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Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will the Clash Between “Human Rights” and “Islamic Law” Be Reconciled in Future Legislative Enactments and Judicial Interpretations?

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Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will the Clash Between “Human Rights” and ”Islamic Law” Be Reconciled in Future Legislative Enactments and Judicial Interpretations?

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Abstract

This Article endeavors to answer the question, are the provisions on “human rights” and “Islamic Law” in the new Iraqi constitution compatible? The new Iraqi Constitution recognizes the concept of “human rights” in accordance with Iraq’s international obligations, establishes an independent “Supreme Commission for Human Rights,” limits the work of governmental intelligence agencies in accordance with human rights, and prohibits tribal customs that contradict human rights. At the same time, the Constitution makes some references to Islamic Shari’ah: it establishes Islam as the official religion of the State, recognizes Islam as a source of legislation, recognizes Iraq as a part of the Muslim world, guarantees the Islamic identity of its majority, allows Iraqis to choose their personal status law according to Islamic Law, and requires that the Federal Supreme Court contain jurists of Islamic Law. This Article endeavours to answer the question by briefly examining the various provisions of the Iraqi Constitution that cover the rights of the Iraqi people.

UNRESOLVED QUESTIONS IN THE BILL OF RIGHTS OF THE NEW IRAQI CONSTITUTION: HOW WILL THE CLASH BETWEEN “HUMAN RIGHTS” AND “ISLAMIC LAW” BE RECONCILED IN FUTURE LEGISLATIVE ENACTMENTS AND JUDICIAL INTERPRETATIONS?

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INTRODUCTION

The new Iraqi Constitution (“Iraqi Constitution”) recognizes the concept of “human rights”¹ in accordance with Iraq’s international obligations,² establishes an independent “Supreme

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1. Few references to “human rights” are made in Arab or Islamic constitutions. *See, e.g.*, CONSTITUTION OF AFGHANISTAN 1382 [2004] art. 6 (“The State is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights”); CONSTITUTION OF THE PEOPLE’S DEMOCRATIC REPUBLIC OF ALGERIA 1996 art. 32 (“The fundamental human and citizen’s rights and liberties are guaranteed”); CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT 1400 [1980] art. 53 (“The right to political asylum shall be granted by the State to every foreigner persecuted for defending the people’s interests, human rights, peace or justice”); THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN 1368 [1989] art. 14 (“[T]he government of the Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights”); CONSTITUTION OF THE STATE OF PALESTINE [Third Draft] 2003 art. 20 (“Human rights and liberties are binding and must be respected”); CONSTITUTION OF THE TUNISIAN REPUBLIC 1959 art. 5 (“The Republic of Tunisia shall guarantee fundamental freedoms and human rights in their universality, comprehensiveness, complementarity and independence”); CONSTITUTION OF THE REPUBLIC OF YEMEN 1994 art. 6 (“The Republic of Yemen confirms its adherence to the United Nations Charter, the Universal Declaration of Human Rights, the Charter of the Arab League, and dogma of international law which are generally recognized”). *See also* SAUDI ARABIA BASIC LAW OF GOVERNMENT 1412 [1992] art. 26 (“The state protects human rights in accordance with the Islamic Shari’ah”).

2. CONST. IRAQ art. 8. “Iraq shall observe the principles of good neighborliness. . . and respect its international obligations.” Article 44 of an earlier draft provided that, “[a]ll individuals have the right to enjoy the rights stated in international human rights

Commission for Human Rights,"³ limits the work of governmental intelligence agencies in accordance with human rights,⁴ and prohibits tribal customs that contradict human rights.⁵ At the same time, the Constitution makes some references to Islamic Shari'ah: it establishes Islam as the official religion of the State,⁶ recognizes Islam as a source of legislation,⁷ recognizes Iraq as a part of the Muslim world,⁸ guarantees the Islamic identity of its majority,⁹ allows Iraqis to choose their personal status law according to Islamic Law,¹⁰ and requires that the Federal Supreme Court contain jurists of Islamic Law.¹¹ Are the provisions on "human rights" and "Islamic Law" compatible? This article endeavors to answer this question by briefly examining the various provisions of the Iraqi Constitution that cover the rights of the Iraqi people.

I. A LIST OF THE CONSTITUTIONAL RIGHTS AND A POSITIVE ROLE OF THE IRAQI GOVERNMENT

In Section Two,¹² the Constitution¹³ enumerates various rights to which the Iraqi people are entitled. These rights are

agreements and treaties endorsed by Iraq that don't run contrary to the principles and rules of this convention." DRAFT CONSTITUTION OF IRAQ [Associated Press trans.] art. 44. Article 44 must be interpreted in light of Article 5(2) of the International Covenant on Economic, Social and Cultural Rights ("ICESR"), which provides:

No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

G.A. Res. 2200A, art. 5(2), 21 U.N.GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), [hereinafter ICESCR], available at http://www.unhchr.ch/html/menu3/b/a_cesr.htm. Unfortunately, this explicit recognition of rights of Iraqis in accordance with international human rights law was deleted in the final draft.

3. CONST. IRAQ art. 102.

4. *See id.* art. 9.

5. *See id.* art. 45.

6. *See id.* art. 2.

7. *See id.*

8. *See id.* art. 3.

9. *See id.* art. 2.

10. *See id.* art. 41.

11. *See id.* art. 92.

12. The Constitution contains a Preamble and six Sections. Section 1 states the "Fundamental Principles;" Section 2 covers "Rights and Liberties;" Section 3 is devoted to "Federal Powers;" Section 4 addresses "Powers of the Federal Governments;" Section 5 defines the "Power of the Regions;" and Section 6 contains "Final and Transitional Provisions."

13. For a discussion of the Constitutional history of Iraq, see Nathan J. Brown,

divided into two parts: Part One of the Section is divided into “[c]ivil and political rights” and “[e]conomic, social and cultural rights;” Part Two makes reference to several freedoms that are likewise to be protected under the Constitution.¹⁴

The Civil and Political rights are: (1) the right to equality before the law;¹⁵ (2) the right to equal opportunity;¹⁶ (3) the right to life;¹⁷ (4) the right to privacy;¹⁸ (5) the right to nationality;¹⁹ (6) the right to access to justice;²⁰ (7) the right to political participation;²¹ (8) the right to freedom from inhumane treatment;²² (9) the right to freedom of religion;²³ (10) the right to freedom from political and religious coercion;²⁴ (11) the right to be free from slavery;²⁵ (12) the right to freedom of speech;²⁶ (13) the right to assembly;²⁷ (14) the right to freedom of movement;²⁸ and (15) the right to asylum for a non-Iraqi.²⁹

The economic, social, and, cultural rights are: (1) the right

Constitutionalism, Authoritarianism, and Imperialism in Iraq, 53 DRAKE L. REV. 923, 925-31 (2005).

14. While Section 2 is the main section that covers “Rights and Liberties,” other sections must also be consulted in defining these rights and liberties. In addition, although the Constitution distinguishes between rights and liberties, they are used here interchangeably. Compare CONST. IRAQ arts. 14-36 (enumerating “Rights”) with *id.* arts. 37-46 (enumerating “Liberties”).

15. *Id.* art. 14.

16. *Id.* art. 16. This is not limited to employment, as the case under Article 7(c) of the ICESCR. ICESCR, art. 7(c), *supra* note 2.

17. *Id.* art. 15.

18. *Id.* art. 17 (providing right to residential privacy), 40 (guaranteeing communication privacy).

19. *Id.* art. 18.

20. *Id.* art. 19. Article 19 includes the right to trial, the right to defense, the right to an attorney, and the right to due process. It is noted that Article 132 provides for the principle of compensation for political prisoners and families of martyrs. *Id.* art. 132.

21. *Id.* arts. 20, 39. Article 39 is based on Article 1 of the International Covenant on Civil and Political Rights (“ICCPR”), which provides that, “all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” G.A. Res. 2200A, art. 1, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), [hereinafter ICCPR], available at <http://www.ohchr.org/english/law/ccpr.htm>.

22. CONST. IRAQ art. 37.

23. *Id.* arts. 41, 43.

24. *Id.* art. 37.

25. *Id.*

26. *Id.* arts. 38.

27. *Id.*

28. *Id.* art. 44.

29. *Id.* art. 21.

to work;³⁰ (2) the right to form unions;³¹ (3) the right to private property;³² (4) the right to free trade;³³ (5) the right to raise a family;³⁴ (6) the right to social security;³⁵ (7) the right to health;³⁶ (8) the right to environment;³⁷ and (9) the right to education.³⁸

Consequently, the government, according to the Iraqi Constitution, is not only bound not to interfere with any constitutional right; it also assumes a “positive” role in providing the basic needs of the Iraqi people, including work, social security, health care, and education.³⁹

A. *Equality Before the Law and Equality in Political Participation*

Women’s rights are specifically addressed in three main articles.⁴⁰ Article 14 provides for the principle of equality before the law and prohibits discrimination on the basis of sex.⁴¹ Article 20 provides for the principle of equality in political participation; it grants all citizens of Iraq, whether males or females, the right to political participation, including the right to vote and the right to be elected.⁴² Article 49 provides that “[t]he elections law shall

30. *Id.* art. 22.

31. *Id.*

32. *Id.* art. 23. Article 27 makes the protection of public property the duty of every citizen. *Id.* art. 27, First.

33. *Id.* art. 24. While the Constitution recognizes that “[e]very Iraqi shall have the right to own property anywhere in Iraq. No others may possess immovable assets,” it allows for exceptions to be determined by law. *Id.* art. 23. The Constitution also provides that the State shall reform the Iraqi economy by diversifying its sources and encouraging and developing the private sector. *Id.* art. 25.

34. *Id.* art. 29.

35. *Id.* art. 30.

36. *Id.* art. 31.

37. *Id.* art. 33.

38. *Id.* art. 34.

39. *Id.* arts. 22, 30, 31, 34.

40. The Preamble states that the people of Iraq shall “pay attention to women and their rights.” *Id.* pmbl.

41. CONST. IRAQ art. 14. Similar provisions are found in the Constitutions of Algeria, Egypt, Libya, Morocco, Oman, and Tunisia. *See* CONST. ALG. 1996 art. 29; CONST. EGYPT 1400 [1980] art. 40; CONSTITUTION OF THE GREAT SOCIALIST PEOPLE’S LIBYAN ARAB JAMAHIRIYA 1969 art. 5; CONSTITUTION OF THE KINGDOM OF MOROCCO 1992 art. 5; THE WHITE BOOK: THE BASIC LAW OF THE SULTANATE OF OMAN 1996 art. 17 [hereinafter Basic Law of Oman]; CONST. TUNIS. 1959 art. 6.

42. CONST. IRAQ art. 20. Under Article 151 of an earlier draft, women would hold at least twenty-five percent of the seats in the Council of Representatives. *See* DRAFT CONST. IRAQ, *supra* note 2, art. 151. Article 48, which sets the number of seats in the Council of Representatives, states that “[t]he Council of Representatives is made up of a

aim to achieve a percentage of representation for women if not less than one quarter of the members of the Council of Representatives."⁴³ This quota was designed to prevent in Iraq the under-representation or lack of representation of women in parliamentary bodies that is evident in many Arab and Muslim countries. For instance, women are not represented in the parliaments of Saudi Arabia and the United Arab Emirates.⁴⁴ Women represent less than five percent of the parliamentary members of Egypt's lower house, Iran's unicameral parliament, Lebanon's unicameral parliament, Mauritania's lower house, Turkey's unicameral parliament, both of Yemen's parliamentary houses, and less than ten percent in Algeria (in both the lower and upper houses), Jordan (in the lower house), Oman (in the lower house), and Somalia (in the unicameral parliament).⁴⁵ Consequently, the quota system of the Iraqi Constitution presents a significant model for enhancing women's participation in the political process, although it is limited to participation in the parliament.⁴⁶

B. *Constitutional Recognition of the Rights of Religious and Ethnic Minorities*

The Constitution guarantees minority rights by recognizing that "Iraq is a country of multiple nationalities, religions, and sects,"⁴⁷ and prohibiting racism, ethnic cleansing,⁴⁸ or discrimination on the basis of ethnicity, nationality, origin, color, religion, sect, or belief.⁴⁹ Thus, although the Constitution guarantees "the Islamic identity of the majority of the Iraqi people,"⁵⁰ it also guarantees "the full religious rights to freedom of religious

number of members at a proportion of one seat for every 100,000 people from the population of Iraq." *Id.* art. 48.

43. CONST. IRAQ. art. 49, Fourth.

44. See Inter-Parliamentary Union Home Page, Women in Parliaments (2006), <http://www.ipu.org/english/home.htm> (last visited Nov. 10, 2006)

45. *Id.*

46. *Id.*

47. CONST. IRAQ art. 3.

48. *Id.* art. 7. Article 7 is based on Article 20 of the ICCPR, which provides that "[a]ny propaganda for war shall be prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." ICCPR, *supra* note 21, art. 7.

49. CONST. IRAQ art. 14.

50. *Id.* art. 2.

belief and practice of all individuals,”⁵¹ and adherence to their personal status laws in accordance with their own religion, sect or belief.⁵² The Constitution specifically recognizes the rights of religious minorities such as Christians⁵³ and ethnic minorities such as Turkomen, Chaldeans, and Assyrians.⁵⁴ The Constitution recognizes Arabic and Kurdish as the two official languages,⁵⁵ and guarantees for ethnic minorities the right to educate their children in their mother tongues, such as Turkmen and Assyrian.⁵⁶ Other Arab constitutions rarely make specific references to rights of minorities, whether religious minorities or ethnic minorities. They merely prohibit discrimination on the basis of religion or ethnic origin.⁵⁷

C. Prohibition Against Trafficking in Persons, Especially Women and Children

For the first time, with Article 37 of the new Iraqi Constitution,⁵⁸ an Arab constitution explicitly prohibits “trade in women

51. *Id.*

52. *Id.* art. 41.

53. CONST. IRAQ art. 2.

54. *Id.* art. 125. The Article provides that the Constitution guarantees the “administrative, political, cultural, and educational rights of the various nationalities.” A similar provision is provided in Article 27 of the Constitution of Sudan. The Article states, “[e]very sect or group of citizens have the right to keep their particular culture, language or religion, and to voluntarily bring up their children within the framework of these traditions. It is prohibited to impose one’s traditions on children by coercion.” CONSTITUTION OF THE REPUBLIC OF THE SUDAN 1998 art. 27.

55. CONST. IRAQ art. 4. Article 4 is based on Article 27 of the ICCPR, which provides that, “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” ICCPR, *supra* note 21, art. 27.

56. CONST. IRAQ art.4. Article 4 further states that the Turkomen and Syriac languages shall be official in areas where they are populated. *Id.* art. 4, Fourth.

57. *See, e.g.*, the Constitutions of Egypt, Kuwait, Oman, and Qatar. *See* CONST. EGYPT 1400 [1980] art. 40; CONSTITUTION OF THE STATE OF KUWAIT 1963 art. 29; BASIC LAW OF OMAN 1996 art. 17; PERMANENT CONSTITUTION OF THE STATE OF QATAR 2003 art. 35; *see also* CONST. SUDAN 1998 art. 1 (providing that “[t]he State of Sudan is a country of racial and cultural harmony and religious tolerance. Islam is the religion of the majority of the population and Christianity and traditional religions have a large following.”). *But see* CONST. IRAN 1368 [1989] art. 13 (stating that “Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.”).

58. Article 37 states that “[f]orced labour, slavery, slave trade, trafficking in women or children, and sex trade shall be prohibited.” CONST. IRAQ art. 37.

or children” and the “sex trade.”⁵⁹ The U.S. Department of State in the 2005 Trafficking in Persons Report stated, “As Iraq moves forward on the path to democracy and builds its internal security, administration, and infrastructure, the government should develop and integrate mechanisms for combating trafficking.”⁶⁰ The 2006 Trafficking in Persons Report acknowl-

59. *Id.* The word trafficking is translated into the Arabic language as “trade.” Traditionally, Arab and Muslim constitutions prohibited “forced labor” or “slavery.” For instance, the Constitution of Jordan provides that “compulsory labour may not be imposed on any person,” although compulsory labor may be imposed on a person in a state of necessity or as a result of conviction by a court of law. CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN 1952 art. 13. The Constitution of the United Arab Emirates states that “no person may be enslaved.” CONSTITUTION OF THE UNITED ARAB EMIRATES 1996 art. 34. The Constitution of Afghanistan provides that “forced labor is forbidden.” CONST. AFG. 1382 [2004] art. 49. Iran’s Constitution states that Iranians should have the right to choose freely an occupation and that every citizen should refrain “from compelling anyone to engage in a particular job.” CONST. IRAN 1368 [1989] art. 43. Similarly, the Basic Law of Oman states that “[e]very citizen has the right to engage in the work of his choice within the limits of the Law. It is not permitted to impose any compulsory work on anyone.” BASIC LAW OF OMAN 1996 art. 12. The Constitution of Kuwait also prohibits forced labor, “except in the cases specified by law for national emergency and with just remuneration.” CONST. KUWAIT 1963 art. 42. The Palestinian Constitution prohibits slave labor. DRAFT CONST. PALESTINE 2000 art. 53. The Constitution of Sudan states that “[e]veryone shall be free and no one shall be held in slavery or servitude or degraded or tortured.” CONST. SUDAN 1998 art. 20. The Pakistani Constitution prohibits slavery, all forms of forced labor, and traffic in human beings. CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 2004 art. 11. For a discussion of trafficking in persons in countries of the Middle East, see Mohamed Mattar, *Trafficking in Persons, Especially Women and Children, In Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 *FORDHAM INT’L L.J.* 721, 721-60 (2003).

60. OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT*, 233 (2005) [hereinafter *Trafficking in Persons Report 2005*], available at <http://www.state.gov/documents/organization/47255.pdf>. The 2006 Trafficking in Persons Report on Iraq describes the scope of the problem. The Report states:

Iraq may be a source country for women and children trafficked to Syria, Yemen, Qatar, United Arab Emirates, Jordan, Turkey, and Iran for the purpose of sexual exploitation. Some Iraqi girls are also believed to be trafficked internally from rural areas to cities such as Kirkuk, Erbil, and Mosul for sexual exploitation. Iraq may also be a destination country for men trafficked from South and Southeast Asia for involuntary servitude. These workers are sometimes offered fraudulent jobs in safe environments in Kuwait or Jordan. Some of these workers were reportedly coerced into involuntary servitude in Iraq, while others go to Iraq voluntarily but are still sometimes subjected to conditions of involuntary servitude after arrival. Although the governments of India, Pakistan, Sri Lanka, Thailand, and the Philippines have official bans prohibiting their nationals from working in Iraq, workers from these countries are reportedly coerced into positions in Iraq with threats of abandonment in Kuwait or Jordan, starvation, or force. Because of the special circumstances in

edges that “the ongoing insurgency and terrorism severely handicapped the government’s abilities to combat trafficking.”⁶¹ With the enactment of the new Iraqi Constitution, Article 37 seems to require the Iraqi legislature to enact a law explicitly prohibiting “trade in women or children.” Iraqi Law no. 8 of 1988 only prohibits prostitution, the exploitation and facilitation of prostitution, and maintaining a brothel.⁶² A specific anti-trafficking law is needed⁶³ because criminalization of the offense of trafficking in persons should include all forms of trafficking, whether for the purpose of prostitution, forced labor, or other forms of slavery.⁶⁴ In addition, such a law must also provide for the necessary measures to protect victims of trafficking.⁶⁵

Iraq, it is difficult to appropriately gauge the human trafficking situation in the country.

OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, at 269-70 (2006) [hereinafter *Trafficking in Persons Report 2006*], available at <http://www.state.gov/documents/organization/66086.pdf>. For a discussion of the United States Trafficking in Persons Report see, Mohamed Mattar, *Monitoring the Status of Severe Forms of Trafficking in Foreign Countries Sanctions Mandated Under the U.S. Trafficking Victims Protection Act*, 10 BROWN J. WORLD AFF., (Summer/Fall 2003), 159, 159-78.

61. See TRAFFICKING IN PERSONS REPORT 2006, *supra* note 60, at 270.

62. Alwaqai Aliraqiya [The Official Gazette of the Republic of Iraq], *Combating Prostitution*, Mar. 30, 1988, Vol. 31, No. 13, at 3-4. Article 2 of the 1988 law states that “prostitution . . . [is] prohibited.” *Id.* Article 3(c) states that “[w]hoever owns or manages a house, rooms or a hotel allowing others to practice the prostitution therein or facilitating or assisting same” shall be punished. *Id.*

63. For a discussion of the elements of an antitrafficking law, see Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TULANE J. INT. & COMP. L. 357 (2006).

64. Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, defines trafficking broadly, to include:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

G.A. Res. 55/25, art. 3, U.N. GAOR, 55th Sess., U.N. Doc. A/55/383 (2000), available at <http://www.ohchr.org/english/law/pdf/protocoltraffic.pdf>.

65. See *id.* arts. 6, 7.

D. *Constitutional Protection of Women as Members of the Family*

The Constitution also makes reference to the role of women in the family and recognizes the family as the basis of society.⁶⁶ It imposes an obligation on the State to protect “motherhood,”⁶⁷ and to prohibit all forms of violence and abuse in the family.⁶⁸ In addition, the Constitution obligates the State to guarantee for the individual and the family, especially women, social security and medical care, and the essential means for living, including housing and appropriate salary.⁶⁹ An Iraqi may acquire nationality not only if he is born to an Iraqi father, as was the rule under the Iraqi Nationality Law, but also if he is born to an Iraqi mother as well.⁷⁰

E. *A Shift from Right to Assembly and Association to State Obligation to Support Civil Society*

For the first time, an Arab Constitution imposes an explicit obligation on the State to “strengthen the role of civil society.”⁷¹ Traditionally, Arab and Islamic constitutions made references only to the right to assembly and the formation of associations.⁷²

66. CONST. OF IRAQ art. 29, First.

67. *Id.* art. 29, First(b).

68. Compare *id.* art. 29, Fourth, with CONST. ALG. 1996 art. 34(2) ([A]ll forms of physical or moral violence or breach of dignity is [sic] forbidden”) and CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA 1991 art. 13(4) (prohibiting “[a]ll forms of moral or physical violence”).

69. See CONST. IRAQ art. 30.

70. *Id.* art. 18. The Iraqi Nationality Law No. 43 of 1961 considered an Iraqi national to be anyone who is born to a father holding the Iraqi nationality, or anyone who is born to an Iraqi mother only if the father is with an unknown nationality or not holding a nationality. Amended Iraqi Nationality Law for 1963 (Law No. 43/1963), art. 4, available at www.iom-iraq.net/Library/Iraqi_Nationality_Law.pdf. The Constitution also allows for dual nationality, although it provides that an Iraqi who holds a high level political or security position must relinquish any other nationality. CONST. IRAQ art. 18. The Nationality Law No. 43 of 1963 did not allow dual nationality. Article 11 thereof provided that “[e]ach Iraqi who has acquired a foreign nationality in a foreign country upon his free choice will be denied the Iraqi nationality.” Amended Iraqi Nationality Law for 1963 (Law No. 43/1963), art. 11.

71. CONST. IRAQ art. 45.

72. See, e.g., the CONST. AFG. 1382 [2004] art. 35; CONSTITUTION OF THE KINGDOM OF BAHRAIN 2002 arts. 27-29; CONST. EGYPT 1400 [1980] arts. 54-56; CONST. JORDAN 1952 art. 16; CONST. KUWAIT 1963 arts. 43-44; CONSTITUTION OF THE LEBANESE REPUBLIC 1926 art. 13; CONST. MAURITANIA 1991 art. 10; CONST. MOROCCO 1992 arts. 3, 9, 14; BASIC LAW OF OMAN 1996 arts. 32-33; CONST. PALESTINE [Third Draft] 2003 arts. 52, 54-55; CONST. SUDAN 1998 art. 26; CONST. SYRIA 1973 arts. 9, 39, 48; CONST. TUNIS. 1959 art. 8; CONST. YEMEN 1994 art. 57.

This new constitutional provision is very significant, especially in a region where political regimes have historically denied and continue to deny non-governmental organizations and other members of civil society the freedom to function.⁷³ Besides the High Commission for Human Rights, the Independent Electoral

73. The United States Department of State Human Rights Report 2005 [hereinafter Human Rights Report 2005], criticizes this policy in different countries. *See, e.g.*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, HUMAN RIGHTS REPORTS FOR 2005 [hereinafter HUMAN RIGHTS REPORT 2005], ALG. (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61685.htm> ("Domestic NGOs confronted bureaucratic obstacles when receiving support from abroad."); HUMAN RIGHTS REPORT 2005, BHR. (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61686.htm> ("In September 2004, the Ministry of Labor and Social Affairs, now the Ministry of Social Development, dissolved the Bahrain Center for Human Rights (BCHR) after it held a seminar on poverty in which a BCHR member criticized the prime minister."); HUMAN RIGHTS REPORT 2005, EGYPT (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61687.htm> ("The minister of insurance and social affairs has the authority to dissolve NGOS by decree. The law also requires NGOs to obtain permission from the government before accepting foreign funds."); Regarding Saudi Arabia: HUMAN RIGHTS REPORT 2005, SAUDI ARABIA (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61698.htm> ("The Basic Law does not address freedom of assembly, and the government strictly limited it in practice. . . The government prohibited the establishment of political parties or any type of group that the government considered counter to its regime, or overstepping the bounds of criticism by challenging the king's authority."); HUMAN RIGHTS REPORT 2005, U.A.E. (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61701.htm> ("Organized public gatherings require a government permit. No permits were given for organized public gatherings for political purposes. In practice, the government did not regularly interfere with informal gatherings held without a government permit in public places, unless there were complaints."); Regarding Kuwait:

The government used its power to license as a means of political control. There were 72 officially licensed NGOs in the country, including a bar association, professional groups, and scientific bodies. The Ministry of Social Affairs and Labor (MOSAL) licensed 19 NGOs during the year compared with only 1 in 2004. There were 160 NGOS pending licensing by the MOSAL; many had been waiting years for approval.

HUMAN RIGHTS REPORT 2005, KUWAIT (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61692.htm>. Regarding Libya:

The government restricted the right of association to institutions affiliated with the government. The formation of groups based on a political ideology was banned. Political activity deemed treasonous by the government was punishable by death. An offense may include any activity that is 'opposed to the principles of the Revolution.'

HUMAN RIGHTS REPORT 2005, LIBYA (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61694.htm>. Regarding Oman:

The government restricted NGO activity. There were no registered domestic human rights NGOs and no government-controlled or autonomous human rights entities in the country. . . Activists involved in foreign-registered organizations were subject to the threat of arrest or loss of government employment or scholarships. No association may receive funding from an international

Commission, and the Commission on Public Integrity, all of which have been established as independent agencies by the new Constitution,⁷⁴ civil society should serve as a primary actor that monitors governmental institutions to ensure transparency and accountability.⁷⁵ Based upon this constitutional provision, civil

group without government approval. Individuals convicted of doing so could receive up to 6 months in jail and a \$1,310 fine (500 rials).

HUMAN RIGHTS REPORT 2005, OMAN (2005), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2005/61696.htm>. Regarding Syria:

The constitution permits private associations, but it also grants the government the right to limit their activities. In practice the government restricted freedom of association. Private associations are required to register with authorities, but requests for registration were usually denied, presumably on political grounds. The government usually granted registration to groups not engaged in political or other activities deemed sensitive.

HUMAN RIGHTS REPORT 2005, SYRIA (2005), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2005/61699.htm>. Regarding Tunisia:

The law requires groups wishing to hold a public meeting, rally, or march to obtain a permit from the Ministry of Interior no later than three days before the proposed event and to submit a list of participants; the authorities routinely approved such permits for groups that supported government positions and generally refused permission for groups that express dissenting views. As in previous years, NGO leaders reported difficulty in renting space to hold large meetings. They maintained that police pressured hotel and hall managers to prevent them from renting meeting space. Hotel managers and businessmen denied that there was a specific ban on renting space to opposition groups; however, they said they cooperated with the Ministry of Interior and accommodated its requests when possible.

HUMAN RIGHTS REPORT 2005, TUNIS. (2005), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2005/61700.htm>.

74. CONST. IRAQ art. 102.

75. The United Nations Convention against Corruption, Article 13 recognizes the role of civil society in combating corruption. G.A. Res. 58/4, art. 13, U.N. GAOR, 58th Sess., Doc. A/58/422 (Oct. 31, 2003), *available at* http://www.unodc.org/unodc/crime_convention_corruption.html. The Article states:

Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information; (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula; (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are

society, especially non-governmental organizations such as human rights and women's rights organizations, should take the lead in guarding the rights stipulated in the Iraqi Constitution. This requires educating civil society itself and ordinary citizens on their constitutional rights and how to monitor violations of those rights.⁷⁶

II. SOURCES OF LAW AND SOURCES OF CONFLICT

A. *Is International Human Rights Law a Source for the Rights of the Iraqi People?*

In several ways, the Constitution adopts an expansive interpretation of the scope of rights it grants. First, an individual should be entitled to all rights stipulated in the international conventions concerning "human rights" that Iraq has ratified in accordance to its international obligations.⁷⁷ Consequently, in interpreting the constitutional rights of the Iraqi people, the Civil and Political rights as well as the Economic, Social, and Cultural rights that are recognized under international law must also be considered. In fact, Iraq has ratified a number of international human rights conventions, including the International Covenant on Civil and Political Rights ("ICCPR"),⁷⁸ the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),⁷⁹ the Convention on the Elimination of All Forms

necessary: (i) For respect of the rights or reputations of others; (ii) For the protection of national security or *ordre public* or of public health or morals. 2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

Id.

76. *Id.*

77. CONST. IRAQ art. 8. According to the Constitution, the cabinet negotiates treaties and international agreements under Article 80, the President endorses such treaties and international agreements following approval of the Council of Representatives under Article 73, and the Council of Representatives approves treaties and international agreements by two-thirds majority under Article 61.

78. ICCPR, *supra* note 21. Iraq ratified the ICCPR on January 25, 1971, and the ICCPR entered into force on March 23, 1976. Office of the United Nations High Commissioner for Human Rights ("OHCHR"), Ratification & Reservations: ICCPR, <http://www.ohchr.org/english/countries/ratification/13.htm> (last visited Oct. 9, 2006).

79. ICESCR, *supra* note 2. Iraq ratified the ICESCR on January 25, 1971, and the ICESCR entered into force on January 3, 1976. OHCHR, Ratifications & Reservations:

of Discrimination Against Women (“CEDAW”),⁸⁰ and the Convention on the Rights of the Child (“CRC”).⁸¹ Likewise, Article 9 of the Constitution explicitly states that Iraq “shall respect its international obligations.”⁸² However, Iraq has made several reservations regarding some of the provisions of these international conventions.⁸³

1. Reservation Regarding the Right of Women to Marry

For instance, Iraq made a reservation⁸⁴ regarding Article 16 of CEDAW, which provides for the equality of men and women regarding the right to marry, the right to choose a spouse, and the right to dissolve a marriage.⁸⁵ According to Islamic jurisprudence, a Muslim woman may not marry a non-Muslim⁸⁶ and uni-

ICESCR, <http://www.ohchr.org/english/countries/ratification/3.htm> (last visited Oct. 9, 2006).

80. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979) [hereinafter CEDAW]. Iraq ratified CEDAW on August 13, 1986, and CEDAW entered into force on September 3, 1981. OHCHR, Ratification & Reservations: CEDAW, <http://www.ohchr.org/english/countries/ratification/8.htm> (last visited Oct. 9, 2006). See generally Rebecca L. Hillock, *Establishing the Rights of Women Globally: Has the United Nations Convention on the Elimination of All Forms of Discrimination Against Women Made a Difference?*, 12 *TULSA J. COMP. & INT’L L.* 481 (2005).

81. Convention on the Rights of the Child (“CRC”), G.A. res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC]. Iraq ratified the CRC on June 15, 1994, and the CRC entered into force on September 2, 1990. OHCHR, Ratification & Reservations: CRC, <http://www.ohchr.org/english/countries/ratification/11.htm> (last visited Oct. 9, 2006).

82. CONST. IRAQ art. 8. Article 8 also states that Iraq shall abide by the principles of “good neighbourliness” and shall not interfere in the internal affairs of other States. *Id.* Article 9 provides that the State shall respect its international commitments regarding the “non-proliferation, non-development, non-production, and non-use of nuclear, chemical, and biological weapons.” *Id.* art. 9, First.

83. See generally Bharathi Anandhi Venktraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari’ah and the Convention Compatible?*, 44 *AM. U.L. REV.* 1949 (1995).

84. OHCHR, Ratifications & Reservations: CEDAW, http://www.ohchr.org/english/countries/ratification/8_1.htm (last visited Oct. 9, 2006).

85. CEDAW, *supra* note 80, art. 16.

86. The Qur’an states:

And do not marry the idolatresses until they believe, and certainly a believing maid is better than an idolatress woman, even though she should please you; and do not give (believing women) in marriage to idolaters until they believe, and certainly a believing servant is better than an idolater, even though he should please you; these invite to the fire, and Allah invites to the garden and to forgiveness by His will, and makes clear His communications to men, that they may be mindful.

Qur’an 2:221 (M. H. Shakir trans.). Mashood Baderin explains:

lateral divorce in general is reserved for the husband.⁸⁷

2. Harmful Customary Practices

Iraq also made a reservation regarding Article 2(f),⁸⁸ which mandates State parties to the Convention “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women.”⁸⁹ Furthermore, Article 45 of the new Iraqi Constitution provides that the State shall, “prohibit the tribal traditions that are in contradiction with human rights.”⁹⁰ Consequently, the State should take the necessary measures, including legislative measures and educational initiatives, to abolish harmful customary practices,⁹¹ such as honor killings.⁹²

[U]nder Islamic law a Muslim man who marries a Christian or Jewish woman has a religious obligation to honor and respect both Christianity and Judaism. Thus the woman’s religious beliefs and rights are not in jeopardy through the marriage, because she would be free to maintain and practice her religion as a Christian or Jew. Conversely, a Christian or Jewish man who marries a Muslim woman is not under such an obligation within his own faith, so allowing a Muslim woman to marry a Christian or Jewish man may expose her religious beliefs and rights to jeopardy.

MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* 144 (2003).

87. A wife may dissolve the marriage through judicial divorce. She may also dissolve the marriage by mutual agreement. In all cases, a wife has the option to include her right to unilateral divorce in the marriage contract. *See* BADERIN, *supra* note 86, at 149-53.

88. OHCHR, *Ratifications and Reservations: CEDAW*, *supra* note 80.

89. CEDAW, *supra* note 80, art. 2(f).

90. CONST. IRAQ art. 45, Second. The Constitution of Afghanistan mandates that the State takes the necessary measures for the “elimination of related traditions contrary to the principles of the sacred religion of Islam.” CONST. AFG. 1382 [2004] art. 54. Other constitutions recognize established customs as long as they do not conflict with public order or morality. *See, e.g.*, CONST. BAHR. 2002 art. 22; CONST. EGYPT 1400 [1980] art. 12; CONST. JORDAN 1952 art. 14; CONST. KUWAIT 1963 art. 35.

91. The United Nations defines harmful customary practices to include female genital mutilation (“FGM”), forced feeding of women, early marriage, the various taboos or practices which prevent women from controlling their own fertility, nutritional taboos, and traditional birth practices, son preference and its implications for the status of the girl child, female infanticide, early pregnancy, and dowry price. *See* OHCHR, Fact Sheet No. 23: Harmful Traditional Practices Affecting the Health of Women and Children, <http://www.unhchr.ch/html/menu6/2/fs23.htm> (last visited Oct. 9, 2006). *See generally* Barbara R. Hauser, *Born a Eunuch? Harmful Inheritance Practices and Human Rights*, 21 *LAW & INEQ. J.* 1 (2003). One may add those practices which, when legislated in accordance with customary norms, hinder women’s ability to fully participate in society, emphasize male dominance over women and demonstrate the Muslim woman’s role as mainly limited to the familial and domestic sphere to a list of harmful customary practices. Such practices include: spousal abuse—especially in the

3. Sex Discrimination in the Iraqi Criminal Law

Iraq also made a reservation⁹³ concerning Article 2(g) of CEDAW, which provides that State parties shall undertake “[t]o repeal all national penal provisions which constitute discrimination against women.”⁹⁴ The Iraqi Penal Code entails numerous provisions that arguably discriminate against women, especially Paragraph 41, which provides that there is no crime in a case where a person is exercising his right to discipline his wife.⁹⁵

form of “wife discipline” and “wife obedience,”—abuse of divorce rights, restricting the right of women to travel, honor killings, and similar practices.

92. See, e.g., Kathryn Christine Arnold, Note, *Are the Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordanian Penal Code Analyzed Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 AM. U. INT’L L. REV. 1343 (2001); See also Wendy M. Gonzalez, *Karo Kari: Honor Killing*, 9 BUFF. WOMEN’S L.J. 22 (2000-2001); Ferris K. Nesheiwat, *Honor Crimes in Jordan: Their Treatment Under Islamic and Jordanian Criminal Laws*, 23 PENN. ST. INT’L L. REV. 251 (2004); Rachel A. Ruane, Comment, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 EMORY INT’L L. REV. 1523 (2000).

93. OHCHR, Ratifications & Reservations: CEDAW, *supra* note 80.

94. CEDAW, *supra* note 80, art. 2(g).

95. Iraqi Penal Code with Amendments for 1969 (“Iraqi Penal Code”), ¶ 41, http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_Index.pdf (last visited Oct. 31, 2006). The right to discipline is based on the Qur’an, which states:

Men are superior to women on account of the qualities with which God [has] gifted the one above the other, and on account of the outlay they make from their substance for them. Virtuous women are obedient, careful, during the husband’s absence, because God [has] of them been careful. But chide those for whose refractoriness [you] have cause to fear; remove them into beds apart, and scourge them: but if they are obedient to you, then seek not occasion against them: verily, God is High, Great!”

Qur’an 4:34 (J.M. Rodwell trans.). For other translations of the same passage, see Qur’an 4:34 (N. J. Dawood trans.):

Men have authority over women because Allah has made the one superior to the other, and because they spend their wealth to maintain them. Good women are obedient. They guard their unseen parts because Allah has guarded them. As for those from whom you fear disobedience, admonish them and send them to beds apart and beat them. Then if they obey you, take no further action against them. Allah is high, supreme.

Qur’an 4:34 (M. Pickthall trans.):

Men are in charge of women, because Allah [has] made the one of them to excel the other, and because they spend of their property (for the support of women). So good women are the obedient, guarding in secret that which Allah [has] guarded. As for those from whom you fear rebellion, admonish them and banish them to beds apart, and scourge them. Then if they obey you, seek not a way against them. Lo! Allah is ever High Exalted, Great.

Qur’an 4:34 (A. J. Arberry trans.):

Men are the managers of the affairs of women for that God has preferred in bounty one of them over another, and for that they have expended of their

Paragraph 377 punishes the adulteress (wife) regardless of the place where the act has been committed, while the husband is punished for adultery only if he commits the act in the marital home.⁹⁶ Paragraph 380 provides for a minor sentence of imprisonment not to exceed one year in cases where the husband induces his wife to commit adultery.⁹⁷ Article 409 provides for a short imprisonment sentence not to exceed three years when the husband murders his wife upon finding her committing the act of adultery.⁹⁸

a. Can the Discriminatory Provisions of the Iraqi Personal Status Law Be Amended?

The argument has also been made that the Iraqi Personal Status Law, no. 188 of 1959, contains several provisions that discriminate against women, including polygamy,⁹⁹ unilateral divorce,¹⁰⁰ judicial divorce,¹⁰¹ marital alimony,¹⁰² and the double-

property. Righteous women are therefore obedient, guarding the secret for God's guarding. And those you fear may be rebellious admonish; banish them to their couches, and beat them. If they then obey you, look not for any way against them; God is All-high, All-great.

Qur'an 4:34 (Y. Ali trans.):

Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard. As to those women on whom part [you] fear disloyalty and ill-conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, seek not against them means (of annoyance): for Allah is Most High, great (above you all).

For a description of the juristic limitations on the right to discipline, see Azizah Y. al-Hibri, *An Islamic Perspective on Domestic Violence*, 27 *FORDHAM INT'L L.J.* 195 (2003).

96. Iraqi Penal Code, *supra* note 95, ¶ 377.

97. *Id.* ¶ 380.

98. *Id.* ¶ 409. For discussion of the crime of adultery in Islamic Law see, Reza Aslan, *The Problem of Stoning in the Islamic Penal Code: An Argument for Reform*, 2 *UCLA J. ISLAMIC & NEAR E.L.* 163 (2003).

99. A Code of Personal Status for 1959 [Personal Status Law, no. 188] art. 3(4) (Iraq). The Article prohibits marrying more than one wife except after acquiring the permission from a judge. Such permission is contingent upon the husband having financial ability to maintain more than one wife and after a proof of a "legitimate interest." Article 3(5) does not allow polygamy if there is fear that the husband will not be just among his wives. *Id.* art. 3(5). Article 40(5) of the 1959 Personal Status Law states that a wife is entitled to ask for judicial divorce in the event her husband marries a second wife without the permission of the court. *Id.* art. 40(5); see J.N.D. Anderson, *A Law of Personal Status for Iraq*, 9 *INT'L & COMP. L.Q.* 542, 546, 549 (1960).

100. Personal Status Law, no. 188, art. 34 (defining divorce as dissolution of marriage by the husband or the wife if such right was delegated to her or by the court). See

inheritance rule.¹⁰³ The principle of equality between men and women and the prohibition against discrimination on the basis of sex in Article 14 require the Iraqi legislature to reconsider these discriminatory provisions of the penal code and the Personal Status Law. One must understand, however, that if any of these provisions is derived from an Islamic legislation, it is definitive in nature as opposed to presumptive,¹⁰⁴ and it may not be subject to interpretation.¹⁰⁵

4. Freedom of Religion and Freedom to Convert to Another Religion

Similarly, Iraq made a reservation regarding Article 14 of

Anderson, *supra* note 99, at 546. See generally Alan Reed, *Transnational Non-Judicial Divorce: A Comparative Analysis of Recognition Under English and U.S. Jurisprudence*, 18 *LOY. L.A. INT'L & COMP. L.J.* 311 (1996); Kristen Cherry, *Marriage and Divorce Law in Pakistan and Iran: The Problem of Recognition*, 9 *TULSA J. COMP. & INT'L L.* 319 (2001); Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 *VAND. J. TRANSNAT'L L.* 1043 (2004).

101. Personal Status Law, no. 188, art. 40. It is significant to note that the Article gives the wife the right to judicial divorce if the husband married a second wife without the permission of the court. *Id.*; see Anderson, *supra* note 99, at 546, 554-55.

102. Personal Status Law, no. 188, art. 25. The Article states that a wife shall not have the right to an alimony in three cases: (1) if she left the marital home without a permission from her husband and for no legal reason; (2) if she was imprisoned for a crime that she committed or a debt she did not pay; (3) if she refused to travel with her husband without a legal reason. *Id.*; see Anderson, *supra* note 99.

103. Personal Status Law, no. 188, art. 89. The Article states that the male shall be entitled to the portion of two females in inheritance. See, e.g., Hauser, *supra* note 91; Mary F. Ratford, *The Inheritance Rights of Women under Jewish and Islamic Law*, 23 *B.C. INT'L & COMP. L. REV.* 135 (2000).

104. See MOHAMED HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 28 (2003) (quoting the Qur'an). Kamali gives three examples of definitive texts: "In what your wives leave, your share is a half, if they leave no child" (4:12); "The adulterer, whether a man or a woman, flog them each a hundred stripes" (24:2); "Those who accuse chaste women of adultery and fail to bring four witnesses [to prove it], flog them eight stripes" (24:4).

105. Although interpretation (ijtihad) is allowed under the Islamic legal theory, repeal of any of the Quranic text is not permissible. On the immutable nature of rules of Islam, see Ali Khan, *Islam as Intellectual Property "My Lord! Increase Me in Knowledge"*, 31 *CUMB. L. REV.* 631, 639 (2000-2001):

In fact, as a matter of principle, the Quran is an unalterable text. No one, neither a Muslim nor a non-Muslim, may lawfully amend, delete, or repeal even a single verse or word of the Quran. Furthermore, not a single verse or word of the Quran can be shifted from its appointed place within the Book. Precisely defined, the Quran is the protected knowledge—a unique form of intellectual property—in that no user is authorized to tinker with its form, substance, integrity, and wholesomeness.

Id.

CRC,¹⁰⁶ which provides for the right to freedom of religion.¹⁰⁷ Under Islamic jurisprudence, conversion from Islam to another religion constitutes the crime of apostasy.¹⁰⁸ However, the Con-

106. OHCHR, Ratifications & Reservations: CDC, <http://www.ohchr.org/english/countries/ratification/11.htm#reservations> (last visited Oct. 9, 2006).

107. CRC, *supra* note 81, art. 14. The other important issue that raises debate in the Arab and Muslim world is the issue of adoption. Although, Article 20 of CRC provides for “Kafalah” in Islamic Law as an alternative to adoption, many Arab and Muslim countries made reservations to Article 20 as well as Article 21 of the CRC. For instance, Egypt’s reservation reads:

Since The Islamic [Shari’ah] is one of the fundamental sources of legislation in Egyptian positive law and because the [Shari’ah], in enjoining the provision of every means of protection and care for children by numerous ways and means, does not include among those ways and means the system of adoption existing in certain other bodies of positive law, The Government of the Arab Republic of Egypt expresses its reservation with respect to all the clauses and provisions relating to adoption in the said Convention, and in particular with respect to the provisions governing adoption in articles 20 and 21 of the Convention.

OHCHR, Ratifications & Reservations, CRC: Egypt, <http://www.ohchr.org/english/countries/ratification/11.htm#N22> (last visited Oct. 9, 2006). Jordan’s reservation reads:

The Hashemite Kingdom of Jordan expresses its reservation and does not consider itself bound by articles 14, 20 and 21 of the Convention, which grant the child the right to freedom of choice of religion and concern the question of adoption, since they are at variance with the precepts of the tolerant Islamic [Shari’ah].

OHCHR, Ratifications & Reservations, CRC: Jordan, <http://www.ohchr.org/english/countries/ratification/11.htm#N22> (last visited Oct. 9, 2006). The United Arab Emirates’ reservation reads: “Since, given its commitment to the principles of Islamic law, the United Arab Emirates does not permit the system of adoption, it has reservations with respect to this article and does not deem it necessary to be bound by its provisions.” OHCHR, Ratifications & Reservations: CRC, U.A.E., <http://www.ohchr.org/english/countries/ratification/11.htm#N22> (last visited Oct. 9, 2006). The Qur’an states that “their mothers are only those who have given birth to them.” Qur’an 58:2, *quoted in* D. Pollack et al., *Classical Religious Perspectives of Adoption Law*, 79 NOTRE DAME L. REV. 693, 733 (2004). The Qur’an also states:

God did not make those whom you call your sons your sons [in reality]. That is no more than an expression from your mouths and God speaks the truth and He guides to the [correct] way. Attribute them to their fathers: That is more just in the eyes of God, but if you know not the names of their fathers, then they are your brothers in faith and your dependents.

Qur’an 33:4-5, Pollack et al., *supra*, at 733.

108. The doctrine of apostasy is based on the Quranic legislation that states “whoever of you turns back from his religion, then he dies while an unbeliever—these it is whose works shall go for nothing in this world and the hereafter, and they are the inmates of the fire; therein they shall abide.” 2:217 (M.H. Shakir trans.). The death penalty for apostasy is based on the tradition of the Prophet “whomsoever changes religion, kill him,” and on another Hadith: “blood of any [Muslim] is unlawful, except for one of three: the married adulterer, life for a life and the one who leaves his religion dividing the community.” Anthony Chase, *Legal Guardians: Islamic Law, International*

stitution prohibits any entity or school of thought from advocating for "takfir"¹⁰⁹ (declaring someone an infidel).¹¹⁰ The Constitution also guarantees the right of a person to be free from "religious coercion."¹¹¹ Freedom of religion, including freedom of worship, practice of religious rites,¹¹² and choice of personal status law¹¹³ is also protected under Articles 41 and 43 of the Constitution.

B. Conflicts Embedded in the Structure of the Iraqi Constitution

1. When Restricting a Constitutional Right Circumvents the Essence of Such a Right

Second, the Constitution prohibits restricting any of the rights or freedoms stated therein, except by a law or in accordance with a law,¹¹⁴ provided that such restriction "does not violate the essence of the right or freedom."¹¹⁵ One may argue, for instance, that requiring a spouse's approval for a wife to travel

Law, Human Rights Law, and the Salman Rushdie Affair, 11 AM. U.J. INT'L L. & POL'Y 375, 403-04 (1996) (quoting SHEIK GAD HAQ AL-GAD HAQ, FATAAWA ISLAAMIYA FI AL-QADAAYAA AL-MU'AASAR [Islamic fatwas on contemporary issues] 357-69 (1990)).

109. As the Qur'an states, "[i]nvite (all) to the Way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious: for thy lord knoweth best, who have strayed from His Path, and who receive guidance." 16:125 (Y. Ali trans.).

110. CONST. IRAQ art. 7, First. The Qur'an recognizes that one may reject the Islamic faith, but return to the faith. The Qur'an provides: "Those who believe, then reject faith, then believe (again) and (again) reject faith, and go on increasing in unbelief,—Allah will not forgive them nor guide them on the way." 4:137 (Y. Ali trans.).

111. *Id.* art. 37, Second. This is consistent with the Quranic verse that states, "[t]here is no compulsion in religion." 2:256 (M. H. Shakir trans.).

112. *Id.* art. 43, First. Article 43 specifically mentions "the (Shiite) Husseiniya Rites." *Id.*

113. *Id.* art. 39.

114. Article 19 of the ICCPR allows for such restrictions only as provided by law and as necessary "[f]or respect of the rights and reputations of others" or "[f]or the protection of national security or of public order (*ordre public*), or of public health or morals." ICCPR, *supra* note 21, art. 19. For permissible restrictions on the right of assembly, see ICCPR, *supra* note 21, art. 21.

115. CONST. IRAQ art. 46. This Article implements Article 4 of the ICESCR, which provides:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

ICESCR, *supra* note 2, art. 4.

would undermine the essence of the right to freedom of movement provided in Article 42 of the Constitution.¹¹⁶ The requirement, which is followed in some Muslim countries,¹¹⁷ is based on the tradition of the prophet that “[i]t is not permissible for a woman who believes in Allah and the Last Day to make a journey of one day and night unless she is accompanied by a *Mahram* (husband or any other relative to whom she is prohibited to marry).”¹¹⁸ This ruling, however, was intended to ensure the security and safety of women, rather than to impose a restriction on women’s right to move.¹¹⁹ One may similarly argue that requiring the husband’s approval for a woman to take a job¹²⁰ clearly undermines her right to work, which is guaranteed for all Iraqis under Article 22 of the Constitution.¹²¹

2. The Morality Clause

Third, the Iraqi legislature and courts must carefully define “public order” and “morality.” In Article 38 of the Constitution

116. CONST. IRAQ art. 44, First.

117. For instance, a woman in Yemen is not allowed to obtain a passport without the approval of her guardian. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T. OF STATE, International Religious Freedom Report 2004: Yemen (2004), available at <http://www.state.gov/g/drl/rls/irf/2004/35512.htm>. Similarly, under Article 15 of the Passport Law No. 11 of 1962 of Kuwait, married women cannot apply for a passport without the approval of their husbands. Passport Law for 1962 (Law No. 11/1962) art. 15 (Kuwait).

118. See Riyadh-us-Saliheen, *Book Seven—The Book of Etiquette of Travelling, Chapter 179: Prohibiting Women from Traveling Alone* 989 (compiled by Al-Imam Abu Zakariya Yahya bin Sharaf An-Nawawi Ad-Dimashqi), available at http://www.masmn.org/documents/Hadith/Riyad_Us_Saliheen/07_0179.htm.

119. See BADERIN, *supra* note 86, at 95. In another tradition, when a man told the Prophet that he planned to take part in an expedition but his wife wanted to travel for pilgrimage, the Prophet advised him to follow his wife for her pilgrimage. *Id.*

120. For instance, the Personal Status Law of Kuwait, Article 89 states that a husband should not forbid his wife from working unless such work affects the interest of the family in a negative way. See Freedom House, Kuwait, <http://www.freedomhouse.org/template.cfm?page=175> (last visited Oct. 9, 2006). Similarly, under the Jordanian Personal Status Law of 1976, “[i]f the wife works outside the home without the consent of her husband, she loses her right to [maintenance].” Personal Status Law of 1976 art. 68 (Jordan), quoted in Gihane Tabet, *Women in Personal Status Laws: Iraq, Jordan, Lebanon, Palestine, Syria* 12 (Div. Human Rights, UNESCO, SHS Papers in Women’s Studies/Gender Research No. 4, 2005), available at http://portal.unesco.org/shs/en/file_download.php/273076fe9922d6d33343dba2c06a3edeWomen_in_Personal_Status_Laws.pdf. This rule has been interpreted to apply only when such work has a negative affect on the interest of the family: in the absence of such conflict of interests, the wife should not be considered disobedient “nushuz.”

121. CONST. IRAQ art. 22, First.

guarantees the right to freedom of speech, freedom of press, and the right to assembly as long as the exercise of those rights does not violate “public order” and “morality.”¹²² Similarly, the Constitution limits the right to personal privacy, which an Iraqi is entitled to “as long as it does not violate the rights of others or general morality.”¹²³ Other Arab constitutions limit constitutional rights and freedoms by requiring that such rights and freedoms may only be exercised or observed in accordance with public order and moral standards.¹²⁴ Many Arab constitutions make observance of public order and respect for public morals a duty incumbent upon all inhabitants.¹²⁵

3. Limitations on Governmental Powers

To ensure respect of the rights of Iraqi people by the government, the Constitution mandates that the security apparatus and the National Intelligence Agency must work “according to the principles of human rights”¹²⁶ and “shall be subject to the supervision of the Council of Representatives.”¹²⁷ Article 9 provides for the same limitation, stating that the Iraqi National Intelligence Agency shall exercise its authorities in gathering information assessing any threats to national security and offering advice to the government “in accordance with the law and

122. *Id.* art. 38. The morality clause is interpreted differently in a country like Iran, which makes it the function of the state to impose certain rules of morality. CONST. IRAN art. 8. Article 8 of the Iranian Constitution states:

In the Islamic Republic of Iran, al ‘amr bilma’ruf wa al-nahy ‘an al’munkar’ [Enjoin the good and forbid the evil] is a universal and reciprocal duty that must be fulfilled by the people with respect to one another, by the government with respect to the people, and by the people with respect to the government.”

Id.

Similarly, in Saudi Arabia, “[t]he state protects Islam; it implements its Shari’ah; it orders people to do right and shun evil; it fulfills the duty regarding God’s call.

BASIC LAW OF SAUDI ARABIA art. 23.

123. CONST. IRAQ art. 17.

124. *See, e.g.*, CONST. BAHR. 2002 arts. 13 and 28(b) (protecting the rights to work and assembly, respectively); CONST. KUWAIT 1963 arts. 35, 40, 44 (protecting freedom of religion and belief, the right to education, and the right to assembly, respectively); CONST. SUDAN 1998 art. 25 (protecting freedom of opinion and expression); CONST. YEMEN 1994 art. 57 (protecting the right to assembly).

125. *See, e.g.*, CONST. KUWAIT 1963 art. 49; BASIC LAW OF OMAN 1996 art. 40; PERMANENT CONST. OF QATAR 2003 art. 57; BASIC LAW OF SAUDI ARABIA 1412 [1992] art. 41.

126. CONST. IRAQ art. 84, First.

127. *Id.*

pursuant to the recognized principles of human rights.”¹²⁸ The Article is designed to curtail human rights abuses that were common practices among police in Iraq in the past.¹²⁹ The Constitution also establishes a “High Commission for Human Rights”¹³⁰ as an independent agent.¹³¹ The Constitution delegates to the legislature the authority to determine the functions of the Commission which will supposedly be entrusted with monitoring the status of human rights in Iraq.¹³² Will the Commission have jurisdiction to receive complaints of violations of human rights?

128. *Id.* art. 9, First(d).

129. The United States Department of State Human Rights Report 2004 reports on such abuses in different countries of the Arab world. *See, e.g.*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, HUMAN RIGHTS REPORTS FOR 2004 [hereinafter HUMAN RIGHTS REPORTS 2004], ALC. (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41718.htm> (“New allegations of incidents and severity of torture continued.”); HUMAN RIGHTS REPORTS 2004, BAHR. (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41719.htm> (“Several cases of police abuse remain unresolved since 2002.”); HUMAN RIGHTS REPORTS 2004, IRAQ (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41722.htm> (“The reported abuses included some instances of beatings with cables and hosepipes, electric shocks to their earlobes and genitals, food and water deprivation, and overcrowding in standing room only cells.”); HUMAN RIGHTS REPORTS 2004, JORDAN (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41724.htm> (“The law prohibits such practices; however, the police and security forces sometimes abused detainees during detention and interrogation, and allegedly also used torture.”); HUMAN RIGHTS REPORTS 2004, KUWAIT (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41725.htm> (“Some police and members of the security forces reportedly abused detainees during interrogation.”); HUMAN RIGHTS REPORTS 2004, MOROCCO (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41728.htm> (“[H]uman rights organizations reported torture and ill treatment during initial interrogations of prisoners.”); HUMAN RIGHTS REPORTS 2004, SYRIA (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41732.htm> (“The torture of political detainees was a common occurrence.”); HUMAN RIGHTS REPORTS 2004, TUNIS. (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41733.htm> (“Police reportedly extorted money from families of innocent detainees in exchange for dropping charges against them.”); HUMAN RIGHTS REPORTS 2004, YEMEN (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41736.htm> (“Members of the PSO and MOI police forces committed serious human rights abuses, including police beatings, arbitrary arrests, and detentions without charge.”).

130. CONST. IRAQ art. 102.

131. *Id.* The Constitution establishes several independent agencies that are covered in Articles 102-108, namely the High Commission for Human Rights, the Independent Electoral Commission, the Commission on Public Integrity, the Central Bank of Iraq, the Board of Supreme Audit, the Communication and Media Commission, the Endowment Commissions, the Martyrs Foundation, the Federal Public Service Council, an agency for the guarantee of the rights of the regions and provinces, and a public commission for monitoring and allocating federal revenues. Article 108 allows the establishment of other independent agencies by law. *Id.* arts. 102-108.

132. *Id.* art. 102.

Will it be responsible for defending such rights? What will be the relation between the Committee and other agencies of the government in deciding the validity of these complaints?¹³³

4. Judicial Review and the Structure of the Constitutional Court

The scope of these rights and any restrictions or limitations that may be imposed upon these rights are to be determined by the judiciary, to which the constitution guarantees independence.¹³⁴ The Constitution creates a Federal Supreme Court to be entrusted with "interpreting the provisions of the Constitution"¹³⁵ and "overseeing the constitutionality of laws and regulations in effect."¹³⁶ The Iraqi Constitutional legislature adopted a centralized remedial and concrete model of judicial review or Constitutional control.¹³⁷ The Constitution, however, does not specifically determine the structure of the Court itself and provides for somewhat contradictory criteria upon which the Court shall decide issues of Constitutionality.¹³⁸

As to the structure of the Court, Article 92 provides that the Court will consist of "a number of judges, experts in Islamic jurisprudence and legal scholars."¹³⁹ Other Arab constitutions do not draw such a distinction between a jurist of the law and a jurist of Islamic Law.¹⁴⁰ However, the number of those who are going to be serving on the Court and the method of selection will be determined by a law.¹⁴¹ Consequently, this law is very sig-

133. *See* CONST. AFG. 1382 [2004] art. 58 (establishing that the Independent Human Rights Commission of Afghanistan can refer cases of human rights violations to the legal authorities, as well as assist the complainant in defending his or her rights).

134. CONST. IRAQ arts. 87-88. Article 95 prohibits establishing special or exceptional courts. *Id.* art. 93-95.

135. *Id.* art. 93, Second.

136. *Id.* art. 93, First.

137. *See, e.g.*, CONST. ALG. 1996 arts. 163-69; CONST. EGYPT 1400 [1980] art. 174; CONST. KUWAIT 1963 art. 173; CONST. LEBANON 1926 art. 19; CONST. MOROCCO 1992 art. 80; CONST. SUDAN 1998 art. 105; CONST. U.A.E. 1996 arts. 98-99. In Iran, Article 91 of the Constitution authorizes the Guardian Council to examine the compatibility of legislation with Islam before it becomes a law. CONST. IRAN 1368 [1989] art. 91.

138. CONST. IRAQ arts. 92, Second; 93.

139. *Id.* art. 92, Second.

140. *See, e.g.*, CONST. EGYPT 1400 [1980] art. 176; CONST. KUWAIT 1963 art. 173; CONST. LEBANON 1926 art. 19; CONST. SUDAN 1998 art. 105.

141. CONST. IRAQ art. 92, Second. Article 92 requires that such law must be passed by two thirds of the members of the parliament. *Id.* Some constitutions detail the structure of the Court. *See, e.g.*, CONST. PAKISTAN art. 203(c)(2) ("The Court shall consist of

nificant. Will it require a number of experts, in Islamic jurisprudence that is equal to the number of jurists of the law? Who will have the authority to choose these judges, experts and jurists? Will all the judges be Muslims? Will the Court include female judges? This last question raises a debate in the Muslim world regarding the relation between Islamic legislation and Islamic jurisprudence, especially because no Quranic verse prohibits women from serving as judges.¹⁴²

5. Wide Constitutional Delegation to the Legislature

The legislative process that will implement the various Constitutional mandates should be exercised with caution to fully reflect the letter and intent of the various provisions of the Constitution, in particular those that establish a bill of rights for the Iraqi people. The Constitution delegates to the legislative branch the power to enact laws regarding many areas: citizenship,¹⁴³ personal status,¹⁴⁴ political asylum,¹⁴⁵ right to form unions,¹⁴⁶ assembly,¹⁴⁷ religious endowments and affairs,¹⁴⁸ establishment and joining of political parties,¹⁴⁹ confiscation of property,¹⁵⁰ free movement of workers, goods, and capital,¹⁵¹ investments,¹⁵² administration of State property,¹⁵³ exemption from taxes for low-income people,¹⁵⁴ social security and health

not more than eight Muslim Judges, including the Chief Justice, to be appointed by the President.”). Similarly, the Constitution of Iran states, in Article 91, “The Guardian Counsel is to be constituted with the following composition: six religious men. . . and six jurists, specializing in different areas of the law” CONST. IRAN 1368 [1989] art. 91.

142. The Qur’an addresses both men and women regarding leadership and judgeship. The Qur’an states, “Allah doth command you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice.” 4:58 (Y. Ali trans.). The Qur’an also states, “[t]he Believers, men and women, are protectors one of another: they enjoin what is just, and forbid what is evil.” 9:71 (Y. Ali, trans.).

143. CONST. IRAQ art. 18, Third(a).

144. *Id.* art. 41.

145. *Id.* art. 21, Second.

146. *Id.* art. 22, Third.

147. *Id.* art. 38.

148. *Id.* art. 43, First.

149. *Id.* art. 39, First.

150. *Id.* art. 23, Second.

151. *Id.* art. 24.

152. *Id.* art. 26.

153. *Id.* arts. 18; 27, Second.

154. *Id.* art. 28, Second.

insurance,¹⁵⁵ right to build medical facilities,¹⁵⁶ rights of disabled persons,¹⁵⁷ private education,¹⁵⁸ role of civil society,¹⁵⁹ elections,¹⁶⁰ structure and membership of the Federation Council,¹⁶¹ powers of the Council of Representatives and of the Prime Minister,¹⁶² nomination for presidency,¹⁶³ functions of the Ministries,¹⁶⁴ salaries and allowances for the Prime Minister and Ministers,¹⁶⁵ federal judiciary,¹⁶⁶ impeachment and disciplinary action of judges,¹⁶⁷ structure of the Federal Supreme Court,¹⁶⁸ security and intelligence services,¹⁶⁹ responsibility of military judiciary,¹⁷⁰ functions of the independent agencies,¹⁷¹ functions of Regions and Governorates,¹⁷² extraction of oil and gas,¹⁷³ and customs and duties.¹⁷⁴ Laws that affect human rights must be carefully drafted, especially those that will implement Article 39 on the choice of personal status law, Article 43 on the role of civil society, Article 90 on the structure of the Federal Supreme Court, and Article 100 on the establishment of the Supreme Commission for Human Rights.

6. Is Islam the Criterion of Constitutionalism?

As to the issue of Constitutionality, the new Iraqi Constitution raises several conflicting issues that should be reconciled. For instance, what is the criterion that will determine constitutionalism? The Constitution, in Article 2, establishes Islam as the

155. *Id.* art. 30, First.

156. *Id.* art. 31, Second.

157. *Id.* art. 32.

158. *Id.* art. 34, Fourth.

159. *Id.* art. 45, First.

160. *Id.* art. 49, Third.

161. *Id.* art. 65.

162. *Id.* arts. 61, Ninth; 61, Fourth; 63, First.

163. *Id.* art. 69, First.

164. *Id.* art. 86.

165. *Id.* art. 82.

166. *Id.* art. 89.

167. *Id.* art. 97.

168. *Id.* art. 90.

169. *Id.* art. 84, First.

170. *Id.* art. 99.

171. *Id.* arts. 102; 103, First; 104.

172. *Id.* arts. 105; 122, Second, Fourth; 132, Third.

173. *Id.* art. 112, First.

174. *Id.* art. 114, First.

official religion of the State¹⁷⁵ and thus follows at least twenty-one other Muslim countries that provide for the establishment of a religion.¹⁷⁶ Article 2 also states that Islam is “a basic source of legislation” and, as such, it follows at least eleven other Muslim countries.¹⁷⁷ The Constitution does not consider Islam as to the *main* source of legislation, as is the case in Yemen, Oman, Qatar, and Egypt.¹⁷⁸ But what is even more significant is the Constitution does not consider Islam the only criterion for constitutionalism. Based upon Article 2 of the Constitution, a law may be held unconstitutional by the Supreme Federal Court, which has the exclusive jurisdiction to review the Constitutionality of existing laws and regulations and interpret the provisions of the Constitution,¹⁷⁹ not only if such laws and regulations contradict “the established provisions of Islam,”¹⁸⁰ but also if they contradict, “the principles of democracy,”¹⁸¹ or “the rights and

175. *Id.* art. 2, First. The 1970 Iraqi Constitution also proclaimed “Islam” to be the “religion of the State.” IRAQ INTERIM CONSTITUTION 1970 art. 4. See generally Hannibal Travis, *Freedom or Theocracy: Constitutionalism in Afghanistan and Iraq*, 3 NW. U. J. INT’L HUM. RTS. 4 (2005).

176. See CONST. AFG. 1382 [2004] art. 3; CONST. ALG. 1996 art. 2; CONST. BAHR. 2002 art. 2; CONSTITUTION OF THE PEOPLE’S REPUBLIC OF BANGLADESH 2004, art. 2A; CONSTITUTION OF NEGARA BRUNEI DARUSSALAM 1959 Part II; Cyprus; CONST. IRAN 1368 [1989] art. 4; CONST. JORDAN 1952 art. 2; CONST. KUWAIT 1963 art. 2; CONST. LIBYA 1969 art. 2; CONSTITUTION OF THE REPUBLIC OF MALDIVES 1998 art. 7; CONSTITUTION OF MALAYSIA 1963 art. 3(1); CONST. MAURITANIA 1991 art. 5; CONST. MOROCCO 1992 art. 6; BASIC LAW OF OMAN 1996 art. 2; CONST. PAKISTAN 2004 art. 2; PERMANENT CONST. QATAR 2003 art. 1; BASIC LAW OF SAUDI ARABIA 1412 [1992] art. 1; CONST. TUNIS. 1959 art. 1; CONST. U.A.E. 1996 art. 7; CONST. YEMEN 1994 art. 3. In contrast, the Turkish Constitution safeguards the secular nature of the State. CONST. TURK. 2001 art. 14 (“None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights.”).

177. CONST. IRAQ art. 2. For other countries whose constitutions set Islam as a basic source for legislation, see: CONST. AFG. 1382 [2004] art. 3; CONST. BAHR. art. 2; CONST. EGYPT 1400 [1980] art. 2; CONST. IRAN 1368 [1989] art. 4; CONST. KUWAIT 1963 art. 2; BASIC LAW OF OMAN 1996 art. 2; PERMANENT CONST. QATAR 2003 art. 1; CONST. SUDAN 1998 art. 65; CONST. SYRIA 1973 art. 3(2); CONST. U.A.E. 1996 art. 7; and CONST. YEMEN 1994 art. 3.

178. For a discussion of Islamic Law as a source of legislation, see Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of Shari’ah in a Modern Arab State*, 37 COLUM. J. TRANSNAT’L L. 81, 91-96 (1998).

179. CONST. IRAQ art. 93.

180. *Id.* art. 2, First(a).

181. *Id.* art. 2, First(b). Article 1 states that Iraq is a democratic republic. *Id.* art. 1. Article 50 requires members of the Council of Representatives to take the constitutional oath to preserve the democratic system of Iraq. *Id.* art. 50. Article 50 states that the

basic freedoms stipulated in [the] Constitution.”¹⁸² Are these criteria that the Iraqi Constitutional legislature intentionally enumerates contradictory? What are the established rulings of Islam? Are these the definitive rules, as opposed to the presumptive rules? Is Islam compatible with democracy?¹⁸³ How will the Federal Supreme Court resolve a conflict between a constitutional right and the interpretation of such right under Islamic Law?¹⁸⁴ Would “public order and morality” be defined in accordance with Islamic Law?¹⁸⁵ What if implementation of the equality principle conflicts a ruling of Islamic law regarding the double inheritance rule, the double witness rule, the right to unilateral divorce, or the right to marry? Will the Iraqi legislature apply the Islamic Code of Crimes and Punishments?¹⁸⁶ The

Federal authorities must maintain the democratic system of the Federation. *Id.* art. 50. Article 6 provides that Government should yield power peacefully “through democratic means stipulated in [the] Constitution.” *Id.* art. 6.

182. *Id.* art 2, First(c). According to article 3 of the Constitution of Afghanistan, “no law can be contrary to the beliefs and provisions of the sacred religion of Islam.” CONST. AFG. 1382 [2004] art. 3.

183. See generally Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 *FORDHAM INT’L L.J.* 4 (2003), Sherman A. Jackson, *Shari’ah, Democracy, and the Modern Nation-State: Some Reflections on Islam, Popular Rule, and Pluralism*, 27 *FORDHAM INT’L L.J.* 88 (2003).

184. For instance, Article 11 of the Egyptian Constitution limits the application of the equality principle by providing that “[t]he state shall guarantee the proper coordination between the duties of women towards the family and her work in the society, considering her equal with man in the political, social, cultural and economic life without violation of the rules of Islamic jurisprudence.” CONST. EGYPT 1400 [1980] art. 11; see CONST. BHR. 2002 art. 5.

185. For instance, Article 3 of the United Arab Emirates Constitution states: Provisions of public order are those concerning personal status such as marriage, inheritance and paternity, provisions concerning state order are freedom of commerce, the movement of capital, private property and rules and principles on which society is founded, on condition that all these prescriptions do not contradict the imperative provisions and fundamental principles of the Shari’ah.

CONST. U.A.E. 1996 art. 3.

186. Some Arab Constitutions explicitly provide for the application of Islamic Law in the area of crimes and punishments. For instance, Article 46 of the Constitution of Yemen provides that “[n]o crime or punishment shall be undertaken without a provision of Shari’ah or the law.” CONST. YEMEN 1994 art. 46. Similarly, Article 38 of the Basic Law of Government of Saudi Arabia states that “there shall be no crime or penalty except in accordance with the Shari’ah or organizational law.” BASIC LAW OF SAUDI ARABIA 1412 [1992] art. 38. Countries that apply the Islamic Code of Crime and Punishment include Iran, Nigeria, Pakistan, Saudi Arabia, Sudan, and Yemen. See generally Edna Boyle-Lewicki, *Need World’s Collide: The Hudud Crimes of Islamic Law and International Human Rights*, 13 *NEW YORK INT’L L. REV.* 42 (2000) (outlining the similarities and differences between Islamic Law and international human rights norm).

Constitution guarantees that “[t]here is no crime or punishment except by law.”¹⁸⁷ However, while the constitution prohibits “inhumane treatment,”¹⁸⁸ it does not explicitly prohibit “cruel, inhuman or degrading punishment” as stipulated in the ICCPR.¹⁸⁹ Will the Iraqi legislature be allowed, for instance, to reconsider the double-inheritance rule¹⁹⁰ that many argue constitutes a case of sex discrimination or gender inequality?¹⁹¹ How would the

187. CONST. OF IRAQ art. 19, Second.

188. *Id.* art. 37.

189. ICCPR, *supra* note 21, art. 7. Article 29 of the Constitution of Afghanistan, for instance, provides that, “[p]unishment contrary to human integrity is prohibited.” CONST. AFG. 1382 [2004] art. 29.

190. The new Iraqi Constitution does not contain a provision on inheritance. The 1970 Constitution merely provided in Article 17 that “inheritance is a guaranteed right, regulated by law.” IRAQ INTERIM CONSTITUTION 1970 art. 17. The Iraqi Personal status law n. 188 of 1959 provided for equal shares to males and females but it was repealed in 1963. See Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT’L L. REV. 695, 750, 752-53 (2004) (mentioning that the 1959 Family Code provided for equal inheritance by male and female heirs, and that the 1963 amendment repealed this part of the Code). Some Arab Constitutions explicitly state that Islamic law shall govern inheritance. See, e.g., CONST. BHR. 2002 art. 5; CONST. KUWAIT 1963 art. 18; CONST. LIBYA 1969 art. 8; BASIC LAW OF OMAN 1996 art. 11); CONST. YEMEN 1994 art. 23.

191. The Qur’an states, “Allah (thus) directs you as regards your Children’s (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half.” 4:11 (Y. Ali trans.). See generally, Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women’s Inheritance in Islamic Law*, 61 ALB. L. REV. 511 (1997). The other rule that is often cited as an example of sex discrimination in Islamic Law is the “double witness rule.” The Quranic legislation states:

O you who believe! when you deal with each other in contracting a debt for a fixed time, then write it down; and let a scribe write it down between you with fairness; and the scribe should not refuse to write as Allah has taught him, so he should write; and let him who owes the debt dictate, and he should be careful of (his duty to) Allah, his Lord, and not diminish anything from it; but if he who owes the debt is unsound in understanding, or weak, or (if) he is not able to dictate himself, let his guardian dictate with fairness; and call in to witness from among your men two witnesses; but if there are not two men, then one man and two women from among those whom you choose to be witnesses, so that if one of the two errs, the second of the two may remind the other; and the witnesses should not refuse when they are summoned; and be not averse to writing it (whether it is) small or large, with the time of its falling due; this is more equitable in the sight of Allah and assures greater accuracy in testimony. . . .

Qur’an 2:282 (M. H. Shakir trans.). The double compensation rule is also subject of criticism. The rule provides that women are entitled to half of what men are in cases of murder. For an interesting discussion of the crime of murder in Islam, see Hossein Esmaeili & Jeremy Gansast, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals In Saudi Murder Trials*, 28 DENV. J. INT’L L. & POL’Y 145 (2000).

courts interpret the supremacy clause in Article 13, which provides that “[t]his Constitution shall be considered as the supreme and highest law in Iraq?”¹⁹² Would rules of Islam supersede provisions of the Constitution, as is the case in Iran¹⁹³ and Saudi Arabia?¹⁹⁴ How would the judiciary reconcile international treaty law on human rights with the principles of the Constitution?¹⁹⁵ Will a civil judge resort to a particular school of Islamic jurisprudence?¹⁹⁶ How will civil law be reconciled with religious law,¹⁹⁷ especially considering that Article 41 of the

192. Article 13 of the Constitution of Iraq, states:

This constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception. No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.

CONST. IRAQ art. 13.

193. According to Article 4 of the Constitution of Iran:

All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the wise persons of the Guardian Council are judges in this matter.

CONST. IRAN 1368 [1989] art. 4.

194. See BASIC LAW OF SAUDI ARABIA 1412 [1992] arts. 1, 6, 7, 8, 45, 46, 48, 67. For a discussion of the Basic Law, see A. Michael Tarazi, *Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government*, 34 HARV. INT'L L.J. 258 (1993).

195. Some Arab constitutions explicitly define the relation between the domestic law and international treaty law. See, e.g., CONST. BAHR. 2002 art. 37; CONST. EGYPT 1400 [1980] art. 151; CONST. KUWAIT 1963 art. 70; BASIC LAW OF OMAN 1996 arts. 10, 72, 76.

196. See, e.g., Civil Code art. 3 (Jordan) (providing that the judge shall interpret the legislation text in accordance with the principles of Islamic Fiqh (Islamic Jurisprudence)); Law of Civil Transactions of the U.A.E., art. 1 (providing that in the absence of a legislative text, the judge shall decide according to the principles of Sharia based on the teachings of the Maliki and the Hanbali, then the Shafi and the Hanafi Schools of Islamic Jurisprudence). In Saudi Arabia, a 1928 decree mandates that a judge must decide civil cases based on the Hanbali School of Islamic Jurisprudence, especially the two treatises, *Sharh Muntaha Al-Iradat* [Explanation of the Act of Will] and *Sharh Aliqna* [Explanation of the Means of Persuasion].

197. The Iraqi Civil Code was enacted in 1951 and is mainly based on the French legal principles, but unlike the French Civil Code, it does not cover family relations, which are subject to Islamic Law. See, e.g., Theodore .W. Kassinger & Dylan J. Williams, *Commercial law Reform Issues in the Reconstruction of Iraq*, 33 GA. J. INT'L & COMP. L. 217, 221 (2004). Under Article 2 of the Iraqi Civil Code, Islamic Law is merely a secondary source, which the Court may consider only in the absence of a legislative provision of the Code or custom and usages. See Dan E. Stigall, *From Baton Rouge to Baghdad: A Comprehensive Overview of the Iraqi Civil Code*, 65 LA. L. REV. 131 (2004); Joshua F. Berry, *The Trouble We Have with the Iraqis Is US: A Proposal for Alternative Dispute Resolution in the New Iraq*, 20 OHIO ST. J. ON DISP. RESOL. 487 (2005) (discussing the sources of Iraqi Law). See generally Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi*

Constitution¹⁹⁸ allows Iraqis to choose the personal status law in accordance with their religions, sects, and beliefs? Would a multiplicity of strict religious doctrines replace the arguably more liberal Personal Status Law no. 188 of 1959? Will the Iraqi legislature reform the 1959 Personal Status Law following, for example, the new Moroccan Family Code (The Moudawana) of 2004, which presents a significant deviation from traditional Islamic jurisprudence especially regarding polygamy,¹⁹⁹ the right of women to file for divorce,²⁰⁰ the disobedience rule,²⁰¹ and child

Legal System, 36 GEO. WASH. INT'L L. REV. 695 (2004); Civil Code art. 1 (Alg.); Law of Commerce art. 2 (Bahr.); Civil Code art. 1 (Egypt); Civil Code art. 4 (Qatar).

198. CONST. IRAQ art. 41.

199. Moudawana (Family Code) pmbl. (Morocco).

[The Moudawana] took into consideration the commitment to the tolerant principles of Islam in establishing justice, which the Almighty requires for polygamy to take place, as it is plainly stated in the Holy Koran: He said '... and if you fear that you cannot do justice (to so many) then one (only). And since the Almighty ruled out the possibility for men to do justice in this particular case, He said: 'You will not be able to deal equally between (your) wives, however much you wish (to do so), 'and he thus made polygamy quasi impossible under Shari'ah (religious law.) We further adhered to the distinguished wisdom of Islam in allowing men to legitimately take a second wife, but only under compelling circumstances and stringent restrictions, with the judge's authorization, instead of illegitimate polygamy occurring if we prohibit it entirely.

Id. Article 40 states, "[p]olygamy is forbidden when there is a risk of inequity between the wives. It is also forbidden when the wife stipulates in the marriage contract that her husband will not take another wife." *Id.* art. 40. Article 41 states "[t]he court will not authorize polygamy: [i]f an exceptional justification is not proven; If the man does not have sufficient resources to support the two families and guarantee all maintenance rights, accommodation and equality in all aspects of life." *Id.* at 41. Similarly, the Syrian Law of Personal Status of 1953 restricts polygamy by providing that, "the [judge] may withhold permission for a man who is already married to marry a second wife, where it is established that he is not in a position to support them both." Personal Status Law art. 17 (Syria), *quoted in* J. N. D. Anderson, *Syrian Law of Personal Status*, 17 BULL. SCH. ORIENTAL AFR. STUD., U. LONDON. 34, 36 (1955). In Tunisia, polygamy is not allowed under any circumstances. The Personal Status Law of 1956 provides that "Polygamy is forbidden. . .[and] is punishable by imprisonment of 1 year or a fine of 240,000 francs, or both." Personal Status Law art. 18 (Tunis.), *quoted in* Amira Mashhour, *Islamic Law and Gender Equality: Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. — (2005). *See generally* Heather Johnson, *There are Worse Things Than Being Alone: Polygamy in Islam, Past, Present, and Future*, 11 WM. & MARY J. WOMEN & L. 563 (2005); Brooke D. Rodgers-Miller, *Out of Jahiliyya: Historic and Modern Incarnations of Polygamy in the Islamic World*, 11 WM. & MARY J. WOMEN & L. 541 (2005).

200. Moudawana pmbl.

[The Moudawana [e]xpanded the women's right to file for divorce when the husband does not fulfill any of the conditions stipulated in the marriage contract, or for harm caused to the wife such as lack of financial support, aban-

custody?²⁰² Will the implementation of Article 41 require the establishment of religious courts or Shari'ah courts?²⁰³ Will the morality clause be interpreted to justify a role for the State to impose what it considers rules of Islamic morality? Finally, how will the establishment clause be reconciled with the sovereignty clause in Article 5, which makes the people, not God, "the source of authority and its legitimacy?"²⁰⁴

donment, violence, and other harm, in view of endorsing the general legal principle: 'neither harm nor be harmed,' to promote equality and equity between the two spouses. Another new provision introduces of the right of divorce by mutual consent under judicial supervision.

Id.

201. See Moudawana arts. 51(3), 51(4) ("[T]he wife's assuming with the husband the responsibility of managing and protecting household affairs and the children's education; consultation on decisions concerning the management of family affairs, children, and family planning.").

202. The Moudawana adopts the "interest of the child" as the standard that must be considered in child custody cases. Moudawana art. 166. That Article states:

Custody is exercised until both the boy and the girl reach the age of legal majority. Following the termination of his or her parents' marriage, a child who completes fifteen years of age has the right to choose either the father or mother as custodian. A child without parents may choose one of the relatives cited in following Article 171, provided that his or her interests are not jeopardized and that the legal tutor consents. In the absence of agreement, the case shall be presented to the judge to settle the matter according to the interests of the minor.

Id. Article 171 states:

Child custody shall be awarded first to the mother, then to the father, than to the maternal grandmother of the child. If this proves difficult, the court shall decide, in light of the evidence before it and in view of what would serve the interests of the child, to award custody to the most qualified of the child's relatives, while guaranteeing the child suitable lodging as one of the custody obligations.

Id.

203. CONST. IRAQ art. 39. For instance, this is the case in Jordan under Article 104 of the Constitution which stipulates that "the religious courts shall be divided into (I) the Shari'ah Courts; (II) The Tribunals of the Religious Communities." CONST. JORDAN 1952 art. 104. Article 105 states:

[T]he Shari'ah Courts shall in accordance with their own laws have exclusive jurisdiction in respect of the following matters: (i) Matters of personal status of Moslem; (ii) Cases concerning blood money (Diya) where the two parties are Moslem or where one of the parties is not a Moslem and the two parties consent to the jurisdiction of the Shari'ah Courts.

Id. art. 105. See generally Amira Sonbol, *Women in Shari'ah Courts: A Historical and Methodological Discussion*, 27 *FORDHAM INT'L L. J.* 225 (2003).

204. For a discussion of the sovereignty clause in an Islamic Constitution, see S. ABDUL A'LA MAUDUDI, *ISLAMIC LAW AND CONSTITUTION* 253, 253-71 (1992). He wrote:

The Quranic concept of sovereignty is simple. God is the Creator of the Universe. He is its real Sustainer and Ruler. It is His Will that prevails in the

Conclusion: Human Rights and Islamic Law: Conflicting or Harmonious Rules?

While the new Iraqi Constitution is to be considered a step forward, it leaves, perhaps intentionally, many questions unresolved, especially in defining the limits that Islamic Law may impose on the exercise of the various human rights enumerated in the Constitution. The answers to many of these questions depended on the legislative process that will commenced when the Constitution was approved by the people of Iraq. It will also depend upon the judicial interpretation of its various provisions, especially those that establish constitutional rights for the Iraqi people. Finally, it will depend upon the degree to which ordinary Iraqis are educated about these rights and if civil society holds the government accountable to upholding these rights. In all cases, the Iraqi people should be fully aware of their constitutional rights. Non-governmental organizations and other members of civil society have the vital duty of engaging in this educational initiative.

cosmos all around. As all creation is His, His command should also be established and obeyed in man's society. He is the real Sovereign and His Will should reign supreme as the Law.

Id. at 166. Compare CONST. IRAQ art. 5, with CONST. IRAN 1368 [1989] art. 2(1) (“[T]he Islamic Republic is a system based on belief in the one God (as stated in the phrase ‘there is no God except Allah’), His exclusive sovereignty and the right to legislate, and the necessity of submission to His commands.”), and *id.* art. 56 (“Absolute sovereignty over the world and men belongs to God.”), and CONST. PAKISTAN 2003 pmbl. (“[S]overeignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.”).