The Right to Change One's Religion:

Apostasy as the Litmus Test for Religious Freedom

in Iraq and Afghanistan's Constitutions

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Fazl Hadi Shinwari, the Supreme Court Justice of the Afghan Supreme Court, accepts the international standards enshrined in the Universal Declaration on Human Rights, with three exceptions: freedom of expression, freedom of religion, and equality of the sexes.\(^1\) When meeting with the United States Commission on International Religious Freedom (hereafter USCIRF), a government commission that monitors the status of freedom of thought, conscience, and religion or belief abroad and gives independent policy recommendations to the U.S. President, Secretary of State, and Congress, Shinwari pointed to the Koran and reportedly said, “This is the only law.”\(^2\) The Afghan Supreme Court, soon after constitutional ratification, created a “Fatwa Council” within the highest court that was composed of Islamic clerics who reviewed questions of Islamic law. On its own initiative, it began to issue rulings in matters not brought before it, such as excluding a candidate from elections because he questioned polygamy.\(^3\) This is deeply troubling after the US poured billions of dollars into an effort to remake Afghanistan into a liberal and democratic country.\(^4\)

While the United States has had an opportunity to structurally reshape Iraq and Afghanistan through the constitutional drafting process, in both instances the task has been arduous and protracted. In order for the drafts to gain wide societal acceptance, important constituencies in both nations had to accept the constitutions as being both authentic and legitimate while protecting liberal and democratic values. Negotiations

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\(^{1}\) Bansal and Gaer.  
\(^{2}\) Ibid.  
\(^{3}\) Under Shinwari, the Fatwa Council upheld the death penalty for blasphemy and sodomy; denied a nine-year-old girl who was forced to marry the right to divorce, even though sixteen is the age of consent in Afghan law; and banned cable television. See Etzioni, p. 172; Miller and Perito, 7.  
over religious freedom provisions, in particular, were controversial and hotly debated. American advisers rightfully worried that a conservative judiciary might use provisions in the constitution to restrict the religious freedom of non-Muslims. If progressive jurists come to power, the Iraqi and Afghan constitutions can be interpreted liberally, but if conservative jurists are in power, fundamental human rights may be in jeopardy. The constitutional drafting process in Afghanistan and Iraq raised anew the question of the compatibility of international human rights within Islamic societies.\textsuperscript{5}

In the West, “the concept of apostasy as a criminal offense seems outmoded, so people…do not tend to think of the freedom to change religion as a central concern of provisions guaranteeing religious freedom.”\textsuperscript{6} Yet in Muslim countries, the question of whether there should be freedom to convert remains relevant “since attitudes are [still] influenced by the shari’a rule prohibiting conversion from Islam.”\textsuperscript{7} Developed in the eighth century, this shari’a rule made apostasy – or ridda – punishable by execution. While the Koran does mention ridda, it does not call for apostates to be executed, and conservatives who argue that apostates should be executed rely on a seventh century hadith – a saying attributed to the Prophet Mohammed – that quotes the prophet as saying “Whoever changes his religion, kill him.”\textsuperscript{8} Nonetheless, Mohammed is never recorded as killing apostates and many believers take their cues from his life. While the idea that Islamic law mandates execution for apostasy is “widely known” in predominately

\textsuperscript{5} Stanke and Blitt 3.
\textsuperscript{6} Mayer 167.
\textsuperscript{7} Ibid.
\textsuperscript{8} Arzt 406; Saeed and Saeed 51.
Muslim countries, it is “often ignored,” and putting apostates to death is very rare today.\(^9\) Typically opponents of the practice reference the Koranic verse: “There is no compulsion in Islam.”\(^10\) While a textual analysis of the prophet’s *hadith* is certainly outside of the scope of this paper, it is important to note that the punishment for apostasy remains highly controversial among Muslims.\(^11\)

Religious freedom, of which the right to apostatize is part, is far more than the right to worship. It is part of what one social scientist has termed the “bundled commodity”\(^12\) of fundamental human freedoms since it is highly correlated with the consolidation of democracy, press freedom, economic freedom, better health and education, higher per capita GDP, less conflict, and civil liberties.\(^13\) It is correlated with these outcomes because religious freedom is the antidote to religious extremism and terrorism, and thus its promotion in parts of the world where intolerance is ripe, is vital to America’s national interests.\(^14\)

How then should we measure the degree to which religious freedom has taken root in a society? Apostasy, not ambiguous religious freedom provisions, should be the litmus test with which to measure the robustness of the religious freedom provisions in the Afghan and Iraqi constitutions.\(^15\) Apostasy is one of the most difficult of all religious

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\(^9\) Elliott. According to a staff member at USCIRF (see Elliott), four people in the past twenty-five years have been executed under apostasy laws: one in Sudan in 1985; two in Iran, in 1989 and 1998; and one in Saudi Arabia in 1992.

\(^10\) Koran 2:26.


\(^12\) Grim 4.

\(^13\) Grim 4.

\(^14\) Farr, “Diplomacy in an Age of Faith.”

\(^15\) Professor Tom Farr has described three levels of religious freedom, with each step being increasingly difficult for a society to incorporate. The first level is the interior level of conscience, which is the most
freedom measures for a nation to achieve, and until it has eliminated blasphemy laws and punishment for apostasy, one cannot say that religious freedom has been achieved.16

This paper will examine the general difficulties in drafting constitutions, the international documents both countries have ratified, the actual drafting process in Kabul and Baghdad, the religious freedom provisions within the final drafts, and then reflect on the dilemma between legitimate constitutions and liberal constitutions.

GENERAL DIFFICULTIES IN CONSTITUTION-MAKING

The goals for a model constitution are rather plain. Constitutions should be perceived as being legitimate by the society, affirm human rights and establish democratic procedures, protect minority rights, and be stable; the constitution-making process itself should be transparent, inclusive and participatory. Pursuing all of these goals simultaneously is not always possible. For a constitution to last and matter, the process by which it came into being and its actual content should be perceived as being legitimate by a society. It must also be sustainable; it cannot be completely at odds with the dominant religion and local culture. Putting liberal, democratic constitutions into play was a goal in both Iraq and Afghanistan. In both countries, reconciling this tension between liberal constitutions and legitimate ones was one of the greatest challenges. The drafting processes in Baghdad and Kabul were further complicated by short timelines and pressure from the U.S. government to finish according to the schedule. According to difficult for government to control. The second level, the right of community and individuals to enter and exit religious communities, includes all of the things that are natural to a religious community, such as building schools and raising children in a religious tradition. The third level, according to Farr’s typology, is the right of individuals and communities to make political arguments within due limits of the law.

16 Farr, Interview.

Larry Diamond, who served as a senior democracy adviser to the CPA, “the worst thing you can do is rush [the drafting] process.”17

Our conception of what a constitution is changed radically in the 20th century. Constitutions were previously thought of as contracts that were negotiated by representatives, signed and observed. Constitutions today are, "a conversation, conducted by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable."18 Process is very important today. In fact, process and the actual outcome have become “necessary criterion for legitimating a new constitution: how the constitution is made, as well as what it says, matters.”19 Within this era of "new constitutionalism," "a right to participate in making a constitution has arisen."20 A "striking element" of contemporary constitution-making is that the norms of democratic procedure, transparency and accountability that are part of daily political life are expected in the constitution-making process.21 It is utterly unimaginable that the secrecy and non-democratic nature of the drafting of the American Constitution would be tolerated today.

Democratic constitutions should establish democratic governance, but today that is not enough: the process by which democratic constitutions are made is expected to be democratic. There is "a moral claim to participation, according to the norms of democracy," the basis of which is “the belief that without the general sense of 'ownership' that comes from sharing authorship, today's public will not understand, respect, support,

18 Hart 3.
19 Ibid. 12
20 Ibid. 4.
21 Ibid.
and live within the constraints of constitutional government.”

Public participation in the process varies around the world, but it often means that the public elects a constitutional convention or ratifies a text through referendum. While this inclusive process should increase its legitimacy, it also lengthens and often delays the constitution-making process.

In Iraq, there was a serious lack of public participation in drafting the Transitional Administrative Law (hereafter TAL). Regional governments were not consulted. The Sunni Arab community was not well represented. The insurgency did not really understand their own interests or the benefits of federalism – after years of living under authoritarian rule, this needed to be explained to them. Fifty-five Iraqis were chosen to draft the permanent constitution; none were Sunni.

Even when fifteen Sunni members were eventually added to the Constitutional Drafting Committee, they could not vote. It is unsurprising that the TAL was perceived as being imposed on Iraqis.

**INTERNATIONAL PROTECTION OF RELIGIOUS FREEDOM**

Both Afghanistan and Iraq are party to the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. Article 18 of the Universal Declaration on Human Rights affirms the individual right to “freedom of thought, conscience and religion.” It also states that “this right includes the freedom to change his religion or belief.”

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22 [Ibid.]
23 Diamond 342.
24 [Ibid. 343.]
25 The Universal Declaration of Human Rights.
26 [Ibid.]
uses identical language guaranteeing the “right to freedom of thought, conscience and religion.” The second clause amplifies on the right to choose, stating that, “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

**DRAFTING A CONSTITUTION IN KABUL**

The United States may have led the military engagement in Afghanistan, but the constitutional drafting process was left up to a nine-member committee of Afghans. The United Nations and some Western consultants were on the ground to offer legal advice, but it was primarily an Afghan document. President Karzai eventually replaced the committee with a 35-member constitutional commission (7 of whom were women). The constitutional commission presented the draft to Karzai on November 3, 2003, and the Loya Jirga approved it on January 4, 2004.

This was not Afghanistan’s first constitution, and Islam was the national religion in all five prior constitutions between 1923 and 1977. Every Afghan that the International Crisis Group interviewed, which included people from civil society organizations, government and jihadi parties, said that Afghanistan was a Muslim country and thought that the constitution would have to be Islamic in nature. The question of how much *shari’a* should be incorporated into the new constitution was strongly contested, however, both internally and externally. Deputy Supreme Court Justice Faxel

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27 International Covenant on Civil and Political Rights.
30 *Ibid* 9. Interestingly, some respondents indicated that in a more secure environment, secularism might have been a viable option.
Ahmad Manawi and a group of scholars argued that *shari’a* should be *the* sole source of the law, which the ICG called “a very restrictive position that would compromise most efforts at modernization and moderation.”

The *Junbish* party, by contrast, advocated that *shari’a* should not be explicitly mentioned in the constitution.

Barnett Rubin, an adviser to the UN Special Representative for Afghanistan Lakhdar Brahimi in 2001, described the final result of the debates over the role of religion as “a package deal that contains potential contradictions to spark future conflicts.” The role of Islam, according to Rubin, “more than almost any other issue...involved balancing outside actors’ demands for the acceptance of international standards with the demands of domestic actors, notably the Islamist politicians and the ulama, for a constitution that conforms to their understanding of Islam.” From the outset, international actors were willing to accept that the new constitution would declare Afghanistan an Islamic state, but they were unwilling for the new constitution to contain an explicit reference to *shari’a*.

The final text passed at the Loya Jirga was the result of eleventh-hour bargaining between Islamists, President Karzai and international representatives. “In quiet negotiations diplomats made clear to Islamist leaders what the international community's red lines were, and the final result reflected negotiation among many Afghan and international parties.” The commission’s draft named Afghanistan the “Islamic Republic of Afghanistan” as a result of Vice-President Nematullah Shahrani’s advocacy,

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32 Rubin 13.
33 Ulama is defined as the “collective term for Islamic scholars and jurists,” in Mayer, 228.
34 Rubin 13-14.
a move that was opposed by many members. At Karzai’s request, the Islamists accepted a measure that expanded the constitutional scope of rights accorded to non-Muslims. While Article 3 had previously read that non-Muslims were “free to perform their religious ceremonies,” it was made broader-sounding by giving non-Muslims the right “to exercise their faith.” As a result of these negotiations, Islamists dropped their attempts to insert Islam or an explicit reference to shari’a as a check on Afghanistan’s international human rights obligations. Article 7 “unqualifiedly requires” the state to abide by the Universal Declaration of Human Rights and all covenants to which Afghanistan is party.

These victories pale, however, when considered in light of the Islamists’ ability to retain what some have termed a stringent “repugnancy clause,” an article which allows the judiciary to strike down anything that is contrary to Islam. While this provision is standard in most constitutions of predominately Muslim countries, the language is a retreat from that of the 1964 constitution, which read that no Afghan law could be against “the basic principles of the sacred religion of Islam and the other values embodied in this constitution.” In an important sense, the new clause “goes farther than did the 1964 document toward enshrining shari’a by specifying that laws cannot contradict any of

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36 Ibid.
37 Rubin 14-15.
38 Ibid. 14.
39 Bernard and Hachigian, 3.
40 Article 64, 1964 Constitution. “In Afghanistan, the 1964 Constitution does not mention the shari’a but used the phrase ‘basic principles of Islam.’ Reference to “the basic principles of Islam,” as in the 1964 formulation, is to be greatly preferred over the reference only to ‘Islam’ or to the ‘shari’a.’ Insertion of the term ‘principles’ contributes to the idea that application of Islamic teachings cannot be mechanistic, based on a frozen interpretation of Islamic law. Moreover, the term ‘Islam’ avoids some of the recent connotations of the term ‘shari’a.’ Currently, in a number of Islamic countries, reforms are being rolled back, democratic structures threatened and extreme applications of Islamic law instituted under the name of shari’a, and the term has been politicized to signal that agenda. It suggests efforts to supplant modern legal structures and impose specific interpretations of Islam, including hudud criminal penalties [apostasy included]. The term ‘principles of Islam’ avoids possible misunderstanding.” Bernard and Hachigian, 4.
Islam’s ‘beliefs and provisions’ and by omitting the 1964 reference to other ‘values of this constitution.’”

Certainly this repugnancy clause, Rubin writes, “promises to be more central to political life [than] in the past,” and he has suggested that conflict between international human rights standards and the repugnancy clause is “almost inevitable,” noting that judicial decisions could be meted out on political grounds. Although they may have made formal concessions to the principles of liberal government, the repugnancy clause gave the Islamists the ultimate trump card. As Amin Tarzi, the former Afghan Regional Analyst at Radio Free Europe/Radio Liberty said with regard to the compromises, “The Islamists knew exactly what they were doing.”

For the first time, the constitution granted the Supreme Court purview over the constitutionality of legislation, presidential decrees and international treaties. The commission had proposed a separate constitutional court, but the president’s team struck the idea down, fearing that it would resemble the Council of Guardians in Iran. However, the Afghan Supreme Court was granted those powers, and it is a body that has always been controlled by jurists trained in Islamic jurisprudence, not constitutional law. Ironically, this configuration may be more restrictive to human rights, not less.

**RELIGIOUS FREEDOM PROVISIONS IN AFGHANISTAN’S CONSTITUTION**

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41 Rubin 15.
44 Tarzi, Telephone Interview.
In 2004, Afghanistan adopted a new permanent constitution that had several troubling clauses that might limit or contradict the previous human rights commitments that Afghanistan had ratified. According to Article 7 of the constitution, the new state would “abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.” Yet, Article 1, 2 and 130 seem to conflict with Article 7.

The constitution established a limited right for non-Muslims to worship – what one religious freedom advocate has termed a “right to rites,” – but it “falls short of guaranteeing freedom of religion.” Article II states:

The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals.

Thus, non-Muslims would be free to practice “within the bounds of the law,” although (as University of Pennsylvania legal scholar Ann Elizabeth Mayer points out) it fails to specify which law—secular or Islamic—applies. Thomas F. Farr, the first director of the Office of International Religious Freedom at the State Department, writes that the constitutional guarantees were not “much better than what non-Muslims were permitted to do in Saudi Arabia, which was to worship in private.”

The “right to rites” was followed by an even more worrying article. The repugnancy clause, Article III of the constitution, stipulates that “No law shall contravene

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46 Shea, 209.
47 Mayer 190; Farr 6.
49 Mayer 165.
50 Farr 6.
the tenets and provisions of the holy religion of Islam in Afghanistan.”51 Accordingly, the courts could strike any law it deemed contravening Islam52 and “traditional Islamic rules affecting religious minorities could potentially be deployed under this rubric.”53

Tad Stahnke and Robert Blitt, legal experts at the United States Commission on International Religious Freedom, found two ways to restrict or override the limited religious freedom provisions. First, Article II restricts the scope of religious freedom “within the bounds of law.” This means that ordinary legislation can “trump the constitutional rights of individual Afghanis.”54 The “right to rites” is contingent on the law, which can be easily changed. Future parliaments might seriously curb minority religious practice simply by passing legislation. Second, the constitution requires that court decisions be made “in accord with the Hanafi jurisprudence” when “there is no provision in the Constitution or other laws regarding the ruling on an issue.”55 This is particularly troubling in the area of religious freedom, for within the Hanafi school of jurisprudence (one of four within Islam), apostates were traditionally given no time to repent and put to death immediately, while within the other three Sunni schools of jurisprudence apostates were traditionally afforded three days to reconsider.56 The Afghan penal code purposefully leaves out apostasy, so that Afghan judges can apply Islamic law on this crucial question and others.57

52 Shea 207.
53 Mayer 165.
54 Stanke and Blitt 10.
55 Afghan Constitution, Article 130.
56 Arzt, 406.
In 2005, the case of Ali Mohaqiq Nasab tested the flimsy religious provisions in the Afghan constitution. The editor of a women’s rights magazine, Nasab was accused of blasphemy for publishing articles that supported Islamic feminist ideas and questioned whether apostasy is a crime within Islam. Conservatives called for his head “and it seemed possible that Nasab would eventually be executed merely because he had challenged some medieval interpretations of the Islamic sources.” Western diplomats intervened, and Nasab was released from prison in December 2005 after he agreed to publicly apologize for his writings.

Theoretical concerns over various constitutional provisions were again tested in 2006 when Abdul Rahman was accused of apostasy. Rahman, an Afghan who converted to Christianity while working abroad, was arrested and threatened with the death penalty for his conversion. President Bush and Pope Benedict interceded, along with a long list of concerned human rights organizations and heads of state, and pressured the Karzai government to release Rahman. The court deemed him mentally unfit to stand trial, which conveniently skirted the issue altogether. Rahman was granted asylum in Italy.

Rahman’s release was seen by most in the West as a great victory. After the case was resolved, Scott McClellan, then State Department Spokesman, said that “we are pleased that this was resolved in a favorable manner and that he has been released.” The response was even more positive down the hall; John Hanford, the State Department’s Ambassador at Large for International Freedom, remarked that he “had never been more

58 Mayer 190.
proud of our government’s work than I was with regard to this case.”

But Thomas F. Farr, the former director of the Office of International Religious Freedom at the State Department, disagreed. According to Farr, the Rahman case was neither an “anomaly” nor a victory. The U.S. mistakenly views apostasy and blasphemy cases simply as "humanitarian problems." After Rahman was released, "The State Department went before Congress and declared the springing of Mr. Rahman a victory for religious freedom. But it wasn't a victory; it was a defeat." The State Department’s response fundamentally ignored the reality that the constitution did not protect religious freedom and that international intervention was required in order to free Rahman; his release was the result of external pressure, rather than a demonstration of an internal commitment by the Afghan government to religious freedom and strong, durable democracy. Instead of celebrating these myopic victories, Farr contends that the U.S. government should be working with Afghan authorities, religious leaders, secular leaders, and jurists to help them understand that religious freedom is necessary for the rooting of democracy, and not an afterthought.

The most troubling aspect is that these cases are likely to occur again and again. Amin Tarzi, himself an Afghan, agrees with Farr’s emphasis on the importance of developing civil society and tolerance on the ground, but he adds a dose of realism, saying, “We can’t expect Afghanistan to become Norway overnight.”

60 Hanford.
61 Farr, 5.
62 Farr, "Diplomacy in an Age of Faith."
63 Ibid.
64 Ibid.
65 Tarzi. Telephone Interview.
Afghanistan is much better off, even with its flawed and “inherently contradictory” constitution, than it was under the Taliban. J. Alexander Thier of USIP sees value in constitutional provisions that leave interpretation open to judges, arguing that they can actually protect human rights. Thier writes, "...with good judges in place who respect basic freedoms, the constitution allows for interpretations that will protect rights, rather than proscribe them." While he acknowledges that "a few good judges won't make [all] the difference," the US should partner with the Afghan government to help create a "competent and legitimate judicial system."

DRAFTING A LIBERAL CONSTITUTION IN BAGHDAD

The earliest draft of the Transitional Administrative Law (hereafter TAL) left out religious freedom from the bill of rights altogether. When religious freedom groups applied pressure, a communal dimension of the right granting Iraqis a limited right to freedom of worship was added. However, the draft also listed Islam alone as a source of legislation, which could have enabled unaccountable judges to run roughshod over constitutional guarantees of equality, human rights and democracy. When these concerns were brought to the attention of several Members of Congress, including Joseph Lieberman, Rick Santorum, Sam Brownback and Lindsey Graham, they joined with religious freedom watchdog organizations to push hard for a last-minute redraft. The final

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66 Ibid.
68 Ibid.
69 Shea 209.
70 Ibid.
version of the TAL included an individual right to religious freedom and contained a muted repugnancy clause: no law could contradict the principles of democracy, the bill of rights or the universally agreed tenets of Islam. Over a dozen other constitutional provisions reinforced these rights, including one that banned blasphemy prosecutions. According to Nina Shea, a USCIRF commissioner, international human rights lawyer, and long-time religious freedom advocate, the TAL “gave all Iraqis the right to debate their future and express their views – both religious and political. This was unprecedented in the Muslim Middle East.”

**RELIGIOUS FREEDOM PROVISIONS IN IRAQ’S CONSTITUTION**

The permanent constitution “was a pretty good document, more liberal and democratic than any other in the Arab world” and yet it contains some troubling provisions that might limit or curtail religious freedom. It opens by establishing Islam as the official religion and as “a foundation source of legislation” in Article II. Article II breaks down into three further provisions: no law shall be made that contradicts “the established provisions of Islam,” the “principles of democracy” or the “rights and basic freedoms stipulated in this Constitution.” The second clause – “[n]o law may be enacted that contradicts the established provisions of Islam” – is an attempt to limit the scope of possible interpretations by the legislature and judiciary. Article II in the permanent

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71 Ibid.
72 Ibid.
73 Diamond 348.
74 Article II, Iraq Constitution.
75 Ibid.
76 “Iraq’s Draft Permanent Constitution,” 2.
constitution differs slightly from the formulation in the TAL: in the permanent constitution, Islam is a “foundation source” instead of “a source of legislation”; secondly, no law can contravene “the established provisions of Islam” rather than its “universally agreed tenets.” While the Federal Supreme Court will ultimately define the scope and meaning of “established provisions of Islam,” the Court must also ensure that their interpretation is not contrary to the “rights and basic freedoms stipulated in [the] constitution.” USCIRF believes that this rights and basic freedoms provision “represents a significant improvement over initial draft language” because it seems to place “respect for Islam and human rights on an equal level.” In this important way, the repugnancy clause in the Iraqi constitution differs from that in the Afghan constitution, which does not require that the interpretation of Islam be in agreement with human rights protections.

While the clause is an improvement and might limit the power of the judiciary, Islam being named a source of legislation could potentially be used against women, religious minorities, and political reformers. More worryingly, the constitution calls for the Federal Supreme Court to be made up of “experts in Islamic jurisprudence.” Doing so would “place Iraq’s judiciary in the company of Iran, Saudi Arabia, and Afghanistan – some of the only countries in the world to allow individuals without traditional legal training to service as judges in matters pertaining to civil law.” A further concern is that while the second clause of Article 2 appears to be liberal in its formulation, it could also be potentially used to undermine religious freedom. The clause reads: “This constitution

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77 Ibid.
78 Ibid.
79 Article 92.
guarantees the Islamic identity of the majority of Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christian, Yazidis, and Mandeans.” Giving the state the power to guarantee Islamic identity might mean that it would seek “to protect Islam” by criminalizing apostasy and blasphemy.81

So far there have been no Abdul Rahman cases to test the robustness of the religious provision freedoms in the Iraqi constitution. On paper, the Iraqi constitution’s protection for the individual right to religious freedom and the right to change one’s religion appear much stronger than that of the Afghan constitution. However, the situation in Iraq for non-Muslim religious minorities is deadly – and no constitutional guarantees will change that. In 2003, 1.4 million Christians lived in Iraq; today the figure is somewhere between 500,000 and 700,000.82 Over 90 percent of Iraqi’s Sabean Mandeans, the followers of John the Baptist, have fled or been killed, and the Yazidis have been attacked too. These vulnerable minorities have fled to Kurdish provinces (mostly Nineveh province) or to neighboring countries. Non-Muslim minorities have been killed, raped, harassed, driven from their property and churches and threatened with bodily harm if they do not leave or pay large sums of money to Islamic militias.83 The situation has become so severe that the U.S. Commission on International Religious Freedom designated Iraq a “Country of Particular Concern” in December 2008, which

81 Ibid.
83 Ibid; Grim “An Exodus from Iraq.”
could lead to economic and political sanctions.\textsuperscript{84} The situation for non-Muslim minorities illustrates a key point from nation-building literature: a state is the first requirement for a democratic state, and statehood requires control over the means of violence, which Iraq has yet to achieve.\textsuperscript{85}

**CONCLUSION – MARRYING LIBERAL AND LEGITIMATE CONSTITUTIONS**

As a result of U.S. intervention, Iraq and Afghanistan were supposed to become robust democracies that would protect minority rights and set an example for the region to emulate. The Rahman case and the dire situation for non-Muslim minorities in Iraq indicate that something went awry. The Rahman case presents an enormous dilemma for Western countries: they can press on, trying to enforce human rights norms from the top that are largely alien to conservative Muslims societies that will ultimately be rejected – and then intervene each time another Abdul Rahman case comes to light.

Some Western human rights advocates, redolent of 19th century imperialism, advocate outright force: Afghanistan and Iraq, both party to the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, which explicitly guarantee an individual the right to choose their own religion, must live up to their agreements. If the U.S. continues to intervene and reshape Islamic countries in a more liberal way, it must be more aggressive in the constitutional drafting process. Michael Cromartie, Vice Chair of the U.S. Commission on International Religious

\textsuperscript{84} “Iraq: USCIRF Recommends Designating Iraq as Country of Particular Concern, Calls for Ensuring Free and Fair Elections, Focusing on Plight of Most Vulnerable Religious Minorities.”

\textsuperscript{85} Diamond 305.
Freedom, believes that these foreign governments “have to be reminded of their international agreements” and that the U.S. government should “press them at the highest levels.” According to Cromartie, “we have won the right to be heard” in Afghanistan and Iraq and “we have legitimate authority to say…you left some paragraphs out.”

Noah Feldman, a constitutional adviser to the CPA and a NYU law professor, favors a slightly different model, that of “trusteeship.” Feldman writes, “It is appropriate for us to favor – not to impose – certain substantive constitutional outcomes…but the reason to favor these outcomes must be that we believe that the vast majority of Iraqis want them.” Feldman argues that we “can and should encourage guarantees of religious liberty” though “our motivation must be that Iraq will be a more stable and secure place if religious freedom is provided.” In Feldman’s model, it is ultimately up to the Iraqis to decide how much religious freedom they want, and international religious freedom is not a universal value. He continues, “If Iraqis are convinced that, say, allowing foreign religious missionaries in their country would be a threat to the stability and public safety – as indeed is the (entirely plausible) concern in India, where such missionaries are typically denied resident status – then we would not be justified in insisting on a provision guaranteeing them access.”

Pamela Constable, the deputy foreign page editor and former Kabul Bureau Chief of The Washington Post, calls the Afghan constitution “ambiguous” when it comes to reconciling Islamic law and international human rights laws. When asked what should be

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86 Cromartie, Personal Interview.
87 Ibid.
88 Feldman 83.
89 Ibid.
90 Feldman 84.
done, she shrugged her shoulders and said that the US should not “mess with religion” in Afghanistan. In her experience, further US intervention in this issue would only confirm the commonly held idea that the US wants religious freedom so that missionaries can freely operate within the country. She acknowledges that the country has ratified international human rights agreements that recognize the right to change one’s religion. When pressed she responded, “So what? You didn’t ask the Afghans.” Constable makes a salient point – the lofty language of constitutions is not enough to guarantee human rights; constitutions must be perceived by society as being legitimate and consistent with their values.

Human rights advocates would counter that religious freedom and the right to change one’s own religion is a universal human right. Constable’s critique is an important one, though, for if a society does not accept an “internationally” recognized human right, how then can it be international?

Thomas Farr rejects these options – force, trusteeship and periodic intervention – and acknowledges that “there’s no silver bullet” and that “you cannot solve [this tension] with constitutions and you cannot solve it without constitutions.” The US should have had a “strategy that work[ed] all ends of the spectrum,” a strategy that focused on both constitutions and culture. The US government has doled out millions in efforts to develop civil society around the world, “yet these programs do not yet focus sufficiently on the most important aspect of civil society in Muslim nations: religious

91 Constable, Personal Interview.
92 Ibid.
93 Farr, Personal Interview.
94 Ibid.
The US should be trying to develop moderate voices within faith communities in the Middle East and there is no reason why grant-giving organizations like the National Endowment for Democracy and its four affiliate organizations cannot work with moderate religious organizations. Diplomatically, the US needs to be making the argument at the highest levels that anti-blasphemy laws and apostasy laws are not in the best interest of that society, and that if a country desires liberal democracy and all of its benefits, it must embrace religious freedom. A growing body of social science literature suggests that where religious freedom is strong, there tend to be fewer incidents of armed conflict, better health, higher levels of income, more educational opportunities for women, and higher overall human development. A recent study of 143 countries concluded that countries without restrictions on conversion – countries that do not criminalize apostasy – tend to have less overall armed conflict, better lives for women and higher levels of fundamental freedoms.

Religious freedom cannot and should not be promoted by the barrel of a gun. Constitutions should be liberal and in harmony with international human rights documents. But that is not enough. A commitment to religious freedom must be developed within a culture to ensure that constitutional protections are actually applied and enforced.

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95 Farr, “Retooling the Middle Eastern Freedom Agenda,” 18.
96 Etzioni 169.


Cromartie, Michael. Personal Interview. 6 December 2008.


--. Personal Interview. 4 December 2008.


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