

CIVIL AND POLITICAL RIGHTS

IN IRAQ AND SOUTH AFRICA:

LESSONS FOR THE EGYPTIAN TRANSITION

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The democratic revolution that engulfed Egypt during the Arab Spring has given the country the chance to start anew, free of massive social inequalities or external influences, which differs greatly from both the post-Apartheid period in South Africa and the post-war situation of Iraq in 2005. Nonetheless, going beyond the drafting process and bearing in mind their direct effects and the potential for improvement, this paper will prove that the two existing constitutions address similar purposes in unique ways. It will then use this comparison to cater for some of the problems likely to be faced by Egypt's drafting committee in enshrining civil and political rights into the country's new fundamental law.

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List of Abbreviations

ANC – African National Congress (South Africa)

CA – Constitutional Assembly (South Africa)

CDHRI – Cairo Declaration on Human Rights in Islam

CI – Constitution of Iraq

CODESA (I and II) – Convention for a Democratic South Africa

CPA – Coalition Provisional Authority (Iraq)

CSA – Constitution of South Africa

ICCPR – International Covenant on Civil and Political Rights

IFP – Inkatha Freedom Party (South Africa)

IGC – Interim Governing Council (Iraq)

NP – National Party (South Africa)

SCC – Supreme Constitutional Court (Egypt)

TAL – Transitional Administrative Law (Iraq)

UDHR – Universal Declaration of Human Rights

Introduction

The process of constitution making is difficult and delicate, with far-reaching implications for the future of a nation. In the historically volatile Middle East, these difficulties are further amplified by the relative political instability and societal and ethnic polarization, on one hand, and an array of stringent religious and social norms that come into play, on the other. Looking at the larger, regional situation, it becomes evident that Middle Eastern constitutional conventions can rarely afford the luxury of ‘importing’ working fundamental laws or concepts from abroad, as national realities differ from border to border. The challenge becomes even greater when a constitution needs to fill the legal vacuum left by the abrupt destitution of a regime, as it now happens in the aftermath of the Arab Spring.

For a non-Arabic-speaking EU citizen that has so far had, at most, limited contact with either Arab or pan-African culture, to embark on a project touching upon the inner workings of Middle Eastern and South African constitutional traditions may seem an exercise in naïveté rather than a genuine academic pursuit. It is however equally true that a detached, external analysis of foreign politics and legislation has a fair chance at being more objective than a similar attempt originating from within the region. Not only are the societies in question deeply polarized – so is the region itself; the pursuits and political philosophy of a particular nation, down to individual level, rarely match those of its neighbors, in turn a cause of the generalized lack of political understanding in the region. The denunciation of Apartheid in the nineties and the more recent prospects for democratization in the Arab world have opened up new opportunities for constitutional drafting, a part of constitutional science endowed with a significant amount of practical ramifications and thus one that makes for a challenging and rewarding thesis subject.

The issues proposed by this thesis are intended to shed light on the current regional situation, to hint at some of the difficulties that constitutional drafters will encounter in the wake of the Arab Spring, and, taking things a step further, to predict some of the problems that are bound to arise from the application of an imperfect constitution during its existence.

What are then the main difficulties faced by constitutional drafting conventions in transitional democracies? Situations vary greatly, but can be summarized into two main groups: constitutions that are reshaped or brought into existence as a sign of changing times – as was the case of South Africa – and constitutions that come into being in the aftermath of massive internal strife unfolded over a short period of time, such as wars or revolutions – the cases of Iraq and Egypt, respectively. The urgency of the latter type adds an entire string of additional issues to be considered, especially in the case of post-war situations where the freedom of constitutional drafters is severely limited by foreign interests.

How does the protection of internationally recognized civil and political rights operate under a Sharia-based legal and institutional system? Largely ignored until recent times, the concepts of human rights and of human rights enforceability have become a central issue of public speech in the Middle East, with social activism at the forefront of this mission. Moreover, towards which extreme are international human rights instruments interpreted by signatory countries – as obligations that must be followed in their letter (and nothing more) or as mere baselines meant to serve as inspiration for further development at national level? To answer this question, the fundamental laws that are the object of this analysis must be held against the relevant international agreements: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) as well as, in the case of Iraq, the Arab Charter on Human Rights and to a lesser extent the Cairo Declaration on Human Rights in Islam (CDHRI).

The Constitution of South Africa has been lauded as a modern and progressive instrument, not least thanks to its Bill of Rights, which used the lessons of “past injustices” to create a democracy that now cherishes diversity. The racial and social rifts forcefully embedded in the South African society over several decades have undergone gradual removal through a process of social dialogue and negotiation, to which the Bill of Rights brought a noticeable contribution. Parallels can be drawn with the multicultural environment of Egypt, it too in an undeniable need for reconciliation. The Constitution of Iraq is one of the more recent pieces of constitutional law created in the Middle East. Since its adoption, enough time has elapsed to analyze its application and to link the problems that have since arisen to the tumultuous conditions in which it was created.

Looking forward to the future, the newest fundamental law that is bound to see the light of day is that of Egypt, following the collapse of Hosni Mubarak’s regime in the spring of 2011. The three countries are divided by differences in faith, tradition – be it cultural or legal – and recent history, most importantly the methods by which their long-standing regimes were removed. The democratic revolution that engulfed Egypt during the Arab Spring has given the country the chance to start anew, free of massive social inequalities or external influences, which differs greatly from both the post-Apartheid period in South Africa and the post-war situation of Iraq in 2005. Nonetheless, going beyond the drafting process and bearing in mind their direct effects and the potential for improvement, this paper will prove that the two existing constitutions address similar purposes in unique ways. It will then use this comparison to cater for some of the problems likely to be faced by Egypt’s drafting committee in enshrining civil and political rights into the country’s new fundamental law.

In regards to the origins and nature of rights in general, several competing theories have been formulated over the centuries. One conception that is becoming more and more pervasive

at global level as time passes is that of fundamental rights, viewed most often from either a natural or a deliberative perspective¹ – it is enshrined in the charters that were created in the wake of the Second World War and upheld by the quintessential international organization, the United Nations. According to this theory, certain rights are connected to the human being in such an intimate fashion that the two cannot be separated without affecting humanity itself. If we move this ‘law of laws’ into the constitutional arena, it translates into a top-down approach. Rights are not meant to be created and constructed by a constitution. What the constitution does is take them for what they are, set their boundaries and balance them with other rights of equal or different importance, in pursuit of the greater general satisfaction of the citizenry. Therefore, along with discussing rights as they are described by the fundamental law, it is important to pinpoint the limitations that may affect them, as ordained by the fundamental law itself, as well as the practical conditions liable to trigger such limitations.

¹ Marie-Bénédicte Dembour, What Are Human Rights? Four Schools of Thought, *Human Rights Quarterly*, Volume 32, Number 1 (February 2010), 9.

Chapter I: Constitution Making in Iraq and South Africa

1.1 Historical context

The present-day societies of the two countries whose constitutional systems are discussed in this paper are the product of very different kinds of transition. While the countries share similar histories of abusive leadership, as well as common aspirations for a future inside the global community, the greatest difference in their process of change was the agent: internal determination in the case of South Africa, as opposed to foreign intervention in Iraq (with the mention that dissident groups, mainly composed of Kurds and Shi'ites, were active in the country even before the invasion, yet would have been unable to produce regime change by themselves)². Once the old order was all but toppled, leading to the drafting phase itself, one could say 'negotiation' and 'compromise' were the keywords shared by the two countries' transformations, but these words presented different meanings and shades that ultimately led to different results.

As the two fundamental laws are the offspring of particular phases of history, their content is sure to bear the signs of the various pressures, interests and constraints of those periods. In order to pave the way for a better understanding of the reasons behind the provisions relevant to this paper, taken separately, but also for the purposes of comparative analysis, it is therefore crucial to place the two fundamental laws in their respective historical contexts.

In Iraq, the prospect of constitutional change became a reality in a rather sudden way, following the US-led invasion of 2003. As it was obvious that the country could no longer

² Nicholas D. Palmer, "It Looks Good On Paper": An Examination of Why the New Iraqi Constitution's Vague and Contradictory Language May Handicap It from the Start, 26 *Penn St. Int'l L. Rev.* 441 (Fall 2007), 5.

function under the constitution that had kept S. Hussein in power for over two decades, the occupying forces, whose local administrative branch was organized under the name of ‘Coalition Provisional Authority’, created the Interim Governing Council as a provisional government in 2003. Among its tasks was the drafting of an interim constitution that would lay out the blueprint for the future organization of Iraq’s political system. A direct passage to a final Constitution would have been impossible not only for practical reasons, but also due to Ayatollah Sistani’s fatwā of June 2003, in which he refused to green light a hasty resolution to the matter³. It should be said that according to some, the CPA’s effective control over the IGC meant that the United States failed to circumvent the prohibition contained in Article 43 of the Hague Convention of 1907, namely that a signatory may not change the constitutional order of a country it occupied⁴. Nonetheless, the process steamed on, and the interim constitution (the Law of Administration for the State of Iraq for the Transitional Period, or the Transitional Administrative Law) came into force in June 2004; its Article 61 created a deadline of six months for the drafting of a permanent constitution.

What followed were legislative elections in January 2005, defining the make-up of the Constitutional Committee that would draft the fundamental law. Members came not only from the National Assembly, but also from the Sunni camp, despite its boycott of the elections. Among the challenges faced by the drafters lay the weakness of civil society in the country, the different views the survivors of the old regime and those returning from exile had concerning the future of Iraq and, most importantly, the utter lack of mutual trust between the negotiating parties⁵. In this vein, Sunni delegates were excluded from the constitutional discussions a few days before the deadline, leaving only the Shia and the Kurds (who controlled the process) to

³ Andrew Arato, “From Interim to ‘Permanent’ Constitution in Iraq”, *Constitutional Politics in the Middle East*, ed. Said Amir Arjomand (Hart Publishing, 2008), 166.

⁴ Idem, 165.

⁵ Edward Chaplin, Iraq’s New Constitution: Recipe for Stability or Chaos?, *Cambridge Review of International Affairs*, Vol. 19, No. 2 (June 2006), 272.

reach a consensus and promote their own interests⁶. The Sunni only received late unilateral concessions; they did support participation in the referendum, hoping in favorable amendments before the law's entry into force, but these however never came. In its final form, the Constitution of Iraq was a mixture of foreign influences (most notably in the Bill of Rights, modeled after its American counterpart) and Arab tradition; though foreign participants were not officially allowed to take part in the writing of the text, commentaries originating from the United Nations were taken into consideration and, more importantly, the Constitution itself was based on the foreign-tailored TAL⁷. The Constitution was adopted on October 15, 2005 following a referendum, as instructed in the transitional provisions.

In South Africa, the process of change slowly started brewing decades before the adoption of the current Constitution; after decades of confrontation that often took violent accents, black and white South Africans sat at the negotiation table for the first time in 1990⁸. The Apartheid regime was coming to a close, a result of both internal pressures from the ANC and similar groups and external pressure in the form of international sanctions. The first steps in the direction of a new legal and political order were taken during the CODESA meetings of 1991 and 1992. Similarly to Iraq, an interim constitution was adopted by a multi-party forum in 1993 to ensure institutional stability until a final fundamental law could be drafted; it also contained thirty-four Constitutional Principles that the final version would have to follow⁹. In April 1994, Nelson Mandela was elected president, with the ANC winning simple majority in Parliament, but not the supermajority required to pass a new Constitution on its own. This meant intensive negotiations with the other political actors were a necessity and led to the creation of a

⁶ Idem, 193.

⁷ Philipp Dann, Zaid Al-Ali, "The Internationalized Pouvoir Constituant - Constitution-Making Under External Influence in Iraq, Sudan and East Timor", *Max Planck Yearbook of United Nations Law*, ed. Armin von Bogdandy and Rüdiger Wolfrum, Vol. 10 (2006), 440.

⁸ Cyril Ramaphosa, "Negotiating a New Nation: Reflections on the Development of South Africa's Constitution", in *The Post-Apartheid Constitutions, Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Witwatersrand University Press, 2001), 72.

⁹ Idem, 79.

Constitutional Assembly. As the main drafting force, the ANC had to accommodate the often conflicting interests of the six other parties.

The process was described as a “long and at times tedious” affair¹⁰, with clauses being debated repeatedly until an agreement could be reached. It involved not only formal negotiations in official committees and subcommittees, but also more opaque private negotiations between all the parties, or at times only between the ANC and the NP. Cracks were bound to appear, most notably the boycott of the Inkatha Freedom Party (ranked third in the elections), which left the negotiations table in mid 1995. A draft proposal was finally submitted to the Constitutional Court, as instructed by the Interim Constitution. The result, however, was not only reached thanks to negotiations, but had been “developed over several generations of struggle”¹¹. It drew from influences both within the country and abroad, and the Bill of Rights especially used the experience and jurisprudence of the United Nations, United States, Canada and India¹².

In September 1995, the Court rejected parts of this draft, including ones related to rights (namely, it found problems with the weak entrenchment of fundamental rights, the exceedingly wide list of state-of-emergency derogations and the absence of socio-economic rights revolving around collective bargaining)¹³. This led to renewed negotiations on the precise issues raised by the Court and a new draft was submitted in October. The following month it received full certification and the sanction of President Nelson Mandela, at the symbolic location of Sharpeville, where a massacre against black protesters had taken place in 1960. The Constitution thus came into force on February 4, 1997.

¹⁰ Katharine Savage, “Negotiating South Africa’s New Constitution: An Overview of the Key Players and the Negotiation Process”, in *The Post-Apartheid Constitutions, Perspectives on South Africa’s Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Witwatersrand University Press, 2001), 185.

¹¹ Hassen Ebrahim, “The Making of the South African Constitution: Some Influences”, in *The Post-Apartheid Constitutions, Perspectives on South Africa’s Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Witwatersrand University Press, 2001), 86.

¹² Idem, 88.

¹³ Siri Gloppen, *The Battle over the Constitution* (Ashgate Publishing, 2007), 213.

1.2 Specific challenges

1.2.1 Political divide

Ethnic and religious differences, rather than opposing political ideologies, were behind the difficulties encountered by the drafting commissions in the two countries during the negotiation process. While political doctrine can be always be trumped by national interest (so-called ‘national unity’ governments offer a good example), there are few things more forceful than religious and ethnic intolerance. In Iraq, the negotiation table had to accommodate both the Shia and the Sunni, religiously-motivated adversaries in the sectarian violence phenomenon engulfing the country throughout the 2000s, and the Kurds, the main ethnic minority living in the shadow of the vast Arab majority. This uneasy teaming led to frequent conflicts within the Governing Council and later to “exclusionary bargaining”, which dramatically affected the final wording of the Constitution and its level of public acceptance¹⁴. A simple fix, at least conceptually if not in its application, would have been forcing all political groups to go through with the negotiations – thus any delays would have meant a failure of the parties rather than the result of exclusion and unfair treatment on behalf of the United States.

South Africa was spared from great religious conflicts, but the ethnic issue was heavy enough to risk harming the entire drafting process. The voters of political groups present in the Constitutional Assembly were firstly divided on ethnic lines and only then in more diverse ideological subgroups, in some cases with extreme nationalist accents. Three parties catered to the black majority (the ANC, the Inkatha Freedom Party and the Pan Africanist Congress) and three to the white minority (the National Party, the Democratic Party and the Freedom Front);

¹⁴ Andrew Arato, “Post-Sovereign Constitution-Making and Its Pathology in Iraq”, *New York Law School Law Review*, Vol. 51 (2006-2007), 9.

the conservative African Christian Democratic Party completed the picture. In these circumstances, the success of the drafting process was a triumph of negotiation. Though all parties were of course animated by their own interests, they also possessed enough pragmatism to understand the significance of the moment and go through with the negotiations (save for the Inkatha Freedom Party), support the final document and continue taking part in a democratic Parliament¹⁵. Failure to adopt the Constitution would have likely created a very different future for South Africa, a choice far worse than agreeing to bitter compromises with political rivals.

1.2.2 Time pressure

Both drafting commissions had to deal with fixed deadlines, whose effects on the drafting process were of a varied nature. In Iraq, the half-year deadline was imposed by the US-led occupation force, and the sides involved in the negotiation process complained about the very short time spans at their disposal. The Kurds blamed the absence of the Sunni from the negotiations on this very time pressure and at the same time deplored it: even though it awarded them benefits in the political game, the lack of public consensus meant a deficit of legitimacy with possible adverse effects in the long run¹⁶. The South African Constitutional Assembly faced a two-year deadline for the final Constitution, and debates on particular issues dragged on until the last possible moment¹⁷ – total consensus was reached with only a few days to spare. But if this time frame seemed too short for some of the actors involved, they should look no further than Iraq for a far worse example. In order to avoid prolonged uncertainty – and perhaps in pursuit of their own agenda – the United States imposed a timetable “measured in weeks rather than months”¹⁸, with disastrous side effects: the negotiations became devoid of a common vision

¹⁵ Savage, “Negotiating South Africa’s New Constitution”, 186.

¹⁶ Arato, “Post-Sovereign Constitution Making”, 163.

¹⁷ Gloppen, *The Battle over the Constitution*, 209.

¹⁸ Feisal Amin Rasoul al-Istrabadi, “A Constitution Without Constitutionalism: Reflections on Iraq’s Failed Constitutional Process”, *Texas Law Review*, Vol. 87, Issue 7 (2009), 1654.

and were instead a contest between the selfish interests of each group involved. The purported uncertainty generated by an interim constitution (which however worked fine in South Africa) was replaced by widespread ethnic violence reflecting the conflictual state between the negotiating parties¹⁹. As a result, the final version of the fundamental law lacked the sense of unity present in the South African Constitution, which may have repercussions and threaten the long term stability of the Iraqi state significantly more than the invoked ‘uncertainty’.

The source of the deadlines, whether external as was the case of Iraq or internal in South Africa, are of little relevance to this analysis; what matters is how the commissions dealt with the time pressure once it became a reality. The existence of such a deadline translated into strict timetables, which proved beneficial for the drafting process in regards to general organization. It also pressured the commissions to focus on the essential rather than lose time bickering about details, knowing that failing to meet the deadline would mean loss of public confidence and possible unrest. However, the commissions’ race to adhere to the aforementioned timetables meant increased haste, especially in the latter stages of their work; this, in turn, led to omissions and mistakes in the final draft of the law, as well as a severe shortage of time for public consultations in the case of Iraq. To conclude, deadlines are necessary; it would be very easy to imagine a scenario with no such time limits, where negotiations devolve into endless debates and deadlocks, keeping the entire country on hold until drafting commission’s members reach compromises on every single issue. The one necessary improvement is providing a larger time span for the drafting process, especially if there is a functioning interim constitution capable of maintaining the country’s democratic processes in working state. As the primary legal building block of a country, a fundamental law is by definition meant to endure the test of time. Only the most optimistic could expect such a complex piece of legislation to be successfully created from nothing over a period of a few months.

¹⁹ Ibid.

Chapter II: Physical Integrity

2.1 The right to life: executions, abortion and euthanasia

Despite being widely seen as the most fundamental of all human rights, the right to life remains subject to different understandings around the globe and, in turn, to varying levels of protection. The three distinct issues that have summoned the most energy in debates over the last decades are capital punishment, euthanasia and abortion. While the right to life itself enjoys a primary role in international instruments such as the Universal Declaration of Human Rights and the ICCPR, the prohibition of capital punishment only makes the object of the latter's Second Optional Protocol, enforced by countries that had already taken steps in this direction on their own accord. As such, the main documents themselves only encourage the abolition of the death punishment and by no means demand it.

Execution is common in the Muslim world, with convictions regularly carried out in Iran, Saudi Arabia and various African countries, mostly for murder or offenses related to drugs. In Yemen, Libya and Syria instances of extrajudicial executions have also been reported in the midst of the protests taking place in 2011²⁰. Iraq, however, has recently moved to an undesirable first place in the world, with a staggering record of executions in its post-invasion existence (a total of 51 for the month of January 2012 alone²¹). The vast majority were cast as punishment for terrorism or murder, no doubt symptoms of the current issues faced by the country. In these conditions, it would be no surprise to learn that the Constitution of Iraq, though protecting the right to life²², places it on the same shelf with those of security and liberty, which can be subject

²⁰ "Death Sentences and Executions in 2011", Amnesty International, <http://www.amnesty.org/en/news/death-penalty-2011-alarming-levels-executions-few-countries-kill-2012-03-27>

²¹ "Executions in January 2012", Capital Punishment UK, <http://www.capitalpunishmentuk.org/jan12.html>

²² Article 15, Constitution of Iraq.

to restriction and, most importantly, deprivation. The same article of the Constitution makes a necessary link to the rights of procedural fairness by ensuring such limitations may only be created through law, and enacted following a decision of the judiciary. Given the American influence on the constitutional drafting process, as well as Iraq's own previous history of capital punishment, it would have been very difficult indeed for the new constitution to escape such provisions. Abolition of the death penalty through a constitutional amendment may someday very well be the final, definitive sign of peace and normalcy, but, considering the country's ongoing strife, this moment likely remains far in the future.

South Africa has remained true to its commitment to international human rights standards and –perhaps even more laudably– progressive tendencies, by abolishing the death penalty despite the prevalence of this form of punishment on the African continent and in the country itself, during the Apartheid era. In fact, at one point South Africa held the same ghastly ranking occupied by Iraq today, being the world's leading executioner in 1987 (mostly murder convictions, many of which were racially-influenced and biased against the black community)²³. The history of capital punishment in the country had two major turning points: the five-year moratorium imposed in 1989 and, more importantly, the landmark 1995 decision of the Constitutional Court, which declared the death penalty unconstitutional and effectively abolished it²⁴. The decision interpreted the provisions of the interim South African Bill of Rights regarding the right to life²⁵ and coupled them with the right to dignity (both, non-derogatory rights even in a state of emergency²⁶), to conclude that the death penalty was contrary to the aims sought by the Constitution. Through its unanimity, deep subject matter, practical implications and detachment from public opinion, the decision was the first major action taken by the Constitutional Court in

²³ John D. Battersby, "Hangings Now the Routine at Pretoria Prison", *New York Times*, December 1, 1988.

²⁴ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

²⁵ S11, Constitution of South Africa.

²⁶ S37(5), CSA.

establishing its role in the new society, as well as strengthening the progressive pillars of society itself.

Abortion and euthanasia are the two other controversial issues dealing with the right to life, the former also touching upon privacy and women's rights. Around the time its final constitution entered into force, South Africa adopted the Choice on Termination of Pregnancy Act, which establishes that a woman's consent is sufficient to interrupt her pregnancy during the first twelve weeks, after which it is dependent on the agreement of a medical practitioner. The provisions of this act would serve to better define those of Section 12(2) in the Constitution, regarding the citizens' right to make decisions about reproduction and to have control over their own body²⁷. Constitutional challenges against the Act failed²⁸, the South African Constitutional Court stating that Section 11 (the right to life) does not apply to fetuses. In Iraq, abortion remains out of the question as a choice of the pregnant woman, being possible only if the prospective mother's life is in danger. In more legal terms, the reason behind this stance is perfect opposite of the South African view: Islamic law considers the unborn child to possess rights, which means its fundamental right to life would overtake lesser rights such as personal autonomy of the woman²⁹. Given that there is no agreement among Muslim jurists on the less controversial issue of contraception³⁰, their view on abortion is unlikely to change in the foreseeable future.

As for euthanasia, it is only considered lawful if it is both voluntary and passive (as is the case with terminally ill patients in a vegetative state), otherwise being likely to lead to charges of

²⁷ John C. Mubangizi, *The Protection of Human Rights in South Africa – A Legal and Practical Guide* (Juta and Company Ltd., 2004), 85.

²⁸ Christian Lawyers Association of South Africa and Others v Minister of Health, 1998 (4) SA 1113 (I).

²⁹ Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford University Press, 2003), 74.

³⁰ Ibid.

murder, though at times these are mitigated³¹. The practice is the topic of an ongoing debate in the country. Its already progressive system of rights would point in the direction of wider legalization, perhaps up to the point of active euthanasia, though at this moment in time the move would be unwise due to practical reasons, namely the poor state of South Africa's health system³².

2.2 Freedom from torture and slavery

These freedoms are the other facet of the right to physical integrity, and they too are the object of international conventions. Two articles of the ICCPR are dedicated to the issue. The first³³ not only prohibits the use of torture, but also of cruel, inhuman or degrading treatment or punishment and of forced medical or scientific experimentation. The other³⁴ is a blanket ban on slavery and related activities, including slave trade and forced labor, in regards to the latter with the exception of criminal punishment and military or civil duty. Similar provisions exist in the UDHR³⁵ and various other international instruments, raising these rights to the level of jus cogens, which gives them a non-derogatory nature³⁶. Corresponding Islamic agreements also forbid any legal recognition of slavery³⁷, of which there is no legalized practice within the Muslim world. Lack of legal sanction is not however a synonym of criminalization, so the practice itself has not been eradicated completely, but is left in a status best described as 'tolerated'. The Qu'ran itself recommends the freeing of slaves, but does not ban slavery in the unambiguous terms it uses for other practices³⁸. As for human trafficking, it is the subject of the UN's so called "Palermo protocol" on trafficking (attached to the organization's Convention Against

³¹ Magdaleen Swanepoel, "End of Life Decisions with Regard to the Mentally Ill Patient in South Africa", *Journal of Contemporary Roman-Dutch Law*, Vol. 74 (2011), 402.

³² *Idem*, 417.

³³ Article 7, ICCPR.

³⁴ Article 8, ICCPR.

³⁵ Article 4 (slavery) and Article 5 (torture), UDHR.

³⁶ Ziyad Motala and Cyril Ramaphosa, *Constitutional Law – Analysis and Cases* (Oxford University Press, 2002), 235.

³⁷ Article 11(a), CDHRI.

³⁸ Baderin, *International Human Rights and Islamic Law*, 86.

Transnational Organized Crime of 2000), of which both countries discussed in this paper are signatories.

In most countries safety from torture can fortunately be taken for granted, and legal provisions banning such practices rarely have to be put to practical tests. South Africa and Iraq, however, have vivid recollections of human rights abuses ranging from degrading treatment to institutionalized torture, for the latter country as recently as in the past decade. Therefore, both their fundamental laws pay increased attention to the issue, a sign of the delicate times in which they were drafted. The Constitution of Iraq specifically prohibits psychological and physical torture, removes any legal value from confessions obtained using such methods (one of the main purposes of torture) and also gives victims the right to seek compensation³⁹. South Africa lists the prohibition of torture in the section of its Bill of Rights dedicated to freedom and security of the person⁴⁰, immediately following the most important rights in constitutional jurisprudence (human dignity and life), and therefore making it of high value. The discarding of any evidence resulted from torture forms part of the section on the rights of the defendant⁴¹.

The two countries also have experiences with the phenomenon of human trafficking. Female trafficking in particular is commonly practiced in many Middle Eastern states, including ones neighboring Iraq (Syria, Saudi Arabia and Iran)⁴², undoubtedly aided by the lack of criminalization. The practice became more widespread during the vacuum of power and general lawlessness characterizing the American occupation of Iraq and it is addressed in a specific paragraph of the Constitution, though oddly only refers to women and children in the section prohibiting trafficking (it should be mentioned that while international charters give special

³⁹ Article 37 (First, C), CI.

⁴⁰ S12(1), CSA.

⁴¹ S35(5), CSA.

⁴² WomanStats Project, <http://womanstats.org/mapEntrez.htm>

attention to these two vulnerable categories, they by no means exclude men)⁴³. This provision is no doubt salutary, Iraq being the first Arab country to raise the issue at constitutional level; it should however be backed by secondary legislation better defining the crime and creating adequate mechanisms of control and victim protection⁴⁴. The situation is still better than that of South Africa, whose Bill of Rights mentions slavery⁴⁵ but lacks any reference to human trafficking and sex trade. Despite being a signatory of the Palermo protocol, the country has failed to enact relevant basic legislation in the past decade, let alone a constitutional amendment. A bill on the Prevention and Combating of Trafficking in Persons is however expected to pass the parliamentary vote this year, following pressures from civil society⁴⁶, while the Children's Amendment Act of 2007 is still awaiting implementation⁴⁷.

⁴³ Article 37 (Third), CI.

⁴⁴ Mohamed Y. Mattar, "Unresolved Questions in the Bill of Rights of the New Iraqi Constitution", *Fordham International Law Journal* (December 2006), 3.

⁴⁵ S13, CSA.

⁴⁶ Theo Barclay, "People Trafficking Legislation Belatedly Proposed in South Africa", *Think Africa Press*, October 20, 2011.

⁴⁷ "Trafficking in Persons Report 2009 - South Africa", United States Department of State, 16 June 2009, <http://www.unhcr.org/refworld/docid/4a42149128.html>

Chapter III: Liberty and Procedural Fairness

Article 9 of the ICCPR is the *sedes materiae* for rights provisions related to due process. Its five subsections speak of the right to liberty, access to information, treatment without delay by a competent court, *habeas corpus* and of the right to compensation in case of unlawful arrest or detention. The rights of those detained are further detailed in Article 10: humane treatment (including decent prison facilities and access to medical treatment), segregation of the accused from those found guilty of a crime and, finally, the purpose of the prison system, which is to be rehabilitation rather than retribution⁴⁸.

Islamic scholars agree on the necessity of the main rights to liberty, security and a humane incarceration system, which makes Islamic law completely favorable to the guarantees stipulated by global human rights documents⁴⁹. The Arab Charter on Human Rights is far more generous than the ICCPR in its guarantees of trial rights, dedicating articles 12 through 20 to the topic. Novel provisions include its repeated emphasis on the right of the arrested and the accused to be informed of their accusations in a language they understand, as well as the right to request a medical examination⁵⁰. The CDHRI also mentions the rights to liberty and security⁵¹, though it makes no mention of the conditions of detention.

These rights do not correspond completely to those contained by the Iraqi and South African fundamental laws, but then again, the international human rights system is not intended to simply replicate the domestic one, but also to complete it and externalize its limits⁵². At the

⁴⁸ Alex Conte, "Security of the Person", in *Defining Civil and Political Rights – The Jurisprudence of the United Nations Human Rights Committee*, eds. Alex Conte, Scott Davidson and Richard Burchill (Ashgate Publishing, 2004), 110.

⁴⁹ Baderin, *International Human Rights and Islamic Law*, 90.

⁵⁰ Articles 14(3), 16(1) and 14(4) Arab Charter on Human Rights, respectively.

⁵¹ Articles 19 and 20, CDHRI.

⁵² Stephen Gardbaum, "Human Rights as International Constitutional Rights", *European Journal of International Law* no. 4 (2008), 32.

same time, national human rights guarantees can and by all means should be more extensive than the ones that are the result of international negotiation (and surely compromise).

In a classification made by one of the drafters of the South African Constitution, this category of rights related to liberty and procedural fairness includes: the right to a remedy; the right of access to an impartial court; freedom and security; the presumption of innocence; the right to remain silent; the right to bail and *habeas corpus*; the notice of charge; access to information; the right to counsel; treatment without delay; search and seizure and the right to privacy (in the criminal law sense); the right of appeal; double jeopardy; the prohibition of convictions under *ex-post facto* laws; administrative fairness⁵³. Most of these rights are enshrined within Section 35 of the South African Constitution, but others lie in different parts of the text (such as Section 39, concerning the obligations of state agents), therefore lacking rigid compartmentalization⁵⁴.

The Iraqi Constitution also presents an array of relevant rights⁵⁵ in an article that includes at the same time provisions about the judiciary. Similarly to South Africa, the text mentions, among others, the rule concerning *ex-post facto* laws, the right to counsel, the presumption of innocence and the double jeopardy rule, non-retroactivity, as well as the right to be detained or imprisoned in specially designated places.

Given that politically-motivated convictions were used by the former regimes in both countries as a tool of oppression, it will be interesting to see how the respective courts tasked with the interpretation of the Constitution will set the limits of these provisions in the future. Iraqi citizens share such a deep mistrust of their country's judiciary that some would agree with

⁵³ Motala and Ramaphosa, Constitutional Law, xii.

⁵⁴ Mubangizi, The Protection of Human Rights, 94.

⁵⁵ Article 19, CI.

the involvement of international judges in the judicial process. The reasons range from local magistrates' susceptibility to accept bribes to their lack of independence caused by the political pressure they were subjected to during their training and tenure. What is encouraging is that the public does not necessarily blame the magistrates themselves, but rather the old legal system – most citizens were themselves familiar with the same kind of pressure during their life under the old regime⁵⁶. At the same time, Iraqi judges and lawyers have expressed their desire to improve the legal system and with it, to aid in the country's transition⁵⁷; it is perhaps the best way to improve public confidence in the judicial branch and they would be wise to act upon their promise.

Arbitrary state action was also the norm in pre-transition South Africa, undoubtedly made easier by the concept of legislative supremacy: the acts of Parliament could not be struck down by a court of law, including acts delegating powers to the executive⁵⁸. This meant that, even if it had the will to impose checks on the other two branches, the judiciary was severely restricted in its power to do so. One such piece of legislation was the vaguely worded Internal Security Act, which endowed the minister and regular police officers with powers overriding a large set of internationally recognized rights of the accused or arrested. Agents of the state not only had the broad capacity to impose such measures, but were also exempted from having to justify them, leading to numerous instances of abuse⁵⁹.

⁵⁶ “Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction”, International Center for Transitional Justice (2004), 33, <http://ictj.org/publication/iraqi-voices-attitudes-toward-transitional-justice-and-social-reconstruction>

⁵⁷ *Idem*, 32.

⁵⁸ Motale and Ramaphosa, *Constitutional Law*, 324.

⁵⁹ *Ibid.*

Chapter IV: Individual Freedoms

4.1 Freedom of thought and speech

The history of the South African emancipation movement stretched over an entire century and, at times, involved armed resistance, bombings and violence against government objectives that also claimed civilian lives. However, its nurturing of progressive ideas was present throughout all of these decades, and was perhaps the main weapon against the Apartheid regime, which retaliated through censorship and intimidation. The African National Congress and other organizations representing the movement were outlawed and some of their leaders imprisoned, but their call to arms had already been propagated to the populace. Two decades ago the tables turned and those seen as criminals by the old regime became leaders of the new one, after gaining political power in the growing democratic system.

Under these circumstances, it was interesting to see the extent to which they would protect the rights denied to them in the past, more precisely those used by any movement trying to convey and instill its message to the masses: free thought and speech. Too little protection and they would fail to meet the democratic objectives they had imposed upon themselves, too much openness and they would allow the creeping in of extremist and nationalist actors, both black and white. This dilemma had to receive an equitable solution. It was decided that South Africa's relevant constitutional provision⁶⁰ would follow the pattern laid out in the ICCPR – the basic guarantees are first mentioned, ranging from freedom of the press to that of the artistic and academic environments, as well as the general transmission of information. Some of the more controversial aspects related to this freedom, particularly in the field of press, are commercial speech, pornography or obscenity and, finally, defamation. Though the former two issues are the

⁶⁰ S16, CSA.

object of control bodies and ordinary legislation⁶¹, the matters of legal finesse are still left to the interpretation of the Constitutional Court under the guidance of common law, as so far there has not been much relevant jurisprudence⁶² (see also: The right to privacy, p. 29). There are strong limitations in the interests of public order (namely, war propaganda and incitement to violence are prohibited) and non-discrimination (the four more common targets of hate speech are mentioned: race, ethnicity, gender and religion). These limitations were the brainchild of the ANC, whose proposals were not received without controversy and worries from free speech advocates⁶³. However, given the country's tumultuous history, it was perhaps wiser to be on the safe side even though it meant a restriction of rights. Further legislation⁶⁴ has since been enacted in this field, defining the ways in which hate speech may be propagated.

Speech was not viewed liberally by the authorities of pre-invasion Iraq either, but given the fact that most middle class Iraqis were involved in the massive state bureaucracy or industries⁶⁵, the truly dissident voices were few and easily suppressed. The current constitution guarantees freedom of expression and of the press⁶⁶ and the areas that generate limitations are those commonly found in human rights acts around the globe: public order and morality. Public order falls in the scope of (secular) state power and therefore its interpretations in most countries are too similar to warrant special attention. In the context of Iraq and its adherence to Sharia, the issue of morality, however, presents a challenge. Islamic human rights instruments do not leave much room for interpretation under the general guise of 'morality' and specify that speech must be exercised in "conformity with the fundamental values of society" and the "principles of

⁶¹ Advertising Standards Authority; Films and Publications Act, South Africa (1996).

⁶² Mubangizi, The Protection of Human Rights, 91-93.

⁶³ Jeremy Sarkin, "The Drafting of South Africa's Final Constitution from a Human-Rights Perspective", *The American Journal of Comparative Law*, Vol. 47, No. 1 (Winter 1999), 81.

⁶⁴ Promotion of Equality and Prevention of Unfair Discrimination Act, South Africa, (2000).

⁶⁵ Adeed Dawisha and Karen Dawisha, „How to Build a Democratic Iraq", *Foreign Affairs Magazine*, Vol. 82, No. 3 (May - June 2003), 48.

⁶⁶ Article 39 (A and B), CI.

Sharia”⁶⁷. The most serious clash between expression and religion will therefore take the form of blasphemy, which is surely covered by Iraq’s less explicit limitations clause, though not to the extent envisioned by classical Islamic jurists (the punishment for blasphemy and apostasy, or the renunciation of faith, was death)⁶⁸. The issue of apostasy also begs discussion in the section dedicated to the freedom of religion.

4.2 Freedom of association and assembly

Though strongly connected and often mentioned together (as they are in the UDHR), these rights should be treated separately; they do not necessarily overlap, as each may exist without the other: citizens may assemble without being part of an association, or associate without taking part in assemblies⁶⁹.

The rights provisions contained by the Constitution of South Africa follow an individualist trend, without ignoring the presence of various groups within society. Ethnically-based parties and organizations are allowed entrance to the political system, as long as they do not discriminate in their acceptance of new members. Along with the so-called “cultural councils” of tribal heritage, they are not however granted automatic participation to any state body, but must instead follow the democratic channels prescribed by the Constitution⁷⁰. Emphasis is therefore placed on the individual citizen rather than specific groups (see also: Political participation, page 32).

⁶⁷ Article 32, Arab Charter on Human Rights and Article 22(a), CDHRI, respectively.

⁶⁸ Baderin, *International Human Rights*, 128.

⁶⁹ Motale and Ramaphosa, *Constitutional Law*, 377.

⁷⁰ Gloppen, *The Battle over the Constitution*, 237.

In the case of Iraq, a new and significant constitutional provision⁷¹ underscores the role of civil society in public life for the first time in the Arab world. Civil movements did not play a role in the collapse of the old regime in Iraq as they have recently done in Tunisia or Egypt, meaning they lacked prominence and their opinions were less likely to be heard during the transition period. However, they can now benefit from the new protection awarded by the Constitution and take up a role next to institutional watchdogs such as the High Commission for Human Rights and the Commission on Public Integrity in bringing abuses and wrongdoings to light. Their second equally important task is the education of regular citizens in topics related to human rights and the constitutional system of protection⁷². As later detailed in Chapter VI (page 34), public understanding is crucial for the success of the entire system; generalized lack of interest among the holders of rights will however risk leading to its demise. It is in these circumstances that recent abuses highlighted by international human rights groups are especially worrisome. Iraqi authorities are said to “undermine Iraqis’ right to demonstrate and express themselves freely”, both through attacks on critics and the adoption of restrictive legislation⁷³. One such example is the proposed new law on freedom of expression and assembly, whose vague provisions grant the authorities an overwhelming amount of power in curtailing these two rights and also impose harsh content-based restrictions on speech⁷⁴.

One particular issue that became a source of controversy in Iraq was the policy of De-Ba’athification enacted by the occupying forces immediately after the 2003 invasion. It involved all members of the former ruling Ba’ath Party being removed from office and also banned from future work in the country’s administration if they had once held positions in the party’s “top

⁷¹ Article 45, CI.

⁷² Mattar, “Unresolved Questions in the Bill of Rights”, 3.

⁷³ “Iraq: Revise Draft Law That Curbs Protests, Speech”, Human Rights Watch, <http://www.hrw.org/news/2011/07/13/iraq-revise-draft-law-curbs-protests-speech>

⁷⁴ Ibid.

three layers of management”⁷⁵. To post-Communist audiences the procedure is better known as ‘lustration’, but contrary to its usual meaning, in Iraq it affected not only those who had participated in political oppression, but any public sector employee, affecting vast numbers of Iraqis. The provisions made the topic of intense negotiations, each party having a distinct view of how the final formulation should appear⁷⁶. Inspiration was drawn from the German Basic Law, which also targeted a specific political movement and its attached ideology (Nazism) for the scars it had left on the country’s past. Proponents of the measure initially agreed upon the banning of the Ba’ath Party as an organization, as well as the removal of clerics and members of the military from political life⁷⁷. The final Constitution and its attached secondary legislation, however, were for more encompassing; two of its articles⁷⁸ dealt with the issue, ensuring both the banning of the party and the creation of mechanisms to avoid its resurrection. Further measures taken to eliminate remnants of Ba’ath ideology from the public sphere include the Accountability and Justice Act of 2008 and the eponymous commission.

In South Africa, on the contrary, the compromises that led to the adoption of the new Constitution would have been difficult to obtain without the participation of the ruling party in the Apartheid era, the National Party.

4.3 Freedom of religion

Freedom of religion can be expected to be one of the more delicate issues in countries where there is a strong bond between the state and religious institutions. Such links are particularly apparent in the Muslim world, with millions of people living in countries not only

⁷⁵ CPA Order no. 1, Iraq (May 16, 2003).

⁷⁶ Ashley S. Deeks and Matthew D. Burton, “Iraq’s Constitution: A Drafting History”, *Cornell International Law Journal* (Winter, 2007), 14.

⁷⁷ Dawisha and Dawisha, “How to Build a Democratic Iraq“, 46.

⁷⁸ Articles 7 and 135, CI.

influenced in their legislation by Sharia law, but organized as theocracies, under one form or another. The fundamental laws of both countries studied in this paper contain references to divinity in their preambles, but do so in different ways. The mention of “God” in the South African Constitution is nothing more than an appreciation of spirituality and religion in its many manifestations and has a sort of “positive neutrality” attached to it.⁷⁹ In Iraq’s case, some sort of reference to divinity is made in all but one of the preamble’s five paragraphs (as well as the religious introductory formula⁸⁰) and in the oaths⁸¹ required from elected representatives, the President, the Prime Minister and his or her cabinet – a sign of the level of importance given to faith. A comparison of the two laws’ takes on religion first requires an overview of the countries’ respective demographics.

The religious makeup of Iraq is less diverse⁸² than that of other countries, but this alone offers no clue as to how difficult it would be for the state to reach a safe balance in its legislation; it is the relations between these faiths that matter. And as proven by the sectarian violence that followed the US-led invasion in 2003, animosity between the two large, evenly-matched opposing Muslim denominations is enough to create long-lasting conflict. Under these circumstances, the drafters of the Constitution not only had the task of creating adequate protection for all citizens practicing a faith, but also to create some sort of basis for the improvement of inter-faith relations (or at the very minimum make sure not to further worsen them).

⁷⁹ Raj Mestry, “The Constitutional Right to Freedom of Religion in South African Primary Schools”, *Australia & New Zealand Journal of Law & Education*, Vol. 12, No. 2, (2007), 59.

⁸⁰ “In the name of God, the Most merciful, the Most compassionate.”

⁸¹ Article 50, CI.

⁸² Iraq is predominantly Muslim (97% of the population), split roughly evenly between the Shia and Sunni traditions (CIA World Factbook).

In enshrining the freedom of religion, the Constitution of Iraq can be said to compare favorably to international human rights instruments⁸³. If we are to take a relative point of view and place Iraq on a scale containing solely Muslim countries, its constitution is nothing short of progressive in this regard, no doubt a positive development (if we return to the international system of values). The reasons are, I submit, partly American influence in the drafting process and partly the increasing openness towards international human rights standards in the Arab world as a whole, despite the governmental abuses committed during the recent protests pointing to a different direction. As such, Iraqis are free “in their commitment to their personal status” as ordained by their faith, free to choose said faith and to practice it⁸⁴. Going beyond the individual level, religious organizations and their places of gathering also receive guaranteed protection. Given the large number of deadly attacks⁸⁵ on mosques in Iraq that took place throughout the past decade, the question remains how (and if) the Iraqi government will be held accountable for continually failing to make good on its promises.

Other realities on the ground point to wrongdoings that are not only the result of governmental helplessness, but also of state policy: Iraqi Christians have been targeted by episodes of violence and abuse rivaling in intensity the ones they experienced during the rule of S. Hussein. The legal rulings of Ayatollah Sistani himself say that Christians and Jews are “unclean”, security for Christians is scarce and their voting rights are often ignored⁸⁶. Watchdog reports make mention of ongoing strife: religious minorities “suffer from targeted violence, threats and intimidation”, while women and secular Iraqis are the targets of “religiously-

⁸³ Tad Stahnke and Robert C. Blitt, “The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries”, *Georgetown Journal of International Law*, Vol. 36 (2005), 17.

⁸⁴ Articles 41, 42 and 43, CI.

⁸⁵ Three of the more violent attacks, at the Imam Ali Mosque in Najaf (2003) and the Buratha and al-Khilani mosques in Baghdad (2006 and 2007) took the lives of over 250 people, while a 2006 attack on al-Askari Mosque in Samarra led to sectarian violence claiming over 1000 lives; E. Knickmeyer – “Blood on our Hands”, *Foreign Policy Magazine* (October 25, 2010).

⁸⁶ Hannibal Travis, “Freedom or Theocracy? Constitutionalism in Afghanistan and Iraq”, *Northwestern University Journal of International Human Rights*, Vol. 3, No. 4 (Spring 2005), 28.

motivated violence and intimidation”⁸⁷. Under these circumstances, the constitutional provision ensuring freedom of religion is weak when it comes to the sectarian divide, and arguably dead letter in the case of other faiths such as Christianity.

While the Western world displays a far greater degree of secularism than its Muslim counterpart, religious influences and tensions remain part of its inner politics. For examples originating in a country more often in the media limelight, one must look no further than the United States, where religion remains a recurring theme of any election campaign. South Africa makes no exception; home to people of various faiths⁸⁸, it has had to accommodate their often competing interests and opposing historical backgrounds. In fact, the factions visible in the social and political arenas often belong to corresponding faiths: the Zion Christian Church and other African initiated churches (as well as remnants of surviving local faiths) among black South Africans, various branches of Christianity among the descendants of white settlers, Hinduism and Buddhism among the descendants of those often brought from Asia by European colonial powers.

With this in mind, the South African Bill of Rights contains not only provisions guaranteeing freedom of religion as a principle, but also mechanisms designed to cover a number of practical situations, most notably in the fight against discrimination. Section 15(1)⁸⁹ is the center of these guarantees, and it is complemented by the prohibition of discrimination on religious grounds, in section 9(3). Subsequent provisions ensure the recognition of marriages concluded under various religious systems of law, the freedom to create religious institutions, as well as, very importantly, the right to practice religion as part of a community centered around

⁸⁷ “2011 Annual Report”, 88, United States Commission on International Religious Freedom <http://www.unhcr.org/refworld/docid/4a42149128.html>

⁸⁸ No faith enjoys an absolute majority in South Africa; Protestantism is the most widespread (36% of the population), others include Roman Catholicism, Islam and local faiths (source: 2001 census via CIA World Factbook).

⁸⁹ “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

this purpose⁹⁰. This latter guarantee is the subject of special protection from a “Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities”, as prescribed elsewhere in the Constitution⁹¹. As in many other areas, the Constitutional Court of South Africa has augmented the fundamental law with its decisions, setting more definite borders for constitutional protection. In the beginning of this process, it managed to stay clear of the temptation of excessive liberalism that may have gripped it during the transition, and instead took a more mature and pragmatic approach⁹². However, in more recent years, the court has embarked in more creative reasoning and “bold assertions”⁹³, linking constitutional protections such as freedom of religion and non-discrimination to reach novel results⁹⁴. The court has therefore been going through its own transition during these years, and what it lacks perhaps is a better measure of predictability to its decisions.

4.4 The right to privacy

Privacy, too, is protected by international documents including the UDHR⁹⁵ and the ICCPR⁹⁶. It can assume one of two main dimensions: the criminal procedure dimension, which I have already discussed, and the so-called “right to be left” alone, which is more closely connected to an individual’s true private life, remote from the prying eyes of the government or his peers.

⁹⁰ S15(3), S29(3) and S31(1), CSA, respectively.

⁹¹ S185, CSA.

⁹² *S v. Solberg*, (CCT40/96) [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 (6 October 1997), where the Court decided that a prohibition on selling alcohol on Sundays was constitutional.

⁹³ Lourens du Plessis, “Religious Freedom and Equality as Celebration of Difference: A Significant Development in Recent South African Constitutional Case Law”, *Potchefstroom Electronic Law Journal*, Vol. 12, No. 4 (2009), 32/360.

⁹⁴ MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007), where a blanket ban on piercings for school students was found to discriminate Hindu students wearing traditional ornaments.

⁹⁵ Article 12, UDHR.

⁹⁶ Article 17, ICCPR.

The right to privacy enjoys a solid standing in the Muslim world⁹⁷, being mentioned repeatedly both in the Qur'an and Islam-specific human rights documents such as the CDHRI⁹⁸ and the Arab Charter on Human Rights⁹⁹. It is interesting that in the Iraqi Constitution the right to privacy¹⁰⁰ is expressly limited by the rights of others and by public morals, leaving significant room for interpretation. On the one hand, privacy entails by definition the purely individual sphere and a lack of interaction or transmission of information, so the number of practical scenarios where it may interfere with the rights of others is not normally high enough to require an express mention in the Constitution, making this provision somewhat peculiar. On the other hand, as the field of 'morals' in the Muslim world is often synonymous with 'religious morals', religion in turn having a significant influence upon the state, this limitation clause poses significant risks.

It is true that privacy is a vague notion, in many countries the subject of extensive (and at times controversial) jurisprudence trying to set better defined boundaries. One might argue that coupling it with established religious values may offer increased stability, but the truth is that perceptions of morality vary wildly among members of different branches of the same faith. If we are to consider the sectarian problems faced by Iraq, privacy becomes, along with other civil rights, one of the areas where it would have been more desirable to keep the possibility of religious interpretation at bay. The issue of homosexuality, prohibited and criminalized by Islamic law, appears in this context as an obvious example where public morals can trump privacy. International bodies such as the UN's Human Rights Commission are urged by some authors to take into account the "moral fabric and sensibilities of Islamic society"¹⁰¹ and thus

⁹⁷ Baderin, *International Human Rights*, 115.

⁹⁸ Article 18 (b) and (c), CDHRI.

⁹⁹ Article 21, Arab Charter on Human Rights.

¹⁰⁰ Article 17, CI.

¹⁰¹ Baderin, *International Human Rights*, 117.

apply different standards of review, something that however violates the notion of human rights universality.

In its section dedicated to privacy¹⁰², the South African Bill of Rights offers a more straightforward approach, covering the most common means of violating privacy: searches of the body, home or property, seizure of possessions and, in an explicit reference that is absent from the Iraqi Constitution, the privacy of personal correspondence. It should be noted that, as other constitutional rights guarantees, privacy is doubled by the common law notion of tort¹⁰³, which permits the victim of an invasion to seek redress from both the state and private or legal (“juristic”) persons. Article 8 extends the application of the Constitution to the latter categories in those situations where it is made fit by the nature of the right, and invasions of privacy certainly fall under this provision.

¹⁰² S14, CSA.

¹⁰³ Tamar Gidron, “Publication of Private Information: An Examination of the Right to Privacy from a Comparative Perspective”, available at SSRN: <http://ssrn.com/abstract=1422525> (June 19, 2009), 42.

Chapter V: Political Participation

Due to the role they played in South Africa's road to constitutional democracy, political rights are a particularly important object of study. On the one hand, a democratic system not unlike the one today was the very goal of the political movement that led to the collapse of Apartheid. On the other, this system at the same time works in its own interest. It is often said that democracy should arm itself with the tools necessary to guarantee its survival; the concept is most evident in Germany's idea of "militant democracy", which has led to the outlawing of several extremist groups whose ideology implied a violent overthrowing of the democratic government. But South Africa reached its goals through compromise and dialogue; it would perhaps be paradoxical for it to put heavy stops and limitations on the very process it owes its creation to. Therefore political rights are treated more as an end-goal and receive extensive protection from the Constitution¹⁰⁴ - its Bill of Rights guarantees citizens' right to action both as voters and politicians, and also to the electoral process itself. Participation is not only seen as a right, but more of a citizen's duty. The drafters of the Constitution stopped short of instituting compulsory voting (perhaps wary of imposing anything on the citizenry in a human rights culture) and preferred to encourage the voting process through other means, such as a well defined public consultation process, attention to province-specific problems (most notably through participation in the National Council of Provinces, the upper chamber of Parliament) and the involvement of civil society organizations¹⁰⁵.

As described in the second chapter, Iraq's path towards a new constitution was diametrically different. The forces that produced a regime change were foreign and armed rather than internal and political. While Iraq shared some of South Africa's earlier goals, its recent

¹⁰⁴ S19, CSA.

¹⁰⁵ Gloppen, *The Battle over the Constitution*, 238.

memories of strife and violence made it more wary of granting wide freedoms to the electorate and risk shaking the status quo: these rights are the subject of a one-sentence article¹⁰⁶. As such, on a mere textual comparison, the Iraqi Constitution, though of more recent date than that of South Africa, does not mention the secret character of the vote, the right to fair and regular elections, as well as freely made political choices or the right to hold public office once elected. The one upside of the Iraqi Constitution is that it explicitly guarantees these rights to both men and women, but it perhaps does so in an effort to correct some of the deep inequalities that were specific to the country and indeed to the Arab world. Women, as well as non-Muslims, have historically been denied full-fledged political rights, especially in those countries displaying weaker secularism (female participation in the political life is not banned by the Qu'ran, but disavowed, which often meant the same thing)¹⁰⁷. And again as a result of its former dictatorship and the power held by the old ruling Ba'ath party, the fundamental law ensures citizens will not be forced to enter an association or political party or to remain members thereof¹⁰⁸, though no mention is made of citizens being pressured to leave such organizations.

The above differences between the two fundamental laws, or in better words, the absence of some provisions from the Iraqi Constitution may be unintentional. Laws are the mere creation of man and there will always be omissions and room for improvement. Still, one should give the drafters the benefit of doubt and assume they left out those explicit references for a purpose. After all, Article 20 does not enumerate, but *exemplify* types of political rights recognized to Iraqi citizens. The limits of this provision are therefore not set in stone, and it will be a duty for the country's Supreme Court to decide on their full meaning.

¹⁰⁶ Article 20, CI.

¹⁰⁷ Baderin, International Human Rights and Islamic Law, 161.

¹⁰⁸ Article 39 (Second), CI.

Chapter VI: Non-discrimination and Minority Rights

Throughout the past decades, institutionalized discrimination against particular ethnic groups has been one of worst realities of both Iraq and South Africa. If the issue of the religious divide was addressed in a previous chapter, along with the attempts to fix it at constitutional level, our attention now needs to turn to ethnically-related actions and the constitutional reaction. In South Africa, Africans/blacks by no means constitute a demographic minority¹⁰⁹; the Apartheid regime, however, had turned them into a political one, leaving their voices unheard in the central legislative process. A kind of discrimination typical of colonial power, with the minority oppressing the majority and not the other way around, as it usually happens.

The classical scenario did emerge in Iraq, with the four-million-strong Kurdish minority (a seventh of the total population) constantly being harassed and abused during the regime of S. Hussein. The social tensions created by these instances of discrimination have led to unrest and violence, and the new constitutional order was required to restore normality and right some of the wrongs committed in the past. This goal was made evident by the drafting process itself, which included members of ethnic groups whose opinions would not have been given much consideration not long before. In South Africa, the African National Congress was created and managed in order to advance the rights of the black African ethnic group it represented and, as previously stated, had a major contribution in the restoration of democracy and establishment of democratic institutions. In Iraq, the minority status of the Kurds meant they were unable to bring any change at national level, so their struggle focused on gaining more rights for and within the territory they occupied. When national political change became a reality through the will of

¹⁰⁹ According to the 2001 census available at <http://www.statssa.gov.za>, four out of every five South Africans were black Africans.

external forces (with Kurdish support when possible), Kurdish interests began receiving much greater consideration in the legislative process.

An analysis of the current constitutional framework needs to bear these facts in mind, as well as the degree of inclusiveness the constitutional dialogue had in each of the two countries. While the ANC merely tried to get black Africans on an equal footing with the whites, the Kurdish political movement had a mandate of making the most of the situation (in particular the Shia's exclusion from the negotiations) to acquire as many benefits as it could, perhaps to put itself on a stronger footing for future negotiations.

As such, the very first article¹¹⁰ in the section of the Iraqi Constitution dedicated to rights prohibits discrimination on almost every basis that is also mentioned in the ICCPR. "Language" is not included, but it could arguably be filed under ethnicity/nationality; at the same time, the group most likely to face discrimination on account of its language, the Kurds, had a far better accomplishment – their language was raised to official status in the country, next to Iraqi. In the context of Iraq, the protection given to citizens of all ethnicities and all religions and sects is particularly important, considering the Kurdish problem and the ongoing violence between Shia and Sunni followers. This protection is in line with Islamic law, which prohibits ethnic or racial discrimination, though at the same time being less liberal on the relationship between the state and non-Muslim subjects or aliens¹¹¹.

Also mentioned in the Iraqi Constitution are other minority groups such as the Turkmen, Chaldeans and Assyrians, who may use their mother tongue in schools, as well as dealings with the administration in the provinces where they live in larger numbers¹¹² – a kind of special

¹¹⁰ Article 14, CI.

¹¹¹ Baderin, *International Human Rights*, 165.

¹¹² Article 4, (First and Fourth), CI.

mention that is usually absent from Arab constitutions¹¹³. Recent reports however show that these and other constitutional guarantees are not consistently enforced, with small minorities still experiencing a “pattern of official discrimination, marginalization and neglect”¹¹⁴.

The corresponding provisions¹¹⁵ of the South African Constitution are however even more extensive, as they include bases of discrimination which could not be subsumed by any others: pregnancy, marital status, sexual orientation, age or disability. The fact that the Iraqi provision is not an exemplification (as was the case with political rights) but an enumeration makes the situation more problematic, giving a possible conservative Supreme Court sufficient backing to close the door on liberal interpretations. Some protection is provided for a few of these categories elsewhere in the Constitution, namely women and the elderly in the Preamble and those suffering from disabilities in the chapter on socio-economic rights¹¹⁶. However, the failure to mention sexual orientation as an unjust basis for discrimination – or its abandonment to an improbable ordinary law – is worrisome, though at the same time explainable on account of the strong religious influence present in the Constitution. What is more, relevant provisions would probably not be enough.

Iraqi women have suffered abuse and discrimination throughout the decades, despite constitutional guarantees in their favor being present even under the old 1970 Constitution. The problem lies with the application of these provisions, which often contradict traditional views embedded in Iraqi society¹¹⁷. If the guarantees were to remain dead letter (along with others protecting similarly vulnerable groups), it would not only affect said groups, but the rule of law itself. A sincere legislator would therefore have to enact ordinary legislation to further empower

¹¹³ Mattar, *Unresolved Questions in the Bill of Rights*, 2.

¹¹⁴ “2011 Annual Report”, 88, United States Commission on International Religious Freedom, <http://www.uscirf.gov/reports-and-briefs/annual-report.html>

¹¹⁵ S9, CSA.

¹¹⁶ Article 32, CI.

¹¹⁷ Palmer, “It Looks Good on Paper”, 8.

women, gradually change societal views and reverse the process of rights erosion¹¹⁸. One very interesting constitutional provision that may help in this regard lies in Article 49(4) of the Iraqi Constitution, which instructs that the country's new election law must guarantee at least one fourth of the members of the Council of Representatives are female. Iraq has established itself as a progressive nation in this regard, given that women usually occupy less than five percent (or none) of the parliamentary seats in most Muslim countries, including more Western-minded secular democracies such as Turkey¹¹⁹.

Another provision described as an "important advance in women's rights" is contained in Article 18, which ensures Iraqi women, not only men, can pass their nationality to their child. Both measures were only passed after intense debate: the Sunni opposed the nationality provision on account of Iranian influence and the purported dangers associated to it, while the Shia were reluctant to agree on a parliamentary quota for women beyond the first two terms¹²⁰. Beyond these formal reasons, the uneasiness of the adoption procedure is perhaps a sign of the aforementioned lack of social backing. The complete absence of female representatives from the Constitutional Committee¹²¹ itself is another worrying sign that the view on women's place in society that was present throughout the last decades is still firmly in place despite the generous wording of the Constitution.

The past history of widespread, institutionalized discrimination meant the topic would receive special priority in the new legal order of South Africa, starting with the Interim Constitution of 1994. Racial and ethnic discrimination was the primary source of injustice during the Apartheid era, but women's rights have also been historically infringed upon. The final version of the constitution addressed these problems and included a reinforced version of the

¹¹⁸ Ibid.

¹¹⁹ Mattar, "Unresolved Questions in the Bill of Rights", 2.

¹²⁰ Deeks and Burton, "Iraq's Constitution", 20.

¹²¹ Chaplin, "Iraq's New Constitution", 279.

legal guarantees against them. Equality has the entire ninth section dedicated to it, with three additional grounds for discrimination added: pregnancy, marital status and birth. Also mentioned is the right to “equal benefit of the law” or, in other words, substantive protection encompassing the effects of laws, which extends the Constitution’s sphere beyond mere formal equality¹²². It should be noted that this list is open-ended, the Constitutional Court itself stating in its jurisprudence that there are two categories of differentiation, either on one of the listed grounds or simply analogous to them¹²³.

The human rights gains brought by the fundamental law have further been strengthened through subsequent secondary legislation, with the Employment Equity Act of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 being worthy of special mention. The latter deals with more practical and procedural matters such as the prevention and elimination of discrimination or the burden of proof, and has been described in the literature as a “very ambitious” and “comprehensive”¹²⁴ piece of legislation.

¹²² Sarkin, “The Drafting of South Africa’s Final Constitution”, 80.

¹²³ Mubangizi, *The Protection of Human Rights*, 75.

¹²⁴ *Idem*, 83.

Chapter VII: The New Constitution of Egypt

The Arab Spring, of which the Egyptian protests were a major component, was unique in the history of the region in that it involved the massive participation of civil society and human rights activists, previously kept under the strict control of the former authoritarian regimes. Increased awareness of global human rights standards meant that a new Constitution with better rights guarantees was among the strongest demands of the crowds¹²⁵. At this point in time, Egypt is undoubtedly as much of a transitional society as South Africa and Iraq were in their respective periods. It finds itself in a phase both countries have gone through, namely that of passage from an interim constitution to a final one. More precisely, if we are to follow A. Arato's model of post-sovereign constitution making¹²⁶, Egypt is now on the right track – with the interim constitution adopted on March 30, 2011 (named “Constitutional Declaration of Egypt”), the country has gone through free elections that have led to the creation of a non-sovereign Constituent Assembly.

However, disagreements are putting the continuation of this process in jeopardy. Tensions are not only present between the leading political formation (the Muslim Brotherhood) and the central authorities (the Supreme Council of the Armed Forces), but between the political parties themselves. Liberals have recently left the Constituent Assembly in protest of purported Islamist tendencies to control the drafting process¹²⁷. History teaches us that neither Sunni exclusion from the Iraqi drafting process nor the IFP's boycott of the South African one brought good results. If the final text is to be free of controversy and enjoy public acceptance it is crucial for all parties involved in the negotiations, starting with the most important ones, to see

¹²⁵ Tamir Moustafa, “Law in the Egyptian Revolt”, *Middle East Law and Governance* 3 (2011), 181.

¹²⁶ Arato, “Post-Sovereign Constitution-Making”, 2.

¹²⁷ Tom Perry and Edward Blair, “Brotherhood at heart of deepening Egypt feuds”, *Reuters Cairo* (March 26, 2012).

the bigger picture and strive to achieve mutual understanding and compromise. Otherwise, the medium term interests of these parties may trump the long term well-being of an entire nation.

Based on the experiences of the two countries analyzed in this paper, another important issue is the duration of the negotiations. According to Article 60 of the interim Constitution of Egypt, from the time of its election the Constituent Assembly of Egypt will have a period of 6 months to create a draft of the new fundamental law (which is to be then submitted to a national referendum). Haste was unnecessary even in the case of Iraq, with its precarious security situation. There is no reason why the Egyptian powers-that-be should impose an equally short deadline. The solution is not to repeatedly extend it, risking protracted instability, but to set a fair, pragmatic deadline that all parties can adhere to.

In regards to the contents of the Constitution itself (in particular, civil and political rights), the recommendation made most strongly by this paper can be summarized as follows. It is a generally accepted truth that discrimination is reprehensible. The list of prohibited bases for discrimination contained by international documents (to name one example) should not be seen as a goal to be reached by constitutional drafters, but as a minimum package of safeties. If drafters are, for whatever reason, unwilling to include a particular item on their list, they should at least have the courtesy of constructing the list as an exemplification, not an enumeration. Protection can, of course, be awarded through ordinary law, but the only national remedy against an obtuse government is to be found at constitutional level. The words ‘such as’ award constitutional adjudication enough leeway to interpret the relevant provisions in an inclusive way. Otherwise, “*to define is to exclude and deny*”¹²⁸, a denial that means waiving off constitutional protection against discrimination.

¹²⁸ José Ortega y Gasset, *The Modern Theme* (Harper & Row, 1923), 99.

As one of the more significant institutions that has remained in place during the entire transition period, the Supreme Constitutional Court of Egypt will no doubt continue to play an important role in the country's judicial life, especially in the years immediately following the adoption of the new Constitution. It will have the task of interpreting the law's provisions by defining their limits, filling in prospective gaps and striking down incompatible ordinary legislation. Historically, the Court has maintained a good degree of independence both from central secular authorities and from the influence of Islamic fundamentalism¹²⁹, and it will likely continue to do so in the future. The Constitution of Iraq proves that the principles of Islam and international human rights agreements (to which Egypt is a party) are not mutually exclusive, but on the contrary, can combine to form a unique kind of citizen protection specific to the Muslim world. If this result is to be achieved, there are two main prerequisites: coherent interpretation of the relevant provisions on behalf of the judiciary and solid public awareness and participation¹³⁰. Considering the traits of the SCC and the emergence of strong voices from the ranks of civil society, there is a good chance that the Constitution will operate healthily after its adoption. This however depends on the success of the drafting process itself.

¹²⁹ Ran Hirschl, "Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales", *Texas Law Review* 82 (2004), 1819.

¹³⁰ Mattar, "Unresolved Questions in the Bill of Rights", 7.

Conclusion

The infinite number of political and social variables belonging to each country render a simple import/export operation impossible in the realm of constitutionalism (and indeed in other fields of law). Being able to draw inspiration from the experiences of other systems is, however, invaluable. Authors agree that while most fundamental laws in the world converge at the abstract level, they offer a vast variety of solutions and wordings, which may further be grouped to filter out the best resolve for a problem shared with the drafter¹³¹. Contrary to what some might think, accepting foreign influence in the process of constitution making does not affect sovereignty, nor does it imply the disregard of local realities. South Africa offers the perfect example; it has not only sought external guidance during the drafting of its Constitution (under the guise of international experts and analyses of foreign documents), but also shared its own experience to countries such as Kenya, whose citizens were thus able to benefit from the work of drafters three thousand kilometers away¹³².

The system of civil and political rights protection in Iraq and South Africa, though by no means perfect, is the result of thousands of man-hours of roundtable discussions, negotiations, legal expertise, public consultation, as well as political blackmail, intimidation and other unorthodox methods. It is as imperfect as those who have created it, but at the same time a product of all their efforts and knowledge. Egypt's embodiment of the *pouvoir constituant* has the opportunity to start from zero and cherry pick the best provisions and formulations of any system it chooses to look at. Given other countries' successful use of comparative constitutional law, one could say it has a *duty* to do so.

¹³¹ T. Ginsburg, R. Dixon, Comparative Constitutional Law: Introduction, Public Law and Legal Theory Working Paper no. 362, University of Chicago, September 2011, p. 6

¹³² R. Philp, In Love with SA's Constitution, in The Mail & Guardian Online, February 24, 2012, at <http://mg.co.za/article/2012-02-24-in-love-with-sas-constitution>

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