

STUDENT NOTE: ISLAM AND THE IRAQI CONSTITUTION

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“Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law.”¹ This quote was first made by Justice Felix Frankfurter concerning a separation of powers issue,² but in the context of this paper, it will be used to set up an issue of pressing international concern. That issue is the creation of the Iraqi government, namely the Iraqi Constitution.

Following the fall of Baghdad in 2004, many aspects of Iraqi society experienced change. One of the more dramatic initiatives in the new Iraqi society was the replacement of Saddam Hussein’s totalitarian government with a system based on the parliamentary model of governance. Given that Iraq is a largely Islamic country, the role that Islam was to play in the new political order inevitably became a major issue. Key Iraqi leaders made clear their position that any political system established in Iraq would require recognition of Iraq’s Islamic identity, but the U.S., an occupying power that was determined to influence Iraqi political developments, had its own ideas about the role Islam should play. U.S. proconsul Paul Bremer, a man who retained veto power over the temporary Iraqi Constitution,³ stated he would not accept a constitution that created an Islamic state.⁴ Secretary of Defense Donald Rumsfeld furthered Bremer’s position, stating that a constitution creating an Islamic state “won’t happen.”⁵

Even though there exist many Muslim nations that have incorporated Islamic principles into parliamentary systems of governance, the rise of Islamic fundamentalism and its conflict with the West assured that the political role of Islam would be one of the most politically sensitive issues for both Americans and Iraqis. America’s concern with influencing events in this area was particularly strong given its particular history of antagonism with the Islamic government in Iran; a nation that during the 1970’s created a system of governance that gave primacy to the political authority of religious leaders.⁶

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1. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 651 (1943) (Frankfurter, J., dissenting).

2. *Id.*

3. BBC NEWS *Timeline: Iraq After Saddam*, http://news.bbc.co.uk/2/hi/middle_east/4192189.stm (last visited Mar. 15, 2007).

4. Phyllis Bennis, *Fatal Flaws in the Iraqi Constitution*, ASIAN TIMES ONLINE, March 25, 2004, http://www.atimes.com/atimes/Middle_East/FC25Ak02.html.

5. Stanley A. Roberts, *Socio-Religious Obstacles to Judicial Reconstruction in Post-Saddam Iraq*, 33 HOFSTRA L. REV. 367, 399 (2004).

6. This form of government was the product of the Iranian Revolution. The government following the Revolution elevated religious authority to the political realm and

This paper will attempt to explain the fundamental aspects of a “Muslim democracy,” and to suggest that the inclusion of Islam into the Iraqi government is perfectly consistent with the tenets of democracy. While Islam stands today as the world’s second largest religion, it is also very much misunderstood in the West. This paper will attempt to clarify some of the issues surrounding Islamic democracies, Muslim diversity in Iraq, and the creation of the Iraqi Constitution. The first section of this paper will be aimed at identifying concepts of Islam that can be integrated into democratic thought. It will be suggested that Islam does not impede the mission of democracy, but instead that both ideologies share common goals and principles. The second section will discuss two primary players in the creation of the Iraqi government and Constitution: the Sunni and Shiite Muslims. Both groups share a rich history with one another that was turned upside down once Hussein’s government was ousted from power. The dynamic between these two groups will set up the third section of this paper, which is an analysis of the Iraqi Constitution, and more specifically, the role of Islam. It will be suggested that the Iraqi Constitution is a progressive improvement upon Muslim democracies due to its blend of Islamic influence and Western recognition of human rights.

The primary purpose of this paper is to show that it is best to embrace the role of Islam in the Iraqi government instead of being afraid of it. It is easy to be hesitant of a system of democracy that is so unlike our own, especially since we often see ourselves as the foremost authority on the subject. However, in relation to Justice Frankfurter’s quote, only by accepting different styles of democracy can the new Iraqi government retain the good will and democratic expression of the Iraqi people.

I. ISLAM AND DEMOCRACY

Islam and Shari’a

Islam was founded by the Prophet Muhammad in the Seventh Century.⁷ In the modern world, there are 1.3 billion Muslims, and Islam is currently the world’s second largest religion.⁸ Islam is interpreted to mean “Submission to God” and all Muslims worship the Quran, which was God’s message to

eliminated the secular democratic principles set in place by the previous government. The new government expanded upon this power by creating a political doctrine known as “the authority of the jurist,” which gave the most qualified jurist in Islamic Law the highest authority in all matters of governance. NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* 88-89 (2003).

7. Mohammed was from the Arabian Peninsula, and his message from God, the Quran, was given to him in Arabic. FELDMAN, *supra* note 6, at 131.

8. Geoffrey Orens, *Preface* to *THE MUSLIM WORLD* vii, vii (Geoffrey Orens ed., 2003).

Mohammed.⁹ The practice of Islam is carried throughout all aspects of daily life and “entails also a general sense of practical readiness for whatever the power of God disposes in small matters or in great.”¹⁰

Muslim behavior is governed by a divine set of laws known as Shari’a.¹¹ Shari’a in its broadest sense can be categorized as religious language contained in the Quran or the hadith, which means, “any report of something the prophet [Muhammad] either said or did.”¹² Although Shari’a is considered God’s Law, it can also be understood through the process of fiqh, which is the human understanding of Shari’a.¹³ Instead of having laws passed down from a higher authority, much of the Shari’a, which falls outside direct language from the Quran or the hadith, is the product of Muslim scholarship. Interpretation of Muslim law, according to Iman Feisal Abdul Rauf, is very similar to other areas of scholarship. According to Rauf:

Take any field of knowledge, like physics or biology or chemistry. Anybody can become a chemist or a biologist or a physicist. But there are rules [developed], and a kind of growing consensus of opinion on how one should think correctly to arrive at what would be deemed a right, a correct decision.

Analogously, there is, in Islam, a tradition of theological interpretation, of [juridical] understanding and knowledge. And as long as you abide by these, the consensus of understanding on how you arrive at a decision, certain differences of opinion are considered equally valid.¹⁴

Simply put, this process has led to different branches of Islam having different interpretations of Shari’a, but all of which still being consistent with the teachings of the Quran.¹⁵

As Muslim democracies have grown, Shari’a has played a significant role in the process of government and law. This does not mean that Islamic law assumes sole governance over a country that honors Shari’a, but it has instead

9. MICHAEL GILSENAN, *RECOGNIZING ISLAM: RELIGION AND SOCIETY IN THE MODERN ARAB WORLD* 15-16 (1982). God’s message to Muhammad was given to his followers in a covenant known as the five pillars of faith, which include (1) the acknowledgment that Allah is the one true God and Muhammed is his prophet, (2) the observance of fasting during the month of Ramadan, (3) the giving of alms, (4) the making of the five daily prayers, and (5) taking the great pilgrimage to the holy cities of Mecca and Medina. *Id.* at 17. Muslims must abide by the five pillars, along with the sunna, which was the model of behavior set by Muhammed the prophet, and the hadith, which were traditions set by Muhammed for defining community and education. *Id.*

10. GILSENAN, *supra* note 9, at 17.

11. *An Interview with Imam Feisal Abdul Rauf*, FRONTLINE, Mar. 2002, reprinted in *THE MUSLIM WORLD*, *supra* note 8, at 12, 17.

12. The word “hadith” in the singular sense is spelled with a lower case “h”; it is spelled with a capital “H” when in reference to the collection of all the reports. *Id.*

13. Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT’L L. REV. 695, 721 (2004).

14. *An Interview with Imam Feisal Abdul Rauf*, *supra* note 11, at 16.

15. *Id.* at 18.

meant that Shari'a acts as a *source* of legislation.¹⁶ In these situations, Islamic standards taken from the Shari'a influence how courts and government bodies interpret legislation and conduct judicial review.¹⁷ It should be noted, however, that while Shari'a plays an influential role in a *broad* view of an Islamic democracy, it could be given substantially more weight and influence in areas such as family law.¹⁸ It is in this context that Islamic law gains its most notoriety and also its greatest criticism.¹⁹

These two points are important in understanding Islam's involvement in the political world. For one, knowing that differences prevail in Islamic interpretation undermine classifications of Islamic democracies under one stereotypical model. Because Islamic interpretation varies, the exact role Islam will play in a growing democracy cannot be predicted. For example, both Turkey and Iran are nations with a Muslim majority that operate as a democracy, but while Turkey has maintained a commitment to secularism,²⁰ Iran's Constitution is infused with Islamic language.²¹ The exact role of Islam depends on the ethnic, religious, historical and geographic identity of the society it intends to govern, and therefore each Islamic Democracy must be considered within the context of the area in which it resides.

Secondly, it is important to understand that the diversity in Islamic interpretation can make construction and implementation of a government a very difficult task. By including Islam as a source of legislation, drafters must account for, and subsequently predict, how Shari'a will be interpreted by later courts and governments. Therefore, the inclusion of Shari'a into law is only the starting point of a much larger analysis. Take the Egyptian Constitution for example. Article 2 of the Egyptian Constitution established Shari'a as "the chief source" of Egyptian legislation.²² When the court attempted to properly

16. Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 861 (2005).

17. Feldman, *supra* note 16, at 861.

18. *Id.*

19. *See infra* note 45.

20. Benjamin D. Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey*, 91 CORNELL L. REV. 129, 131-33 (2005). Turkey's commitment to secularism is attributed to Mustafa Kemal Ataturk. *Id.* at 133. Ataturk saw the economic and technological advancements in Western culture and strived to bring Turkish society up to that standard. *See id.* Ataturk believed that Islamic society was inferior to Western nations and moved to eliminate all references of Islam from Turkish government to help advance the progression of Turkey. *Id.* at 132-35.

21. Stilt, *supra* note 13, at 716-17. The Iranian Constitution states, "[t]he government of Iran is an Islamic republic, endorsed by the people of Iran on the basis of their long-standing belief in the administration of truth and justice in the [Quran]." *Id.* (citations omitted). The Constitution also states, "[t]he official religion of Iran is Islam, and the sect followed is Twelver Ja'fari Shi'ism, and this principle is never subject to change." *Id.* at 717 (citations omitted).

22. Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 390 (2006). The 1971 draft of the Constitution was amended in 1980 from stating that Islam was "A" chief source of legislation, to "THE" chief source of legislation, giving the role of Shari'a significantly more influence.

define the scope of Article 2 in the 1980's, three popular theories of interpretation competed to influence the court.²³ The Supreme Constitutional Court of Egypt not only had to agree on a set method of interpretation, but it also had to ensure that citizens who disagreed with chosen interpretation would still honor the court's decision.²⁴

Perceptions of Islamic Democracy

It is easy to cast doubt on the idea of a religious democracy, as the American system of government is largely predicated on separation of church and state through the Establishment Clause of the First Amendment. Few areas of Constitutional law have the rich historical background of the Establishment Clause. Thomas Jefferson first characterized this as a "wall of separation between church and State," stating "religion is a matter which lies solely between a man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions."²⁵ The "wall" analogy was later furthered by Justice Hugo Black's quote in *Everson v. Board of Education*, which reads "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."²⁶ In today's court, Establishment Clause cases center primarily around the concept of "governmental neutrality between religion and religion, and between religion and nonreligion."²⁷ While the "impregnable wall" analogy has lost some of its luster in the last few decades, courts evaluating Establishment Clause claims must still ensure that the government does not show any sense of favoritism toward any particular religion.²⁸

Although American courts stay true to America's secular origins, it is not uncommon or anti-democratic for successful societies to incorporate religious language into their Constitutions. England, for example, maintains a democracy with an established Church of England.²⁹ In Canada, religious freedom is a fundamental right to all citizens, but in 1774, the Constitution was amended to allow government funding to Catholic schools in Ontario.³⁰ And even though our courts honor a secular American history, it should be noted that most of the original American colonies had an established church

23. *Id.* at 394-95. The three theories were (1) Neo-Traditional, which only gave credence to traditionally trained Islamic Scholars, (2) Utilitarian Neo-Ijtihad, which sought to only include those Islamic rules that were clearly defined and accepted by all Islamic scholars, and (3) Comparative Neo-Taqlid, which is similar to the Utilitarian model, only it focuses less on traditional scholars and follows the policy set by modern jurists. *Id.* at 394-414.

24. *Id.* at 403.

25. *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (citation omitted).

26. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1946).

27. *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (citations omitted).

28. *Id.* (citations omitted).

29. Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 917-19 (2005).

30. *Id.* at 875-76; *see also*, *Adler v. Ontario*, [1996] 3 S.C.R. 609 (allowing government funds for secular and Catholic schools, but no others).

when they were founded.³¹ It has even been suggested that the American separatist model was mainly predicated on necessity against religious zealots, and not a fundamental principle upon which democracy is dependant.³²

But if history has shown religion and democracy can be compatible, why is the concept of an Islamic democracy handled with such caution? It is presumed that this hesitation is the result of popular assumptions concerning Islam that result from differences between Muslim and Western society.

One popular assumption about Islam is that it does not honor true equality, and therefore, it is contrary to the idea of democracy. There is no doubt all democracies need equality to succeed, as “the principle of equality or nondiscrimination would be breached if society itself espoused one or another conception of the good life.”³³ So the question then becomes, does the Islamic faith support the notion of equality for all citizens?

To suggest an affirmative answer, Muslim scholars reference language in the Quran, which advocates equality among all people. A fundamental teaching of the Quran states, “[w]e have created you from male and female and divided you into nations and tribes that you might get to know one another. The noblest of you in Allah’s sight is he who fears Him most. Allah is wise and all-knowing.”³⁴ Scholar Ali S. Asani interprets this passage:

I believe it is clear that from the perspective of the [Quran], which forms the core of the Islamic tradition, the divine purpose underlying human diversity is to foster knowledge and understanding, to promote harmony and cooperation among peoples. God did not create diversity as a source of tensions, divisions, and polarization in society. Indeed, whether we recognize it or not, our diversity is a sign of divine genius. The [Quranic] verse also envisages a world in which people, regardless of their differences, are united by their devotion to God.³⁵

From this concept of equality, it can be said that Islam “virtually requires a democratic system because humans are all created equal and any system that denies equality is not Islamic.”³⁶ Further language in the Quran obliges Muslims to resolve their political differences through “mutual consultation,” or shura, which can be related to the democratic concept of public voting to decide leadership.³⁷ It is even suggested that by not appointing a leader prior

31. Albert, *supra* note 29, at 883 & nn.107 & 108 (citations omitted). The actual number of states with an established church is the subject of scholarly debate, but the number ranges from 6-10. *Id.*

32. Albert, *supra* note 29 at 872, *see also* *Everson v. Bd. of Educ.*, 330 U.S. 1, 9 (1946).

33. CHARLES TAYLOR, *PHILISOPHICAL ARGUMENTS* 186 (1995), *quoted in* Albert, *supra* note 29, at 905.

34. QURAN 49:13.

35. Ali S Asani, *Pluralism, Intolerance, and the Qur'an*, AM. SCHOLAR, Winter 2002, *reprinted in* THE MUSLIM WORLD, *supra* note 8, at 135, 137.

36. John L. Esposito & John O. Voll, *Islam and Democracy*, HUMANITIES, Nov.-Dec. 2001, *reprinted in* THE MUSLIM WORLD, *supra* note 8, 105, 107.

37. *Id.* (quoting QURAN 42:38).

to his death, Muhammad was encouraging Muslims to think democratically and appoint leaders through consensus.³⁸

But as true with all bouts of opinion, not all Muslim scholars hold democracy in such high regard. One often-referenced contention relates to the Islamic reverence of God over man. Martin Kramer explains this concept as, “[t]he role of the Islamic state is not to legislate the will of the people, but to implement the will of God.”³⁹ This idea is not simply a Western impression of Islam either, as Ali Belhadj of the Algerian Islamic Salvation Front stated, “[w]hen we are in power, there will be no more elections because God will be ruling.”⁴⁰ And as Ahman Nawfal, a Muslim Brother from Jordan stated, “[i]f we have a choice between democracy and dictatorship, we choose democracy. But if it’s between Islam and democracy, we choose Islam.”⁴¹

Another point of contention with the Islamic view of equality is the apparent societal disparity between men and women. What makes this issue confusing is the amount of evidence that supports both sides of the argument. On one hand, the Quran states, “[m]en have authority over women because Allah has made the one superior to the others, and because they spend their wealth to maintain them,”⁴² but the Quran was also responsible for prohibiting the practice of killing unwanted female newborn babies in Muslim nations during the 7th century.⁴³ In regard to modern evidence, one side could cite Muslim customary law, which gives women unequal treatment in divorce, inheritance and civil law,⁴⁴ but then the other could cite the plethora of high female political victories in Muslim nations.⁴⁵ The underlying truth behind this debate is that while Islamic principles may not conform to universal standards of gender equality, Muslim women enjoy many of the same, if not greater,

38. Center for the Study of Islam and Democracy, Mission Statement, *reprinted in* Robin Wright, *Islam Does Not Present an Obstacle to Democracy*, in *ISLAM: OPPOSING VIEWPOINTS* 44, 50 (Jennifer A. Hurley ed., 2000) (website given in the text has been changed along with the mission statement; the new website is <http://www.csidonline.org/>).

39. Martin Kramer, *Ballots and Bullets: Islamists and the Relentless Drive for Power*, HARV. INT’L REV., Spring 1997, *excerpted in* *ISLAM: OPPOSING VIEWPOINTS*, *supra* note 38, at 34, 40.

40. Daniel Pipes, *There Are No Moderates: Dealing with Fundamentalist Islam*, Fall 1995, *available at* <http://www.nationalinterest.org/General.aspx?id=92&id2=11860>, *quoted* Kramer, *supra* note 39, at 37.

41. *Id.*

42. QURAN 4:34.

43. Lisa Breyer et al., *The Women of Islam*, TIME, Dec. 3, 2001, *reprinted in* THE MUSLIM WORLD, *supra* note 8, at 73, 73. Likewise, the Quran provides:

[w]hen the birth of a girl is announced to one of them, his face grows dark and he is filled with inward gloom. Because of the bad news he hides himself from men: should he keep her with disgrace or bury her under the dust? How ill they judge! Evil are the ways of those who deny the life to come.

QURAN 16:57.

44. FELDMAN, *supra* note 6, at 64-65. In Muslim society, a female’s testimony is given less weight than a male’s at trial. *Id.*

45. Breyer et al., *supra* note 43, at 76 (noting that Pakistan, Bangladesh, Indonesia, and Turkey are all Muslim countries that have been run by a female leader).

rights enjoyed by women around the world. Scholar Noah Feldman also points out that if all democratic movements were stymied due to sexism, “there would today be no democracies at all, because the equality of the sexes remains unaccomplished everywhere.”⁴⁶

This last section points out an underlying problem with this type of analysis, which is that comparing Western democracy and Islamic society will always have fundamental differences, so one should not expect a Muslim nation to conform to standards which mirror the American model.⁴⁷ There is an important difference between how both Western and Islamic societies regard human rights and that difference will effect any evaluation over what is right and what is wrong. In the United States, the emphasis is on the individual,⁴⁸ whereas in Islamic society the focus is on the group.⁴⁹ Islamic teachings place the rights of God at such a high value that if “the right of Allah’ conflicts with an individual’s private interest, the public good and the welfare of others take precedence.”⁵⁰ Therefore, any fair consideration of “equality” in a Muslim democracy must be evaluated through the eyes of Islamic, and not Western, society. Lastly, it should be noted that any Muslim democracy that incorporates Islamic tenets should automatically be democratic because democracy reflects the will of the people.⁵¹ If the will of the people is to adhere strictly to Shari’a, that should be for them to decide.

46. Feldman, *supra* note 6, at 66; Muller v. Oregon, 208 U.S. 412, 421 (1908) (“[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present.”); see also Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (“Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”); Eileen Kaufman, *Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts’ Equality Jurisprudence*, 34 GA. J. INT’L & COMP. L. 557 (2006); Jayanth K. Krishnan, *Lawyering for a Cause and Experiences Abroad*, 94 CAL. L. REV. 575, 596-98 (2006) (describing women’s rights under the Indian Constitution and the subsequent women’s rights movement).

47. See Melanie D. Reed, *Western Democracy and Islamic Tradition: The Application of Shari’a in a Modern World*, 19 AM. U. INT’L L. REV. 485, 492-93 (2004) (“One difficulty with combining Islamic values with Western rights terminology is that those who attempt to do so often try to effect change by placing Western terminology onto existing Islamic traditions, rather than creating new human rights terminology derived from Islam.”) (citation omitted).

48. Joseph Kwaham, *A World of Lessons: The Iraqi Constitutional Experiment in Comparative Perspective*, 37 COLUM. HUM. RTS. L. REV. 717, 717; see also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (“[T]he . . . Fourteenth Amendment[] to the Constitution protect[s] persons, not groups.”).

49. Reed, *supra* note 46, at 493 (“individuals have obligations to each other, without which individual rights are unachievable”) (citation omitted).

50. *Id.* at 494 (citation omitted).

51. Feldman, *supra* note 16, at 862.

II. ISLAM AND IRAQI SOCIETY

The Creation of the New Iraqi Government

The ironic part about this analysis is that Islam had little influence over Saddam Hussein's Ba'athist government.⁵² Due to Hussein's wealthy oil supply, he was able to create a totalitarian leadership in which there was almost no need to cater to his civilian population.⁵³ This sense of power left Hussein's government basically unaffected by the growth of political Islam in the 1970's and 80's.⁵⁴ Hussein avoided religious criticism by using his power to control communication in local mosques, and the only time Hussein incorporated Islam into his presidency was when it was most beneficial to his own cause.⁵⁵

Hussein's totalitarian regime not only halted religious development, but it also prevented the formation of any real Iraqi political opposition to Hussein's government.⁵⁶ Through violence and intimidation, Hussein squelched all contradictory political movements.⁵⁷ By the 21st Century, Iraq's local governments were completely dependent on the word of Hussein and his officials.⁵⁸ A change in this regime was considered impossible, as independent political parties could not count on passive Iraqi citizens or religious leaders for support.⁵⁹

Hussein's control over the Iraqi political identity changed on March 20, 2003, when the United States launched Operation Iraqi Freedom, a military campaign with the stated purpose of ousting Hussein's government.⁶⁰ Immediately following the fall of Baghdad, temporary parties appointed by U.S. officials controlled Iraq. In May of 2003, the United States government placed U.S. official Paul Bremer in charge of overseeing the Iraqi state until a new Iraqi government could take power.⁶¹ Bremer's first task was creating an interim Iraqi Government.⁶² The interim government was composed of 25 Iraqi citizens chosen by American and British forces and was given the

52. FELDMAN, *supra* note 6, at 176.

53. *Id.* at 174.

54. *Id.*

55. ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC & INT'L STUDIES, IRAQ: TOO UNCERTAIN TO CALL 4, *available at* <http://www.comw.org/warreport/fulltext/0311cordesman.pdf>; FELDMAN, *supra* note 6, at 175. During his struggle with the United States, Hussein capitalized on Arab sympathy by painting himself as a Muslim persecuted under Western oppression. *Id.* at 176. Hussein even added the phrase "Allah Akbar," a popular Muslim slogan, to the Iraqi flag to gain support from the Muslim community. *Id.*

56. CORDESMAN, *supra* note 55, at 4.

57. *Id.*

58. *Id.*

59. *Id.*

60. Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 NW. U. J. INT'L HUM. RTS. 1, 26 (2005); Borgna Brunner, *Iraqi Timeline*, INFOPLEASE, Mar. 20, 2003, <http://www.infoplease.com:80/spot/iraqtimeline2.html>.

61. Brunner, *supra* note 60, at May 12, 2003.

62. *Id.*; *see also id.* at Apr. 15, 2003.

authority of drafting a temporary Constitution.⁶³ In March of 2004, the interim government submitted a temporary Constitution that consisted of, amongst other things, a Bill of Rights, a provision that held that Islam was a source of legislation, and a system of checks and balances.⁶⁴

In the months that passed, the Iraqi government began taking shape. In June of 2004, the United States transferred sovereignty of Iraq back to the Iraqi people.⁶⁵ On January 30, 2005, 8.5 million Iraqis voted for the formation of a 275-person National Assembly,⁶⁶ which was the government body assigned the task of creating the Iraqi Constitution.⁶⁷ The Assembly appointed a 55-person panel composed of all National Assembly members to draft the Constitution, with the planned finish date being August 15, 2005.⁶⁸ While the process appeared on its face to be simple, the task of drafting the Constitution turned out to be very arduous. This difficulty can be attributed to the fact that when Hussein's government was ousted from power, the social structure of Iraqi society took a complete turn. This change played a significant role in how the new Constitutional process would be received.

The Origins of Conflict

In Iraqi society, there are two main divisions of Muslims, the Sunni and the Shiite.⁶⁹ The original split between the Sunni and the Shiite followed the death of Muhammed in 632 A.D.⁷⁰

During his life, Muhammed left no heir or explanation as to who should succeed him, which led his followers to clash over who should be appointed

63. *Id.* at Jul. 13, 2003.

64. *Id.* at Mar. 8, 2003; BBC NEWS, *supra* note 3.

65. Brunner, *supra* note 60, at Jun. 28, 2004. Even though the intended date for transfer was the 30th of June, the United States held the official ceremony two days earlier in fear of violence from the Iraqi insurgency. *Id.*

66. Brunner, *supra* note 60, at Jan. 30, 2005. Note that the original intention of the United States was to appoint a government for the Iraqis, but following protest from Iraqi citizens, elections were held. *See infra* text accompanying notes 87, 88.

67. Nathan J. Brown, *Policy Outlook: Democracy and Rule of Law: Iraq's Constitutional Process Plunges Ahead*, CARNEGIE ENDOWMENT FOR INT'L PEACE, July 2005, at 2, available at <http://www.carnegieendowment.org/files/PO19Brown.pdf>. The Assembly was granted a substantial amount of freedom in deciding how the Constitution would be drafted. *Id.* at 3. They were provided only a timetable and a few procedural and substantive guidelines to follow. *Id.*

68. *Id.* at 2.

69. PUB INT'L LAW & POLICY GROUP & THE CENTURY FOUND., REPORT: ESTABLISHING A STABLE DEMOCRATIC CONSTITUTIONAL STRUCTURE IN IRAQ: SOME BASIC CONSIDERATIONS, available at <http://www.pilpg.org>, reprinted in 39 NEW ENG. L. REV. 53, 56-59 (2003). It should also be noted that the Kurds are very prominent in Iraqi society; however, the debate concerning their role in the new Iraqi government is predicated mostly on federalism and will not be the focus of this note.

70. FELDMAN, *supra* note 6, at 88; GILSENAN, *supra* note 9, at 16.

caliphate after his death.⁷¹ Sunni Muslims insisted on appointing a leader through “consultation and consensus” and therefore followed an appointed leader named Abu Bakar.⁷²

Shiite Muslims instead followed Muhammed’s son-in-law Ali, believing that the leader of Islam should come from Mohammed’s family.⁷³ The Shiite Muslims refused to acknowledge the appointed Sunni caliphate and followed Ali and his descendants until the 11th imam died without a son.⁷⁴ Many Shiites, however, believe that the last descendant had a son, known as the 12th imam, and that imam would return to lead the Shiites.⁷⁵ Until the missing heir returns, power in the Shiite faith was given to religious figures with high authority in society, known as ayatollahs.⁷⁶ This ideological dispute is the fundamental difference between the Shiite and Sunni Muslims, but while this difference may appear religious, it is essentially a political disagreement.⁷⁷ While both Shiite and Sunni Muslims believe in the same concept of Islam, they primarily disagree over how the religion should be led.⁷⁸ This dispute over leadership provides a telling backdrop for the history of Iraqi Shiite and Sunni Muslims.

The Shiites

While most Muslims in today’s world are Sunni, the majority of Muslims in Iraq are Shiite.⁷⁹ Despite large numbers, Iraqi Shiite Muslims have historically been a target of discrimination by Sunni-led Iraqi governments.⁸⁰ Discrimination against the Shiites began in 1920, when the Iraqi Constitution at the time classified Shiites as “non-original Iraqis.”⁸¹ During Hussein’s time, discrimination against Iraqi Shiites increased in response to Iraq’s conflict with

71. FELDMAN, *supra* note 6, at 88. The Columbia Encyclopedia defines the term “caliphate” as “the spiritual head and temporal ruler of the Islamic State.” THE COLUMBIA ENCYCLOPEDIA (6th ed. 2000), available at <http://www.bartleby.com/65/ca/caliphat.html>. The caliphate has temporary religious powers, but he is not recognized as a prophet, so he does not have the power to set religious doctrine. *Id.*

72. Terry C. Muck, *An Introduction to Islam: One God, Many Believers*, THE COLUMBUS DISPATCH, Sept. 30, 2001, reprinted in THE MUSLIM WORLD, *supra* note 8, at 5, 7.

73. *Id.* at 7.

74. FELDMAN, *supra* note 6, at 88. The term Imam in the Shiite faith refers to a descendant of Ali who is an “infallible intermediary[ies] between the human and the divine.” THE COLUMBIA ENCYCLOPEDIA, *supra* note 71.

75. FELDMAN, *supra* note 6, at 88.

76. *Id.*

77. Muck, *supra* note 72, at 8.

78. *Id.*

79. FELDMAN, *supra* note 6, at 82.

80. Iraq was originally assembled after World War I by the British from 3 diverse Ottoman provinces with Sunni Arabs appointed leaders over the entire population. This began a regime of Sunni control over the Shiite population that would continue throughout the 20th century. David Romano, *Whose House is This Anyway: IDP and Refugee Return in Post-Saddam Iraq*, 18 J. REFUGEE STUD. 430, 431 (2005).

81. *Id.* The classification of Shiites as “non-original Iraqis” applied in perpetuity to all subsequent generations of Shiite Muslims. *Id.*

the Shiite government in neighboring Iran.⁸² Hussein often intensified his assault on the Shiite Muslims with violence and genocide, leaving visible devastation in the Shiite community.⁸³

As it turned out, Hussein's attempts at repressing the Shiite community only strengthened the Shiite resolve.⁸⁴ After Hussein's ouster, a reclusive, but powerful and charismatic leader known as Ayatollah Ali Sistani came to the forefront of the Shiite community and had a profound impact upon Iraqi politics.⁸⁵ On June 26, 2003, Sistani issued a fatwa,⁸⁶ which demanded that the

82. CORDESMAN, *supra* note 55, at 3. During the Iraq-Iran War, Shiite Muslims were exiled to the southern parts of Iraq and denied any sense of political participation in the Iraq government. *Id.*

83. *Id.* at 3. Iraqi officials estimate that mass graves in the Shiite territory include 100,000 to 300,000 murdered Shiite Muslims. *Id.*; see also Randall T. Coyne, *Reply to Noah Feldman: Escaping Victor's Justice By the Use of Truth and Reconciliation Commissions*, 58 OKLA. L. REV. 11, 12-14 (citations omitted).

84. Khawam, *supra* note 48, at 740 (citations omitted).

85. Rod Norland & Babak Dehghanpisheh, *What Sistani Wants*, NEWSWEEK, Feb. 14, 2005, available at <http://www.msnbc.msn.com/id/>, Iraq's interim prime minister made a declaration of support for Sistani, declaring, "at the forefront of that, Ayatollah Sistani." Travis, *supra* note 60, at 26 (citing E-Media, *Transcript: Political Authority Handover Ceremony*, WASHINGTONPOST.COM, June 28, 2004, available at <http://www.washingtonpost.com/ac2/wp-dyn/A11428-2004Jun28?language=printer>).

86. A fatwa is defined as "a legal opinion or ruling issued by an Islamic Scholar." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). Islamic scholars use fatwas to settle disputes on how Islamic law applies to "changed historical circumstances." Kenneth L. Woodward, *In the Beginning, There Were the Holy Books*, NEWSWEEK, Feb. 11, 2002, reprinted in THE MUSLIM WORLD, *supra* note 8, at 127, 133. The approved translation of Sistani's fatwa reads:

In the Name of The Almighty

[American] forces have no jurisdiction whatsoever to appoint members of the Constitution preparation assembly. Also there is no guarantee either that this assembly will prepare a constitution that serves the best interests of the Iraqi people or express their national identity whose backbone is sound Islamic religion and noble social values. The said plan is unacceptable from the outset. First of all there must be a general election so that every Iraqi citizen—who is eligible to vote—can choose someone to represent him in a foundational Constitution preparation assembly. Then the drafted Constitution can be put to a referendum. All believers must insist on the accomplishment of this crucial matter and contribute to achieving it in the best way possible.

May Allah The Blessed Almighty, guide everyone to that which is good and beneficial.

Wassalamu alaikum warahmatullah wabarakatuh
(Peace and Allah's love and blessings be upon you)
Signed & Sealed

Ali Al-Hussaini Al Seestani
25 Rabiul-Akhar 1424
26 June 2003

new Iraqi government be composed of an elected group of Iraqi citizens and not a collection of U.S. appointees.⁸⁷ Once the elections were in place, Sistani armed himself with a vast network of formerly oppressed Shiite representatives and created what is undoubtedly the most powerful political faction in present day Iraq.⁸⁸ In the January elections to appoint the Iraqi National Assembly, Shiite parties claimed 48% of the possible positions.⁸⁹

Now in power, Sistani's party of Shiite Muslims has declared its intention to include Islamic principles in the new Iraqi government.⁹⁰ It is here that the previous discussion over Islamic interpretation takes center stage.⁹¹ Sistani's Shiite parties have shown intentions for the future of Iraq to involve a very prominent role for Shari'a, which includes the implementation of Islamic concepts analogous to those of Iran.⁹² Sistani, a native of Iran, stated that he did not want Iraq to echo Iranian society; however, Sistani's own teaching suggests a very significant Islamic influence.⁹³ For example, Sistani publicly encouraged Iraqi women to vote, but according to Sistani's own teachings, women will not be able to shake the hand of any man to whom they are not related or married.⁹⁴ Juan Cole, a scholar on Shiite Muslims at the University of Michigan, compared Sistani to the Christian Coalition, in that both parties don't want religious figures to run the government, but they do want their religious principles to control government policy.⁹⁵

The Sunni

The Sunni face far different circumstances following the fall of Hussein and the creation of the new Iraqi government.⁹⁶ Sunni Muslims, which make up about 20% of the Iraqi population, held political control in Iraq from Iraq's inception throughout Hussein's rule. Loyal Sunni areas such as Al Ramadi, Fallujah, and Baghdad were all granted special privileges by Hussein's government in reward for their support.⁹⁷ But with the ouster of Hussein in 2004, so went the Sunni's political power in Iraq.

In what could be seen as an effort to cleanse Iraq of Hussein's influence, the role of Sunni Muslims was strictly limited in the formation of the new Iraqi

Feldman, *supra* note 16, at 857 n.2 (citation omitted).

87. Feldman, *supra* note 16, at 857-58 (citation omitted).

88. Norland & Dehghanpisheh, *supra* note 85.

89. Brunner, *supra* note 60, at Jan. 30, 2005.

90. Norland & Dehghanpisheh, *supra* note 85. Sistani has stated publicly that he "has promised to be less active in politics than Ayatollah Khomeini believed that clerics should be[.]" Travis, *supra* note 60, at 26 (citation omitted).

91. *See supra* text accompanying note 16.

92. Travis, *supra* note 60 at 27 (citation omitted).

93. Norland & Dehghanpisheh, *supra* note 85.

94. *Id.*

95. *Id.*

96. *Id.*

97. CORDESMAN, *supra* note 55, at 3.

government.⁹⁸ Sunni leaders previously in power were now being excluded from participation, as United States forces tried to allocate government positions based on what they felt was a fair reflection of Iraqi diversity.⁹⁹ On the 55-person Iraqi Constitution Committee, Sunni Muslims were granted only two positions.¹⁰⁰ Although the number of Sunni committee positions was eventually raised to 15, the Constitution was too far along, so the extra seats provided little benefit to the Sunni cause.¹⁰¹

In response to these actions, a large majority of Sunni Muslims boycotted Iraqi elections, and some factions resorted to violence as a way to deter others from participating. Some of the Sunni publicly denounced the Shiite parties and stated that a government led by Shiite Muslim parties will lead the future of Iraq into a situation similar to that of Iran.¹⁰² Other factions of Sunni Muslims also repeatedly spoke out against the U.S. occupation in Iraq as an impediment to a true Iraqi government.¹⁰³ Tariq al-Hashimi, secretary general of the Iraqi Islamic Party, has stated, “[a] Constitution will do nothing to stop the violence, because most people in government are not recognized by the Iraqi people . . . [a]lthough there have been elections, there is no credibility.”¹⁰⁴

After a complete boycott of the January 2005 elections, Sunni Muslims began to involve themselves with the new Iraqi state. Sunni leaders encouraged followers to vote, stating that the lack of participation was doing more harm than good.¹⁰⁵ The interim Shiite government has facilitated Sunni involvement by agreeing to defer most of the contentious government issues out of the new Constitution and instead to future legislators.¹⁰⁶ When a large turnout of Sunni Muslims voted against the ratification of the new constitution, one U.S. official quipped, “[b]etter for them to throw an election, than to throw a bomb.”¹⁰⁷

98. Roel Meijer, *The Association of Muslim Scholars in Iraq*, MIDDLE EAST REPORT, available at <http://www.merip.org/mer/mer237/meijer.html> (last visited Mar. 10, 2007).

99. *Id.*

100. *Id.*

101. *Id.*

102. Owen Matthews, *Our Voice Must be Heard*, NEWSWEEK INT’L EDITION, Web Exclusive Oct. 16, 2005, <http://www.msnbc.msn.com/id/9706462/site/newsweek/>. It should be noted that the Sunni fears are not completely unfounded. Sistani’s coalition “receives large donations from the spiritual capital of Iran and uses them to maintain private armies, along with a website detailing the characteristics of the planned [Iraqi] fundamentalist state.” Travis, *supra* note 60, at 26 (citations omitted).

103. Robert Collier, *Sunnis Offer an Exit Plan*, S. F. CHRON., Aug. 21, 2005, at B-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/08/21/INGQEEA80E1.DTL>.

104. *Id.*

105. Note, *Democracy in Iraq: Representation Through Ratification*, 119 HARV. L. REV. 1201, 1206 (2006).

106. *Id.* at 1205. In the election for the interim government, the largest Sunni party only received 1.8% of the popular vote and 5 out of 275 seats in the legislature. *Id.* at 1206.

107. Matthews, *supra* note 102.

III. THE IRAQI CONSTITUTION

The Role of Islam

The Iraqi Constitution was submitted to a national referendum on October 15, 2005, and it was no surprise that there was a prominent role for Islamic Shari'a.¹⁰⁸ The most important statement on Islam is found in Article 2, which states, "Islam is the official religion of the State and is a foundation[al] source of legislation[.]"¹⁰⁹ Noted is the fact that while Islam has a preserved role in the Constitution, there is no mention of any specific denomination. It was suggested that this was meant to defuse any conflict between the Shiites and the Sunni, and that "it was the product of a negotiated compromise that sought acceptance from a wide range of views in Iraq."¹¹⁰ Islam is further referenced in Article 2(A) which states "[n]o law may be enacted that contradicts the established provisions of Islam,"¹¹¹ and Article 2(Second), which "guarantees the Islamic identity of the majority of the Iraqi people."¹¹² The principles of Article 2 are protected by the Federal Supreme Court of Iraq, which mandates positions for experts in Islamic Law to ensure Islamic principles are not violated by new legislation.¹¹³

One issue with the role of Islam in the Iraqi Constitution is its ambiguity. Taking into consideration the Shiite majority and the Islamic agenda of powerful Shiite factions, it poses a logical connection that Iraq faces an immediate future of a certain Shiite interpretation governing Article 2. This creates obvious discomfort in those outside the prevailing interpretation. For example, in Article 15 the Constitution grants each citizen life, security and freedom, but allows these rights to be compromised if the specified right is (1) in violation of constitutional law and (2) based on an appropriate judicial body.¹¹⁴ If the appointed Iraqi government states that a legislative act, for example a statute that expands women's rights in family law, is (1) in violation of the Shiite interpretation of Islamic Law, and then (2) further supported by a Supreme Court influenced by Shiites, then that right would no longer be protected by the constitution under a legally valid process.¹¹⁵ By writing Islam in a malleable context, the Constitution provides little guidance for the future of Article 2.

108. Kwaham, *supra* note 48, at 741-43.

109. IRAQI CONST. art. 2, an online version of the Iraqi Constitution can be found at <http://www.iraqigovernment.org/content/Biography/English/Constitution.htm>. For semantics comparison, see *supra* note 23 for a difference between Islamic law being "A" and "THE" source of legislation.

110. Khawam, *supra* note 48, at 742 (citation omitted).

111. IRAQI CONST. art. 2.

112. *Id.*

113. *Id.* at art. 92.

114. *Id.* at art. 15.

115. See Isobel Coleman, *The Impact of Shari'a*, FOREIGN AFFS., Jan.-Feb. 2006, at 24, 24 ("Yanar Muhammad, a leading secular activist and the head of the Organization of Women's Freedom in Iraq, worries that the Islamic provision will turn the country 'into an Afghanistan under the Taliban, where oppression and discrimination of women is institutionalized.'").

In the same breath, expecting *too much* of the Iraqi Constitution, that is defining the entire scope of Article 2's powers at the onset of the new government, is an unrealistic task. It was mentioned earlier in this paper that a similar provision in the Egyptian Constitution also recognizes Shari'a as a source of legislation.¹¹⁶ The Egyptian court interprets Article 2 to mean that all future legislation "(1) [] must be consistent with universally applicable scriptural rules of Islamic [Shari'a], and (2) [] must advance the goals of the [Shari'a]."¹¹⁷ Although the Egyptian Constitution was drafted in 1971,¹¹⁸ it took until 1989 for the Egyptian Supreme Court to set forth a test to resolve Article 2.¹¹⁹ The new Iraqi government should therefore be entitled to some leeway in defining the exact scope of its own Article 2.¹²⁰ Also, while an ambiguous Constitution presents one side of contention, had the Constitution taken the opposite side, which would be clearly stating a governing interpretation, criticism of Islam's role in the Constitution would have been much greater. One of the more recurring fears with the new Iraqi government is that it would end up similar to the fundamentalist state of Iran. Iran's Constitution, however, states, "the [denomination of Islam] followed is Twelver Ja'fari Shi'ism, and this principle is never subject to change," and this language is the source of most of the Islamic power in Iran.¹²¹ So although the Iraqi Constitution does not clearly define the role of Islam, an immediate future of ambiguity should be preferred over a specific interpretation being cemented into the Constitution.

Protection for Democracy and Human Rights

A prominent role for Islam in the new Iraq was never really in doubt, as the possibility of a purely secular state would unfairly divorce the Iraqi citizens

116. *See supra*, note 22.

117. Lombardi & Brown, *supra* note 22, at 418 (citations omitted). The court did not end all uncertainty regarding Article 2, as the court did not explain which Islamic laws were universally applicable and which laws were too ambiguous to base national laws upon. By failing to set concrete definitions, the court allows itself to use broad concepts instead of specific laws to best compromise the differences in Islamic interpretation. *Id.* at 419, 421.

118. *Id.* at 389.

119. *Id.* at 418. The Egyptian Supreme Court avoided an opportunity to resolve Article 2 in 1985 by creating a doctrine of "non-retroactivity" of Article 2. *Id.* at 392. It was decided that the Supreme Court would be a neutral arbitrator for Article 2 claims, but the court did not have jurisdiction to hear any law that was passed before Article 2 was adopted in 1981. *Id.* at 392-93. The decision was seen as an ingenious tactic that appeased both secular and religious parties, while also providing the court with time to develop a set method for interpreting Shari'a. *Id.*

120. The only problem with this solution is the new Courts have to craft the role of Islam in the new government instead of dealing with more pressing issues like federalism and regional authority. Ersin Kalaycioglu, *A Successful Iraqi Constitution Will Also Require Pure Luck*, THE DAILY STAR, Nov. 11, 2005, available at <http://www.iraquupdates.com/sct/preview.php?article=3718>.

121. Stilt, *supra* note 13, at 717 (citation omitted).

from their culture and undoubtedly lose public support.¹²² Also, a purely secular nation with a majority Muslim population is more of an anomaly than a rule. It took the Turkish Constitution years to attain its current level of secularism, as the government found it difficult to achieve legitimacy without Muslim leaders, and would consistently revert back to acknowledging Muslim laws to gain public support.¹²³

But as a way to rectify certain impressions of Islamic democracy,¹²⁴ a significant amount of language was included in the Iraqi Constitution to prevent the Islamic principles from overshadowing the human rights provisions. Included with Islam in Article 2 are Articles 2(B) and (C), which prohibit any law that contradicts human rights or the principles of democracy.¹²⁵ Similar rights protected in the new constitution include “full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeian Sabians,”¹²⁶ and equality “before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.”¹²⁷ Article 41 specifically grants each Iraqi the right to adhere to their own personal beliefs,¹²⁸ while Article 37 protects the Iraqi civilians against religious coercion.¹²⁹ The last two sections were especially beneficial to the Christians and Sunni Muslims in Iraq who feared the Shiite rule would compromise their ability to worship.¹³⁰

The inclusion of human rights provisions along side Islam is a telling advancement in the construction of Islamic Constitutions. While it may just be an organizational preference, it should be noted that while human rights stand side by side with Islam in the Iraqi Constitution, few other Islamic Constitutions place both of these rights in such a connected context. In the Egyptian Constitution, the right to freedom of religion appears in Article 46, opposed to Islam’s role in Article 2.¹³¹ In the Iranian Constitution, citizens are merely protected as far as, “investigation of [one’s religious] beliefs is

122. Sanford Levinson, *“Imposed Constitutionalism”: Some Reflections*, 37 CONN. L. REV. 921, 926 (2005).

123. Bleiberg, *supra* note 20, at 136.

124. “Using indicators such as the political process, civil liberties, political rights and independence of the media, the U.N.’s *Arab Human Development Report 2002* said the Arab world has the lowest ‘freedom score’ of the globe’s seven regions.” David Lamb, *Arab World Sees a Resurgence of Islamic Politics*, L.A. TIMES, Nov. 2, 2002, *reprinted in* THE MUSLIM WORLD, *supra* note 8, at 101, 103.

125. IRAQI CONST. art. 2.

126. *Id.*

127. *Id.* at art. 14.

128. *Id.* at art. 41.

129. *Id.* at art. 37.

130. Iraqi Christians have “suffered continued tyranny, garbed in religious fervor” following the Shiite rise to power and over 45,000 Christians have fled the country since the start of the U.S. occupation in 2005. Travis, *supra* note 60, at 28 (citation omitted).

131. CONST. OF THE ARAB REPUBLIC OF EGYPT art. 46, *available at* <http://www.uam.es/otroscentros/medina/Egypt/egypolcon.htm>, (“The State shall guarantee the freedom of belief and the freedom of [practicing] religious rights.”).

forbidden, and no one may be molested or taken to task simply for holding a certain belief.”¹³²

Washington Post columnist Charles Krauthammer had an interesting take on the Iraqi constitution that helps explain how this constitution differs from Islamic democracies in the past. Krauthammer believes that all constitutions have “shalls” and “shall nots.”¹³³ “Shall nots,” like our Bill of Rights, are regulations against government tyranny that protect our fundamental rights.¹³⁴ Krauthammer sees the inclusion of Islam into the new constitution as a “shall not,” in that the government *shall not* infringe upon Islamic rights.¹³⁵ On its own, this language does not protect all Iraqi citizens, but further language in the constitution provides that new laws *shall not* infringe upon human rights and democratic principles.¹³⁶ Therefore, any law regarding Islamic law would have to satisfy both the human rights and the democratic requirements before it could be passed.¹³⁷ The Iranian constitution only provided protections for Islamic law, making the legislature’s only concern the rights of Muslims. These “roadblocks,” as long as they are adhered to, will provide sufficient procedure for the Iraqi legislature to honor the wishes of the Shiite majority, while still protecting those who want to retain their freedom.¹³⁸

But even though this language is progressive for a Muslim constitution, the human rights provisions are also still subject to the interpretation of the new government. Article 38, for example, grants citizens the right to express their opinions “that [do] not violate public order and morality.”¹³⁹ The term “morality” again references the ambiguity problems present in Article 2.¹⁴⁰ With no set guidelines or definitions of “morality” for the government to abide by, there is no telling what limits the Iraqi citizens will have to follow until the new government takes power.¹⁴¹

CONCLUSION

On October 15, 2005, the Iraqi Constitution was approved by the Iraqi people, and it served as a basis for elections that would be held in December

132. CONST. OF THE ISLAMIC REPUBLIC OF IRAN art. 23, *available at* <http://www.oefre.unibe.ch/law/icl/ir00000.html>.

133. Charles Krauthammer, *A Sensible Iraqi Constitution*, WASH. POST, Sept. 29, 2005, at A29, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/01/AR2005090101638.htm>.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Krauthammer, *supra* note 133.

139. IRAQI CONST. art. 38.

140. Vanessa J. Jiménez, *Iraq’s Constitutional Process: Challenges and the Road Ahead*, HUM. RTS. BRIEF, Fall 2005, at 21, 22.

141. *Id.*

of 2005.¹⁴² While 79% of all Iraqi voters approved the Constitution, the process was almost halted by a large amount of negative Sunni votes.¹⁴³ As the country continues to grow, the Shiite and Sunni conflict continues to slow down the process due to ideological differences.¹⁴⁴

But although conflict exists amongst Iraq's Muslim community, this situation is no different than most budding democracies. In *The Federalist Papers*, a milestone document defending the United States Constitution, Madison states:

A zeal for different opinions concerning religion, concerning government, and many other points, as well as speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.¹⁴⁵

It should therefore be expected that countries with a diverse population will experience growing pains when a new governing system is implemented. This statement is not meant in anyway to condone or minimize the violence and bloodshed that has occurred in Iraq over the last three years, but it is instead intended to promote understanding over the *political* process that has attempted to start a democratic institution in Iraq. Consistent with the idea that this process has made some headway over the last three years, the role of Islam should be seen as a progressive improvement over past Muslim democracies instead of a roadblock to Iraqi independence.

The Iraqi Constitution shows an unprecedented attempt to honor Islamic traditions of Shari'a, but in the same token, ease the concerns of Western nations who fear that human rights will be set aside in favor of Islamic principles. It was mentioned earlier that Islamic equality should be seen through Islamic and not Western eyes, but the Iraqi Constitution has attempted to meld both of those concepts into one unified legal document. As for how this language will effect the diversity of Muslims in Iraq, it is likely that the conflict between Iraqi Shiite and Sunni Muslims will continue throughout Iraq's history, but those issues will most likely rest upon political and not religious grounds. It also seems likely that while Iraq will be governed by a Shiite interpretation, the state of Iraq will probably not become a nation run by religious leaders, as Iraqi leaders understand that imposing a monolithic

142. Kwaham, *supra* note 48, at 741.

143. Brunner, *supra* note 60, at Jan. 30 2005.

144. *See generally id.*

145. THE FEDERALIST NO. 10, at 47 (James Madison) (Clinton Rossiter ed., 1961).

bloc of religious faith on a society with such a diverse population will only undermine any attempt to unify the Iraqi people.¹⁴⁶

As it stands, the Iraqi Constitution is a document with an uncertain future. While there exists little debate over Islam, continued violence between Iraqi citizens has led many to call for an Iraqi state with a decentralized central power and heightened power to regional areas.¹⁴⁷ While this plan may quell the political fight, it is unlikely to be a reality without an equitable division of Iraq's wealthy oil supply.¹⁴⁸ Regardless of what occurs with the Iraqi government, the progress made by the Iraqi Constitution should not be forgotten, as the balance struck between Islamic and Western values provides a hopeful future for Muslim democracies.

146. Amir Taheri, *Role of Islam in Iraqi Constitution*, ARAB VIEW, 2003, available at <http://www.arabview.com/articles.asp?article=384>.

147. David Brooks, *Separation of Seats May Be Best Solution*, N.Y. TIMES, Jan. 7, 2007, available at <http://www.rojname.com/show-all-last-minute-news.php?nuce=167148>.

148. *Id.* ("The Sunnis will never be content with a strip of sand unless they're constitutionally guaranteed 20 percent of the nation's wealth.").