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4 Islamic reformism and human rights in Iraq: gender equality and religious freedom

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Introduction

Since the invasion and occupation of Iraq in 2003, the considerable scrutiny of the new Iraqi constitution has focused on the issues of sectarianism and political centralization. However, other areas of tension are also evident. In particular, the issues of gender equality and religious freedom are crucial areas for discussion, particularly in the context of the broader discourse of Islam and human rights. Gender equality and religious freedom are the two most contested areas of debate between advocates of the universal human rights regime and those seeking to develop and infuse an Islamic perspective on human rights. The debates concerning these issues in the formation of the new Iraqi constitution provide an illustrative example of possible compromise between perspectives that are often posited as mutually exclusive.

Gender equality is under stress in the new Iraqi constitution, but a visible civil society movement champions it both domestically and internationally with clear precedents for the reconciliation of Islam and international human rights standards. Religious freedom, particularly the right of Muslims to convert to other religions or adopt a secular lifestyle, is also under pressure. Here, there is room for the opening of dialogue to protect those who want to convert from Islam through radical reformist discourse on religious freedom and human rights in Islam whilst maintaining the Islamic character of the constitution. However, this debate is hampered by the ethnic/identity overtones of this debate in the country, particularly in the early stages of power acquisition after the fall of the Saddam regime. Also, the issue of religious freedom in terms of apostasy does not have the support of visible and active civil society movements as is the case with those who support strengthening gender equality in Iraq.

The Iraqi constitution takes important steps in terms of enshrining rights on gender equality and religious freedom in Iraq. However, there are
serious weaknesses in the document in terms of the potential abandonment of personal status laws in favor of community and sectarian law. In addition, the constitution does not recognize the links between political status and religious freedom. The debate concerning the place of human rights in the constitution needs to work from a position of critical engagement with both Islamic approaches to human rights and the international rights regime in order to enshrine a series of rights for Iraqis that are both legitimate and resilient.

**Islam and human rights**

The debate surrounding Islam and human rights centers on the applicability of human rights in non-Western contexts (Berween 2003: 129). Implicit in this is the idea amongst a number of Islamic scholars and activists that human rights, as articulated in the 1948 Universal Declaration of Human Rights (UDHR), the 1976 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are largely a product of “Western” historical experiences. Consequently, the discussion has centered on the applicability of human rights to Islamic societies. This is not to posit a homogenous discourse, but this general sketch does peg the broad parameters of debate. Within this, there is a wide range of positions as to the validity of human rights norms in Islamic societies. Four main approaches to this issue can be identified: an “Islamization” of human rights; pragmatic reforms within the framework of the shari’a; critical reconceptualization of the shari’a; and political secularism in Islam (Bielefeldt 2000). The first position, a “status quo” or “traditionalist” stance, does not critically engage with the details of the human rights regime, instead it simply denies the issue any controversy. That is, proponents of this view claim that there is no necessity for a critical debate as ‘human rights have always been recognized in the shari’a’, thus, it provides an absolute and final blueprint for a human rights program (Bielefeldt 2000: 103–4). Conceptually, this approach found its contemporary voice through the work of Abul A’la Moudoudi and his proposition that the non-discriminatory nature of Islam provides the ideal basis for respect for human rights (Maudoudi 1988).

More recently, the Organization of Islamic Conferences (OIC) has given specific voice to this perspective through the Cairo Declaration on Human Rights in Islam. The Cairo Declaration, released at the OIC summit on 5 August 1990, states from the very outset that humans are bound through ‘their subordination to Allah’ and Islam ‘is the guarantee for enhancing ... dignity along the path to human integrity’
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(OIC 1990: Article 1-a). Thus, it is fraternity through religion that provides the basis for the bestowal of human rights.

Despite the inclusion of a range of tenets akin to those in the UDHR, the Cairo Declaration contains key differences that show how it lacks any critical engagement with human rights discourse. The most prominent of these lie at the end of the document which state, respectively, that ‘all rights and freedoms stipulated in this Declaration are subject to the Islamic shari’ a’ and ‘the Islamic shari’ a is the only source of reference for the explanation or clarification of any of the articles of this Declaration’ (OIC 1990: Articles 24-5). Thus, the Cairo Declaration does not critically engage with the global human rights regime as enshrined in the UDHR, instead, simply claiming that Islamic doctrine is complete in its perspectives on human rights issues. As such, the traditionalist stance on the Islam and human rights debate offers little in terms of promoting cross-cultural understanding.

The second categorization is one prominent in Muslim societies globally, what Bielefeldt describes as consistent with the ‘tradition of humanitarian pragmatism’ even though ‘conceptual differences between shari‘a and human rights may yet remain unsettled’ (Bielefeldt 2000: 106). This pragmatism has centered on the difference between theory and practice in the implementation of, for instance, hudd punishments (Schacht 1964: 120). This approach has manifested itself not so much in prominent Muslim intellectual thought, but instead through state practice over several centuries. For instance, the legitimacy of polygamy has remained but authorities within the vast majority of Muslim communities have discouraged its practice. Such changes generally take several generations to take shape and are organic in that the necessity for reform stems from circumstance rather than ideology.

Departing from these perspectives, the radical reformist approach to the debate concerning Islam and human rights seeks to engage in a ‘courageous and frank criticism’ of the shari’ a that leads not to a dismissal of Islamic law but its reappraisal in the contemporary global environment (Bielefeldt 2000: 108). This is a process, described by Rahman, as an acceptance of ‘existing society as a term of reference’ in the understanding and application of Islamic law (Rahman 1966: 136). This approach has primarily sought to attenuate the tendency to equate shari’a strictly with traditional jurisprudence (fiqh), emphasizing it as an ‘ethical and religious concept rather than a legalistic one’ (Bielefeldt 2000: 108). Such an approach is illustrated in the work of prominent reformist scholar, the Sudanese academic Abdullah Ahmed An-Na‘im. An-Na‘im proposes a new hermeneutic approach to understanding the Qur‘an and the shari‘a that differentiates
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between the earlier revelations in Mecca and the latter revelations in Medina. The core of An-Na‘im’s approach proposes that the earlier revelations (in Mecca) contain the core theological messages of Islam while the latter, which are more elaborate and legalistic, are more responsive to the specific historical circumstances of the time (An-Na‘im 1990: 54). Whilst not contesting the ‘divine character’ of these latter revelations, they need to be viewed in their historical context (Bielefeldt 2000: 110).

This differentiation serves as a mechanism by which certain Islamic principles act as immutable values whilst others serve as ‘examples of an Islamic way of life within a particular historic context’ that can be interpreted and applied by Muslims in changed historical circumstances (Bielefeldt 2000: 110). Such an approach serves as a blueprint for many radical reformists in the Muslim community in their efforts to develop alternative interpretations of Islamic law that can constructively and critically engage with the human rights regime. Indeed, such an approach has gained increasing currency amongst civil society groups throughout the Muslim world in their efforts to promote political reform that is grounded in a local context whilst also being responsive to global norms.

The final position in this typology is that of political secularism. This is not to be confused with “ideological secularism” that seeks to remove religion from the public arena. Instead, this approach argues that it is possible to differentiate between the prophetic and political roles of the Prophet Muhammad, whereby the religious and the political themselves can be separated. This perspective has received little currency amongst Muslim communities, but has been championed in small pockets of the Muslim intelligentsia. Central to this argument is an objection to the use of religion to validate temporal political activity; an act they argue is akin to idolatry. Instead, humans must accept their finite circumstance and not ‘instrumentalize’ religion for ‘the purposes of power politics’ (Bielefeldt 2000: 113–4). An implicit form of this can be seen to resonate in the Arab Middle East where the idea of cultural unity through Islamic identity has been promoted through secular political systems based on civil law codes. This was particularly prominent up to the 1970s and 1980s in states such as Egypt, Algeria, Syria, and Iraq.

This typology is useful as it gives nuance to the debate concerning Islam and human rights. However, it is important to see how such approaches manifest themselves in relation to specific events. The formation of the post-Saddam era constitution in Iraq provides such an opportunity, particularly in terms of the activities of radical reformist groups and their efforts to promote a reformist agenda on key human rights issues. Two such issues sit at the centre of this debate concerning, those of gender rights and
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religious freedom. These two are key points of tension as they present apparently immutable areas in terms of compromise between Islam and human rights. Thus, before turning to the case study it is important to outline the tension surrounding the issues of gender rights and religious freedom.

Overlapping universalities?

The issues of gender equality and religious freedom are key points of debate on Islam and human rights as they involve the most difficult areas of mutual accommodation (Brems 2004: 18). The challenge rests in the “inclusive universality” of both systems. The international human rights regime has effectively set the parameters of what is acceptable and what is not. In contrast, Islam also contains clear injunctions on the *halal* and the *haram*. Both systems regard their ideological parameters as set and internally consistent. The question is, therefore, whether there is an overlap between these systems which claim universality.

The UDHR and ICESCR are both unequivocal in their outline of gender equality. The UDHR states, in Article 2, that ‘everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as ... sex’ and the ICESCR states, in Article 3, that state parties must ‘ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights’. However, there is intense disagreement within Islamic scholarship over the status of women as accorded by the Qur’an and the shari’a. Many ‘ulama and jurists claim that women have been given a subordinate status to men whilst ‘modernists’ in Islamic scholarship believe that ‘the holy book accords equal status to both sexes’ (Engineer 2004: 1).

In order to explore the Islamic position it is helpful to break down the issue of gender quality into a series of elements which make up the stance of the Qur’an and the shari’a. In terms of human dignity, there is minimal disagreement over the equality of the sexes. Central to this is the declaration in the Qur’an that all humans were created from a ‘single soul’ (4:1), thus no gender implicitly enjoys superiority over the other. This is compounded by many other Qur’anic references that focus on the equality of all humankind, regardless of gender. However, moving beyond this basic element, the idea of absolute equality becomes more problematic when the concept of gender complementarity is introduced. In particular, the idea of gender complementarity relates to the specific social functions of men and women rather than dignity or religious status (William & Chrisman 1993). Debates concerning gender rights are not new in Muslim societies, but have been pronounced particularly at times of rapid social change. In terms of the contemporary debate, there has been significant attention on what
Deniz Kandiyoti identifies as ‘Muslim women as the bearers of the “backwardness” of their societies’ in the eyes of Western observers and Western-oriented reformers (Kandiyoti in Afkhami 1995: 20–1). This is a process that often inspires local reaction whereby certain social and cultural practices relating to gender rights and restrictions are elevated ‘into symbols of cultural authenticity and integrity’ (Kandiyoti in Afkhami 1995: 21; see also Ahmed 1992). Advocates of women’s rights in Muslim countries have typically struggled to gain both resources and recognition for their efforts (Kandiyoti in Afkhami 1995: 26). This weakness stems, in part, from the broad range of views within the discourses on women’s rights in Islam. The diversity of Muslim opinions in Iraq reflects the breadth of debates at the regional level between secular feminists, reformists, to ‘Islamist women who fully endorse the dictates of the shari’a’ (Kandiyoti in Afkhami 1995: 26).

Similar to gender equality, international human rights mechanisms are clear in their assertion of religious freedom in terms of the right to practice and convert. Article 18 of the UDHR states that:

> everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and 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.

This is echoed in Article 18 of the ICCPR which adds that ‘no one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice’. Article 27 of the ICCPR states that minority communities ‘shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language’.

The statement within Article 18 of the UDHR concerning the right to ‘change ... religion or belief’ is of primary importance here as it touches on the controversial area of apostasy in Islam. Saeed and Saeed contend that the right to religious freedom ‘is perhaps the oldest human right recognized internationally’ (Saeed & Saeed 2004: 10). However, such freedom is seen as violating the tenets relating to apostasy in Islam. This provides an area of heated discussion as the treatment of apostasy ‘has not differed essentially from its conceptualization in the second century of Islam’ to the present time (Saeed & Saeed 2004: 1). It is an immutable law, and one that prescribes the harshest of hadd punishments.

The scale of punishments is contested among Muslim scholars, as it is based not on Qur’anic law but on the traditions of the Prophet (hadith)
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(Saeed & Saeed 2004: 2). The debate within Islam over apostasy centers on the severity of punishments, not the illegality of the act. Some scholars claim that there is no Qur’anic basis for the application of the death penalty for apostasy and, in addition, that freedom of religion is a basic principle of Islam (Al-Naqib 1997: 595). Saeed and Saeed argue that capital punishment for apostasy was originally limited to acts of high treason, but has been hijacked subsequently by those seeking to apply it to conversion from or renunciation of Islam (Saeed & Saeed 2004: 2–3).

Prior to the emergence of international norms enshrined through the UN, religious freedom in Islam acknowledged the “people of the book” (Jews and Christians) who are regarded as the recipients of early revelations in the form of the sacred texts. Judaism and Christianity, both monotheistic, have more in common with Islam than other religions and are, therefore, privileged. The Islamic notion of freedom of religion was traditionally applied to “revealed religions.” Historically (particularly prior to WWI), Muslim rulers demonstrated a far greater degree of tolerance to all religions than warranted in Islamic law for political expediency. The deciding factor for Muslim rulers was whether their subjects were law-abiding and pledged loyalty to their authority. This contractual system assured a significant degree of social harmony and averted internal strife, allowing religious freedom to non-Muslims in pre-modern times (Lapidus 2002: 197–217). With the advent of the nation-state system, most states with Muslim majorities have developed constitutions that, de jure, allow religious pluralism without discrimination.

However, neither the core Islamic texts nor the constitutions of many modern Muslim states deal explicitly with the conversion of Muslims to another religion. The OIC declarations on human rights, particularly the Cairo Declaration, echoes this by not giving the specific right of an individual to leave Islam but only granting the right of individuals to have ‘religious freedom’ (OIC 1990: Articles 10, 22a, 22b). Religious freedom in the Cairo Declaration is more concerned with the protection for Muslims in the face of increased Christian evangelical and missionary activity than a concession for the freedom to convert from Islam or practice Islam according to local custom.

In terms of intellectual approaches, three perspectives have emerged. First, the pre-modern position of no conversion from Islam with the penalty of death for apostasy; second, the use of this system with some form of limitations; and third, the total freedom ‘to move to and from Islam’ (Saeed & Saeed 2004: 88). The first position is dominant amongst Muslim scholars and thus allows no room for accommodation of Article 18 of the UDHR. The second position, evident in the work of scholars
such as Moudoudi, is that the punishment must stand but that the declaration of apostasy must come from the state. That is, to turn one's back on Islam in a Muslim political community is tantamount to treason, thus deserving of capital punishment administered by the state. The third perspective corresponds to the position taken by radical reformers and secular Muslims. The radical reformist position takes issue with the religious legal basis for the penalty, arguing that either the death penalty for apostasy is not outlined in the Qur'an, and the apostate will be judged upon their natural death (Saeed & Saeed 2004: 94–5). Opposition to the death penalty is central to the secular perspective. This stems from a call for the imposition of a civil law code that would protect freedom of religion.

The invasion of Iraq and the post-Saddam Iraqi constitution

Bearing this debate in mind, discourses concerning human rights in Islam acquired significant relevance beyond academic discourse following the fall of Saddam Hussein's regime in 2003. The state-building project in the post-Saddam era opened up the political arena to a full range of players subscribing to very diverse ideologies. In this context, the articulation of the new Iraqi constitution has been a critical test of the ability of various forces to converge over the role of Islam in Iraqi public life, and particularly its position vis-à-vis gender equality and religious freedom. However, the continuing instability in Iraq, along with the efforts of conservative elites to pursue their agenda, one often backed by the occupying forces as they enlist their support to enhance Iraq's security prospects, places the future of gender equality and religious freedom in Iraq at risk.

Gender rights and religious freedom under Saddam Hussein

The situation for women and minority religious communities under the regime of Saddam Hussein is a contested subject. Secular personal status laws up to the 1990s governed both areas. Iraqi laws on religious freedom and gender equality were based on the 1959 Personal Status Law. According to the international solidarity network, Women Living Under Muslim Laws (WMULM), this was 'one of the most progressive family laws in the Middle East' (WL UML 2005). This law was updated in 1970 with a new constitution. Article 19 of the 1970 Iraqi Provisional Constitution guaranteed equal gender rights by civil law. The new constitution and its
The status of women was further affected when the government-sponsored General Federation of Iraqi Women (GFIW) replaced women’s civil society groups that existed before the coup (such as the Women’s Empowerment Society, the Kurdish Women’s Association, and the Iraqi Women’s League) (HRW 2003: 1). The GFIW facilitated the training of women for placement in various spheres such as industry, public service, and agriculture. This move stemmed from the labor shortage faced by the new regime due to successive wars. Gender equality was an important part in encouraging women to join the workforce. This was a deliberate attempt to tap into the potential pool of an industrial labor force and political base that women represented.

The expansion of women’s rights in Iraq at this time to promote state-led development is a pattern that is repeated in many Muslim states. The necessity of mobilizing women’s labor as well as using the image of women’s labor force participation as a sign of social progress has framed the efforts at women’s emancipation in countries such as Egypt, Syria, Tunisia as well as Iraq (Kandiyoti in Afkhami 1995: 22). Ironically, the increased rates of women’s participation in the labor force, the professional sphere and in political life has been the source of a conservative backlash within Muslim societies, particularly in times of economic recession and high male unemployment (Mernissi 1988: 8–11). This backlash became public in the constitutional debate of the post-Saddam era.

The Ba’ath regime, however was undeniably repressive and intolerant of dissent. State sanctions against religious and ethnic communities, dissidents and intellectuals also affected women (HRW 2003: 1). Women’s conditions suffered a blow in the wake of the 1991 Gulf War which brought UN sanctions on Iraq. In the 1990s the ruling regime was under siege and obsessed with its survival. This led the regime to buttress its legitimacy by seeking to ‘embrace Islamic and tribal traditions as a political tool in order to consolidate power’ (HRW 2003: 3–4). This reinforced the patterns that undermined the status of women. An unintended consequence of the sanctions was the retraction of state services for women, particularly education. For instance, as school places shrunk, families focused on granting access for boys ahead of girls (HRW 2003: 23). Therefore, whilst women were subject to the systemic violence of Saddam’s dictatorship, their status was formally enshrined in civil law and they had access to full marriage, inheritance, employment, and other rights. Since 1991 and especially since 2003, there has been a notable regression in the formalized rights for women in Iraq, particularly in terms of the growing conservative religious influence in the country.
Invasion, occupation and human rights in Iraq

On 11 October 2002 the United States Congress passed the “Authorization for Use of Military Force Against Iraq Resolution of 2002,” permitting President George W. Bush authorization to use military force if the Iraqi regime of Saddam Hussein was deemed to have not relinquished his alleged possession of weapons of mass destruction. Instigated by US pressure, the UN passed resolution 1441 on 9 November threatening ‘serious consequences’ if Iraq did not comply with previous disarmament obligations (United Nations 2002). After intense diplomatic pressure and negotiations, President Bush addressed the US people on 17 March 2003 to declare that Iraq had not met its obligations. This declaration came despite protests from the Iraqi regime, the UN weapons inspection committee and the International Atomic Energy Agency that Iraq had complied with the disarmament procedure.

Consequently, on 20 March 2003 the United States, in cooperation with the United Kingdom and the so-called “coalition of the willing” launched “Operation Iraqi Freedom.” The initial military operation was quick, leading to the fall of Baghdad on 9 April and the formal removal of Ba’ath Party rule on 1 May 2003. However, even with the capture of Saddam Hussein on 13 December 2003 the occupation forces have faced an ongoing resistance in the form of Ba’ath Party loyalists, Islamist insurgents, and other armed groups that continue to challenge the foreign military occupation of Iraq.

This insurgency has sought to cripple the occupying powers and derail the process of political transformation instigated by the coalition forces. This process has made progress despite the significant armed challenge to its presence. In June 2004, limited sovereignty was transferred from the Coalition Provisional Authority (CPA) to the appointed caretaker government under Iyad Allawi. Allawi’s government served until the first post-invasion election on 31 January 2005. This new elected body was charged with drafting the new constitution for post-Saddam Iraq by 15 August. After several delays, the draft was approved on 28 August and on 15 October 2005 the Iraqi constitution was approved in a referendum by 16 of Iraq’s 18 provinces. Views on the significance of this moment have differed widely, from a dismissal of the document as enshrining division in the country and as a recipe for future disaster to those who see it as a triumph for the nascent electoral process and laying the foundations of democracy and prosperity in Iraq.

The deterioration of the security situation under the American occupation has seen an escalation of violence against women, particularly rape and physical abuse. The Iraqi Ministry of Public Works and Social Affairs has
reported a significant increase in cases of physical and sexual abuse against women (WLUML 2005). The reported cases are put in stark relief in light of comments by various NGOs which state that these cases reflect only a small proportion of the overall instances of sexual and physical abuse. The lack of reporting of cases, it has been argued, is due to the threat of honor killings and pressures from the families of victims (WLUML 2005). In addition, there are charges against the government for inaction and fostering an environment conducive to the continuation of such acts. For instance, Juan Khalaf of the National League for Women’s Rights in Iraq has stated that ‘women are being raped and sexually abused and instead of the government increasing our power to judge and defend ourselves, they are just decreasing it, trying to keep us out of politics and the important sectors of society’ (quoted in WLUML 2005).

The picture in relation to religious minorities was also mixed. The regime of Saddam Hussein conducted systematic campaigns of aggression toward various religious groups in the country, particularly the Shi’a community of Baghdad and Iraq’s south. In addition, the regime also sought to annihilate the military capacity of the large Kurdish community in the north of the country. However, the status of religious minorities, notably the “ChaldoAssyrian” population as well as the Yezidi population did not suffer as a specific target of the Hussein regime’s wrath. These communities benefited from the enshrinement of rights in Iraqi civil law.

The tension between religious and ethnic communities in Iraq has heightened markedly since 2003. Outside the most notable triad of Shi’a—Sunni—Kurdish competition for power in the post-Saddam era, the promotion of shari’a law as the basis for a future Iraqi constitution has caused concern amongst Iraq’s Christian and secular population. In addition, the tensions between the ChaldoAssyrian and Kurdish communities in the north, particularly around the mixed city of Kirkuk, has led this group to seek the enshrinement of religious freedom as a method for protecting their small community from being subsumed in larger territorial units within a prospective federal structure.

**Drafting the constitution**

Following the US invasion and occupation of Iraq, the Transitional Authority Law (TAL), drafted by the Coalition Provisional Authority (CPA), was introduced on 8 March 2004 and served as the “Supreme Law of Iraq” until the ratification of the Iraqi constitution by referendum on 15 October 2005 (CPA 2004). The two most prominent Iraqi participants in the CPA helping to draft the TAL were Faisal al-Istrabadi, a former
US State Department Advisor and Iraqi UN charge d’affaires, and Salem Chalabi, nephew of former pro-US Iraqi exile Ahmad Chalabi and head of the criminal tribunal charged with trying ex-President Saddam Hussein (Marr 2005).

The US was heavily involved in the formulation of the TAL. This posed problems for the legitimacy of the law as the US sought to impose its own vision for what the future political structure of Iraq should look like. According to Noah Feldman, advisor to the CPA on the formulation of the TAL, the US ‘did try to effect substantive outcomes in this document by exercising its own influence’ (Plumer 2005). In this, efforts were made to ensure women’s participation in the prospective constitutional formation process (Al-Marashi 2005: 139).

The TAL set out the parameters for the drafting of the constitution by the Transitional National Authority (TNA) elected in January 2005. The 30 January polls for the TNA saw the election, out of 275 seats, of 140 members of the predominantly Shi’a United Iraqi Alliance (UIA) of which the SCIRI was the dominant member. The Kurdish Constitutional List (KCL), an alliance of the Kurdish Democratic Party and the Patriotic Union of Kurdistan gained 75 seats and Al-Iraqiyyun (“the Iraqis”) of Iyad Allawi gained 14 seats. The various Sunni parties gained 17 seats as a result of a widespread Sunni boycott of the poll, the Iraqi Turkmen Front (ITF) gained three seats and the National Mesopotamia List representing Iraqi Christians, gained one seat (Al-Marashi 1995: 141). This parliament was charged with appointing the 55 member committee which would draft the constitution. Members of the UIA (28) and KCL (15) dominated the Constitutional Committee (CC). The CC also contained eight members of Al-Iraqiyyun and four members representing the Turkmen, ChaldoAssyrian, and Yezidi communities. Later on, 17 new Sunni members were appointed to the CC in an effort to promote Sunni inclusion in the drafting process (UN 2005: 2). The TAL provided for a 25 per cent quota for women’s representation in parliament. There were 10 women on the final 72 member CC (Wong 2005).

This drafting process was short as the constitutional drafting committee had less than three months to complete its task (ICGb 2005: 2). The TAL contained some promising provisions in relation to the issue of human rights. Whilst the opening articles declared the centrality of Islam to the political structure, Article 22 of the TAL declared that Iraqis shall ‘enjoy all the rights that befit a free people possessed of their human dignity, including the rights stipulated in international treaties and agreements’. At face value, these provisions stood in contrast to the declaratory significance of Islam to the post-Saddam political system. The protection of ‘all rights’ in
Article 22 seemed to suggest a modest effort to temper ideological limitations contained in the Constitution's preamble or apply a liberal interpretation of Islam. However, the Iraqi constitution that emerged in August stepped away from these provisions and took a woefully ambiguous position on gender rights and religious freedom.

The CC had its first meeting on 24 May and set itself a 15 August deadline. This speedy drafting of the constitution was hoped to undermine the insurgency and foster a democratic process. There is broad consensus, however, that 'in the end, none of these goals was met' (Brown 2005c). The final draft was presented on 28 August but the draft itself did not achieve consensus on the key issues of the role of Islam as a source of law, the political structure of the state (namely the issue of federalism), or even the name of post-Saddam Iraq. The draft constitution was pushed through by the Kurdish and Shi'a delegates in the face of vehement objections from the Sunni delegation (ICGb 2005: 2).

During the final stages of the drafting process, representatives of the smaller communities along with the Sunni representatives were largely excluded as the Shi'a and Kurdish delegations pushed ahead to produce a document by the August deadline (ICGb 2005: 3). The final drafting process took place 'behind closed doors', excluding both the Sunnis and the minority delegates, even those from the large blocs such as the United Iraqi Alliance (ICGb 2005: 3–4). This led the Sunni delegates to withdraw from the drafting process on 28 August, just before the final agreement (Cragan 2005). The completion of the constitution on 28 August came after a 13-day delay from the original deadline of 15 August. The draft was further amended on 13 September by the speaker of the National Assembly without the approval of the body (Brown 2005b: 1). However, these amendments (federal vs. regional control over water sources, comments on the identity of the Iraqi state, the application of international human rights treaties) were adjusted so that only minimal changes affected the constitution (Worth 2005).

Efforts to rush through the drafting process were backed by the US who focused on the speedy completion of the draft. This was largely a response to the domestic pressures in the US that began to turn against the continued troop presence in Iraq during 2004 and 2005. As a result, the constitution contains a number of controversial elements. The first are the provisions for decentralization. For instance, the constitution allows for two governates (other than Baghdad) to join and form a region with the vote of a simple majority, as well as allowing two regions to merge into a new region. The status of Kirkuk, previously protected like Baghdad and prevented from joining other regions, was dropped from the TAL on the formation of
the constitution. This was a major setback for the minority groups (Turkoman, ChaldoAssyrian, Arab) and a major win for the Kurdish delegation (ICGb 2005: 6).

The application of international human rights treaties proved to be a highly contested issue in drafting the constitution (ICGb 2005: 4). Some within the CC argued that the omission of references to international human rights treaties in Article 44 would actually strengthen the position of international human rights treaties as the article stated that they would be subsumed to the limits of the constitution. This was a highly suspect argument leading to the retention of this article in the final draft.

Earlier drafts of the constitution envisaged a restrictive application of international human rights treaties in Iraq. For instance, a draft circulated in July 2005 stated that international human rights treaties would be observed in Iraq ‘so long as these do not contradict Islam’ (Article 22) (Brown 2005a: 7). This article echoes the Cairo Declaration in subsuming the application of human rights treaties but uses the more ambiguous reference to “Islam” rather than to the specificities of Islamic law. Article 44, instead, places restrictions on the application of human rights treaties only if they ‘run contrary to the principles and rules of (the) constitution’. Originally included in Article 44, this commitment to international human rights treaties was put up for omission in the 13 September referendum.

The international response to the new Iraqi constitution was mixed. For instance, the International Crisis Group describes it as ‘a weak document that lacks consensus … the worst possible outcome’ the product of a ‘rushed constitutional process (that) has deepened rifts and hardened feelings’, laying the groundwork for further sectarianism and heightening the risk of civil war (ICGb 2005: 1–3, parenthesis added). The European Union issued a measured statement in response to the constitutional drafting process, welcoming the ‘continuing political transition … including drafting a constitution, holding a referendum and elections for a constitutionally elected government’ (EU 2005). However, this was coupled with a statement expressing ‘great concern over the deteriorating security situation in Iraq since the end of combat operations’ (EU 2005). For international Arab/Muslim groups, gender equality and human rights took a back seat in comparison with they regarded to be the urgent task of securing Iraq’s stability and avoiding regional repercussions. The Arab League has been staunchly opposed to the wording of the constitution, particularly to the references that limit links between Iraq and the community of Arab states. One League official stated that Arab diplomats are trying to convince Iraqi politicians ‘to ensure that the Arabism of Iraq is stressed in the Iraqi constitution’ (quoted in Al-Jazeera 2005). The League Secretary-General,
Amr Moussa, described it as a ‘recipe for disaster’, comments that followed up his earlier warning that attacking Iraq would ‘open the gates of hell’ in the region (quoted in Young 2005).

However, Moussa’s comments offered no constructive alternative path for the country. Indeed, Moussa and the Arab League are viewed with skepticism within Iraq due to their notable absence during the early phases of the constitutional formation process. The withdrawal of the Sunni delegation from the constitutional drafting process on 28 August seemed to vindicate the League’s warnings. The Sunnis called for a more active involvement by the League in the run-up to the 15 October referendum where the UN helped make the League largely irrelevant (Al-Jazeera 2005). In response, the League initiated a reconciliation conference to bridge the gap between the League and the emerging Iraqi leadership in the Governing Council. 3

The OIC has been more restrained in its response, focusing on the need to formulate an inclusive document for the political restructuring of the country. It makes little reference to the prospective Islamic character of the charter, instead calling for the formation of a document that does not lead to the ‘exclusion of any component of the population of Iraq from the process of decision-making on the future of the country’ (OIC 2005). The OIC position represents a status quo stance in terms of not seeking to focus on the formation of the new Iraqi constitution as an opportunity to critically engage with the debate on Islam and IHR. Instead, it is concerned with stability in regards to an inclusive approach as the best way to avoid further disruption in the war-ravaged country.

There has been an alternative critical response from the international arena. An-Na‘im has declared that the constitution ‘is not a workable document … (it has) brushed their differences under the carpet and crafted language that they could vote for. It’s a time bomb that will explode as soon as its enacted’ (quoted in WLUML 2005). This perspective is echoed from within Iraq by “liberal” Shi‘ite cleric Iyad Jamal Din who claims that the constitution ‘tries to preserve human rights, but within a choking religious society that is a clone of the Iranian system’. This will lead, he argues, to ‘a dark society controlled by extremists’ (quoted in WLUML 2005).

This differs from the statements of both the US administration and their representatives in Iraq. Former-US Ambassador to Iraq Zalmay Khalilzad has stated that the constitution is laudable as a ‘synthesis of Islamic traditions with the universal principles of democracy and human rights’ (quoted in WLUML 2005). These sentiments were echoed by Bush himself when he stated that ‘the constitution is one that honors women’s rights and freedom of religion’ (quoted in Pollitt 2005). Both Khalilzad and Bush’s statements
are overly-optimistic when one examines the specific tensions in the document in terms of gender rights and religious freedom. There is no real “synthesis” of Islamic traditions with the international human rights regime as the constitution is too ambiguous. This ambiguity contains the seeds for future discord particularly in terms of the wide range of issues left untouched by the constitution.

**Gender equality and the new Iraqi constitution**

During the drafting process, tensions were rife between secularists, reformists (both moderate and radical), and conservative Islamists over gender rights in the constitution. The former group, represented by such organizations as the New Horizons for Women, an umbrella organization headed by Neba Hamid, the Organization of Women’s Freedom in Iraq headed by Houzan Mahmoud, and the US-based Women’s Alliance for a Democratic Iraq headed by Basma Fakri, sought either a removal of references to Islamic law or its substantial modification in the constitution. The latter, represented by such groups as the Muslim Women’s Federation (Ittihad al-Mar’a al-Muslima) headed by Mahdiya Abd al-Lami and Salama Sumaysim alongside prominent figures in religious, social and political organizations sought a traditionalist interpretation and application of shari’a (Al-Sarraj 2005).

Therefore, the debate over gender issues in the Iraqi constitution largely centered on the role of Islam in the political life of the country. In particular, there was concern over whether the enshrinement of shari’a would ‘automatically deprive Iraqi women of their rights’ (Al-Marashi 2005: 153). Ibrahim Al-Marashi has described this debate as somewhat alarmist in that whilst some elements of the new constitution may annul provisions of the 1959 Personal Status Law, other provisions work to enhance the rights of women (Al-Marashi 2005: 153–4). However, there is a danger in the removal of the previous personal status law as it had raised the ire of many conservative religious groups since its inception (Brown 2005b: 6).

It is important to note that the constitution lacks specific provisions dealing with gender equality. However, there are a series of general provisions that relate to gender rights in Iraq. First, Article 14 states that ‘Iraqis are equal before the law without discrimination because of sex, ethnicity, nationality, origin, color, sect, belief, opinion or social or economic status’. Article 18 gives Iraqi women the right to pass their citizenship on to their children even if the father is not an Iraqi citizen. This provision was a victory for gender rights activists as it was not included in any previous Iraqi statute. However, there is no provision for Iraqi women to pass their citizenship on.
to their husbands (Brown 2005: 7a). In addition to this specific measure, the constitution outlines general principles to enhance gender equality and women's participation in the political sphere. Article 20 states that 'citizens, male and female, have the right to participate in public matters and enjoy political rights, including the right to vote and run as candidates'.

There was pressure to remove the quota system guaranteeing a 25 per cent female representation in the Iraqi parliament, first enshrined in the TAL, from the constitution. However, pressure from a variety of women's rights groups prevented this from taking place. This has come through in Article 48 which seeks to promote the inclusion of women in the political structure of the country whereby the 'elections law aims at achieving a representation percentage of women that is not less than one quarter of the council's members'. Another controversial area where activist groups achieved success was the inclusion of provision seeking to outlaw domestic violence. Not included in either the TAL of earlier drafts, Article 29 states that 'violence and abuse in the family, school and society shall be forbidden'. This was the first time that domestic violence was criminalized in Iraq.

Despite these provisions, the constitution lacks specific mechanisms to ensure full protection of gender equality as stated in the UDHR. The draft makes no mention of the 1959 law, instead referring to the settling of matters in line with the religious beliefs of each community (Pollitt 2005). Article 39 is at the heart of the controversy. 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'. The constitution does not explicitly do away with the 1959 Personal Status Law but it allows for the application of sectarian law in relation to issues of personal status such as marriage, divorce, inheritance, and various judicial matters. This has been seen as a dangerous trajectory for gender rights in Iraq as the use of “sectarian law” within communities promotes the possibility of arbitrary imposition of retroactive laws against women. Article 39 is a rewording of Article 14 of the earlier draft constitution that stated 'personal status shall be included in the law in accordance with the religion and the sect of the person' (Brown 2005a: 5). Both Articles, including the tempered Article 39, undermine the enshrinement of universal personal status contained in the 1959 Personal Status Law bode ill for the position of Iraqi women's rights. A former member of the constitutional panel and leading Iraqi academic, Professor Suha Azzawi has stated that 'Iraqi women will lose so much if this constitution is passed' (quoted in WLUMIL 2005).

Brown argues that instead of a single code for all personal status law in Iraq, the constitution now offers a 'menu of choices' depending on 'religion,
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sect, belief and choice’ (Brown 2005b: 6). There is an assumption that if citizens choose to act according to the provisions of the 1959 law, they would be able to as it is not abrogated. However, as the law is outlined largely in communal rather than individual terms, the pressure to act according to the status law of each community is likely to be great, particularly in rural areas. In addition, the ambiguity of personal status in Iraq is compounded by the lack of lucidity surrounding what judicial system will implement personal status law. There is no clarity in terms of whether the state will be responsible for the establishment of separate court systems for each community or whether this will be the responsibility of the community leaders. There is also no clarity in terms of whether a citizen can select different provisions from different codes and how disputes are to be settled if disputants claim to be working under different personal status codes. Brown has noted that these very problems are what led many Middle Eastern states to initially adopt uniform Personal Status Laws even in the face of charges of encroaching on religious freedoms (Brown 2005b: 7). In its efforts to accommodate all groups, the constitution has created further confusion for the status of women in the complexity of Iraqi society, a far more intricate mixture than the Shi’a—Sunni Arab—Kurd trichotomy.

The debate between the different positions on this provision highlights the divisiveness of this Article, and how the traditionalist groups have succeeded in implementing their vision for personal status in Iraq over the radical reformists. For instance, the traditionalist Muslim Women’s Federation countered the reformist demands as contradictory to Islam. Head of the Federation, Mahdiya Abd al-Lami stated that the group sought to pursue ‘justice, not equality’ (Al-Sarraj 2005). This position was premised on the contention that if primacy was given to gender equality in personal status through the constitution then women would lose their ability to act in their designated roles in the family. The focus on the maintenance of the family structure (Article 29) where the state is to ‘preserve its (the family’s) existence and ethical and religious value’ buttresses this contention. Another member of the Muslim Women’s Federation, Salama Sumaysim, has taken a more conciliatory tone by acknowledging the misuse of Islamic law over the years to promote patriarchal structures in Islamic societies. However, the parameters for the ‘dialogue’ that Sumaysim calls for have shifted due to the imposition of sectarian law (Al-Sarraj 2005).

The formal promotion of women in public institutions, formal equality in personal status law as well as protection from the arbitrariness of sectarian law are key factors in any democratic society. These safeguards
are especially important in Iraq since women constitute 60 per cent of the population due to successive wars (Fakri 2005). Yet, the constitution of post-Saddam Iraq falls short of those human rights yardsticks. This shortfall is partly due to the minimal role of women’s lobby groups, especially those with liberal leanings, in the drafting of the new constitution. This enraged groups like the Iraqi Women’s Movement which accused ‘prominent Iraqi political forces’ of deliberately neglecting women in the constitutional draft (Al-Marashi 2005: 154).

Indeed, during the drafting process, there was a manipulation of the quota system whereby existing male members of the Provisional Authority were designated the responsibility of choosing women to sit on the drafting committee. It was argued by leading women’s rights activists in an open letter to Ambassador Bremer that women who were chosen to fill the quotas were those whom they ‘knew they could intimidate and control’ (National Council of Women’s Organizations 2003).6 In addition, the quota system fell short of requiring the appointment of women to key institutional positions in the judiciary, the executive, as well as in the ministry.

Basma Fakri has articulated the core of these concerns from the perspective of the radical reformist group (Tully 2005). In particular, there are concerns in terms of the application of personal status provisions within sectarian law. Despite this, these groups do not seek the removal of references to Islamic law in Iraqi political life where ‘Iraqi women are not opposing Islam’ (Fakri 2005). Fakri argues that Islam is a ‘great source and guide for inspiration’ for all Muslim Iraqi men and women, but Islamic law must be utilized as ‘one among many sources’ administering gender rights in post-Saddam Iraq (Fakri 2005). Iraq is a signatory to a number of international treaties affecting gender rights, including the UDHR, the ICCPR, and the ICESCR treaties. The constitution does not refute these commitments. But references to sectarian and Islamic law make Iraq’s adherence to these international treaties problematic.

**Religious freedom and the new Iraqi constitution**

Similar to the tensions concerning the issue of gender equality issues surrounding religious freedom proved highly complex during the constitutional drafting process. Again, Islam and its role in the political life of post-Saddam Iraq was at the heart of this complication. The issue of religious freedom affects all of Iraq’s confessional and ethnic communities. Outside the dominant Shi‘a, Sunni Arab and Kurdish communities, Iraq has a significant Turkoman population who are largely Sunni but also include a smaller number of Shi‘a groups. In addition also Iraq has diminutive but
long-standing Catholic and Christian communities, the largest of which are the Chaldean community as well as the Syrian Catholics and Syrian Orthodox, Armenian Catholics and Protestants, along with smaller groups constituting 3–5 per cent of the total population. In addition to these groups, Iraq also has an ancient Sabaen—Mandean community in addition to the Yezidi community around the city of Mosul.

The Turkmen have historically been excluded from the political process in Iraq. In 1977 the Ba’ath regime allowed only Arab and Kurdish nationality to be registered in the national census. The 1990 constitution stated that the ‘Iraqi people are Arabs and Kurds only’. This echoed patterns of exclusion as early as 1958 where the post-independence constitution stated, ‘the Arabs and the Kurds are the participants in the homeland’. Only in 1997, the Turkmen were allowed to register as ‘New Arabs’.

The post-Saddam political system has done little to address the need to recognize and include the ethnic and religious minorities in Iraq. The new constitution echoes the 1958 constitution in focusing on the Arabs and Kurds as the only constituents of Iraq. Those provisions in the Interim Constitution that allowed for education in minority languages (particularly Turkmen) have been abrogated by the enforcement of Kurdish dominance in the north. This has been particularly notable in Kirkuk. The Mandaeans community was left without a representative in the constitutional drafting committee but had a committee member appointed along with 15 Sunni members on 5 July 2005 (ICGb 2005: 2). For the other groups, they sought to ally themselves with the various lists in the elections. For instance, ‘the Yezidis … ran on the Kurdish list’ whilst the ‘representatives of the Christian/Assyrian/Chaldean/Syriac and Armenian communities predominant in the north either ran on their own (small) lists … Sunni Turkomans had their own list, whilst Shi’ite Turkomans joined the United Iraqi Alliance’ (ICGb 2005: 2).

The constitution led to mixed results for the religious communities and the enshrinement of rights. The position of Islam as ‘a basic source of legislation’ where ‘no law can be passed that contradicts the undisputed rules of Islam’ (Article 2) was tempered with the declaration that ‘the full religious rights for all individuals and the freedom of creed and religious practices of people like Christians, Yezidis, and Mandaeans Sabaens’ shall be protected (Article 2). This was an important concession when placed in relation to the controversial Article 39 which allowed personal status law to be organized by each community. Thus, community groups appear to have gained supremacy over personal self-determination. Despite this, efforts to undermine the unity of the Christian and other minority position in the drafting process overshadowed these concessions for religious freedom.
There was much consternation amongst the Iraqi Christian community concerning Article 122 which declared the Chaldean and Assyrian communities as separate. This article enshrined a formal division in the community. This has been controversial as, in October 2003, the leaders of the various Christian communities in Iraq met at the ‘Chaldean Syriac Assyrian Conference’ in Baghdad where they agreed on the use of the label ChaldoAssyrian to refer to the entire community (AINA 2005; Naby 2005: 1). This was done so that the community would have a stronger bargaining position in any future negotiations on the political future of Iraq such as the constitutional drafting process.

The core issues for the ChaldoAssyrian community in this have been to strengthen their status in relation to their position in Kirkuk. However, the Kurdish leaders, particularly the KDP, have been active in seeking to promote division within the ChaldoAssyrian community and due to their high degree of control over the constitutional drafting process, they were able to undercut the ChaldoAssyrian community’s attempt at formal political unity. Whilst Article 122 appears to be a concession to the ChaldoAssyrian community, it is in fact a move to undermine the community’s unity through a formal enshrinement of division (see AINA 2005).

Another critical issue is the question of apostasy. Article 7 takes an important step through the criminalization of entities or trends that advocate, instigate, justify, or propagate racism, terrorism, (and) takfir (declaring someone an infidel). Yet, the constitution says nothing about the right to choose one’s own religion. Religious freedom, including the freedom of choice in religion, has traditionally been lacking in the Middle East and the new Iraqi constitution does not move beyond generalities to protect it.

Adherence to Islam has traditionally been seen as a cornerstone of national identity and ruling regimes have exploited this presumed connection for political gains (Saeed & Saeed 2004: 105–7). The issue of religious freedom, in this respect, is highly important as it can be used for these alternative means as it has been in other Islamic societies and states (Saeed & Saeed 2004: 107). In a similar manner, the adoption of a secular lifestyle has been seen by some Muslims as ‘an indirect “Christianization” of their societies’, particularly through the influence of a globalized Western culture (Saeed & Saeed 2004: 109; Sadri & Sadri 2000: 160–2). This rejection of the West also extends to criticisms of democracy in the Muslim world where support for such political models is seen as tacit support of Western dominance. Consequently, supporters of democracy are accused of apostasy by radical Islamic groups. Indeed, for many Muslims the issue of apostasy is closely linked to the Western colonization of
Muslim lands. The process of colonization brought with it concerted attempts to spread Christianity leading to fears that Islam was under attack. Harsh punishments for apostasy have been a response to this fear (Saeed & Saeed 2004: 117).

The post-Saddam constitution does not allow for charges of apostasy against Muslim groups. The constitution does not lay down a strict interpretation of Islam (Sunni or Shi'a, Isma'ili or Mu'tazili) that can provoke the imposition of apostasy punishments for other Muslim sects. However, there is no effort to address the other area of controversy where a Muslim may seek to leave the faith. This is an area covered by the UDHR but not by the more “conventional” or “traditionalist” views on Islam and human rights, such as the Cairo Declaration. There are vague provisions in the new constitution that seem to hold out the possibility of separate courts for each religious community (Pollitt 2005). This is a major concern as it implies the application of religious law to all within a specific community, even if they are secular. It also threatens to roll back common law applicable to the entire population.

Conclusion

The removal not only of a regime but of an entire state structure represents a new course in US foreign policy. In doing this, the United States, along with its coalition partners, the UN, as well as all regional and global bodies have an obligation to the Iraqi people to ensure that the new political structures introduced enable a constructive, pluralist, and peaceful future. An essential element of this is an engagement with the issue of human rights for the Iraqi people and its protection in the new constitution.

The new Iraqi constitution is a compromised document. It was put together by an unlikely group of people with widely different agendas, all of whom had their ethnic/sectarian interests to protect. These competing interests collided at the intersection of Islam/human rights and the result was a compromise deal that included some aspects from the competing programs of every delegation, without satisfying any of them completely. The constitution, whilst making important progress, is in real danger of reverting into a traditionalist understanding of the relationship between Islam and human rights. This is particularly pronounced in relation to the issue of gender rights where universal personal status laws can be replaced with the laws of particular sectarian communities with minimal government oversight. Religious freedom stands in a stronger position, particularly in terms of limits on the use of apostasy injunctions against Iraqi Muslims and non-Muslims.
Notes

1 Iraq's disarmament obligations refer to UNSCRs 660, 661, 678, 686, 687, 688, 707, 715, 986 and 1284.

2 At the time of the invasion, the US and UK were joined by 46 other states in the coalition as 'publicly committed' partners.

3 The reconciliation conference took place between 19–21 November in Cairo and went some way to re-establish the relevance of the Arab League in terms of influence over the situation in Iraq.

4 The New Horizons for Women (www.ihcenter.org/groups/nhfw), the Organization of Women's Freedom in Iraq (www.equalityiniraq.com) and Women's Alliance for a Democratic Iraq (www.wafdi.org).

5 Ibrahim Al-Marashi was the author of 'Iraq's Security & Intelligence Network: A Guide & Analysis', the article from which the Blair government plagiarized to compile their 'intelligence dossier' as justification for invasion.

6 This letter was signed by Dr. Maha Al Sakban (Secretary, Diwanyiah Women's Association), Sawan Al Barrak (President, Hillah Women's Association [also called Fatima Zahra Women's Rights Association]), Bahija Mahdi (President, Karbala Women's Association), Dunia Kareem (Coordinator, Al Kut Women's Association), Rabab Mahmud (Coordinator, Najaf Women's Association), Salah Muhsen (male) (Chair, Hillah Human Rights Association), Asaad Fadhil (male) (Chair, Human Rights and Democracy Center in Diwaniyah), Muhana Al Kinani (male) (Chair, Human Rights Watch in Karbala), Ali Al Shaibani, (male) (Chair, Human Rights and Democracy Center in Najaf), Ala Talabani (High Council for Iraqi Women, Co-founder), Lina Abood (Al Nahda Association) and Hadil Hassan Kudeir (Iraqi Women's League).