

ON THE POPE, CARTOONS, AND APOSTATES: SHARI'A 2006

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INTRODUCTION

During 2006, controversies concerning *Shari'a* or Islamic law seemed to dominate media reports. From cartoons to apostasy trials, *Shari'a* was deemed to be at the core of controversies that attained international notoriety. Furthermore, *Shari'a* was implicitly invoked by the Pope in his now infamous speech at Regensburg, in which he referred to the prophet Muhammad and an early Muslim jurist in order to define Europe as Christian and contrary to all that is Islamic. The *Shari'a*-related events of 2006 raised fundamental questions not just about what *Shari'a* is, but more fundamentally about the place of Muslims and their religious tradition in the international system. This article attempts to survey the above *Shari'a*-related events from 2006 in order to illustrate how references to *Shari'a*, whether by Muslims or non-Muslims, were embedded within a larger discourse on identity, community, and difference.

This survey will not provide an in-depth analysis and critique of the *Shari'a* doctrines invoked in each case, as that would be beyond its scope. Rather, this article is intended to review the events in light of how "*Shari'a*" was characterized, used, and positioned within a larger legal and political discourse. All of them illuminate similar problems of definition and identity that will generally arise in any critical discussion of *Shari'a* in the modern day. *Shari'a* has arguably become more than a system of legal rules that can be subjected to critical legal scrutiny. Rather, it is also a symbol of political identity, such that any suggestion of legal reform may create political fall out amongst those committed to

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certain conceptions of identity, political and otherwise. The controversies concerning *Shari'a* in 2006 arguably had less to do with legal doctrine, and more to do with how "*Shari'a*" can be used and manipulated to facilitate political ends concerning the definition of identity and thereby the separation (and even marginalization) of communities.

DEFINING CHRISTIANITY, DEFINING EUROPE:
POPE BENEDICT XVI'S REGENSBURG SPEECH

In his speech at the University of Regensburg, now posted on the Vatican website with the addition of footnotes as subsequent commentary,¹ the Pope invoked an early memory from his days at the University of Bonn. He remarked about how the University was proud of its two theological faculties, and how

by inquiring about the reasonableness of faith, they too carried out the work which is necessarily part of the "whole" of the *universitas scientiarum*, even if not everyone could share the faith which the theologians seek to correlate with reason as a whole.²

The basic theme of the Pope's speech was that faith and reason are not mutually exclusive, but instead are dependent upon one another. Referring to the Fourth Lateran Council of 1215, the Pope held that God and His willfulness are not distinct from the rational processes of human inquiry. A theology that attributes to God an absolute voluntarism would render humans subject to the mere commands of God without recourse to reason, nature, and divinity that expresses itself in the human experience. Rather, the Pope stated that "the truly divine God is the God who has revealed himself as *logos* and as *logos*, has acted and continues to act lovingly on our behalf."³ In other words, by focusing on a theology of God, as *logos*, the Pope defined the religious project as embracing reason amidst faith commitments. The idea that reason and faith complement one another is not a new idea; rather one recognizes this theme in medieval natural law theorists such as Aquinas, who held that one could seek the Eternal Law of God through scripture or natural law reasoning.⁴ For the Pope, though, the significance of his speech was

1. For the text of the speech, entitled "Faith, Reason and the University," including its new footnotes, see http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spc_20060912_university-regensburg_cn.html (accessed June 8, 2007).

2. Pope Benedict XVI, *Faith, Reason and the University* 1.

3. *Id.* at 3-4.

4. Anthony Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (Oxford U. Press 2001).

to suggest that rationality is not purely a secular, Hellenistic enterprise separate from religion and belief.

To emphasize his point, the Pope contrasted the Islamic tradition that was centrally significant to his argument, but that lies in the shadows of his reference to a Byzantine Emperor. Certainly much of the outrage from the Pope's speech arose from his reference to Emperor Manuel II Paleologus who stated to a Persian at his court: "Show me just what Mohammed brought that was new, and there you will find things only evil and inhuman. . . ." ⁵ This quotation from the Emperor certainly was provocative and has led to considerable outrage against the Pope, including during his visit to Turkey in November 2006. ⁶ Importantly, the Pope denied that he shares the same view as the Emperor. Rather the quotation was "intended solely to draw out the essential relationship between faith and reason." ⁷

The essential relationship between faith and reason in Islam, according to the Pope, is that the two are mutually exclusive. ⁸ To illustrate his point, the Pope referred to a medieval Muslim theologian and jurist Ibn Hazm (d. 456/1064). Ibn Hazm was an Andalusian jurist from a family politically connected to the Umayyad dynasty prior to its fall. His intellectual contributions were vast, ranging from the literary to the legal. Within law and legal theory, he is most widely regarded as an opponent of reasoning by analogy or precedent, and is perhaps best known as the foremost representative of the literalist Zahiri school of law. According to the historian R. Arnaldez:

Insensible to the demands brought about by historical changes, Ibn Hazm applied himself to reconstructing a legal system stripped of all that he considered to be additions made by the jurists who came after the Prophet and the Companions. ⁹

Importantly, Ibn Hazm also represented a trend in Islamic legal theory that rejected reason as a source of divine law. Adopting the voluntarist position, he argued that divine law can only emanate from an express divine will. The divine will is the means by which one knows the good from the bad, the obligatory from the prohibited. ¹⁰ Importantly, this position was debated amongst Muslim jurists who realized that it was

5. *Supra* n. 1, at ¶ 3.

6. *Tiptoeing through a spiritual minefield*, *The Economist* 53-54 (Dec. 2-8, 2006).

7. *Supra* n. 1, at ¶ 3 n. 3.

8. *Id.*

9. R. Arnaldez, "Ibn Hazm," *Encyclopaedia of Islam* 3:790 (2^d ed., Brill 1960).

10. For a discussion of voluntarism and ethical rationalism in Islam, see George F. Hourani, *Two Theories of Value in Medieval Islam*, 50 *Muslim World* 269-278 (1960); Richard M. Frank, *Moral Obligation in Classical Muslim Theology*, 11 *J. Religious Ethics* 204-223 (1983).

significant to determining the ultimate justice of God. If the good and the right are products of God's will, then if God changes his commands, the good and the right will change as well. The implication of this position was highlighted by the Pope who said: "Ibn Hazm went so far as to state that God is not bound even by his own word, and that nothing would oblige him to reveal the truth to us. Were it God's will, we would even have to practise idolatry."¹¹

Ibn Hazm certainly indicated that the good and the bad were dependent exclusively on the divine will. In fact, in his work on legal theory, he states unequivocally that "God . . . does what he wishes. If he were to prohibit what he permits, or permit what he prohibits, he can do so. . . . If he does [that], we are obligated to follow it all."¹² This voluntarist view of God's will effectively limited the dynamism of reason in Islamic thought as a source for knowing the good and the bad, let alone for establishing obligations and prohibitions with the stamp of the divine will.

The Pope admitted in a footnote that similar voluntarist positions existed in medieval Christian theology.¹³ He also added that they were rejected by the Fourth Lateran Council of 1215. While the Pope recognized medieval Christian diversity on the issue of voluntarism and ethical rationalism, he did so only to illustrate how the Church chose the latter as characteristic of the Christian faith. Notably, he did not suggest that Islamic intellectual history enjoyed the same diversity of views. To have done so would have undermined his dichotomy between Islam and Christianity, and ultimately the nexus between Christianity and Europe he wished to promote.

Islamic intellectual history shows, however, that Muslim theologians and legal theorists fiercely debated the role of reason as a source of value and obligation in Islam. As I have written elsewhere, premodern Muslim jurists adopted competing models of naturalism whereby they recognized that reason can be a source for normative value in light of a natural teleology that fuses fact and value together.¹⁴ One can move from the natural order of the world to a determination of obligation and prohibition through the operation of reason. The fundamental difference between what I have called hard and soft naturalism in Islamic legal theory is whether or not the rational valuation

11. *Supra* n. 1, at ¶ 4.

12. Ibn Hazm, *al-Ihkam fi Usul al-Ahkam* 1:31 (8 vols., Dar al-Hadith 1984) (Arabic) (all Arabic translations are author's).

13. *Supra* n. 1, at ¶ 4 n. 7 & at ¶ 7.

14. For the full analysis, see Anver M. Emon, *Natural Law and Natural Rights in Islamic Law*, 20 *J.L. & Religion* 351, 351-395 (2004-05).

binds God to reward or punish. Those who adopted the hard naturalist position reasoned logically as follows:

God creates the world only to benefit humanity;

Using their reason, humans can empirically know from experience and observation of the world what promotes and inhibits human fulfillment;

Any rational determination about human welfare not only reflects the empirical fact of human fulfillment, but also God's will that such fulfillment be satisfied;

Since any rational determination of human fulfillment fuses both fact and value, one can convert a rational determination about the empirical good and bad into a normative conclusion about the obligatory and the prohibited as a matter of law, hence overcoming the naturalistic fallacy by utilizing a natural teleology.

The soft naturalists, on the other hand, were theologically wary of the first and third element of the hard naturalists' logical analysis, and how those elements contribute to the fourth element. They certainly agreed that the world does benefit humanity. But they were unwilling to hold that God creates the world *only* to benefit humanity. To hold such a view, they argued, would limit God's omnipotence. Yet they could not ignore that humans make determinations of the good and the bad all the time in light of deliberative analyses of the human condition.¹⁵ Consequently, they argued that the goodness of God's creation is a result of God's grace (*tafaddul*), which could change if God chooses. With this theological move, they were able to uphold God's omnipotence while permitting naturalistic reasoning for the purpose of rule-making. But those rules of law could not be attributed to God's will. Consequently, while the soft naturalists fused fact and value through a naturalistic teleology, they were less likely to attribute any normative determinations to God's will.

Perhaps the Pope was unaware of this early diversity in Islamic legal philosophy. Nevertheless, by constructing a dichotomy between Islam and Christianity, the Pope paved the way for defining an undeniable relationship between a rational Christianity and a rational, but increasingly secularizing, Europe. By defining Christianity as a tradition of reason and faith that took root in Europe, the Pope was able to suggest that it lay at the heart of European identity. He stated:

15. See for example Abu al-Ma'ali Imam al-Haramayn al-Juwayni, *al-Burhan fi Usul al-Fiqh* 1:10 (2 vols., Dar al-Kutub al-'Ilmiyya 1997) (Arabic).

it is not surprising that Christianity, despite its origins and some significant developments in the East, finally took on its historically decisive character in Europe. We can also express this the other way around: *this convergence, with the subsequent addition of the Roman heritage, created Europe and remains the foundation of what can rightly be called Europe.*¹⁶

These words are especially poignant at a time when Europe is struggling with its identity amidst an influx of immigration from the Muslim world.¹⁷ But perhaps that was the point. By defining Islam in direct contrast to a rational Christianity, the Pope asserted the ongoing relevance in Europe of a Church that has witnessed a decline in its influence in the region.¹⁸

DEFINING THE LIBERAL AND THE ISLAMIC: THE DANISH CARTOON CONTROVERSY¹⁹

Pope Benedict XVI's suggestion that Europe and Christianity are united in a common identity certainly could be viewed (and was viewed by many) as a negative commentary on the rising Muslim population in the Continent. In 2006, the place of Muslims in Europe was especially highlighted by the now infamous Danish cartoon controversy. The controversy arose in September 2005 when the Danish newspaper *Jyllands-Posten* published a series of cartoons representing the Prophet Muhammad (d. 11/632), whom Muslims revere as an exemplary human being.²⁰

The cartoons themselves are rather uninteresting. Some simply depict a man wearing traditional Arab dress, while others present the Prophet in a satirical context. For example, in one cartoon, the Prophet stands at the gates of heaven halting people from entering, saying "Stop, stop, we ran out of virgins." In another cartoon, perhaps the most provocative, a bearded Arab-looking man wears a bomb that looks like a turban, which has the Islamic declaration of faith written on it: "There is no god but Allah and Muhammad is the Messenger of God."²¹

16. *Supra* n. 1, at ¶ 8 (emphasis added).

17. *Tales from Eurabia*, *The Economist* 11, 29 (June 24-30, 2006).

18. George Parker, *Catholic Church fails in bid to halt EU funding for research into stem cells*, *Fin. Times* 10 (London ed.) (July 25, 2006).

19. A portion of the following discussion on the Danish cartoon controversy is drawn from an earlier analysis of the issue: Anver M. Emon, *Enhancing Democracy, Respecting Religion: A Dialogue on Islamic Values and Freedom of Speech*, in *Faith and Law: How Religious Traditions from Calvinism to Islam View American Law* (Robert F. Cochran ed., N.Y. U. Press forthcoming 2007).

20. Peter Goodspeed, *Orchestrated "Clash of Civilizations,"* *Natl. Post* A16 (Feb. 9, 2006).

21. The cartoons are variously hosted on the internet. For one site, see

The cartoon publication resulted from a competition hosted by the newspaper when editors learned that a children's book author could not find artists to illustrate the Prophet because they feared violating the Islamic ban on depicting the Prophet.²² The cultural editor of *Jyllands-Posten*, Flemming Rose, defended his decision as a proactive effort to include Denmark's Muslim population in the democratic culture of the country:

Equal treatment is the democratic way to overcome traditional barriers of blood and soil for newcomers. To me, that means treating immigrants just as I would any other Danes. And that's what I felt I was doing in publishing the 12 cartoons of Muhammad. . . . Those images in no way exceeded the bounds of taste, satire, and humor to which I would subject any other Dane, whether the queen, the head of the church or the prime minister. By treating a Muslim figure the same way I would a Christian or Jewish icon, I was sending an important message: You are not strangers, you are here to stay, and we accept you as an integrated part of our life. And we will satirize you, too. It was an act of inclusion, not exclusion; an act of respect and recognition.²³

Despite the stated effort to promote the democratic inclusion of minorities, Muslims in Europe and elsewhere saw the newspaper's action as an attack on their prophet, faith, and community. International reaction was at first silent until Danish Muslim leaders toured the Muslim world, raising awareness and outrage by distributing a forty-three-page portfolio of cartoons negatively depicting the Prophet, including the twelve published by *Jyllands-Posten*. Thereafter, governments recalled ambassadors from Denmark and Muslims worldwide began boycotting Danish goods. Other European newspapers reprinted the cartoons, after which protests and riots sprang up from Indonesia to the West Bank, often erupting in violence and damage to European embassies.²⁴

Significantly, editorialists said the conflict reflected the irreconcilable gulf between Western liberal rights (i.e., speech and press) and Muslim fundamentalists' demands that Muhammad not be insulted. For instance, Daniel Pipes wrote:

<http://www.brusselsjournal.com/node/698> (accessed June 8, 2007).

22. Goodspeed, *supra* n. 20.

23. Flemming Rose, *Why I Published the Muhammad Cartoons*, N.Y. Times (May 31, 2006). Notably, *Jyllands-Posten* refused to publish unsolicited cartoons satirizing Jesus out of concern for Denmark's Christian population. Gwladys Fouché, *Danish paper rejected Jesus cartoons*, The Guardian (Feb. 6, 2006).

24. For a timeline of events, see Goodspeed, *supra* n. 20; Anthony Shadid & Kevin Sullivan, *Anatomy of the Cartoon Protest Movement*, Wash. Post A1 (Feb. 16, 2006).

Will the West stand up for its customs and mores including freedom of speech or will Muslims impose their way of life on the West? Ultimately there is no compromise; Westerners will either retain their civilization including the right to insult and blaspheme or not.²⁵

Commentators assumed there was a strict unbridgeable dichotomy expressed in terms of a “clash of civilizations” or a conflict between fundamental values. These values of religious beliefs and free press rights were considered not only objective and determinate, but also so deep-seated and even sacred to each civilization that no compromise or accommodation was imaginable.²⁶ In other words, each side adopted a fundamentalist position, whether secular-liberal or Islamic.²⁷ The problem, though, is that by adopting fundamentalist rhetoric, neither side in Europe seemed open to consider how their own values or rights claims are saddled with limitations, exceptions, and specifications that might allow room for greater dialogue about accommodation and inclusion in a democratic, pluralist society.²⁸

The idea that the rights of free speech and press are fundamental values in secular liberal societies says little about the legal context that gives substantive content and nuance to those rights. These rights are certainly enshrined in constitutions and human rights treaties across the world. The U.S. Constitution’s First Amendment guarantees the right of free speech and press, and Canada’s *Charter of Rights and Freedoms* includes in its list of “Fundamental Freedoms” the freedom of “thought, belief, opinion and expression, including freedom of the press and other media of communication.”²⁹ The *European Convention of Human Rights* also upholds the right to the freedom of expression.³⁰ Nevertheless, these seemingly absolute endorsements of free speech and press are limited in the interest of larger public goals. For instance, Section 1 of Canada’s *Charter* states that it “guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic*

25. Daniel Pipes, *We are all Danes now*, Jerusalem Post 14 (Feb. 7, 2006). See also the column by the conservative writer Ann Coulter, *Excuse me, Mr. President*, Pitt. Trib. Rev. (Feb. 26, 2006).

26. Karen Armstrong, *We can defuse this tension between competing conceptions of the sacred*, The Guardian 30 (Mar. 11, 2006).

27. John Esposito, *Common Ground: Muslims and the West*, UPI (Mar. 8, 2006).

28. For reviews of Huntington’s book, see Stephen Shulman, Review, *The Clash of Civilizations and the Remaking of the World Order*, 60 J. Pol. 304 (1998); Walter A. McDougal, Review, *The Clash of Civilizations*, 70 J. Modern Hist. 436 (1998).

29. *Canadian Charter of Rights and Freedoms*, § 2(b).

30. *European Convention on Human Rights*, Art. 10(1).

society.”³¹ The European Convention on Human Rights also restricts the scope of the freedoms of speech and press:

The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime. . . .³²

Likewise, the United States Supreme Court has subjected the First Amendment’s protection of the freedoms of speech and press to narrowly tailored limits.³³ The presumption that one enjoys a right to free speech or press in liberal democratic societies is couched within a larger context of boundary-drawing in light of competing values and interests. The contingencies embedded in a liberal rights tradition illustrate how those who held fast to the fundamental value of free press contributed to bright lines of definition (and hence separation) that are shadowed by ambiguities.

Likewise, Muslims who upheld as fundamental to Islam the imperative to respect the Prophet ignored the historical context that effectively limits the scope of their absolutist claims. Under pre-modern Islamic law, one is not permitted to create images of objects of any sort. This prohibition is based on Prophetic traditions (*hadith*) that condemn those who create images (*taswir*) or have statues (*suwar*) in their home. These traditions are an important source of legal norms within Islamic law, second only to the Qur’an. In one tradition, Muhammad’s wife ‘A’isha (d. 678) recounts how he entered her room and saw images stitched onto a blanket. His face reddened, after which he shredded the blanket and said: “The most tormented people on the final day are those who created these images [on the blanket] (*al-musawwirun*).”³⁴

The highly respected *hadith* scholar, Ibn Hajar al-‘Asqalani (d. 852/1449), remarked that this tradition chastises those who intentionally create images to worship something other than God. Furthermore, even

31. *Supra* n. 29, § 1 (emphasis added).

32. *Supra* n. 30, Art. 10(2).

33. The U.S. Supreme Court in *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), allowed a preliminary injunction restricting an abortion protestor’s activities outside an abortion clinic. Likewise, in *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court held that municipal ordinances prohibiting picketing a residence or private dwelling are content neutral under First Amendment scrutiny, and thereby permissible. Moreover, in *Cantrell v. Forest City Publ. Co.*, 419 U.S. 245 (1974), the court ruled that a newspaper publisher and its reporter were liable for invasion of privacy by portraying the plaintiff in a false light through a known or reckless truth.

34. Ibn Hajar al-‘Asqalani, *Fath al-Bari bi Sharh Sahih al-Bukhari* 10:382-384, 517 (Muhammad Fawwad ‘Abd al-Baqi & Muhibb al-Din al-Khatib eds., Dar al-Ma’rifa n.d.) (Arabic).

without this intent, one still sins by creating these images.³⁵ This tradition seems to reflect a concern with pagan practices in a characteristically monotheistic faith tradition.³⁶ The idea that creating images would be prohibited seems to evince a theological concern that one might use such images as icons or idols of worship.³⁷ This was especially the case with depictions of the Prophet himself. To counter any iconic movements within the Islamic tradition, Muslim jurists seemed to take a staunch iconoclastic position, banning depictions of the Prophet lest they be substituted for the worship of God. Despite this doctrinal position, Islamic art history is replete with examples of miniature paintings depicting people, animals, landscapes, and even the Prophet himself.³⁸ In some instances, the Prophet is depicted with his face covered by a white towel, while in others even his face is fully illustrated.³⁹

Arguably, the Muslim outrage against the cartoons was most significantly premised on proscriptions against *insulting* the Prophet. Under the historical rules of *Shari'a*, a Muslim who insults the Prophet may be charged with apostasy. If he repents and returns to the faith, many premodern jurists held that he suffers no harm. But if he is obstinate, he is judged an apostate and is executed.⁴⁰ If a non-Muslim insults the Prophet, the consequences will depend, in part, on whether or not he is a resident of the Islamic polity. If the non-Muslim is not a resident of the Muslim polity, unsurprisingly, Islamic law does not apply extraterritorially to him. However, if the non-Muslim resides in the Muslim polity under a permanent contract of protection (*'aqd al-*

35. *Id.* at 10:383.

36. Ira M. Lapidus, *A History of Islamic Societies* 11-20 (Cambridge U. Press 1991).

37. G.R.D. King argues that while Islamic law condemned iconic representations, it generally did not affect Christians except in banning the public display of crosses. G.R.D. King, *Islam, Iconoclasm, and the Declaration of Doctrine*, 48 *2 Bull. Sch. Oriental & African Stud.* 267 (1985).

38. For examples of miniatures, see Seyyed Hossein Nasr, *Islamic Art and Spirituality* 177-184 (SUNY Press 1987); *Islamic Art: The Nasli M. Heeramanek Collection* 99-148 (Pratapditya Pal ed., LACMA 1973); Susan Stronge, *Painting for the Mughal Emperor: the Art of the Book 1560-1660* (V & A Publications 2002). The Turkish author, Orhan Pamuk, has written an historical novel about miniaturist painters in the Ottoman Empire. Orhan Pamuk, *My Name is Red* (Erdag Gokner trans., Vintage Intl. 2002).

39. Titus Burkhardt, *Art of Islam: Language and Meaning* 33 (World of Islam Festival Publ. Co. Ltd. 1976). For an example of a full depiction of the Prophet, see the online collection of Bibliothèque Nationale de France (MSS Arabe 1489, fol. 5v) (available at http://expositions.bnf.fr/livrarab/grands/0_01.htm).

40. See al-Mawardi, *al-Hawi al-Kabir*, 13:149-60 ('Ali Muhammad Mu'awwad and 'Adil Ahmad 'Abd al-Mawjud eds., Dar al-Kutub al-'Ilmiyya 1994) (Arabic); W. Heffening, "murtadd," in *Encyclopaedia of Islam* 7:635 (2d ed., Brill 1966); Mahmoud Ayoub, *Religious Freedom and the Law of Apostasy in Islam*, 20 *Islamochristiana* 75 (1994) (relating the historical legal tradition on apostasy in Islamic law while critiquing its foundations).

dhimma), the consequences for insulting the Prophet will depend on the terms of the agreement and the legal doctrine enforced by the Muslim ruling authorities.⁴¹ Non-Muslims can reside in Islamic lands upon paying a tax known as the *jizya*. By paying the *jizya*, the non-Muslim can retain his faith and live peacefully in Muslim lands. The *'aqd al-dhimma* is the agreement non-Muslims enter that renders them liable under the Islamic rule of law system, and holds Muslims responsible for protecting their lives and property.

One legal debate about the contract of protection concerned what behavior by the non-Muslim would breach the contract, thereby suspending the Muslim government's obligation to protect non-Muslims residents. Some jurists, including the famous Shafi'i jurist Abu Hamid al-Ghazali (d. 505/1111), said that the existence of a breach depends on how harmful a *dhimmi's* act might be to Muslim society. For instance, if the *dhimmi* publicly displays wine, al-Ghazali said he poses no significant harm to Muslim society; the contract remains intact and the state can impose a discretionary punishment on the *dhimmi*. But if a *dhimmi's* action poses a serious harm to Muslim society, such as if he refuses to pay his *jizya*, rejects the rule of law, or even insults the Prophet, the contract is breached and the *dhimmi* no longer enjoys its protection.⁴² An earlier Shafi'i jurist, al-Muzani (d. 878), held that if the contract is void, the *dhimmi* becomes an enemy of the state and can be killed without consequence.⁴³ Hanafi jurists, however, held that the contract of protection is not so easily breached. They voided the contract only if the *dhimmi* leaves the Muslim polity, conquers an area formerly under Muslim dominion, or generally fights against the Muslims. Anything less than these actions will not breach the contract, although the state may take discretionary action to encourage compliance with the contract's provisions.⁴⁴

41. Non-Muslims might also reside temporarily in Muslim lands under a pledge of security (*aman*). To discuss the legal doctrine pertaining to both groups would exceed the scope of this paper. Furthermore, the focus on non-Muslim permanent residents is significant because of the issues of identity and inclusion that arise with permanent residence, as opposed to the case of temporary visitors to Muslim lands.

42. Abu Hamid al-Ghazali, *al-Wasit*, 4:208-9 (Abu 'Amru al-Husayni ed., Dar al-Kutub al-'Ilmiyya 2001) (Arabic); al-Shirazi, *al-Muhadhdhab* 3:318 (Zakariyya 'Amirat ed., Dar al-Kutub al-'Ilmiyya 1995). See also al-Nawawi, *Rawdat al-Talibin* 10:328 (3d ed., al-Maktab al-Islami 1991) (Arabic) (relates the debate about whether the contract is void or whether it remains intact while subjecting the *dhimmi* to state sanction).

43. Al-Muzani, *Mukhtasar al-Muzani*, in *al-Shafi'i, Kitab al-Umm* 5:385 (Dar al-Fikr 1990) (Arabic). See also the Shafi'i jurist al-Mawardi, *al-Hawi al-Kabir* 14:316 (Dar al-Kutub al-'Ilmiyya 1994); and the Shi'ite Ja'fari jurist al-Muhaqqiq al-Hilli, *Shara'i' al-Islam* 1:260-1 (Markaz al-Rasul al-A'zam 1998) (Arabic).

44. Badr al-Din al-'Ayni, *al-Binaya Sharh al-Hidaya* 7:260 (Ayman Sha'ban ed., Dar al-

The analysis above illustrates that the debate on insulting the Prophet falls within the larger *Shari'a* debate about defining via contract law the non-Muslim's obligations and commitments when he is residing permanently in the Muslim polity. The contract was embedded within a broader socio-political discussion about how one defines Muslim social values and the extent to which the law can impose those values on all who live within the polity. Much like the debate in the United States on the flag burning amendment, the premodern legal debate on the *'aqd al-dhimma* reflects broad questions about its political function in both upholding social values and imposing them on non-Muslims residing in the Muslim polity. Consequently, for modern Muslims to invoke premodern Islamic legal precedent to justify their outrage against the cartoonists and editors extends the legal tradition without a proper understanding of the significance the rules played in designing a Muslim polity. Certainly the rules might operate as cultural norms that justify a sense of offense. But that does not mean that the rules and the consequences for their violation can define what Muslims can expect or demand when living in a secular, liberal, pluralist society. The peaceful marches and demonstrations that were organized certainly expressed outrage, while manifesting commitment to democratic principles. But holding placards calling for the execution of the cartoonists and editor does not.⁴⁵ By ignoring the historical context, Muslims arguably ignored the underlying spirit that gave the rules meaning at one time. Instead, they utilized *Shari'a* arguments as symbolic of political identity to distinguish themselves from real or perceived hegemony while demanding equal respect and acceptance domestically. Like the Pope's reference to the jurist Ibn Hazm, Muslims used *Shari'a* doctrine to assert a political claim about their social and political place in Europe. In doing so, they contributed to the masking of democracy deficits in Europe that have in some cases targeted and marginalized immigrant Muslim communities.⁴⁶

But more than a tool to be used by Muslim minorities in liberal states, *Shari'a* can also be used by governments to quickly silence dissenting voices in a way that masks democratic deficits concerning equal access, inclusion, and the openness of society. Perhaps the case

Kutub al-'Ilmiyya 2000). See also al-Kasani, *Bada'i' al-Sana'i'* 9:447 ('Ali Muhammad Mu'awwad and 'Adil Ahmad 'Abd al-Mawjud eds., Dar al-Kutub al-'Ilmiyya 1997); al-Marghinani, *al-Hidaya* 1:456 (2 vols., Dar al-Arqam, n.d.) (Arabic).

45. *Others' religion; isn't it all about respect?*, Evening Herald 6 (Feb. 9, 2006).

46. One such example is the bill introduced in the Netherlands to ban women from wearing the burqa in public. *Intolerance in Europe: Prostitutes and drug dealers are welcome in the Netherlands. Just don't wear a veil*, Wash. Post A20 (Nov. 25, 2006).

that best illustrates how *Shari'a* is used by governments to deflect attention away from their democratic deficits involves the Moroccan opposition newspaper *Le Journal Hebdomadaire* and its Muslim publisher Aboubakr Jama'i, a self-declared "free-speech fundamentalist."⁴⁷ On February 11, 2006, Jama'i and his editors published an article in the French weekly addressing the Danish cartoon controversy. They discussed whether to reprint the cartoons and what repercussions might follow in the predominantly Muslim country. Jama'i's editor-in-chief, Ali Amar, decided to publish a picture of a man holding open the French newspaper *France Soir*, which had reprinted the cartoons.⁴⁸ The image was not of the cartoons themselves, but of a European paper that published them. As printed in the weekly, the cartoons themselves were extremely small once the photograph was reduced and republished. But when he saw the paper at the printers, Jama'i was concerned:

[W]hen I saw the magazine at the printers, I said, "I won't gamble with this, I won't take this risk." I hired twenty guys, who worked all night and managed to ink out the cartoons on twenty-five thousand copies. It was inevitable that a few got through.⁴⁹

Within days of the paper's distribution, city vans and buses brought one hundred angry protestors to *Le Journal's* headquarters in Casablanca. The vans were registered to the Casablanca city government, and were driven by neighborhood prefects who worked for the government's Interior Ministry. The protestors called for *jihād* and hurled insults at Jama'i. Yet when confronted as to why they were there, many protestors indicated that they were brought by local officials working for the Interior Ministry.⁵⁰ In light of *Le Journal's* history of opposition, it is perhaps not surprising that the Moroccan government would manipulate the cartoon situation to its advantage. In her article on *Le Journal* and Jama'i's reputation as a critic of the government, Jane Kramer writes

Jama'i's weekly is a thorn in the side of the executive monarchy and, in fact, of most of the executives in a country where

47. Jane Kramer, *The Crusader: A Moroccan journalist takes on the King*, *The New Yorker* 108-124, 113 (Oct. 16, 2006). *Others' religion*, *supra* n. 45, at 6.

48. Kramer, *supra* n. 47, at 117.

49. *Id.*

50. See press release issued by the Committee to Protect Journalists (CPJ), *Moroccan paper says it is victim of state-organized protests over cartoons* (Feb. 15, 2006) (available at <http://www.cpj.org/news/2006/mideast/morocco15feb06na.html>). See also CPJ's letter to the King Muhammad VI of Morocco, *CPJ calls on Moroccan king to probe government-organized protests against magazine* (Mar. 17, 2006) (available at <http://www.cpj.org/protests/06ltrs/mideast/morocco17mar06pl.html>).

corruption is endemic, and business at almost every level is conducted according to a time-old ritual exchange of cash for favors. *Le Journal* is stubbornly uncorrupted and un beholden. It is critical, confrontational, exasperating, angry, and didactic, and like Jamaï himself, not much loved by the people who seek power in Morocco.⁵¹

The case of *Le Journal* illustrates that posing a dichotomy between the West and the Islamic world over issues of free speech and press is unduly simplistic and simply unhelpful. The easy resort to fundamentalist claims—e.g., rights fundamentalism or Islamic fundamentalism—hides from view the underlying deficits in democratic values in the Muslim and European world across varying sectors of society. Arguably, the Danish cartoons in Europe meant something different than in the Muslim world. In Europe, they raised questions about inclusion and exclusion amidst an increasing Muslim demographic in a Europe that is struggling with identity as it dissolves borders into a unified European Union. In the Muslim world, the Danish cartoons provided an opportunity for governments to exert their Islamicity (and thereby respond to the domestic populace) at the expense of those who criticize the government for its democratic deficits. In both cases, though, the fundamentalist discourse on rights and *Shari'a* hid the fact that underlying the tension in Europe and the Muslim world are democracy deficits that keep some groups on the margins, economically, socially, and politically.

DEFINING THE POST-COLONIAL MUSLIM NATION: THE AFGHAN APOSTATE CASE

Muslim-majority nations that arose out of the ashes of colonialism in the twentieth century have experimented with different forms of political identity as they embraced their new-found independence. But since the late twentieth century, these states have increasingly embraced an Islamic ethos as a basis for the nation's political identity. Sometimes one finds an Islamic reference in the national symbols of the country (e.g., flags) or even in its official name. But as a matter of law, there has been a noted incorporation of Islam and Islamic law within the constitutions of predominantly Muslim nations.⁵²

These constitutions will often contain provisions protecting fundamental rights, such as religious freedom. But these protections are

51. Kramer, *supra* n. 47, at 108.

52. For a study of Arab constitutions, see Nathan J. Brown, *Constitutions in a Nonconstitutional World* (SUNY Press 2001).

construed in light of other provisions stating that no law can violate *Shari'a*. If one defines "*Shari'a*" to include the premodern rules that discriminate on religious grounds,⁵³ a conflict generally arises between *Shari'a* requirements and human rights concerns for religious freedom. One might ask why premodern rules of Islamic law should matter in the twenty-first century. Why not leave them in the past? In the wake of post-colonial nationalist movements in former colonized regions, such as the Muslim world, some have argued that a "time paradox" has arisen that makes the past substantively relevant for defining national identity.⁵⁴ In the case of Muslim states, that can mean invoking "*Shari'a*" in a state's foundational documents to provide substantive content for a national ethos in light of domestic and international posturing. Such states arguably seek a political identity that distinguishes them from former colonial powers and establishes an authentic national identity that does not at the same time exclude them from participating as equal members of the international system.⁵⁵

To illustrate how *Shari'a* in modern Muslim states is often used as an instrument to craft national identity, we might consider the 2006 apostasy trial in Afghanistan. In this case, an Afghan man, Abdul Rahman, was tried in court for having converted to Christianity, and thereby apostatizing from Islam. In a country that embraces no religion, his conversion should not have been a problem. However, as a constitutional matter, Abdul Rahman's apostasy presented a capital case for the newly established Afghan democracy in light of its commitments to an Islamic constitutional vision. The Preamble to the Afghan constitution states in relevant part: "We the people of Afghanistan: I. With firm faith in God Almighty and relying on His lawful mercy, and Believing in the Sacred religion of Islam" Further, in defining the nature and quality of the State, Article 1 states: "Afghanistan is an Islamic Republic, independent, unitary and indivisible state." The use of Islam to define the national ethos is perhaps not surprising given the

53. For varying treatments of the historical Islamic legal treatment of non-Muslims, see 'Abd al-Karim Zaydan, *Ahkam al-Dhimmiyyin wa al-Musta'minin* (2d ed., Mu'assasat al-Risala 1988) (Arabic); Yohanan Friedman, *Classification of Unbelievers in Sunni Muslim Law and Tradition*, 22 *Jerusalem Stud. Arabic & Islam* 163-195 (1998); C.E. Bosworth, *The Concept of Dhimma in Early Islam*, in *Christian and Jews in the Ottoman Empire: The Functioning of a Plural Society* 1:37-54 (Benjamin Braude & Bernard Lewis eds., 2 vols., Holmes & Meier Publishers 1982); Muhammad Hamidullah, *Status of Non-Muslims in Islam*, 45 *Majallat al-Azhar* 6-13 (1973).

54. Anne McClintock, *Family Feuds: Gender, Nationalism and the Family*, 44 *Feminist Rev.* 61 (summer 1993).

55. On the role of Islamic law as an anchor for disputes on political identity, see Roxanne Euben, *Enemy in the Mirror: Islamic Fundamentalism and the Limits of Modern Rationalism: A Work of Comparative Political Theory* (Princeton U. Press 1999).

recent memory of violence in Afghanistan, during which the fight against Soviet occupation was often framed in Islamically meaningful language and resulted in both sacrifice and success.⁵⁶ The Islamic nature of the Afghan state is further emphasized in Article 2 which provides for Afghanistan's official religion: "(1) The religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam." This does not mean that religious minorities are not able to reside within the state. Rather Article 2 immediately provides the following: "(2) Followers of other religions are free to exercise their faith and perform their religious rites *within the limits of the provisions of law.*" The key phrase in Article 2(2) is indicated in italics, namely that non-Muslim minorities enjoy religious freedom to a certain extent as provided by law.

Limiting religious freedom is not unique to the Afghan constitution. Rather it can be found in constitutions and human rights charters the world over. For instance, Canada's *Charter of Rights and Freedoms* includes the freedom of conscience and religion as one of its "fundamental freedoms" in Section 2. However, Section 1 provides that in some cases, even fundamental freedoms can be limited by the government "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁵⁷ Likewise, the European Convention on Human Rights provides for the freedom of conscience in Article 9. But that same article asserts that such freedoms are subjected to such restrictions "as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others."⁵⁸

In Afghanistan, the limits on freedom of religion are defined in part by Article 3, which states: "In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam." Consequently, when Abdul Rahman was tried as an apostate, he certainly could have invoked his religious freedom under Article 2(2). But for the court to free him on that ground would violate Article 3,

56. The impact of this history is further evident in sections 2 and 3 of the preamble to the Afghanistan constitution:

2. Realizing the injustice and shortcoming of the past, and the numerous troubles imposed on our country;
3. While acknowledging the sacrifices and the historic struggles, rightful Jihad and just resistance of all people of Afghanistan, and respecting the high position of the martyrs for the freedom of Afghanistan

See http://www.oefre.unibe.ch/law/icl/af00000_.html (accessed June 8, 2007).

57. *Supra* n. 29, § 1.

58. *Supra* n. 30, Art. 9(2).

given that the premodern rules of *Shari'a* prohibit apostasy as a capital crime. As noted above, under *Shari'a* doctrine, an apostate was given some time to repent; if he did not repent, he was subjected to execution.⁵⁹ The issue posed by Abdul Rahman's case was whether the constitution can permit a Muslim to convert to Christianity and then enjoy the privileges of Article 2(2). Any law or judicial decision that allows a Muslim to convert to another faith might be construed as violating Article 3's requirement that all law be *Shari'a* compliant, where *Shari'a* is substantively defined to include premodern rules governing the treatment of apostates from Islam.

In Abdul Rahman's case, however, the court found him mentally incompetent and acquitted him. This judicial conclusion certainly has precedential authority in premodern Islamic law whereby an insane person (*majnun*) is presumed unable to act with the requisite intent to render him subject to legal liability.⁶⁰ This ruling, however, might be perceived as implying that anyone in Afghanistan who would declare his apostasy from Islam must by definition be insane, thereby emphasizing the very limited religious freedom in the country. Or it might be viewed as fundamentally disrespectful of Abdul Rahman's religious sincerity.

Another reading of the case illustrates how the judge used technical rules of premodern *Shari'a* to dispose of the case and uphold a nascent democracy attempting to bring law and order to an intractable region. For instance, Article 116(1) of the Afghan constitution proclaims the independence of the judiciary: "The judicial branch is an independent organ of the state of the Islamic Republic of Afghanistan." However this independence is qualified in cases where a court imposes an execution sentence on a defendant. Specifically Article 129(2) states: "All specific decisions of the courts are enforceable, except for capital punishment, which is conditional upon approval of the President." If the judge in Abdul Rahman's case found him guilty of apostasy and sentenced him to death, the judge would have forced a confrontation with the executive, namely President Hamid Karzai. Karzai was already under considerable international pressure to intervene in Abdul Rahman's case. If the judge issued a death sentence and Karzai refused to approve the court's decision, Karzai's refusal could be criticized as executive over-reach into the judicial function because of international pressure. If Karzai failed to approve the capital sentence, he would have set a dangerous precedent of executive interference with the judiciary

59. *Supra* n. 39.

60. Abu Hamid al-Ghazali, *al-Mustasfa min 'Ilm al-Usul* 1:224-5 (Ibrahim Muhammad Ramadan ed., Dar al-Arqam n.d.) (Arabic).

and potentially undermined the public's confidence in the independence of the judiciary, and the integrity of the President's office. By finding Abdul Rahman insane, the judge in this case used premodern Shari'a rules not only to preserve Abdul Rahman's life, but also to avoid a conflict with the executive and the likely critique that Karzai is a mere puppet of international forces.

CONCLUSION

The three cases discussed in this article raise questions about the role of premodern rules of Islamic law in defining the content of *Shari'a* in modern states such as Afghanistan, and for Muslim minorities living in liberal, pluralist states. By suggesting that *Shari'a* operates as a symbol of political identity and not just a system of religious rules of ritual conduct, this survey suggests that any effort to rethink or reform *Shari'a* content will require more than a straightforward method of critical legal history. Reform attempts may raise the ire of those who see premodern rules of *Shari'a* as a basis for a post-colonial identity defined in opposition to real and perceived imperial interests. For the modern Muslim who embraces the historical *Shari'a* tradition, *Shari'a* is arguably more than a faith commitment *simpliciter*. Rather, the traditional *Shari'a* provides content to an identity that is presented by both Muslims and non-Muslims as distinct from the rational, atomistic self of the modern West. Roxanne Euben, writing about Islamic fundamentalism more generally, has suggested that resort to traditional values such as the *Shari'a* may constitute a "conduit for an antimodern backlash" against a modernity that is defined "both by the ascension of rational forms of organization in politics, economy, and society, and in opposition to . . . those polities in which tradition, faith, kin, and clan hold sway."⁶¹

The references to *Shari'a* in 2006, whether by Muslims or non-Muslims, utilized the legal tradition as a symbol for defining—and most importantly differentiating—one group from another in often reductive and reified terms. The anxieties about *Shari'a* noted above arguably masked underlying political conflicts about the identity of communities, the extent of difference between them, and the willingness of each to engage in effective deliberation with the other.

Certainly, the events of 2006 raise questions about the flexibility and adaptability of *Shari'a* in a modern, liberal secular state, as well as in Muslim states in which Islam plays a significant constitutional role.

61. Euben, *supra* n. 55, at 33.

Nevertheless, any effort to rethink the rules of *Shari'a* will need to account for how "*Shari'a*" is not the rule of law system it was in the premodern past, and how it has been imposed piecemeal on a new socio-political-institutional context in a post-colonial setting. In doing so, one will recognize how *Shari'a* is significant not only as a doctrinal tradition of a faith community, but is also a politically embedded normative system that Muslims and non-Muslims use strategically to make claims about inclusion, exclusion, and the contours of identity.