
RELIGIOUS MINORITIES AND SHARI'A IN IRAQI COURTS

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ABSTRACT

There is a rising academic interest in the study of constitutional states, particularly in the Islamic world, whose legal and constitutional structure is at least as a formal matter both founded on and subject to religious doctrine. For those interested in the Arab Spring, and indeed in constitutionalism in much of the Islamic world, this work is not only valuable, but also positively vital. Without it, we are unable to discuss most emerging Arab democracies in constitutional terms. In Iraq and Egypt, two of the premier Arab states that have recently seen constitutions approved through popular referendum, Islam is described as a state religion, as a source of legislation, and as a constraint upon law as well. While the details may well differ from one state to another, the principle of "constitutional theocracy" holds fast throughout much of the Arab world. The effect of this on religious minorities that are not Muslim is the subject of this essay, with particular reference to the one Arab state with which I am most familiar: Iraq.

In assessing how rising constitutional theocracies like Iraq balance the priorities they afford Islam in foundational text with religious freedom, a value also invariably enshrined in the constitutions of emerging democracies in the Middle East, it is important to note that the going opinion is very much in favor of some form of protection for and tolerance of non-Muslim minorities. It is also important to note that in assessing any conflicts with shari'a, there is a great deal of nuance, indeed near incoherence, in understanding not only the precise impact which that body of rules is supposed to have as a legal matter in the modern constitutional theocratic state, but also what the rules of the shari'a even are and how much reinterpretation of the his-

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toric content of the shari'a will be tolerated. This article will explore this unusual dichotomy, and further explore how courts in the Kurdistan region have managed to come to different results, in a manner altogether more promising for supporters of religious freedom.

I. NON-MUSLIM MINORITIES IN THE ISLAMIC STATE

Legal scholars are increasingly interested in the study of constitutional states, particularly in the Islamic world, where legal and constitutional structures are, at least as a formal matter, both founded on and subject to religious doctrine.¹ For those of us interested in the Arab Spring, and indeed in constitutionalism in much of the Islamic world, this work is not only valuable, but positively vital. Without this valuable work, we are unable to discuss most emerging Arab democracies in constitutional terms. In Iraq and in Egypt — two premier Arab states that have recently seen constitutions approved through popular referendum — Islam is described as a state religion, a source of legislation and a constraint upon law as well.² While the other states that have undergone or are undergoing massive transition in the context of the Arab Spring have yet to agree upon a final constitution, such constitutions will almost certainly enshrine a prominent place for Islam in the legal and constitutional order.³ The details may differ between states, but the principle of

¹ See generally RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010); Larry Catá Backer, *Theocratic Constitutionalism: An Introduction To A New Global Legal Ordering*, 16 *IND. J. GLOBAL LEGAL STUD.* 85, 93 (2009).

² Article 2, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (describing Islam as “a foundational source” of legislation) [hereinafter *The Constitution of Iraq*], *unofficial English translation available at* <http://www.unhcr.org/refworld/docid/454f50804.html>. Article 2 of the Egyptian Constitution remains, after referendum, precisely the same as it was during the Mubarak era. The constitution declares that the principles of the *shari'a* are “the main source of legislation.” *Compare* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 15, 2012, art. 2, *with* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, art. 2. The Supreme Constitutional Court of Egypt has long interpreted Article 2 to prohibit legislation that is contrary to the principles of the *shari'a*. CLARK B. LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW 1-2* (2006).

³ The three other states most identified with massive regime change in the context of the Arab Spring are Syria, Libya and Tunisia. At the time of the publication, Syria is mired in an intractable civil war as between insurgents seeking to remove the dictatorial regime of Bashar al-Asad and a Syrian army which seeks to keep the regime intact. Jonathan Steele, *Kerry's Syria Problem: The New Secretary of State Should Resist the SNC and US Hawk and Push for Talks, Not Arms*, *THE GUARDIAN* (U.K.), Feb. 26, 2013 at 28. While in a better position than Syria, Libya's constitutional processes also appear to have stagnated, as an assembly elected to draft a constitution instead called for new elections for a new body to write a constitution. Chris Stephen, *Libya's Revolution Stagnates as Rubbish Piles Up in Tripoli*, *THE*

“constitutional theocracy” holds fast throughout much of the Arab world.⁴

The effect of this broad use of Islam in the constitutions of Arab states on non-Muslim religious minorities is the subject of this article, with a particular focus on Iraq. This is a matter of some concern in the West in particular, and one, therefore, with important ramifications for international relations and foreign policy.

The concern is a natural one. After all, it is hard to treat a religion as the exclusive official faith of the state, to use it as a form of state identity, and to insist that it will be the source of legislation and a basis to constrain it, and not to wonder, indeed to worry, about the treatment of non-adherents to that religion in that polity. As I shall demonstrate, significant problems have emerged.

At the same time, it is important to frame the issue in a manner that does not overstate it. It is simply not the case that in the democracies emerging out of the Arab spring, there is any present intention to prohibit religious freedom altogether in any recognizable form.⁵ Arab legal and political elites are as aware of, and influenced by, global norms concerning respect for religious freedom as others, and they have long internalized those norms to a significant extent. Constitutions throughout the Arab world, whether in authoritarian states or rising democracies, frequently make references to religious freedom, as does the Cairo Declaration for Human Rights in Islam, a much maligned document intended to

GUARDIAN (U.K.), Feb. 16, 2013 at 36. Tunisia seems the most promising of the three states, though it is suffering a crisis of its own, as between secularists and the leading Islamist party, the moderate Ennahda, with a constitutional transition process set to begin in the summer of 2013. Currently, it is being run under an interim constitution commonly referred to as the “Little Constitution.” John Thorne, *Tunisia Wobbles Further as PM Resigns and Credit Rating Drops*, CHRISTIAN SCIENCE MONITOR, Feb. 20, 2013. Tunisia is the Arab state which has long been identified as a “bastion of Arab secularism.” Monica Marks and Kareem Fahim, *Tunisia Moves to Contain Fallout After Opposition Figure is Assassinated*, N.Y. TIMES, Feb. 7, 2013 at A6. The fact that it is currently being led by an Islamist party in a coalition government demonstrates well the appeal of a role for Islam in the legal and constitutional order throughout the Arab world.

⁴ See HIRSCHL, *supra* note 1, at 2 (defining “constitutional theocracy” and outlining its appeal). Backer, whose views differ from Hirschl’s in important respects, adopts the term “theocratic constitutionalism,” which is substantially similar. Backer, *supra* note 1, at 85-86.

⁵ It is true that some Islamic states, most notably Saudi Arabia, appear to offer no constitutional protections to non-Muslim minorities. ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* 148 (5th ed. 2013). However, as the main text demonstrates, this is very much the exception rather than the rule, and certainly is hardly a fair characterization of the rising Arab democracies.

demonstrate a peculiarly “Islamic” approach to human rights.⁶ The point is not that such provisions are as robust as might be found elsewhere around the globe either in their terms or their application — in some cases, plainly they are not.⁷ Rather, the point is that there is a sufficient enough *conception* of religious freedom and *recognition* of its importance to result in its appearance in various foundational texts.

Moreover, even to the extent that Arab elites had not internalized religious freedom norms, the international community certainly played, and will continue to play, a role in constitution making in rising Arab democracies. This role is manifested not so much in directing the drafters within the Arab democracies to include particular provisions, but rather, in communicating global expectations to them.⁸ The importance of conforming to such expectations would surely not be lost on the drafters, who would presumably prefer not to be deemed pariahs in the international community.

As a result, although it might be perfectly obvious that secularists are strong defenders of the right of peoples of all faiths to practice their religions freely, there is little objection from Islamist forces, who insist that Islam is fundamentally a tolerant and humane religion and that compulsion in religion is prohibited by the Qur’an itself.⁹ Indeed, Islamic law

⁶ In Article 10, the Cairo Declaration prohibits forcible conversions, or conversions obtained by exploiting poverty and ignorance. Organisation of the Islamic Conference, Cairo Declaration on Human Rights in Islam art. 35, U.N. GAOR, 4th Sess., U.N. Doc. A/CONF.157/PC/62/Add.18 (Aug. 5, 1990), available at <http://www1.umn.edu/humanrts/instree/cairodeclaration.html> [hereinafter Cairo Declaration]. The specific matter of Iraq’s constitutional text is outlined in further detail in Part II *infra*. Morocco’s 1996 Constitution, which was amended and approved by referendum in 2011, grants rights to freedom of worship to all religions in Article 6. CONSTITUTION OF THE KINGDOM OF MOROCCO, Mar. 10, 1972, as amended, Oct. 7, 1996, art. 6. Egypt’s 2012 Constitution contains a provision in Article 43 guaranteeing religious freedom, though only for followers of monotheistic religions. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Dec. 15, 2012, art. 43. Constitutions of authoritarian states within the region containing references to religious freedom include Jordan (Art.14) and Syria (Art. 35). THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, Jan. 11, 1952, art. 14; CONSTITUTION OF THE SYRIAN ARAB REPUBLIC, Feb. 27, 2012, art. 35, translated in THE ENGLISH TRANSLATION OF THE SYRIAN CONSTITUTION MODIFICATIONS (Qordoba 2012).

⁷ See, e.g., MAYER, *supra* note 5, at 147 (offering critique of Cairo Declaration).

⁸ Hasan Yasiri, a leading legal, technical drafter of the Iraqi Constitution indicated in a recent conference in Cairo that over six hundred civil service organizations had offered advice and commentary on the Iraq constitution in its drafting phase. Hasan Yasiri, Remarks at the Conference on the Constitutions in the Nations of the Arab Spring (Cairo, December 5, 2012). One would expect significant, similar contributions from international actors in any Arab state seeking a transition to democratic rule.

⁹ QUR’AN 2:256 (“Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most

jurists, whether of the Sunni variety in Azhar or the Shi'a of Najaf, are quick to proclaim their support for the freedoms of religious minorities, castigating terrorist attacks upon Christian churches and declaring Christian communities to be vital parts of the national community.¹⁰ To do otherwise — to depart, that is, from the general consensus that non-Muslim populations are entitled to some form of respect — seems in much of the Arab world to be uncivilized.

The real question is thus not whether there is any understanding of religious freedom among elites in the Arab world, Islamist or otherwise.¹¹ Instead, the real question is precisely how far these rights actually extend, and in particular, whether they qualify or limit particular, traditional interpretations of the *shari'a* that hold sway over the Muslim imagination. However, even this qualified question is more nuanced than it initially appears. Specifically, to answer it with any degree of particularity, it is important to note a significant difference between suggesting that the *shari'a* — the vast body of varying and various norms and rules developed by medieval and modern jurists from Islamic foundational text — is supreme in constitutional theory, and to suggest that it is so in practice. I have sought to demonstrate at greater length in previous articles that any claim of fealty to religious doctrine in Islamic states is hardly consistent, neither in its methodology for using the *shari'a* as a source of, and constraint upon, legislation, nor in its determination of what *shari'a* is.¹² Both of these, *shari'a* content and *shari'a* applicability, add further complexity to the picture.

Thus, no Arab state actually looks particularly closely at *shari'a* to develop its corporate or commercial regimes, for example, because of its incompatibility with the realities of modern economies.¹³ The source of such laws is not the *shari'a* that the constitutions of the region call for, but instead the source is plainly Western in origin — transplants, as it were, from Europe or the United States.¹⁴ Concepts that have no historic Islamic pedigree, such as companies with independent personality and

trustworthy hand-hold, that never breaks. And Allah heareth and knoweth all things.”) (Yusuf Ali trans.).

¹⁰ See, e.g., *Azhar Condemns Attack on Aswan Church*, AHAM ONLINE (Oct. 5, 2011), <http://english.ahram.org.eg/NewsContent/1/64/23405/Egypt/Politics-ElAzhar-condemns-attack-on-Aswan-church.aspx> (describing Azhar criticisms of attack on Coptic Church in Aswan, Egypt); *Leaders Condemn Iraq Church Bombs*, BBC NEWS (Aug. 2, 2004, 7:01 PM), http://news.bbc.co.uk/2/hi/middle_east/3527032.stm (describing Sistani criticism of attacks on Iraq churches).

¹¹ See, e.g., Cairo Declaration, *supra* note 6.

¹² Haider Ala Hamoudi, *The Death of Islamic Law*, 38 GA. J. INT'L & COMP. L. 293, 294-95 (2010).

¹³ *Id.* at 324-25; HIRCHL, *supra* note 1, at 12.

¹⁴ See Lama Abu Odeh, *The Politics of (Mis)Recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 790 (2004) (pointing out central role of transplanted law in legal systems throughout the Muslim world).

limited liability,¹⁵ are an integral part of the commercial infrastructure of modern Arab states and do not solicit objection from any significant mainstream political movement, even Islamist ones.¹⁶

This lack of objection to non-*shari'a* based corporate and commercial regimes is partly due to a rejection of the historic and traditional interpretations of juristic texts, a re-evaluation of *shari'a* content as it were.¹⁷ However, not all of it is. Even commercial practices routinely condemned by modern Islamic scholars as prohibited, most notably the taking of interest, are frequently, indeed almost invariably, legal.¹⁸ Political and legal elites faced with the choice of either declaring the giving or taking of interest prohibited, or admitting that not necessarily *all* law must conform to *shari'a*, tend to either ignore the problem or construct embarrassing and implausible legal arguments to avoid choosing among the unsatisfying alternatives.¹⁹

¹⁵ TIMUR KURAN, *THE LONG DIVERGENCE* 60-61 (2011).

¹⁶ Hamoudi, *supra* note 12, at 325.

¹⁷ See, e.g., Haider Ala Hamoudi, *Muhammad's Social Justice or Muslim Cant?: Langdellianism and the Failure of Islamic Finance*, 40 CORNELL INT'L. L.J. 89, 128-29 (2007) (describing in greater detail Sanhuri's justificatory approach to the legalization of the taking of interest).

¹⁸ Thus, for example, the Civil Codes of numerous Arab States, including those of Egypt, Iraq and Kuwait, were drafted by the greatest Arab jurist of the twentieth century, Abdul Razzaq al Sanhuri. ABDULLAHI AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE* 17-18 (2010). The Sanhuri Codes plainly permit the taking of interest; Sanhuri in fact goes to great lengths to justify this in his own lengthy treatise on the relationship of *shari'a* to the modern Civil Code. See 'ABD AL-RAZZAQ AHMAD SANHURI, 3 MASADIR AL-HAQQ FI AL-FIQH AL-ISLAMI: DIRASA MUQARANAH BI-AL-FIQH AL-GHARBI [THE SOURCES OF AUTHORITY IN ISLAMIC JURISPRUDENCE: A COMPARATIVE STUDY WITH WESTERN JURISPRUDENCE] 241-44 (1954). See also Hamoudi, *supra* note 17, at 128-29.

¹⁹ Most instructive is the case of Egypt. Faced with the unappealing prospect of either destroying Egypt's economy (by declaring interest unlawful because contrary to *shari'a*) or being dismissed by the Muslim Brotherhood and its supporters as inauthentic interpreters of Islamic text (by declaring interest to be consonant with *shari'a*), Egypt's Supreme Constitutional Court engaged in an artful dodge. See *Shari'a and Riba*, Case No. 20/1985/Supreme Constitutional Court (Egypt), translated in 1 ARAB L.Q. 100, 104 (1985). It held that the matter was non-justiciable. *Id.* This is because the relevant amendment to the Constitution requiring all law to conform to *shari'a* was adopted in 1985 — after the rules permitting interest were already part of Egyptian law. *Id.* To quote the Court more fully:

[T]he obligation imposed on the [legislature] to follow the principles of the *shari'a* and to consider them as the source of legislation is aimed only at the legislative enactments which are issued after the date of the imposition of the said obligation, and does not cover former legislative enactments . . . [O]nly such new legislative enactments fall within the prohibition to the effect that they should not be contrary to the principles of Islamic law. . . [I]t follows the above that only the legal enactments issued after the coming into effect of the obligation to conform to Islamic law are affected, so that, should any such legal

This decision to overlook *shari'a* arises when there is money to be made, but not when there are women to be suppressed — in the context of the law of the family, for example. In such instances, the *shari'a* is regarded as central; even the opportunistic selection of rules from among different historic schools of thought, deemed a perfectly commonplace method of Islamic reasoning in the context of Islamic finance,²⁰ can be met with fierce condemnation.²¹

For example, over the last few decades there has been a consistent effort in Iraq to repeal the state's Personal Status Code (containing both family and inheritance law), itself largely an amalgamation of *shari'a* rules from different schools of thought, and replace it with uncodified *shari'a* as determined by the jurists of the sect of the litigants that might appear before the court in any particular context.²² There has thus long been strident objection within Iraq to the incorporation of different rules from various schools of thought to govern the area of personal status law.²³ The demand has been to restore rulemaking authority over personal status to jurists, not to legislators who may pick and choose among juristic rulings they prefer.²⁴ If the opportunistic selection of rules from

enactments be in conflict with the principles of Islamic law, such legal enactments alone would fall in the domain of constitutional illegality. . . . [L]egal enactments which antedated the amendment are not affected by the obligation to conform because they were in existence before that limitation became due for implementation. [C]onsequently, such prior enactments are immune from the application of the limitation because of its anterior date, which is the determining factor on which proper constitutional control is based.

Id. (emphasis added).

In other words, laws enacted prior to a constitutional amendment are immune from the effects of that amendment. A similar ruling in the United States would have held the slavery laws as they existed in the former Confederacy immune from the application of the Thirteenth Amendment. It is, to say the least, a difficult proposition to support.

²⁰ See FRANK E. VOGEL & SAMUEL L. HAYES III, *ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN* 37 (1998) (describing such “utilitarian choice” as the methodology upon which Islamic finance relies to develop its structural and organizational rules).

²¹ See *infra* notes 22-23 and accompanying text (demonstrating the objections to Iraq's Personal Status Code precisely because it is an amalgam of different rules from different Islamic schools of thought).

²² Kristen Stilt offers a helpful summary of these efforts through 2003. Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Islamic Legal System*, 36 *GEO. WASH. INT'L L. REV.* 695, 751-55 (2004).

²³ *Id.* at 752. As Stilt notes, the significant jurist of note primarily responsible for giving voice to the objections to Iraq's Personal Status Code, Muhammad Bahr ul-Ulum, opposed even provisions that came from his sect, on the theory that requiring any Muslim to follow the rules of jurists he did not believe in was itself problematic. *Id.* Needless to say, Iraq's commercial and corporate laws are not built on such an unworkable theory of pluralism. *Id.* at 751-52.

²⁴ *Id.*

among those of some traditional and historic Islamic pedigree is met with this objection, then it is unsurprising that legal invention independent of very historic and very traditional juristic derivation of sacred text is met with even greater derision in matters of personal status.²⁵ This is the case even if such inventions are no more a departure from traditional juristic manuals than the creation of limited liability companies with separate juridical personalities are in the corporate context.²⁶ It seems that the ability to reinvent Islamic rules depends on the area of law at issue.

The lesson derived from this inconsistency in approaching and understanding *shari'a* is that while it is important to conceptualize emerging democratic Arab states as "constitutional theocracies," of a sort, this formal designation only takes us so far when assessing precisely what this means in any given context. It is important, but not enough, to say that Islam is "an integral part, or even the metaphorical pillar of the polity's national metanarrative . . . determin[ing] the polity's boundaries of collective identity, as well as the rights and duties assigned to its residents."²⁷ This is because the "metaphorical" pillar is a highly imperfect one. At times, the pillar is deemed eternal and unchanging, and no methodology other than the strict application of one particular interpretation of *shari'a* will be tolerated.²⁸ At others, a far more liberal, patchwork method is broadly used, and the possibility of legal invention or religious reinterpretation is far more possible.²⁹

Thus, in assessing how rising constitutional theocracies like Iraq happen to balance the priorities they afford Islam in foundational text with religious freedom, it is important to note that popular opinion is very much in favor of some form of protection for and tolerance of non-Muslim minorities. It is also important to note that in assessing any conflicts with *shari'a*, there is a great deal of nuance, almost incoherence, in understanding not only the precise impact which that body of rules is supposed to have as a legal matter in the modern constitutional theocratic state, but also what the rules of the *shari'a* are and how much reinterpretation of its content will be tolerated. With that important context in mind, we can

²⁵ Again, Egypt proves instructive. President Sadat sought to reform Egypt's family laws by providing for a number of protections for women that did not exist in the *shari'a* as traditionally derived, including a right to alimony for up to two years for women divorced by their husbands without valid cause. LOMBARDI, *supra* note 2 at 170. The objection from Islamist parties was quite fierce, and the law, dubbed "Jihan's law" after the name of Sadat's wife, was derided as the product of a henpecked husband. *Id.* at 169-70.

²⁶ See *supra* notes 15-16 and accompanying text.

²⁷ HIRSCHL, *supra* note 1, at 3.

²⁸ See *supra* notes 22-26 and accompanying text (objecting to the application of *shari'a* except in a traditional manner, strictly by school of thought).

²⁹ See *supra* notes 15-19 and accompanying text (suggesting a more flexible approach to *shari'a* in the corporate and commercial contexts).

attempt to approach more soundly the question of the place of the non-Muslim in the emerging Iraqi constitutional theocracy.

Part II will describe the precise constitutional formulations that Iraq deploys to realize both the prominent role of Islam in the legal framework of the nation-state as well as a robust form of religious freedom. Effectively, the drafters of the Constitution managed the divisions between secularists and Islamists by giving each side the constitutional phrasing it sought concerning religious freedom and Islam, respectively, without even attempting to manage the tensions that might thereby arise. Thus, the Constitution conferred upon the judiciary broad power to develop the law.

Part III will then turn to Iraqi praxis. It will demonstrate that where traditional rules of the *shari'a* have been all but abandoned by modern nation-states, particularly inasmuch as *political* equality as between Muslim and non-Muslim is concerned, it has been easier for the judiciary to advance notions of religious freedom and, perhaps more saliently, equality of citizens irrespective of religion. Indeed, Iraqi courts and legislators not only permit non-Muslim participation in legal and political affairs, but advance programs to ensure adequate non-Muslim representation in the legislature.

However, as Part IV shows, in contradistinction to political freedoms afforded to non-Muslim minorities, courts are more cautious when it comes to recognizing vital elements of religious freedom and religious equality if to do so would directly challenge traditional understandings of *shari'a* where such understandings remain relevant in modernity. This remains the case even in areas where the actual role of *shari'a* in the legal infrastructure of the state is slight. This part will show the manner in which courts deal with this, both within Iraq generally and in the more secular autonomous region of Kurdistan, which has developed quite different precedents. It will conclude by demonstrating that the debate within the Iraqi courts is not only over methodology — where *shari'a* is supposed to remain relevant — but it is also over content, or precisely over what the rules of the *shari'a* are.

By exposing all of this complexity and nuance, I do not claim to offer in these few pages any coherent formula for understanding either the content of *shari'a* in the modern Muslim state, or the means by which it is used to inform and constrain law. Indeed, I claim no such rigid formula exists. I only hope to frame the questions and considerations more precisely in one nation-state, in the hopes that this might inform others as they continue to grapple with these issues elsewhere.

II. IRAQI CONSTITUTIONAL TEXT

Commentators have extensively discussed the bitter social, political, ethnic, and religious divisions that Iraqi constitution makers faced as they

sought to draft a consensual constitution.³⁰ The one area of division relevant to this article concerns the extent to which Islam was to play a role in the nation state.³¹ Iraq's premier Shi'i Islamist³² parties during constitutional negotiations quite plainly sought a prominent role not only for *shari'a*, but also for the juristic authorities, who according to core Shi'i theological notions, have the authority to pronounce it.³³ Sunni Islamists also favored a robust role for *shari'a*, yet resisted any suggestion of deference to the Shi'i juristic authorities in Najaf in determining its content and contours.³⁴ The Kurds were undoubtedly Iraq's most secular population. They acknowledged a role for Islam in the state, but sought to keep it relatively constrained.³⁵ In this effort, the Kurds were joined by secular nationalists, who were primarily, though by no means exclusively, Sunni.³⁶

³⁰ See, e.g., ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ 50 (2009); Haider Ala Hamoudi, *Identitarian Violence and Identitarian Politics: Elections and Governance in Iraq*, 51 HAR. INT'L L.J. 82, 86-87 (2010).

³¹ Many of the deepest divisions within Iraq that became manifest during constitutional drafting dealt with areas that had almost nothing to do with Islam, such as federalism and de-Baathification. See ALI A. ALLAWI, THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE 148-50 (2007) (describing divisions over de-Baathification); Feisal Amin Rasoul al-Istrabadi, *A Constitution Without Constitutionalism: Reflections On Iraq's Failed Constitutional Process*, 87 TEX. L. REV. 1627, 1629 (2009) (noting that federalism was the most divisive issue during constitutional negotiations). These matters are, of course, well beyond the scope of the current paper.

³² Throughout this article, I use the term "Islamist" to refer broadly to one who seeks a greater role for the *shari'a* in the legal infrastructure of the nation-state. As such, the term would exclude Al Qaeda, which rejects the very concept of the nation-state, and it would exclude political parties such as Turkey's AKP, which repeatedly denies that it thinks that Islam has any role in political order. See, e.g., Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53, 126 (2002) (quoting Turkish Premier Erdogan as indicating that the AKP endorsed secularism and was against "the exploitation of religion and . . . distorting . . . secularism by misinterpreting it as animosity against religion.").

³³ Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 7 ST. THOMAS L. REV. 692, 697 (2010).

³⁴ *Id.* at 698-99.

³⁵ *Id.* at 698.

³⁶ The leader of the current Iraqiya coalition, Ayad Allawi, is a secular nationalist and a Shi'i, even if he draws most of his support from the Sunni population. Hamoudi, *supra* note 30, at 83. The Kurdish-Iraq nationalist alliance is somewhat ironic, because there was little else on which the two sides agreed. By and large, nationalists sought to limit the scope of federalism in Iraq, preferring a highly centralized state, while the Kurdish leadership represented Iraq's uber-federalist contingent, seeking a confederated state in which the nation's capital, Baghdad,

The Sunnis, Shi'a and Kurds were the primary domestic players. Iraq's non-Muslim minorities by contrast, constituted less than 5% of the population.³⁷ Thus, they were sufficiently small as not to be able to act as a significant influence during the negotiations, though certainly they had representation in the drafting sessions.³⁸ To the extent that their interests were advanced, it was either due to the commitment of the international community, or the ideological commitments of the Muslim drafters who, as noted earlier, considered themselves without exception proponents of the principle of religious freedom.³⁹

What emerged from all of this was consensual language that was sufficiently ambiguous and to some extent contradictory as to be appealing to all sides. Hence, Article 2 of Iraq's Constitution reads as follows:

Article 2

First: Islam is the official religion of the state, and it is a foundational source of legislation:

No law may be enacted that contradicts with the established provisions of Islam.

No law may be enacted that conflicts with the principles of democracy.

No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.

Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice, of all individuals such as Christians, Yazidis, and Mandeans Sabians.⁴⁰

would be kept extraordinarily weak. ALLAWI, *supra* note 31, at 409; al-Istrabadi, *supra* note 31, at 1629-33.

³⁷ The Christian community, composed primarily of Chaldeans and Assyrians, is estimated to be about 2% of the population. ALLAWI, *supra* note 31, at 20. The other religious minorities, primarily the Yazidis and the Sabians, are even less. *Id.* Iraq also once had a significant Jewish population, but it has almost entirely disappeared. *Id.* at 19. This came about after decades of pan-Arab political leadership hostile to Israel and fierce repression of the Jewish community as somehow suspect in its loyalties to the Iraqi state. See KANAN MAKIYA, *REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ* (2d ed. 1998) (describing early efforts of Ba'ath party to target Iraqi Jews).

³⁸ In connection with my upcoming book on the drafting and interpretive evolution of the Iraq constitution, entitled *Negotiating in Civil Conflict* and to be published at the end of 2013 by the University of Chicago Press, I was given extraordinary access to meeting minutes, memoranda and draft proposals prepared in the midst of constitutional negotiations. The documentation clearly reflects the participation of non-Muslim minorities, and the Christian minority in particular in the negotiating process.

³⁹ See, e.g., *supra* note 6.

⁴⁰ Article 2, The Constitution of Iraq.

Article 14 later indicates that Iraqis are equal before the law irrespective of a number of factors, including both religion and sect.⁴¹ Freedom of conscience and freedom of religious exercise are reiterated later in Articles 42 and 43.⁴² Article 42 extends “to each individual freedom of thought, conscience and belief,”⁴³ and Article 43 specifically references non-Muslims by granting religious exercise rights to “the followers of all religions and sects.”⁴⁴

The constitution and its relationship to Islam is broader than these provisions alone,⁴⁵ but for the purposes of understanding the nature of the balance as between the rights and freedoms afforded to non-Muslim minorities on the one hand, and the general, robust constitutional recognition of Islam as state religion, this will suffice. The articles demonstrate well the tensions inherent in the formulations. If Islam is a foundational source of legislation, could a Christian serve in the legislature and be tasked with voting to enact law that at least in theory claims Islam as source material? Would the historic treatment of religious minorities in an Islamic polity be at all relevant to answering the previous question, given the requirement that law conform to Islam’s “settled rulings”? If the state has the obligation to sustain Islam as a source of identity for its Muslim citizens, does this mean that conversion from Islam is to be prohibited, consistent with historically dominant understandings of Islamic sacred text? What is left of the freedom of belief if so? What are we to understand as Islam’s settled rulings if not?

Obviously, this tension could only be resolved in the courts. The next two parts will describe more fully precise Iraqi judicial and legislative practice, and its deference to broader global expectations at some times, to historic conceptions of religious doctrine at others, and to reinterpreted “modernist” doctrine in yet others. This amalgamation reflects well the haphazard and selective attachment to disparate conceptions of *shari’a* that prevail among Muslims in modernity.

⁴¹ *Id.*, art. 14.

⁴² *Id.*, arts. 42-43.

⁴³ *Id.*, art. 42.

⁴⁴ *Id.*, art. 43.

⁴⁵ Most notably, Article 41 of the Iraqi Constitution indicates that Iraqis are free to live by their own rules of personal status according to their beliefs, their choices, their religions and their sects. *Id.*, art. 41. This article has been understood to be a call for the repeal of Iraq’s Personal Status Code and its replacement with more traditional conceptions of *shari’a*, though as with Article 2, its language is ambiguous and capable of different constructions. See Haider Ala Hamoudi, *Judicial Review of Islamic Law Under Iraq’s Constitution*, JURIST (Apr. 26, 2012), <http://jurist.org/forum/2012/04/haider-hamoudi-iraq-islam.php> (describing Article 41 and a Federal Supreme Court decision relating to it).

III. POLITICAL EQUALITY AND NON-MUSLIM MINORITIES

Historically, under classical conceptions of the *shari'a* as it existed during the Middle Ages, the only non-Muslims who were permitted to reside peacefully in the geographic territory known as the Abode of Islam were known as *dhimmis*.⁴⁶ Originally, the *dhimmis* were understood to be members of other monotheistic faiths who followed a Scripture from a Prophet recognized in Islam, primarily Christians and Jews, though the category was expanded over time to include those who clearly did not fit within such parameters, such as Hindus in South Asia.⁴⁷

While the *dhimmis* certainly enjoyed significant levels of autonomy organizing their civil and political affairs, classical manuals illustrate their second-class status.⁴⁸ For instance, *dhimmis* were required to pay a tax, known as the *jizya*.⁴⁹ Officials quite often extracted the tax in a humiliating fashion to demonstrate *dhimmi* subjugation to Muslim rule.⁵⁰ In addition, there were strict limitations on the manner in which *dhimmis* could build houses of worship; for example, Al-Shaybani, a leading classical jurist on the subject, insists that *dhimmis* could only repair houses of worship, not build new ones.⁵¹ Other rules required specific forms of dress⁵² (wearing bells in public bathhouses)⁵³ and rules regarding where *dhimmis* could reside.⁵⁴ The point of these rules, ultimately, was to emphasize Islam's priority throughout the Abode of Islam.⁵⁵

With this history in mind, if the words of the Iraqi Constitution are to mean anything, then they must (and do) represent a significant rejection on the part of Iraq's legal and political elite of some of these positively medieval notions. It simply does not make sense to grant "all individuals . . . the entirety of religious rights . . ." as Article 2 does,⁵⁶ and somehow mean that to *exclude* the possibility that religious minorities may build houses of worship. Equality under the law irrespective of one's

⁴⁶ JOHN KELSAY, ARGUING THE JUST WAR IN ISLAM 99 (2007); MAJID KHADDURI, THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYAR 11 (1966).

⁴⁷ KHADDURI, *supra* note 46, at 11; KELSAY, *supra* note 46, at 40.

⁴⁸ KHADDURI, *supra* note 46, at 11.

⁴⁹ *Id.*

⁵⁰ KRISTEN STILT, ISLAMIC LAW IN ACTION: AUTHORITY, DISCRETION AND EVERYDAY EXPERIENCES IN MAMLUK EGYPT 123 (2011) ("The jurists largely agreed that the individual must pay the tax in person, rather than paying through an intermediary, such as the head of the religious community, in part to allow the collector to insult or otherwise make each non-Muslim taxpayer feel personally degraded.").

⁵¹ KHADDURI, *supra* note 46, at 277.

⁵² *Id.*

⁵³ STILT, *supra* note 50, at 116.

⁵⁴ KHADDURI, *supra* note 46, at 277-78.

⁵⁵ KELSAY, *supra* note 46, at 40.

⁵⁶ Article 2, The Constitution of Iraq.

religion, required by Article 14,⁵⁷ is a meaningless concept if it prohibits members of particular faiths from residing in particular areas, requires them to wear particular forms of dress, or subjects them to particular forms of taxation.

Of course, it should be no surprise that modern Muslims in Iraq or elsewhere are not constrained by how medieval jurists interpreted Islam's holiest texts, particularly where those rules are more the product of juristic speculation than the revelatory text itself.⁵⁸ Yet, even conceding this and noting the profound changes in the Muslim world since the end of the Ottoman Empire, we still might question whether some of these historic political notions survived the social and political ruptures brought about by colonialism and modernity, particularly in limiting the political participation of non-Muslim minorities. While it may be obvious that a Christian will not be required to wear special dress or pay a special tax, a more restricted question might be asked. Given Islam's priority in Article 2 of the Iraq Constitution, might a Christian's political participation be circumscribed in narrower ways?⁵⁹

The answer, quite plainly, is no. To take the simplest and most significant example, not only does Article 68 of the Constitution not mention anything respecting religion in setting out the qualifications for the office of President, but a subsequent law attaching additional qualifications for presidential nominees does not mention religion either.⁶⁰ Similarly, no political position, save those that concern exclusively religious affairs,⁶¹

⁵⁷ *Id.*, art. 14.

⁵⁸ KHADDURI, *supra* note 46, at 19.

⁵⁹ Article 2, The Constitution of Iraq.

⁶⁰ Law for the Rules for the Nomination for President of the Republic No. 8 of 2012 (Iraq), art. 1 [hereinafter Rules for the Nomination for President]. Specifically, Article 1 of the law adds two conditions not set forth in Article 68. One, that the President not be subject to disqualification because of membership in Saddam Hussein's now banned Ba'ath party, is set forth elsewhere in the Constitution, in Article 136. *See* Article 136, The Constitution of Iraq. The other is a requirement that the President have a bachelor's degree from an institution recognized by Iraq's Higher Education Ministry. *See* Rules for the Nomination for President. It is fair to point out that the idea that a legislature could impose an additional qualification necessary for the Office of the Presidency beyond that which the Constitution indicates hardly seems supportable. The point here, however, is that the legislature sought to do precisely that, *and* that no mention is made by it of a religious test, any more than was made in the Constitution itself.

⁶¹ For example, Iraq has three separate laws permitting the establishment of *waqfs*, effectively trusts set up under religious rules for charitable purposes. One is for the Shi'a, one for the Sunnis, and one for Iraq's primary non-Muslim minorities — Christians, Yazidis and Sabians. *See* Law of the Sunni Waqf Bureau No. 56 of 2012 (Iraq); Law of the Shi'i Waqf Bureau No. 57 of 2012 (Iraq); Law of the Waqf Bureau of Christians, Sabian-Mandeans and Yazidis of 2012 (Iraq). Each of these laws, which are remarkably parallel in structure, contain in article 4(2) a requirement that relevant religious authorities must approve the head of the respective bureau, and in

makes religion a qualification for holding office. In fact, during my many years studying and writing on contemporary Iraq and speaking with members of the Iraqi legal and political elite, I have never encountered any suggestion, even from the most ardent Islamists, that the relationship between citizen and state should be based on anything but nationality. The idea that non-Muslim populations within Iraq are entitled to full *de jure* political equality is in this sense broadly noncontroversial. Traditional *shari'a* notions are long dead, and quite modern concepts reign supreme.

Not only are the equality provisions of the Iraq Constitution understood to prohibit political *discrimination* against non-Muslim minorities, they also serve to advance the participation of non-Muslim minorities in political affairs. In this vein, a recent case from Iraq's constitutional court, the Federal Supreme Court, is instructive.⁶² In that case, an individual from a non-Muslim minority known as the Sabians challenged an election law on the grounds that it violated the equality guarantee found in Article 14 of the Iraqi Constitution.⁶³ Specifically, the law awarded Iraqi Christians five seats in the Iraqi parliament.⁶⁴ Iraq was considered a single electoral district for the purposes of these seats, meaning that anyone (of any religion) from anywhere in the country could vote for these candidates, and the five candidates with the highest number of votes would be elected to parliament.⁶⁵ The five seats were a quota (both the electoral law being challenged and the Court used an Arabic transliteration of the English word "quota" to describe it),⁶⁶ meaning that parliament would have *at least* five Christians irrespective of how many votes

article 6(d) require that clergy of the relevant religion or sect be members of its board of directors. See Law of the Sunni Waqf Bureau No. 56 of 2012 (Iraq); Law of the Shi'i Waqf Bureau No. 57 of 2012 (Iraq); Law of the Waqf Bureau of Christians, Sabian-Mandean and Yazidis of 2012 (Iraq). As these bureaus are responsible for administering purely religious trusts established by private individuals under the relevant rules of their religion, it is hardly controversial that such bureaus would be run by or in close association with the clergy of particular religious institutions.

⁶² [Federal Supreme Court of Iraq], decision No. 6 of 2010, *available at* <http://www.iraqja.iq/viewd.744>. Technically, the Federal Supreme Court is more than merely a constitutional court, because it does have jurisdiction on matters that are not purely constitutional, including, for example, disputes as between the central government and an autonomous region or province, or between the subnational units. Article 93, Sections 4-5, The Constitution of Iraq. However, in contradistinction to the United States Supreme Court, and consonant with general global practice, the Supreme Court is not the final court of general appeal. Ordinary appeals cannot be brought to it.

⁶³ [Federal Supreme Court of Iraq], decision No. 6 of 2010, p. 1 (Iraq).

⁶⁴ *Id.* at 1.

⁶⁵ *Id.*

⁶⁶ *Id.*; Amending the Electoral Law No. 16 of 2005, Law No. 26 of 2009, art. 1(5) (Iraq).

those candidates received relative to any other candidates running in the same election.

The Sabian contended that while his religious minority had a similar one-candidate quota in parliament, the Sabian candidate could only run in the Baghdad electoral district.⁶⁷ Hence, no person from outside Baghdad could vote for him, and only candidates in Baghdad could contest the seat.⁶⁸ Given that Sabians inhabit many parts of Iraq, Sabian candidates were disadvantaged relative to Christian candidates because only Sabians in Baghdad could take advantage of the Sabian quota.⁶⁹

The court agreed, indicating as follows:

[W]hereas the law . . . regarded the seats set aside as a quota for Christians to be within one electoral district . . . and it did not extend this right to the Sabian-Mandean sect, where it limited the right of nomination and voting to Baghdad alone, as a result, the aforementioned law violates the principle of equality among Iraqis as it is set forth in Article 14 of the Constitution. [This is] because the limitation of the right of voting of the Sabian minority to the governorate of Baghdad alone harms the candidate as it harms the Sabian minority because it prevents the individuals of the sect from other governorates from exercising their right, as a Sabian minority, in their enjoyment of political rights which include the right to vote, to be elected, and to be nominated, as set forth in Article 20 of the Constitution.⁷⁰

This rather remarkable conclusion bears some emphasis. Implicitly, the Court affirmatively rejects the argument that setting aside particular seats for a religious minority constitutes reverse discrimination, and therefore a violation of Article 14 of the Constitution. The notion that minority quotas violate equal protection thus resonates more with certain members of the American judiciary than it does with the Iraqi judiciary.⁷¹ Indeed, the Iraqi court found it broadly uncontroversial to set aside particular seats for religious minorities to ensure that they have a voice — so uncontroversial, in fact, that the Court does not even bother to justify its conclusion.

What is objectionable to the Court is that having enabled the Christian minority to run under quota protection and vote for Christian candidates

⁶⁷ [Federal Supreme Court of Iraq], decision No. 6 of 2010, p. 1-2 (Iraq).

⁶⁸ *Id.*

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 5.

⁷¹ There is no real doubt, for example, that important members of the current Supreme Court find various forms of affirmative action for racial minorities to be themselves a denial of equal protection of the laws. *See, e.g.*, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J.) (describing a program designed to ensure racial integration in public schools as a form of “discriminating on the basis of race”).

regardless of their location in Iraq, Sabians outside of Baghdad were not granted the same dispensation. The issue was not whether or not Sabians were entitled to vote wherever they happen to be located (clearly they could), nor even whether they were entitled to run as candidates wherever they wished (clearly they could). Rather, the issue was whether the legislature could design a quota system for Sabians mandating Sabian participation with a scope limited to Baghdad and thus less extensive than that granted to Christians. This, the Court decided, was unconstitutional and a violation of equal protection. Clearly, Iraqi judicial and legislative praxis takes the formal notion of political equality and political participation quite seriously.

VI. RELIGIOUS EQUALITY AND RELIGIOUS CONVERSIONS

Unfortunately however, the story of religious minorities in the constitutional theocratic state is more nuanced than this. There are areas in Iraq where the medieval-period priorities given to Islam quite clearly continue in rather unexpected ways, and in a manner that disproportionately burdens religious minorities. Nowhere is this more obvious than in religious conversions.

Under the classical system, *dhimmi* conversion to Islam was not only permitted but positively incentivized,⁷² whereas conversion away from Islam, or apostasy, was considered a crime.⁷³ Apostasy was among the few crimes deemed to have been decreed by God, and therefore its prescribed penalty of death was unwaivable.⁷⁴ However, the perpetrator was generally given an opportunity to repent, in which case no punishment would be applied.⁷⁵

Generally speaking, after the colonial era, the criminal laws of Arab states have been, as with commercial laws, largely European in origin and transplanted from Western sources.⁷⁶ As such, Iraq's Penal Code contains no reference to apostasy as a crime.⁷⁷ Moreover, given the principle of *nullum crimen sine legem* that prevails in Iraq and throughout the Muslim world,⁷⁸ the state cannot prosecute individuals on the grounds that they have abandoned Islam in the absence of such a law.

⁷² See, e.g., KHADDURI, *supra* note 46, at 275 (reciting Shaybani's familiar rule that the payment of the *jizya* is not due from one who converts, even as to amounts previously due and owing).

⁷³ RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW* 65 (2005).

⁷⁴ *Id.*

⁷⁵ *Id.* (noting exception for Shi'a, who do not offer an opportunity for repentance for those born Muslim).

⁷⁶ *Id.* at 103.

⁷⁷ See generally Penal Code No. 111 of 1969 (as amended) (Iraq).

⁷⁸ KENNETH S. GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW* 53 (2009) ("Islamic law countries today generally do

However, just as the decriminalization of sodomy is only the beginning of any gay rights movement, the absence of such a conversion law does not necessarily mean that a Muslim may freely convert into another religion. That the state will not actively pursue the convert in the criminal courts does not mean it will affirmatively agree to change his national identity documents to reflect a change in religion.⁷⁹ While this alone is vitally important from a symbolic, identitarian perspective, state recognition of a citizen's religion has significant legal ramifications as well. For example, under the *shari'a* derived Personal Status Code, a Muslim woman may not marry a non-Muslim man,⁸⁰ nor may a non-Muslim inherit from a Muslim.⁸¹

The problem is particularly compounded for religious minorities as concerns involuntary conversions. The number of born Muslims who wish to convert to a religion other than Islam seems relatively low in Iraq; certainly such matters do not appear to reach the courts with any degree of frequency. I have yet to find a single case in which such a request was made, though of course whether some were deterred less out of genuine conviction and more out of social stigma is impossible to ascertain. It is also rather unsurprising that those who voluntarily convert to Islam do not appear to abandon their new faith in large numbers. More salient, however, are those who were not born Muslim and did not attempt to convert, but were converted by one of their parents while a minor. Iraqi law has long regarded the conversion of a parent as effectively converting a minor child, even over the objection of the non-converting parent.⁸² And once converted into Islam, the question might well be whether or not such an individual upon reaching adulthood can convert back into their original religion of choice.

In Saddam-era Iraq, the answer was resoundingly no, though based on spurious legal grounds. The most well-known case comes from Iraq's highest court of general appeal, the Court of Cassation, and dealt with the attempted reconversion of a Sabian woman whose father had con-

not object to international law obligations respecting the non-retroactivity of criminal law.”).

⁷⁹ Iraq's identity cards, both the Certification of Citizenship and the Civil Status Identity Card, indicate one's religion on its face.

⁸⁰ Personal Status Code No. 188 of 1959, art. 17 (Iraq).

⁸¹ Article 90 of the Personal Status Code indicates that the rules for the distribution of estates are those that existed prior to the enactment of the Code, which are effectively the established juristic rules respecting inheritance. *See* Personal Status Law No. 188 of 1959, art. 90 (Iraq). It is abundantly clear that under such rules, non-Muslims may not inherit from Muslims. *See, e.g.,* ALI SISTANI, MINHAJ AL-SALIHEEN 2:320 (2008) (setting forth the familiar rule that “the nonbeliever does not inherit from the Muslim, even if closely related”).

⁸² The case discussed in the next paragraph makes this amply clear.

verted to Islam when she was ten years old.⁸³ She made the request within one year of reaching adulthood, claiming she had exercised her right to do so within that time limit, as permitted in a 1988 executive order. The Court of Cassation ruled that this order was overruled by a subsequent order issued in 1994, and then pointed to two principles that it said controlled in such matters.⁸⁴ The first was that a young child became a Muslim if either of the child's parents became a Muslim, and the second was that once one became a Muslim directly or vicariously (i.e., through the conversion of a parent), conversion from Islam was forbidden because *shari'a* made conversion a crime.⁸⁵ On the basis of these principles, the Court denied her request and the woman remained registered as a Muslim.

Ironically, neither of these principles appears in Iraqi law. As noted, while apostasy may well be a crime under the *shari'a*, it is not a crime under Iraqi law. More importantly, Article 25 of the 1970 Interim Constitution in effect at the time contained broad protections for religious freedoms, and the 1970 Interim Constitution did not enshrine *shari'a* as part of the state's legal framework.⁸⁶

The reliance of the Court on *shari'a* is therefore already difficult to understand given the absence of any reference to *shari'a* in the legal framework of the state at the time as it pertained to the crime of apostasy. The decision is also odd for two additional reasons. First, the Court of Cassation is composed of judges of law, not clerics of religion, and the Court does not often apply religious rules on which it has little formal training in place of legal ones even when invited to do so.⁸⁷ Second, the Court was not actually *applying shari'a* in any recognizable fashion. If it were, it would have imposed the death penalty, for the Sabian woman had attempted to change her religion from Islam and failed to repent. Rather, the Court denied an individual access to a modern, civil process — a change of state documentation — and justified it on the basis of a historic, religious crime for which Iraq and Iraqi courts recognized no criminal sanction. Faulty and unsupportable as the reasoning was, it tellingly illustrates the biases of Iraqi judges and legal elites at the time.

⁸³ [Iraq Court of Cassation], decision No. 318 of Feb. 14, 2000, *reprinted in* THE JUSTICE COMPENDIUM NO. 80, 6 (Ali Muhammad Ibrahim Al Kerbasi ed., 2000).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Article 25 of the Ba'ath era interim constitution of 1970 indicates that "[f]reedom of religions, beliefs, and the exercise of religious rites is guaranteed, so long as they do not conflict with the provisions of the constitution and they do not contradict general morals and order." Article 25, Al-Doustour al-Iraqi al-Mouakkat [The Interim Iraqi Constitution] of 1970. The only real reference to Islam is the indication in Article 4 that "Islam is the religion of the state." See *id.*, art. 4. This hardly compares to the more significant references set forth in the 2005 Constitution. See The Constitution of Iraq.

⁸⁷ See Hamoudi, *supra* note 33, at 701 (noting secular training of Iraqi judiciary).

Apostasy was so reviled that freedom of religion effectively did not exist for Muslims in Saddam-era Iraq, even for those coerced into adopting Islam, and even though no law criminalized conversions.

But that was then and this is now. Nobody in Saddam-era Iraq could take constitutional rights and freedoms very seriously, particularly the guarantee of freedom of religion and religious exercise granted in Article 25 of the 1970 Interim Constitution.⁸⁸ Even the majority Shi'a Muslim population could not freely conduct their own religious rites during that time.⁸⁹ Whatever the Court might have been interpreting and ignoring was done in the context of a totalitarian dictatorship, under the auspices of an interim constitution nobody had voted for.⁹⁰ It is fair to ask whether things might be different under a negotiated constitution approved in a popular referendum.

The 2005 Constitution, on its own terms, gives reasons to be hopeful. As mentioned in the previous section, Article 2 obligates the state to "guarantee[] the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeans Sabaeans."⁹¹ Articles 41 through 43 also speak in broad terms of freedom of conscience and freedom of religious exercise, without suggesting that the freedom is limited by the religion of the individual seeking to assert her right.⁹² Limitations on conversions from Islam would have been easy to include as a technical matter, yet were not. This omission, in the context of such strong language in favor of religious freedom, is noteworthy.

However, a reason for this constitutional language exists that has nothing to do with religious conversions or religious freedom generally. It relates to particular Sunni extremist movements that brand the Shi'a apostates and justify attacking them and their places of worship on the theory that they are apostates, or at least "rejecters" of proper Islamic doctrine. The "lurking snake, the crafty and malicious scorpion, the spying enemy" were but a few of the terms used by Iraq's most well-known Sunni terrorist, Abu Mus'ab Al Zarqawi, to describe the Shi'a in a letter to Bin Laden.⁹³ Given this political context, the Shi'a, who along with the

⁸⁸ Article 25, Al-Doustour al-Iraqi al-Mouakkat [The Interim Iraqi Constitution] of 1970.

⁸⁹ Megan Stack, *March of a Million Pilgrims Shows Shi'a Power*, NEWARK STAR-LEDGER, Apr. 23, 2003, available at 2003 WLNR 15603321 (noting first time that Shi'a could practice their own rites freely in decades was following the fall of Saddam).

⁹⁰ Al-Doustour al-Iraqi al-Mouakkat [The Interim Iraqi Constitution] of 1970. The interim constitution was promulgated by decree of the Revolutionary Command Council, No. 792 of 1970. It was not therefore the product of a referendum or a democratically elected council.

⁹¹ Article 2, The Constitution of Iraq.

⁹² *Id.*, arts. 41-43.

⁹³ Letter from Abu Mus'ab Al-Zarqawi to Osama Bin Laden (Feb. 2004), available at <http://www.au.af.mil/au/awc/awcgate/state/31694.htm>.

Kurds were largely controlling the constitutional negotiation process,⁹⁴ had no interest in granting broad sanction to historic prohibitions of apostasy in the Constitution. Hence, Article 7 of the Constitution not only bans the Ba'ath party,⁹⁵ but also bans any party that engages in the "infidelization" (*takfir* in Arabic) of other Muslims.⁹⁶ The Sabian woman seeking to return to the religion of her birth after being involuntarily converted as a child was, therefore, at least an unintended beneficiary of the Constitution's broad grants of religious freedom.

However, the language of constitutional theocracy as it appears in the Iraqi Constitution has provisions that seem to work in a contradictory direction. Article 2 not only grants individuals the rights of freedom of religion and religious exercise, it also obligates the state "to guarantee the sustaining of the Islamic identity for Iraq's Muslim majority."⁹⁷ A prohibition against individual conversion from Islam might well be justified to protect Islamic identity. After all, a prospective convert, currently part of Iraq's Muslim majority, is seeking to obliterate her Islamic identity altogether. Article 2 might now obligate the state to prevent this from happening.

Moreover, Islam is now a "foundational source" of legislation and a constraint upon the issuance of legislation.⁹⁸ The Saddam-era courts at least demonstrated the Iraqi legal and political elites' strong reluctance to reinterpret the *shari'a* rules concerning apostasy from what they had been understood to have been historically, even if they were willing to rethink other *shari'a* rules broadly.⁹⁹ Saddam-era Iraqi elites may not have sought to actually apply the *shari'a* principles on apostasy where they were intended to apply — in the criminal law. Still, they plainly sought to apply the historic *shari'a* rules on apostasy in other contexts, as the case of the Sabian woman demonstrates.¹⁰⁰ Given this, the impulse to continue to deny Muslims the right to register as belonging to another religion, even as to those involuntarily converted, would be strong.¹⁰¹

⁹⁴ ARATO, *supra* note 30, at 214-15.

⁹⁵ Ashley S. Deeks and Matthew D. Barton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1, 26-30 (2007).

⁹⁶ Article 7, The Constitution of Iraq.

⁹⁷ *Id.*, art. 2.

⁹⁸ *Id.*

⁹⁹ This was just as true during the Saddam era as it is now. Precisely at the time that the Iraqi Court of Cassation was denying an involuntarily converted Sabian the ability to register herself as a Sabian, Iraq's Deputy Prime Minister, Tariq Aziz, was a Christian. The distinction as between traditional understandings of apostasy, clung to fiercely, and traditional understandings of *dhimmi* status, categorically rejected, could hardly be starker.

¹⁰⁰ [Iraq Court of Cassation], decision No. 318 of Feb. 14, 2000, *reprinted in* 80 THE JUSTICE COMPENDIUM 6 (Ali Muhammad Ibrahim Al Kerbasi ed., 2000).

¹⁰¹ Article 2, The Constitution of Iraq.

As a result, courts in most of Iraq have continued to deny religious freedoms as they concern conversion away from Islam.¹⁰² Specifically, the Court of Cassation has upheld its earlier precedent prohibiting conversions without so much as discussing the potential constitutional problems this engenders.¹⁰³ For example, in 2005 an Iraqi Christian father converted to Islam, and in so doing, effectively converted his 16-year-old son as well.¹⁰⁴ Immediately upon reaching adulthood two years later, the son sought to register himself as a Christian, but was denied by the Court of Cassation in a decision issued in 2008.¹⁰⁵ This decision offered no constitutional analysis, and instead merely referred to the Saddam-era case law discussed above.¹⁰⁶ That this case law developed *before* the ratification of the current Constitution, with its robust rights of religious freedom, went unmentioned by the Court.

While the Court of Cassation is not itself a constitutional court with power to declare existing legislation unconstitutional, it would not have had to invalidate any legislation to grant the Appellant's request, for no legislation on the subject existed. There was only the earlier case law of the same Court of Cassation, issued under a different constitutional arrangement, in a legal system where cases are not supposed to contain any precedential value.

Moreover, the Federal Supreme Court, which does address constitutional matters, does not seem particularly eager to undertake a rebalancing the tensions inherent in Article 2. The Christian individual in the 2008 case appealed twice to the same Court of Cassation under different grounds, and was twice rebuffed.¹⁰⁷ If the Federal Supreme Court was willing to hear his case, it could have done so. After all, the Chief Judge of the Court of Cassation at the time also was head of the Federal Supreme Court.

The Federal Supreme Court's reluctance is likely politically adroit. If it were to reverse the Court of Cassation's ruling, it would risk the wrath of powerful Islamist groups and Najaf for taking a radical step in favor of secularizing the state. If it upheld the ruling, it would obliterate the very idea of religious freedom for those minors forcibly converted by their

¹⁰² See *infra* notes 104–107 and accompanying text.

¹⁰³ See, e.g., [Iraq Court of Cassation], decision No. 285 of Dec. 31, 2008, *reprinted in* 2 A SELECTION OF CASES FROM THE FEDERAL COURT OF CASSATION: CASES ON PERSONAL STATUS 424 (J. Razzaq Jabbar Ilwan ed., 2011).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See [Iraq Court of Cassation], decision No. 285 of Dec. 31, 2008, *reprinted in* 2 A SELECTION OF CASES FROM THE FED. COURT OF CASSATION: CASES ON PERSONAL STATUS 427 (J. Razzaq Jabbar Ilwan ed., 2011); [Iraq Court of Cassation], decision No. 285 of Dec. 31, 2008, *reprinted in* 2 A SELECTION OF CASES FROM THE FED. COURT OF CASSATION: CASES ON PERSONAL STATUS 425 (J. Razzaq Jabbar Ilwan ed., 2011).

parents to Islam, and would almost certainly earn broad international condemnation. Neither option is particularly appealing to a new judicial tribunal seeking to develop and enhance its social and political standing. Hence it permits the status quo, thereby favoring the provisions on Islam, but only by implication.

A very different result was reached however in Iraqi Kurdistan, with its relatively more secular population. A 2004 case before the Kurdistan Court of Cassation involved a Christian child whose parents had separated.¹⁰⁸ The father remained Christian and had custody of the child.¹⁰⁹ They resided in the Kurdistan region, which retained an autonomous political and legal system entirely independent of the rest of Iraq from 1991 until the end of the Saddam era in 2003.¹¹⁰ In 1992 the mother converted to Islam in the non-Kurdistan controlled city of Mosul.¹¹¹ The issue before the Court was whether the child could register as a Christian upon becoming an adult, despite his mother's conversion. The lower court had ruled in a manner similar to Iraqi courts outside Kurdistan, and found that the child was now a Muslim and no conversion was possible.¹¹²

Issuing its decision, ironically, on Christmas Day 2004, the Kurdistan Court of Cassation reversed on three grounds.¹¹³ First, the mother's change of religion occurred outside of Kurdistan at a time when the child had no relationship or contact with his mother. Under such circumstances, the Court reasoned that the son had not "rejected" Islam by "converting" to Christianity given the tenuous relationship he had to his mother at the time.¹¹⁴

Second, a 2004 Transitional Administrative Law ("TAL") (effectively, an interim constitution in effect at the time, partly drafted by the United States),¹¹⁵ granted a broad right of religious exercise and also prevented the passing of any law that conflicted with the rights and freedoms of Iraqis.¹¹⁶ The Court held that forcing the son to remain a Muslim violated these provisions. The TAL language is similar to that found in

¹⁰⁸ [Court of Cassation for the Region of Kurdistan], unnumbered decision of Dec. 25, 2004 (Iraq), *reprinted in* 45 A SUMMARY OF JUDICIAL IMPLEMENTATION IN THE COURTS AND CENTERS OF JUSTICE 25 (J. Abdullah Ali Sherfani ed., 2006).

¹⁰⁹ *Id.*

¹¹⁰ ALLAWI, *supra* note 31, at 73 (noting that much of the work toward creating an entire political authority took place after 1996).

¹¹¹ [Court of Cassation for the Region of Kurdistan], unnumbered decision of Dec. 25, 2004 (Iraq), *reprinted in* 45 A SUMMARY OF JUDICIAL IMPLEMENTATION IN THE COURTS AND CENTERS OF JUSTICE 25 (J. Abdullah Ali Sherfani ed., 2006).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ ALLAWI, *supra* note 31, at 220-22 (describing roles of different parties, including the United States, in finalizing the TAL).

¹¹⁶ The Law of Administration for the State of Iraq for the Transitional Period of Mar. 8, 2004, art. 7 [hereinafter TAL].

Iraq's current permanent Constitution.¹¹⁷ The Kurdistan Court of Cassation thus chose to do what the Iraqi Court of Cassation had declined to do: invoke the constitutional question and suggest that preventing an adult from changing his or her religion was an unconstitutional interference with religious exercise, notwithstanding other provisions that enshrined Islam as the state religion and prohibited the enactment of laws contradicting Islamic tenets.¹¹⁸ In other words, unlike the Iraqi courts outside Kurdistan, the Court resolved the tensions that inhere in Article 2 of the permanent constitution in a manner that secularized the state.

Third and most remarkably, the Kurdistan Court of Cassation suggested a far more liberal construction of the *shari'a* itself than would more traditional jurists. In other words, not only did it reason that in this particular context *shari'a* did not apply, it also implicitly suggested that *shari'a* deserved re-thinking. Citing a verse of the Qur'an that specifically declares "there shall be no compulsion in religion," the Court indicated that compelling this individual to be a Muslim *was itself contrary to Islam*.¹¹⁹ Such a modern approach stands at odds with the positions of many traditionalist jurists.¹²⁰

It is unclear how far the Kurdistan Court of Cassation would be willing to advance this position. After all, the first reason for reversal is in some tension with the third, and the Court does not attempt to manage that tension. One cannot easily maintain that the apostasy rules were not intended to apply in the specific context of a child having no contact with a converted parent and simultaneously hold that the same apostasy rules are an affront to sacred text. Yet the Court's reasoning is still noteworthy as it reveals a strong willingness by the more secular-minded Kurdistan judges to resolve tensions between *shari'a* and constitutionally and globally recognized rights and freedoms in a manner favoring the latter, at least relative to Iraqi courts outside Kurdistan. More importantly, it reveals a cautious attempt to help resolve these tensions by reinterpreting Islam itself in a manner that renders it more congenial to contemporary human rights schemes as they concern to religious freedoms.

This may well suggest more significant changes in the years ahead. The position that the Kurdistan Court of Cassation announced — that Islam

¹¹⁷ *Id.* There are important differences, though not significant enough to deserve mention in the main text in this particular context. Most notably, Article 7 only requires the state to "respect" the Islamic identity of Iraq's Muslim population, not to guarantee that such identity be sustained. *Id.*

¹¹⁸ [Court of Cassation for the Region of Kurdistan], unnumbered decision of Dec. 25, 2004 (Iraq), reprinted in 45 A SUMMARY OF JUDICIAL IMPLEMENTATION IN THE COURTS AND CENTERS OF JUSTICE 25 (J. Abdullah Ali Sherfani ed., 2006).

¹¹⁹ *Id.*

¹²⁰ See, e.g., MOHAMMAD HASHIM KAMALI, SHARI'AH LAW: AN INTRODUCTION 220 (2008) (while criticizing the traditional approach as being entirely incompatible with any reasonable conception of religious freedom, Kamali notes its continued salience among many commentators).

itself forbids apostasy — is not the invention of the Court, but is in fact a particularly favored approach among an increasing number of contemporary Muslim authorities. The renowned Muhammad Hashim Kemali has indicated that the Qur'an does not criminalize apostasy and that Prophetic example only directed punishment against those who had committed the equivalent of treason, not against those engaged in a non-hostile renunciation of faith.¹²¹ Abdulaziz Sachedina has put together a formidable work entitled *The Islamic Roots of Democratic Pluralism*, which argues that the dictates of Islamic revelatory text indicates that Muslims should strive towards an ethical pluralistic state, and that apostasy *per se* is not a religious offense.¹²²

Currently, traditionalism is ascendant in much of the Arab world. Iraqi courts do not permit conversions away from Islam, and Egyptian courts have, in the recent past, gone so far as to impose divorces on happily married couples on the grounds that one of them had “rejected” Islam by virtue of pronouncing unorthodox religious views.¹²³ When Abdulaziz Sachedina attempted to present his views on Islamic pluralism to Grand Ayatollah Sistani, the meeting did not go well, to understate the incident.¹²⁴ Sachedina’s report suggests that Sistani offered to supplant much of his salary to stop Sachedina from spreading his heterodox and “un-Islamic” views.¹²⁵ Sachedina is a professor at the University of Virginia, and Sistani is deemed the most learned Shi’i jurist in the clerical academies of Najaf. Quite plainly, the latter wields considerably more influence. Still, the fact that a debate exists, and that the debate has at least penetrated the consciousness of a significant court in the region, is not a matter to be gainsaid. After all, it was not long ago that the notion of the political equality for religious minorities would have been considered an affront to Islam, and it is no longer.

V. CONCLUSION

In these short pages, I could not hope to expound at length on the tensions between religious rules granting priority to Islam and the rights and freedoms that appear in modern constitutions that presume a secular polity at least to some extent. These tensions are inherent in the modern Islamic constitutional theocratic state and deserve greater attention than they have received. I have only sought to isolate and identify some particular tensions, specifically, the place of the non-Muslims in the Islamic constitutional theocratic state, and their place in one emerging democracy

¹²¹ See, e.g., *id.* at 220-21.

¹²² ABDULAZIZ SACHEDINA, *THE ISLAMIC ROOTS OF DEMOCRATIC PLURALISM* 97-101 (2001).

¹²³ See, e.g., Stilt, *surpa* note 22, at 734-40 (describing the case of Nasr Abu Zayd).

¹²⁴ Personal Account, Abdulaziz Sachedina, *What Happened in Najaf?*, http://islam.uga.edu/sachedina_silencing.html (last visited Feb. 1, 2013).

¹²⁵ *Id.*

in the region, Iraq. In so doing, I hope to have shown that these tensions are real, and while they at times work to the significant detriment of non-Muslim minorities, they are nuanced and complex. First of all, broader global conceptions of religious freedom have, to some extent, permeated the region and the worldviews of the constitutional theocrats. Secondly, even where traditional concepts of *shari'a* reign, their applicability to law is hardly assured. At times, such as in the banning of loan interest, *shari'a* laws are generally ignored. At other times, such as in family law, they are decidedly not ignored. And at still other times, as in apostasy, they have important secondary effects, but do not affect the originally intended area of law. Finally, the content of the *shari'a* is often the subject of significant contestation. Observing how these nuances affect *shari'a*'s role in the Arab world's rising democracies will no doubt prove fascinating in the years to come.