, within polities in which religion is privileged, there appears to be a tendency to substitute the language of religion for that of politics, and to substitute the priest (cleric) for the politician. Effectively, Iran, and to some extent Malaysia, suggests the ways in which shifts in discursive forms shift political power. Within a democratic polity, especially one with minority religious populations, the effects can be profound. If political legitimacy is grounded in religious legitimacy, and its discursive forms, political and religious impiety merge, legitimacy will depend on the adoption of the forms of majority religious behaviors and its discursive forms, and on reliance on majority religious leaders. The result is a very distinct form of representative democracy, one unsuitable for religiously plural states.

## VI. Echoes of Religious Privilege in Pluralist States: The Contradictions of Privilege and Participation<sup>278</sup>

We return to the West, where the forms and mechanics of religious political engagement evidence the tendencies described in the prior sections, but which are expressed within the forms and traditions of secular liberalism. The core of the existential crisis for secular liberalism reduces itself to one of privilege and participation. Two recent events, while appearing to be completely unrelated, suggest that law, culture, politics, and religion have begun to interact in ways that are producing significant changes in the socio-cultural foundations of Europe and the United States. Each involves cultural objects. Both cultural objects are highly regarded by the social elites in the states in which they appear. In both cases, the objects are important representations of the production of high culture in the West. In neither case was this disputed. Each event, however, involves the intersection of religious sensibilities with these important cultural objects. In both cases, highly important (and in one case almost venerated) cultural objects were abandoned or rejected in favor of another set of values.

The first event occurred in Germany. On September 25, 2006, the Deutsche Oper, one of the most respected opera houses in the Western world, announced that it was eliminating performances of the opera *Idomeneo* for the season and would replace it with two other operas “over

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277. *Id.*, at 154.

278. Larry Catá Backer, *Offending Religion*, LAW AT THE END OF THE DAY (Sept. 30, 2006, 10:47 PM), <http://lbackerblog.blogspot.com/2006/09/offending-religion.html>; Larry Catá Backer, *Robert C. Blitt on Tunisia: Springtime for Defamation of Religion*, LAW AT THE END OF THE DAY (Aug. 17, 2012, 11:16 PM), <http://lbackerblog.blogspot.com/2012/08/robert-crobert-blitt-on-tunisia.html>.

concerns [*Idomeneo*] could enrage Muslims and pose a security risk.”<sup>279</sup> This is no ordinary work of popular culture. The opera, written by Mozart in the 1780s, is considered one of the finest examples of its kind ever to have been written. It has been performed all over the world.<sup>280</sup> It is one of the foundational works of Western culture music.<sup>281</sup> But what is culture today when the stakes of cultural production have changed? The reason the opera was cancelled was simple: “[t]he decision was taken after Berlin security officials warned that putting on the opera as planned would present an ‘incalculable security risk’ for the establishment.”<sup>282</sup> It seems that “[i]n the production, directed by Hans Neuenfels, King *Idomeneo* is shown staggering on stage next to the severed heads of Buddha, Jesus, Poseidon and the Prophet Mohammad, which sit on chairs.”<sup>283</sup> The basis of the determination of the existence of a threat “was prompted by an anonymous phone call in June,”<sup>284</sup> although the police had “no evidence of a specific threat.”<sup>285</sup> While a number of prominent politicians condemned the decision, Mozart’s *Idomeneo* did not grace the stage of the opera house in Berlin that year.<sup>286</sup> “Has it come so far that we must limit artistic expression?” [deputy Parliamentary Speaker Wolfgang Thierse asked]. “What will be next?”<sup>287</sup>

Surprisingly, the answer comes from Dallas, Texas. There, a “popular art teacher with 28 years in the classroom [was] out of a job after leading her fifth grade classes last April [2006] through the Dallas Museum of Art.”<sup>288</sup> The Dallas Museum of Art does not have a reputation for exhibiting works of low culture.<sup>289</sup> Indeed, it prides itself as one of the premiere showcases of the best artistic work of Western civilization. The Dallas Museum of Art “recently celebrated one hundred years of connecting art and people. Established in 1903, the Museum features an outstanding collection of more than 23,000 works of art from around the world, from ancient to modern times.”<sup>290</sup> Moreover, the Dallas Museum is supported

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279. *Mozart Opera Cancelled over Severed ‘God’ Heads*, CANADA.COM, (Sept. 27, 2006), <http://www.canada.com/nationalpost/news/story.html?id=8379aa1f-2100-4605-9ffd-2177103e8ecd>.

280. See Donal Henahan, *Met Opera: ‘Idomeneo’*, N.Y. TIMES (Oct. 15, 1982), <http://www.nytimes.com/1982/10/15/arts/met-opera-idomeneo.html>.

281. *Id.*

282. *Mozart*, *supra*, note 279.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Opera Canceled Over Depiction of Muhammad*, N.Y. TIMES, Sept. 27, 2006, available at [http://www.nytimes.com/2006/09/27/world/europe/27germany.html?\\_r=0](http://www.nytimes.com/2006/09/27/world/europe/27germany.html?_r=0). (“The cancellation of the performances fanned a debate in Europe about whether the West is compromising values like free expression to avoid stoking anger in the Muslim world.”).

287. *Mozart*, *supra* note 279.

288. Ralph Blumenthal, *Museum Field Trip Deemed Too Revealing: Texas Art Teacher Suspended After a Parent Complains*, N.Y. TIMES, Sept. 30, 2006, at A9, available at <http://www.nytimes.com/2006/09/30/education/30teacher.html>.

289. See generally *Art*, DALLAS MUSEUM OF ART, <https://www.dma.org/art>.

290. *Dallas Museum of Art*, SAATCHI GALLERY, <http://www.saatchigallery.com/museums/museum-profile/Dallas+Museum+Of+Art/131.html>.

not only by private donations but is intimately tied to local government; it is “supported in part by the generosity of DMA Partners and donors, the citizens of Dallas through the City of Dallas Office of Cultural Affairs, and the Texas Commission on the Arts.”<sup>291</sup> “Over the past decade, more than half a million students. . . have toured the museum’s collection.”<sup>292</sup> But all of this meant nothing in the face of parental outrage. And what was the source of this outrage? The suspension letter to the teacher stated that “[d]uring a study trip that you planned for fifth graders, students were exposed to nude statues and other nude art representations.”<sup>293</sup> And, indeed, they may well have been exposed to, for example, the “marble torso of a Greek youth from a funerary relief, circa 330 B.C.”<sup>294</sup>

In both cases, important institutional actors took extreme action by suspending a teacher and canceling an opera because of a single complaint or a single threat based on offense. In both cases, high culture fell to single expressions of offense or threats of violence based on such offense. In both cases important institutional actors may disavow the importance of culture in the face of offense. In a sense there is an inversion here. Where once one might speak of socially approved offense in the face of cultural boorishness, now the reverse seems to be true—there is a move to a socially approved sense of offense in the face of the “arrogance” of high culture to reflect something other than the boorish tastes of the least educated, or of cultural strangers. Where culture becomes inverted, will law not quickly follow? We might find it galling sometimes to be led from the top, but consider the effects of being led from the bottom; we may not like where we wind up.<sup>295</sup> And indeed, such an inversion might portend decadence more than cultural vigor in culture as well as in law.<sup>296</sup>

When a political community abandons its own culture, when it ceases to affirm its own ideals expressed through cultural symbols—pictures, speech, music and the like—it begins to express an altogether different value: a desire for self-destruction or its acceptance.<sup>297</sup> The events I relate above do not appear connected, yet they are the product of the same set of impulses. That impulse was nicely summarized recently in a criticism of the Western response to the violence that accompanied the so-called Danish cartoon controversy. Professor Hassen is critical in an interesting way:

The real hypocrites in the debate were liberal intellectuals, too many to name, who spent years denouncing Christian fundamentalist demands for prayer and the teaching of evolution, in schools, the censorship of books and films, and limits on abortion, only to cave to fundamentalist Muslim

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291. DALLAS MUSEUM OF ART, <https://www.dma.org>.

292. Blumenthal, *supra* note 288.

293. *Id.*

294. *Id.*

295. See, e.g., JOHN FISKE, UNDERSTANDING POPULAR CULTURE (New York: Routledge 1989).

296. See, e.g., HERBERT J. GANS, POPULAR CULTURE AND HIGH CULTURE (rev. & updated) 55-63 (New York Basic Books, 1999).

297. See, e.g., Claudio Lomnitz, *Decadence in Times of Globalization*, 92(2) Cultural Anthropology 257-67 (1994).

demands for the introduction of Shari'a law, for separate swimming classes for boys and girls, and—in the Danish case—for the respect of religious rules not only by members of the religious group but by the society at large. . . . That liberal intellectuals could be so absolutist in their dismissal of demands made by Christian fundamentalists but so apologist and relativist in their indulgence of those made by Muslim fundamentalists beggars belief.<sup>298</sup>

Clearly Professor Hassen suggests another wrinkle in the crisis of liberal secularism, one evidenced by the quite distinct treatment of non-Western religions from Christianity and Judaism. Beyond the underlying racism is both a fear of violence that cannot be controlled effectively, and a perverse multicultural sensibility in which “foreign” or “exotic” religions are privileged to a far greater extent than indigenous religion.<sup>299</sup> This form of what he characterizes as liberal hypocrisy may also be shared by a substantial portion of the political and media elites in the West.<sup>300</sup> Indeed, disciplining Western norms through an application of an offense or provocation standard tends to serve as a means of marginalizing one set of values for another, which might in turn trigger a violent response.<sup>301</sup> Indeed, inversion tends to follow, as the Turkish President, in the wake of the Charlie Hebdo killings, suggested that the magazine itself engaged in acts of terror.<sup>302</sup>

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298. Randall Hassen, *The Danish Cartoon Controversy: A Defense of Liberal Freedom*, European Union Studies Association (EUSA) Review 19(2):1, 5 (Spring 2006), available at [http://homes.chass.utoronto.ca/~rhansen/Current\\_Projects\\_files/danishcartoon.pdf](http://homes.chass.utoronto.ca/~rhansen/Current_Projects_files/danishcartoon.pdf). (“Portraying the prophet may be prohibited for Muslims, but it is not and cannot be for anyone else. Muslims may ask that others respect their religious precepts, but they cannot demand it any more than observant Jews can demand that their fellow citizens not shop on Saturdays or Christians can demand that non-believers respect their sexual mores.”).

299. See, e.g., *id.*

300. Thus, for example, when commenting on the 2015 executions of individuals at Charlie Hebdo in Paris, Pope Francis I, echoing comments from others, suggested that “while violent reaction is never the answer, people should not be making fun of other people’s faith. The pope made these comments while on a plane with reporters heading to the Philippines. Referring to an aide who organizes trips for him, Pope Francis said, “You cannot react violently, but if Mr. Gasparri, my great friend, says a curse word against my mother, he can expect a punch, this is normal.”“ *Pope on Charlie Hebdo: It’s a Provocation to Make Fun of People’s Faith*, MEDIA, Jan. 15, 2015, available at <http://www.mediaite.com/online/pope-on-charlie-hebdo-its-a-provocation-to-make-fun-of-peoples-faith/>. See also, Richard Falk, *Pope Francis, Salman Rushdie and Charlie Hebdo*, AL JAZEERA, Jan. 17, 2015, available at <http://www.aljazeera.com/indepth/opinion/2015/01/pope-francis-salman-rushdie-char-20151176461502319.html>.

301. That, certainly might be one way of reading the Turkish Prime Minister’s call for Western restraint by seeking to suppress reprinting of Charlie Hebdo cartoons by a Turkish press. “Prime Minister Ahmet Davutoğlu has strongly criticized daily Cumhuriyet for reprinting the Charlie Hebdo cartoon featuring the Prophet Muhammad, saying freedom of expression “does not grant anybody the right to insult another’s beliefs. Cumhuriyet’s move to print a selection of Charlie Hebdo caricatures has “nothing to do with freedom of expression,” Davutoğlu said on Jan. 15. *Turkish PM Calls Reprinting of Charlie Hebdo Cartoons ‘Deliberate Provocation’*, DAILY NEWS, Jan. 15, 2015, available at <http://www.hurriyetdailynews.com/turkish-pm-calls-reprinting-of-charlie-hebdo-cartoons-deliberate-provocation.aspx?pageID=238&nid=76983&NewsCatID=338>.

302. “Turkish President Recep Tayyip Erdogan has lashed out at Charlie Hebdo, the French satirical magazine, for its “provocative” publications about Islam, saying the



The point is easily extended to the Berlin opera's unfortunate decision to cancel a performance of a venerable Mozart opera. But it applies with equal force to the self censorship and fear that is generated by domestic fundamentalists who would undo centuries of cultural development, development on which their political, social, moral, and even religious privilege rests. The same decadence that drives the director of the Berlin opera to cancel an operatic performance also drives a school administration to essentially forbid student viewing of representational art that has spanned millennia. In one case, the West denies itself a continued renewal of its cultural ties to music and expression, and in the other the West forbids the education of its children in its own cultural fundamentals. A society that rejects its own cultural basis for existence, or a community that forbids its children an education in its own past, is one that is easy prey for other political and cultural communities that have a greater attachment to their own identity. Western society appears to value this less in the 21st century; perhaps it suggests a rejection of those core values inherent in its own culture in favor of something else in the long cultural struggle that became increasingly ferocious at the turn of this century.<sup>303</sup>

It is also worth considering whether the conceptual solicitude for religion in pluralist societies creates an impossible situation, one grounded in the conflation between the political sanctity of belief and its protection with the freedom of institutional actors, including religious institutional actors, to participate freely in the political life of the state. Where an institutional actor and its adherents may participate in the political life of the state for the purpose of transposing and protecting its religious views, practices, beliefs, and the like, but may also take advantage of legal protections based precisely on the religious beliefs, practices etc. that are the subject of their political agenda, then the existential crisis is complete.<sup>304</sup> The secular liberalism that produced this contradiction will necessarily collapse into the politics of religious privilege within the apparatus of the state. One gets a sense of this from the visit of then-Pope Benedict XVI to Latin America in 2007.<sup>305</sup>

On May 10, 2007, Pope Benedict XVI traveled to Brazil.<sup>306</sup> The visit was a homecoming, though not in the usual sense. While he had not visited

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weekly paper incites hatred and racism . . . 'This is not called freedom. This equates to wreaking terror by intervening in the freedom space of others. We should be aware of this. There is no limitless freedom,' he said." Erdogan lashes out at Charlie Hebdo magazine, AL JAZEERA, Jan. 16, 2015, available <http://www.aljazeera.com/news/middleeast/2015/01/erdogan-lashes-out-at-charlie-hebdo-magazine-201511616465336139.html>.

303. See, e.g., JAMES DAVIDSON HUNTER, *CULTURE WARS: THE STRUGGLE TO CONTROL THE FAMILY, ART, EDUCATION, LAW AND POLITICS IN AMERICA* (New York, Basic Books, 1992); JONATHAN ZIMMERMAN, *WHOSE AMERICA? CULTURE WARS IN THE PUBLIC SCHOOLS* (Harvard University Press, 2005).

304. See generally Backer, *supra* note 5.

305. See generally Larry Catá Backer, *Law: Benedict XVI and the Constitution of Political States*, LAW AT THE END OF THE DAY, (Jun. 7, 2007), <http://lbackerblogger.blogspot.com/2007/06/law.html>.

306. See *Papa: políticos pró-aborto podem ser excomungados*, O GLOBO (May 10, 2007), <http://g1.globo.com/Noticias/PapanoBrasil/0,,MUL33664-8524,00.html>; *Ministro diz*

Brazil in person, the Pope had visited Brazil in an intellectual sense. His visit provided an opportunity to tour the site of Benedict's greatest triumph as Cardinal Ratzinger about 30 years earlier—a triumph that might well have secured him his future at the Vatican.<sup>307</sup>

Brazil had been a hotbed of liberation theology, a form of engagement between Catholicism, social action, and the state that had energized many parts of Latin America in the 1970s and 1980s.<sup>308</sup> In some parts of Latin America it caused its adherents, priests as well as lay Catholics, to challenge not only the secular leadership of the state, but the leadership of the Church itself.<sup>309</sup> Benedict's contribution to the dissipation of that movement within Catholicism, at least as an intellectually vibrant aspect of Catholic social thought, and the suppression of its foundational norms as heretical, is well-known.<sup>310</sup> The basis of Ratzinger's attack was that liberation theology was unacceptable not because of its inherent totalitarianism but because of its essentially Godless totalitarianism. "The message of the Gospel cannot be reduced to politics. Nevertheless, the Gospel has certainly political consequences," the Cardinal explained.<sup>311</sup> These efforts, combined with his earlier theological work, helped cement his ties with the new Pope John Paul II,<sup>312</sup> who was himself on a crusade against the godless totalitarianism in Poland and the rest of the Stalinist Soviet Bloc<sup>313</sup> that ultimately may have played a role in his securing the bishopric of Rome.<sup>314</sup>

But the attack on Liberation Theology was also grounded in more positive aspects. These principally touched on issues of solidarity within the communion of the faithful.<sup>315</sup> The meaning, exercise, and obligations of that communion, and the penalties for rejection of faith, of living in solidar-

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*não temer excomunhão*, O GLOBO, (May 9, 2007), <http://oglobo.globo.com/pais/noblat/posts/2007/05/09/ministro-diz-nao-temer-excomunhao-57512.asp>.

307. See GEORGE WEIGEL, *WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II* 459-64 (Cliff Street Books, 1999).

308. Two of the foundational works of the movement were GUSTAVO GUTIERREZ, *A THEOLOGY OF LIBERATION: HISTORY, POLITICS, AND SALVATION*, 15th anniversary ed., (Caridad Inda and John Eagleson, trans., Maryknoll: Orbis, 1988; 1st ed., Maryknoll: Orbis, 1973) (Originally published as *Teología de la liberación: Perspectivas* (Lima: CEP, 1971) and LEONARDO BOFF AND CLODOVIS BOFF, *INTRODUCING LIBERATION THEOLOGY* (Maryknoll: Orbis, 1987).

309. For a history of Liberation theology, see, e.g., CHRISTIAN SMITH, *THE EMERGENCE OF LIBERATION THEOLOGY: RADICAL RELIGION AND SOCIAL MOVEMENT THEORY* 150-222 (University of Chicago Press, 1991).

310. See Joseph Cardinal Ratzinger & Alberto Bovone, *Instruction on Certain Aspects of the Theology of Liberation*, CONGREGATION FOR THE DOCTRINE OF THE FAITH (Aug. 6, 1984), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19840806\\_theology-liberation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19840806_theology-liberation_en.html).

311. *Cardinal Ratzinger To Review Liberation Theology In Mexico*, CATHOLIC CULTURE .ORG (May 9, 1996), <http://www.catholicculture.org/news/features/index.cfm?recnum=474>.

312. See, e.g., George Weigel, *WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II* 244, 442-44 (Cliff Street Books, 1999).

313. See, e.g., *id.* at 459-464; Jane Barnes & Helen Whitney, *John Paul II and the Fall of Communism*, *PBS Frontline*, available <http://www.pbs.org/wgbh/pages/frontline/shows/pope/communism/>.

314. *Id.*

315. See Ratzinger & Bovone, *supra* note 310.

ity with the faithful, were well-developed in Ratzinger's attack.<sup>316</sup> The success of these attacks can be seen today in Brazil: "[i]n Brazil, though, liberation theology is far from dead. These days, instead of preaching class struggle and defying dictators, many veterans of the movement have adapted their rhetoric and role to the times. They work to promote environmental conservation or women's rights; they help the homeless and AIDS patients."<sup>317</sup> Liberation Theology has been tamed, and now may find its way into the heart of the Roman Magisterium itself with the ascension of Pope Francis I in 2014.<sup>318</sup>

This background is critically important when one attempts to understand Benedict's trip to Brazil, and the statements that he carefully chose to make there. Benedict chose Brazil not only to gloat about the transformation of the force of liberation theology, but also to refine the points he made so effectively against Liberation Theology<sup>319</sup> (and where better than in the place of its greatest potency?). That point can be described simply as solidarity. Benedict used his visit to Brazil to emphasize the contours of the behavior necessary to show solidarity with the Church—what are, in other words, the minimum requirements for “being” Catholic.<sup>320</sup>

Though felt in a particular way within Catholicism, the ideas of solidarity in the management of the integrity of communities and its self-conception provide important lessons to all governance communities in a transnational world. That solidarity focuses on the nature of the community—evangelization—and its *organization*, which is hierarchical and demands a certain amount of fidelity and obedience. “All priests, religious, and lay people who hear this call for justice and who want to work for evangelization and the advancement of mankind, will do so in communion with their bishop and with the Church, each in accord with his or her own specific ecclesial vocation. . . . Aware of the ecclesial character of their vocation, theologians will collaborate loyally and with a spirit of dialogue with the Magisterium of the Church. They will be able to recognize in the Magisterium a gift of Christ to His Church and will welcome its word and its directives with filial respect.”<sup>321</sup> “It has to do with a challenge to the ‘sacramental and hierarchical structure’ of the Church, which was willed by the Lord Himself.”<sup>322</sup>

316. *Id.*

317. Monte Reel, *An Abiding Faith in Liberation Theology*, WASH. POST (May 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/01/AR2005050100821.html>.

318. *Pope Francis I: Cardinal Jorge Mario Bergoglio named new Pope*, BALTIMORE NEWS JOURNAL (Mar. 13, 2013), <http://www.baltimorenewsjournal.com/2013/03/13/pope-francis-i-cardinal-jorge-mario-bergoglio-named-new-pope/>.

319. See Ratzinger & Bovone, *supra* note 310, and *Instruction on Christian Freedom and Liberation*, CONGREGATION FOR THE DOCTRINE OF THE FAITH, (April 17, 1986).

320. James Carroll, *The pope's 'culture of solidarity,'* BOSTON GLOBE (Aug. 5, 2013), <http://www.bostonglobe.com/opinion/2013/08/04/pope-francis-culture-solidarity-hints-change-and-not-just-for-church/TxIBcNcrXwHaiwiakC3lxH/story.html>.

321. Ratzinger & Bovone, *supra* note 310.

322. *Id.*, at pt. IX, para 13.

And contrary to the usual course for Benedict, he chose praxis over theological discourse to emphasize his points. “In this sense, it is necessary to affirm that one becomes more aware of certain aspects of truth by starting with ‘praxis’, if by that one means pastoral ‘praxis’ and social work which keeps its evangelical inspiration.”<sup>323</sup> Thus, it should have come as no surprise that Benedict issued a statement, even as he was flying into Brazil, that he supported the position of the Mexican bishops who had threatened to excommunicate Mexican politicians who voted in favor of the legalization of abortion within Mexico City.<sup>324</sup> When the Brazilian Health Minister, himself a Catholic, was asked about the threat of excommunication for officials that acted contrary to the will of the Magisterium of the Church, he responded with “a fé não pode ser excomungada” (faith cannot be excommunicated).<sup>325</sup>

It seems that Benedict had the better of this dialogue with the Health Minister. No community can retain autonomy without both a sense of those characteristics that make it different from others, and the willingness to enforce communal boundaries. If it means anything to be a Catholic, it means to be a Catholic through practiced faith—that is, through faith “on the ground.” There can be no higher calling in a system in which God sits at the top of a system guarded by its disciples. Disobedience must be disciplined, and a serious disobedience might well merit expulsion from the body of the faithful.<sup>326</sup> In matters of faith, political officials in Mexico must pay heed to Rome even as they act as representatives of the people of a variety of faith communities. Benedict has thus been right to suggest that he would rather have a smaller community of truly faithful than a larger community of faithless. Certainly the Jews have proven the lasting power of such choices for grounding communal solidarity, as well as the risks.

In effect, Benedict rejects the notion of a “soft Catholicism” in the same way that many in the Muslim world have rejected a version of “soft Islam.” Benedict suggests, and from his perspective not incorrectly, that faith is the paramount community, and that the obligation of the faithful must seamlessly conform to its requisites in all of the individual’s actions—both personal and representational. One can only represent others in a political system by being true to the tenets of one’s faith obligations. Thus, an individual cannot wear multiple hats, as individual and as representative of the people, and remain true to his faith. And in this faith, of course, the nature of both personal and representational obligations is subject to the mandatory guidance of the Church’s Magisterium. For Benedict, this represents no conflict with democratic values. Yet the political consequences of this stance are clearly visible in Marxist-Leninist states, like

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323. *Id.*

324. *Pope arrives in Brazil with tough abortion stance*, USA TODAY (May 10, 2007), [http://usatoday30.usatoday.com/news/world/2007-05-09-pope-brazil\\_N.htm](http://usatoday30.usatoday.com/news/world/2007-05-09-pope-brazil_N.htm).

325. *See Papa apóia excomunhão de políticos pró aborto*, FOLHA DE S. PAULO (May 10, 2007).

326. *See* Auguste Boudinhon, *Excommunication*, *The Catholic Encyclopedia*, Vol. 5 (2012), <http://www.newadvent.org/cathen/05678a.htm>.

China, where the secular government understands the role of religion in disciplining its members and organizing its institutional structures as essentially political and potentially adverse to the sovereign powers of states.<sup>327</sup> In that respect he mirrors the theological perspective of so-called political Islam, both of which would marginalize secular or multi-normative systems.<sup>328</sup> Yet perspective matters. And from the perspective of those who must share a democratic political system with the faith of “hard” religion, the loss of representational power might be deeply felt, especially when the values of the Magisterium become translated into mandatory obligations in secular law.

But in the absence of a complete monopoly of the faithful and the corresponding power to control conformity with its obligations, and in the context of the current system that is trending toward universal tolerance of faith communities (and the right to choose among them), any “victory” of hard political religion, such as that suggested by Benedict, is perverse. For in the absence of a complete correlation between the community of Catholics and other faith communities, and in the absence of viable faith alternatives for individuals, the reality of enforcement of faith boundaries through expulsion cannot have the effect it might have 1000 years ago. In this sense, “faith” cannot be excommunicated—excommunication is separation from the body of believers. But faith extends beyond the body of believers. And faith to the precepts of other communities may require obedience every bit as strong as that to the body of the faithful. Thus, faithfulness to the political community may require faithlessness to the community of the faithful—at least to the extent that faith communities seeks to universalize its mores over the body of different believers. Benedict reminds us of the binding power of solidarity to the constitution and community, as well as its viability. The Health Minister reminds us that in a world of multiple global communities of faith, solidarity has its limits. As long as a variety of communities of faith, political, and economic communities compete more or less on an equal plane, the individual may chose freely from among them for the satisfaction of his earthly and otherworldly needs. But he also reveals the risks—authority and legitimacy may be adversely affected by the migration from one group to another. In a transnational world, the multiple pull of solidarity will add a certain level of complexity to governance.

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327. See Joan Frawley Desmond, Pope Francis on China: ‘I am Ready to Go There,’ NATIONAL CATHOLIC REGISTER, Jan. 22, 2015, available at <http://www.ncregister.com/daily-news/pope-francis-on-china-i-am-ready-to-go-there/>.

328. See Omayma Abdel-Latif, *Harmonising immutable values and ever-changing mechanisms*, AL-AHRAM WEEKLY ON-LINE, Iss. No. 716, (Nov. 11–17, 2014), <http://weekly.ahram.org.eg/2004/716/focus.htm> (interview with Ahmet Davutoglu, chief advisor to the Turkish AK Party, and referencing Mr. Davutoglu’s book democratic political theory).

## Conclusion

The existential crisis for secular liberalism in Western states is one of its own making. It is produced by an unhealthy conflation of solicitude for religion and a willingness to allow institutional religion a role in the political life of the state. It is not possible to contain religion within the private realm while law circulates freely in the public realm of reason, and the converse is impossible as well. Likewise, seeking refuge in the notions of a benign faith in contradistinction with a more muscular law belies the reality that faith communities are governance organs that do have a habit of seeking to impose their faith-based values on others through the guise of politics and through law. The resulting contradiction is unavoidable and creates the sort of instability experienced in varying degrees in different states that seek to harmonize a plural regime while privileging religion. The problem is neither faith nor reason, but rather the clash of institutional power represented by two law generating apparatus—those of the state and those of religion. Where there is a convergence of both, then the political and religious policy merge. But in multi-religious states there will be an asymmetry and a vertical arrangement of power relationships grounded on religious power as expressed through the mechanics of mass democracy.

The problem is particularly acute in democratic states built around sharp political contests. Individual belief and its protection are not the problem, but institutional systems built around beliefs complicate governance. The effects are most acute in states that are substantially religiously homogenous, and the consequences are most in evidence outside the West. That problem is in turn compounded by a solicitude for religion that extends protection for religious political convictions that are unavailable to others competing in the robust marketplace of politics and ideas. That is the underlying difficulty of cases like *Burwell v. Hobby Lobby*.<sup>329</sup> The nature of the shocks to the constitutional settlement of the U.S. Constitution and its now-misunderstood model of secularism, which touches on the nature and application of the rule of law, the nature and limits of direct democracy, the relationship between apostasy and treason, the language of interpretation and the power to participate in that dialogue, and the role of the foreign or minority remains to be seen. For secular liberalism, the price of preserving the privileging of the practices and autonomy of religion by the state is the disbaring of institutional religion (though not religious values) from organized political life. The alternative, privileging (institutional) religion and permitting it a broad institutional right to participate in politics, is very much in evidence abroad.

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329. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). *But see* Paul Horwitz, *The Hobby Lobby Moment*, (October 30, 2014) HARV. L. REV. (forthcoming) (U. Ala. Legal Studies Research, Paper No. 2516853), available at SSRN: <http://ssrn.com/abstract=2516853>.