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# The Law of the Land and the State of the Soul: Analyzing Theoretical Frameworks of Bahá'í and Islamic Law Within and Beyond the Nation-State

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## Introduction

In the American psyche, the illustration of a nine-member council would tend to invoke an image of the United States Supreme Court.<sup>1</sup> Mention that such a council is inviolable<sup>2</sup> and of international stature might suggest that global politics has surpassed the current “anarchic system of states”<sup>3</sup> to achieve something futuristic and idealistic, beyond the limited sovereignty of the United Nations.<sup>4</sup>

Posit a globally democratically elected decision-making body tasked to legislate in the pursuit of upholding “unity in diversity,”<sup>5</sup> justice,<sup>6</sup> and peace.<sup>7</sup> Assume that it is a constitutionally sanctioned supreme body that sits above all nations and principalities, whose constituency is spread across the globe and permeates national borders.<sup>8</sup> Presume that the entity is authorized to prescribe directives, enforce and interpret its own pronouncements, and protect the most central and sacred texts which establish its authority.<sup>9</sup> Assume as fact that the body has the capacity to amend and repeal laws to accommodate progressive stages of human evolution.<sup>10</sup> Arguably, the preceding illustration begins to resemble a legal framework akin to a governance structure at the international level, a body with sovereignty over all constituent nation-states.

Notwithstanding the seemingly utopic principles set forth in the description above, the illustration is not the result of fabrication, but rather a loose description of the main legal organ of the Bahá'í Faith as described by the International Web Site of the Bahá'ís of the World.<sup>11</sup>

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<sup>1</sup>See U.S. Const. art. III, § 1.

<sup>2</sup>The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html> (“[T]he Universal House of Justice is Head of the Faith and its supreme institution.”); see also Roshan Danesh, *Church and State in the Baha’I Faith: An Epistemic Approach*, 24 J.L. & Religion 21, 43 (2009).

<sup>3</sup>See Joseph S. Nye, Jr. *Understanding International Conflicts: An Introduction to Theory and History* 3 (4th ed. 2003) (1993). The anarchic system of states, as described by Joseph Nye, refers to an international system of states without a supranational governing structure, having sovereignty over all states. *Id.* For example, although the United Nations Organization exists, it has very limited powers and its decisions are not necessarily binding on all states. *Id.* The United Nations is an opt-in system with little enforcement power, leaving states unanswerable to a higher authority. *Id.*

<sup>4</sup>See *id.*

<sup>5</sup>Danesh, *supra* note 2 (“Inherent within and inseparable from this vision of unity are the well-known Bahá'í commitments to gender and racial equality and social justice that are essential for the creation of true unity in diversity.”); see The Bahá'í International Community, The Universal House of Justice, <http://info.bahai.org/universal-house-of-justice.html> (last visited Oct. 11, 2009) [hereinafter *Universal House of Justice*] (“A conviction of the practicality of world unity, coupled with a dedication and willingness to work toward this goal, is the single most distinguishing characteristic of the Bahá'í community.”); see also Danesh, *supra* note 2, at 50.

<sup>6</sup>See *Universal House of Justice*, *supra* note 5 (“The efforts of Bahá'ís around the world to build communities founded on cooperation and justice are guided by a unique system of administration.”); see also Udo Schaefer, *An Introduction to Baha’I Law: Doctrinal Foundations, Principles and Structures*, 18 J.L. & Religion 307, 328 (2003).

<sup>7</sup>See *Universal House of Justice*, *supra* note 5 (“[T]he Universal House of Justice has vigorously pursued a campaign promoting international peace and stability.”).

<sup>8</sup>See generally *id.*

<sup>9</sup>See generally *id.*

<sup>10</sup>See *id.* (“[T]he House of Justice has the right to repeal and alter any of its enactments as the Bahá'í community evolves.”).

<sup>11</sup>See generally The Bahá'í International Community - The International Web site of the Bahá'ís of the World, <http://www.bahai.org/> (last visited Nov. 17, 2009). The Bahá'í International Community’s website is the primary information dissemination organ of the Faith. *Id.* The Faith’s central documents are available at the above-listed web address. *Id.* For purposes of this essay, any citation to the Bahá'í International Community’s website (URLs containing “www.bahai.org”) should be considered a primary source. *Id.* Printed copies of the Faith’s Sacred Texts repose with the Universal House of Justice in Haifa, Israel. *Id.*

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The mere difference between the rendering above and the one on the website is that the account above masks references to the religious tenets and principles founding the Faith.<sup>12</sup>

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<sup>12</sup>*See generally id.*

## History of the Bahá'í Faith

Essential to conceptualizing Bahá'í law as an independent body of law is an understanding of the historical context to which the Bahá'í Faith was born and the evolution of the Faith since its genesis on May 23, 1844, marking the Declaration of the Báb.<sup>13</sup> Bahá'u'lláh, the Faith's venerated Prophet, founded the relatively young religion in Persia, present day Iran.<sup>14</sup> The Báb preceded the Founder<sup>15</sup> and announced the arrival of Bahá'u'lláh, the next messenger in the line of prophets to arrive after Muhammad, the figurehead of Islam and deliverer of the Qur'an.<sup>16</sup> The historical setting and emergence of the Bahá'í Faith, subsequent to the development of Islam, is of monumental importance to the present Bahá'í legal structure, as it relates to Islamic law (*shari'a*).<sup>17</sup>

## Principles of the Bahá'í Faith

Distinguishing the Bahá'í Faith from most other religions is its recognition of other faiths' teachings and prophets.<sup>18</sup> Bahá'ís recognize the prophets of other religions, including Judaism, Christianity, Islam, Hinduism, Buddhism, and Zoroastrianism<sup>19,20</sup>. The prophets, spread across various religions are seen in the Bahá'í Faith as Manifestations of the same God.<sup>21</sup> Acceptance of multiple teachings, sometimes seemingly contradictory doctrines, is central to the Bahá'í belief that manifestations are made in accordance with the development and evolution of society.<sup>22</sup> The fundamental premise is that the teachings of the prophets are not in conflict, because each prophet made revelations proper to the age of his ministry, thus a religious prohibition at one period in human evolution might not be necessary upon society's attainment of a certain level of maturation.<sup>23</sup> Consequently, Bahá'u'lláh has ushered humanity into the present age and Bahá'ís believe that we are presently awaiting the next divine revelation, to

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<sup>13</sup>See Shoghi Effendi, *God Passes By* 7-15 (1979), available at <http://reference.bahai.org/en/t/se/> (follow "God Passes By" hyperlink).

<sup>14</sup>See The Bahá'í International Community, *Historical Context of the Bábí and Bahá'í Faiths*, <http://info.bahai.org/babi-and-bahai.html> (last visited Oct. 14, 2009) [hereinafter *Historical Context of the Bábí and Bahá'í Faiths*] ("The new faith first appeared in Persia, a predominantly Muslim country."); see also Schaefer, *supra* note 6, at 317.

<sup>15</sup>See Schaefer, *supra* note 6, at 309.

<sup>16</sup>See *id.* (stating "...an announcement by a forerunner and herald (the Bab) preparing the way for the Promised One, who is also the prophet-founder Bahá'u'lláh of a new religion."). See generally *Historical Context of the Bábí and Bahá'í Faiths*, *supra* note 14; The Bahá'í International Community, *The Báb (1819-1850)*, <http://info.bahai.org/the-bab.html> (last visited Oct. 14, 2009) [hereinafter *The Báb*].

<sup>17</sup>See Schaefer, *supra* note 6, at 309 ("This religion, whose relationship to Shi'a Islam is comparable to the relationship of Christianity to Judaism, sees itself as the fulfillment of Islamic eschatology."); *Historical Context of the Bábí and Bahá'í Faiths*, *supra* note 14 ("The religious matrix of the Bahá'í Faith was Islam.").

<sup>18</sup>See *Historical Context of the Bábí and Bahá'í Faiths*, *supra* note 14 ("The Bahá'í Faith is perhaps unique in that it unreservedly accepts the validity of the other great faiths.").

<sup>19</sup>See generally BBC, *Religion: Zoroastrianism*, <http://www.bbc.co.uk/religion/religions/zoroastrian/> (last visited Jan. 29, 2009).

<sup>20</sup>See *Historical Context of the Bábí and Bahá'í Faiths*, *supra* note 14 ("Bahá'ís believe that Abraham, Moses, Zoroaster, Buddha, Krishna, Jesus, and Muhammad are all equally authentic messengers of one God.").

<sup>21</sup>See *id.* ("But Bahá'ís believe that this series of interventions by God in human history has been progressive, each revelation from God more complete than those which preceded it, and each preparing the way for the next.").

<sup>22</sup>See *id.* ("He 'manifests' His will to humanity through the series of messengers whom Bahá'ís call 'Manifestations of God.' The purpose of the Manifestation is to provide perfect guidance not only for the spiritual progress of the individual believer, but also to mold society as a whole.").

<sup>23</sup>See Danesh, *supra* note 2, at 49-50; Schaefer, *supra* note 6, at 323.

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come during the next stage of human evolution.<sup>24</sup> As will be revealed in subsequent sections of this essay,<sup>25</sup> the concept of progressive manifestations is the basis for some of the Bahá'í Universal House of Justices' constitutionally conferred powers, as stated in the Constitution of the Universal House of Justice.<sup>26</sup>

The aggregation of many faiths into one, to form a continuum of divine evolution, is also the foundation for the Bahá'í principle of human unification.<sup>27</sup> Achieving global unity and appreciation for diversity is the innermost credo of the Bahá'í Faith.<sup>28</sup> It is believed that such unity will put asunder barriers to human cooperation and lead to the emergence of the human nation, a nation transcending all other national identities.<sup>29</sup> From the Bahá'í perspective, the development of the “human family” and a unified human race necessitates local, national, and international legal organs to implement the laws by which such a family will have to abide in order to ensure the emergence of world peace.<sup>30</sup>

### Evolution of the Bahá'í Faith

Three main persons contributed to the growth of Bahá'í law and the legal order through which it is administered.<sup>31</sup> There is no equivalent to the Jewish Tannak, the Christian Bible, or the Muslim Qur'an in the Bahá'í Faith, because the foundational documents have not been reduced to one book.<sup>32</sup> Bahá'u'lláh himself delivered the *Kitáb-i-Aqdas*, “The Most Holy Book,” prescribing a code of laws similar to, yet operatively different from, Muslim *shari'a*.<sup>33</sup> The *Kitáb-i-Aqdas* is the primary source of Bahá'í law covering personal status, i.e. penal law, family law, and inheritance law.<sup>34</sup> Bahá'u'lláh was succeeded by his son, Abdu'l-Bahá, who was designated as the sole authority that could interpret the writings of Bahá'u'lláh.<sup>35</sup> The Guardian, successor to the leadership of the Faith, provided the framework for the

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<sup>24</sup>See Schaefer, *supra* note 6, at 323 (“[D]ivine law can be valid only until such time as God confirms or repeals the law He had previously promulgated—which man is not authorized to change—through a new revelation. Since Bahá'u'lláh has excluded the possibility that such a revelation will take place before the passing of a thousand years the *ius divinum* of the Baha'is is valid for at least one millennium.”).

<sup>25</sup>See *infra* Part II.A.1-2 (discussing the Constitution of the Universal House of Justice).

<sup>26</sup>See generally The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>27</sup>See Danesh, *supra* note 2, at 49-53. See generally The Bahá'í International Community, The Bahá'í Faith, <http://info.bahai.org/> (last visited Oct. 14, 2009); The Bahá'í International Community, Basic Teachings of Bahá'u'lláh, <http://info.bahai.org/bahauallah-basic-teachings.html> (last visited Oct. 14, 2009) [hereinafter *Basic Teachings of Bahá'u'lláh*].

<sup>28</sup>See Danesh, *supra* note 2, at 49-53. See generally *The Bahá'í Faith*, *supra* note 27; *Basic Teachings of Bahá'u'lláh*, *supra* note 27.

<sup>29</sup>See Danesh, *supra* note 2, at 49-53. See generally *The Bahá'í Faith*, *supra* note 27; *Basic Teachings of Bahá'u'lláh*, *supra* note 27.

<sup>30</sup>See Schaefer, *supra* note 6, at 349-50. See generally The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>31</sup>See Schaefer, *supra* note 6, at 317-319.

<sup>32</sup>See *id.* at 317.

<sup>33</sup>See *id.* (“The central text ... is Bahá'u'lláh's *Kitáb-i-Aqdas* ... [L]egal norms (like moral instructions) are scattered throughout the revealed scripture. They do not form a consistent system; instead, they constitute supreme norms (as in the case of legal provisions of the Qur'an) that require systematization and specification. This is done not, as in Islam, by means of the interpretation of the sacred texts but through supplementary legislation.”).

<sup>34</sup>See *id.* (“The central text setting out legal norms is Bahá'u'lláh's *Kitáb-i-Aqdas*, which as the “Book of Laws” holds a special rank among the texts.”). See generally Bahá'u'lláh, *The Kitáb-i-Aqdas* (1992), available at <http://reference.bahai.org/en/t/b/> (follow “The *Kitáb-i-Aqdas*” hyperlink); Shoghi Effendi, *God Passes By* 57-149 (1979), available at <http://reference.bahai.org/en/t/se/> (follow “God Passes By” hyperlink).

<sup>35</sup>See The Bahá'í International Community, ‘Abdu'l-Bahá: the Center of the Covenant, <http://info.bahai.org/abdulbaha-center-of-covenant.html> (last visited Oct. 15, 2009) (“As the authorized interpreter of Bahá'u'lláh's teachings, ‘Abdu'l-Bahá became the living mouth of the Book, the expounder of the Word.”). See generally Effendi, *supra* note 34, at 149-200.

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establishment of the legal and spiritual institutions to implement Bahá'u'lláh's Covenant<sup>36, 37</sup>. Shoghi Effendi, 'Abdu'l-Bahá's grandson, became the Guardian of the Faith.<sup>38</sup> The entrustment of the Guardianship in a single person would terminate as early as it started;<sup>39</sup> Shoghi Effendi's passing without issue obviated the succession to the Guardianship by primogeniture.<sup>40</sup> In the absence of a Guardian, The Bahá'í International Teaching Centre and the Continental Boards of Counsellors have taken over as the protectors of the Sacred Writings.<sup>41</sup>

### Legal and Institutional Concretization

It would seem that Shoghi Effendi's passing might bring sectarian division in the Faith, but the Founder's foresight made provisions to prevent such an occurrence.<sup>42</sup> Bahá'u'lláh's writings prescribed the creation of an administrative system, the establishment of which became the principal goal of Shoghi Effendi's guidance of the Faith.<sup>43</sup> Accordingly, the Bahá'í Administrative Order was founded around two pillars, the Guardian and the Universal House of Justice.<sup>44</sup> As a consequence of the termination of the line of primogeniture at Shoghi Effendi's death, no person was able to fill the office of the Guardian and the leadership of the Faith vested in the Universal House of Justice.<sup>45</sup>

The distinguishing characteristic between the Guardianship and the Universal House of Justice is that the former was intended to be backward looking and the latter is forward looking.<sup>46</sup> To

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<sup>36</sup>See 'Abdu'l-Bahá: the Center of the Covenant, *supra* note 35 ("A Covenant implies a solemn agreement between two parties. As already noted, Bahá'u'lláh's part of His Covenant is to bring us teachings that transform both the inner and outer conditions of life on earth, to provide us with an authoritative interpreter to keep us from misunderstanding God's will for us, and to give us guidance to establish institutions that will pursue the goals of the achievement of unity. Bahá'u'lláh's Covenant affects us at all levels of existence, from our social organizations to our individual lives.").

<sup>37</sup>See *id.* ("He elucidated the teachings of His Father's Faith, amplified its doctrines, and delineated the central features of its administrative institutions."). See generally Effendi, *supra* note 34, at 57-149.

<sup>38</sup>See Schaefer, *supra* note 6, at 351-53; The Bahá'í International Community, The Guardian of the Bahá'í Faith, <http://info.bahai.org/guardian-of-the-bahai-faith.html> (last visited Oct. 15, 2009) [hereinafter *Guardian of the Bahá'í Faith*] ("Abdu'l-Bahá, particularly in His Will and Testament ... appointed His eldest grandson, Shoghi Effendi, as Guardian of the Bahá'í Faith and also referred to the future election of the Universal House of Justice."). It should also be noted that after Abdu'l-Bahá's death, Bahiyiyih Khanum, his sister, temporarily occupied the office of the Guardian, affording Shoghi Effendi the time to take leave to prepare for the task ahead. See Early Bahá'í Heroines, <http://info.bahai.org/article-1-3-7-2.html> (last visited Sep. 16, 2011).

<sup>39</sup>See Schaefer, *supra* note 6, at 351-53. At the passing of the Guardian, who was the President of the International Bahá'í Council, leadership temporarily passed to the Custodians who were the living "Hands of the Cause." They maintained stability of the Faith until the election of the Universal House of Justice in 1963. The development of the International Teaching Centre and the Continental Boards of Counsellors followed some time after the election of the House of Justice. See generally Custodians, <http://bahaikipedia.org/Custodians> (last visited Sep. 16, 2011).

<sup>40</sup>See Schaefer, *supra* note 6, at 351-53.

<sup>41</sup>See *id.* at 352-53 ("Since Shoghi Effendi died without issue in 1957, the office of Guardian is now permanently vacant. The Universal House of Justice has not perceived any possibility of appointing a successor. Owing to the permanent vacancy of the Guardianship, the community no longer has an authoritative teaching office. Binding interpretation of the scripture therefore ended with the death of Shoghi Effendi. Since the 'Hands of the Cause of God' (Ayadi i-amru'llah) --who, according to the testament of 'Abdu'l-Baha were to have been subordinate to the Guardian-- could no longer be appointed and guided by him, the Universal House of Justice created new institutions to fulfill most of the functions of the 'Hands' in 1968, these functions being primarily the protection and proclamation of the Faith. These institutions are the International Teaching Centre in Haifa and the Continental Boards of Counsellors.").

<sup>42</sup>See *id.* at 352; *Guardian of the Bahá'í Faith*, *supra* note 38.

<sup>43</sup>See Schaefer, *supra* note 6, at 352; *Guardian of the Bahá'í Faith*, *supra* note 38 ("This administrative order was originally envisaged by Bahá'u'lláh in his Book of Laws and was given further shape by 'Abdu'l-Bahá, particularly in His Will and Testament. In that document He appointed His eldest grandson, Shoghi Effendi, as Guardian of the Bahá'í Faith.").

<sup>44</sup>See Schaefer, *supra* note 6, at 349-53; *Guardian of the Bahá'í Faith*, *supra* note 38 ("After the passing of 'Abdu'l-Bahá in 1921, the leadership of the Bahá'í community entered a new phase, evolving from that of a single individual to an administrative order founded on the 'twin pillars' of the Guardianship and the Universal House of Justice.").

<sup>45</sup>See Schaefer, *supra* note 6, at 352-54 ("[S]ince Shoghi Effendi died without issue in 1957, the office of Guardian is now permanently vacant.").

<sup>46</sup>See *id.* at 354.

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clarify, the Guardianship was instilled with the power to protect the foundational documents of the Faith, those authored by Bahá'u'lláh and 'Abdu'l-Bahá, from erosion and incorrect reinterpretation.<sup>47</sup> Before its disappearance, the Guardianship retained the capacity to interpret already established law.<sup>48</sup> The Universal House of Justice, on the other hand, remains the lawmaking body with the competence to legislate with respect to the future of the Bahá'í Faith and interpret those laws that it promulgates.<sup>49</sup> The purpose of the Universal House of Justice correlates directly with the aforementioned principle of progressive manifestation and the idea that the Faith must be adaptable to society's evolution over time.<sup>50</sup> The Universal House of Justice is the head of the tripartite Administrative Order.<sup>51</sup> The two remaining arms, the National and Local Spiritual Assemblies feed directly into the Universal House of Justice.<sup>52</sup> Although the national and local bodies are currently referred to as Assemblies, the foundational documents indicate they will one day be of the same legally prescriptive character as the Universal House of Justice.<sup>53</sup>

Reviewing the illustration given in the introduction, a transposition of the administrative order of the Bahá'í Faith, out of the religious context upon which it was founded, reveals a state governance structure analogous to that of a supranational entity like the European Union.<sup>54</sup> The sections below evaluate the Bahá'í Faith in the context of a legally rooted governance structure and consider the sovereignty of a non-state entity (The Bahá'í Faith) acting as a state or a supranational organization.<sup>55</sup>

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<sup>47</sup>See *id.* at 354-56.

<sup>48</sup>See *id.*

<sup>49</sup>See *id.*

<sup>50</sup>See Schaefer, *supra* note 6, at 323.

<sup>51</sup>See *id.* at 356-57.

<sup>52</sup>See *id.* at 356-58.

<sup>53</sup>See *id.* at 358. Additional elective bodies, namely, the Regional Bahá'í Councils, exist between the local and national assemblies and are designed to address regional macro issues. See generally Regional Bahá'í Council, [http://bahaikipedia.org/Regional\\_Bah%C3%A1%E2%80%99%C3%AD\\_Council](http://bahaikipedia.org/Regional_Bah%C3%A1%E2%80%99%C3%AD_Council) (last visited Sep. 16, 2011).

<sup>54</sup>See generally Treaty of Lisbon Amending The Treaty On European Union and the Treaty Establishing The European Community, Dec. 12, 2007, 2007 O.J. (C 306) 42; Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C340) 3.

<sup>55</sup>See *infra* Part II-III.



## Analysis: Non-state Governance Modeled After State-based Governance

Udo Schaefer<sup>56</sup> and Roshan Danesh<sup>57</sup> are the two Bahá'í scholars cited herein who have written about Bahá'í law, but it is important to differentiate their respective articles from the aims of this exercise. Schaefer's study is the first scholarly overview of the Bahá'í legal order.<sup>58</sup> His article highlights the sources of personal status laws<sup>59</sup> and the laws establishing the governance structure of the Bahá'í Administrative Order.<sup>60</sup> Danesh's article investigates the correlation between church and state and concludes that the writings of the Bahá'í Faith are inconclusive on how such a relationship should be managed.<sup>61</sup> Furthermore, Danesh resolves that an epistemic vision of church-state relations should be adopted, wherein integration of religion and the state may be attained in the future, when society achieves the prerequisite level of "maturation."<sup>62</sup> This thesis proposes to explore how the Bahá'í Faith establishes a self-referencing<sup>63</sup> and functionally differentiated<sup>64</sup> legal system unlike the world's other independent religions. The aim is to identify how the administrative framework through which the Bahá'í legal order operates differs from that of other faiths, focusing primarily on Islam, the religion often assumed to have influenced the development of the Bahá'í Faith.<sup>65</sup> Lastly, this exercise focuses on how the centralized Administrative Order avoids fragmentation and ensures continuity of the Bahá'í legal system, but the essay also questions the validity of Bahá'í law by raising the various barriers to enforcement.<sup>66</sup>

To prevent excessive repetition of the work already done by various scholars, whose work is fundamental in understanding this exercise, this essay will focus primarily on the administrative law of the Bahá'í Faith, the conferral of competence on the Universal House of Justice and

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<sup>56</sup>See generally Schaefer, *supra* note 6, at 307.

<sup>57</sup>See generally Danesh, *supra* note 2, at 21.

<sup>58</sup>See Schaefer, *supra* note 6, at 308.

<sup>59</sup>See *id.* at 324-42.

<sup>60</sup>See *id.* at 342-62.

<sup>61</sup>See Danesh, *supra* note 2, at 62.

<sup>62</sup>See *id.* at 49 ("The lens for analyzing the current conditions of political and social life is through the category of social maturation. For example, in a typical statement of this idea by the Universal House of Justice, the Bahá'í Faith views [t]he human race, as a distinct, organic unit, [which] has passed through evolutionary stages analogous to the stages of infancy and childhood in the lives of its individual members, and is now in the culminating period of its turbulent adolescence approaching its long-awaited coming of age. This vision of social maturation rests upon the idea of unity, which is the axis of Bahá'í ontology.").

<sup>63</sup>See Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, 16 *Ind. J. Global Legal Stud.* 101 (2008) (describing a self-constituted and self-referencing system, as a community or entity which has its own substantive laws and ideals, forming the basis for a constitution); see also Larry Catá Backer, *Governance Without Government or Government Without a State?: Gunther Teubner on Complications of Umoooring Corporate Governance From Corporate Law*, <http://lcbackerblog.blogspot.com/2009/06/gunther-teubner-on-complications-of.html> (June 25, 2009, 16:25 EST) [hereinafter Backer, *Governance Without Government or Government Without a State?*].

<sup>64</sup>See generally, Gunther Teubner, *Societal Constitutionalism: Alternatives to State-centered Constitutional Theory*, in *Constitutionalism and Governance 3* (Christian Joerges, Inge-Johanne Sand & Gunther Teubner, eds. 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=876941](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=876941) (describing functional differentiation as what makes a governance structure unique; wherein each system has its own rules of operation and has its own citizenship).

<sup>65</sup>See Schaefer, *supra* note 6, at 308.

<sup>66</sup>See *infra* Part II.B.1-III.

the Spiritual Assemblies, the jurisdiction of these bodies, and their ability to enforce law on the adherents of the Faith.<sup>67</sup> The primary reference materials for this exercise will be the Constitution of the Universal House of Justice<sup>68</sup> and the Kitáb-i-Aqdas.<sup>69</sup>

## The Constitution of the Universal House of Justice: Prescribing a Progressive and Living Body

After a cursory look at the Constitution of the Universal House of Justice, it becomes apparent that it describes a legal system that bears an uncanny resemblance to the American legal order, as described in the United States (U.S.) Constitution.<sup>70</sup> Taking into consideration that the Constitution of the House was ratified in 1972, centuries after the American Constitution, one might be led to believe that the intertextuality<sup>71</sup> between the two documents is the result of American influence.<sup>72</sup> In reality, there is no such intertextuality between the documents, because the Bahá'í Faith is a new creation, not meant to imitate any existing modes of thought. Furthermore, its governance mechanisms are based on a divinely inspired model meant to surpass existing governance systems in effectiveness. The Bahá'í legal order is a model of non-state-centered constitutionalism, and the Constitution of the United States is a representation of state-based constitutionalism; a comparison of the two merely serves to relate the Constitution of the Universal House of Justice with a document that many are familiar with. The juxtaposition is especially telling of how a non-state entity begins to employ various governance apparatuses in constituting itself to resemble the state.<sup>73</sup>

The Constitution of the Universal House of Justice is subdivided into multiple sections, of which the first is the “Declaration of Trust,” enumerating (1) the powers vested in the House, (2) its governing authority with respect to other Bahá'í institutions, and (3) its responsibilities.<sup>74</sup>

### Conferral of Competence: The “Declaration of Trust”

The Constitution begins with an appeal to the function that Bahá'u'llah served in the establishment of the Faith and His consequent role in the founding of the House of Justice.<sup>75</sup> The

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<sup>67</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html> (referring to the Bahá'í Nation as the “people of Baha”)

<sup>68</sup>See generally *id.*

<sup>69</sup>See generally Bahá'u'lláh, *supra* note 34.

<sup>70</sup>See generally U.S. Const. art. III; The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>71</sup>See Oxford English Dictionary, [http://dictionary.oed.com.ezaccess.libraries.psu.edu/cgi/entry/00297406?query\\_type=word&queryword=intertextuality&first=1&max\\_to\\_show=10&single=1&sort\\_type=alpha](http://dictionary.oed.com.ezaccess.libraries.psu.edu/cgi/entry/00297406?query_type=word&queryword=intertextuality&first=1&max_to_show=10&single=1&sort_type=alpha) (last visited Jan. 29, 2010) [hereinafter *Oxford English Dictionary*](defining intertextuality as “[t]he need for one text to be read in the light of its allusions to and differences from the content or structure of other texts; the (allusive) relationship between esp. literary texts.”).

<sup>72</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>73</sup>See U.S. Const. arts. I-IV; The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>

<sup>74</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>

<sup>75</sup>See *id.*

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document specifically names him as the ordainer<sup>76</sup> of both the Administrative Order and the substantive laws by which the Faith operates.<sup>77</sup> The Universal House of Justice is described as a continuation of God's Covenant with man, a covenant ensuring continued divine guidance.<sup>78</sup> Having ordained authority, the Universal House of Justice's defining facet is the maintenance of unity in the human race.<sup>79</sup> Despite the intended evolutionary character of the Faith, as described above, the text renders the "unity of the human race" the "immovable foundation" upon which the Faith and the House are built.<sup>80</sup> Despite the civil nature of the Constitution as a whole, the first paragraph serves as a guiding principle and a reminder that the Constitution is first rooted in its divine purposes.<sup>81</sup>

Making only periodic references to the Divine, the document proceeds by laying out the seemingly laic purposes of the Universal House of Justice.<sup>82</sup> Exclusive competence is conferred upon the House, because it is designated as the sole arm of the Faith with the ability to illuminate the Sacred Texts.<sup>83</sup> The clause granting the House such broad power seems modeled after the American understanding that a national government within the federal structure must be supreme, as evidenced by the U.S. Constitution's Supremacy Clause.<sup>84</sup> The text of the Constitution explicitly states that the Universal House of Justice is the supreme body that sits atop all other institutions and individuals in the Faith.<sup>85</sup> The additional caveat that the House's authority will remain unchanged unless amended by a future Manifestation of God conveys the impression that the body is inviolable.<sup>86</sup>

The House is vested with all three primary functions of governance: executive, legislative, and judicial. Entrusted with the right to promulgate statutes not sanctioned by the Sacred Texts, the Universal House of Justice ensures the continuity of the Faith through the ages.<sup>87</sup> Such legislative authority operates in tandem with executive competence to protect individual rights granted through the founding documents and the House's own enactments.<sup>88</sup> Furthermore,

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<sup>76</sup>See *Oxford English Dictionary*, *supra* note 71 (defining ordainer as "[a] person who confers holy orders ... [or a] person who institutes or appoints").

<sup>77</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html> ("Bahá'u'lláh ... has proclaimed the advent of God's Kingdom on earth, has formulated its laws and ordinances, enunciated its principles and ordained its institutions.")

<sup>78</sup>See *id.* ("His Covenant ... continues to fulfil its life-giving purpose through the agency of the Universal House of Justice.")

<sup>79</sup>See *id.*

<sup>80</sup>*Id.*

<sup>81</sup>See *id.*

<sup>82</sup>See generally The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>83</sup>See *id.*

<sup>84</sup>See U.S. Const. art. VI.

<sup>85</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html> ("[T]he Universal House of Justice is the Head of the Faith and its supreme institution, to which all must turn, and on it rests the ultimate responsibility of ensuring the unity and progress of the Cause of God.")

<sup>86</sup>See *id.*

<sup>87</sup>See *id.* ("[A]ll that is not expressly recorded therein must be referred to the Universal House of Justice' ... duties with which the Universal House of Justice has been invested are ... to enact laws and ordinances not expressly recorded in the Sacred Texts ... according to the changes of time.")

<sup>88</sup>See *id.* (granting the Universal House of Justice the right to "safeguard the personal rights, freedom, and initiative of individuals.")

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extensive executive power affords the House the ability to expand the scope of governance by adding institutions to the Administrative Order.<sup>89</sup> Primary among its judicial faculties is its trusteeship as protector of the founding documents - the House is meant to “safeguard their inviolability.”<sup>90</sup> Essentially, the House does not have license to reinterpret the founding documents, but it may settle “all problems that have caused difference[s]” with regard to the meaning of laws that it has itself enacted.<sup>91</sup> Such a limitation on the interpretation of the sacred documents is by design and is prescribed in anticipation of a future Manifestation that may alter the meaning of the foundational documents.<sup>92</sup> Further, the Constitution seems suggestive of the House’s adjudicative and arbitrate capacity in personal disputes, and its ability to establish and enforce sanctions for transgressions of Bahá’í law.<sup>93</sup>

An additional operative clause in the Constitution seems to establish a system of checks and balances, but as opposed to the U.S. Constitution, the ambiguity of the House’s Constitution’s language makes it unclear how such a system would operate.<sup>94</sup> Unlike the American government’s tripartite institutional structure (the legislative,<sup>95</sup> the executive,<sup>96</sup> and the judicial<sup>97</sup> branches), in the Bahá’í governance system, the three functions are all vested in one authority, thus making it inconceivable for such a collective to ‘check’ itself.<sup>98</sup> Consequently, it seems such oversight is only conferred upon the House with regard to subordinate bodies; nevertheless, it seems that the Bahá’í notion of decision-making through “Consultation” may itself be an alternative that ensures transparency and accountability in governance.<sup>99</sup>

The spending clause that is incorporated into the Constitution of the House is vague and unlike the U.S. Constitution’s Taxing and Spending Clause;<sup>100</sup> it generally endows the Universal House of Justice with the right to manage funds, endowments, and properties at Its disposal, but it makes no mention about the direct acquisition of such materials.<sup>101</sup> Collections from

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<sup>89</sup> *See id.*

<sup>90</sup> The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.* (“Among the powers and duties with which the Universal House of Justice has been invested are ... [t]o adjudicate disputes falling within its purview; to give judgment in cases of violation of the laws of the Faith and to pronounce sanctions for such violation ... provide for the enforcement of its decisions ... and arbitration and settlement of disputes arising between peoples.”).

<sup>94</sup> *See* U.S. Const. arts. I-IV; The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html> (stating that the Universal House of Justice is “responsible for ensuring that no body or institution within the Cause abuse its privileges or decline in the exercise of its rights and prerogatives”).

<sup>95</sup> *See* U.S. Const. art. I.

<sup>96</sup> *See id.* at art. II.

<sup>97</sup> *See id.* at art. III.

<sup>98</sup> *See generally* The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>99</sup> *See id.*; Consultation, <http://info.bahai.org/article-1-3-6-3.html> (last visited Sep. 17, 2011) (“The principles of consultation were laid down in Bahá'u'lláh's writings, and, as a procedure for building consensus and investigating truth, they have the potential for wide application ... In essence, consultation seeks to build consensus in a manner that unites various constituencies instead of dividing them. It encourages diversity of opinion and acts to control the struggle for power that is otherwise so common in traditional decision-making systems.”).

<sup>100</sup> *See* U.S. Const. art. III, §8, cl. 1.

<sup>101</sup> *See* The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>

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Huqúqu'lláh, a nineteen percent tax that Bahá'ís pay voluntarily on any non-essentials, might fund certain operations within the Faith, but the voluntary nature of the tax and the absence of elaborative language in Constitution of the House elucidate some of the limitations on the House; it would appear that the House has not been ordained with the power to authoritatively mandate the payment of taxes as would be expected in state-based governance.<sup>102</sup>

As the Universal House of Justice is a supranational entity, some of Its conferred powers deal directly with the relations between nations.<sup>103</sup> Specifically, it is entrusted with ensuring comity and cordiality between the 'nations' and establishing law and order in the world.<sup>104</sup> Again, the language is unclear as to the concerned states; there is no indication of whether the reference is to the nations as devised in the traditionally recognized international system<sup>105</sup> or if it is a reference to the interaction amongst the Bahá'í Faith's National Spiritual Assemblies.<sup>106</sup> Nevertheless, given the aims of the Faith to transcend national borders and achieve "universal peace,"<sup>107</sup> it would be appropriate to conclude that the reference is to relations among the sovereign nation-states, rather than interaction between National Spiritual Assemblies.<sup>108</sup>

In concluding the section on the conferred powers, the Constitution of the Universal House of Justice establishes the Bahá'í nation and the constituency of the House as the "people of Bahá."<sup>109</sup> Conversely, the members of the Universal House of Justice are identified as "Men of Justice,"<sup>110</sup> once again very reminiscent of the structure and functions of the American Supreme Court and the use of the term 'justice' to designate a Supreme Court judge in the American legal system.<sup>111</sup> Additionally, the charge bestowed on the members of the Universal House of Justice is one of complete impartiality.<sup>112</sup> As the life term of U.S. Supreme Court Justices is intended to prevent the Justices from being influenced by majoritarian politics, the Constitution of the House makes the Men of Justice accountable to their conscience and their duty to carry out the prescriptions of the Sacred Texts, rather than the present and temporal convictions of

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<sup>102</sup>See *id.*; Huqúqu'lláh, <http://bahaikipedia.org/Huq%C3%BAqu%27ll%C3%A1h> (last visited Sep. 17, 2011)

<sup>103</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>104</sup>See *id.*

<sup>105</sup>See generally The United Nations - Member States of the United Nations, <http://www.un.org/en/members/index.shtml> (last visited Nov. 18, 2009).

<sup>106</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html> ("Among the powers and duties with which the Universal House of Justice has been invested are ... to do its utmost for the realization of greater cordiality and comity amongst the nations and for the attainment of universal peace; and to foster that which is conducive to the enlightenment and illumination of the souls of men and the advancement and betterment of the world.")

<sup>107</sup>*Id.*

<sup>108</sup>See *id.*

<sup>109</sup>*Id.*

<sup>110</sup>*Id.*

<sup>111</sup>See U.S. Const. art. III, § 1; see also The Supreme Court of the United States, A Brief Overview of the Supreme Court, <http://www.supremecourtus.gov/about/briefoverview.pdf> (last visited Nov. 14, 2009) [hereinafter *A Brief Overview of the Supreme Court*] ("The Supreme Court consists of the Chief Justice of the United States and such number of Associate Justices as may be fixed by Congress. The number of Associate Justices is currently fixed at eight (28 U. S. C. §1). Power to nominate the Justices is vested in the President of the United States, and appointments are made with the advice and consent of the Senate.")

<sup>112</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

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their constituents.<sup>113</sup> Although the Men of Justice are not appointed for life, the framers of both constitutions understood the need for a politically divorced judiciary.<sup>114</sup>

### Procedural Laws: “By-Laws” of the Constitution of the Universal House of Justice

The ‘By-Laws’ of the Constitution of the Universal House of Justice may potentially be more telling than the Declaration of Trust about the logistical operation of a non-state entity that assumes the identity of a state.<sup>115</sup> The Preamble describes the Bahá'í administrative system and posits the continued expansion of the system.<sup>116</sup> The Constitution foresees the establishment of “auxiliary branches and ... subordinate agencies.”<sup>117</sup> The language alludes to the appointment of executive and administrative bodies, potentially analogous to American federal agencies.<sup>118</sup>

Expanding on the description of the people of Bahá the ‘By-Laws’<sup>119</sup> discuss qualifications for membership in the Bahá'í Community.<sup>120</sup> Much like the Twenty-Sixth Amendment to the U.S. Constitution,<sup>121</sup> attaining the appropriate age is a condition precedent to the privilege of voting.<sup>122</sup> The Constitution of the House of Justice makes voting incumbent on attainment of age twenty-one, unlike the American voting age of eighteen.<sup>123</sup>

The ‘By-Laws’ also give a description of the two levels of governance leading up to the Universal House of Justice, namely the Local and National Spiritual Assemblies.<sup>124</sup> Reinforcing notions of intertextuality with the U.S. Constitution,<sup>125</sup> both types of assemblies, like the Universal House of Justice, have nine members.<sup>126</sup> Nevertheless, in stark contrast to the Supreme Court, members of all Spiritual Assemblies and the House are democratically elected.<sup>127</sup>

Per the House’s Constitution, a Local Spiritual Assembly must form where more than nine twenty-one year-old Bahá'ís reside within a common area; the members are elected through

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<sup>113</sup>See *id.* (“[T]he members of the Universal House of Justice, it should be borne in mind, are not, as Bahá'u'lláh's utterances clearly imply, responsible to those whom they represent, nor are they allowed to be governed by the feelings, the general opinion, and even the convictions of the mass of the faithful, or of those who directly elect them. They are to follow, in a prayerful attitude, the dictates and promptings of their conscience. They may, indeed they must, acquaint themselves with the conditions prevailing among the community, must weigh dispassionately in their minds the merits of any case presented for their consideration, but must reserve for themselves the right of an unfettered decision.”).

<sup>114</sup>See U.S. Const. art. III, § 1; The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>

<sup>115</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>116</sup>See *id.*

<sup>117</sup>*Id.*

<sup>118</sup>See U.S. Const. art. II, § 2; The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>; USA.gov - A-Z Index of U.S. Government Departments and Agencies, [http://www.usa.gov/Agencies/Federal/All\\_Agencies/index.shtml](http://www.usa.gov/Agencies/Federal/All_Agencies/index.shtml) (last visited Nov. 19, 2009).

<sup>119</sup>The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>120</sup>See *id.*

<sup>121</sup>See U.S. Const. amend. XVI.

<sup>122</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>123</sup>See *id.*

<sup>124</sup>See *id.*

<sup>125</sup>See *A Brief Overview of the Supreme Court*, *supra* note 111.

<sup>126</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>127</sup>See *id.*

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a direct democratic vote of the local members.<sup>128</sup> A National Spiritual Assembly, on the other hand, forms at the prompting of the Universal House of Justice and delegates from the Local Spiritual Assemblies of the respective country elect members of the National Spiritual Assembly.<sup>129</sup> Each form of Spiritual Assembly has jurisdiction over its local matters and has its own constitution.<sup>130</sup> Furthermore, National Spiritual Assemblies represent their constituents before the Universal House of Justice, a structure perhaps resembling the United Nations General Assembly.<sup>131</sup> Similarly to many state-centered or nation-centered political systems, the three-part governing structure devised in the by-Laws depicts a federal system akin the American federal structure.<sup>132</sup>

The democratic nature of Bahá'í institutions is entrenched in the 'By-Laws' which task Spiritual Assemblies with carrying out their mandates without "dictatorial assertiveness" and while maintaining the utmost open discourse.<sup>133</sup> Perhaps the only seemingly non-democratic aspect of the prescribed structure is the fact that women are not to be elected to the Universal House of Justice – some would say this is in apparent derogation of the progressive nature of the Faith, but such a contention may be dispelled by the fact that a future Manifestation may grant women the right to serve as members of the House of Justice.<sup>134</sup>

Further resembling a democratic republic like to the U.S., the election system of the House is emblematic of a delegate-based representative democracy like the American Electoral College, as described in the Twelfth Amendment to the U.S. Constitution.<sup>135</sup> National Spiritual Assemblies send delegates to the International Bahá'í Convention, where the members of the House of Justice are elected, every five years.<sup>136</sup>

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<sup>128</sup> See *id.*

<sup>129</sup> See *id.*

<sup>130</sup> See *id.*

<sup>131</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>. See generally The United Nations, Functions and Powers of the General Assembly <http://www.un.org/ga/about/background.shtml> (last visited Nov. 19, 2009).

<sup>132</sup> See U.S. Const. arts. I-IV; The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>

<sup>133</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>

<sup>134</sup> See *id.*; see also Research Department of the Universal House of Justice, Compilation on Women 13 (1986), available at <http://reference.bahai.org/en/t/c/> (follow "Compilation on Women" hyperlink) ("As regards your question concerning the membership of the Universal House of Justice: there is a Tablet from 'Abdul-Bahá in which He definitely states that the membership of the Universal House is confined to men, and that the wisdom of it will be fully revealed and appreciated in the future. In the local as well as the national Houses of Justice, however, women have the full right of membership ... From the fact that there is no equality of functions between the sexes [with regard to the Universal House of Justice] one should not, however, infer that either sex is inherently superior or inferior to the other, or that they are unequal in their rights.")

<sup>135</sup> See U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."); *id.* at amend. XII ("The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate."); The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>136</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

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The House permits impeachment and removal of members of the Universal House of Justice for moral or sinful obstruction of community principles, similar to the American requirement that judges only maintain their “[o]ffices during good Behavior.”<sup>137</sup> A member of the House may also be removed pursuant to a determination that he can no longer fulfill the functions of his office.<sup>138</sup> Voluntary relinquishment of office is not permitted without the prior approval of the House.<sup>139</sup>

As the Universal House of Justice does not have a hierarchy, all members are assumed to occupy the same position; there is no equivalent of an American Chief Justice.<sup>140</sup> To further engrain the equality of members of the House, all members have signatory authority on behalf of the whole, where the entire House gives prior approval.<sup>141</sup> Furthermore, like the Supreme Court of the United States, the Universal House of Justice’s decisions must be made by a majority, in the presence of the full membership or where quorum has been met.<sup>142</sup>

As the U.S. Supreme Court is the last recourse in review of national constitutional matters in the United States, the Universal House of Justice has the exclusive competence of judicial review.<sup>143</sup> The Universal House of Justice’s power, in this regard, is much broader than that of the U.S. Supreme Court, because it has the ability to review the decisions of lower Assemblies *sua sponte*.<sup>144</sup> Further, with regard to judicial appeals, the higher courts (the House of Justice and the National Assemblies) have discretion on whether to accept cases from Local Assemblies.<sup>145</sup> Much like the U.S. Supreme Court, the Universal House of Justice and the National Spiritual Assemblies have discretion in deciding whether a case is worthy of their attention.<sup>146</sup> An appellant must submit his appeal request to the court hearing his case in order to obtain reconsideration or an appeal.<sup>147</sup> Where the Assembly does not address the appeal in a timely manner or refuses to address it, the appellant may directly petition the higher authority.<sup>148</sup> Similarly to the American Constitution’s notion of subject-matter jurisdiction,<sup>149</sup> cases arising between two different governing bodies must be addressed by the higher authority,

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<sup>137</sup>U.S. Const. art. III, § 1; see The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>138</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>139</sup>See *id.*

<sup>140</sup>See *id.*; *A Brief Overview of the Supreme Court*, *supra* note 111.

<sup>141</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>142</sup>See *id.*; ‘Abdu’l-Bahá, The Will and Testament of ‘Abdu’l-Bahá 12, available at <http://reference.bahai.org/en/t/ab/> (follow “The Will and Testament of ‘Abdu’l-Bahá” hyperlink) (“Unto the Most Holy Book every one must turn and all that is not expressly recorded therein must be referred to the Universal House of Justice. That which this body, whether unanimously or by a majority doth carry, that is verily the Truth and the Purpose of God Himself.”); *A Brief Overview of the Supreme Court*, *supra* note 111.

<sup>143</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>; *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>144</sup>See *id.*

<sup>145</sup>See *id.*

<sup>146</sup>See *id.*; *A Brief Overview of the Supreme Court*, *supra* note 111.

<sup>147</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>

<sup>148</sup>See *id.*

<sup>149</sup>See U.S. Const. art. III, § 2.



i.e. where a National Assembly is a party, the case must be resolved by the House, and where a two Local Assemblies are opposing parties, the case must be resolved by the National Assembly.<sup>150</sup>

The analysis of the judicial functions of the Universal House of Justice makes evident the reasons for this extensive comparison of the American legal order to that of the Bahá'í Universal House of Justice. The juxtaposition of the two establishes the framework of analysis for the remainder of the essay by contextualizing the Universal House of Justice as a state-like alternative to state-based governance.<sup>151</sup> Furthermore, the comparison reveals the democratic character that the Bahá'í Administrative Order espouses.<sup>152</sup>

## Measuring Up to Theories of Non-State Governance

Larry Catá Backer<sup>153</sup> and Gunther Teubner,<sup>154</sup> two legal scholars, posit that private transnational legal regulatory systems illustrate the existence of alternatives to state-centered governance theories.<sup>155</sup> Although both scholars primarily employ corporate regulation as the exemplar of how industry-specific soft law is suggestive of the privatization of governance, a valid argument can be made that the same framework is applicable to other non-state governance structures like that of the Bahá'í Faith.<sup>156</sup>

In his article, titled, *Societal Constitutionalism: Alternatives to State-centered Constitutional Theory*,<sup>157</sup> Teubner claims that constitutional theory is no longer limited to the nation-state, and that the aggregation of the various non-state constitutional structures amount to the Constitution of World Society.<sup>158</sup> The non-state governance model presupposes the transformation of objects of law (civil society organs, corporations, and nongovernmental organizations) into the subjects of law (the state).<sup>159</sup>

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<sup>150</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>151</sup>See *id.*

<sup>152</sup>See Danesh, *supra* note 2, at 60.

<sup>153</sup>See Backer, *Governance Without Government or Government Without a State?*, *supra* note 63.

<sup>154</sup>See Teubner, *supra* note 64, at 3.

<sup>155</sup>See generally *id.*; Backer, *Governance Without Government or Government Without a State?*, *supra* note 63.

<sup>156</sup>See generally Teubner, *supra* note 64, at 3; Backer, *Governance Without Government or Government Without a State?*, *supra* note 63.

<sup>157</sup>See Teubner, *supra* note 64, at 3.

<sup>158</sup>See *id.* at 8 (“[Once] one abandons the state centring of the constitution, then the real possibilities of constitutionalisation without the state become visible. For constitutional theorists this amounts to breaking a taboo. A constitution without a state is for them at best a utopia, but a poor one into the bargain. But this formula is definitely not an abstract normative demand for remote, uncertain futures, but an assertion of a real trend that can today be observed on a world-wide scale. The thesis is: emergence of a multiplicity of civil constitutions. The constitution of world society comes about not exclusively in the representative institutions of international politics, nor can it take place in a unitary global constitution overlying all areas of society, but emerges incrementally in the constitutionalisation of a multiplicity of autonomous subsystems of world society.”).

<sup>159</sup>See *id.* at 4-5.

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The non-state theory puts forth the notion that where communities form,<sup>160</sup> they seek to establish their own rules, both substantive and procedural, for internal regulation.<sup>161</sup> Such rules are generated by, enforced on, and consented to by members of these communities.<sup>162</sup> Every such community or system has certain constitutional norms,<sup>163</sup> and Teubner identifies four features<sup>164</sup> that such non-state governance structures must possess: (1) the system must exhibit structural coupling of legal norms with a social system;<sup>165</sup> (2) there must be a hierarchy of norms, wherein certain norms become incontrovertible law;<sup>166</sup> (3) a legal organ within the system must have the capacity of judicial review;<sup>167</sup> and (4) the constitution of the system must be split between a formally organized sphere and spontaneous, uncontrolled sphere.<sup>168</sup>

All of Teubner's factors are applicable to the Bahá'í legal order, perhaps with the exception of the fourth, because it is arguably irrelevant when applied to religious entities.<sup>169</sup> First, structural coupling between the social system and legal norms is evident, because the Bahá'í Sacred Texts (the works of Bahá'u'lláh, Àbdu'l-Bahá, and Shoghi Effendi) serve to inform the legal norms in the Faith.<sup>170</sup>

Concomitantly, the same Sacred Writings are the foundation for the incontrovertible "higher"<sup>171</sup> law in the Constitution of the Universal House of Justice.<sup>172</sup> The notion of incontrovertible law conveys the understanding that certain laws are formative postulates of the system, without which the system would cease to exist.<sup>173</sup> In the Bahá'í Faith, such fundamental laws would include: (1) the preservation of "unity in diversity" (establishing one human race)<sup>174</sup> (2) striving towards global peace and justice,<sup>175</sup> and (3) upholding the equality of all mankind,<sup>176</sup> to name a few. Essentially, higher law is set forth in the Universal House

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<sup>160</sup>See *id.* at 10-12. Quoting David Sciulli, Teubner gives some examples of such communities: research institutes, artistic and intellectual networks, legislatures, professional associations, public and private corporations, non-profit organizations, etc. *Id.*

<sup>161</sup>See *id.* at 10-12 ("Contract, moral obligations, communal consensus expressed in otherwise non-binding instruments have begun to assert a regulatory power far in excess of the extent of their formal effect in law within a system in which only legitimately enacted state measures are vested with a power to demand conformity and which may be enforced through the instrumentalities of the state.").

<sup>162</sup>See Teubner, *supra* note 64, at 10-12.

<sup>163</sup>See *id.* at 4-5 ("Not every polity has a written constitution, but every polity has constitutional norms. These norms must at least constitute the main actors, and contain certain procedural rules. Theoretically, a constitution could content itself with setting up one law-making organ, and regulating how that organ is to decide the laws.").

<sup>164</sup>See *id.* at 20-28

<sup>165</sup>See *id.* at 20 ("A constitution is always bridging two real ongoing processes: from the viewpoint of law it is the production of legal norms, which is interwoven with fundamental structures of the social systems; from the viewpoint of the constituted social system it is the production of fundamental structures of the social system which at the same time inform the law and are in turn normed by the law.").

<sup>166</sup>See *id.* at 22.

<sup>167</sup>See Teubner, *supra* note 64, at 25-26.

<sup>168</sup>See *id.* at 27-28.

<sup>169</sup>See *id.*

<sup>170</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>171</sup>Teubner, *supra* note 64, at 22 ("In addition to the quality of legal norm and to its structural coupling with a social system, a specific autological relationship, a hierarchialisation between norms of 'higher' constitutional quality and those of 'lower' quality of ordinary law must exist.").

<sup>172</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>

<sup>173</sup>See Backer, *Governance Without Government or Government Without a State?*, *supra* note 63.

<sup>174</sup>*The Universal House of Justice*, *supra* note 5.

<sup>175</sup>See *id.*

<sup>176</sup>See Basic Teachings of Bahá'u'lláh, *supra* note 27

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of Justice's Constitution's Declaration of Trust, and the House's actions must not counter the Declaration's prescriptions.<sup>177</sup>

The third feature requires the entity to have an established judicial organ with the ability to repeal laws (judicial review).<sup>178</sup> The analysis above established that the Universal House of Justice is conferred with such authority,<sup>179</sup> in its ability to review the decisions of the Local and National Spiritual Assemblies.<sup>180</sup> Judicial review naturally hinges on the existence of some codified law, thus Teubner and Backer's theory requires some legal formalism.<sup>181</sup> The system must have its own form of positive law, rather than mere informal pronouncements, which can be recognized by all members of the community.<sup>182</sup> From such legal formalism is born an autonomous "implementation organ"<sup>183</sup> which can establish, modify, and interpret the norms (laws) of the system.<sup>184</sup> Again, as established in the previous section of the essay,<sup>185</sup> the Bahá'í Faith has its own laws, contained in its Sacred Texts.<sup>186</sup> Furthermore, the Universal House of Justice is the "implementation organ" that has legislative ability, and though it may not re-interpret the Sacred Texts, it is the luminary for anything not addressed by those Texts.<sup>187</sup>

Lastly, the fourth feature requires that there be a dualism in the system.<sup>188</sup> The legal order must be partly institutionalized and partly spontaneous in character.<sup>189</sup> Teubner provides an example by explaining that in state politics dualism exists, because there is government administration (the institutionalized part) and the electorate (the spontaneous part).<sup>190</sup> Similarly, in economics, the spontaneity of market sectors counters the more organized enterprise sectors.<sup>191</sup> Nevertheless, it is important to note that campaigning by candidates for Bahá'í institutional offices is forbidden.<sup>192</sup> Additionally, the Bahá'í election system is not politicized and Bahá'ís are required to abstain from political participation outside the Faith.<sup>193</sup>

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<sup>177</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>178</sup> See Teubner, *supra* note 64, at 25-26.

<sup>179</sup> See *supra* Part II.A.2.

<sup>180</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>181</sup> See Teubner, *supra* note 64, at 26-27; Backer, *Governance Without Government or Government Without a State?*, *supra* note 63 ("Formalism, it seems, leads to functional effects, or at least to comfort. But not enough without a certain level of institutionalization. Law must not merely be complete, it must exist within a differentiated sphere in which its own autonomy is grounded on its own will.").

<sup>182</sup> See Teubner, *supra* note 64, at 26-27; Backer, *Governance Without Government or Government Without a State?*, *supra* note 63.

<sup>183</sup> Backer, *Governance Without Government or Government Without a State?*, *supra* note 63.

<sup>184</sup> See *id.*

<sup>185</sup> See *supra* Part I.

<sup>186</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>187</sup> *Id.*; see 'Abdu'l-Bahá, *supra* note 142, at 12.

<sup>188</sup> See Teubner, *supra* note 64, at 27 ("The democratic character of a constitution seems to depend on whether a dualism of formally organized rationality and informal spontaneity can be successfully institutionalised as dynamic interplay without the primacy of one or the other.")

<sup>189</sup> See *id.* at 27.

<sup>190</sup> See *id.* ("In politics, the point is mutual control by the formally organized sector of political parties and state administration on the one side, and the spontaneous sector of the electorate, interest groups and public opinion on the other.")

<sup>191</sup> See *id.*

<sup>192</sup> See Schaefer, *supra* note 6, at 359 ("[The] theocratic element is safeguarded by the prohibition of the selection or proposal of candidate, election agreements, electoral groups and any form of campaigning or electioneering.").

<sup>193</sup> See Danesh, *supra* note 2, at 53-54 ("This privileging of social meanings is also captured in the Bahá'í principle of "non-participation in politics." Bahá'u'lláh taught his believers to avoid partisan politics, a principle that could be interpreted as suggesting quietism and passivism. But such a rendering is inaccurate, for the issue is not politics itself, but whether engagement in contemporary political processes is an approach

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Although one might argue that economics and politics are not really applicable to organized religious groups, the Bahá'í Faith governance structure does display aspects of dualism.<sup>194</sup> The Universal House of Justice and all the Spiritual Assemblies are evidently representative of the more institutionalized structure, but since all the Faith's institutional bodies are elected, the electorate preserves the element of spontaneity.<sup>195</sup>

Having evaluated the Bahá'í legal structure, under the guise of Teubner and Backer's non-state governance theory, the Bahá'í Faith effectually begins to resemble a private governance system, set apart from, but mimicking state-based governance systems, as described by Backer:

The idea, one increasingly accepted among international actors, is that the constitution of states is not something unique to states. Instead, any juridical person might also acquire a certain legitimacy as a regulatory entity by mimicking states. "We can observe the typical components of a constitution: regulations about the establishment and functioning of decision-making processes (organisational and procedural rules), and the codification of the boundaries of the organisation in relation to individual freedoms and civil liberties (basic rights)."<sup>196</sup>

Furthermore, the argument can be made that the Bahá'í Faith has acquired far more "legitimacy as a governance structure"<sup>197</sup> than the corporate structures that Teubner and Backer describe, because it has a far more formalistic structure.<sup>198</sup> The Faith has distinguished itself as a non-state governance structure through *sui generis* law, coupled with its local, national, and international legal organization.<sup>199</sup>

### Enforcement Mechanisms

Describing previous efforts to form a global non-state governance structure, above independent nation-states, Teubner points to the United Nations.<sup>200</sup> He characterizes the creation of the United Nations as a failed attempt to establish "the constitutional law of the 'international community' [to be] put into force by a world sovereign."<sup>201</sup> His main reproach of the United Nations is undoubtedly the same contention that most scholars would raise as a structural flaw to the Bahá'í Faith's governance order.<sup>202</sup> Such supranational organizations, even those that mimic state-based governance, are limited in their sovereignty, and are thus crippled

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to social and political change reflective of the principle of unity. For Bahá'u'lláh, there was no value in Bahá'ís assuming positions of political power within current political systems.").

<sup>194</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>195</sup>See *id.*

<sup>196</sup>See Backer, *Governance Without Government or Government Without a State?*, *supra* note 63.

<sup>197</sup>*Id.*

<sup>198</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>199</sup>See *id.*

<sup>200</sup>See Teubner, *supra* note 64, at 4-5.

<sup>201</sup>*Id.*

<sup>202</sup>See *id.*

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in their ability to enforce laws.<sup>203</sup> Teubner notes: “Traditional law is based on institutional, procedural and personal separation of law-making, application and law enforcement. This is also true to a certain degree for law making in private sectors.”<sup>204</sup> The words “to a certain degree”<sup>205</sup> seems to imply that separation of powers and enforcement capacity are indicia of non-state governance rather than necessary ingredients for the existence of such systems.<sup>206</sup> As previously stated, there is a limited checks and balance system in the Bahá'í Administrative Order,<sup>207</sup> because the Universal House of Justice retains legislative, executive, judicial authority in the governance structure.<sup>208</sup> However, it remains important to discuss the enforceability of Bahá'í law, because an effective and operative legal system without enforcement power seems nearly inconceivable.<sup>209</sup>

Although the Bahá'í Faith might share the United Nations' challenges in enforcing its laws, it is important to note that the structural organization of the United Nations and the Bahá'í governance structure are intrinsically different.<sup>210</sup> The Bahá'í framework is closer to that advanced by Teubner<sup>211</sup> because the framework devised in the Constitution of the Universal House of Justice shares more attributes with a multiple-branch corporation than the United Nations.<sup>212</sup>

The United Nations is often referred to as having limited sovereignty, because its sovereignty derives directly from the authority granted to it by the independent ‘nation-states’<sup>213</sup> that have signed its Charter.<sup>214</sup> In contrast, the Bahá'í Faith has many branches, namely its National and Local Spiritual Assemblies, over which it has direct jurisdiction.<sup>215</sup> Although it is acknowledged that individual nation-states may limit the influence of the Bahá'í Faith by refusing to recognize the pronouncements of its institutions, the Universal House of Justice, nonetheless, does not require a grant of authority from a state, i.e., India, in order to arbitrate cases between individual Bahá'ís or to hear a case involving two countries' National Spiritual

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<sup>203</sup>See *id.* (“All attempts can be reproached with not generalizing the traditional concept of the constitution sufficiently for today's circumstances, nor re-specifying it carefully enough, but instead uncritically transferring nation-state circumstances to world society. In particular, the changes the concept of constitution would have to go through in relation to sovereignty ... hierarchies of decision, [etc.]”). See generally Nye, *supra* note 3.

<sup>204</sup>Teubner, *supra* note 64, at 25-26.

<sup>205</sup>*Id.*

<sup>206</sup>See *id.*

<sup>207</sup>See *supra* Part II.A.1.

<sup>208</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>209</sup>See Teubner, *supra* note 64, at 25-26.

<sup>210</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>; Mariano Aguirre, Power and paradox in the United Nations, [http://www.opendemocracy.net/globalization-institutions\\_government/un\\_paradox\\_4073.jsp](http://www.opendemocracy.net/globalization-institutions_government/un_paradox_4073.jsp) (last visited Jan. 5, 2010).

<sup>211</sup>See Teubner, *supra* note 64, at 3.

<sup>212</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>; Aguirre, *supra* note 210.

<sup>213</sup>See *Oxford English Dictionary*, *supra* note 71 (defining nation-state as “[a]n independent political state formed from a people who share a common national identity (historically, culturally, or ethnically); (more generally) any independent political state.”).

<sup>214</sup>See Aguirre, *supra* note 210.

<sup>215</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

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Assemblies.<sup>216</sup> Contrarily, the United Nations is highly limited in its authority to take positive action, without the prior approval and monetary support of its Member States.<sup>217</sup> Succinctly, while the United Nation's constituents are individual sovereign nation-states,<sup>218</sup> the Universal House of Justice's constituents form one nation: the Bahá'í nation (constituted of the people of Bahá').<sup>219</sup>

Understanding of the word 'nation'<sup>220</sup> in the Bahá'í context is more related to the notion of 'nation-building',<sup>221</sup> and divorced from the territorially-linked definition of the same word, which is more synonymous with the word 'state.'<sup>222</sup> More appropriate to this comparative exercise is an understanding that the word 'nation' is a reference to an aggregate of people who are united by a common identity, and thus associate together.<sup>223</sup> The Bahá'í nation is an aggregate of persons who share common religious and ideological beliefs, and have independently agreed to organize themselves into Local and National Spiritual Assemblies, subject to the jurisdiction of the Universal House of Justice.<sup>224</sup>

People who belong to the same nation generally have the same interests, because of their shared characteristics,<sup>225</sup> but the same cannot be said of signatories of the United Nations Charter, as certain signatories have more power than others, i.e., U.N. Security Council members have veto power which other members of the General Assembly do not enjoy.<sup>226</sup> Realist theory<sup>227</sup> makes evident that states are undeniably self-interested, thus making it hard for them to relinquish sovereignty to a higher power, i.e. the United Nations.<sup>228</sup> Essentially, the Universal House

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<sup>216</sup> See *id.*

<sup>217</sup> See Aguirre, *supra* note 210.

<sup>218</sup> See *id.*

<sup>219</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>; The Bahá'í International Community, The Bahá'í World Community, <http://info.bahai.org/bahai-world-community.html> (last visited Jan. 6, 2010) ("The Bahá'í community today numbers some five million members resident in 189 independent countries and 46 territories. Its rich diversity embraces people from most of the planet's races, creeds and cultures, including over 2,100 different ethnic groupings.")

<sup>220</sup> See *Oxford English Dictionary*, *supra* note 71 (defining nation as "1. a. A large aggregate of communities and individuals united by factors such as common descent, language, culture, history, or occupation of the same territory, so as to form a distinct people. Now also: such a people forming a political state; a political state. (In early use also in *pl.*: a country.) ... c. A group of people having a single ethnic, tribal, or religious affiliation, but without a separate or politically independent territory.")

<sup>221</sup> See *id.* ("nation-building *n.* and *adj.* (a) *n.* the creation of a new nation, esp. a newly independent nation; the encouragement of social or cultural cohesion within a nation; (b) *adj.* characterized by or relating to such activity.")

<sup>222</sup> See *id.* (defining states as "a body of people occupying a defined territory and organized under a sovereign government. Hence *occas.* the territory occupied by such a body.")

<sup>223</sup> See *id.* (defining nation as "[a] group of people having a single ethnic, tribal, or religious affiliation, but without a separate or politically independent territory.")

<sup>224</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>225</sup> See *Oxford English Dictionary*, *supra* note 71 (defining nation as "1. a. A large aggregate of communities and individuals united by factors such as common descent, language, culture, history, or occupation of the same territory, so as to form a distinct people. Now also: such a people forming a political state.")

<sup>226</sup> See Aguirre, *supra* note 210.

<sup>227</sup> See Internet Encyclopedia of Philosophy, Political Realism, <http://www.iep.utm.edu/polreal/> (last visited Sep. 29, 2012) ("Political realism is a theory of political philosophy that attempts to explain, model, and prescribe political relations. It takes as its assumption that power is (or ought to be) the primary end of political action, whether in the domestic or international arena. In the domestic arena, the theory asserts that politicians do, or should, strive to maximize their power, whilst on the international stage, nation states are seen as the primary agents that maximize, or ought to maximize, their power. The theory is therefore to be examined as either a prescription of what ought to be the case, that is, nations and politicians ought to pursue power or their own interests, or as a description of the ruling state of affairs-that nations and politicians only pursue (and perhaps only can pursue) power or self-interest.")

<sup>228</sup> See Nye, *supra* note 3, at 3.

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of Justice has created its own matrix, in which its jurisdiction extends over all commonly-interested Bahá'ís who submit to such jurisdiction, across various state boundaries.<sup>229</sup>

Issues of sovereignty arise with regard to the fact that submission to the Universal House of Justice's jurisdiction seems completely voluntary on the part of individual Bahá'ís.<sup>230</sup> Unlike the nation-state, which has the ability to apply its law to citizens, regardless of whether the citizen recognizes the authority of the state, the Universal House of Justice appears to have limited enforcement ability.<sup>231</sup> This aspect of sovereignty reveals what the United Nations and the Universal House of Justice share in common; they do not have the ability to prevent constituents from deviating from their established laws.<sup>232</sup>

The Faith is sourced in free will and voluntariness, thus every Bahá'í has the ability to leave the Faith at his or her own discretion.<sup>233</sup> Such a principle seems to work against enforcement of law; although citizens of independent nation-states may emigrate from their respective countries to other states, leaving the Faith is far simpler than emigrating from one nation-state to another.<sup>234</sup> Furthermore, certain governments have laws that can complicate emigration, especially for those trying to escape legal proceedings and obligations.<sup>235</sup> Coupled with harsher immigration law in receiving countries, emigration can be a struggle for many prospective immigrants.<sup>236</sup> Contrary to the difficulty of emigration, freedom to dissociate oneself from the Faith, with such facility, is undoubtedly a barrier to enforcement of law in the Bahá'í Faith.<sup>237</sup>

The Faith's ability to excommunicate may be its strongest enforcement tool; out of fear of being excommunicated, Bahá'ís might be compelled to abide by the laws applicable to them.<sup>238</sup> The ability to expel those whose actions counter the fundamental norms is the Bahá'í Faith's primary method of avoiding "division and sectarianism in the Faith."<sup>239</sup> Disloyal members are considered to be covenant-breakers, because their actions breach the covenant formed between mankind and the Divine.<sup>240</sup> Though, there is "no legal definition of this offence ... it is clear that only exponents of subversion and sedition are covenant-breakers ... only divisive activities, sectarianism, and attacks on the authority of institution constitute this offence."<sup>241</sup>

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<sup>229</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>230</sup> See *id.*

<sup>231</sup> See *id.*

<sup>232</sup> See *id.*; Aguirre, *supra* note 210.

<sup>233</sup> See Schaefer, *supra* note 6, at 347 ("[E]very believer who has lost his faith has the right to leave the community without any form of stigmatization, for God does not compel the soul to become spiritual; the exercise of the free human will is necessary.")

<sup>234</sup> See *id.*

<sup>235</sup> See The UN Refugee Agency, Republic of Lithuania Law on Emigration, <http://www.unhcr.org/refworld/category.LEGAL,,,LTU,3ae6b52e20,0.html> (last visited Jan. 5, 2010)

<sup>236</sup> See Ginger Thompson & David M. Herszenhorn, *Obama Set for First Step on Immigration Reform*, <http://www.nytimes.com/2009/06/25/us/politics/25immig.html?scp=14&sq=immigration%20bill&st=cse> (last visited Oct. 31, 2009)

<sup>237</sup> See Schaefer, *supra* note 6, at 347.

<sup>238</sup> See *id.* at 347-48.

<sup>239</sup> *Id.*

<sup>240</sup> See *id.*

<sup>241</sup> *Id.* at 348.

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Excommunication implies a complete exclusion of the covenant-breaker, because any believer who associates with such a person would be subject to the same punishment.<sup>242</sup> Naturally, such exclusion would mean disenfranchisement of the offender.<sup>243</sup> Loss of all rights in the community is the equivalent of loss of citizenship in any nation-state, thus excommunication is potentially the most effective legal enforcement practice in the Faith.<sup>244</sup>

The above serves as evidence that at present enforcement tools are very limited in the Faith, especially since excommunication could be irrelevant to someone who may already desire to leave the Faith.<sup>245</sup> It is absurd to think that anyone would actively seek exclusion, but those who may seek to make themselves out to be the equivalent of the Catholic Church's Copernicus, may have no such reservations.<sup>246</sup> Lack of such enforcement power may appear to invalidate the effectiveness of Bahá'í laws, but it does nothing to prevent the institutions from mandating compliance from adherents of the Faith, it merely limits the reach of the legal organs, beyond the Bahá'í governance network.<sup>247</sup>

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<sup>242</sup>See Schaefer, *supra* note 6, at 349.

<sup>243</sup>See *id.* at 347-49.

<sup>244</sup>See *id.*

<sup>245</sup>See *id.*

<sup>246</sup>See *Basic Teachings of Bahá'u'lláh*, *supra* note 27. This sentence is not meant to suggest that the Bahá'í Faith sees science as a threat, for the Faith presupposes that "religion is in harmony with reason and the pursuit of scientific knowledge." *Id.*

<sup>247</sup>See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.



## Conclusion: Comparisons with *Shari'a* and the Potential for Continuity

As alluded to in previous sections of this essay, the Bahá'í Faith was born under the influence of Islam.<sup>248</sup> Consequently, *shari'a* serves as a basis of comparison in understanding the potential for continuity of Bahá'í law.<sup>249</sup> Having existed for centuries prior to the Bahá'í Faith,<sup>250</sup> it is comprehensible that Islamic law could serve as a factor in assessing the prospects of continuity of Bahá'í law.

Much like Bahá'í law, *shari'a* involves personal status laws and is based on the Sacred Texts of Islam, namely the Qu'ran and the Sunna.<sup>251</sup> Contrarily to the Bahá'í example, some form of *shari'a* has been adopted and is legally enforceable in many independent nation-states, including Iran, Lybia, Sudan, Nigeria, Indonesia, etc.<sup>252</sup> Reza Banakar<sup>253</sup> and Haider Ala Hamoudi,<sup>254</sup> both legal scholars, have assessed the perceptions of *shari'a* in their respective articles.<sup>255</sup> Banakar criticizes the common Western approach to analyzing *shari'a* as a uniform legal system,<sup>256</sup> and Hamoudi furthers Banakar's argument by showcasing the factors that have lead to the disintegration of Islamic law and have, in turn, stunted its development as a uniform legal system.<sup>257</sup>

Banakar advances the notion that Muslim communities are not “mono-cultural or mono-ethnic,” thus they cannot have the same laws.<sup>258</sup> In the wake of recent terrorism and the unveiling of Samuel Huntington's “clash of civilizations”<sup>259</sup> paradigm, there is a Western desire to constitute all Muslim states as having a monolithic legal system that stands in opposition to Western principles.<sup>260</sup> Extremist Muslim groups, in opposition to the West, also favour this monolithic perception, because they want to reinforce the perceived West-versus-Islam dichotomy.<sup>261</sup> Nevertheless, cultural and social variance in Muslim countries prevents *shari'a*

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<sup>248</sup> See *supra* Part I.

<sup>249</sup> See Schaefer, *supra* note 6, at 309.

<sup>250</sup> See *id.*

<sup>251</sup> See generally Haider Ala Hamoudi, *The Death of Islamic Law*, 38 Ga.J.Int'l & Comp. L. (forthcoming 2010) (manuscript at 6, on file with author), available at <http://www.jhfc.duke.edu/disc/events/documents/TheDeathofIslamicLaw10.doc> (“God's Law, as set forth in Muslim sacred text (primarily the Qur'an, the Revealed Book of God to the Prophet Muhammad, and the Sunna, the actions and utterances of the Prophet Muhammad).”).

<sup>252</sup> See *id.* at 6.

<sup>253</sup> See generally Reza Banakar, *The Politics of Legal Cultures*, in Retfærd: The Nordic Journal of Law and Justice 37 (2008), available at <http://ssrn.com/abstract=1323371>.

<sup>254</sup> See generally Hamoudi, *supra* note 250.

<sup>255</sup> See generally Banakar, *supra* note 252. See generally Hamoudi, *supra* note 250.

<sup>256</sup> See generally Banakar, *supra* note 252.

<sup>257</sup> See generally Hamoudi, *supra* note 250.

<sup>258</sup> Banakar, *supra* note 252, at 38.

<sup>259</sup> *Id.* (“The assumptions regarding the incompatibility of Islam and Western democracy are in line with the ideologically manufactured idea of the ‘clash of civilizations,’ which ... sees insurmountable divisions between Islam and the West.”).

<sup>260</sup> See *id.* at 43.

<sup>261</sup> See *id.* at 47 (“Extremist Islamic groups ... use the immutable dichotomy of West and Muslims to describe the relationship between themselves and their host countries. These groups conceptualise the West as a mono-cultural entity and regard a rejection of the Western identity of their host countries as the first step towards the ‘promotion of a single united ummah.’”)

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from being regarded as a set of laws that is uniformly applied across the various Muslim states.<sup>262</sup> Muslim countries cannot be said to belong to the same “Islamic (legal) culture,”<sup>263</sup> because each community’s “interpretations of Islam and religious practices are shaped by their socio-historical backgrounds and experience.”<sup>264</sup> Banakar concludes that because *shari’a* is intrinsically tied to culture, we have witnessed its continued fragmentation into many legal branches throughout history.<sup>265</sup> His analysis illustrates, one of the present differences between Bahá'í law and *shari’a*.<sup>266</sup> Contrary to *shari’a*, Bahá'í law can be deemed holistically monolithic, and is expected to remain as such, given the efforts of the Universal House of Justice to avoid any sectarianism or disunity.<sup>267</sup>

Hamoudi construes *shari’a* as not uniform, because of its dependence on state authority and the ability of every state to decide the extent to which it will apply religious law.<sup>268</sup> He characterizes Islamists (fundamentalists) as opportunistic; they desire the secular state to be subservient to the religious state, but only when it is beneficial to them.<sup>269</sup> Hamoudi notes the emergence of new exception clauses in many Muslim state constitutions, allowing the state to circumvent *shari’a* in certain circumstances.<sup>270</sup> He also points to the innate difference between *shari’a* as prescribed in the Sacred Texts and the statutory versions that have been promulgated by the various states.<sup>271</sup>

In addition to having multiple schools of thought on the interpretation of religious law, there is no equivalent of the Universal House of Justice in Islam.<sup>272</sup> Consequently, there is no central authority that can determine whether *shari’a* has been appropriately applied, nor is there a body that can legislate for the future.<sup>273</sup> The absence of such an institution has resulted in the further

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<sup>262</sup>See *id.* (“[A] culturally reified and socio-politically monolithic concept of civilization ... disregards the plurality of worldviews and local practices within each so-called ‘civilization.’ It is, admittedly, true that the practices of Sharia have taken inhumane and oppressive forms in some Islamic states and much of this oppression is directed towards Muslim women. However, it does not mean that all Muslims, or all Islamic states for that matter, are in favour of such practices.”).

<sup>263</sup>*Id.* at 49.

<sup>264</sup>Banakar, *supra* note 252, at 49

<sup>265</sup>See *id.* (“No attention was paid to the fact that there were different versions of Islam. Nor any notice was taken of the link between Sharia and local customs (a link which is often ignored by Western scholars) ... Sharia too needs to be interpreted before it is put into practice, which opens it to the possibility of change.”)

<sup>266</sup>See Schaefer, *supra* note 6, at 348.

<sup>267</sup>See *id.*

<sup>268</sup>See Hamoudi, *supra* note 250, at 1.

<sup>269</sup>See *id.* at 3 (“[T]he Islamist may say that he wishes God’s Law to be supreme over that of man, there is nothing in his actions to suggest that this rhetoric, however sincerely held, is an accurate reflection of his actual aims ... The Islamist does not want God’s Law to reign supreme in areas such as corporate law and the law of business entities, where the economic consequences might be dire ... Once the law is safely in the hands of the state, the Islamist need only bring *shari’a* where he wishes it ... and leave all other, largely transplanted, law, where it lies, which is to say in as authoritative a position as any *shari’a* derived enactment by the state.”).

<sup>270</sup>See *id.*

<sup>271</sup>See *id.* at 4-5.

<sup>272</sup>See *id.* at 6.

<sup>273</sup>See Hamoudi, *supra* note 250, at 6 (“[T]he question nevertheless remains as to who is responsible for the determination of God’s Law ... Had this question been answered in Muslim history with reference to an executive authority such as a Caliph, then certainly the notion of codification would be entirely consistent with adherence to God’s Law. The caliph could then simply enact a code based on his own understanding of God’s Law, and future enactments and re-enactments of codes under the authority of future Caliphs could be, at least in theory, as unproblematic as any authoritative religious institution revisiting portions of its own doctrine. Ann Elizabeth Mayer reports that precisely such a codification was proposed in early Islamic history, and ultimately rejected.”).

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bastardization of Islam by extremists and varied applications of *shari'a* among states.<sup>274</sup> The codified versions of *shari'a* are essentially a compromise between the secular and religious interest of Islamists, who want to play both sides of the coin, by limiting religiosity in certain instances.<sup>275</sup> Islamic law judges are now well versed in the language of statutorily enacted forms of *shari'a*, as opposed to the forms contained in the Sacred Texts, thus even in personal status law, where legal systems tended to stray less from the Sacred Texts, judges are more likely to apply the statutory form.<sup>276</sup> Hamoudi further portrays the importation of Western forms of criminal, constitutional, and financial law into Islamic states as the lead cause for pre-emption of existing religious law.<sup>277</sup> He illustrates the variance in the application of Islamic criminal law by describing the differences in how judges interpret *shari'a* in Lybia, Pakistan, Iraq, and Indonesia.<sup>278</sup> Hamoudi effectively concludes “the broad divergence in *shari'a* adoption across both subject matter and geographical location in various Muslim states will only increase with time.”<sup>279</sup>

All the variations between the statutory enactments of *shari'a* and the varied interpretations of the Sacred Texts have all led to the fragmentation of *shari'a*, so as to prevent it from being considered a uniform corpus of law.<sup>280</sup> Both Banakar and Hamoudi seem to point to a disintegration of Islamic law, which leads to the question of whether such a fragmented unit can actually be referred to by one name, “*shari'a*.”<sup>281</sup> Arguably, *shari'a* is more enforceable than Bahá'í law, because it has actually been adopted and enforced in various states; meanwhile Bahá'í law has yet to be adopted by any state.<sup>282</sup> Nevertheless, some would argue that the lack of a central institution to manage the application of *shari'a*, like the Universal House of Justice in the Bahá'í Faith, is essentially a death sentence for *shari'a*.<sup>283</sup>

Compared to Islamic law, Bahá'í law is still in its stages of infancy,<sup>284</sup> but it would seem that Bahá'u'lláh, ‘Abdu'l-Bahá, and Shoghi Effendi were enlightened enough to foresee

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<sup>274</sup>See *id.* at 9-10 (illustrating the alleged bastardization, Hamoudi writes, “[i]n the Anbar, quasi judges used their forms of *shari'a* to ban, among other things, the sale of cucumbers and tomatoes together, because of their sexual suggestiveness ... *shari'a* is capable of far more sophistication than these various absurd applications would ever suggest.”).

<sup>275</sup>See *id.* at 15.

<sup>276</sup>See *id.*

<sup>277</sup>See *id.* at 14.

<sup>278</sup>See Hamoudi, *supra* note 250, at 28-29 (“[T]here is considerable variation, both in scope of application and emphasis ... In a nation such as Libya, where a professional judiciary schooled in transplanted law has been left to apply those Islamic crimes that have been codified, there has been little if any actual enforcement of the criminal codes respecting *shari'a* ... The role of *shari'a* in the area of criminal law in fact depends not only on the relative strength of Islamist forces, but also on the relative priorities of their respective selective legislative agendas. The Islamists of Pakistan, Iran and the Sudan have seemed rather aggressive and broad in their approaches, seeking a prominent role for *shari'a* in any number of areas ... By comparison, ... Iraq’s Islamists ... have ... comparatively little on their public legislative agenda in terms of *shari'a* beyond personal status ... Islamist parties in Indonesia probably lie somewhere between these two poles, more committed to aspects of *shari'a* than Iraq’s Islamists, but also limited in the amount of *shari'a* they wish to, or can adopt.”).

<sup>279</sup>*Id.* at 35.

<sup>280</sup>See *id.* at 6-7.

<sup>281</sup>See generally *id.*; Banakar, *supra* note 252, at 49.

<sup>282</sup>See generally Banakar, *supra* note 252, at 49.

<sup>283</sup>See Hamoudi, *supra* note 250, at 6.

<sup>284</sup>See Danesh, *supra* note 2, at 24-25.

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the crippling effects of not having a central legal order (the Universal House of Justice) to administer the Faith.<sup>285</sup> They might have foreseen the fragmentation of *shari'a*,<sup>286</sup> and consequently took preemptive action to avoid the same fate as *shari'a*. Their preemptive action resulted in the institution of the Universal House of Justice,<sup>287</sup> in tandem with the notion of progressive manifestation, as a fail-safe.<sup>288</sup> Although Bahá'í laws have yet to be adopted by any state, to date,<sup>289</sup> if and when they are adopted by states, the structure of the Bahá'í Administrative Order will save the Bahá'í legal corpus from facing many of the problems that have led to the fragmentation of *shari'a*.<sup>290</sup>

There is no telling what the future religion-state relationship will look like in states where Bahá'í law would be adopted, but it appears that the Faith itself postulates the evolution of a Bahá'í state, where religion and the state would be one and Bahá'í laws would be enforceable.<sup>291</sup> Admittedly, such a church-state relationship might seem inconceivable to some, but it must be acknowledged that the Bahá'í Faith is potentially the world's most progressive religion, sharing many secular goals with civil government.<sup>292</sup> Showcasing its secular tendencies, the Bahá'í Faith has no clerics, unlike in Islam<sup>293</sup>.<sup>294</sup> Roshan Danesh postulates that the evolution of Bahá'í state will come about voluntarily, democratically, and constitutionally.<sup>295</sup>

Obviously, all religions have a manner of organizing themselves, but the Bahá'í example presents one of the most adaptable, centralized, and organized systems of religious non-state administration.<sup>296</sup> The word adaptable is appropriate here, because (1) the Universal House of Justice's legislative functions ensures the ability of the Faith to confront future social problems, and (2) the notion of progressive manifestations enables the Faith to guarantee its continuity

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<sup>285</sup> See generally The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>286</sup> See *id.*

<sup>287</sup> See *id.*

<sup>288</sup> See Schaefer, *supra* note 6, at 323.

<sup>289</sup> See generally Danesh, *supra* note 2.

<sup>290</sup> See Hamoudi, *supra* note 250. See generally The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>291</sup> See Danesh, *supra* note 2, at 61.

<sup>292</sup> See *id.* at 40.

<sup>293</sup> See *id.* ("In writing that 'acts of worship' must be obeyed according to the teachings of scripture, Bahá'u'lláh removes them from the purview of the House of Justice, and as such reforms the classical Islamic scheme. The realm of worship ('ibádat) is historically drawn within Islamic law as distinct from the realms of societal relations (mu'ámalát) and politics (siyása). In the classical Sunni Islamic theory, the methods and rules developed by the ulama control the realms of 'ibádat and mu'ámalát, thereby lending significant public power to the clerics. Over time the ulama also developed theoretical justifications for roles in the realm of siyása, though in practice, the ruler exercised some legal (legislative) power in the realm of siyása.")

<sup>294</sup> See *id.* at 41 ("There is only one legal authority, the Universal House of Justice, and it is restricted from operating in the realm of 'ibádat. The Universal House of Justice is also a form of legal actor that operates outside of the parameters of the classical Islamic legal theory. In particular, the Universal House of Justice has an explicit grant of legislative powers. As well, there is no public or legal role for a clerical class in this scheme, and no authority over the sacramental aspects of religious life.")

<sup>295</sup> See *id.* at 61-62 ("These principles stress that a movement towards a Bahá'í state is wholly in the hands of the state that wishes to pursue such a course. The decision by a state and its citizens to adopt the Bahá'í Faith as the State Religion, let alone to the point at which a State would accept the Law of God as its own law and the National House of Justice as its legislature, must be a supremely voluntary and democratic process. As a general principle, such a transition would have to occur 'by constitutional means' while Bahá'ís still observe principles of abstention from certain forms of political action, and it would have to be consistent with the core Bahá'í commitments to democracy and human rights.")

<sup>296</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

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through the various stages of human ideological evolution.<sup>297</sup> Despite its ability to adapt, its centralized governance structure prevents it from becoming as disintegrated as *shari'a*.<sup>298</sup> Furthermore, the Bahá'í aim to deconstruct human differences, and achieve the development of a common human identity (the notion of the 'human family'),<sup>299</sup> is more in tune with globalization.<sup>300</sup>

Although the Faith presupposes becoming an world governance system,<sup>301</sup> it is currently still in a stage of infancy<sup>302</sup> where perhaps Teubner's theory is still applicable; the Bahá'í Administrative Order is a private governance structure, to be aggregated with other functionally differentiated systems, thus forming the basis of global constitutionalism.<sup>303</sup> Given the progressive nature of the Bahá'í Faith, and the fact that even its religious aims seem to advance the interests of many secular international organizations and NGOs,<sup>304</sup> it may serve as a far more influential governance network in the future.<sup>305</sup> Religion has been improperly used in many instances to justify political action at the international level, i.e. the Crusades, the present extreme jihadist movement, etc.; perhaps the Bahá'í Faith, through non-state private governance, will achieve the advancement of more positive secular ideals, such as human rights.<sup>306</sup> To conclude, the Bahá'í legal structure, as embodied in the Constitution of the Universal House of Justice presents a model of viable non-state governance that resembles the state and ensures continuity.<sup>307</sup>

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<sup>297</sup> See *id.*

<sup>298</sup> See generally *id.*; Banakar, *supra* note 250, at 49.

<sup>299</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.

<sup>300</sup> See Teubner, *supra* note 64, at 13 ("Globalisation is a polycentric process in which simultaneously differing areas of life break through their regional bounds and each constitute autonomous global sectors for themselves ... a multidimensional phenomenon involving diverse domains of activity and interaction including the economic, political, technological, military, legal, cultural, and environmental. Each of these spheres involves different patterns of relations and activity.").

<sup>301</sup> See Danesh, *supra* note 2, at 24-25.

<sup>302</sup> See *id.*

<sup>303</sup> See generally Teubner, *supra* note 64.

<sup>304</sup> See Danesh, *supra* note 2, at 40.

<sup>305</sup> See generally Teubner, *supra* note 64; Backer, *Governance Without Government or Government Without a State?*, *supra* note 63.

<sup>306</sup> See Danesh, *supra* note 2, at 62.

<sup>307</sup> See The Constitution of the Universal House of Justice (Nov. 26, 1972), available at <http://info.bahai.org/article-1-3-6-1.html>.