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The Iraqi Constitution: Upholding Principles of Democracy While Struggling to Curtail the Dangers of an Islamic Theocracy

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The Iraqi Constitution: Upholding Principles of Democracy While Struggling to Curtail the Dangers of an Islamic Theocracy

The [Iraqi] constitution is undemocratic and out of step with human rights norms.

David Phillips¹

This innovative formulation [of the Iraqi constitution] goes far toward establishing Islamic and democratic values on equal footing.

Noah Feldman²

INTRODUCTION

The Republic of Iraq, plagued in the past by oppression, dictatorship, war, ethnic cleansing and discrimination,³ captivated

1. See *Constitution Process Risks a Civil War*, Council on FOREIGN RELATIONS, Aug. 26, 2005, http://www.cfr.org/publication/8766/constitution_process_risks_a_civil_war.html (last visited Nov. 29, 2006) (arguing that the promulgation of the constitution is not an amazing event, but a process that will increase the chances of a civil war). David Phillips is a senior fellow at the Council of Foreign relations who has worked with Iraqi opposition political groups. *Id.*

2. Op-Ed., *Agreeing to Disagree in Iraq*, N.Y. TIMES, Aug. 30, 2005, at A19 (recognizing that although the Iraqi constitution is quite vague, it confers upon Iraqis all the rights contained in international agreements that Iraq has signed, as well as establishes democratic principles).

3. See generally Bureau of Near E. Affairs, U.S. Dep't of State, *Background Note: Iraq* (2006), <http://www.state.gov/r/pa/ei/bgn/6804.htm> (last visited Nov. 29, 2006) [hereinafter *Iraq*] (reciting the history of Iraq – the long periods of war and the years of oppression under Saddam Hussein). See generally Cathal J. Nolan, *The Longman Guide to World Affairs* 182 (1995) (recounting the history of Iraq from a Mesopotamian civilization to a present day sovereign nation).

a world-wide audience on October 15, 2005 as Iraqis risked their lives to ratify their Constitution.⁴ Only days before this historic event,⁵ Shiites, Sunni Arabs, and Kurds⁶ alike negotiated and

4. Edward Wong, *Final Tally Shows Iraqi Voters Approved New Constitution*, N.Y. TIMES, Oct. 25, 2005, <http://www.nytimes.com/2005/10/25/international/middleeast/25cnd-iraq.html?ex=1287892800&en=4e00737c0063f04c&ei=5088&partner=rssnyt&emc=rss>; see also Associated Press, *Iraq's Constitution Distributed to Citizens*, MSNBC.com, Iraq's Constitution Distributed to Citizens – Conflict in Iraq, <http://www.msnbc.msn.com/id/9584857/print/1/displaymode/1098/> (last visited Sept. 25, 2006) (“[S]ome 4 million copies [were] printed in Arabic – at a rate of 250,000 a day . . .”). See *Iraqi Election Results, by Province*, N.Y. TIMES, Oct. 25, 2005, <http://fairuse.1accesshost.com/news5/nyt11.htm> (reporting through empirical studies that two of the three Sunni dominated provinces largely rejected the constitution, while the third province passed it by 15%). If the third Sunni province had rejected the constitution, it would not have passed. See also Richard A. Oppel Jr., *Rice In Baghdad, Urges Sunni Role in the Constitution*, N.Y. TIMES, May 16, 2005, at A1 (recounting Secretary of State Condoleezza Rice's visit to Iraq and her encouragement to the Shiites and Kurds to include the Sunni's in negotiations for a new constitution).

5. See Kirk Semple, *Iraqi Rivals Trying to Fine-Tune Constitution for Voter Approval*, N.Y. TIMES, Oct. 11, 2005, at A8 (remarking that Iraqis made last minute changes to the constitution in order to appeal to a wider audience and hopefully insure ratification). See, e.g., Editorial, *Off Course in Iraq*, N.Y. TIMES, July 21, 2005, at A28 (noting that some experts believed the constitution to be a complete failure). The Iraqi Constitution, after a two week extension, was completed and signed on August 28, 2005. See also Dexter Filkins, *Sunni Leaders Offer Mixed Views of Deal on Constitution*, N.Y. TIMES, Oct. 12, 2005, <http://www.nytimes.com/2005/10/12/international/middleeast/12cndiraq.html?ex=1162180800&en=dd6b6f3754974d42&ei=5070> (noting that throughout the negotiating process the Sunnis have varied in their degree of participation and involvement). See also Dexter Filkins & James Glanz, *Leaders in Iraq Extend Deadline on Constitution*, N.Y. TIMES, Aug. 16, 2005, at A1 (insisting that forcing the Iraqis to a consensus within a short period of time may increase tensions among the major groups). On December 15, 2004, for the first time in Iraq's history, eager Muslims and Kurds packed voting booths for the election of the National Assembly, whose function would be to draft a permanent constitution and then present it to the country for a national referendum on October 15, 2005. Kristen A. Silt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 697 (2004). The National Assembly succeeded in drafting a constitution defying many critics and pessimists. The Iraqi Constitution, after a two week extension, was completed and signed on August 28, 2005; Aneesh Raman, Cal Perry & Enes Dulami, CNN.com – Committee Signs Iraq's Draft Constitution – Aug 28, 2005, <http://www.cnn.com/2005/WORLD/meast/08/28/iraq.constitution/index.html> (last visited Sept. 25, 2006).

6. See *infra* Part I.A.1 (identifying the three distinct groups that occupy present day Iraq and their divergent interests and policies in the re-

adamantly debated the language and structure of the constitution, attempting to address the numerous issues facing an emerging democracy in the Middle East.⁷

One of the most significant and controversial issues of the new constitution is the sphere of influence allotted to Islam⁸ or more specifically, whether the influence of Islam in the newly drafted constitution undermines the principles of democracy set forth therein.⁹ If the constitution permits Islam a dominant position and unfettered authority, it is likely that an Islamic theocratic Iraq will be born.¹⁰ An Islamic theocracy could possibly lead to increased human rights violations, mistreatment of women, and an oppressive state.¹¹ On the other hand, if the influence of Islam is diminished and stifled, the Iraqi constitution will never effectuate into respectable law.¹² Therefore, it is important that the Iraqi constitution allow for an Islamic influence, but not to the extent that democratic principles are

structuring of the Iraqi state).

7. See *Iraq's Constitution: Democracy or Division?*, WALL ST. J., Oct. 15, 2005, at A5 (Iraq's constitution additionally faces the issues of federalism, oil revenue, de-Baathification and equal rights).

8. David Rohde, *A World of Ways to Say 'Islamic Law'*, N.Y. TIMES, Mar. 13, 2005, § 4, at 4 (suggesting that the fateful question to address in Iraq is what role Islam will have in the constitution). See Dexter Filkins, *Leaders in Iraq Report Progress on Constitution*, N.Y. TIMES, Aug. 22, 2005, at A1 ("The most sensitive of unresolved issues revolved around the role of Islam, which the drafters have designated as 'a main source of legislation' in the new constitution.").

9. This question assumes to a certain extent that Islam and democracy are functionally compatible. See Ali Iyad Yakub, *The Islamic Roots of Democracy*, 12 U. MIAMI INT'L & COMP. L. REV. 269, 270 (2004) (arguing that Islam and democracy are compatible in that they have the same objectives for society, such as aims of justice, equality, freedom of expression and a fair criminal procedure). *But see* Hugh Goddard, *Islam and Democracy*, POL. Q. Jan.-Mar. 2002 at 3, 4 (2002) (arguing that Islam is the anathema to democracy because Islam calls for a state governed by God).

10. See Filkins & Glanz, *supra* note 5, at A8 (emphasizing that the Shiite Muslims are more than willing to form an Islamic theocracy).

11. See Ann Elizabeth Mayer, Book Review, *International Human Rights and Islamic Law*, 99 AM. J. INT'L L. 302, 303 (2005) (stating that governments rely on Islamic law to justify policies of discrimination, persecution and repression).

12. See Asli U. Bali, *Justice Under Occupation: Rule of Law and The Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 450 (2005) (indicating that the principles Arab unity, nationalism, social and economic justice are the core values upon which Iraq must build in order to have a functioning, law-abiding society).

compromised.¹³

This Comment argues that the influence of Islam in the Iraqi constitution does not undermine fundamental democratic principles provided that it is strictly interpreted.¹⁴ This Comment draws from the constitutions of Egypt and Iran in order to comprehend the status of Islam in the Iraqi constitution.¹⁵ Egypt and Iran represent opposite sides of the possible spectrum for Iraq, the former being a secular democracy and the latter an Islamic theocracy.¹⁶ This Comment individually evaluates articles defining the influence of Islam in the Iraqi constitution and contrasts those to similar articles in the Egyptian and Iranian constitutions.¹⁷ Part I presents a brief contextual overview of the newly promulgated Iraqi Constitution and a summation of Islam

13. See *supra* text accompanying notes 1-2 (recognizing that experts believe that Iraq has the potential to become a democratic or a theocratic state).

14. See discussion *infra* Part III (arguing that through a strict interpretation of the Iraqi Constitution a balance of Islam and democratic principles is attainable); A. Kevin Reinhart, *Reconstruction and Constitution Building in Iraq*, 37 VAND. J. TRANSNAT'L L. 765, 782-83 (2004) (admitting that there are theocratic elements in the new Iraqi constitution, but there was not much sentiment in Iraq for a great theocracy).

15. Turkey is only briefly mentioned in the footnotes of this Comment because, although Turkey is considered a Muslim democracy, it is too secular for Iraq at this time. See Silt, *supra* note 5, at 716 (suggesting that Turkey's focus on ways to separate religion and state and to exclude Islam is unrealistic for Iraq). See also Susan Sachs, *Are Islam & Democracy Compatible?*, N.Y. TIMES, Dec. 13, 2004, at 20 (Upfront) (considering Turkey as making the most progress toward a democracy of the Muslim nations of the world).

16. Andrew Grossman, "*Islamic Land*": *Group Rights, National Identity and Law*, 3 UCLA J. ISLAMIC & NEAR E. L. 53, 71 (2003-04). Iran is considered an Islamic state while Egypt is considered a secular democracy. *Id.* Iraq's constitution could conceivably set up a system comparable to either of these states. See Silt, *supra* note 5, at 699 (noting that Egypt provides a useful comparative tool to shed light in Iraq's current legal situation and the shape it may take in the future); see Filkins & Glanz, *supra* note 5, at A8 (observing that Shiite leaders were planting the seeds for an Islamic theocracy); see *supra* note 15 and accompanying text (explaining that Turkey is far too secular for Iraq at this time because of its extreme separation of church and state).

17. This Comment analyzes the constitutions of Iraq, Iran and Egypt in a limited fashion, focusing principally upon key articles pertaining to religion, democracy and Islam. This Comment is not comprehensive, but only examines the most significant articles pertaining to Islam and democracy from each constitution.

in each state's respective constitution, focusing on the articles principally concerned with Islam. Part II dissects each constitution into separate sections and then explores and compares the provisions relevant to the influence of Islam and democracy. The preamble,¹⁸ source of law provision,¹⁹ and protection of Islam provision of each state are highlighted in order to demonstrate the ambit of influence attributed to Islam and democracy.²⁰ As well, Part II examines the judiciary of each state, canvassing the provisions describing the function and composition of the highest court and personal status courts (courts concerned with personal and family law).²¹ Finally, Part III concludes that Iraq will achieve a balance of Islam and democratic principles so long as the constitution is strictly interpreted by judges familiar with Islam.²²

I. BACKGROUND

The constitutions of Iraq, Iran and Egypt each contain provisions which, implicitly and explicitly, allocate authority to Islam and protect democratic principles. Highlighting and isolating these provisions in the constitution of each respective state provides an illustrative indication of Islam's possible scope of influence.²³

18. See discussion *infra* Part II.A.

19. See discussion *infra* Part II.B.

20. See discussion *infra* Part II.C.

21. See discussion *infra* Parts II.D & E. Courts of personal status in the Muslim world mainly apply Islamic law to marriage, divorce and inheritance cases. See Farnaz Fassihi, *Iraq Constitution Talks Hit Impasse; Divisions Over Islamic Law, Regional Governments' Role Remain as Deadline Looms*, WALL ST. J., Aug. 15, 2005, at A3. See generally Melanie D. Reed, *Western Democracy and Islamic Tradition: The Application of Shari'a in a Modern World*, 19 AM. U. INT'L L. REV. 485, 487 (2004) (discussing the role of Islamic courts in both the Muslim and non-Muslim world and raising the issue as to whether Islamic courts do in fact adequately protect basic human rights).

22. See discussion *infra* Parts III.A-D (recommending that the constitution be literally and strictly construed by judges schooled in Islamic law).

23. See discussion *infra* Part I.A-C (denoting the provisions in the constitutions of Iraq, Iran and Egypt pertinent to Islam's scope of power and democratic principles).

A. *The Republic of Iraq's Constitution*

1. *The Context of the Newly Promulgated Constitution*

The population of Iraq consists of three principle groups: Shiite Muslims, Sunni Arabs and Kurds.²⁴ Engaging and appeasing each unique group in formulating the new constitution proved to be a monumental task given that each group brought distinct interests and concerns to the negotiating table.²⁵

The Shiite Muslims, who make up the majority of the population of Iraq, believed Islam warranted an imperious role in the new constitution.²⁶ Their liberation from a state of oppression under Saddam Hussein invigorated their desire for a powerful, centralized, religious-oriented government.²⁷ In staunch opposition, the Sunni Arab minority, whom affiliated with the Ba'ath Party under Saddam Hussein, sought a de-centralized government, attempting to preserve their self-governance.²⁸ The

24. See *Iraq*, *supra* note 3 (stating that the two largest ethnic groups are Arabs and Kurds and that most Iraqi Muslims are Shiites, but there is also a large Sunni population made of both Arabs and Kurds).

25. See James Glanz, *Constitution or Divorce Agreement*, N.Y. TIMES, Oct. 9, 2005, § 4, at 1, 4 (providing that due to the large differences between the people, Iraq is threatening to become "a collection of independent fiefs, none truly viable as full-fledged nations, that are locked in a civil war").

26. Fassihi, *supra* note 21 (some Shiite groups have called for the establishment of an Islamic state similar to Iran). See Pub. Int'l Law & Policy Group & The Century Found., *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations* (2003), <http://www.publicinternationallaw.org/publications/reports/IraqReport.pdf> [hereinafter *Stable Democratic Constitutional Structure*]. However, under the current system, the Shiites should have a substantial representation because they represent 60% of the population. *Iraq*, *supra* note 3.

27. See *Tough Shiite*, THE NEW REPUBLIC, Mar. 22, 2004, at 7 (explaining that during the negotiating process, the Shiites had objectives of enabling the majority and increasing their influence).

28. *Stable Democratic Constitutional Structure*, *supra* note 26, at 9. The Sunni make up an estimated 32-37% of the Iraqi population. *Iraq*, *supra* note 3. When the rest of Iraqis went to the poles in January of 2005 to vote, most of the Sunnis stayed home in a planned boycott, thus giving them a limited role in drafting the constitution. See Opperl, *supra* note 4 (reporting that while in Iraq, Condoleezza Rice urged the Shiite-dominated government to increase the involvement of the Sunni minority in the constitution). See also Greg Jaffe, *For U.S. Military, A Key Iraq Mission Is Adverting Civil War*, WALL ST. J., Oct. 14, 2005, at A1 (observing that in order to produce political harmony among groups and avoid a civil war, the Sunnis needed to be more involved).

Sunni also believed Islam warranted a domineering role in the new constitution, but follow a different strand of Islam from that of the Shiites.²⁹ Finally, the minority Kurds, whom are also Muslim but differ in language, dress and customs, wanted to maintain their autonomy in the North and limit Islam's influence in the constitution.³⁰

The Sunnis wanted a weak central government, allowing more power to the states, so in effect they can continue to rule as they did in the former Iraq. *See Stable Democratic Constitutional Structure, supra* note 26, at 9 (stating that in addition to a weak central government, the Sunnis are concerned about profits from oil). Since the majority of Sunnis are in central Iraq, they lack access to the oil rich land found in the north and south and fear they will be denied access. *Id.* In response to this concern, days before the national referendum, both the Shiites and Kurds conceded to distribute more evenly the oil profits in order to encourage Sunni support. *See A Nearly Final Constitution, THE ECONOMIST*, Sept. 3, 2005, at 41 (noting the disagreement over the distribution of oil profits). *See also* Fassihi, *supra* note 21 ("The Kurds want control of a significant share of the oil revenues..., while the Shiites and Sunnis contend that revenues should be controlled by the central government.").

The Sunnis ultimately participated in the referendum on October 15, 2005, which was a positive step toward forming a new government, even though most Sunnis voted against the referendum. *See Wong, supra* note 4 (explaining that two Sunni provinces rejected the constitution and the third one approved it). Sunni Arab leaders say they will focus on winning seats in the new parliament and push for changes. *See id.*

29. *See* Moughesh Shisheneh Mozafarian, Note, *The Fallacy of Hejab in Iran: A Critique of Islamic Judicial Review as Performed by the Guardian Council of the Islamic Republic*, 12 S. CAL. REV. L. & WOMEN'S STUD. 279, 285-86 (2003) (noting that one of the major differences between the Sunni and Shiites is how Islamic law is interpreted and rationalized). Shiites believe divine Islamic Law can flexibly apply to new situations while the Sunni believe the law has been fixed for centuries. *Id.* *See* Jaffe, *supra* note 28 (deep divisional rivets and hatred among the Sunni and Shiite have caused significant casualties since the commencement of the new Iraqi government).

30. *Iraq, supra* note 3. The Kurds make up much of the northern population of Iraq. *Stable Democratic Constitutional Structure, supra* note 27, at 9. At the end of the twentieth century, the Kurds attempted to rebel and leave Iraq. *Id.* To quell the rebellion, Saddam Hussein attempted to dispose of the Kurds using chemical weapons of mass destruction leading to the death of nearly 200,000 Kurds. *See generally Human Rights Watch, Genocide in Iraq: the Anfal campaigning against the Kurds* (1993), <http://www.hrw.org/reports/1993/iraqanfal/> (last visited Nov. 29, 2006) (explaining that Saddam Hussein caused the Kurds to flee their city of Kirkuk and as a result, in 1992, the United States and Britain established a no-fly zone in order to protect the Kurds).

The Kurds are interested in maintaining their autonomy and favor a de-centralized government. *See Stable Democratic Constitutional Structure, supra* note 26, at 15 (observing that the Kurds desire a Kurdish Region which

Through deliberation and debate the three groups finally arrived at a consensus on August 28, 2005, marking a revolutionary day in the Middle East.³¹

2. *The Preamble*

The Republic of Iraq's³² Constitution's preamble commences by nobly acknowledging the country's origin and heritage: "We are the people of the land between two rivers, the homeland of the apostles and prophets, abode of the virtuous imams,³³ pioneers of civilization, crafters of writing and cradle of numeration."³⁴

In the subsequent paragraph, the preamble calls attention to the fact that Iraqis voted for the first time on January 30, 2005 "in response to the call of [their] religious and national leadership."³⁵ The preamble then laments the torture, oppression and terror endured under the iron fist of Saddam Hussein and dramatically proclaims the Iraq of the future "free from sectarianism, racism, locality complex, discrimination and exclusion."³⁶

The system of government identified in the preamble grants "an equal opportunity for all"³⁷ by providing "a republican, federal,

would allow them to "preserve and expand their existing level of self-rule"). Kurds, whom are more secular than the other groups, would also like to minimize the effects of Islam in the Republic of Iraq. See generally *A Nearly Final Constitution*, *supra* note 28, at 2 (explaining that the "secular-minded Kurds fear an Islamic theocracy").

31. Raman, *supra* note 5; see Glanz, *supra* note 25 (insisting that the balance between Islam and democracy in Iraq "could form the basis for a form of government that would be revolutionary in the Middle East").

32. It is interesting to note that the drafters heavily disputed the name of Iraq. Nathan Brown, *The Final Draft of the Iraqi Constitution: Analysis and Commentary* 3 (2005), available at <http://www.carnegieendowment.org/files/FinalDraftSept16.pdf>. The debate was whether Iraq should be called a federal and/or Islamic state. *Id.* For the final draft of the Constitution, the drafters dropped the proposal for Iraq to be named an Islamic state and choose the name the country has held since 1958, the Republic of Iraq. *Id.*

33. An Imam is a Muslim leader said to have direct succession from Muhammad, and therefore in theory is the divinely appointed and rightful ruler of the faithful. Nolan, *supra* note 3, at 167.

34. The Permanent Const. of The Republic of Iraq. pmb1.

35. *Id.*

36. *Id.* For a comprehensive study of the history of Iraq, see generally CHARLES TRIPP, *A HISTORY OF IRAQ* 5-6 (2d ed. 2002) (recounting Iraq's history of social conflict, wars, dictators and politics).

37. The Permanent Const. of The Republic of Iraq. pmb1.

democratic, pluralistic system.”³⁸ Accordingly, the preamble calls upon all Iraqis to “respect the rules of law, to establish justice and equality [and] to cast aside the politics of aggression.”³⁹ Finally, in the last paragraph, the Iraqis declare that they “freely choose to draft this lasting constitution.”⁴⁰

3. *Islam’s Source of Authority Provision*

When drafting Article 2(1), the drafters⁴¹ struck an impasse in deciding whether Islam should be “a” main source of legislation or “the” main source of legislation.⁴² After a drawn-out debate, they ultimately decided for Islam to be “a main source of legislation.”⁴³

4. *Protection of Islam and Democracy Provisions*

The drafters of the Iraqi constitution addressed freedom of

38. *Id.*

39. *Id.* See generally Wael B. Hallaq, “Muslim Rage” and Islamic Law, 54 HASTINGS L.J. 1705 (2002-03) (observing that because of the attacks of September 11th, Western notions of Islam tend to see the violence as causally connected with the entire religion of Islam; it is true that Islamic fundamentalists can be aggressive, but it is not an inherently violent religion).

40. The Permanent Const. of The Republic of Iraq. pmbl. The Kurds stressed the word “freely” to demonstrate that each group (Sunnis, Shiites and Kurds) freely chose to join the Republic of Iraq and thus, in the event the Kurds decide to succeed, they would have no obligation to remain with Iraq. Brown, *supra* note 32, at 1.

41. See John F. Burns, *Iraq Legislators Set Up Panel to Draft Constitution*, N.Y. TIMES, May 11, 2005, at A9 (discussing the committee selected to draft the Iraq’s permanent constitution, who consisted of 28 members of the Shiite alliance and 27 nominees from other groups).

42. Brown, *supra* note 32, at 2; John F. Burns, *Shiites Offer to Give Sunnis Larger Role on Broader Panel Writing a Constitution*, N.Y. TIMES, May 26, 2005, at A16 (stating that Islam was made just one of the sources of legislation to act as a shield against an Iranian theocracy). See Fassihi, *supra* note 22 (acknowledging that the Shiites want to give Islam a dominating presence in the government). See also *A Nearly Final Constitution*, *supra* note 28 (noting that the language on Islam aroused much argument, especially among the Kurds who feared an Islamic theocracy).

43. The Permanent Const. of The Republic of Iraq. art. II, § 1. Some versions of the constitution translate this article as “a basic source of legislation.” Associated Press, *Test of Iraq’s Draft Charter*, N.Y. TIMES, Oct. 12, 2005, at <http://www.nytimes.com/2005/10/12/international/middleeast/12web-itex.html?ex=1162270800&en=735586f89791e9d7&ei=5070> (emphasis added).

religion through Articles 2(1)(a) and 2(2), the former addressing Islam specifically in requiring that “no law that contradicts the established provisions of Islam may be established.”⁴⁴ Article 2(2), addressing a broader notion of religion, protects religion by guarantying that all individuals will have full “freedom of religious belief and practice.”⁴⁵

The constitution addresses democracy through three different provisions, each dealing with a different aspect of democracy. Article 2(1)(b), which applies to the judiciary and parliament, boldly requires that no law will be established that “contradicts the principles of democracy.”⁴⁶ Article 1 addresses the government as a whole, describing it as representative and democratic.⁴⁷ Finally, Article 5 concerns the democratic processes of Iraq, providing that the people are the source of authority and that the “transfer of authority shall be made peacefully through democratic means.”⁴⁸

5. *The Supreme Federal Court and Personal Status Courts*

Articles 89 and 90 delineate the composition and jurisdiction of the Iraqi Supreme Federal Court.⁴⁹ Article 89(2) requires that

44. The Permanent Const. of The Republic of Iraq. art. II, § 1A. A prior Associated Press/N.Y Times translation states that “no law can be passed that contradicts the undisputed rules of Islam.” Associated Press, *Text draft of the constitution*, Aug. 28, 2005, www.nytimes.com/2005/08/28/international/iraqtext_new.html?pagewanted=all (last visited Nov. 30, 2006). Nathan Brown, an Islamic expert, translated this article as “No law can be passed that contradicts the fixed elements of the rulings of Islam.” Brown, *supra* note 32, at 2. For the purposes of this Comment, the difference is minor because Brown and the Associated Press both agree that the phrase generally suggests that no legislation shall contradict Islam.

45. The Permanent Const. of The Republic of Iraq. art. II, § 2. There are other articles guaranteeing religious rights which put into place general provisions of religious freedom. The Permanent Const. of The Republic of Iraq. art. 41, § 1B & 2. (“The follower of all religion and sects are free in the practice of religious rites ... [and] ... [t]he state guarantees freedom of worship and the protection of worship places.”).

46. The Permanent Const. of The Republic of Iraq. art. II, § 1B. See *Iraq’s Constitution: Democracy or Division*, *supra* note 7 (stating that according to one survey, 88% of Iraqi’s approved of keeping this clause in the constitution).

47. The Permanent Const. of The Republic of Iraq. art. 1.

48. *Id.* at art. 5.

49. *Id.* at art. 89, 90. Federal Supreme Court Judges shall be elected “by a two-third majority of the members of the Council of Representatives.” The

“the Federal Supreme Court shall be made up of a number of judges, and experts in Islamic jurisprudence and law experts whose number, the method of their selection and the work of the court shall be determined by a law enacted by two-thirds of the members of the Council of Representatives.”⁵⁰ Article 90(1) and (2) endow the Supreme Federal Court with jurisdictional authority, namely, “oversight of the constitutionality of the laws . . . and interpretation of the provisions of the constitution.”⁵¹

In regard to personal status courts, Article 92 prohibits “special or exceptional courts.”⁵² However, Article 39 grants Iraqis freedom “in their commitment to their personal status according to their religions,” with the condition that this provision be regulated by law.⁵³

B. *The Islamic Republic of Iran’s Constitution*

1. *The Preamble*

The Islamic Republic of Iran’s preamble openly declares itself “an Iranian society based on Islamic principles and norms, which represent an honest aspiration of the Islamic Ummah.”⁵⁴ The

Permanent Const. of The Republic of Iraq, art. 2. See Kirk Semple, *The Struggle for Iraq: Compromises; Constitution Panel Proposes Some Limits on Role of Clergy*, N.Y. TIMES, Aug. 4, 2005, at A9 (reporting that some drafters said the constitution should not grant political authority to the country’s religious leaders).

50. The Permanent Const. of The Republic of Iraq, art. 93. Due to the disputes and disagreements regarding the court, the drafters deferred many of the details of the court to legislation. See Brown, *supra* note 32, at 10 (explaining that the Council of Representatives is the Iraqi parliament or legislative branch of government).

51. The Permanent Const. of The Republic of Iraq, art. 90 §§ 1, 2. Other matters fall within the jurisdiction of the courts. See, e.g., *id.* at art. 90 § 3, (settling matters that arise from the application of the federal laws); *id.* at art. 90 § 4 (settling disputes between the federal government and regional governments); *id.* at art. 90 § 6 (settling accusations directed against The President, Prime Minister and the Ministers); *id.* at art. 90 § 7 (ratifying the final results of the general elections for the Council of Representatives).

52. *Id.* at art. 92.

53. *Id.* at art. 44; see Reed, *supra* note 21, at 497 (explaining that religious courts in the Muslim world may make some members of the community “feel forced to live up to standards in which they do not fully believe”).

54. Qanuni Assassi Jumhuri’I Isla’mai Iran [Constitution] pmbl. (Iran); see Nolan, *supra* note 3, at 183 (explaining that an Ummah is the ultimate

preamble attributes the pain and suffering of Iran during the early and middle of the twentieth century to a departure from genuine Islamic principles.⁵⁵ The revolution of 1979 ended these years of blood and struggle, enabling the emergence of an Islamic state governed by the Koran.⁵⁶ In fact, the preamble necessitates that the government “revolve around the Koran and the Sunnah.”⁵⁷ Not surprisingly, numerous passages in the preamble cite verses directly from the Koran.⁵⁸

The preamble also predicates Iran’s objective to “guarantee the rejection of all forms of intellectual and social tyranny and economic monopoly.”⁵⁹ In effect, the aforementioned objective competes with the other main objective, namely “to realize the ideological objectives of the [Islamic] movement and develop man in accordance with the noble and universal values of Islam.”⁶⁰

2. *Islam’s Source of Authority Provision*

The Iranian Constitution grants authority to Islam under

aspiration of the Iranians, namely an Islamic Community).

55. Iran Const. pmbl (“[T]he Muslim people of Iran learned from this costly experience that the obvious and fundamental reason for the failure of those movements was their lack of an ideological basis.”).

56. Iran Const. art 1.; *see also* HAMID R. KUSHA, *THE SACRED LAW OF ISLAM: A CASE STUDY OF WOMEN’S TREATMENT IN THE ISLAMIC REPUBLIC OF IRAN’S CRIMINAL JUSTICE SYSTEM 2* (2003) (“The Qur’an [Koran] is believed to represent the verbatim word of God, gradually revealed to the Prophet Muhammad within a period of twenty-three years (610-632).”); Mozafarian, *supra* note 29, at 283 (defining the Koran as the set of God’s revelations, as revealed through the Angel Gabriel to the Prophet Mohammed). The Koran consists of the core beliefs of Islamic society and establishes the criteria for being Muslim. *Id.*

57. Iran Const. pmbl; *see* Mozafarian, *supra* note 29, at 284 (defining the Sunnah as an assemblage of laws deduced from the Prophet Mohammed’s saying or conduct); *see also* KUSHA, *supra* note 56, at 3 (explaining that the Sunnah plays a secondary role to the Qur’an [Koran], which is the primary authority). When the Koran is silent, the Sunnah is the next source to be consulted. *Id.*

58. Iran Const. pmbl. The Koran is directly quoted seven times in the preamble. *Id.* For example, when describing the divine order of Islam, the preamble quotes the Koran, 3:28 “And toward God is the journeying.” *Id.*

59. *Id.*

60. *Id.* *See* Reed, *supra* note 21, at 509 (stating that a primary goal of Islam is “to create an Islamic community that brings all people, equal before God, together in a community founded upon God”); *see infra* Part I.B.4 (suggesting that the Iranian Council of Guardians in effect oppressively rules the people in order to fulfill Islamic objectives).

Article 4, which provides that “[a]ll civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria.”⁶¹ This principle applies absolutely and generally to all articles of the constitution, as well as to all other laws and regulations.⁶² Additionally, many provisions in the constitution contain the precondition that they are “in accordance with the law of Islam.”⁶³

3. *Protection of Islam and Democracy Provisions*

Iran lacks a true freedom of religion provision and instead recognizes in Article 13 “Zoroastrian,⁶⁴ Jewish, and Christian Iranians as the only religious minorities who are free to perform their religious rites and ceremonies within the limits of the law.”⁶⁵ Likewise, the constitution lacks a provision protecting Islam, but instead goes a step further by actively requiring all regulations to be founded in Islamic criteria.⁶⁶

The constitution contains numerous articles protecting democratic principles, the most significant of them being Article 6, which states “the administration shall be based on public opinion expressed by the means of elections.”⁶⁷ Along with insuring democratic elections, the constitution also provides for fundamental democratic rights such as equality of rights, equal protection, freedom of press, secrecy of communication, freedom of

61. Qanuni Assassi Jumhuri’I Isla’mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980] art. 4.

62. *Id.* See ASGHAR SCHIRAZI, THE CONSTITUTION OF IRAN 10 (John O’Kane trans., 1998) (“Article 2 binds legislation to the Sharia by representing legislation as power reserved for God and acknowledging that revelation has a fundamental role in the promulgation of laws.”).

63. *See id.* at 11 (“[T]he articles which describe the rights of the people in general and the democratic rights of the citizens in particular always include the precondition that these rights must be compatible with Islamic ideals and principles or simply with ‘the law’ (naturally, Islamic law is meant).”).

64. *See* Grossman, *supra* note 16, at 83 (“According to Islam, religions are classed by degrees of preference as follows: Islam, Judaism, Christianity, Zoroastrianism ... and in last place polytheists.” (quoting Sami Awad Aldeeb Abu-Sahlieh, *L’impact de la religion rue l’ordre juridique*, NON-MUSULMANS EN PAYS D’ISLAM 256 (1979))).

65. Qanuni Assassi Jumhuri’I Isla’mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980] art. 13.

66. *Id.* at art. 14.

67. *Id.* at art. 6.

association and freedom of assembly.⁶⁸

4. *The Guardian Council and Personal Status Courts*

In order to safeguard Islamic ordinances and the constitution, Article 91 promulgates a Guardian Council consisting of six religious men,⁶⁹ conscious of the present needs and issues of the day, and six jurists, specializing in different areas of the law, selected by the head of judicial power.⁷⁰ The Guardian Council has authority under Articles 94 and 96 to review all legislation passed by the Islamic Consultative Assembly (Iranian legislature) and the power to determine the compatibility of legislation with the constitution.⁷¹

If the powers mentioned above are not enough, under Article 99, the Guardian Council supervises the elections of representatives to the Islamic Consultative Assembly and also acts as the direct recourse to popular opinion and referenda.⁷² In practice, all courts are based on Islamic law, which includes courts of personal status.⁷³ All provisions and judiciary structure considered, Iran's non-restrictive and liberating approach to Islamic law has essentially created a Islamic theocratic state.⁷⁴

68. Qanuni Assassi Jumhuri'I Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980] art. 19-27. Iran's Constitution also expressly protects women's rights, but with a condition that the article is "in conformity with Islamic criteria." *Id.* at art. 21.

69. See Sachs, *supra* note 15, at 21 (religious clerics can cite Islamic law to void legislation and disqualify candidates for public office).

70. Qanuni Assassi Jumhuri'I Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980] art. 91; SCHIRAZI, *supra* note 62, at 12 (indicating that the only jurists entitled to rule are committed experts on Islam who are distinguished as God fearing men and who hold some sort of religious office).

71. Qanuni Assassi Jumhuri'I Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980] art. 94, 96. The Constitution itself gives the Guardian Council authority to interpret the constitution. *Id.* at art. 98.

72. *Id.* at art. 99.

73. See Mozafarian, *supra* note 29, at 289 (explaining that the entire judiciary is subject to the review by the Guardian Council based on its compatibility with Islam).

74. See Silt, *supra* note 5, at 717 (explaining that Iran is an Islamic Republic where all state affairs are subrogated to the review of religious leaders); see *The Law of Man or the Law of God?*, THE ECONOMIST, Sept. 13, 2003, at 11 (insisting that Iran epitomizes the opposite of democracy); Bureau of Near E. Affairs, U.S. Dep't of State, *Background Note: Iran* (2006), <http://www.state.gov/r/pa/ei/bgn/5314.htm> (last visited Nov. 29, 2006)

C. *The Arab Republic of Egypt's Constitution*

1. *The Preamble*

The Arab Republic of Egypt's preamble, referred to as the constitutional proclamation,⁷⁵ begins by declaring the Egyptian people confident in their profound faith and respectful of the honor of man and humanity.⁷⁶ The preamble pledges to realize four objectives: "(1) Peace based on justice and freedom, (2) Arab Unity, (3) development of life through the nation, and the (4) freedom for the humanity of the Egyptian man."⁷⁷ While the preamble applauds protections of democracy and addresses faith generally, it fails to mention Islam specifically.⁷⁸

The preamble concludes by asserting a pledge to protect the country through furthering democracy and upholding the fundamental principles of "freedom, socialism and unity."⁷⁹

2. *Islam's Source of Authority Provision*

After heated debate among drafters,⁸⁰ Article 2 of the 1971 Egyptian Constitution stipulated that "the Islamic Sharia⁸¹ is a

[hereinafter Iran] (noting that "Iran's relations with many of its Arab neighbors have been strained by Iranian attempts to spread its Islamic revolution").

75. *Dustur Jumhuriyyat Misr Al-'Arabiyya* [The Const. of The Arab Republic of Egypt] pmbl.

76. *Id.*

77. *Id.* See generally Bureau of Near E. Affairs, U.S. Dep't of State, *Background Note: Egypt* (2006), <http://www.state.gov/r/pa/ei/bgn/5309.htm> (last visited Nov. 29, 2006) [hereinafter *Egypt*] (discussing the history, government, economy and people of Egypt).

78. *Dustur Jumhuriyyat Misr Al-'Arabiyya* [The Const. of The Arab Republic of Egypt] pmbl.

79. *Id.*

80. See Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 85 (1998) (delineating the vigorous public debate that occurred on the issue of how much Islamic influence should be in the new constitution).

81. "Sharia law is the technical term for 'Islamic law.'" *Id.* at 91 (quoting 'Adb al-Halim Mahmud, *Debate on the Application of Shari'a in Egypt*, Al-Ahram, May 7, 1976). It is the body of rules that God revealed to men in the sacred texts of Islam. *Id.* Muslims consider obedience to the Sharia to be a crucial religious duty." *Id.*

main source of legislation.”⁸² However, as opposition increased from proponents of Islam,⁸³ the government amended Article 2 in 1980 to “the principles of the Islamic Sharia are *the* main source of legislation.”⁸⁴ Since the reformation of Article 2, the Supreme Constitutional Court (SCC) has interpreted the article by applying a two part test: (1) the authenticity of the text [Koran] must be proven beyond doubt; and (2) there must be one absolutely clear meaning of the text.⁸⁵ In effect, this test has reduced the application of Sharia law to limited circumstances.⁸⁶

3. *Protection of Religion and Democracy*

The Egyptian Constitution, pursuant to Article 46, generally protects religion in “guarantying the freedom of belief and the freedom of practice of religious rites,” but does not specifically mention Islam.⁸⁷

The Egyptian Constitution recognizes democracy from the very beginning of the constitution by describing Egypt as a democratic, socialist state where the people alone are the source of authority.⁸⁸ Later in the text, the constitution additionally guarantees freedom of opinion, freedom of press, freedom of assembly and human rights.⁸⁹

4. *Supreme Constitutional Court (SCC) and Personal Status Courts*

Pursuant to Article 175, the SCC has the authority to

82. *Dustur Jumhuriyyat Misr Al-'Arabiyya* [The Const. of The Arab Republic of Egypt] art. 2 (as originally set forth in the 1971 constitution) (emphasis added).

83. See Lombardi, *supra* note 80, at 86 (finding that because the pro-Islamist movements had grown too powerful in Egypt, the government was forced to make changes). Consequently, in 1980 the government amended the constitution to give Islam a more influential role. See *id.*

84. *Dustur Jumhuriyyat Misr Al-'Arabiyya* [The Const. of The Arab Republic of Egypt] art. 2 (amended version) (emphasis added).

85. See Lombardi, *supra* note 80, at 99.

86. See Silt, *supra* note 5, at 727 (acknowledging that the two part test passed by the Supreme Constitutional Court (SCC) made it much more difficult for Sharia law to invalidate legislation).

87. *Dustur Jumhuriyyat Misr Al-'Arabiyya* [The Const. of The Arab Republic of Egypt] art. 46.

88. *Id.* at art. 1.

89. *Id.* at art. 47-48, 70.

“undertake the judicial control in respect of the constitutionality of the laws and regulations . . . in accordance with the manner prescribed by law.”⁹⁰ The composition of the court is described by Article 176, which states that “[t]he law shall organize the way of formation of the Supreme Constitutional Court, and prescribe the conditions to be fulfilled by its members.”⁹¹ The constitution is silent in regard to requirements for judges and personal status courts.⁹² Due to Egypt’s judicial structure and constitutional protections of democracy, it is considered a secular democracy.⁹³

II. ANALYSIS

The Iraqi Constitution, although ambiguous in certain respects, aligns itself closer to an Egyptian secular democracy than an Iranian theocracy.⁹⁴ Through Iraq’s historically founded preamble and unique, meticulous approach to Islam, the drafters appeased the potentially hostile tension between Islam and democracy by fully respecting the history of Islam while protecting democratic principles.⁹⁵

90. *Id.* at art. 175; see Lombardi, *supra* note 81, at 83 (comparing the SCC to the United States Supreme Court because the SCC is the supreme source of law, whose interpretation of a constitution is binding upon all other courts).

91. *Dustur Jumhuriyyat Misr Al-‘Arabiyya* [The Const. of The Arab Republic of Egypt] art. 176.

92. Nathan J. Brown, *Arab Judicial Structures: A Study to the United Nations Development Program*, <http://www.undp-pogar.org/publications/judiciary/nbrown/egypt.html> (last visited Sept. 25, 2006).

93. See *Egypt*, *supra* note 77 (“Egypt’s judicial system is based on European (primarily French) legal concepts and methods.”). Additionally, the Egyptian constitution provides for a strong executive with the authority vested in the President. *Id.* Courts have demonstrated increasing independence and the principles of due process and judicial review are more widely accepted. *Id.*

94. See discussion *infra* Part II. A–D (comparing Iraq’s preamble and other provisions concerning Islam to the preamble and similar provisions in the Iranian and Egyptian constitutions).

95. See Yakub, *supra* note 9, at 270 (“Despite the fact that some political thinkers believe Islam is hostile to democracy, there are in fact numerous references in Islamic jurisprudence that pertain to representative government, respect for the rule of law, and individual freedom.”).

A. The Iraqi Preamble Recognizes a Heritage of Islam While Safeguarding Principles of Democracy.

Iraq's preamble demonstrates a balance between Islam and democratic principles and generally suggests that the drafters intended that the constitution allocate equal weight to each, similar to Egypt's Constitution.⁹⁶ The first sentence identifies the two authorities who brought the state into being: religious leaders – the prophets, apostles, and imams and secular leaders – pioneers of civilization and crafters of writing.⁹⁷ This sentence indicates the existence of an ideological harmony among religious and secular leaders in Iraq.⁹⁸ Additionally, the preamble credits both religious and national authorities with inspiring and guiding the state to a new constitution.⁹⁹ Thus, the preamble creates a harmonious backdrop of democracy and Islam while implicitly urging the furtherance of this harmony throughout the constitution.¹⁰⁰

The preamble also focuses on the evolution of Iraq from an oppressed state to a democratic state.¹⁰¹ It highlights the fact that all Iraqis freely voted their leaders into office in the elections of January 15, 2005 and suggests that Iraq, as a democratic state, has reached the apex of its civilization.¹⁰² Thus, while praising and honoring a heritage of Islam, the preamble strongly recognizes the importance of democratic principles.¹⁰³ This

96. See discussion *infra* Part I.A.2 (describing the Iraqi preamble and its effort to balance principles of democracy with Islam).

97. The Permanent Const. of The Republic of Iraq. pmbl.

98. See generally TRIPP, *supra* note 36, at 5 (relating the principle political structures and ideologies of Iraq).

99. Cf. Brown, *supra* note 32, at 2 (discussing the debates that occurred as both religious and civil authorities negotiated the issues of the constitution). See generally Silt, *supra* note 5 (relating an extensive background on the drafting of the interim constitution).

100. See discussion *infra* Part I.A.2 (relating aspects of the preamble to the Iraqi Constitution in order to demonstrate that drafters intended both democracy and Islam to balance one another not only in the preamble, but throughout the entire constitution).

101. See generally Bali, *supra* note 12, at 431-33 (discussing the downfall of Iraq's former dictator Saddam Hussein and the rise of a movement of freedom in Iraq).

102. See generally Iraq, *supra* note 3 (recounting Iraq's evolution from an oppressed state under a dictatorship to a newly emerging democracy).

103. See discussion *infra* Part I.A.3 (providing the principle references to

established balance extends beyond the borders of the preamble itself and overflows into the constitution, demanding the mutual existence of Islam and democracy.¹⁰⁴

Similar to Iraq, Egypt's constitutional proclamation (preamble) conveys a message of moderation between Islam and democracy.¹⁰⁵ The constitutional proclamation admonishes democratic principles while at the same time acknowledging an Arabic heritage.¹⁰⁶ In the first sentence, Egypt sets forth the objectives of freedom, socialism and unity, demonstrating a firm commitment to democracy.¹⁰⁷ At the same time, the proclamation honors Islam by identifying the people as strong in their profound faith and by envisioning the objective of Arab unity.¹⁰⁸

Conversely, the Iranian preamble is distinguished from Iraq's because of the lack of references to democratic principles and heavy emphasis on Islam.¹⁰⁹ The Iranian preamble forecasts an Islamic theocracy and permits Islamic jurisprudence unfettered authority.¹¹⁰ It calls for an Iranian Islamic Republic "based on

both democracy and Islam in the Iraqi preamble).

104. See also Yakub, *supra* note 9, at 299 (acknowledging that there are difficulties interpreting Islamic law in changing times just as the United States struggles to interpret the constitution in changing times, but in the end Islamic law is compatible with democracy and in fact started as a religion that liberated people from political oppression and social inequality).

105. *Dustur Jumhuriyyat Misr Al-'Arabiyya* [The Const. of The Arab Republic of Egypt] pmbl.

106. See discussion *supra* part I.C.1 (discussing Egypt's constitutional proclamation and the articles upholding Islam and protecting democracy).

107. *Dustur Jumhuriyyat Misr Al-'Arabiyya* [The Const. of The Arab Republic of Egypt] pmbl. ("[We] carry the responsibility of great present and future objectives whose seeds are embedded in the long and arduous struggle, and which hosted the flags of freedom, socialism and unity along the path").

108. See *Dustur Jumhuriyyat Misr Al-'Arabiyya* [The Const. of The Arab Republic of Egypt], translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Omer Faruk Genckaya trans., Gisbert H. Flan ed., 2003) Turkey, a more secular state than Egypt and Iraq, focuses on rights and freedoms of the individual in its preamble by requiring equality and social justice while striving to "attain to the level of contemporary civilization." The Constitution of The Republic of Turkey pmbl.

109. See Hallaq, *supra* note 39, at 1714 (suggesting that the Iranian revolution was one of many movements through out the world constituting a resurgence of fundamentalist Islam); See *Qanuni Assassi Jumhuri'I Isla'mai Iran* [The Constitution of the Islamic Republic of Iran] 1358 [1980] pmbl.

110. See *Iran*, *supra* note 74 (recounting that after the Iranian revolution (described in the preamble), a theocratic republic was formed where clergy

Islamic principles” that unflinchingly adheres to the Koran and Sunnah.¹¹¹ Moreover, after attributing the pain and torture of Iran in the twentieth century to an Islamic apostasy,¹¹² Iran aspires to build an ideal Islamic society, neglecting to mention principles such as equality, freedom of religion or social justice.¹¹³

Thus, from a preamble perspective, Iraq resembles a moderate state respective of democratic principles, comparable to Egypt’s secular democracy.¹¹⁴ Both Iraq and Egypt recognize their Islamic origins and history, but at the same time exhibit a democratic ideology through their preambles.¹¹⁵ As to the possibility of an Islamic theocracy, Iraq’s preamble unequivocally distances itself from Iran’s Islam dominated preamble.¹¹⁶

B. Article 2(1) of the Iraqi Constitution Grants Islam Less Authority than Iran and Egypt.

Article 2 of the Iraqi constitution, providing that Islam is a main source of law, still leaves question and ambiguity as to the ambit of Islam in Iraq.¹¹⁷ This article contains two parts subject to interpretation: (1) “Islam” and (2) “a main source of legislation.”¹¹⁸ The term “Islam” could include, but is not limited to, Sharia law, Fiqh law, Islamic jurisprudence and general principles of Islam.¹¹⁹

dominated the key power structures).

111. See *infra* notes 56-57 (defining both the Koran and the Sunnah as sacred Islam texts).

112. See Reed, *supra* note 21, at 516 (explaining that some Muslims’ right to hold and practice their religion includes the right to prohibit apostasy from their faith).

113. See Qanuni Assassi Jumhuri’I Isla’mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980].

114. See *supra* Parts I.A.2, I.B.1 (describing the preambles of Egypt and Iraq and highlighting their focus on Islam and democracy).

115. See Dustur Jumhuriyyat Misr Al-‘Arabiyya [The Const. of The Arab Republic of Egypt] pmb1; The Permanent Const. of The Republic of Iraq. pmb1.

116. See *supra* Parts I.A.2 & I.C.1 (identifying provisions in the preambles that show the deep contrast between Iraq and Iran in their approaches to Islam).

117. Anne Gearan, *Iraq Constitution Said Vague on Some Points*, Associated Press, Aug. 29, 2005, at 1. In order to please all sides, they had to leave the language broad enough so Shiites, Sunni Arabs and Kurds could at least support and ratify the constitution. *Id.*

118. Silt, *supra* note 5, at 741 (emphasis added).

119. See Reed, *supra* note 21, at 504 (explaining that “[t]he Sharia, the Islamic law derived from the Koran and the Prophet Muhammad’s example,

This signifies that Article 2 could either allow Islam a general presence in Iraqi jurisprudence or call for a specific Islamic law.¹²⁰

The second part of Article 2, “a main source of legislation,” implicitly acknowledges that there are other sources of law apart from Islam, but that Islam is a main source of law.¹²¹ The word “main” could imply that Islam will serve as Iraq’s primary and dominating law or that Islam is one of many “main sources of legislation.”¹²² Thus, Article 2 does in fact limit Islamic law by constricting it to “a” source of legislation, but there is still the possibility of Islam deriving unfettered authority from this article, thus leading Iraq to an Islamic theocracy.¹²³

Iran, in contrast to Iraq, overtly permits Islam unfettered influence pursuant to Article 4, which requires that Islamic criteria be the foundation for all regulations.¹²⁴ In addition, numerous articles in the Iranian constitution contain the condition that the articles are only applicable if “in accordance with the law” (meaning Islamic law) or “in accordance with the law of Islam.”¹²⁵ Thus, Islam effectively infiltrates and pervades

is broadly defined as the way in which Muslims seek order in the society on earth”); Silt, *supra* note 5, at 721 (stating that the Arabic term for the legal doctrine produced from the Sharia is fiqh, which means discernment or comprehension). While Sharia is divine law, Fiqh is human knowledge about the Sharia. *Id.*

120. See generally Lombardi, *supra* note 80, at 85 (denoting the trouble and difficulty of Egypt in defining a similar article in its constitution).

121. See Silt, *supra* note 5, at 742 (attributing the vagueness of Article 2 to the strategy of the diverse drafting parties) (emphasis added).

122. See generally Rohde, *supra* note 8 (elaborating on the role of Islam in the Iraqi constitution and the question as to its scope).

123. See discussion *infra* II.D (emphasizing the large impact that the Federal Supreme Court will have on the interpretation of Article 2 and the ever prevalent danger of an Islamic theocracy); see also *A Nearly Final Constitution*, *supra* note 28, at A1 (arguing that the role of Islamic law should not be enshrined in the constitution, but left to future elected parliaments). This is yet another reason why the make up of the constitutional court in Iraq is important. See *id.*

124. Likewise, Saudi Arabia, almost as liberal in allocating power to Islam, if not more so than Iran, declares the Holy Koran its constitution. Bureau of Near E. Affairs, U.S. Dep’t of State, *Background Note: Saudi Arabia* (2006), <http://www.state.gov/r/pa/ei/bgn/3584.htm> (last visited Nov. 29, 2006). Article 7 states that the Government in Saudi Arabia derives power from the Holy Koran and the Prophet’s tradition. The Constitution of the Kingdom of Saudi Arabia art. 7, available at http://www.oefre.unibe.ch/law/icl/sa00000_.html (last visited Nov. 30, 2006).

125. See *supra* notes 61-63 and accompanying text (insisting and arguing

every article of the Iranian Constitution.¹²⁶

Article 2 in the Egyptian Constitution is also distinct from Iraq's Article 2 because of its strength in wording.¹²⁷ Egypt defines "Islam" as "the principles of Sharia law" and authorizes it to be *the* main source of legislation instead of *a* main source of legislation.¹²⁸ In calling for "the principles of Sharia law," the Egyptian constitution eliminates the possibility of generally recognizing Islamic ideals and narrows Islam to a much more rigid, strict and applicable law.¹²⁹ Iraq, on the other hand, by foregoing the word "principles" or any other qualifier before "Islam," implicitly maintains the ability to generally recognize and apply principles of Islam, instead of a strict, inflexible Islamic law.¹³⁰

In the second element of Article 2, Egypt authorizes Islam more authority than Iraq by calling it *the* main source of legislation instead of *a* main source of legislation.¹³¹ However, despite Egypt's broad allocation of authority to Article 2, Egypt's Supreme Constitutional Court (SCC) has effectively limited the influence of Islam by making stringent requirements for its

that Islam applies generally to all provisions of the Iranian Constitution no matter the interpretation).

126. On the more conservative side of granting Islamic Law influence in legislation, Turkey, who prides itself on secularism, focuses more on the secular state. See Niyazi Öktem, *Religion in Turkey*, 2002 BYU L. REV. 371, 397 (2002) (noting Turkey's effort to separate church from state by prohibiting religious symbols in the public school system).

127. See Lombardi, *supra* note 80, at 86 (declaring that because of the 1980 reformation of Article 2, Islamic law has a more important role in Egyptian society and is a potentially powerful clause).

128. See *Dustur Jumhuriyyat Misr Al-'Arabiyya* [The Const. of The Arab Republic of Egypt] art. 2.

129. See Lombardi, *supra* note 80, at 86-87 (recounting that when Article 2 was adopted in 1971 (as Islamic Sharia as *a* source of legislation), it was not considered to require Egyptian laws to be rewritten to conform to the Sharia). *Id.* However, the new version definitely gives the Sharia more authority to influence Egyptian legislation. *Id.*

130. See Silt, *supra* note 5, at 741 (noting that the Iraqi Interim Constitution tracked the same language, but without a qualifier). Thus, Article 2 could literally signify that any aspect of Islam could be a source of legislation. *Id.*

131. Iraq's current rendition of Article 2 is the same as the Egyptian Constitution of 1971. See Lombardi, *supra* note 80, at 85 ("Article 2 also contained a clause that stated ... 'Islamic Sharia is a principal source of Egyptian legislation.'").

application.¹³² Thus, in practice, Islam is not “the” main source of legislation, but plays a more limited role in Egypt’s jurisprudence.¹³³

In sum, Iraq’s Article 2 pales in comparison to Iran’s domineering, all-authoritative Article 4.¹³⁴ With respect to Article 2 in the Egyptian constitution, Iraq’s Article 2, notably constructed in the same manner as Egypt’s, is seemingly weaker because it only calls for the application of “Islam” generally, instead of a specific Islamic law.¹³⁵ Moreover, Iraq further dilutes Egypt’s Article 2 by promulgating Islam as *a* main source of law instead of *the* main source of law.¹³⁶ Thus, Iraq finds itself taking a more conservative approach in its allocation of authority to Islam than both Egypt and Iran.¹³⁷ Although Iraq has the most conservative approach, it still could enable the effectuation of a dominant Islamic law.¹³⁸

132. See Silt, *supra* note 5, at 727 (explaining that the SCC has rarely invalidated legislation for contradicting Article 2 because of the specificity and narrowness of the two part test).

133. See *id.* at 727-28 (stating that because there exist numerous interpretations of the Koran, in practice experts have difficulty agreeing on one interpretation).

134. See The Permanent Const. of The Republic of Iraq art 2; see Qanuni Assassi Jumhuri’I Isla’mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980] art 4. However, even though Iraq’s Article 2 is weaker than Iran’s Article 4, Article 2 could still lead to a repressive state. Compare Silt, *supra* note 5, at 719 (stating that Iraqis would not be sympathetic to Iran’s system of government because of Iraq’s diverse population and knowledge of Iranian’s dissatisfaction with their government), with Rohde, *supra* note 8, at 4.4 (arguing that the constitution in its current form could possibly lead to an oppressive state).

135. See The Permanent Const. of The Republic of Iraq art 2; Dustur Jumhuriyyat Misr Al-‘Arabiyya [The Const. of The Arab Republic of Egypt] art. 2.

136. The Permanent Const. of The Republic of Iraq. art. 2 §1.

137. For the purposes of this Comment, a more conservative approach to Islam is allowing civil law to rule over Islamic law. A more liberal approach is just the opposite, granting Islamic law power over civil law.

138. Just as occurs in Egypt and Iran, the Supreme Federal Court of Iraq will ultimately decide Article 2’s sphere of influence. See *infra* notes 156-80 and accompanying text (claiming that the Supreme Federal Court of Iraq plays a vital role in the interpretation of Article 2).

C. Article 2(1)(a) and 2(1)(b) Protect both Islam and Democracy, but Set Forth a Vague Standard, Leaving the Possibility of an Iranian-Style Islamic Theocracy.

Through Article 2(1)(a) and Article 2(1)(b), both protectionist clauses, Iraq distances itself from Egypt's approach to Islam and leaves open the possibility of an Islamic theocracy comparable to Iran.¹³⁹ Article 2(1)(a) and 2(1)(b) respectively require that no law may contradict Islam and that no law may contradict democracy.¹⁴⁰ Since the constitution neglects to specifically define Islam and democracy, it is difficult to predict how they will balance each other.¹⁴¹ Democracy could signify that democratic principles will generally apply to all legislation, or it could set forth explicit inalienable rights and freedoms to which all legislation must conform.¹⁴² As discussed previously, Islam could have a spectrum of varying interpretations.¹⁴³ Proponents of an Islamic theocracy will definitely vocalize their support of Article 2(1)(a), while there is question as to whether there is a competent, democratic voice to support Article 2(1)(b) in Iraq.¹⁴⁴

The Iranian constitution parallels the Iraqi Constitution with its two significant protectionist clauses, one protecting Islam and the other democratic principles.¹⁴⁵ Article 4 in the Iranian

139. See Burns, *supra* note 41 ("Shiite religious parties may use their majority in the assembly to ... reject Iraq's strong secular tradition in modern times in favor of a stringently Islamic state.").

140. The Permanent Const. of The Republic of Iraq, art. 2; see Feldman, *supra* note 2 (recognizing that the Shiites, Sunni and Kurds in drafting the constitution deferred many tricky questions for debate by future legislators and judges).

141. See Glanz, *supra* 25 (voicing that the constitution is extremely general, but that this general language could "still be molded by legislation and precedent into a subtle intermingling" of both principles of democracy and Islam).

142. See Stable Democratic Constitutional Structure, *supra* note 27, at 54 (recommending that Iraq promulgate a bill of rights in order to establish mechanisms that protect democracy).

143. See *supra* Part II.B (stating that Islam could signify a specific Islamic law or the general principles of Islam).

144. Whether these two articles are interpreted broadly or narrowly could significantly change the face of Islam in Iraq. See, e.g., Filkins & Glanz, *supra* note 5, at A8 (observing that the Shiites have no qualms in creating an Islamic theocracy).

145. See JURIST, Iran, <http://jurist.law.pitt.edu/world/iran.htm> (last visited Sept. 28, 2006) (stating that Article 4 directly contradicts Article 6 in the

constitution states that Islamic principles apply absolutely and generally to all articles of the Constitution, thus providing a concrete foundation for Islam.¹⁴⁶ Article 6 in the Iranian Constitution protects democracy in providing that elections and public opinion will govern the administration of affairs.¹⁴⁷ However, even though Article 6 provides a basis for democratic principles, in practice Article 4 assumes a significant portion of power and authority in Iran.¹⁴⁸ Therefore, although Iraq does not permit Islam the same dominating presence as Iran in other sections of the Constitution, an expansive, broad interpretation of Iraq's Article 2 could allocate Islam as much authority as Iran's Article 4.¹⁴⁹

The Egyptian constitution is distinguishable from Iraq's because it does not contain an article specifically protecting Islam.¹⁵⁰ The constitution generally protects religion in Article 46, which "guarantees the freedom of belief and the freedom of practice of religious rights," but lacks any specific information on particular religious denominations.¹⁵¹

In terms of democratic protection, the Egyptian Constitution declares Egypt a democratic state where the people are the source of authority and enumerates numerous freedoms for

constitution because the rights granted in Article 6 are unreasonably restricted by Article 4) [hereinafter JURIST, Iran].

146. Qanuni Assassi Jumhuri'I Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980] art 4; *compare* The Constitution of the Kingdom of Saudi Arabia art. 23 & 48 (stating in Article 23 that "the state protects the Islamic creed, carries out its Sharia" and in Article 48 that "the Sharia rules ... that ...do not contradict the Holy Quran and Sunnah"), *with* Qanuni Assassi Jumhuri'I Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980] art 4.

147. JURIST, Iran, *supra* note 145.

148. *See id.* (noting that "[t]he rights granted to the people in Article 6 are unreasonably restricted by the Article 4's mandate that no law or regulation may contradict Islamic principles").

149. *See id.* (commenting on the inability of Iranian citizens to change their government due to numerous restrictions).

150. *See* Dustur Jumhuriyyat Misr Al-'Arabiyya [The Const. of The Arab Republic of Egypt].

151. Dustur Jumhuriyyat Misr Al-'Arabiyya [The Const. of The Arab Republic of Egypt] art. 46; *compare* Kuwait Const. art. 12 (specifically isolating Islam by stating it "safeguard[s] the heritage of Islam"), *with* Dustur Jumhuriyyat Misr Al-'Arabiyya [The Const. of The Arab Republic of Egypt] art. 46.

individuals.¹⁵² Thus, Egypt heavily protects democratic principles and does little more than Article 2 to protect Islam.¹⁵³ In sum, the Iraqi Constitution, by virtue of an additional protective Islamic provision (Article 2(1)(b)), goes beyond the Egyptian Constitution in protecting Islam, and even advances toward Iran's theocratic approach of Islamic exaltation.¹⁵⁴ However, a well-established, competent democratic voice could limit Article 2(1)(b)'s scope of influence.¹⁵⁵

D. The Requirement of Expert Judges on the Supreme Federal Court and Authorizing Personal Status Courts Could Undermine Democratic Principles.

Since the Supreme Federal Court of Iraq will ultimately interpret the articles of the new Iraqi constitution, the makeup and structure of the court system will significantly impact the face of Islam in Iraq.¹⁵⁶

1. The Supreme Federal Court

The Iraqi constitution under Article 89(2) requires the Supreme Federal Court to include a number of judges who are expert in Islamic jurisprudence.¹⁵⁷ This requirement gives rise to questions such as what is an expert in Islamic jurisprudence and how many of the judges will be Islamic experts.¹⁵⁸ The interpretation of these judicial factors will determine how Islam influences Iraqi jurisprudence.¹⁵⁹

152. See *Egypt*, *supra* note 77 (indicating that the Egyptian constitution provides for a strong executive).

153. See *Dustur Jumhuriyyat Misr Al-'Arabiyya* [The Const. of The Arab Republic of Egypt].

154. See Preeti D. Bansal & Nina Shea, *Iraq Must Avoid a Rollback of Rights*, WASH. POST., Aug. 4, 2005, at A23 (admitting that this additional article could place Iraq along side Iran and Saudi Arabia).

155. This caveat is not implying that a Western Democracy would be the ideal system for Iraq, but simply that democratic principles must be established in Iraq.

156. See discussion *infra* Parts II.D.I & II (exploring the nature of Iraq's Supreme Federal Court and personal status courts).

157. The Permanent Const. of The Republic of Iraq. art. 89.2.

158. See, e.g., Filkins & Glanz, *supra* note 5, at A8 (stating that the Shiite leaders tried to insert a provision that would declare senior Shiite clerics independent of the government and symbols of the nation).

159. *Id.*

An expert in Islamic jurisprudence could be interpreted to signify a holy cleric (a religious leader) or an expert schooled in Islamic law.¹⁶⁰ If religious clerics are chosen as judges, they will regard the Koran as governing law and will invalidate any legislation that fails to conform to the principles of the Koran.¹⁶¹ Moreover, God's law would prevail over civil law in all circumstances, connoting an Islamic theocracy.¹⁶² However, if the judges on the Supreme Federal Court are experts in Islamic Jurisprudence, they would have a profound knowledge of Islamic law and regard it as one of many sources of jurisprudence.¹⁶³ The effect would be a respect of Islamic heritage and traditions without allowing Islam to be the ultimate authority in every case.¹⁶⁴

Like the definition of Islamic experts, the number of judges required to be experts in Islamic jurisprudence will also affect the influence of Islam.¹⁶⁵ The more judges required to have expertise in Islam, even if only secular or academic knowledge, the greater the possibility that the court's jurisprudence will favor Islamic law.¹⁶⁶

Iraqi's Supreme Federal Court is similar to Iran's Council of Guardians because Iran's Constitution also requires that judges be experts in Islamic law.¹⁶⁷ The Iranian Constitution

160. See Burns, *supra* note 41, (arguing that the majority of Shiites, especially those chairing the parliamentary constitutional committee, are pushing for an Islamic theocracy). *But see* Brown, *supra* note 32, at 11 (arguing that it is unlikely that any senior Shiite clerics would serve on the constitutional court because it is beneath their dignity).

161. See *The Law of Man or the Law of God?*, *supra* note 74, at 10 (stating that Islam has a set of God-given laws that are not open to revision by other laws).

162. See *id.* at 11 (arguing that Islam does not prescribe any system of governance and that democracy is too far of a stretch).

163. See Lombardi, *supra* note 80, at 93 (describing the Egyptian SCC as having judges that are schooled in Islamic jurisprudence). However, the question for Egypt is how much schooling is required and not if the judges will be clerics as in Iraq. See *id.*

164. See Yakub, *supra* note 9, at 299 (concluding that Islam embraces many of the tenets of democracy, such as liberating people from political oppression and creating social equality).

165. See Filkins, *supra* note 8 (stating that the question of whether to allow clerics to sit upon the Supreme Court is still unresolved).

166. *Id.*

167. See Mozafarian, *supra* note 29, at 289 (indicating that the Iranian constitution grants the Guardian Council excessive discretionary power).

promulgates a Guardian Council consisting of six religious men, selected by the head of judicial power, and six jurists.¹⁶⁸ In practice, both the jurists and the religious men are in fact holy clerics.¹⁶⁹ If Iraq authorizes a substantial number of holy clerics on the Supreme Federal Court as does Iran, there is a strong likelihood of the development of an Islamic theocratic state.¹⁷⁰

Although Iran and Iraq each have a requirement for Islamic experts, Iraq's Supreme Federal Court and Iran's Council of Guardians greatly differ in authority.¹⁷¹ The Guardian Council, under Article 98, has the power to supervise the elections of the President of the Republic and the Islamic Consultative Assembly (Iranian Legislature).¹⁷² The Guardian Council is also a direct recourse to popular opinion and referenda.¹⁷³ Thus, it may exclude candidates for the Islamic Consultative Assembly based on ideological, political and religious suitability.¹⁷⁴ Conversely, the Iraqi Federal Supreme Court lacks the authority to supervise the election of candidates for the Council of Representatives (Iraqi Legislature).¹⁷⁵

The Supreme Constitutional Court (SCC) of Egypt is also

168. See SCHRAZI, *supra* note 62, at 11 (noting that the six jurists have the right to vote on whether parliamentary resolutions are in conformity with the Sharia); Mozafarian, *supra* note 29, at 289 (suggesting that because of the broad discretion of the Guardian Council, they are able to go beyond the interpretation of the proper Sharia in determining relevant Islamic law).

169. See SCHIRAZI, *supra* note 62, at 8 (commenting that the Islamic elements of the Iranian constitution ensure that positions of leadership will be reserved for Islamic jurists).

170. See discussion *supra* notes 164-65 and accompanying text (explaining that the more religious clerics (or even those schooled in Islam), the more the Iraqi Supreme Federal Court will resemble Iran's Council of Guardians).

171. See *id.* ("The second most important government institution is the Guardian Council which has the right to veto over parliamentary resolution.").

172. See *id.* at 13 (noting that in practice the Guardian Council occupies a dominant position in the legislature).

173. See *id.* at 14 (stating that a function of the guardian council is to interpret the constitution, and supervise elections).

174. Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, Iran, <http://www.state.gov/g/drl/rls/hrrpt/2004/41721.htm> (2005) (last visited Nov. 29, 2006) [hereinafter Iran Human Rights] (indicating that the Guardian Council only accepts candidates who support a theocratic state).

175. See The Permanent Const. of The Republic of Iraq, art. 90 (limiting the power of the Supreme Federal Court to only ratifying the results of the election).

distinguished from Iraq's because Egypt's constitution contains no requirement for Islamic experts.¹⁷⁶ In practice, the judges on the SCC are experts in Islamic law, but not necessarily clerics.¹⁷⁷ On the other hand, Iraq and Egypt are similar in that each grants its constitutional courts the power of judicial review.¹⁷⁸ Iraq permits the court to review the constitutionality of legislation and likewise, the Egyptian SCC may screen the constitutionality of all laws and regulations.¹⁷⁹ Thus, Iraq's judiciary is set up to balance both democracy and Islam, as long as judges do not subordinate Iraqi law to their personal religious beliefs.¹⁸⁰

2. Personal Status Courts

The Iraqi constitution promulgates two principle clauses with respect to personal status courts.¹⁸¹ While Article 39 states that Iraqis are free in their commitment in personal status cases according to their religion, Article 92 prohibits special or exceptional courts as regulated by law.¹⁸²

Article 39 clearly authorizes personal status issues to be governed by one's religion, but does not call specifically for or prohibit personal status courts.¹⁸³ Thus, Article 92 could be interpreted as prohibiting solely military courts and other similar

176. See *supra* Part I.C.4 (describing the constitutional requirements for the SCC).

177. See Lombardi, *supra* note 80, at 115 (recounting that the SCC allows civil judges and that the SCC also assumes that they can define the Sharia law). However, many Islamists insist that only professional Islamic scholars can properly identify and apply the principles of the Sharia. *Id.*

178. NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD 150 (2002) (identifying the Egyptian SCC as a potential strong actor in the struggle to establish constitutionalism and democracy in Egypt).

179. *Id.* at 149 (noting that Egypt's SCC has invalidated some restrictions on political parties and nongovernmental organizations and thrice struck down electoral laws).

180. See *supra* Part I.A.4 (analyzing Iraq's judiciary, where there is notably no requirement for a certain number of judges or certain requirements of credentials for judges).

181. See The Permanent Const. of The Republic of Iraq, art. 39 & 92.

182. *Id.* See Brown, *supra* note 32, at 11 (stating this provision precludes exceptional courts and prevents trial of civilians in military courts).

183. See Reed, *supra* note 21, at 509 (calling attention to the negative effects of religious courts, such as inequalities arising within particular religious communities because of the burden forced upon a non-Muslim's trying to employ the services of Muslim court).

specialty courts, or could include personal status courts.¹⁸⁴ However, Article 92 contains a potentially controlling precondition that it shall be “regulated by law.”¹⁸⁵ Consequently, if Islamic law becomes the law of Iraq, religious courts applying Islamic law will more than likely exist.¹⁸⁶ However, if civil law governs Iraq, Article 92 will probably be interpreted as prohibiting religious courts and all cases will be adjudicated in civil courts by civil judges.¹⁸⁷

To be distinguished, the Egyptian Constitution is silent in regard to courts of personal status.¹⁸⁸ In practice, personal status issues are dealt with by civil courts and Sharia law is only a supplemental source of law in limited circumstances.¹⁸⁹

The Iranian Constitution also contrasts that of Iraq because through Articles 2 and 4, it gives Islam unbridled authority over Iran’s jurisprudence.¹⁹⁰ Therefore, in theory and practice, all courts in Iran are religious.¹⁹¹

In sum, Iraq situates itself relatively close to the Egyptian approach with a constitutional court capable of reviewing legislation and personal status courts.¹⁹² However, there is still a wide range of possible interpretations, which could lead to Islamic clerics serving as judges and personal status courts.¹⁹³

184. See *id.* at 497 (indicating that the establishment of personal status courts generally causes religious coercion that infringes upon individual rights).

185. See, e.g., SCHIRAZI, *supra* note 62, at 11 (noting that Iran has similar phrases in its constitution which naturally imply Islamic law).

186. *Id.*

187. See generally MARK HOYLE, MIXED COURTS OF EGYPT (1991) (explaining the origin of both personal status and civil courts in Egypt and their evolution).

188. See *Dustur Jumhuriyyat Misr Al-‘Arabiyya* [The Const. of The Arab Republic of Egypt].

189. Silt, *supra* note 5, at 732.

190. See Iran Human Rights, *supra* note 174 (stating that the Supreme Leader of Iran, a Muslim clergyman, dominates the judicial branches of Iran, as well as the executive and legislature).

191. See *id.*

192. See *supra* text accompanying notes 176-80 (comparing and contrasting the Egypt’s SCC with Iraq’s Supreme Federal Court).

193. See Feldman, *supra* note 2 (observing that many details of Iraqi courts was left for the legislature to decide).

III. RECOMMENDATIONS

A. The Iraqi Constitution Should Be Interpreted According to the Spirit Set Forth in the Preamble.

The Iraqi preamble sets the tone and mood for the constitution, similar to the Egyptian preamble.¹⁹⁴ It strikes a delicate balance between Islam and democratic principles by, on one hand, recognizing Islam as an integral part in the origin and heritage of Iraq and on the other hand, establishing democratic principles such as justice, freedom and equality.¹⁹⁵

In order to adequately preserve this balance of democratic principles and Islam, the constitution should be interpreted within the framework set forth by the preamble.¹⁹⁶ If the preamble is fully incorporated into legislation, Islam will serve as the foundation for values and principles in the constitution.¹⁹⁷ As well, all Iraqis will have the freedom and protection of democratic principles.¹⁹⁸ Therefore, it is important that these components of the preamble underscore and permeate the articles of the constitution.¹⁹⁹

B. In Order to Protect Democratic Principles, it is Important to Strictly Construe Article 2.

The preservation of Article 2 in its present form is important to establishing democratic principles in Iraq.²⁰⁰ If interpreted too broadly, Iraq could evolve into an Islamic theocracy comparable to Iran.²⁰¹ To prevent a theocracy and follow the intentions of the

194. See *supra* Part I.A.2 (demonstrating the unique balance between Islam and democracy established by the preamble of Iraq's constitution).

195. See Bali, *supra* note 12, at 449 ("[I]mportant rule-of-law commitments and values are present in Arab legal traditions.").

196. See *supra* Part I.A.2 (indicating a strong ideological harmony between notions of democracy and Islam, which was intended to persist throughout the entire constitution).

197. See Bali, *supra* note 12, at 450 (noting the importance of building on the core values of the Iraqi society rather than trying to efface them).

198. See The Permanent Const. of The Republic of Iraq pmbl.

199. See generally C.A. HOOPER, THE CONSTITUTIONAL LAW OF IRAQ (1998).

200. See Rohde, *supra* note 8, at 4.4 (explaining that declaring Islam the principle inspiration for Iraq's laws could be dangerous).

201. If Article 2 were interpreted too broadly, this would go against the

drafters, Article 2 should be interpreted literally as written in the constitution.²⁰² Islam should be “a” source of law and not “the principle” or “the fundamental” source of law.²⁰³ Moreover, it is important that “Islam” be interpreted generally as Islamic principles and not specifically as Islamic law.²⁰⁴ As Article 2 is strictly and literally applied, as in Egypt,²⁰⁵ the possibility of Islam suppressing or compromising democratic principles will be much less probable.²⁰⁶

C. In Order to Insure that Article 2(1)(a) and 2(1)(b) Are Equally Balanced, it May Be Useful for Human Rights Law, International Law and Non-Governmental Organizations to Enumerate Principles of Democracy.

As Iraq evolves into a democracy, proponents of Islam will insure that Islam is protected and incorporated into the new government.²⁰⁷ In fact, the Shiites have already demonstrated a determination to establish Islam in Iraq.²⁰⁸ However, the same may not be true for democracy. Principles of democracy are a

intentions of the legislature. Burns, *supra* note 41 (stating that the main reason for the provision is to prevent an Islamic theocracy).

202. *Id.*

203. See *supra* Part II.B (exploring the possible interpretations of Article 2).

204. See *Iraq's Constitution: Democracy or Division?*, *supra* note 7 (“Twenty-four of the forty-four predominantly Muslim countries world-wide don’t use Islamic law as their primary source of laws.”); see Reed, *supra* note 22, at 486 (“For most Muslims, Islam is a religion that allows and requires free speech, democratic participation, and tolerance.”).

205. See *supra* Part I.C.2 (indicating that in practice the SCC limits the application of the Sharia law to where (1) the authenticity of the text (Koran) is proven and (2) there is one absolutely clear meaning of the text). Obviously there are endless methods to limit the reach of Islamic law—Egypt is only one example.

206. When this Comment recommends applying Islamic principles instead of Islamic law, it means principles of Islamic law that change with society. See Reed, *supra* note 21, at 512 (acknowledging that some experts say Islam can change to accommodate the needs of the time, even if doctrine cannot). “In the ancient world, practical applications changed with community needs.” *Id.*

207. See *Iraq*, *supra* note 3 (stating that the division of Religion is 60%-65% Shiite Muslim, 32%-37% Sunni Muslim, 3% Christian and others less than 1%, thus showing ample representation of the Muslim faith).

208. See Fassih, *supra* note 21 (indicating that the Shiites have pushed relentlessly for Islam to be the main source of law).

more foreign concept to Iraq and its leaders.²⁰⁹ Therefore, it may be useful to look to other resources for an understanding of democratic principles, such as non-governmental organizations, human rights groups²¹⁰ and international law.²¹¹ These could be a source of information and aid in codifying and establishing democratic principles as a part of Iraq's law.²¹² As a result, democratic principles would be afforded an additional protection and democracy would become a more integral part of Iraq's Jurisprudence.²¹³

D. It is Important that Judges on Iraq's Supreme Federal Court Be only Required to Have Secular Knowledge of Islam and that Special Religious Courts Are Prohibited.

The requirement of judges to be experts in Islamic jurisprudence in Article 89(2) should be interpreted as those having substantial knowledge in Islamic law and not as religious clerics.²¹⁴ Religious clerics would most likely invalidate legislation in order to follow the Koran as occurs in Iran.²¹⁵ Following the

209. See Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, *Iraq: A Population Silenced*, <http://www.state.gov/g/drl/rls/15996.htm> (last visited Nov. 29, 2006) (explaining that voting and other democratic rights have been far displaced from Iraq because of Saddam Hussein's oppressive regime).

210. See generally Edna Boyle-Lewicki, *Need World's Collide: The Hudud Crimes of Islamic Law and International Human Rights*, 13 N.Y. INT'L L. REV. 43 (2000) (identifying the many sources of Human Rights Law; for example, The Universal Islamic Declaration of Human Rights).

211. See Cynthia Hamra, Karen Heyman, Anita Sarah Jackson, Laura Martino, *Incorporating Human Rights and Fundamental Freedoms Into Peace Agreements and New Constitutions*, PUBLIC INTERNATIONAL LAW AND POLICY GROUP (providing model language for the protection of specific human rights generally found in constitutions), http://www.publicinternationallaw.org/programs/peace/drafters/Human_Rights_Template.pdf.

212. See, e.g., Paul R. Williams & William Spencer, Editorial, *Iraq's Political Compact*, THE BOSTON GLOBE, Aug. 13 2005, at A15 ("To turn the political compact into a workable constitution will require continued development of these skills and the assistance of the United States and the international community.").

213. See generally Farish A. Noor, *Negotiating Islamic Law*, FAR E. ECON. REV., Sep. 19 2002, at 23 (arguing that Muslim governments are confronted by hard-line Islamists who call for religious law when secular legal systems fails). "Moreover, the corruption endemic in poorer countries takes a large bite out of justice." *Id.*

214. See Brown, *supra* note 32, at 11.

215. See Mozafarian, *supra* note 29, at 289 (noting that the Guardian

Egyptian example and authorizing judges with expertise in Islam would balance Islam with civil law.²¹⁶

In regard to courts of personal status, Article 92 should be narrowly defined to exclude radical religious courts.²¹⁷ Personal status courts may force individuals to accept religious beliefs with which they do not agree.²¹⁸ Moreover, personal status courts have a potential to discriminate against women and violate human rights.²¹⁹ Islamic law could find a place within the civil code in limited circumstances, but must not be a justification for human rights violations.²²⁰

CONCLUSION

The Iraqi constitution is a living document formulated by the Iraqis themselves through democratic methods. Iraq has a unique approach in showing devotion and reverence for Islamic traditions while embracing the freedoms and rights insured by democracy.²²¹

power has ultimate subjugation of all state activity, giving it tremendous power).

216. Along with only requiring judges with Islamic expertise, the judicial system must be fair and effective in order to instill confidence among Iraqis. *See id.* at 452.

217. *See* Talal Asad, *Boundaries and Rights in Islamic Law: Introduction*, SOC. RES., Sept. 19, 2002, at 683, 684 (2003) (contending that supervisory institutions in modern Islamic countries have become much more intrusive in everyday life than classical jurisprudence allowed). Prohibiting religious courts must not be mistaken as prohibiting religion or Islam. It simply means there will be no special courts for Islam or any other religion. *Id.*

218. Reed, *supra* note 21, at 497.

219. Fassihi, *supra* note 21 (“Shiites want the civil family law changed to the strict Sharia law, which would compromise the rights to women with respect to marriage, divorce, inheritance and child custody.”). *See* Reed, *supra* note 22 (pointing out that “the European Court of Human Rights suggests that a system in which Islamic religious courts adjudicate personal issues could never be consist with democracy or the protection of basic human rights”).

220. This is provided that the civil courts are reliable and consistent. In many developing countries, going to the civil system means having to pay for lawyers and wait for a long period of time. Noor, *supra* note 215, at 23. *See also* Mayer, *supra* note 11 (according to many modern Muslims, principles of Islam do not require forfeiting human rights).

221. *See* Charles Krauthammer, *A Sensible Iraqi Constitution*, WASH. POST., Sept. 2, 2005, at A29 (arguing that although not perfect, the Iraqi constitution deserves far more respect than it has received by critics). “The idea that it creates an Islamic theocracy is simply false. Its Islamist influence is relatively mild.” *Id.* *But See* Andrew C. McCarthy, *A Not So Sensible Iraqi*

As the people of Iraq respect the balance between Islam and democracy already set forth in the constitution, they will build a faithful and free society.

Forrest Hansen*

Constitution, Foundation for Defense of Democracies: National Review Online, Sept. 6, 2005, http://www.defenddemocracy.org/in_the_media/in_the_media_show.htm?doc_id=29519 (arguing the constitution proves problematic in allowing Islam excessive authority).

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