

RELATIONAL RIGHTS MASQUERADING AS INDIVIDUAL RIGHTS

HALLIE LUDSIN*

ABSTRACT

This article seeks to fill a void in rights theory that permitted Western policy-makers to support the Iraqi and Afghan constitutions despite the risk they posed to women's rights. Women's advocacy efforts focused on the danger of discrimination from constitutional protection of religious law, which policy-makers stated would be countered by the constitutions' progressive human rights provisions. The concept of discrimination failed to capture the true depth of harm, which is that religious law may exclude women from the protection of some or all of those human rights provisions. This article proposes expanding the theory of relational rights to simply and clearly explain the process that could render constitutionally protected individual rights meaningless to women in these countries. While the impetus for this article was the drafting of the Iraq and Afghan constitutions, this concept applies beyond these examples to any situation in which a country cedes authority over law or law enforcement to unaccountable non-governmental actors and is not limited to the adoption of religious law.

Many women's groups around the world watched the drafting and adoption of the constitutions of Afghanistan and Iraq with horror, futilely trying to explain to policy-makers the danger constitutional protection for religious law poses to women's rights. The focus of their advocacy efforts was on the obvious discrimination that results from conservative and at this time prevailing interpretations of Shari'a law. Western policy-makers all too easily countered these efforts by pointing to the progressive human rights protections in both constitutions, claiming that they will balance out any detrimental effect of religion in government.¹

* Hallie Ludsin is a Fellow in Human Rights and Terrorism at the Institute for Global Security Law and Policy at Case Western Reserve University School of Law and a legal consultant to the Women's Centre for Legal Aid and Counselling in Ramallah, West Bank. Thank you to Marius Pieterse, Amos Guiora, William Carter and Ravi Nessman for their insightful comments on this article.

1. See, e.g., President Discusses Iraqi Constitution with Press Pool (August 23, 2005) <http://www.whitehouse.gov/news/releases/2005/08/20050823.html> (last visited Nov. 26, 2007); *Constitutionalism in the Muslim World: A Conversation With Noah Feldman* <http://usinfo.state.gov/journals/itdhr/0304/ijde/feldman.htm> (last visited February 13, 2007); I use the phrase "Western policy-makers" rather than "American policy-makers" because officials from other Western countries and inter-governmental bodies supported the constitution despite women's concerns in agreement with their American counterparts. See, e.g., Iraq FAQs: Does the Iraqi constitution erode women's rights? Foreign and Commonwealth Office, <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1082830025454> (Deflects concerns over

What was missing from women's advocacy efforts was a coherent conceptual framework to describe the true depth of the injury to women, which far exceeds the threat of discrimination. A new concept is needed to explain how constitutional protection for religious or cultural law can remove the safeguards of many, if not most, of the human rights provisions by making them unenforceable by women.² To fill this void, I propose an expanded theory of relational rights to simply and clearly express not only the extent of the damage constitutional protection of religious or cultural law can cause to women, but also the process that transforms individual rights into relational rights. By arming women's groups with a new concept, this article seeks to prevent Western policy-makers from supporting constitutional protection of religious or cultural law without examining women's concerns more deeply.

Part I of this article explains the theory of relational rights and its disparate impact on women. One important point described in this section is that the risk of harm expressed by the concept of relational rights is not limited to Iraq and Afghanistan, to the adoption of religious or cultural law or to women. Part II applies the expanded theory to the Iraqi and Afghan constitutions to illustrate more fully how constitutional entrenchment of religious or cultural law creates the possibility that women will be removed from under the protection of constitutional human rights provisions. It is intended to counter the assumption of Western policy-makers that progressive human rights provisions can neutralize the harm to women. While it is too late for this concept to influence the drafting processes in Iraq and Afghanistan, the understanding of how relational rights work may stop their development in other constitutions.

TABLE OF CONTENTS

I. RELATIONAL RIGHTS.....	197
A. The Theory	197
B. Women and Relational Rights.....	202
C. The Special Case of Group Rights.....	204
D. The Solution.....	206
II. CONSTITUTIONALLY ENTRENCHED RELATIONAL RIGHTS: THE CASES OF IRAQ AND AFGHANISTAN	207
A. The Premises	208
B. The Transformation	214
CONCLUSION.....	221

the effect of religious personal status law on Iraqi women by noting the democratic process that will lead to the constitution's adoption).

2. I purposely use the conditional verb tense in this introduction because progressive interpretations of Shari'a law, such as have occurred in several Muslim countries, could mitigate the dangers inherent in these constitutions. Hoping for such interpretations rather than mandating the protection of all rights for all individuals, however, should not be enough of a basis to justify supporting these constitutions.

I. RELATIONAL RIGHTS

Part I introduces the expanded theory of relational rights to provide a framework for understanding the risk of harm women face from the constitutional protection of religious law in Iraq and Afghanistan. Although ultimately the focus of this article is on the constitutional entrenchment of religious law, Section A develops the theory more generally, describing how it applies in several different contexts. Section B discusses the disparate impact of relational rights on women, which is important to understanding why relational rights are a women's issue. Section C then examines how group rights, such as the right to be governed by religious or cultural law, elevate the risk that individual rights will become relational. Part I ends in Section D with a brief discussion of one possible method for preventing the constitutional transformation of individual rights into relational rights.

A. The Theory

Relational rights are rights that are derived from the government, such as from a constitution, legislation or a judicial decision, but that individuals can exercise only with the permission or acquiescence of someone with whom they have a personal relationship.³ Suad Joseph developed the initial concept based on her research and experiences in Lebanon where political circumstances were such that average citizens rarely were able to claim their rights and entitlements from the government without the help of their personal relationships.⁴ Access to public services and resources depended on a patronage system that forced individuals to develop vast social networks.⁵ Joseph provided the example of a neighbor who had been unable to obtain certification of his residency in Lebanon from the government. Her neighbor approached her for help. Joseph turned to her friends, who turned to their networks and so on until the neighbor eventually received his papers.⁶ What should have been a simple and regular task of the government could not be completed without resort to private sources of power. Joseph extrapolated from a wide number of such examples that in Lebanon citizen's rights, or rights that inhere in individuals as a result of their citizenship in a country, had been transformed into relational rights in which access to them depended on personal networks of power.

Joseph's concept of relational rights can be developed to apply beyond the political transformation of rights through a patronage system to a transformation through law, law enforcement or their failures. In this expanded conception, government action, or in some cases inaction, removes certain areas

3. Suad Joseph describes relational rights and responsibilities as occurring when "a person's sense of entitlements and duties came from specific relationships that they built or were built for them." Suad Joseph, *Teaching Rights and Responsibilities: Paradoxes of Globalization and Children's Citizenship in Lebanon*, 38(4) *J. SOC. HIST.* 1007, 1010 (2005). Cheryl Rubenberg considers them "the outcome of distinctive relationships that people actively construct and work to sustain." Cheryl A Rubenberg, *PALESTINIAN WOMEN: PATRIARCHY AND RESISTANCE IN THE WEST BANK* 121 (2001).

4. Suad Joseph, *Problematizing Gender and Relational Rights: Experiences from Lebanon* 1(3) *SOC. POL.*, 272, 272-73 (1994).

5. *Id.* at 277-78.

6. *Id.* at 279.

of law or law enforcement from government oversight so that there is no accountability mechanism with the ability and/or willingness to enforce human rights. Governments create this void either by permitting unaccountable persons or bodies to determine the rules within particular areas of law or by ceding law enforcement to such actors. By surrendering its jurisdiction, the government allows these private actors to determine for others the content of human rights, and therefore access to them, without any meaningful oversight.

The concept developed here differs from Joseph's in that she seems to envision an individual needing a relative or an acquaintance to act essentially as a broker between the government and the individual. The government retains the power to provide the rights while the broker serves as a bridge between the individual and the government necessary to access those rights. Anyone with access to an effective broker then can achieve their rights. In my conception, personal relations are more directly responsible for determining the contours and boundaries of a person's rights as they actually control them. To clarify the difference, in Joseph's example, if she and her personal network were unable to help the neighbor access his rights, he could turn to others for help to reach the government. Under my theory, there would be no one else who could help him as the government in effect would have relinquished its power to safeguard and enforce the neighbor's rights to a specific person or group within his personal network, who then could decide whether and when to enforce or deny those rights. To avoid confusion, where necessary to delineate between Joseph's theory and mine, I will refer to my concept as the expanded theory of relational rights. Despite these differences, many of the lessons Joseph draws from her concept of relational rights apply also to the expanded theory.

The beneficiaries of this now private jurisdiction usually are the most powerful members of the community. Where these rights exist, access to them depends on the strength of a person's relationships with those more powerful actors and the bargaining chips they hold.⁷ The dominant by-product of relational rights is the creation of differentiated citizenship under which citizens receive the benefit and privileges of citizenship based on the strength of their social relationships.⁸ Some people will have full access to their rights, while others will have only some or even no access.⁹ Citizens are not entitled to the same rights, and the strength of their rights could change as their relationships change.¹⁰ Relational rights reinforce any existing social hierarchies or power imbalances between individuals, particularly between men and women, a point that is examined more fully in Part I (B) below.¹¹

7. See, e.g., Rubenberg, *supra* note 3, at 144–45 (Describing the process of “reality bargaining” that women undertake to receive their rights from or solve their problems with their husbands).

8. For a description of differentiated citizenship, see WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 182 (1995).

9. Joseph, *supra* note 4, at 278 (“Rights were not stable givens. They shifted with people and with situations. Rights changed as relationships transformed – growing stronger, weaker, broader, narrower, more generalized, more specialized. The fluid and shifting character of rights corresponded to the fluid and shifting character of relationships.”)

10. *Id.*

11. Rubenberg, *supra* note 3, at 151.

Relational rights can be created when law or practice gives non-governmental actors the power to interpret or enforce law. In some instances, the unwillingness or inability of a government to enforce law creates relational rights. The lack of enforcement could result from a conscious decision of governmental actors or could be an element of a weak or failing state. The lack of accountability must be systemic and not simply a bad ruling or decision by a government official. The accountability mechanisms in that country must acquiesce to the transfer of the power to determine the content of and/or to enforce rights to private actors.

The treatment of domestic violence cases in much of the world demonstrates the conversion of individual rights to relational rights that results from the government's unwillingness to enforce law – or the systemic relinquishment of enforcement power to non-governmental actors. Throughout the world, police often are reluctant to intervene in domestic violence cases, believing that what goes on between intimate partners and within families is private. For example, in the United States standard protocol for a long time encouraged police officers to establish momentary peace rather than arrest and prosecute abusers or provide for a different long-term solution.¹² Such failure to address domestic violence violates women's right to equal protection of law by treating violence against women differently than violence among any other persons and also violates women's right to bodily integrity. The harm, however, goes far deeper than the violation of these rights. When police refuse to intervene in "private" family matters, they relinquish control over the enforcement of the right to bodily integrity to the husbands. The husbands then decide whether women can access this right by deciding whether to abuse their wives. Through the government's acquiescence to this transfer of power, women's individual right to bodily integrity becomes relational.

In other instances, a constitution or legislation expressly assigns such control so that compliance with the rule of law establishes relational rights. South Africa's customary law of succession illustrates how this process can work. This example is imperfect in that the South African constitution also supplies the solution to relational rights; however it illustrates the potential for constitutions and legislation to create relational rights.

Customary law is defined by the South African legislature as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples."¹³ As a system of dispute resolution, it stresses conciliation and mediation to maintain harmony within the community rather than focusing on fault.¹⁴ At the center of the fluid rules are the family and community: "[u]nlike most Western legal systems,

12. David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1165–1166 (1995). I have chosen to use the example from the United States to illustrate that relational rights are not just a phenomenon of the developing world.

13. Recognition of Customary Marriages Act 120 of 1998 s. 1(ii).

14. Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law*, 21 BERKELEY J INT'L L 62, 70 (2003).

customary law focuses on the obligation of an individual to the family and collective, rather than on individual personal rights.”¹⁵

Article 15(3) of South Africa’s constitution allows the enactment of legislation recognizing traditional systems of personal status or family law.¹⁶ The Recognition of Customary Marriages Act of 1998 (“Customary Marriages Act”) was adopted in accordance with Article 15(3) to recognize as legal marriages conducted under African customary law.¹⁷ The Customary Marriages Act permits cultural norms to control personal status matters of black South Africans and, by doing so, allows privileged individuals to determine access to rights for their relations.

Under Article 7(1) of the Customary Marriages Act, customary law governs the proprietary consequences of customary marriages completed before the statute went into effect.¹⁸ One proprietary consequence is that all property is deemed to belong to the husband,¹⁹ with the limited exception of personal items such as clothing.²⁰ In exchange for the husband’s “right” to control all marital property, customary law places on men a duty to use the property to care for their wives and families.²¹ Customary law further prohibits a woman from inheriting property.²² On the death of a husband, any property belonging to the husband, which includes all marital property, passes by intestate succession to the closest and most senior male from her husband’s family, which could be a son, the husband’s brother, his father, grandfather or even his uncle.²³ It follows a system of primogeniture. Customary law places a duty on the heir of the estate to take financial care of the widow, daughters and minor sons for as long as they live on the deceased’s property.²⁴ The heir must meet his obligations regardless of the size and wealth of the estate he inherits.²⁵ If the widow or children eligible for care leave the property, the heir is no longer required to support them and he keeps the husband’s estate.²⁶

The legal adoption of a system of customary law for persons married prior to the statute’s enforcement converts a variety of women’s rights into relational

15. *Id.*

16. S. AFR. CONST. 1996. ART. 15(3).

17. Recognition of Customary Marriages Act 120 of 1998.

18. Any customary marriage completed after the date of the enforcement of the Customary Marriage Act is governed by community of property, which means the date of the customary marriage determines property rights. *Id.* at s. 7(2).

19. NJJ OLIVIER ET AL., INDIGENOUS LAW 148-149 (1995); Ericka Curran & Elsje Bonthuys Customary Law and Domestic Violence in Rural South African Communities, Centre for the Study of Violence and Reconciliation (2004) 2.4.3.

20. Curran & Bonthuys, *supra* note 19, at 2.3.3.

21. TW BENNET, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW 236 (1991) (the head of family’s “first obligation is to use house property to maintain the wife and children of the house concerned.”)

22. OLIVIER, BEKKER ET AL., *supra* note 19, at 160.

23. *Id.*

24. *Id.*

25. Women and Law in Southern Africa Research Project WIDOWHOOD, INHERITANCE LAWS, CUSTOMS & PRACTICES IN SOUTHERN AFRICA (1995) 52.

26. NJJ OLIVIER ET AL., *supra* note 20 at 161. (“During her stay in the kraal of her deceased husband or as allocated to her, she and her children are entitled to proper maintenance and use of the assets of the estate, although she has no ownership in respect of that property.”)

rights. In violation of constitutionally protected equality rights,²⁷ customary law prohibits these married women from owning property with little exception and prohibits them from inheriting based on the men's perceived social roles as protectors and financial providers for the families.²⁸ It limits women's right to own private property,²⁹ essentially treating them as legal minors. Further, if widowed women want to benefit from the property to which they contributed, they cannot leave their husband's property after his death, although the constitution protects the right to freedom of movement.³⁰ The only way they can access their equality, property or freedom of movement rights is with the permission of their husband or their husband's heir. Rights women should be able to approach the government to enforce, the Customary Marriages Act permits to be determined solely by the woman's husband or his heir. Fortunately, South Africa's Constitutional Court undid the customary law of succession's transformation of individual rights into relational rights using the constitution as its basis; the decision is discussed in Part I (D) below.

Relational rights reflect a problem in the process of accessing and enforcing rights. The content of the rights is irrelevant to determining whether rights are relational. What matters is (1) who is responsible for deciding whether a right can be exercised, and (2) whether the person or body is accountable for his or her decisions. Even if the content meets personal or international standards of rights, societies do not want unaccountable sources of power controlling aspects of their lives. The content becomes important, however, when determining who is impacted by the transfer of jurisdiction.

Critics of the theory of relational rights might argue that all rights are relational in all countries because access to justice for at least some segment of society always requires the cooperation and support of others. For example, everyone needs financial resources to litigate claims for violations of their rights, with the exception of some criminal defendants who are entitled to free legal representation. Other than in those limited circumstances, the indigent are likely to find that they cannot exercise their rights without the financial support of their personal networks, which could include private legal aid organizations. In another example, women living in patriarchal societies not only are unlikely to have the independent financial resources to fight for their rights, but where rights violations are committed by family members, they may lack the emotional support to sustain what could be a protracted and emotionally-charged battle. What differentiates this article's conception of relational rights from these examples of barriers to access to justice is whether formal mechanisms of accountability retain the jurisdiction to enforce an individual's rights. In the examples of the indigent and of women in patriarchal societies, there is an assumption that the courts have the jurisdiction and are willing to adjudicate

27. S. AFR. CONST. 1996. ART. 9. .

28. Curran & Bonthuys, *supra* note 19 at 2.2 (describing that at the time the rules were developed and in the context of subsistence economies, the purpose of the rules was to ensure women's security by guaranteeing that someone would be responsible for their maintenance.". Boys and men who are not the first born male child also cannot inherit in a system of primogeniture, which discriminates against them on the basis of birth order rather than their sex.)

29. S. AFR. CONST. 1996. ART. 25.

30. *Id.* at ART. 21

claims of rights violations for litigants with the financial and emotional wherewithal to file a claim. The expanded theory of relational rights, on the other hand, is premised expressly on the lack of government oversight of rights violations, which means there is no possibility of legal recourse for such violations regardless of an individual's resources.

B. Women and Relational Rights

Both men and women can be affected by relational rights, yet their creation typically has a disparate impact on women. While the key to the transformation of individual rights to relational rights is the shifting of the interpretation and/or enforcement of areas of law to private actors, the cause of the harm is the treatment of this jurisdiction as private or outside governmental oversight. Essentially, the handing over of governmental functions to non-governmental actors, whether by will, force or acquiescence, institutes a public-private divide, a concept with which feminist thinkers are only too familiar.

The public-private divide is established according to the belief that there are certain aspects of people's lives that should be protected from government interference, although if a state is failing, it may be created without choice. Typically, the family and home are considered private and therefore protected from outside scrutiny or intervention except to maintain the status quo; the public realm, which consists of government and the economy, are treated as deserving of the full protection of the government.³¹ Where this public-private divide exists, men are its beneficiaries particularly since retaining the status quo usually means maintaining any existing power imbalances between family members.³² In societies that conform to a traditional model of the family, the husband is treated as head of the household and his decisions as inviolable, including – if necessary – the decision to chastise physically and emotionally his wife and children.³³ Male authority and violence within the family and women's concomitant subordination are protected from government intervention, not the

31. Suzanne A. Kim, *Reconstructing Family Privacy* 57 HASTINGS L.J. 557, 568–69 (2006); Susan Moller Okin, *Equal Citizenship: Gender Justice and Gender: An Unfinished Debate*, 72 FORDHAM L. REV. 1537, 1551–1552 (2004); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 955 (1991) reprinted in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES 388 (D. Kelly Weisberg ed. 1996).

32. Kim, *supra* note 31, at 571. ("Domestic violence has been viewed as a literal example of power's influence in family life. Feminists have pointed to the ways in which privacy has reinforced the power of powerful members of families—i.e., husbands and fathers—over less powerful women and children, by ratifying "openly hierarchical" social roles within the family in the guise of nonintervention and freedom.") The concept of privacy in family matters is not always bad. For example, individuals should be provided the opportunity to make decisions regarding their health, family planning or how they wish to raise their children with little interference from their government. *Id.* at 995. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991), reprinted in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES 388 (D. Kelly Weisberg ed. 1996) See, e.g., Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 725 (1999). Such protection would allow individuals to exercise their autonomy without infringing on the rights of others. *Id.* The problem with the public-private divide created by relational rights is that it has the opposite effect – it permits men to subordinate women to their interests, denying them their rights.

33. Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN'S L.J. 303, 303 (2005).

family.³⁴ Women (and children) suffer heavily as a result. In the public sphere, men receive the benefits of government protection from abuses of their rights;³⁵ whereas “sex-based exclusionary laws join with other institutional and ideological constraints to directly limit women’s participation” in that sphere, which means they profit less from public rights.³⁶

As the two examples from the previous section show, the areas of law subject to interpretation and/or enforcement by private actors often follow existing notions of the public-private divide and protect patriarchal control. In the South African example, the only area of law the constitution expressly permits to be governed by religious or cultural law is family law.³⁷ With domestic violence, courts around the world for a long time condoned some forms of physical abuse as the husband’s prerogative as head of the household and because of the concept that the home is the man’s castle.³⁸ In both instances, jurisdiction over aspects of family relations is ceded to private sources of power, consistent with the divide.

Where men and women both suffer from relational rights, men are likely to have greater access to power and therefore to their relational rights. As Joseph described of Lebanon: “[s]tate officials often preferred dealing with and were more likely to be responsive to males and seniors. State officials often set up idiomatic patriarchal relations with those seeking their services – relations that further enhanced the position of males and seniors.”³⁹ As a consequence of the interaction of the patronage system and patriarchy, women found that access to their rights depended on their conformity with social mores.⁴⁰ Women confronted additional hurdles that did not exist to the same degree or at all for men.⁴¹ While Joseph’s description applies to the situation where members of personal networks were necessary to act as brokers to reach the government, the hurdles are the same for women under an expanded theory of relational rights. As described in Part I (A), the jurisdiction transfer typically benefits the more powerful members of society, usually men. As a direct result of patriarchy, which arguably exists everywhere, men prefer to deal with men and are likely to hold them in higher esteem. This greater respect for men translates into greater access to their rights.⁴²

34. *Id.*

35. Kim, *supra* note 31, at 568–69.

36. Schneider, *supra* note 31, at 388.

37. The provision ensures that a court will not deem religious or cultural family law an inherent violation of the constitution’s freedom of religion clause. It is notable for the fact that it is the only area of religious or cultural law given specific constitutional protection.

38. Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 *YALE J.L. & HUMAN*, 195, 209–10 (1995).

39. Joseph, *supra* note 4, at 283.

40. *Id.* at 282–83.

41. Joseph describes that women often needed the intervention of men as negotiators to achieve their relational rights. *Id.* at 283.

42. *See, e.g. Id.* Relational rights also can privilege the economic and social elite, regardless of their sex, as their enhanced access to private power may give them greater access to their rights. In doing so, relational rights can exacerbate the inequalities of minority groups and the poor.

In other cases, men's rights remain individual rights while women's are relational, again because of patriarchy. As described in Part I (A), under South African customary laws of marriage and succession and until recently, men retained full access to their property and equality rights while they were given the power to determine women's access to those rights. The result is the same in the example of domestic violence. While women have only a relational right to bodily integrity, men faced with violence in the public sphere have an individual right the government, through the police, will enforce.⁴³ As this section shows, rarely is the privatization of law enforcement and rights interpretation in the interest of women.

C. The Special Case of Group Rights

The concept of group rights has substantial potential for transforming individual rights into relational rights. Group rights are special protections and entitlements groups receive on the basis of the particular characteristics that define their membership. Group rights can be defined as rights derived from a person's membership in a group rather than his or her status as an individual; these rights can belong to the group or to the individual as part of his or her membership in the group.⁴⁴

Numerous countries are struggling with the question of whether to provide groups with the right to organize aspects of their lives according to their religious or cultural beliefs and practices. In societies where the group is in the majority, adoption of religious or cultural laws and practices can be considered part of the democratic decision to allow society to determine how it wishes to be governed. In many countries, group rights reflect the communitarian nature of their societies in which individual rights have never been dominant in the political or legal culture. Where the religious or cultural group is in the minority, typically these groups are advocating for the adoption of some or all of their religious or cultural family law and/or the right to religious or cultural education.⁴⁵ For minority groups, group rights can provide the opportunity to express culture or religion. They can provide equal access to religion or culture and send the message that their culture or religion is a valued part of their society.⁴⁶ For both minority and majority groups, group rights can increase their enjoyment of individual rights that can be accessed best as part of a group.⁴⁷

While there are a variety of criticisms of group rights,⁴⁸ the concern for purposes of this paper is the extent to which protection of group rights

43. Other examples of men retaining their individual rights while women's rights become relational are described in Part II (B) below.

44. KYMLICKA, *supra* note 8, at 45.

45. See, e.g., Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385, 387 (2000)(discussing benefits of group rights for minority groups).

46. See, e.g., *Id.* at 391—92.

47. SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN 31 (Joshua Cohen et. al eds., 1999) (Quoting Will Kymlicka).

48. See, e.g., KYMLICKA, *supra* note 8; OKIN, *supra* note 47, at 47 (quoting Yael Tamir); SHACHAR, *supra* note 46.

establishes relational rights through the adoption of religious or cultural law into the legal system or as a separate legal system. Religious and cultural practices are problematic when they are based on a division of social roles that creates unequal power relations between members of the group.⁴⁹ When religious or cultural law codifies these unequal relations, giving some members of the group control over the actions of others, they create relational rights. South Africa's customary law as described in Part I (A) provides a clear example of this. Again, women are disproportionately at risk of subordination to the interests of men and the group.⁵⁰ As Ayelet Shachar explains, "religious traditions often encode within their legal traditions various formal and informal mechanisms for controlling the personal status and sexuality of women, primarily because women play a central and potentially powerful role in symbolically reproducing the collective."⁵¹ This explanation applies equally to cultural traditions.

Although group rights risk transforming many individual rights into relational rights, they should not be conflated. Not all group rights create relational rights, even when they result in inequality. If a law based on cultural practice prohibits women from testifying in court, the end result is discrimination not relational rights. The law does not provide anyone with the discretion to refuse women the right to testify, but instead is applied to all women. At least in theory, simply because a country adopts religious or cultural law as the basis of their legal system by itself does not mean that individual rights will be turned into relational rights. Again, relational rights in this context arise when unequal power relations between individuals are adopted into the legal system.

Group rights need to be tailored carefully to ensure that their positive goals are not overshadowed by their negative impact – that these rights are protected to allow individuals to express themselves as part of a group and not permitted to create relational rights.⁵² South Africa offers an example of how to protect group rights without transforming individual rights into relational rights. When the customary law of succession was challenged as a violation of women's equality, South Africa's Constitutional Court relied on provisions in the constitution that require customary law to be consistent with the constitution to establish accountability and undo the relational rights.⁵³ It found that primogeniture violated the constitution by "impl[ying] that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender."⁵⁴

Many proponents of religious and cultural law argue that placing these laws in a subordinate position to constitutional human rights would lead to

49. Shachar, *supra* note 45, at 397–98.

50. *Id.* at 396.

51. *Id.* at 397.

52. KYMLICKA, *supra* note 8, at 34.

53. *Bhe v. Magistrate Khayelitsha & Others*, 1 BCLR 1, ¶¶41-44 read together with ¶100 (CC 2005).

54. *Id.* at 92.

their eradication.⁵⁵ This discussion implicates the debate surrounding the concepts of universal human rights and cultural relativism. If accountable bodies adopt notions of universal human rights then religious or cultural beliefs and practices that follow different interpretations of those rights will be treated as unconstitutional. If that happens, group rights will be stripped of any meaning.⁵⁶ These concerns are not related to the question of relational rights, which is a process issue, but instead are focused on the content of rights. For this reason, the paper need not delve further into the debate. The important point for our purposes is that group rights create relational rights when they permit private actors to determine the content of rights for persons within their personal networks without accountability. When that happens, the benefits achieved by group rights are outweighed by the harm to individuals and must be treated as wholly unacceptable.

D. The Solution

The end result of transforming individual rights into relational rights in many cases is the exclusion of individuals, particularly women, from human rights safeguards, including those expressly protected by a constitution. The most obvious way to reverse the transformation is to eradicate the public-private divide by returning all aspects of governance to the government or placing all areas of law under governmental oversight. How that can be accomplished depends on what is causing jurisdiction over law and/or law enforcement to be removed from the government.

Where relational rights are created through law or a constitution, the law or constitution needs to be changed to permit the enforcement of human rights against private actors, ensuring their accountability. Traditionally, constitutions permit individuals to challenge violations of their rights by the government, but not so-called “private” violations of rights.⁵⁷ For example, a family-owned business in the United States that discriminates against women in hiring violates the law but not the constitution. The power to legislate against such discrimination may derive from the constitution, but these employers currently can be sued only under federal or local statutes because their behavior is not considered state action. The application of constitutional human rights provisions to private actors would change this situation. Individuals would no longer need to rely on the legislature to protect their human rights from “private” violations through legislation, such as in the employment example, but instead would be able to turn directly to the constitution to enforce their rights. The accountability of private actors for constitutional human rights

55. See, e.g., Titia Loenen, *The Equality Clause in the South African Constitution: Some Remarks From a Comparative Perspective* 113 SAJHR 401 (1997) (“Because African culture is pervaded by the principle of patriarchy, the gender equality clause now threatens a thorough-going purge of customary law”); AJ Kerr, *Inheritance in Customary Law Under the Interim Constitution and Under the Present Constitution* 1998 115 SALJ 263, 266–67 (1998).

56. *Id.*

57. Catherine Phuong, *Persecution by Third Parties and European Harmonization of Asylum Policies*, 16 GEO. IMMIGR. L.J. 81, 87 (2001).

violations would fill any gap in government jurisdiction over areas of law and over law enforcement, ensuring the option of formal accountability.

An example of a constitutional provision guaranteeing the application of human rights to private actors can be found in South Africa's constitution. Article 8(2) reads: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."⁵⁸ In this formulation, not all rights are enforceable against individuals, but only those that seem appropriate. For example, if a constitution protects the socio-economic right to housing, it is unlikely that a court would find that individuals owe that duty to others. However, when jurisdiction over the determination of the content of rights is surrendered to non-governmental actors, then the application of human rights provisions to those actors would seem appropriate.⁵⁹ A different solution to correct the problem of relational rights is necessary when they are created because the government is unable or unwilling to enforce individual rights. How to solve these accountability failures is beyond the scope of this article since the focus is on constitutionally-created relational rights.

II. CONSTITUTIONALLY ENTRENCHED RELATIONAL RIGHTS: THE CASES OF IRAQ AND AFGHANISTAN

Part II undertakes a more in depth examination of how constitutions can create relational rights to concretize what so far has been described mostly as theory. The reason for focusing on this method of transformation of individual rights into relational rights is that it provides women's advocates with a framework for describing the harm that can be caused by the constitutional protection of religious or cultural law, a phenomenon that has happened and continues to happen throughout the Middle East,⁶⁰ Africa⁶¹ and Asia.⁶² Using the

58. S. AFR. CONST. 1996 ART. 8(2).

59. As Osiatynski explains, critics of the application of human rights to private actors claim it will cause undue strain on interpersonal relationships. Wiktor Osiatynski, *Human Rights for the 21st Century*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 29, 41 (2000). The critique misses the point; this concept is intended, among other things, to challenge the status quo in personal relationships by tackling the problem of unequal power within them.

60. A variety of Middle Eastern constitutions protect a role for religious law in their constitutions. Article 9 of the Lebanese constitution guarantees respect for the personal status laws of each religious sect within the country. LEB CONST. 1990, ART. 9. Egypt guarantees that "Islamic jurisprudence is the principal (sic) source of legislation." EGYPT CONST. 1980, ART. 2. (*translated at* <http://www.uam.es/otroscentros/medina/egypt/egypolcon.htm>) Yemen's constitution contains a similar provision. YEMEN CONST. 1991, ART. 3 (Islamic Shari'ah is the source of all legislation.).

61. Some African constitutions protect customary law institutions that were under threat during colonialism, but often with an express limitation that the laws conform to human rights, such as in South Africa and Namibia. South Africa allows family law to be governed by religious or cultural law if it does not conflict with the constitution or statutory law. S. AFR. CONST. 1996, ART. 15(3). Namibia allows customary law to govern where it has not been repealed by the legislature and it does not conflict with the constitution. NABIM.CONST. 1990, ART. 66.

62. The Constitution of Afghanistan adopts religious personal status law, at least in part, which is discussed in Part II(1). The Malaysian constitution protects religious law to the extent that the legislature may make changes to it only if it consults with the government (MALAY. CONST. 1964, ART. 76) and protects personal status laws from invalidation by the constitution's equality clause (MALAY. CONST. 1964, ART. 8(5)(A)). The Constitution appears to expect personal status law to be

examples from the Afghan and Iraqi constitutions, Part II is intended to reveal the hidden nature of relational rights to prevent their adoption in future constitutions. Part A describes the premises on which this discussion relies, while Part B examines how the transformation to relational rights is likely to occur in Iraq and Afghanistan.

A. The Premises

Iraq and Afghanistan's constitutions protect a role for religion in government while at the same time guaranteeing a variety of progressive individual rights, including the right to equality. A superficial reading of the constitutions allowed Western policy-makers to assert that the human rights provisions insulate women from discrimination and oppression that could result from this role for religion.⁶³ Such a superficial reading obscures the truth, which is that many individual rights become relational rights when the provisions are infused with social, political and legal context. Once rights become relational, individuals no longer benefit from the full protection of the constitution, which challenges the assertions of these policy-makers.

The first premise of this analysis is that both constitutions ensure the adoption of religious personal status law in their respective countries. Personal status law governs the areas of marriage, divorce, custody, maintenance and inheritance. The Afghan constitution contains three provisions that read separately and together require the adoption of religious personal status law, at least for a portion of the population but likely for all. Article 131 states that the personal status matters of Shi'a followers, approximately 20% of the population,⁶⁴ will be governed by Shi'a jurisprudence.⁶⁵ The purpose of the provision is to protect their minority group rights. At a minimum, the Afghan constitution deprives the legislature of the discretion to determine what law should govern Shi'a personal status matters and limits its ability to adopt a unified code.

The constitution does not state explicitly that religious law governs the personal status matters of Sunni Muslims, approximately 80% of the population,⁶⁶ but it can be inferred from Article 131, which seems to expect that Sunni jurisprudence will be adopted as general legislation.⁶⁷ Even if Article 131 does not result in the constitutional protection of Sunni personal status law, other provisions can be interpreted to provide that protection. Article 3 states that "no law can be contrary to the beliefs and provisions of the sacred religion

governed at least in part by religious law. MALAY. CONST. 1964. Ninth Schedule, List 1(1)(e)(1) East Timor's constitution permits customary law to govern, but it follows the lead of the African constitutions by requiring customary law to conform to the constitution and legislation. E. TIMOR CONST. 2002. s. 2(4).

63. See, *supra* note 1.

64. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2007), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html#People>. (Last visited Jan. 31, 2008).

65. AFG. CONST. 2004. ART. 131.

66. CENT. INTELLIGENCE AGENCY, *supra* note 64.

67. See, e.g., AMIN TARZI, ASSESSING THE DRAFT CONSTITUTION (PART 1): PRESIDENTIAL POWERS AND THE ROLE OF RELIGION 2 AFGHANISTAN REPORT Volume 39 (2003).

of Islam.”⁶⁸ The provision creates a repugnancy clause that requires all legislation to be measured against the moral and religious standards established by Islam; those that do not measure up will be deemed a violation of the constitution.⁶⁹ Article 3 removes at least some legislative freedom in all areas, including personal status law. Islam again is used as a measuring stick for governmental and individual behavior, this time specifically related to the family, in Article 54. This provision guarantees that the state will protect the well-being of the family including by eliminating “traditions contrary to the principles of sacred religion of Islam.”⁷⁰ It seems intended to target traditional practices that are part of Afghanistan’s customary law or informal legal system that serves as the *de facto* legal system for the majority of Afghans,⁷¹ but it could be used against more “progressive” traditions as well. Article 54 expresses the intention to subject family practices to religious scrutiny.⁷² While the legislature may retain the ability to enact personal status legislation, as a result of these repugnancy clauses, it appears their powers may be restricted mostly to process related legislation. Articles 3 and 54 strongly suggest that the substance of personal status law must be determined by religion. Together, these three provisions likely require the adoption of religious personal status law for all Afghans, while Article 131 guarantees it at least for Shiites.

In Iraq, the constitution could read as though individual Iraqis will have a choice whether to have their family relations governed by religious family law or by civil law practices.⁷³ When reading the Iraq Constitution as a whole, however, it is possible to read Article 39 as requiring religious authority to govern this area of law. Article 39 reads: “Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices. This shall be regulated by law.” The provision protects the group rights of the majority Muslim population, as well as those of minority religious groups, by allowing them to be governed by their religious personal status law.⁷⁴ At a minimum, it is impossible for the legislature to adopt a unified civil personal status law that applies to all of its citizens.

Whether Iraqis will be able to choose to be governed by a civil personal status law depends on how the constitution is interpreted.⁷⁵ Article 2(1)(a) of the

68. AFG. CONST. 2004. ART 3

69. Article 3 has the same effect as the provisions in many Muslim constitutions that explicitly proclaim that Islam, Shari’a or its principles are a major source of law. NATHAN BROWN, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *DEBATING ISLAM IN POST-BAATHIST IRAQ 2-3* (2005), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=print&id=16619>. Such a provision is unnecessary in the Afghan constitution since requiring legislation to be consistent with Islam effectively establishes it as a main source of law.

70. AFG. CONST. 2004. ART 3

71. INT’L LEGAL FOUND., *THE CUSTOMARY LAWS OF AFGHANISTAN 4* (2004).

72. AFG. CONST. 2004. ART 54.

73. See, e.g., Nathan J. Brown, *The Final Draft of the Iraqi Constitution: Analysis and Commentary*, Carnegie Endowment for International Peace (2005) 6.

74. 97% of Iraqis are Muslim. CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* (2007), available at <https://www.cia.gov/library/publications/the-world-factbook/print/iz.html>.

75. Even if arguably Iraqis can opt out of religious personal status law, societal pressure makes it unlikely that many Iraqis will choose to do so, at least in the near future. Family pressure likely

constitution does not permit legislation to contradict the established provisions of Islam.⁷⁶ As with the Afghan constitution, some elements of Islam will be used as a measuring stick for the constitutionality of legislation.⁷⁷ As to whether personal status laws are among those established provisions, consider that most Arab Muslim countries adopt some form of religious personal status law.⁷⁸ Governments are reluctant to deviate from Shari'a law in that area,⁷⁹ while political and economic aspects of Shari'a law are regularly discarded.⁸⁰ Whether secular family law will be treated as contradictory to established provisions of Islam again will depend on the views of the legislature and judiciary.

Article 29(1)(a) of the Iraqi constitution further supports that the Iraqi government will impose religion within the area of personal status law as the provision promises to preserve the religious values of the family.⁸¹ What better way to ensure those values than apply religious personal status law? Read as a whole, the Iraqi constitution makes it impossible for the elected legislature to eradicate religious personal status law and likely mandates its adoption.⁸²

will push many individuals to follow religious personal status law, while unequal power relations may be enough for men to force women to "choose" religious personal status law.

76. IR. CONST. 2005. Article 2 also states that Islam is a fundamental source of legislation. IR. CONST. 2005. ART. 2(1). Describing Islam or some aspect of it as a source of law is a common provision throughout the Muslim world, although the exact language differs between constitutions. Brown, *supra* note 73, at 2-3. Nathan Brown states that at its tamest, the description of Islam as a fundamental source of law provides moral support to legislators who wish to ground legislation in religious law. *Id.* at 3. At the other end of the possibility spectrum, it could be read to require the wholesale adoption of Shari'a law into the legal system.

77. Article 2 of the Iraqi constitution also uses principles of democracy and the fundamental rights and freedoms protected in the constitution as measuring sticks. IR. CONST. 2005. ART. 2(b) and (c).

78. Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT'L L. 349, 368 (2004). See also, ABOU EL FADL, ET. AL, *infra*. See e.g., Nathan J. Brown The Final Draft of the Iraqi Constitution: Analysis and Commentary, Carnegie Endowment for International Peace (2005) 6; see also, KHALED M. ABOU EL FADL, SAID ARJOMAND, NATHAN BROWN, JERROLD GREEN, DONALD HOROWITZ, MICHAEL RICH, BARNET RUBIN, & BIROL YESILDA, *DEMOCRACY AND ISLAM IN THE NEW CONSTITUTION OF AFGHANISTAN*, 8-9 (Cheryl Benard, Nina Hachigian eds.) (RAND) (2003).

79. See, e.g., 'Divorced from Justice: Women's Unequal Access to Divorce in Egypt' Human Rights Watch (2004)11. While many governments are reluctant to legislate secular personal status law, some have successfully reformed legislation to create greater rights for women within the framework of religion. See e.g., Amna Arshad, *Ijtihad as a Tool for Islamic Legal Reform: Advancing Women's Rights in Morocco*, 16-WTR KAN. J.L. & PUB. POL'Y 129 (2006-2007).

80. Drumbl, *supra* note 78, at 368,

81. IR. CONST. 2005 ART. 29(1)(a),

82. Complicating matters, the Iraqi constitution also seems to restrict the national government from enacting a uniform personal status law or maintaining the current one. Unless an area of law is designated as within the sole purview of the national government, regional governments are permitted to pass inconsistent laws that take precedence over national laws. IR. CONST. art. 117(2). Legislative control of personal status law has not been reserved for the national government, which means that political and communal leaders in each region can exercise that power freely. Critics of this division of power explain: "By devolving family law to the regions, the state accommodates social and religious differences, while encouraging the loyalty of communal leaders to the state. Family law becomes part of a 'social contract,' trading communal autonomy for women's rights." Nadjie Al-Ali and Nicola Pratt, *Women in Iraq: Beyond the Rhetoric* MIDDLE EAST RESEARCH AND INFORMATION PROJECT 8 (2006), <http://www.acttogether.org/MERIParticleSummer06.pdf>.

The second premise of this discussion is that conservative interpretations of Shari'a personal status law will apply in both countries, at least for the time being. Before describing these interpretations, it is important to note that Islam is not a monolithic religion. There is no one set of rules of Islam, rather religious beliefs and Shari'a law differ by sect and by schools of thought within these sects.

This discussion relies on conservative interpretations of the law because at this time they are the prevailing interpretations.⁸³ While several countries that follow Islamic family law have amended their legislation toward more progressive interpretations of religious texts,⁸⁴ which includes Baathist Iraq, the political tides in Iraq and Afghanistan favor classical interpretations. Research in Afghanistan shows that the judiciary applies classical interpretations of personal status law.⁸⁵ The Max Planck Institute concluded that despite a personal status statute that combines mostly the *Hanafi* school of Sunni thought with improvements taken from other schools: "In practice, the judges . . . bypass statutory law and apply their interpretation of the *hanafi* rules, as far as they know them, thus putting aside all improvements that had been incorporated into the code as compared to the classical *hanafi* rules."⁸⁶

As for Iraq, current personal status legislation is relatively progressive. It restricts polygamy, punishes coercing women to marry and revokes men's right to unilaterally and extra-judicially divorce their wives, among other breaks from classical religious law.⁸⁷ Women's rights advocates fear, however, that Iraq will replace the current code with stricter religious rules, undoing these departures

83. See, e.g., Susan Otterman, *Islam: Governing under Sharia*, Council on Foreign Relations (2005), <http://www.cfr.org/publication/8034/> ("Most Middle Eastern countries continue to incorporate some traditional *sharia* into their legal codes, especially in the area of personal-status law, which governs marriage, divorce, and inheritance. In other areas of the law, such as the criminal code, most Islamic nations have attempted to limit the application of traditional *sharia*, replacing it either with secular legislation or with laws characterized as modern interpretations of *sharia*.").

84. For example, Tunisia eliminated a man's right to unilaterally declare a divorce extra-judicially as well as his right to participate in a polygynous marriage, justifying both changes on religious prescriptions. Michele Brandt and Jeffrey A. Kaplan, *The Tension between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 J.L. & RELIG. 105, 129 (1995-1996). Morocco also limited the right to polygyny using progressive interpretations of religious law. Morocco Personal Status Law (2004) Preamble and Art. 40 (English Translation by Global Rights, at <http://www.hrea.org/moudawana.html> (last visited September 3, 2006)).

85. The judiciary's conservatism likely will remain unchallenged. As Deniz Kandiyoti describes, proponents of centralizing Afghanistan's government rely heavily on Islamic identity and law as a unifying force to overcome communal loyalties. Deniz Kandiyoti, *Occasional Paper 4: The Politics of Gender and Reconstruction in Afghanistan*, 2005 UNITED NATIONS RESEARCH INST. FOR SOCIAL DEVELOPMENT 12, available at [http://www.unrisd.org/unrisd/website/document.nsf/462fc27bd1fce00880256b4a0060d2af/3050be40da5b871cc125704400534a7a/\\$FILE/OPGP4.pdf](http://www.unrisd.org/unrisd/website/document.nsf/462fc27bd1fce00880256b4a0060d2af/3050be40da5b871cc125704400534a7a/$FILE/OPGP4.pdf). Conservative notions of what it means to be Muslim become the identity behind which the divided tribal communities can unify. *Id.*

86. *Family Structures and Family Law in Afghanistan*, 2005 THE MAX PLANCK INST. FOR FOREIGN PRIVATE LAW AND FOREIGN PRIVATE INTERNATIONAL LAW 8, http://www.mpiprivhh.mpg.de/deutsch/Forschung/LaufendeProjekte/Afghanistan/MPI-Report_Family.pdf.

87. Noga Efrati, *Negotiating Rights in Iraq: Women and the Personal Status Law*, 59(4) THE MIDDLE EAST JOURNAL 577 (2005).

from traditional practices.⁸⁸ The Iraqi Governing Council, which served as an advisory board to the US-led Coalition Provisional Authority (CPA), attempted to do just that shortly after the fall of the Hussein regime.⁸⁹ L. Paul Bremer, the head of the CPA at the time, refused to ratify the change.⁹⁰

The US is no longer in the position to protect personal status law, which remains vulnerable as Islamists increase their power in Iraq. As early as December 2003, the United States Institute for Peace identified that “Iraq seems to be experiencing a religious revival and religious leaders, particularly Shiite leaders, exert increasing political influence.”⁹¹ In the December 2005 election, the United Iraqi Alliance (UIA) won a plurality just short of a majority of seats in the National Assembly.⁹² The UIA is a Shi’a political party umbrella group dominated by two conservative Islamist groups, the Supreme Council of the Islamic Revolution in Iraq (SCIRI) and al-Da’wa. It was under the leadership of a member of SCIRI that the Iraqi Governing Council attempted to revoke the progressive personal status law. The al-Dawa party promised in its campaign that it “would guarantee the family’s status based on Islamic values and the traditional norms of Iraqi society.”⁹³ The UIA’s political leaders appear to be focused on increasing the role of religion in Iraq’s government, although they are not unified on what that entails.⁹⁴ Kurds, who hold the next largest block in the National Assembly, tend to be more secular, but Islamist ideology is gaining within the Kurdish population.⁹⁵

The third premise of this discussion is that women’s advocates will not succeed in challenging these conservative interpretations as a violation of the constitution, at least in the near future. The issue boils down to how the judiciaries will treat apparent conflicts between religious laws and human rights protections. The Afghan constitution does not contain a clause stating how to handle such conflicts.⁹⁶ Iraq’s constitution permits rights to be limited as long as the “limitation or restriction does not violate the essence of the right or freedom.”⁹⁷ Stripping rights down to their essence could allow for excessive limitations of human rights. An appropriate standard for determining when

88. See, e.g., Dahr Jamail and Ali Al-Fadhily, *Iraq: It’s Hard Being a Woman*, INTER PRESS NEWS SERVICE AGENCY, Dec. 5 2006, <http://ipsnews.net/print.asp?idnews=35718>; Graham Usher, *Mother Iraq* AL-AHRAM WEEKLY ONLINE ISSUE NO. 679, 26 February - 3 March 2004, <http://weekly.ahram.org.eg/2004/679/re9.htm>.

89. Al-Ali and Pratt, *supra* note 82, at 3. The CPA attempted to pass legislation that would revoke the current personal status law and transfer jurisdiction over personal status matters to religious leaders. David Shelby U.S.-Iraq Women’s Network Prepares for Iraqi Elections (2004) <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2004&m=April&x=20040426174230ndyblehs0.6389734>

90. *Id.*

91. David Smock, *The Role of Religion in Iraqi Politics*, USIPEACE BRIEFING, Dec. 23, 2003, http://www.usip.org/pubs/usipeace_briefings/2003/1223_NBiraq.html.

92. Phebe Marr, *Special Report 160: Who Are Iraq’s Leaders? What Do They Want?*, 2006 UNITED STATES INST. OF PEACE 12, <http://www.usip.org/pubs/specialreports/sr160.pdf>.

93. BROWN, *supra* note 73, at 6.

94. Marr, *supra* note 92, at 15.

95. *Id.* at 14.

96. See AFG. CONST. 2004.

97. IR. CONST. 2005 ART. 44.

constitutional rights can be limited should account for the importance of the right, the reasons for the restriction, and whether the limitation is justifiable in a democratic, human rights-based country.⁹⁸ This clause is a problem for all Iraqi citizens, but could prove to be particularly problematic for sharply contested women's rights.

On its own, the fact that religious personal status law is protected expressly in both the Iraqi and Afghan constitutions could be viewed as insulating this area of law from judicial review.⁹⁹ Separate protection for personal status law without a clear statement that the religious law must conform to the constitutions' human rights provisions could place it in a protective bubble removed from accountability. To the extent the courts exercise judicial review, they could resolve apparent conflicts by: (1) favoring human rights over religion, (2) favoring religion over human rights, or (3) finding a way to read the provisions as consistent with each other. The requirement that courts use aspects of Islam as a measuring stick for the constitutionality of legislation in both countries suggests that religious law will be presumed to be constitutional. This means the judiciaries would be forced to prefer religion over human rights or find a way to read them as consistent. This conclusion is bolstered by the persistent references to Islam in both constitutions, which shows the intention to permit a role for religion in governance. The Iraqi constitution also requires legislation to conform to fundamental human rights and principles of democracy.¹⁰⁰ Placing these requirements in the same article as the religious repugnancy clause suggests that the constitution's drafters believe that no conflict exists between religious laws and constitutionally protected individual rights.¹⁰¹ The probable assumption that religious law is constitutional could result in removing personal status law from judicial oversight and accountability.

98. An example of such a clause can be found in South Africa's constitution. Article 36, reads:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

S. AFR. CONST. 1996.

99. Ayelet Shachar, *Reshaping the Multicultural Model: Group Accommodation and Individual Rights*, 8 WINDSOR REV. LEGAL & SOCIAL ISSUES 83, at 95-99 (1998) (describing how state policy that permits multiculturalism may follow the notion of "family privacy", which could insulate group practices from governmental intervention even when they violate the rights of group members).

100. ART. 2 (B) and (C).

101. *Id.* at.2.

B. The Transformation

Keeping in mind the three premises from the previous section, particularly that there will be no governmental oversight of personal status law, the remainder of Part II describes classical interpretations of important aspects of personal status law and how they create relational rights. At times, this section measures religious rules against international human rights law because the paper is intended to influence Western policy-makers who espouse the importance of promoting international human rights protections around the world.¹⁰² Once some, if not many, of women's individual rights are revealed as relational rights or under threat of becoming so, the potential depth of the injury is revealed – which is that Iraq and Afghanistan's constitutional protection for religious law may remove women from under the safeguards of the constitutions' human rights provisions.

Starting with marriage, men and women with full legal capacity have the right to refuse to marry.¹⁰³ Under most classical interpretations, a woman cannot marry without her male guardian's permission.¹⁰⁴ A guardian can refuse permission on the basis of a perceived social inequality between the spouses.¹⁰⁵ Inequality could refer to differences in lineage, amount of property or piety, among other things.¹⁰⁶ No Muslim woman is permitted to marry a non-Muslim man, although Muslim men may take wives that practice a monotheistic religion.¹⁰⁷ One explanation for the limitations on women's choice of spouses is that women need to be protected from making "immature" or "overzealous" decisions.¹⁰⁸ Under most schools of thought, only the guardian can contract a marriage.¹⁰⁹ The *Hanafi* school is the exception as it merely requires his participation.¹¹⁰

These rules of marriage, to the extent they are protected by a constitution and the judiciary, not only treat women as incompetent to make a monumental decision but transform several individual rights into relational rights. Giving guardians the right to refuse a woman's marriage gives them the power to

102. See, e.g., President Proclaims Human Rights Day & Bill of Rights Week, Office of the Press Secretary (2001) <http://www.whitehouse.gov/news/releases/2001/12/print/20011209.html> (describing the importance of "defending international human rights."); European Union Guidelines on Human Rights Dialogues (2001)4; http://www.consilium.europa.eu/uedocs/cmsUpload/14469EN_HR.pdf (describing the European Union's policy of promoting international human rights law around the world.)

103. JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION* 7 (2nd Ed. 1994). It appears that guardians may have the right to compel minors to marry. *Id.* at 10, 12; HAMMUDAH 'ABD AL 'ALI, *THE FAMILY STRUCTURE IN ISLAM* 80 (1977) (describing that a guardian may force a marriage when he fears the woman "will engage in sexual misbehavior" or is a minor.)

104. *But see* NASIR, *supra* note 103, at 10 (describing that guardianship could be viewed more as agency where the woman in deference to tradition gives her guardian permission to conduct the marriage).

105. *Id.* at 18. The *Hanafi* school of Sunni thought may be an exception to this general rule. ABDUR RAHMAN I. DOI, *SHARI'AH THE ISLAMIC LAW* 142 (1984).

106. NASIR, *supra* note 103, at 18–19.

107. *Id.* at 29. Men are not permitted to marry women who are not Christian or Jewish. *Id.* at 45.

108. DOI, *supra* note 105, at 123.

109. NASIR, *supra* note 103, at 10.

110. *Id.*

determine whether women can exercise their equality and autonomy rights, both of which are constitutionally protected in Afghanistan and Iraq.¹¹¹ True equality requires that women be given the same right as men to choose with whom to enter into marriage.¹¹² Choosing a spouse also is an exercise of an adult's autonomous decision-making power.¹¹³ A guardian who defers to the woman's wishes allows her access to those rights; a guardian who does not, denies them. Men, on the other hand, retain their individual rights to autonomy and equality under these rules, although their marriage rights also are restricted. The restriction that men may marry only women who follow a monotheistic faith is applied equally to all men; no person has the discretion to refuse them the right to marry. Overall, the practice of requiring a guardian to approve women's marriages wholly denies them the right to equality under the law, gives their guardians control over women's access to equality and autonomy rights, and stereotypes women, all of which maintain patriarchy and discrimination.

Within marriage, Shari'a law creates a system of complementary rights and duties, where men and women receive different rights and owe each other different duties based on their familial and social roles. The differing rights are based on the concept that God gave men and women complementary qualities that create harmony in the family and community and that ultimately their rights and duties, while separate, are equal:

God has endowed men and women with different qualities to perform their different tasks. A woman must bear children, for which God has given her the quality of compassion. . . God has endowed man with more than women (twice the inheritance, imama and qada'), making him responsible for her. This is not an honor but a burden involving responsibilities and duties.¹¹⁴

Under this system, a man has a duty to maintain his wife financially,¹¹⁵ including providing her with a home.¹¹⁶ The duty of maintenance of a husband is an enforceable right of the wife. In return, the woman owes her husband a duty of

111. IR. CONST. 2005 ART. 14—15 ; AFG. CONST. 2004 ART. 22, 24.

112. The Convention on the Elimination of Discrimination against Women, which establishes international standards for women's rights, attempts to address these types of rights violations. Article 16 requires governments to provide women with the right to choose whether to marry and to whom. Convention on the Elimination of Discrimination Against Women (CEDAW) ART. 16, Dec. 18, 1979.

113. McClain, *supra* note 38, at 217—218 (quoting the Pennsylvania Supreme Court, which refers to “the right to choose one's marriage partner . . . [as] a fundamental right protected by the right of privacy.”). See also, Edith M. Hofmeister, *Women Need Not Apply: Discrimination and the Supreme Court's Intimate Association Test*, 28 U.S.F. L. REV. 1009, 1015 (1994).

114. Yvonne Yazbeck Haddad, “Islam and Gender: Dilemmas in the Changing Arab World” 14 in Yvonne Yazbeck Haddad and John L. Esposito (Eds.) *ISLAM, GENDER, AND SOCIAL CHANGE 1998; but see* Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 LAW & SOC. INQUIRY 1, 7 (2004).

115. NASIR, *supra* note 103, at 63. (Maintenance includes provision of food, clothing, medicine, and medical services). 'ABD AL 'ALI *supra* note 103, at 149.

116. NASIR, *supra* note 103, at 41. Although classical Shari'a law allows for polygyny, men are required to provide a home for each wife without additional wives or family members living there. *Id.*

obedience, which is a husband's enforceable right.¹¹⁷ Obedience typically means that the woman must not leave her home without the permission of her husband¹¹⁸ and that she must provide children and sexual relations.¹¹⁹ Disobedience, whether by leaving the home without permission, denying her husband sexual relations or refusing to have children, results in a loss of the woman's right to maintenance.¹²⁰ It also may allow a man to "discipline" his wife.¹²¹ Both spouses owe each other a duty of respect.¹²²

The system of complementary rights based on a woman's obligation of obedience violates the guarantee of equality under the law since by definition complementary rights treat men and women differently. This system also transforms a wide variety of women's individual rights into relational rights. First, access to their equality rights depends on whether the husbands choose to enforce obedience rules. Husbands who allow their wives to work, travel and make reproductive and sexual choices freely, allow women access to their equality rights. Any restriction on those decisions denies women their equality.

Obedience rules that require women to exchange sexual relations for maintenance also deprive women of their rights to bodily integrity and to autonomy, establishing them as relational rights since it sets up a situation where the woman's body belongs to her husband. Under international human rights law, the rights to autonomy and bodily integrity permit all people, including women, to choose whether and when to have sexual relations.¹²³ They also permit women to choose whether and when to have children.¹²⁴ Iraq's constitution guarantees autonomy and bodily integrity rights in Article 15,¹²⁵ while Afghanistan protects the right to autonomy in Article 24.¹²⁶ Women subjected to classical interpretations of religious law can exercise these rights only to the extent their husbands permit them. These rights remain individual rights for men, as women do not hold the reciprocal power to require sexual relations or children.

Similarly, women's right to freedom of movement is relational under a system of obedience. Freedom of movement is protected expressly in both the Iraqi and Afghan constitutions. Afghanistan's constitution promises that

117. 'ABD AL 'ALI, *supra* note 103, at 148 read together with 172.

118. NASIR, *supra* note 103, at 41-42; 'ABD AL 'ALI, *supra* note 103, at 172-73.

119. NASIR, *supra* note 103, at 64-65; DOI, *supra* note 105, at 205.

120. NASIR, *supra* note 103, at 66-68. According to one scholar a woman loses her right to maintenance if she expresses an "aversion to her husband, hatred toward him, disinterest in his companionship or attraction to another person." 'ABD AL 'ALI, *supra* note 103, at 138.

121. *Id.* at 173.

122. NASIR, *supra* note 103, at 43.

123. Yakaré-Oulé Jansen, *The Right to Freely have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 AKRON L. REV. 311, 317-20 (2007) (discussing right to be free from sexual violence and coercion).

124. CEDAW, *supra* note 112 ART. 16(1) & 16(1)(e) ("States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.").

125. IR. CONST. 2005.

126. AFG. CONST. 2004.

“[e]very Afghan shall have the right to travel and settle in any part of the country, except in areas forbidden by law;” and that “[e]very Afghan shall have the right to travel outside Afghanistan and return, according to the provisions of the law.”¹²⁷ In Article 24, Iraq’s constitution guarantees the “right of free movement, travel, and residence inside and outside Iraq.”¹²⁸ Despite these constitutional provisions, classical interpretations of religious rules prohibit women from leaving their home or traveling without their husbands’ permission, with few exceptions, establishing a relational right to freedom of movement.¹²⁹ Men, however, maintain this constitutionally protected, individual right as women have no right to restrict their movement.

Obedience rules also transform the individual right to work into a relational right that requires a man’s permission. Both constitutions protect this right,¹³⁰ yet husbands could prohibit their wives from working or restrict them from working in certain professions or jobs. The relational nature of the right to work could cause severe harm since it ensures women’s dependency on men unless women are independently wealthy. While religious rules require men to meet women’s basic needs, financial control gives men an unfair power advantage in the relationship by giving them the power to require women to bargain for access to resources beyond what the law requires. Men also may be harmed by complementary rights as women do not owe their husbands a reciprocal duty of maintenance regardless of their financial circumstances.¹³¹

Classical Shari’a law’s treatment of marital property also transforms women’s constitutional right to own private property into a relational right.¹³² The religious law views property owned by a married couple as separate property belonging to the husband or the wife, rather than joint property. Women are entitled to control over and to retain their full rights in property they brought into the marriage, received through inheritance, purchased with their separate income or money, and received as dower, except in cases of a *Khul* divorce as described below.¹³³ All other property belongs to the husband. A woman’s unpaid labor in the home makes no impact on this distribution of property nor does her decision to contribute her money or property to the family, depriving her of her full individual right to own private property. What would be deemed joint marital property under many secular laws, is treated

127. *Id.* at. ART. 39.

128. IR. CONST. 2005 ART. 24

129. Women cannot be prevented from attending religious worship or from visiting their families when a parent is ill. NASIR, *supra* note 103, at 41–42.

130. IR. CONST. 2005 ART. 22(1); AFG. CONST. 2004 ART. 48.

131. NASIR, *supra* note, 103.(defining maintenance as “the lawful right of the wife under a valid marriage contract on certain conditions.”)(emphasis added) *See also*, LYNN WELCHMAN, ISLAMIC FAMILY LAW TEXT AND PRACTICE IN PALESTINE(1999)(“The reason why the woman’s work under the classical rules is not held to be a legitimate reason to leave the house is that the husband alone is responsible for his wife’s maintenance; in theory, she has no legal obligation to spend anything on herself or the house, since everything she actually needs is supposed to be provided by the husband.”)

132. AFG. CONST. 2004 ART. 40 (protecting right to own private property); IR. CONST. 2005 ART. 23 (protecting right to own private property)

133. *See, e.g.*, ISLAM, LAND AND PROPERTY RESEARCH SERIES UN HABITAT, PAPER 5: MUSLIM WOMEN AND PROPERTY § 5.2.3 (2005).

under religious law as belonging solely to the man. Women's property rights again are relational as they can access them only if their husbands choose to share this property or on divorce relinquish it. Men, on the other hand, retain their individual right to own private property, including the right to sell the property, regardless of their status as married.

If a married couple is unhappy, under all interpretations of Shari'a law the couple is allowed to divorce; religious law "does not keep them tied in a loathsome chain to a painful and agonizing position."¹³⁴ Classical interpretations give the husband the unilateral and extra-judicial right to declare a divorce.¹³⁵ Women receive divorces by agreement with their husbands, which is a *Khul* divorce, or in some countries by court order. Unlike men, women can receive a divorce only with someone else's permission. Court-ordered divorces typically are hard to obtain and being a victim of domestic violence does not always lead the court to grant a woman a divorce.¹³⁶ Grounds for judicial divorce differ both between and within Sunni and Shi'a sects.¹³⁷ They may be limited to proof of the husband's impotence or insanity¹³⁸ or expanded to include when there is injury or discord,¹³⁹ a failure to pay maintenance,¹⁴⁰ and abandonment by the husband.¹⁴¹

In a *Khul* divorce, women relinquish all financial entitlements they receive or should receive from their husbands in exchange for their agreement for a divorce;¹⁴² this is considered compensation to the husband according to religious thought.¹⁴³ Upon marriage, the husband pays a dowry to his wife that belongs solely to her. The dowry is considered a right of a married woman;¹⁴⁴ it is a gift that belongs to her and is considered a sign of respect.¹⁴⁵ In many countries and permissible under religious law, the practice is for the man and woman to agree to a specific amount of dowry but for the husband to pay only a small portion initially.¹⁴⁶ If the couple should divorce or on the death of the husband, the remaining dowry becomes payable to the wife; it is a debt he is obligated legally to pay to her. With a *Khul* divorce, women relinquish their entitlement to that

134. DOI, *supra* note 105, at 169.

135. NASIR, *supra* note 103, at 74-75.

136. See, e.g., Hajjar, *supra* note 114, at 25; IMMIGRATION AND REFUGEE BOARD OF CANADA, NIGERIA: AVAILABILITY OF DIVORCE FOR WOMEN IN A MUSLIM MARRIAGE WHO HAVE EXPERIENCE DOMESTIC ABUSE April 9, 2001.

137. NASIR, *supra* note 103, at 88.

138. *Id.*

139. *Id.*

140. *Id.* at 97.

141. *Id.* at 100.

142. *Id.* at 84. Women typically are entitled to maintenance for a short period of time, usually for 3 months after the declaration of a divorce, during which time if the divorce was declared unilaterally by the husband, the husband can rethink his decision. *Id.* at 107; See also DOI, *supra* note 105, at 200. If a court finds that the husband's unilateral divorce was arbitrary, then it may award a woman additional maintenance. NASIR, *supra* note 103, at 105.

143. *Id.* at 84-85.

144. *Id.* at 52.

145. DOI, *supra* note 105, at 158-59 ("The payment . . . on the part of the husband is an admission of the independence of the wife, for she becomes the owner of the property on her marriage.")

146. NASIR, *supra* note 103, at 49.

debt as well as to maintenance.¹⁴⁷ A husband also may require a woman to give up maintenance payments for their children or even her custody rights in exchange for his consent to the divorce.¹⁴⁸

Overall, the right to divorce under classical religious law violates the requirement of equal treatment under the law. Men can extricate themselves from the marriage with relative freedom whereas women require someone else's permission. It implies that only men are capable of determining for themselves that they cannot reconcile with their spouses whereas women need the validation of either their husbands or a court.

When women cannot prove one of the grounds for a court-ordered divorce or if this option is unavailable, they must bargain for a divorce with their husbands. The process of achieving a *Khul* divorce makes women's rights to equality and autonomy relational since access to these rights depends on whether their husbands grant them permission. Women can have the same right to an extra-judicial no-fault divorce and can exercise their decision-making power only if their husbands permit it. Additionally, women's right to own private property becomes relational. While a dower is treated as a gift to the woman, and therefore as her property, women who utilize the *Khul* divorce have only a relational right to that property – their right exists as long as their husbands give it to them. Furthermore, women have relational rights to marital property since husbands, considered the owners, can choose whether to share it on divorce. Putting these divorce rules and relational rights in broader perspective, husbands have the power to prohibit their wives from working and on divorce may be able to force the women to relinquish any financial entitlements and all marital property, potentially leaving them destitute.

Custody of children on divorce is granted to the woman while a child is young, as it is believed the woman is the appropriate person to look after children in their early years.¹⁴⁹ After the child reaches a specified age, custody belongs to the father.¹⁵⁰ Some sects or schools restrict women's custody of boys to when breast-feeding stops and slightly older for girls; others allow custody of both until puberty.¹⁵¹

There are numerous restrictions on women's rights to custodianship under classical interpretations of Shari'a law. Women cannot act as custodians if they remarry to men not in a close familial relationship to the children.¹⁵² The mother and children cannot move far from the father or travel without the father's permission.¹⁵³ Other restrictions that different sects or schools impose are that the woman and children must live in an approved residence and must retain their Muslim identity.¹⁵⁴ Men have no restrictions on becoming custodians of

147. *Id.* at 84.

148. *Id.* at 85.

149. NASIR, *supra* note 103, at 131.

150. *Id.* at 144.

151. *Id.*

152. *Id.* at 136.

153. *Id.* at 141.

154. *Id.* at 137.

their children.¹⁵⁵ Further, men are always treated as the legal guardians of their children with an inherent right to make decisions regarding their children, particularly in the area of education.¹⁵⁶ Men are obligated to pay maintenance for their children unless the women relinquish their entitlement in order to reach a divorce agreement. A court may order the husband to pay maintenance despite the agreement, but it becomes a debt the woman owes the man.¹⁵⁷

The custody regime deprives men and women of equality under the law, as the decision over custody is based solely on gender. The rules are detrimental to all members of the family since both parents are deprived arbitrarily of important parental rights, while custody decisions are based on formulaic assumptions of what is in the best interest of the children rather than an examination of what is in fact in their best interests. These custody rules also transform women's individual rights to freedom of movement, autonomy and to choose their religion into relational rights. Women cannot freely choose their religion, whom to marry, where live, or whether to travel without risking custody of their children. These decisions must undergo the approval of their ex-husbands, which transforms these rights into relational rights. Each of the effected rights remains individual for men as these restrictions on custody rights apply only to women.

From this limited examination of classical interpretations of Shari'a personal status law, it becomes apparent that the problem women confront from constitutional protection of this religious law in Iraq and Afghanistan is not simply discrimination but also that they may be removed from under the protections of many constitutional rights.¹⁵⁸ The concept of equality under the law does not exist in the area of personal status law, while women's access to their rights to equality, freedom of movement, bodily integrity, property and autonomy likely will depend on the will of their fathers and/or husbands. Women likely will be deprived of their individual rights by a constitution that gives religious or cultural personal status law a role in governance without ensuring that any private actor to whom jurisdiction over law and/or law enforcement is transferred is held accountable to the constitution. All of this information refutes the assumption that the balance between the role of religion in governance and the human rights provisions in the Iraqi and Afghan constitutions ensures that women's rights will be protected. Once the assumption is proved untrue, there is no basis for Western policy-makers' support for these constitutions or any other constitutions that protect religious or cultural law without ensuring that rights remain individual rather than transformed into relational rights.

155. *Id.* at 138.

156. *Id.* at 131.

157. *Id.* at 86.

158. Women may be able to mitigate the harm of obedience rules by stipulating in their marriage contracts that they must have the right to work, to travel and to divorce without restriction. *See, e.g.*, Lynn Welchman, *ISLAMIC FAMILY LAW TEXT AND PRACTICE IN PALESTINE*, Women's Center for Legal Aid and Counseling, 65 (1999). Such mitigation, however, does not undo the transformation of these rights to relational rights since the husbands must agree to these contractual stipulations, which means they remain under men's control.

CONCLUSION

The expanded theory of relational rights begins to capture the depth of the risk of injury to women's rights when constitutions provide religion or culture a role in governance without guaranteeing that the application of religious or cultural law will be subjected to scrutiny for human rights violations. Relational rights are created from individual rights when unaccountable, private actors are given the power to determine the content of those rights for persons with whom they have a relationship. Religious or cultural law accomplishes this transformation when it protects and enforces unequal power relations, whether in society or in the family. Once rights become relational, weaker parties may not be able to access some or all of the protections of the constitution, at least in the affected areas of law. Instead, they must hope the stronger parties allow them to exercise their rights. Because most cultural and religious law maintains elements of patriarchy, women suffer the greatest risk of having their individual rights undergo the transformation.

A democratic constitution and protections for progressive human rights will not necessarily neutralize women's risk. Suad Joseph's description of how she conceived of relational rights depended on a political system that was weak, corrupt, undemocratic and ultimately failing; it was based on a government that refused to provide its constituency the benefits, privileges and rights considered in democratic theory to inhere in all citizens without the intervention of private actors. Relational rights created by constitutions, on the other hand, can exist even if the government is democratic and follows the rule of law as long as the constitution protects these unequal power relations by protecting the law that maintains them.

The constitutional protection of equality rights may not alter the risk of harm to women, since the danger goes well beyond discrimination. To frame the danger of adopting religious or cultural law into the legal system as potentially resulting in discrimination against women suggests that the power to correct the problem lies in the hands of the government; it assumes a violation of equality provisions of the law and/or constitution can be corrected through state accountability and the application of the rule of law. What the expanded theory of relational rights shows is that the power to correct discrimination in fact is controlled by private actors who often are under no mandate or constitutional requirement to protect women's rights.

To combat relational rights, these constitutions must ensure the enforcement of human rights guarantees against private actors. The failure to do so should force Western policy-makers to rethink their support for constitutional protection of religious or cultural law. While it is too late for the concept of relational rights to influence the Afghan and Iraqi constitutions, the trend of constitutionally protecting religious or cultural law must be re-examined in light of the new harm identified.