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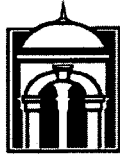
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THE RIGHTS OF THE BAHÁ'ÍS IN POST-SADDAM IRAQ: DOES THE NEW IRAQI CONSTITUTION PAVE THE WAY FOR IMPROVED TREATMENT OF RELIGIOUS MINORITIES IN THE MIDDLE EAST?

Austin Turner[†]

I. INTRODUCTION

On April 9, 2003, a U.S.-led coalition, Operation Iraqi Freedom, militarily deposed Saddam Hussein's Ba'athist government less than three weeks after its invasion of Iraq had begun. Though the decision to invade Iraq remains controversial, among the pre-war and postwar justifications presented by George Bush and Tony Blair was the concern for human rights of the Iraqi citizens and the desire to end the oppression of Hussein's government.¹ U.N. Security Council Resolutions 1483,² 1500,³

[†] J.D. candidate, May 2007, University of Tulsa College of Law, Tulsa, Oklahoma; B.A., August 2000, English Writing, University of Oklahoma, Norman, Oklahoma. This comment is dedicated to my friends and family in gratitude of their support. Special thanks to my friends and colleagues at the Tulsa Journal of Comparative and International Law for their hard work in preparing this comment for publication. Finally, love to Dad, Mom, Sarah, Molly, Sugar, Socks, and Shadow II.

1. See President George W. Bush, *President Bush Outlines Iraqi Threat*, Remarks by the President on Iraq at the Cincinnati Museum Center - Cincinnati Union Terminal (Oct. 7, 2002), at <http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html> (last visited Feb. 28, 2006); see also Ronald C. Kramer and Raymond J. Michalowski, *War, Aggression, and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq*, 45 BRIT. J. CRIMINOLOGY 446, 450-51 (2005). "It was only in the aftermath of the invasion, once the WMD argument proved to be hollow, that humanitarian concerns were reframed as the primary justification for the invasion of Iraq." *Id.* at 450.

2. See S.C. Res. 1483, U.N. Doc S/RES/1483 (May 22, 2003), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement>.

and 1511⁴ empowered the postwar Coalition Provisional Authority (“CPA”) to work with the Iraqi Governing Council to create a permanent, democratic government that protects the rights of all of its citizens.⁵ After the establishment of the CPA, officials from the U.S. government met with many prominent Iraqis who would play a role in shaping the permanent Iraqi Constitution to express concerns that the final document protect the human rights all of Iraqi citizens.⁶ Of particular concern was the right of religious freedom or belief, especially for the non-Islamic religious minority groups of Iraq.⁷ One of the groups affected is the Bahá’í Faith, one of the newest of the world’s religions.

The Bahá’í Faith is a distinctive and independent monotheistic religion,⁸ with 5 million adherents worldwide.⁹ “It is the second most geographically widespread religion in the world.”¹⁰ Though the Bahá’í Faith developed out of a Shiite Islamic culture in Iran in the 1840s, the modern Iranian Bahá’í community numerically represents less than ten percent of the religion’s worldwide following.¹¹

Since its inception in the Middle East, the Bahá’í Faith has been a target of religious persecution.¹² Bahá’ís believe in a principal called Progressive Revelation, meaning that all the world’s religions are divine in origin, and represent progressive stages of humanity’s spiritual development.¹³ Some Muslim authorities regard the Bahá’ís’ belief as heresy, since it directly contradicts the Islamic belief that Muhammad is the last of the prophets.¹⁴ This attitude towards the Bahá’í Faith has

3. See S.C. Res. 1500, U.N. Doc S/RES/1500 (Aug. 14, 2003), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/467/78/PDF/N0346778.pdf?OpenElement>.

4. See S.C. Res. 1511, U.N. Doc S/RES/1511 (Oct. 16, 2003), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/563/91/PDF/N0356391.pdf?OpenElement>.

5. Bureau of Democracy, Human Rights, and Labor, Iraq: International Religious Freedom Report 2003, n.1, (Dec. 18, 2003), available at <http://www.state.gov/g/drl/rls/irf/2003/24452.htm> [hereinafter Iraq Report 2003].

6. See Iraq Report 2003, *supra* note 5, n.2.

7. *Id.*

8. See Peter Smith and Moojan Momen, *The Baha’i Faith 1957-1988: A Survey of Contemporary Developments*, 19 RELIGION 63 (1989), available at <http://bahai-library.com/articles/smith.momen.html> (last visited Feb. 28, 2006).

9. ENCYCLOPEDIA OF RELIGIOUS FREEDOM 7 (Catharine Cookson ed., 2003).

10. *Id.*

11. See Smith & Momen, *supra* note 8, at 64.

12. David A. Jordan, Note, *The Dark Ages of Islam: Ijtihad, Apostasy, and Human Rights in Contemporary Islamic Jurisprudence*, 9 WASH. & LEE RACE & ETHNIC ANC. L. J. 55, 63 (2003).

13. See Cookson, *supra* note 9, at 7.

14. Jordan, *supra* note 12, at 64.

resulted in the religion being banned in many Middle Eastern countries. These countries severely restrict the Bahá'ís' fundamental human right of freedom of religious belief or practice,¹⁵ a right many constitutions and international instruments drafted after World War II proclaim as one of the most basic rights known to humankind.¹⁶

This comment addresses a still-unresolved dynamic in international law – the need for governing documents which adequately protect the religious rights and freedoms of all of a country's citizens, but which do not suffocate the dominant culture's right to dictate its own government.¹⁷ Iraq, as an emerging democracy, presents an interesting situation of a country that wishes to establish an Islam-centered society, yet fully guarantee the rights of citizens who practice religions other than Islam. Section II of this comment examines the increasing importance of the freedom of religious belief or practice as a fundamental human right, enshrined in international law, by surveying seminal international law instruments, and examining the current international response to violations of human rights on the basis of religion. Section III offers a survey of the tension between constitutionally-enshrined rights and Islamic jurisprudence in Middle Eastern countries' treatment of the Bahá'í Faith by comparatively examining the rights that the constitutions of Iran, Saudi Arabia, and Egypt grant the Bahá'í Faith and other non-Islamic religions.

Sections IV, V, and VI examine Iraq's evolving treatment of minority religions. Section IV examines how the religious rights of the Bahá'ís were severely curtailed under the regime of Saddam Hussein. Section V examines the unprecedented rights and freedoms granted by the post-Hussein Transitional Administrative Law, and the interim government's implementation of the Transitional Administrative Law. Section VI examines the draft Iraqi Bill of Rights, and the subsequent draft Iraqi Constitution, and assesses how the final Iraqi Constitution should incorporate international conventions on religious rights to ensure that the religious freedoms of all Iraqi citizens are protected by law.

15. Smith & Momen, *supra* note 8, at 85.

16. ROBERT F. DRINAN, S.J., CAN GOD AND CAESAR COEXIST?: BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW 1 (2004).

17. *See id.* at 13.

II. RELIGIOUS FREEDOM IN INTERNATIONAL LAW - RESPONSE TO VIOLATION OF RELIGIOUS RIGHTS

Though it is difficult to legally define the term religion,¹⁸ religious rights and freedoms have been increasingly prominent in the international legal community since World War II and the creation of the United Nations. The right to freedom of religious belief or thought is now enshrined in several international instruments, and is given a status equal to, if not greater than, other international human rights, such as “the right to a free press, the right to vote, and the right to due process in criminal proceedings.”¹⁹ The belief that an individual should have the right to practice one’s religion in accordance with personal belief is relatively new in human history.²⁰ Yet, despite religious freedom’s growing importance in international law, there is no specific mandatory treaty or binding covenant concerning religious rights.²¹ Instead, a few prominent documents govern the norms and standards of international religious rights.²²

The United Nations has passed legally binding covenants, or other instruments, with respect to other human rights issues such as the rights of women, children, and minorities, but hesitates to pass a similar instrument with respect to religious freedom, in part because of “the uncertainty . . . concerning the extent to which governments should guarantee religious freedom.”²³ The challenge of such a binding declaration is clear: signatory governments would pledge to enact specific provisions guaranteeing their citizens freedom of religious belief, or conversely, the freedom to have no religion.²⁴ In countries with a strong relationship between state and religion, encroaching on the entrenched character of traditional religious belief could impair “the morality and well-being of the country.”²⁵

Uncertainty over how to adequately monitor violations of religious freedom presents another barrier, as the United Nations would need to create an agency - such as those which correspond to political and economic covenants - to implement a covenant on religious freedom.²⁶

18. Natan Lerner, *The Nature and Minimum Standards of Freedom of Religion or Belief*, 2000 BYU L. REV. 905, 907 (2000).

19. DRINAN, *supra* note 16, at 30.

20. *Id.* at 1.

21. Lerner, *supra* note 18, at 931.

22. *Id.* at 905.

23. DRINAN, *supra* note 16, at 3.

24. *Id.* at 23.

25. *Id.* at 11.

26. *Id.* at 3.

Some governmental restrictions on religious freedom, which may be imposed by a predominating religion, are arguably inextricable from the history, culture, and mythology of the country.²⁷ Nations may be reluctant to intervene when another government violates religious freedom to preserve public order and the common good, due to concerns with interfering with that government's autonomy.²⁸ As such, offender countries often use the excuse of preservation of "public order" or "common good" to shield particularly egregious violations of religious freedom.²⁹

Additionally, many groups whose rights have been violated fail to litigate their rights, if such litigation is even available, further complicating monitoring of religious freedom.³⁰ This is part of the reason why it is impossible to know how many religious groups silently assent to violations of their rights.³¹ It is these minority religious groups, including nontraditional religions and nascent faiths, such as the Bahá'í Faith, that would most benefit from an international covenant that monitors religious freedoms.³²

In lieu of a United Nations monitoring organization, many nongovernmental organizations ("NGOs") have taken it upon themselves to monitor the status of religious freedom and advocate for religious freedom's prominence in the leading issues addressed by the global community.³³ Most NGOs, however, are limited in that each is usually concerned with a single religious group in a single locale.³⁴ There is no worldwide coalition of NGOs dedicated to religious freedom and advocacy, a fact which arguably diminishes their individual effectiveness in advocating for religious freedoms at the United Nations.³⁵

Despite the lack of an existing binding covenant, the right of religious freedom, as enshrined in three seminal documents passed by the United Nations, greatly influences the global community.³⁶ The rights contained in these instruments influence individual national policy.³⁷ In addition, the constitutions of many emerging states, including several

27. *Id.* at 9.

28. *See* DRINAN, *supra* note 16, at 9.

29. *See id.* at 8.

30. *Id.* at 9.

31. *Id.*

32. *Id.* at 11.

33. *Id.* at 12.

34. DRINAN, *supra* note 16, at 12-13.

35. *Id.*

36. *See id.* at 1.

37. *See* Gunn, *infra* note 106.

Islamic governments, reference the instruments and the rights of religious freedom that each contains.³⁸

A. *International Instruments Regarding Religious Rights and Freedoms*

1. Universal Declaration of Human Rights

The 1948 Universal Declaration of Human Rights (“Universal Declaration”) was the first United Nations instrument that specifically addressed religious rights.³⁹ While it is not a legally-binding document, the Universal Declaration influenced other subsequent, binding documents.⁴⁰ It continues to influence international religious rights policy.⁴¹

Article 18 of the Universal Declaration states that “[e]veryone has the right to freedom of thought, conscience and religion.”⁴² This broad category includes the freedom to have religion, or to have none.⁴³ The freedom of conscience, included against some objection, was not a universally considered legal right at the time of drafting.⁴⁴ It is not exclusively bound with religion, and refers to individual matters of principle, such as pacifism and other matters of conscience objection.⁴⁵

38. See Tad Stahnke and Robert C. Blitt, United States Commission on International Religious Freedom, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries* 2-3 (March 2005), available at http://uscirf.gov/countries/global/comparative_constitutions/03082005/Study0305.pdf (last visited Dec. 31, 2005) [hereinafter *Comparative Textual Analysis*].

39. Lerner, *supra* note 18, at 910. It is worth noting that Egyptian delegate Dr. Mahmoud Azmi played a crucial role in UDHR’s creation and passage. He argued that Egypt’s multi-religious and multi-cultural history was among the evidence of the universality of commitment to human rights. See *Comparative Textual Analysis*, *supra* note 38, at 3 n.3 (citing Susan Waltz, *Universal Human Rights: The Contribution of Muslim States*, 26 HUMAN RIGHTS QUARTERLY 800, 835 (2004)).

40. *Id.*

41. See *infra* note 106; see DRINAN, *supra* note 16, at 32; see also United States Commission on International Religious Freedom Home Page, <http://uscirf.gov> (last visited Mar. 3, 2005).

42. G.A. Res. 217 A, art. 18., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter *Universal Declaration*].

43. Lerner, *supra* note 18, at 911.

44. *Id.*

45. *Id.* Due to the subjective nature of “conscience,” it seems unlikely that it will ever be included in human rights instruments apart from the right to religious freedom, a concept whose definitions can be more meaningfully construed. DRINAN, *supra* note 16, at 17. Yet, the freedom of conscience, a right not fully defined or explored, is emerging as one of the prominent human rights enshrined by international law. *Id.* at 18-19.

Article 18 further states, "this right includes freedom to change his religion or belief."⁴⁶ The word "belief" in the document is meant to refer strictly to "religious belief,"⁴⁷ and was included to extend protection to both atheists and nonreligious individuals.⁴⁸ Article 18 concludes by stating that an individual possesses "freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance"⁴⁹ The rights granted by Article 18 are arguably limited by Article 29(2),⁵⁰ with its provision that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.⁵¹

The inclusion, in Article 18, of the external manifestations of religious freedom – in "teaching, practice, worship and observance"⁵² – as separated from the mental freedoms of thought and conscience, is important as those rights are more likely to be infringed than others.⁵³ At the time Article 18 was drafted, the right to teach one's religion – essentially disseminating and proselytizing – was included, though the right would become controversial by the time later instruments were drafted.⁵⁴ Part of the objection stemmed from Muslim nations, many of whom expressed a commonly held belief "that no Muslim has a right to convert to another faith."⁵⁵ As a result of the provision's inclusion, "Saudi Arabia, along with other Islamic countries, abstained on the final vote of approval for the Universal Declaration."⁵⁶

2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights ("ICCPR"), drafted in 1966, is presently the only binding treaty that

46. Universal Declaration, *supra* note 42, at art. 18.

47. As opposed to "political, scientific, economic, or other beliefs." Lerner, *supra* note 18, at 911.

48. *Id.*

49. Universal Declaration, *supra* note 42, at art. 18.

50. DRINAN, *supra* note 16, at 17.

51. Universal Declaration, *supra* note 42, at art. 29(2).

52. *Id.* at art. 18.

53. Lerner, *supra* note 18, at 911.

54. *Id.* at 911-12.

55. DRINAN, *supra* note 16, at 32.

56. *Id.*

contains specific articulations of religious rights.⁵⁷ Article 18 of ICCPR generally tracks Article 18 of the Universal Declaration,⁵⁸ and states that all “shall have the right to freedom of thought, conscience and religion,”⁵⁹ and that no one is “subject to coercion which would impair [t]his freedom.”⁶⁰ This freedom can only be limited by prescription of law, and only when “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁶¹

Though Article 18 is generally interpreted to allow an individual to convert from one religion to another, its failure to specifically include this right created problems during the drafting of the later 1981 Declaration.⁶² The coercion prohibited by Article 18(2) is not defined, but it is interpreted to include not only force or threats, but also subtle forms of influence related to family matters or public standing.⁶³ Related to the issue of coercion, Article 18(4), dealing in the highly sensitive area of education,⁶⁴ affords parents or legal guardians the right to “educat[e] . . . their children in conformity with their own convictions.”⁶⁵

Article 18 distinguishes these rights to be protected unconditionally – the “freedom of thought, conscience, religion or belief”⁶⁶ – from rights which can be limited – “the freedom to manifest [one’s] religion or belief.”⁶⁷ According to Article 18(3), the freedom to manifest one’s religion or belief may only be limited if “prescribed by law.”⁶⁸ The limitations are to be interpreted narrowly.⁶⁹ A state may not discriminate against a religion on the basis of national security.⁷⁰ Article 4 of ICCPR protects all of Article 18 as a provision that cannot be abrogated, even in times of “public emergency.”⁷¹

57. Lerner, *supra* note 18, at 914.

58. *Id.*

59. G.A. Res. 2200 A, art. 18(1)-(2), U.N. Doc. A/6316 (1966), *entered into force* Mar. 23, 1967 [hereinafter ICCPR].

60. *Id.*

61. *Id.*

62. Lerner, *supra* note 18, at 914.

63. *Id.* at 915.

64. *Id.* at 916.

65. ICCPR, *supra* note 59, at art. 18(4).

66. Lerner, *supra* note 18, at 917.

67. *Id.*

68. ICCPR, *supra* note 59, at art. 18(3).

69. *See* Lerner, *supra* note 18, at 915-17.

70. *Id.* at 915.

71. ICCPR, *supra* note 59, at art. 14.

Although it is not a binding instrument, ICCPR contains an optional protocol, allowing a citizen to appeal “to the [United Nations] Committee on Human Rights” for relief from state infringement of religious freedom.⁷² Petitioners who take advantage of this provision must exhaust all local remedies, and carry the burden of proof to refute the government’s assertion that the governmental action was justified.⁷³ No significant ruling has been made under this provision.⁷⁴ Although the Committee’s ruling is not binding (it is merely an interpretation of the government’s obligations under the instrument to which it is a signatory), a high-profile ruling could elevate the status of religious freedom in the world, and hasten the passing of a binding covenant.⁷⁵

3. 1981 Declaration

The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (“1981 Declaration”) “is presently the most important global instrument regarding religious rights,”⁷⁶ and “reflects the international community’s present understanding of the minimum standard . . . of religious rights.”⁷⁷ Most of the 1981 Declaration provisions exist in the earlier documents,⁷⁸ but the 1981 Declaration expands the scope of ICCPR.⁷⁹ It recognizes that the disregard of the freedom of religion or belief has resulted in “great suffering to mankind.”⁸⁰

The first three clauses of ICCPR’s Article 18 are enumerated in the 1981 Declaration’s Article 1, continuing the previous instruments’ listing of “freedom of thought, conscience [and] religion.”⁸¹ The drafters of the 1981 Declaration “intended to protect conscientious belief to the same extent that religious belief was protected.”⁸² However, the amorphousness of the right of conscience is one of the reasons the international community

72. DRINAN, *supra* note 16, at 37.

73. *Id.*

74. *Id.*

75. *Id.*

76. Lerner, *supra* note 18, at 918.

77. *Id.* at 921.

78. *See id.* at 919.

79. *See id.* at 921.

80. G.A. Res. 36/55, Preamble, U.N. Doc. A/36/684 (Nov. 25, 1981) [hereinafter 1981 Declaration].

81. *Id.* at art. 1.

82. DRINAN, *supra* note 16, at 20.

remains reluctant to elevate the 1981 Declaration to the status of binding covenant.⁸³

The parental rights of ICCPR's Article 18(4) have been moved to Article 5,⁸⁴ which expands on ICCPR's rights for parents or legal guardians by giving children the right to have religious education in accordance with their parents' wishes,⁸⁵ and to be protected from discrimination on the basis of religion.⁸⁶ If a child has no parent or legal guardian, the best interests of the child shall be used to determine what religious education the child receives.⁸⁷

Article 6 of the 1981 Declaration introduces a "comprehensive, but not exhaustive"⁸⁸ list of religious rights, including, but not limited to, the right to worship or assemble,⁸⁹ the right "[t]o make, acquire and use . . . necessary articles and materials" for religious rites and customs,⁹⁰ the right "[t]o solicit and receive voluntary financial . . . contributions,"⁹¹ the right to designate religious leaders,⁹² the right to observe religious holidays and days of rest,⁹³ and the right of communication in the matters of religion with individuals and communities on a national and international level.⁹⁴ "The 1981 Declaration does not distinguish the [religious] rights of nationals and the [religious] rights of aliens."⁹⁵

The concerns regarding the issue of proselytizing continued; Iran was one the leading countries who objected to inclusion of the right to change one's religion.⁹⁶ The issue took two decades to resolve, and almost prevented the General Assembly from passing the 1981 Declaration.⁹⁷ Article 8 contains the compromise that allowed the 1981 Declaration to be passed.⁹⁸ It states that the 1981 Declaration does not "restrict" or

83. *Id.* at 24.

84. *See* 1981 Declaration, *supra* note 80, at art. 5.

85. *Id.* at art. 5(2).

86. *Id.* at art. 5(3).

87. *Id.* at art. 5(4).

88. Lerner, *supra* note 18, at 920.

89. *See* 1981 Declaration, *supra* note 80, at art. 6(a).

90. *Id.* at art. 6(c).

91. *Id.* at art. 6(f).

92. *Id.* at art. 6(g).

93. *Id.* at art. 6(h).

94. *Id.* at art. 6(i).

95. Lerner, *supra* note 18, at 920.

96. DRINAN, *supra* note 16, at 38.

97. *Id.*

98. Lerner, *supra* note 18, at 919.

“derogate” any rights defined in the Universal Declaration and International Covenants on Human Rights.⁹⁹

A criticism leveled against the 1981 Declaration has to do with its usage of the legal term “discrimination,”¹⁰⁰ and the non-legal term “intolerance,”¹⁰¹ and the equivalent meaning given to both terms.¹⁰² Article 2 defines “intolerance or discrimination” as “any distinction, exclusion, restriction or preference based on religion or belief.”¹⁰³ The document’s prohibition in this area is vague, as preferential legislation based on religion may not be discriminatory, depending on the circumstances.¹⁰⁴ Nonetheless, the 1981 Declaration remains a key legal document in its explication of international religious rights.¹⁰⁵

B. The International Religious Freedom Act of 1998

After unanimous passage by both Houses of Congress, President Clinton signed the International Religious Freedom Act into law on October 27, 1998.¹⁰⁶ Representative Fred Wolf introduced an early version of the bill to the House of Representatives in 1997;¹⁰⁷ the bill was a response to Congress’s growing concerns regarding other countries’ discrimination and persecution on the basis of religious affiliation,¹⁰⁸ and intended as a continuation of Congress’s prior denunciations of religious persecution – among those, House Concurrent Resolution 102 of the One Hundred Fourth Congress, which specifically addressed Iran’s treatment of the Bahá’í Community.¹⁰⁹ The early version of the bill was controversial, largely because it required automatic sanctions against countries

99. See 1981 Declaration, *supra* note 80, at art. 8.

100. Article 3 states that discrimination “shall be condemned as a violation of the human rights and fundamental freedoms . . . [of] the Universal Declaration . . . and . . . the International Covenants on Human Rights.” 1981 Declaration, *supra* note 80, at art. 3; see also Lerner, *supra* note 18, at 919.

101. “[I]ntolerance [is] . . . a rather vague concept referring essentially to emotional, psychological, philosophical, and other attitudes likely to generate discrimination, hatred, or persecution.” Lerner, *supra* note 18, at 919.

102. *Id.*

103. 1981 Declaration, *supra* note 80, at art. 2(2).

104. Lerner, *supra* note 18, at 920.

105. *Id.* at 921.

106. T. Jeremy Gunn, *A Preliminary Response to Criticisms of International Religious Freedom Act of 1998*, 2000 BYU L. REV. 841, 843 (2000).

107. *Id.*

108. *Id.* at 842-43.

109. See *id.* at 842 n.6 (citing H.R. Con. Res. 102, 104th Cong. (1996)); 22 U.S.C.A. § 6401(a)(7)(C).

determined to violate religious freedoms.¹¹⁰ Senator Don Nickles introduced the final revised version of the bill shortly before its Senate passage on October 9, 1998; the House of Representatives passed the revised version the next day.¹¹¹

The International Religious Freedom Act ("IRFA") declares the importance of religious freedom "as a fundamental right and as a pillar of our Nation" that "undergirds the very origin and existence of the United States."¹¹² Recognizing the existing international instruments on religious rights, IRFA asserts that the "[f]reedom of religious belief and practice is a universal human right and fundamental freedom."¹¹³ IRFA further asserts that "[g]overnments have the responsibility to protect the fundamental rights of their citizens."¹¹⁴

"IRFA created three new entities within the U.S. government to promote international religious freedom."¹¹⁵ The first is the Office on International Religious Freedom, created within the State Department, headed by an Ambassador at Large for International Religious Freedom.¹¹⁶ The Office is responsible for issuing an annual report on the status of religious freedom in each country, identifying countries with "particularly severe violations of religious freedom."¹¹⁷ The Ambassador at Large is also responsible for advising the President and Secretary of State on how to proceed in matters related to religious freedom, and for representing the U.S. abroad in matters regarding religious freedom.¹¹⁸ IRFA also created the independent, nine-member Commission on International Religious Freedom, which is responsible for reviewing violations of religious freedoms, and making policy recommendations regarding those violations.¹¹⁹ IRFA also appointed a Special Advisor on International Religious Freedom to the National Security Council.¹²⁰

IRFA requires that the President act "as expeditiously as practicable in response to" a country's violation of religious freedoms.¹²¹

110. Gunn, *supra* note 106, at 843.

111. *Id.*

112. 22 U.S.C.A. § 6401(a)(1).

113. *Id.* § 6401(a)(2).

114. *Id.* § 6401(a)(3).

115. Gunn, *supra* note 106, at 843.

116. *See* 22 U.S.C.A. § 6411(a)-(d).

117. § 6412(b)(1)(A)(III).

118. *See id.* § 6411(c).

119. *See id.* § 6431-6432. The Ambassador at Large is an ex-officio, nonvoting member of the Commission. *Id.* § 6431(b)(1)(A).

120. 50 U.S.C.A. § 402(i).

121. 22 U.S.C.A. § 6441(b)(1).

The President may take one of fifteen enumerated actions,¹²² including issuing a demarche,¹²³ a condemnation,¹²⁴ withdrawing foreign aid,¹²⁵ and blocking contracts with the offending country.¹²⁶ The President may also choose an action commensurate with one of the enumerated fifteen,¹²⁷ or may negotiate a binding agreement with the offender country requiring the country to cease its offensive conduct.¹²⁸ In acting, the President should focus “as narrowly as practicable” on the specific entities responsible for the violation,¹²⁹ while minimizing adverse impact on the country’s citizens.¹³⁰

The President may designate countries, identified by the annual reports as “particularly severe violat[ors] of religious freedom”, or as “countr[ies] of particular concern for religious freedom.”¹³¹ In acting against a country of particular concern, the President may select from six enumerated presidential actions,¹³² each financially impacting against the offending country.¹³³ The President may also choose an action commensurate with these six,¹³⁴ choose to negotiate a binding agreement,¹³⁵ or choose to take no action, providing that sanctions of some kind are in effect at the time the country is designated a “country of particular concern.”¹³⁶

IRFA is not without its criticisms, the most frequent of which decries the United States taking it upon itself to monitor and police the world’s violations of religious freedoms.¹³⁷ IRFA’s critics, both in America and abroad, have posited that IRFA’s American-centric view of separation of state and religion adversely affects its negative assessment of other culture in which religion is more closely intertwined in the role of

122. *See id.* § 6445(a)(1)-(15).

123. *See id.* § 6445(a)(1)-(2). A “demarche” is “a diplomatic or political initiative or maneuver.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 306 (10th ed. 1994).

124. *See* § 6445(a)(3)-(4).

125. *See id.* § 6445(a)(9)-(12).

126. *See id.* § 6445(a)(14)-(15).

127. 22 U.S.C.A. § 6441(b)(1)(A).

128. *Id.* § 6441(b)(1)(B).

129. *See id.* § 6441(c)(1)(B).

130. *See id.* § 6441(c)(2).

131. *See id.* § 6442(a)-(b).

132. *See* 22 U.S.C.A. § 6442(c)(1)(A).

133. *See id.* § 6445(a)(9)-(15).

134. *Id.* § 6442(c)(1)(B).

135. *Id.* § 6442(c)(2).

136. *Id.* § 6442(c)(4)-(5).

137. Gunn, *supra* note 106, at 844.

government.¹³⁸ The Human Rights Watch's assessment of IRFA focused on criticisms that IRFA promotes the interests of American's Christian right and its missionary interests,¹³⁹ and that IRFA creates a "hierarchy" of human rights, and treats religious freedom as the most important of those rights.¹⁴⁰ Officials of other governments tend to view IRFA as being an instrument designed to unilaterally impose sanctions in an effort to punish other countries¹⁴¹ while the United States pays lip service to multilateral action.¹⁴² Other countries have accused the United States of hypocrisy for criticizing the human rights practices of other governments in relation to religious minorities when the United States does not have a spotless human rights record.¹⁴³

Despite these criticisms, IRFA remains in force today. In the September 2004 reports, Iran and Saudi Arabia were designated "count[ri]es of [p]articlar [c]oncern."¹⁴⁴ Iraq, which had been designated a country of particular concern in prior years, had its status removed in 2004, because the United States, which occupied Iraq at the time of the reports, does not comment on its own activities.¹⁴⁵

III. TREATMENT OF THE BAHÁ'ÍS IN THE MIDDLE EAST

Shar'ia, literally meaning "the path to follow,"¹⁴⁶ is the name given to Islamic jurisprudence.¹⁴⁷ Shar'ia grew out of the Qu'ran, and a body of law developed by controversies settled by the prophet Muhammad.¹⁴⁸ It has been used to govern Islamic societies for centuries, because Islam historically did not distinguish between religious and secular life.¹⁴⁹ The jurisprudence of Shar'ia varies, and the body of authoritative interpretations of Islamic text differs according to the tenets of Shi'ite

138. *See id.* at 845-51.

139. *See id.* at 851-56.

140. *See id.* at 856-57.

141. *See id.* at 857-60.

142. Gunn, *supra* note 106, at 862-65.

143. *See id.* at 860-62.

144. Bureau of Democracy, Human Rights, and Labor, International Religious Freedom Executive Report 2004, (Sept. 15, 2004), *available at* <http://www.state.gov/g/drl/rls/irf/2004/35335.htm>.

145. *Id.*

146. Ahmed Zaki Yamani, *The Eternal Sharia* 1 (unpublished manuscript) (2003).

147. Jordan, *supra* note 12, at 56.

148. *Id.* at 57.

149. *See Yamani, supra* note 146, at 1.

Islam or Sunni Islam.¹⁵⁰ Historically, Islam has recognized the religions that came before it, including Christianity and Judaism.¹⁵¹ These religions were usually legally recognized as separate communities (*'ummas*) from the Islamic majority, though Shar'ia could be interpreted to also brand the communities as pagans.¹⁵² Religions subsequent to Islam, such as the Bahá'í Faith, have not historically received recognition under Shar'ia.¹⁵³

Islam has no central authority, and interpretations under different versions of Shar'ia can often be contradictory.¹⁵⁴ In some Islamic societies, Shar'ia can be moderate, or even liberal.¹⁵⁵ Some Islamic countries have a dual system of courts – secular and Islamic,¹⁵⁶ with Islamic courts handling only matters of personal status.¹⁵⁷ Under more fundamentalist interpretations of Shar'ia, the courts can reach all citizens, whether Muslim or not, and severe punishments may be delivered for violation of Islamic law.¹⁵⁸ For example, apostasy, defined specifically as converting from Islam to another religion, is punishable by death.¹⁵⁹

Iran, Saudi Arabia, and Egypt are contemporary Islamic constitutional states that still incorporate Shar'ia in their jurisprudence. Each represents differing approaches to their interpretation and incorporation of Shar'ia. How they differ affects the rights accorded to religious minorities in the state.

A. Iran

The Islamic Revolutionary Government of Iran is responsible for some of the most egregious human rights violations in their treatment of the Bahá'í community.¹⁶⁰ Since coming to power in 1979, after the Islamic Revolution deposed Shah Reza Pahlavi, the Islamic Revolutionary Government has renewed the historic campaign of persecution against the Bahá'ís, which had declined somewhat in previous decades.¹⁶¹ Since 1979,

150. Jordan, *supra* note 12, at 58-59.

151. MUHAMMAD BAQIR AS-SADR, LESSONS IN ISLAMIC JURISPRUDENCE 4-5 (Roy Mottahedeh, trans., Oneworld Publications 2003) (1978).

152. *Id.*

153. *Id.*

154. DRINAN, *supra* note 16, at 181-82.

155. See As-Sadr, *supra* note 151, at 27.

156. Comparative Textual Analysis, *supra* note 38, at 9.

157. *Id.*

158. See DRINAN, *supra* note 16, at 188.

159. Jordan, *supra* note 12, at 61.

160. See generally Jordan, *supra* note 12, at 64.

161. See generally Paul D. Allen, *The Bahá'ís of Iran: A Proposal for Enforcement of International Human Rights Standards* (Note), 20 CORNELL INT'L L.J. 337, 339 (1987). The

more than 200 Bahá'ís have been killed, and fifteen are missing and presumed dead.¹⁶² The Islamic Revolutionary Government has removed Bahá'ís, now banned from government employment, from over 10,000 government and university jobs.¹⁶³ The government has claimed to outside observers that Bahá'ís, as citizens, are entitled to their religious beliefs, and are protected by Iran's Constitution.¹⁶⁴ However, as noted in a 2001 Ministry of Justice report, it is the policy of the Islamic Revolutionary Government to eventually eliminate the Bahá'ís from Iran.¹⁶⁵

The Bahá'ís represent the largest non-Muslim minority community in Iran, with an estimated 300,000 to 350,000 adherents.¹⁶⁶ Article 13 of Iran's Constitution states that, "Zoroastrian[s], Jew[s], and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies."¹⁶⁷ The Bahá'í community is not offered such explicit recognition.¹⁶⁸ As such, Bahá'ís have no legal recourse to petition violation of their rights.¹⁶⁹ Since 1979, the government has routinely seized Bahá'í assets; these have included holy places, cemeteries, administrative buildings, and historical sites.¹⁷⁰ None of the properties have been returned, and many were destroyed.¹⁷¹ The Bahá'í community claims the government restrictions

Bahá'í Faith has been persecuted in Iran, in varying degrees, since its inception in the 1840s. *Id.*

162. Bureau of Democracy, Human Rights, and Labor, Iran: International Religious Freedom Report 2005 (Nov. 8, 2005), *available at* <http://www.state.gov/g/drl/rls/irf/2005/51599.htm> [hereinafter Iran Report 2005].

163. *Id.*

164. Bureau of Democracy, Human Rights, and Labor, Iran: International Religious Freedom Report 2004 (Sept. 15, 2004), *available at* <http://www.state.gov/g/drl/rls/irf/2004/35497.htm> [hereinafter Iran Report 2004]. The Islamic Revolutionary Government have repeatedly offered clemency to Bahá'ís in exchange for renouncing their faith. Iran Report 2005, *supra* note 162.

165. *Id.* The Islamic Revolutionary Government considers the members of the Bahá'í Faith to be apostates, because the Bahá'ís believe in a religious revelation subsequent to Islam. The Bahá'ís are also accused of being counterrevolutionaries, alleged supporters of the Shah Pahlavi's regime, and Zionist conspirators. Smith and Momen, *supra* note 8, at 84.

166. Iran Report 2005, *supra* note 162.

167. Quanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran], art. 13 [1980].

168. Iran Report 2005, *supra* note 162; *see also* Allen, *supra* note 161, at 340.

169. *See* Iran Report 2005, *supra* note 162.; *see also* Allen, *supra* note 161, at 340.

170. *Id.*

171. *Id.*

placed on property ownership, education, and employment opportunities diminish the economic resources of the community.¹⁷²

The Islamic Revolutionary Government prohibits Bahá'ís from teaching and practicing their faith,¹⁷³ thereby hindering the coherence of their religious community.¹⁷⁴ The government also requires that police register the Bahá'ís.¹⁷⁵ The government severely limits the Bahá'ís' group meetings and religious gatherings and education, which are held in private homes and businesses.¹⁷⁶ While the government allows other religious minorities to form community centers and certain types of associations,¹⁷⁷ this right is not extended to Bahá'ís.¹⁷⁸ Bahá'ís are not allowed to form official assemblies and administrative institutions.¹⁷⁹ If an attempt to form an assembly or administrative institution is made, the government actively closes such institutions, affecting the survival of the Bahá'í community.¹⁸⁰

The government does not allow Bahá'ís to communicate with adherents of their religion in other countries.¹⁸¹ Bahá'ís routinely receive little or no compensation from the religious courts for injury or criminal victimization.¹⁸² "Baha'is are not allowed to bury and honor their dead in keeping with their religious tradition."¹⁸³ "The Government generally allows recognized religious minorities [to establish private schools] to conduct religious education for their adherents."¹⁸⁴ However, the Bahá'ís are denied this right.¹⁸⁵

"The property rights of Bahai's are generally disregarded . . ."¹⁸⁶ Article 22 of the Iranian Constitution proclaims property rights "inviolable,

172. *Id.*

173. *Id.*

174. *Id.*

175. Iran Report 2004, *supra* note 164.

176. *Id.*

177. *See generally* Quanuni Assasi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran], art. 13 [1980] (authorizing identified religious minorities the freedom to practice "within the limits of the law.").

178. Iran Report 2005, *supra* note 162.

179. *Id.*

180. *Id.* Since Bahá'ís have no clergy, assemblies and institutions are necessary for the religious organization to function. *See also* A BASIC BAHÁ'Í DICTIONARY 139-149 (Wendy Momen ed., 1989).

181. *Id.*

182. Iran Report 2004, *supra* note 164.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

except in cases sanctioned by law.”¹⁸⁷ Private homes and businesses have been routinely seized since 1979.¹⁸⁸ In some instances, government seizure has prevented Bahá'í farmers from claiming their farms and crops.¹⁸⁹ The government has also “seized private homes in which Baha'i youth classes were held despite the owners having proper ownership documents.”¹⁹⁰

Educational opportunities for Bahá'ís have been severely limited.¹⁹¹

A 2001 Ministry of Justice report stat[es] . . . Baha'is would be permitted to enroll in schools only if they did not identify themselves as Baha'is, and that Baha'is preferably should be enrolled in schools with a strong and imposing religious ideology. The report also stat[es] that Baha'is must be excluded or expelled from universities, either in the admission process or during the course of their studies, once their identity becomes known.¹⁹²

In recent years, “the [Islamic Revolutionary] Government has taken a few positive steps in recognizing the rights of Baha'is as well as of other religious minorities.”¹⁹³ “In 1999 President Khatami publicly stated that persons should not be persecuted because of their religious beliefs. He vowed to defend the civil rights of all citizens, regardless of their beliefs or religion.”¹⁹⁴ This is more in keeping with Article 23 of the Iranian Constitution, which provides that “no one may be molested or taken to task simply for holding a certain belief.”¹⁹⁵ Bahá'ís have also been allowed to receive food ration booklets.¹⁹⁶

187. *Quanuni Assassi Jumhuri'i Isla'mai Iran* [The Constitution of the Islamic Republic of Iran], art. 22 [1980].

188. *Iran Report 2005*, *supra* note 162.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Iran Report 2005*, *supra* note 162. In 2004, Bahá'í students were allowed, for the first time, to participate in the nationwide entrance exam to state-run universities. However, for Bahá'í students who passed the exam, Islam was marked as their religion of choice. Since it is against Bahá'í tenets to disavow one's faith, this action had the effect of preventing the Bahá'í students' matriculation. *Id.*

193. *Iran Report 2004*, *supra* note 164.

194. *Id.*

195. *See Quanuni Assassi Jumhuri'i Isla'mai Iran* [The Constitution of the Islamic Republic of Iran], art. 23 [1980].

196. *Iran Report 2004*, *supra* note 164.

Only recently, in 2000, did the government cease the requirement that religious affiliation be listed when couples register their marriages.¹⁹⁷ This allowed registration of Bahá'í marriages by default.¹⁹⁸ Historically, "Baha'i marriages were not recognized by the Government, leaving Baha'i women open to charges of prostitution."¹⁹⁹ In addition, Bahá'í children "had not been recognized [by the Government] as legitimate and therefore were denied inheritance rights."²⁰⁰ Similarly, recent relaxation of requirements made it easier for some Iranian Bahá'ís to travel abroad.²⁰¹ "In addition some Iranian embassies abroad do not require applicants to state a religious affiliation," which makes it "easier for Baha'is to renew their passports."²⁰²

Despite increased promises from the government, Bahá'ís are still being arrested with impunity.²⁰³ Government officials arrest Bahá'ís arbitrarily, charge them, detain them, and release them without dropping the charges, making the released fear they could be re-arrested at any time.²⁰⁴ Other arrested Bahá'ís have been sentenced to prison, merely for practicing their religion.²⁰⁵ The sentences given to Bahá'ís range anywhere from fifteen years in prison to death.²⁰⁶

B. Saudi Arabia

Like Iran, Saudi Arabia does not offer religious protection to members of the Bahá'í Faith. Saudi Arabia is a constitutional monarchy

197. *Id.*

198. *See id.*

199. *Id.* Charges of prostitution in Iran can result in execution. False charges of prostitution are often used as an excuse to punish women for purported transgressions against Islamic law. See David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 221-22 (1981).

200. Iran Report 2004, *supra* note 164.

201. *Id.* In 1981, the Islamic Revolutionary Government ordered its embassies to cease renewing Bahá'í passports, and to instead issue a "transit paper," valid only for return to Iran. Allen, *supra* note 161, at 340.

202. Iran Report 2004, *supra* note 164.

203. *Id.*

204. *Id.* From 2002-2004, "23 Baha'is from 18 different localities were arbitrarily arrested and detained . . . because of their Baha'i faith." *Id.* None of them were in prison as of September 15, 2004. *Id.*

205. Iran Report 2004, *supra* note 164. Only one Bahá'í prisoner was reported during 2004, serving a life sentence commuted from a death sentence. Two Bahá'í prisoners were released following fifteen-year sentences. "In May 2003, a Baha'i prisoner was released following a visit by the U.N. Human Rights Working Group on Arbitrary Detention." *Id.*

206. *See id.*

that operates according to Islamic law.²⁰⁷ Article 1 of the Saudi Arabian Constitution, adopted in 1992, states that Islam is the official religion of Saudi Arabia.²⁰⁸ The state-sanctioned Islam, however, is narrowly limited to the practice of Salafi (also known as “Wahhabi”), which is a “strictly conservative version of Sunni Islam.”²⁰⁹

There is no freedom of religion in Saudi Arabia.²¹⁰ The government neither provides nor enforces legal protection of religious freedom, but has repeatedly claimed to the international community that all non-Muslims are free to practice their religions in private.²¹¹ However, the guidelines of private worship are vague.²¹² The Saudi Constitution ambiguously states that the government cannot enter or search a home,²¹³ or arrest an individual,²¹⁴ “except in cases specified by statutes.”²¹⁵ The “mutawaa” (religious police) routinely monitor religious practice in homes, and have harassed, detained, and beaten private worshippers.²¹⁶

Article 46 of the Saudi Constitution establishes the judiciary as an “independent authority” with “no control” over its judgments save Islamic Shar’ia.²¹⁷ These generally closed judicial proceedings make it hard for organizations, which monitor international human rights, to verify allegations of abuse.²¹⁸ Saudi citizens do not have the same rights before the courts.²¹⁹ Under the broad authority granted to them, judges may discount testimony from non-Salafi citizens.²²⁰ Judges have also ordered

207. Bureau of Democracy, Human Rights, and Labor, Saudi Arabia: International Religious Freedom Report 2005, para. 1 (Nov. 8, 2005) *available at* <http://www.state.gov/g/drl/rls/irf/2005/51609.htm> [hereinafter Saudi Arabia Report 2005].

208. SAUDI ARABIA BASIC LAW, art. 1, para. 1 (1992).

209. Bureau of Democracy, Human Rights, and Labor, Saudi Arabia: International Religious Freedom Report 2004, (Sept. 15, 2004) *available at* <http://www.state.gov/g/drl/rls/irf/2004/35507.htm> [hereinafter Saudi Arabia Report 2004].

210. Saudi Arabia Report 2005, *supra* note 207.

211. *Id.*

212. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, 2005 ANNUAL REPORT, at 114 (May 2005), *at* <http://www.uscirf.gov/countries/publications/currentreport/2005annualRpt.pdf> [hereinafter USCIRF REPORT 2005].

213. SAUDI ARABIA BASIC LAW, art. 37 (1992).

214. *Id.* at art. 36 .

215. *Id.* at art. 36-37.

216. USCIRF REPORT 2005, *supra* note 212, at 114.

217. SAUDI ARABIA BASIC LAW, art. 46 (1992).

218. Saudi Arabia Report 2005, *supra* note 207.

219. *See id.*

220. *Id.*

torture or other degrading treatment as punishment for violation of the Islamic law.²²¹

Article 9 of the Saudi Constitution mandates that family members should be raised in the Islamic Faith.²²² The government interprets this law to mean all offspring of male citizens are Muslims.²²³ This denies all non-Muslims, including Bahá'ís, the freedom to choose the religion of their children.²²⁴

The government also restricts education for non-Muslim Saudis.²²⁵ Article 13 of the Saudi Constitution mandates that "education will aim at instilling the Islamic faith in the younger generation."²²⁶ Religious instruction in the Salafi tradition of Islam is mandated at all levels of public education, though non-Muslims are not required to study Islam in private schools.²²⁷ However, the government does not allow private religious instruction for adherents of non-Salafi Islam.²²⁸

The government also prohibits ownership of religious material it considers to be incompatible with Salafi Islam.²²⁹ Article 18 of the Saudi Constitution states that "[n]o one is to be stripped of his property except when it serves the public interest."²³⁰ It is the government's policy to confiscate non-Salafi religious books and videotapes when intercepted by customs officials.²³¹

C. Egypt

Egypt is another Middle Eastern country that denies religious protection to members of the Bahá'í Faith, even though its constitution provides for freedom of religious belief and practice.²³² Article 2 of the Egyptian Constitution states that Islam is the official state religion and "Islamic jurisprudence is the principal source of legislation."²³³ Egypt's

221. USCIRF REPORT 2005, *supra* note 212, at 113-14.

222. SAUDI ARABIA BASIC LAW, art. 9 (1992).

223. Saudi Arabia Report 2005, *supra* note 207.

224. *Id.*

225. *Id.*

226. SAUDI ARABIA BASIC LAW, art. 13 (1992).

227. Saudi Arabia Report 2004, *supra* note 209.

228. *Id.*

229. *See Id.*

230. SAUDI ARABIA BASIC LAW, art. 18 (1992).

231. Saudi Arabia Report 2005, *supra* note 207.

232. *See* U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Egypt: Int'l Religious Freedom Rep. 2005, (Nov. 8, 2005), at <http://www.state.gov/g/drl/rls/irf/2005/51598.htm> [hereinafter Egypt Report 2005].

233. EGYPT CONST., art. 2.

Constitution guarantees the freedom of belief and religious practices,²³⁴ but in practice this freedom is provided for only those religions that do not conflict with Shar'ia.²³⁵ Members of minority religions who are recognized by the Religious Affairs Department of the Ministry of Interior are mostly free to practice their religions.²³⁶ Bahá'ís in Egypt, however, are not recognized by the government and do not share this freedom.²³⁷

As of 2005, the population of Bahá'ís in Egypt was approximately between several hundred and two thousand.²³⁸ "In 1960, President Gamal Abdel Nassar issued a decree [law 263] banning [Bahá'í religious] institutions and community activities."²³⁹ This order led to the confiscation of "[a]ll [Bahá'í] community properties, including [Bahá'í] centers, libraries, and cemeteries."²⁴⁰ This ban is still in effect and the property has not been returned.²⁴¹

A small group of Bahá'ís were arrested for holding a religious gathering.²⁴² Of the fifty-one accused, 3 Bahá'ís received a criminal conviction for violating Law 263, receiving a three-year suspended sentence.²⁴³ Though the Court of Appeals of Cairo overturned the convictions, they upheld the constitutionality of Law 263.²⁴⁴ The court reasoned that while the Constitution, and article 18 of the International Covenant on Civil and Political Rights, which Egypt ratified, guaranteed religious freedom, the public practice of the Bahá'í Faith in Egypt might upset Muslim fundamentalists, disturbing "public order."²⁴⁵ Since the Bahá'ís could still practice their religion in private, the court reasoned that their religious freedom existed.²⁴⁶

234. *Id.* at art. 46

235. Egypt Report 2005, *supra* note 232.

236. *Id.*

237. *Id.*

238. U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Egypt: Int'l Religious Freedom Rep. 2004 (Sept. 15, 2004), at <http://www.state.gov/g/drl/rls/irf/2004/35496.htm> [hereinafter Egypt Report 2004]. See Egypt Report 2005, *supra* note 232.

239. Steven T. McFarland, *Missionaries and Indigenous Evangelists: The Right to Bear Witness in International Law*, 31 CUMB. L. REV. 599, 611 n.33 (2001).

240. *Id.*

241. *Id.*

242. M. Cherif Bassiouni, *Speech Religious Discrimination, and Blasphemy*, 83 AM. SOC'Y INT'L L. PROC. 427, 435 (1989).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

The effects of Law 263 are still present in Egypt. Since the government requires the categorization of its citizens as either “Muslims, Christians, or Jews”, Bahá'ís are unable to obtain valid government documents.²⁴⁷ As such, Bahá'ís in Egypt cannot possess birth certificates, identity papers, and marriage licenses.²⁴⁸

IV. RELIGIOUS RIGHTS OF BAHÁ'ÍS PRIOR TO THE LIBERATION OF IRAQ

The Ba'athist regime came to permanent power in Iraq in 1968, after the success of their second military coup.²⁴⁹ Already a rising figure in the Ba'athist party, Saddam Hussein became the official head of Iraq in 1979 after years of de facto²⁵⁰ leadership.²⁵¹

Islam was the official religion of Saddam Hussein's Iraq.²⁵² Under Hussein's regime, Article 25 of The Interim Constitution of Iraq allowed religious freedom if the religion did not violate “morals and public order.”²⁵³ The government's public policy, however, violated this provision, as it repressed religious freedom “and sought to exploit religious differences for political” gain.²⁵⁴ It sought to repress any religion it saw as not fully socially and politically supporting the regime.²⁵⁵

In 1970, the Ba'athist regime issued Law No. 105, an order banning the practice of the Bahá'í Faith.²⁵⁶ Under the order, “all Bahá'í activity [was] punishable by death.”²⁵⁷ By 1994, the Bahá'í Faith in Iraq was largely eradicated.²⁵⁸

247. Egypt Report 2004, *supra* note 238.

248. *Id.*

249. DILIP HIRO, IRAQ: IN THE EYE OF THE STORM 53 (Thunder's Mouth Press 2002).

250. Though Hussein did not become the official head of Iraq until 1979, his rank in the Ba'ath Party allowed him great influence in the affairs of the country. *See id.*

251. *Id.*

252. IRAQI INTERIM CONSTITUTION, art. 4, GILBERT H. FLANZ ET AL., CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gilbert H. Flanz eds. & Fouad Fahmy Shafik trans., 1990).

253. *Id.* at art. 25.

254. Iraq Report 2003, *supra* note 5.

255. *Id.*

256. *See* Smith and Momen, *supra* note 8, at 85.

257. Letter from Felice D. Gaer, Chair of The U.S. Commission on International Religious Freedom, to President George W. Bush (Apr. 28, 2003), *available at* http://www.uscirf.gov/mediaroom/press/2003/april/04282003_iraq.html.

258. Joy Aschenbach, *Troubles Follow Bahá'ís Faith Persecuted from the Beginning*, WICHITA EAGLE, May 28, 1994, at 8c, *available at* 1994 WLNR 835171.

It is unclear whether Hussein's government required religious organizations to register with the state.²⁵⁹ The government, however, was heavily involved in the regulation of recognized religions, using its Ministry of Endowments and Religious Affairs to build, repair, and monitor places of worship, approve publication of religious material, and appoint clergy.²⁶⁰ The regime did not allow instruction "in languages other than Arabic and Kurdish," limiting access to religious texts written in other languages.²⁶¹

Though there were no Shari'a courts in Iraq, the civil courts were free to interpret and apply Islamic law in personal status²⁶² cases.²⁶³ Though precise data is unavailable, it is estimated that the regime imprisoned tens of thousands of citizens on religious grounds, holding some of them for decades.²⁶⁴ Some individuals unaccounted for since being arrested are believed to have died or been secretly executed.²⁶⁵

V. RELIGIOUS FREEDOMS UNDER THE TRANSITIONAL ADMINISTRATIVE LAW

A. *The Transitional Administrative Law*

The Iraqi Interim Governing Council signed the temporary Iraqi constitution, The Law of Administration for the State of Iraq for the Transitional Period, on March 8, 2004.²⁶⁶ The Transitional Administrative Law contains unprecedented²⁶⁷ legal rights for the religious minorities of Iraq.²⁶⁸ Article 3 declares the Transitional Administrative Law "the Supreme Law of the land . . . binding in all parts of Iraq without exception."²⁶⁹ The National Assembly²⁷⁰ and the Presidency Council²⁷¹ are

259. Iraq Report 2003, *supra* note 5.

260. *Id.*

261. *Id.* Note: The original languages of Bahá'í religious texts are Arabic, Farsi, and English.

262. Personal status laws are those dealing with family matters, such as marriage and divorce. See James Y. Rayis, *Business Law in Iraq? Yes, But Be Careful*, BUS. L. TODAY, July/August (2005) at 28.

263. Iraq Report 2003, *supra* note 5.

264. *Id.*

265. *Id.*

266. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

267. See generally The Coalition Provisional Authority, Iraqi Governing Council Adopts Bill of Rights: Unprecedented Document for Iraq and the Region, available at http://www.cpa-iraq.org/government/TAL_factsheet.html (last visited Feb. 25, 2006).

268. See Comparative Textual Analysis, *supra* note 38, at 13.

269. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 3(A) (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

prohibited from creating amendments to the Transitional Administrative Law that could “affect Islam, or any other religions or sects and their rites.”²⁷²

The Transitional Administrative Law recognizes Islam as “the official religion of the State and . . . a source of legislation [that] guarantees the full religious rights of all individuals to freedom of religious belief and practice.”²⁷³ In articles analogous to the United States Bill of Rights,²⁷⁴ Iraqi citizens are given, among other rights, the right of free expression,²⁷⁵ the right of free assembly and to join associations freely,²⁷⁶ and “the right to freedom of thought, conscience, and religious belief and practice.”²⁷⁷ All Iraqis are equal before the law, equal before the courts, and “equal in their rights without regard to gender, sect, opinion, belief, nationality, religion, or origin . . . Discrimination against an Iraqi citizen on the basis of his gender, nationality, religion, or origin is prohibited.”²⁷⁸

The Transitional Administrative Law accords a right to life, liberty, and security of person, and prohibits the deprivation of “life or liberty, except in accordance with legal procedures.”²⁷⁹ No Iraqi may be detained for his or her religious beliefs.²⁸⁰ No Iraqi may be denied voting rights for

270. See generally *id.* at art. 30(A)-(D). The Transitional Administrative Law mandates an election, no later than January 31, 2005, of a National Assembly to “legislate and exercise oversight over the work of the executive authority.” *Id.* at art. 30(A).

271. See generally *Id.* at art. 36. The Transitional Administrative Law mandates that the National Assembly elect a Presidency Council, composed of “a President of the State and two Deputies . . . [who are] to represent the sovereignty of Iraq and oversee the higher affairs of the country.” *Id.* The National Assembly elected the Presidency Council on April 6, 2005. See State Department Conducts Daily Press Briefing, Apr. 25, 2005, available at 2005 WLNR 6867073.

272. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 3(A) (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

273. *Id.* at art. 7(A).

274. See Jacquelyn S. Porth, *Rumsfeld Says Haiti Shows Need for Peacekeeping Operations*, STATE DEP'T PRESS RELEASES & DOCUMENTS, Mar. 1, 2004, available at 2004 WLNR 2620178 (“This is an historic day for the people of Iraq,” [U.S. Secretary of Defense Donald Rumsfeld] said. Such a bill of rights is unprecedented for Iraq and the broader region . . .”).

275. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 13(B) (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

276. *Id.* at art. 13(C).

277. *Id.* at art. 13(F).

278. *Id.* at art. 12.

279. *Id.*

280. *Id.* at art. 15(C).

religious reasons.²⁸¹ “Any Iraqi whose Iraqi citizenship was withdrawn for political, religious, racial, or sectarian reasons has the right to reclaim his Iraqi citizenship.”²⁸²

B. Implementation of the Transitional Administrative Law

After the end of Saddam Hussein's regime, the United States Department of State removed Iraq's designation as a “Country of Particular Concern” for its egregious violations of religious freedom under Saddam Hussein's rule.²⁸³ The United States Commission on International Religious Freedom praised the provisions of the Transitional Administrative Law for its favorable treatment of international human rights standards in a state where Islam is the dominant religion.²⁸⁴ Religious followers were also allowed to return to their former places of worship.²⁸⁵ However, as of November 8, 2005, Law No. 105, which banned the Bahá'í Faith in Iraq, was not yet officially repealed.²⁸⁶ Though the provisions of the Transitional Administrative Law—and the Iraqi Constitution—should technically nullify Law No. 105, a court has yet to officially void it.²⁸⁷

Though the Interim Government sought to undo the human rights abuses of Saddam Hussein's regime, there were still problems.²⁸⁸ Insurgents in Iraq were responsible for most of the religiously-motivated violence,²⁸⁹ including bombing Shi'a mosques, and assassinating both Sunni and Shiite clerics.²⁹⁰ In addition, the insurgents bombed several Christian churches and Christian-owned businesses.²⁹¹ The insurgent attacks represent an effort to instigate inter-religious conflict among Sunni and

281. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 20(B) (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

282. *Id.* at art. 11(D).

283. Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *International Religious Freedom Report, 2004 Executive Summary* (Sept. 15, 2004), available at <http://www.state.gov/g/drl/rls/irf/2004/35335.htm>.

284. See Comparative Textual Analysis, *supra* note 38, at 13.

285. See U.S. Dep't of State, Bureau of Democracy, Human Rights, & Labor, *Iraq: International Religious Freedom Report 2005* (Nov. 8, 2005), available at <http://www.state.gov/g/drl/rls/irf/2005/51600.htm> [hereinafter Iraq Report 2005].

286. *Id.*

287. *Id.*

288. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, *Iraq: Country Reports on Human Rights Practices - 2004* (Feb. 28, 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41722.htm> [hereinafter Iraq Report 2004].

289. See *id.*

290. USCIRF Report 2005, *supra* note 212, at 12.

291. *Id.*

Shiite Muslims, as well as inter-religious conflicts between Christians and Muslims.²⁹²

In addition to attacks by insurgents, Christians also faced localized religious persecution.²⁹³ Women were intimidated and assaulted for not wearing the hijab, the traditional Muslim headscarf.²⁹⁴ As a result of these persecutions, over 30,000 Christians fled Iraq in 2004.²⁹⁵

Extra-judicial Islamic courts' interpretation of Shar'ia has reportedly been the basis for several instances of violations of religious freedom.²⁹⁶ These include university campuses requiring separate entrances for women, the closing of barbershops for providing modern haircuts and beard shaving, and the threat of beheading for teachers and schoolchildren who observe the Interim Government's extension of the Friday weekend to include Saturday, the Jewish day of rest.²⁹⁷ These events underscore the need for Iraq's permanent Constitution to ensure the freedom of religion or belief for every Iraqi citizen.²⁹⁸

VI. RELIGIOUS FREEDOMS UNDER THE PROPOSED IRAQI CONSTITUTION: QUESTIONS AND CONCERNS

The National Assembly, under the authority granted to it by the Transitional Administrative Law, was responsible for drafting the permanent Iraqi Constitution by no later than August 15, 2005.²⁹⁹ A draft constitution, which U.S. Ambassador to Iraq Zalmay Khalilzad called "the most progressive document of the Muslim world," was finalized on August 29, 2005.³⁰⁰ Four days later, the Iraqi Parliament approved subsequent changes in an effort to secure the support of the Sunni Arab minority in Iraq.³⁰¹ On October 15, 2005, Iraqi citizens passed a referendum on the final version of the Iraqi Constitution, ratifying the document.³⁰²

292. *Id.* at 13.

293. *Id.*

294. Iraq Report 2004, *supra* note 288.

295. *Id.*

296. USCIRF Report 2005, *supra* note 212, at 13.

297. *Id.*

298. *Id.* at 14.

299. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 61(A) (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

300. *The Implications of a Flawed Constitution*, 50 APS DIPLOMAT STRATEGIC BALANCE IN THE MIDDLE EAST 3, Sept. 12, 2005, available at <http://www.allbusiness.com/periodicals/article/557353-1.html>.

301. Sameer N. Yacoub, *Iraq's Parliament Sends Amended Constitution to U.N. for Printing, Distribution to Voters*, SAN DIEGO UNION-TRIBUNE, Sept. 18, 2005, at A2,

A. Concerns Regarding the New Constitution – July 20, 2005 Draft and Final Draft

On July 25, 2005, the United States Commission on International Religious Freedom released its report analyzing the July 20, 2005 draft Iraqi Constitution's Bill of Rights.³⁰³ Under their analysis, the Bill of Rights fails to protect fundamental rights of Iraqi citizens,³⁰⁴ and is a "significant departure" from the Transitional Administrative Law in many respects.³⁰⁵ The final draft of the Iraqi Constitution ("Final Draft") improves on the Bill of Rights with "some positive language directed at protecting human rights. However, . . . ambiguities and contradictions . . . threaten to compromise the scope and extent of human rights protections."³⁰⁶

Article 2 of the Final Draft declares Islam to be the official state religion.³⁰⁷ While declaring Islam the official religion in a constitution or other governing document in no way precludes adequate protection of religious freedoms for all citizens,³⁰⁸ the provisions contained in the Final Draft may be construed to limit the religious freedoms of both non-Muslims and Muslims who do not conform to the controlling standards of the Islamic majority.³⁰⁹

1. Fundamental Human Rights

available at <http://www.signonsandiego.com/news/world/iraq/20050918-0535-iraq-constitution.html>. With one exception, the constitutional provisions discussed below were not altered. *See infra* note 374.

302. *See* LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 61(B) (Mar. 8, 2004), *available at* <http://www.cpa-iraq.org/government/TAL.html>; Press Release, U.S. Dep't of State, U.S. Envoy to Iraq Praises Passage of Iraqi Constitution (Oct. 26, 2005), *available at* <http://usinfo.state.gov/mena/Archive/2005/Oct/26-760646.html>.

303. *See generally* United States Comm'n on Int'l Religious Freedom, Iraq 's Draft Permanent Const.: Analysis and Recommendations, (Sept. 28, 2005), *available at* http://uscirf.gov/countries/region/middleeast/iraq/09282005_iraq.html [hereinafter Analysis of Draft].

304. Letter from Michael Cromartie, Chair, U.S. Commission on International Religious Freedom, to Zalmay Khalilzad, U.S. Ambassador to Iraq (July 26, 2005), http://www.uscirf.gov/mediaroom/press/2005/july/07262005_iraq.html.

305. *Id.*

306. Analysis of Draft, *supra* note 303.

307. DRAFT IRAQI CONSTITUTION art. 2, *available at* http://www.iraqigovernment.org/constitution_en.htm (last visited Feb. 26, 2006).

308. *See* Comparative Textual Analysis, *supra* note 38, at 6-9.

309. Analysis of Draft, *supra* note 303.

Article 1(a) of the July 20, 2005 Draft Bill of Rights (“Draft Bill of Rights”) states that all Iraqis are “equal before the law without regard to gender, opinion, belief, nationality, religion, sect, or origin. Discrimination on the bases of gender, nationality, religion sect, origin, or social position is forbidden.”³¹⁰ This provision excludes the Transitional Administrative Law’s language “that all Iraqis ‘are equal in their rights,’ although this may be inferred from the prohibition on discrimination.”³¹¹ The Final Draft did not substantively alter this provision, providing for “equal[ity] before the law without discrimination because of sex, ethnicity, nationality, origin, colour, religion, sect, belief, opinion or social or economic status.”³¹²

Article 1(a) also provides that “[no one] may be deprived of . . . life or liberty except in accordance with law.”³¹³ This language is changed from the Transitional Administrative Law, which prohibited deprivation of “life or liberty, except in accordance with legal procedures.”³¹⁴ The ambiguity of the word “law” may allow interpretation of this provision to limit human rights for Iraqi citizens, potentially allowing “crimes and punishments based on the judge’s individual interpretation of Islamic law, rather than application of statutory law passed by the legislature.”³¹⁵ The Final Draft modified this language to restore the substance of the Transitional Administrative Law by preventing deprivation of “the right to life and security and freedom . . . except in accordance to the law and based on a ruling by the appropriate judicial body.”³¹⁶

The Draft Bill of Rights does not accord every Iraqi citizen the unqualified right to “[f]reedom of religion, belief, and performance.”³¹⁷ Draft Article 20 provides for “[f]reedom of religion, belief, and performance . . . in accordance with the law.”³¹⁸ The limited scope of the freedom “is in contradistinction to other rights enumerated in the [D]raft

310. CONSTITUTION OF IRAQ DRAFT BILL OF RIGHTS art. 1(a) (Nathan J. Brown trans.) (July 27, 2005), available at <http://www.carnegieendowment.org/files/BillofRights.pdf>.

311. Analysis of Draft, *supra* note 303.

312. DRAFT IRAQI CONSTITUTION art. 14, available at http://www.iraqigovernment.org/constitution_en.htm (last visited Feb. 26, 2006).

313. CONSTITUTION OF IRAQ DRAFT BILL OF RIGHTS art. 1(a) (Nathan J. Brown trans.) (July 27, 2005), available at <http://www.carnegieendowment.org/files/BillofRights.pdf>.

314. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 12 (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

315. Analysis of Draft, *supra* note 303.

316. DRAFT IRAQI CONSTITUTION art. 15, available at http://www.iraqigovernment.org/constitution_en.htm (last visited Feb. 26, 2006).

317. CONSTITUTION OF IRAQ DRAFT BILL OF RIGHTS art. 20(a) (Nathan J. Brown trans.) (July 27, 2005), available at <http://www.carnegieendowment.org/files/BillofRights.pdf>.

318. *Id.*

[B]ill [of Rights], including the right of ownership, which is expressed specifically as a right of 'the Iraqi citizen,' and freedom of expression, which is extended to '[a]ll individuals.'"³¹⁹ The Transitional Administrative Law, in contrast, guarantees all individuals "full religious rights . . . to freedom of religious belief and practice."³²⁰ Analysts fear that limiting religious freedom to be "in accordance with the law"³²¹ would grant freedoms only to religious groups as a whole, "and therefore may fail to provide protection for individuals from within a particular religious community to manifest their religion or belief."³²² Article 2 of the Final Draft substantively alters the provision; it "guarantees . . . full religious rights for all individuals and the freedom of creed and religious practices."³²³

The second provision of the Final Draft's Article 2 attempts to balance the Islamic character of Iraq with the rights of non-Muslim Iraqis by "guarantee[ing] the Islamic identity of the majority . . . and guarantee[ing] the full religious rights of all individuals to freedom of religious belief and practice such as Christians, Yazedis, and Mandi Sabians."³²⁴ While recognition of the Yazedis, who some Muslims traditionally regarded as "'devil worshippers'"³²⁵ is positive, there are concerns that the provision may be interpreted to not guarantee rights to those enumerated groups. If Article 2 is interpreted in that manner, the Bahá'ís may not "be able to practice freely."³²⁶

Article 135 in the Final Draft contains a similar provision, guaranteeing "administrative, political, cultural, educational rights for the various ethnicities such as Turkomen, Chaldeans, Assyrians, and the other components."³²⁷ The ChaldoAssyrians "expressed concern over the

319. U.S. Commission on International Religious Freedom, Iraq's Permanent Constitution: Analysis of July 20, 2005 Draft Bill of Rights, art. 20 (July 25, 2005), http://www.uscirf.gov/mediaroom/press/2005/july/07262005_analysis.html [hereinafter July 20 Analysis].

320. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 7(A) (Mar. 8, 2004), *available at* <http://www.cpa-iraq.org/government/TAL.html>.

321. CONSTITUTION OF IRAQ DRAFT BILL OF RIGHTS art. 20(a) (Nathan J. Brown trans.) (July 27, 2005), *available at* <http://www.carnegieendowment.org/files/BillofRights.pdf>.

322. July 20 Analysis, *supra* note 319.

323. DRAFT IRAQI CONSTITUTION art. 2, *available at* http://www.iraqgovernment.org/constitution_en.htm (last visited Feb. 26, 2006).

324. Analysis of Draft, *supra* note 303.

325. *Id.*

326. *Id.*

327. DRAFT IRAQI CONSTITUTION art. 135, *available at* http://www.iraqgovernment.org/constitution_en.htm (last visited Feb. 26, 2006).

separate listing of Chaldeans and Assyrians in article 121 as an attempt to weaken their unified ability to preserve their culture and heritage.”³²⁸ The Transitional Administrative Law, in contrast, utilized the term ChaldoAssyrians for similar provisions.³²⁹

The right to freedom of thought and conscience is also not guaranteed in the Draft Bill of Rights.³³⁰ The Transitional Administrative Law provides that the right of “freedom of thought, conscience, and . . . [c]oercion in such matters shall be prohibited.”³³¹ Article 41 of the Final Draft restores for “[e]very individual . . . freedom of thought and conscience.”³³² The Draft Iraqi Constitution also imposes on the state the duty to protect individuals from “coercion in thought, religion or politics.”³³³

The positive duty on the state to respect rights, which is an important component of international human rights law, was also omitted from the Draft Iraqi Bill of Rights.³³⁴ However, the Transitional Administrative Law mandated that the state “respect the rights of the [Iraqis]” as enumerated within the document.³³⁵ The Draft Iraqi Constitution partially restores the substantive provision by mandating that “[n]o law can be passed that contradicts the rights and basic freedoms outlined in this constitution.”³³⁶

The Draft Iraqi Bill of Rights limits the scope of rights and freedoms of Iraqi citizens to those “in accordance with the law,”³³⁷ with regard to “[f]reedom of opinion, expression, organization . . . meetings, [and] peaceful demonstration.”³³⁸ Though not explicitly associated to religious

328. Analysis of Draft, *supra* note 303.

329. *Id.*; see LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 30(C), art. 53(D) (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

330. See Analysis of Draft, *supra* note 303.

331. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 13(F) (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

332. DRAFT IRAQI CONSTITUTION art. 41, available at http://www.iraqgovernment.org/constitution_en.htm (last visited Feb. 26, 2006).

333. DRAFT IRAQI CONSTITUTION art. 35, available at http://www.iraqgovernment.org/constitution_en.htm.

334. See Analysis of Draft, *supra* note 303.

335. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 10 (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

336. DRAFT IRAQI CONSTITUTION art. 2(C), available at http://www.iraqgovernment.org/constitution_en.htm.

337. DRAFT IRAQI BILL OF RIGHTS art. 15, available at <http://www.carnegieendowment.org/files/BillofRights3.pdf>.

338. *Id.* at art. 21.

freedom, freedoms of expression, association, and assembly are, nevertheless, inextricably bound with freedom of religion, especially in regards to religious practices.³³⁹ While international human rights standards allow restrictions on the exercise of rights, the restrictions must be both prescribed by law and necessary for public interests.³⁴⁰ The draft does not specify to which law this provision refers, leaving legal analysts to worry this provision could be used to violate international human rights standards.³⁴¹ The Draft Iraqi Constitution modifies these provisions. Article 36 guarantees freedom of opinion “as long as it does not violate public order and morality.”³⁴² Freedom of assembly and “peaceful protest” are also guaranteed according to this stipulation, with the further proviso that they “will be organized by law.”³⁴³ The Draft Iraqi Constitution does not refer to freedom of expression, or meetings.³⁴⁴

2. Personal Status

Article 14 of the Draft Iraqi Bill of Rights states that “[p]ersonal status shall be included in the law in accordance with the religion and the sect of the person.”³⁴⁵ The Transitional Administrative Law did not contain any provision regarding personal status.³⁴⁶ The Draft Iraqi Bill of Rights may be interpreted to repeal the 1959 secular personal status law.³⁴⁷ At a minimum, this will establish legislation that will provide separate treatment for personal status matters according to the religion of the parties.³⁴⁸ The Draft Iraqi Constitution does not vary this provision. It states that “Iraqis are free in their adherence to their personal status according to their own religion, sect, belief and choice, and that will be organized by law.”³⁴⁹

339. See Comparative Textual Analysis, *supra* note 38, at 19.

340. See ICCPR, *supra* note 59, art. 19.

341. See Analysis of Draft, *supra* note 303.

342. DRAFT IRAQI CONSTITUTION art. 36, available at http://www.iraqigovernment.org/constitution_en.htm.

343. *Id.* at art. 36.

344. See *id.* at art. 36.

345. DRAFT IRAQI BILL OF RIGHTS art. 14, available at <http://www.carnegieendowment.org/files/BillofRights3.pdf>.

346. July 20 Analysis, *supra* note 319.

347. *Id.* (an attempted repeal of the secular system by the Iraqi Governing Council was prevented by the Coalition Provisional Authority).

348. *Id.*

349. DRAFT IRAQI CONSTITUTION art. 39, available at http://www.iraqigovernment.org/constitution_en.htm.

Granting citizens separate rights on the basis of religion can be interpreted as violating the international law provision against coercions that impair freedom to adopt a religion or belief on one's choice.³⁵⁰ Article 39 does not provide the mechanism by which an individual will access the courts of personal status, nor does it indicate whether an individual may opt out of appearing before these courts.³⁵¹ The change in law may result in discrimination against Iraqis without religion, and married couples of different religious backgrounds, who may have to appear before religious courts adverse to their beliefs.³⁵² Bahá'ís may be affected by adverse rulings by judges interpreting and applying religious personal status legislation.³⁵³

3. Detainment Due to Political or Religious Beliefs

The Draft Iraqi Bill of Rights omits³⁵⁴ the Transitional Administrative Law's provision that "[n]o one may be unlawfully arrested or detained, and no one may be detained by reason of political or religious beliefs."³⁵⁵ Article 13(a) of the Draft states instead that "[n]o one may be detained, held or searched, except by a decision from a competent judicial agency."³⁵⁶ The language "by reason of political or religious beliefs" was added to the Transitional Administrative law to prevent the use of Islamic law "religious offenses," like blasphemy or apostasy, to stifle debate or dissent.³⁵⁷ The Draft Iraqi Constitution provision does not substantively change the Draft Iraqi Bill of Rights version, and states that "[n]o one may be detained or investigated unless by judicial decision."³⁵⁸

4. Commitment to International Human Rights Standards

Vagaries in the language of the draft constitution also presented problems.³⁵⁹ Article 23 of the Draft Iraqi Bill of Rights states that, "[i]n

350. See Comparative Textual Analysis, *supra* note 38, at 12.

351. Analysis of Draft, *supra* note 303.

352. *Id.*

353. See *id.*

354. Analysis of Draft, *supra* note 303.

355. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 15(C) (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

356. DRAFT IRAQI BILL OF RIGHTS art. 13(a), available at <http://www.carnegieendowment.org/files/BillofRights3.pdf>.

357. Analysis of Draft, *supra* note 303.

358. DRAFT IRAQI CONSTITUTION art. 35, available at http://www.iraqigovernment.org/constitution_en.htm.

359. Analysis of Draft, *supra* note 303.

addition to the rights stipulated in this constitution Iraqi citizens enjoy the rights stipulated in international treaties, agreements, and international legal documents that Iraq has signed or joined or that are considered binding according to the provisions of international law.”³⁶⁰ However, the Draft Iraqi Bill of Rights limits Iraq’s commitments to international human rights to those rights that do not “contradict Islam.”³⁶¹ The Transitional Administrative Law included similar language, but did not include the limitation that international human rights cannot “contradict Islam.”³⁶² Legal analysts fear that the provision may exist solely to give Iraq a way to limit its commitments to international human rights instruments to which it is a signatory.³⁶³ The Final Draft changed the Draft Bill of Rights language somewhat, by stating that Iraqi citizens “enjoy the rights stated in international human rights agreements and treaties endorsed by Iraq that don’t run contrary to the principles and rules of this constitution.”³⁶⁴

Article 44 was excised from the final version of the Iraqi Constitution which was submitted to the United Nations.³⁶⁵ Though a constitution need not explicitly reference international human rights protections, a textual reference to international human rights, if interpreted as part of recognizably enforceable law, “can supplement [the] constitution[’s] [own] provisions on human rights.”³⁶⁶ The deletion of Article 44 is troubling, because when coupled with textual ambiguities elsewhere in the Iraqi Constitution, it signals that Iraq may move away from the commitment to international human rights standards expressed in the Transitional Administrative Law.³⁶⁷

5. Discretionary Interpretation of Shar’ia

360. DRAFT IRAQI BILL OF RIGHTS art. 23, *available at* <http://www.carnegieendowment.org/files/BillofRights3.pdf>.

361. *Id.*

362. *Id.*; *see also* LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 23 (Mar. 8, 2004), *available at* <http://www.cpa-iraq.org/government/TAL.html>.

363. Analysis of Draft, *supra* note 303.; July 20 Analysis, *supra* note 319. The Human Rights Committee was critical of a similarly ambiguous Egyptian declaration, noting that such provisions may be used to undermine the effects of instruments to which the country is a signatory. *Id.*

364. DRAFT IRAQI CONSTITUTION art. 44, *available at* http://www.iraqigovernment.org/constitution_en.htm.

365. *See* Analysis of Draft, *supra* note 303.

366. Comparative Analysis of Draft, *supra* note 38, at 27.

367. *See* Analysis of Draft, *supra* note 303.

Also troubling is the omission³⁶⁸ of the Transitional Administrative Law's provision that no citizen may be convicted of a crime that was not illegal at the time the crime was committed.³⁶⁹ The "provision [was designed as a limit] on the ability of judges to convict and punish individuals for crimes based on their discretionary interpretation of Islamic law", as opposed to application of statutory law.³⁷⁰ Article 16(g) of the Draft Bill of Rights states, instead, that "[c]riminal laws do not have retroactive effect except by law."³⁷¹ A latter provision states, though, that retroactive effect of criminal laws is to be applied only if "it is in the interest[] of the accused."³⁷² The Final Draft does not substantively alter this provision; it states that "[p]unitive law shall not be applied retroactively unless it is best for the defendant."³⁷³

Article 89 of the Final Draft allows the appointment to the Federal Supreme Court of "experts in Islamic jurisprudence . . . [who do] not require[] . . . [training in] civil law."³⁷⁴ The rationale for allowing Shar'ia jurists to sit on the Federal Supreme Court is related to a need for interpreting laws in light of Article 2's provision that Islam be "a fundamental source of legislation".³⁷⁵ Article 89 mandates that "the method of . . . selection [for the Federal Supreme Court,] and the work [done by] the [Court, will] be determined by a [statute passed] by [two-thirds] . . . of the Council of Representatives."³⁷⁶ This could allow the Council to create a law that either tempers the influence of discretionary Shar'ia, or allows Iraq to join Iran and Saudi Arabia in allowing Shar'ia judges with no training in civil law to sit on the highest civil court.³⁷⁷

VII. CONCLUSION

The provisions contained in the Iraqi Constitution present two possibilities for the future treatment of the Bahá'í Faith, and other

368. Analysis of Draft, *supra* note 303.

369. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 15(A) (Mar. 8, 2004), *available at* <http://www.cpa-iraq.org/government/TAL.html>.

370. July 20 Analysis, *supra* note 319.

371. DRAFT IRAQI BILL OF RIGHTS art. 16(g), *available at* <http://www.carnegieendowment.org/files/BillofRights3.pdf>.

372. *Id.* at art. 16(b).

373. DRAFT IRAQI CONSTITUTION art. 19(10), *available at* http://www.iraqgovernment.org/constitution_en.htm.

374. Analysis of Draft, *supra* note 303.

375. *Id.*

376. *Id.*

377. *Id.*

religious minorities in Iraq.³⁷⁸ The new Iraq will either fulfill the stated goals of the constitution's drafters by protecting the rights of the Bahá'ís, and Iraq's other religious minorities, or it will restrict the rights of those religious minority groups by requiring the groups to conform to laws and norms based on the dominant Islamic culture, enforced by Islamic judge's discretionary interpretation of Shar'ia.³⁷⁹ One should not infer that the Iraq Constitution's declaration of Islam as the official state religion, and a fundamental source of legislation, denies non-Islamic citizens the full protection of the religious rights and freedoms guaranteed them by customary international law.³⁸⁰ A "count[r]y [that professes a] state religion . . . [may] provide . . . effective protection . . . [of] the right to freedom of religion [and] belief" for all its citizens, provided that it guarantees such rights through its constitution and legislature, and provides an adequate method of enforcing those rights in comportment with international standards.³⁸¹

Though its language is ambiguous, the Iraqi Constitution provides textual guarantees of the right to freedom of religion and belief.³⁸² However, as indicated by Iraq's previous constitution, as well as constitutions of Iran, Egypt, and Saudi Arabia, written provisions do not guarantee enforcement of rights.³⁸³ Iraq's legislative and judicial mechanisms must interpret textual ambiguities in favor of international human rights standards to ensure that the religious rights and freedoms of the Bahá'í Faith, and Iraq's other religious minorities, are fully protected.³⁸⁴ For example, Law No. 105 of 1970 has yet to be officially nullified.³⁸⁵ If those bodies fail, then those religious minorities may be required to seek assistance from the international community or nongovernmental agencies for enforcement of their rights.³⁸⁶ Iraq has the potential to create a just Islamic society that judiciously balances its rich tradition and heritage with a progressive government that ensures the

378. *Id.*

379. *See id.*

380. *See id.*

381. Comparative Textual Analysis, *supra* note 38, at 17.

382. Analysis of Draft, *supra* note 303.

383. *See* Comparative Textual Analysis, *supra* note 38, at 16.

384. *See* Analysis of Draft, *supra* note 303.

385. Iraq Report 2005, *supra* note 292.

386. *See* DRINAN, *supra* note 16, at 181-185.

human rights of all its citizens.³⁸⁷ Such a country could pave the way for improved treatment of religious minorities in the Middle East.³⁸⁸

387. See Analysis of Draft, *supra* note 306.

388. *But see* Zaid Al-Ali, *Iraq: A Constitution to Nowhere*, Open Democracy: Free Thinking for the World, Oct. 14, 2005, http://www.opendemocracy.net/conflict-iraq/iraqconstitution_2925.jsp.

