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June 25, 2003

Report Prepared for the Senate Hearings, June 25, 2003, on: "Constitutionalism, Human Rights, and the Rule of Law in Iraq."

Islam and the Legal and Constitutional Systems of Iraq and Other Muslim Countries in Comparative Perspective
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Introduction to Islamic Concepts of the State:
The relationship of Islam to the state, both in theory and practice, has been complex and multifaceted. Islam, as a system of beliefs embodying a multitude of moral and ethical principles, has inspired a wide range of social and political practices, and a diverse set of legal interpretations and determinations known collectively as the Shari'a. Muslims believe the Shari'a to be divine law, in the sense that the Shari'a is based on the human interpretations and extrapolations upon the revealed holy book, the Qur'an, and the authentic precedents of the Prophet, known as the Sunna. Therefore, the Shari'a (which literally means the way to God or the fountain and spring source of goodness) is the sum total of the various efforts of Muslim scholars to interpret and search for the Divine Will as derived from the Qur'an and Sunna. Importantly, through the course of fourteen centuries, Muslim scholars emphasized that the main objective of Shari'a law is to serve the interests and well being, as well as protect the honor and dignity, of human beings. There is no single code of law or particular set of positive commandments that represent Shari'a law. Rather, Shari'a law is constituted of several schools of jurisprudential thought that are considered equally orthodox and authoritative. In the Sunni world there are four dominant schools of thought: the Shafi'is, Hanafis, Malikis and Hanbalis. In the Shi'i world, the dominant schools are the Ja'faris and Zaydis. The Sunni population of Iraq is predominately Hanafi, while the Shi'i population is predominantly Ja'fari.

The Historical Background of Muslim States:
The first Muslim polity was the city-state led by the Prophet Muhammad in Medina. But after the Prophet Muhammad died, no human being or institution was deemed to inherit his legislative, executive, or moral power. In Islamic theology, there is no church or priestly class that is empowered to speak for God or represent His Will. There is a class of Shari'a specialists (jurists) known as the 'ulama' or fuqaha', who are distinguished by virtue of their learning and scholarship, but there is no formal procedure for ordination or investiture. These jurists are not thought to embody the Divine Will nor treated as the exclusive representatives of God's law. The authoritativeness that a particular jurist might enjoy is a function of his formal and informal education, and his social and scholastic popularity. As to their political and institutional role, in classical Islamic theory, jurists are supposed to play an advisory and consultative role, and to assume judicial positions in the administration of justice. It is an interesting historical fact that until the modern age, jurists never assumed direct political power. Although, historically, the jurists played important social and civil roles and often served as judges implementing Shari'a law and executive ordinances, for the most part, government in Islam remained secular. Until the modern age, a theocratic system of government in which a church or clergy rule in God's name was virtually unknown in Islam.
Institutionally, Islam does not dictate a particular system of government, and in theory, there is no inconsistency or fundamental clash between Islam and democracy. The Qur'an dictates only that governance ought not be autocratic, and that the affairs of government should be conducted through consultation (shura). According to the classical jurisprudential theory, governance should be pursuant to a civil contract ('aqd) between the governor and the governed, and the ruler should obtain a pledge of support (bay'a) from the influential members of society as well as the majority of his constituency. In theory, rulers are supposed to consult with jurists, as well as other representative elements in society, and then, after concluding the consultative process, act upon the best interests of the people. In classical Islam, the consultative body was known as ahl al-hal wa al-aqd, and this body was supposed to be representative to the extent that it included the authoritative and popular jurists, and other influential members of

society. There is substantial disagreement in the classical sources, however, on whether upon concluding the consultative process, the ruler is duty bound to adhere to the judgment of the majority, or whether he may act upon his own discretion, even if his opinion is contrary to the view expressed by the majority. This doctrine was known as ilzamiyyat al-shura. There was a strong consensus among the classical scholars that in principle, consultation itself is mandatory, but they disagreed on the extent to which a ruler is free to act in contradiction to the will of the majority as expressed in the consultative process.
Outside this basic framework, the state was supposed to respect Shari'a, and strive to fulfill Shari'a's ultimate objectives in society. Historically, the prevailing form of government in Islam was known as the Caliphate, which in reality was dynastic and authoritarian. For about thirty years after the death of the Prophet, Muslims succeeded in establishing a form of government with a strong democratic orientation, but upon the rise of the Umayyad Dynasty, the democratic experiment came to an end, and power became concentrated in the hands of particular families or military forces. In pre-modern practice, to the extent that rulers adhered to the process of consultation at all, the consultative body was usually not representative of the governed, and membership in such a body was typically the product of political patronage and not the outcome of a democratic elective process.

The Adoption of European Laws by Muslim Countries in the Modern Age:
In the post-Colonial era, after most Muslim nation states achieved independence, the relationship between Islam and the state gained a new sense of urgency. At issue were the extent to which Shari'a law would play a role in the legal systems of the newfound nation-states, and the extent to which Islam would play a role in affairs of governance. In the period between the 1940's and 1960's, most Muslim countries opted for a nationalist republican secular model in which there is a very strong executive power, supported by weaker legislative and judicial branches of government. Some countries, such as Saudi Arabia continued to be governed by a strong royal family, a consultative branch of limited powers, and a judiciary that implemented a mixture of customary law and Shari'a based law. Most Muslim countries, such as Egypt, Iraq, and Kuwait imported the French Civil and Criminal Codes, and organized their legal systems according to the Civil Law legal tradition. A few countries such as Pakistan, Indonesia, and Malaysia were influenced by the British Common Law system, which they supplemented by various statutory laws enacted in specific fields. The extent to which the Islamic legal tradition was integrated into modern legal systems varied widely from one country to another, and also varied in accordance with the particular field of law in question. More specifically, in commercial and civil legal matters, most Muslim countries generated a synchronistic system, which was predominantly French, Swiss, or British amended by various concepts and doctrines inspired by the Islamic legal tradition. In criminal matters, most countries adopted the French or British systems of criminal justice. Countries such as Saudi Arabia and post-revolutionary Iran rejected Western influences, and claimed to base their criminal laws on the Islamic tradition. Most of the countries of the Arabian Peninsula, some African nations, and Iran continued to adhere to the Islamic tradition in matters of personal injury and tort law. This was manifested primarily by the incorporation of blood money (diya), and strict caps on financial liability in cases of personal injury. Personal and family law remained the field most susceptible to Islamic influence. Most Muslim countries created courts of separate jurisdiction to handle matters related to inheritance, divorce, and marriage. In these fields, judges typically implement statutory laws, which were enacted as codifications of Islamic laws.

The Iraqi Legal Experience in the Modern Age:
It is often said that Iraq was the cradle of civilization. This is definitely true as far as Iraq's long and rich jurisprudential experience. Before Saddam came to power, Iraq, in addition to Egypt, was one of the most influential countries in the development of the legal institutions and substantive laws of the Arabic speaking world. This was in part due to the high level of education enjoyed by the Iraqi elite, and the rich cultural experiences and cosmopolitan nature of Iraqi urban centers, such as Baghdad and Basra. Geographically, Iraq was at the central point where Arab, Persian, Kurdish, and Turkish cultures meet and interact. As noted above, Iraq was also home to both Shi'i and Sunni major centers of religious study. The rich and diverse makeup of Iraqi society itself allowed Iraq to be the beneficiary of ethnic, linguistic, religious, and sectarian cultural exchanges. This in turn was reflected in the fact that Iraqi legal thought was characterized by a distinctive synchronistic quality, open-mindedness, and a lack of xenophobic nativism.
Historically, the urban centers of Iraq, Baghdad, Basra, and Kufa, played central roles in the birth of Islamic jurisprudence, and they continued, over the span of a thousand years, to play a leading role in the development and evolution of the institutions and doctrines of Islamic law. In fact, the Hanafi and Ja'fari schools of Islamic jurisprudence, in particular, developed primarily in Kufa, Basra, and Baghdad in the first few centuries of Islam. Furthermore, Baghdad was the capital of the Abbasid Empire, the second major dynasty in Islam. As such, Iraq's intellectual heritage, especially as it relates to Islam's divine law, continued to carry considerable moral weight within the Muslim world.

After gaining independence from Britain in 1930, like most Arab countries, Iraq eventually adopted Civil Law and Criminal Law Codes, which were adapted from the French and Germanic legal systems. Iraq's personal law, however, continued to be based primarily on Islamic law. Like most Muslim countries, the continuing tension and at times conflict were between Iraq's Islamic legal heritage, and the legal system borrowed from Europe at the end of the Colonial era. Many aspects of the classical tradition of Islamic law conflicted with the newly adopted European-based Civil and Criminal laws, and as in the case of many other Muslim countries, there were considerable socio-political pressures, both internal and external, to simultaneously Islamize and modernize.

In the 1950's Iraq was at the forefront of the creative and demanding effort to adopt a system of law that was efficient, modern, and at the same time, Islamically legitimate. In this regard, the Iraqi Civil Code of 1953 was one of the most innovative and meticulously systematic codes of the Middle East. Iraqi jurists, working with the assistance of the famous Egyptian jurist Al-Sanhuri, drafted a code that balanced and merged elements of Islamic and French law in one of the most successful attempts to preserve the best of both legal systems. Furthermore, in 1959 Iraq promulgated the Code of Personal Status, which on the issues of family and testamentary law was at the time the most progressive Muslim code of law. Importantly, this Code merged elements of Sunni and Shi'i law to grant women greater rights as to marriage, divorce, and inheritance.

The Iraqi Ba'th, a staunchly nationalist and secular party, came to power in 1968, and Saddam formally ascended to the presidency in 1979. It is fair to say that especially after Saddam rose to power, all creative and inspiring legal activity came to an end. Since coming to power, Saddam involved Iraq in a series of wars that enabled him to declare a constant state of national emergency and to rule mostly by executive order. The centralization of power in the hands of the Ba'th and Saddam meant that legal institutions lost all vestiges of independence, and civil society became thoroughly co-opted by the ruling party. Increasingly, Iraqi law could no longer be described as either Islamic or French, but as distinctly and uniquely Saddamian. The death sentence was prescribed for a large variety of offenses including usurpation of public money, corruption, insulting the Presidency, and treason, which was defined very widely. The implementation of these laws was highly whimsical and largely contingent on the will of the party and President. Even foreign investments became largely dependent on having the proper connections to the ruling elite, and tapping into a network of businessmen who were sanctioned and protected by a clique that was close to Saddam and his family.

The Islamization of Laws in Modern Muslim Countries:

The period between the 1960's and 1970's witnessed the emergence of fundamentalist Islamic movements that materially impacted the constitutional place of Islam in the various Muslim states. Building upon the positions of some pre-modern theological orientations, most fundamentalist groups, but not all, contended that sovereignty belongs only to God (al-hakimiyya li'llah), that governments ought to represent and give effect to the Divine Will, and that there ought to be a strict adherence to the detailed determinations of religious scholars. The fundamentalist orientations of that period are most accurately understood as oppositional nationalistic movements dissatisfied with the status quo, and utilizing religious symbolisms as a means of claiming authenticity and legitimacy. The problem, however, is that fundamentalists tended to treat Shari'a as if a code of law containing unitary and uncontested specific legal determinations, and also tended to ignore the highly contextual socio-historical nature of most of Islamic jurisprudence. The Islamic legal tradition is too diverse, diffuse, and amorphous to yield to the type of narrow treatment afforded to it by fundamentalists. In addition, taken out of its socio-historical context, parts of Islamic legal tradition become problematic in terms of contemporary international human rights standards.

Although fundamentalist movements did not achieve direct power in most Muslim countries, they generated political pressure towards what might be described as greater symbolic Islamization. As a part of their Islamization efforts, a large number of Muslim countries drafted in their constitutions articles that either stated: "Shari'a is the main source of legislation," or "Shari'a law is a main source of legislation." The former version made Islamic law the near exclusive source of law for the nation, while the latter version mandated that Islamic law be only one of the several sources of law making in the country. Importantly, however, especially for countries that adopted the former version, the Shari'a clause was deemed not to be self-executing. This meant that the Shari'a clause was deemed to be addressed to the legislative and executive powers in the country, and not the judiciary. Accordingly, the judiciary would not, on its own initiative, give effect to Islamic law. Rather, Shari'a law needed to be implemented or executed by statutory law, and only upon the enactment of such statutory laws would the judiciary be bound to give it effect. Effectively, this meant that in most instances the Shari'a constitutional clause would remain dormant until made effective by statutory law. Nevertheless, at the political level, Shari'a clauses played an important symbolic role. In addition, Shari'a clauses were often cited by courts in resolving possible ambiguities in statutory law by referring to the principles of Islamic jurisprudence.

Other than the Shari'a clauses found in the constitutions of many Muslim nations, a large number of countries incorporated Islamic law in their civil codes as one of the sources of legal construction. Typically, there is a clause

written into the civil code instructing judges to interpret a statute by referring to the explicit meaning of the words of the statute. In cases of ambiguity, a judge is instructed to refer first to the established principles of Islamic law, and second to the prevailing customary practices in the country. In several Muslim countries, in cases of statutory ambiguity, judges are instructed to refer to custom first, and then to Shari'a law. Such civil code Shari'a clauses have their biggest impact upon the commercial practices of Muslim countries, depending, for the most part, on the clarity and specificity of the statute being interpreted by a court.

The Purported Islamization of Laws in Iraq:
After the Gulf War of 1991, and especially after the rebellions in the South and North, Saddam announced that he would implement Islamic law in Iraq, but he did so primarily as a legitimacy and popularity ploy. Saddam had systematically obliterated all Islamic, Sunni and Shi'i opposition, and especially after quelling the rebellions that plagued the country at the conclusion of the first Gulf War, Saddam had achieved notoriety for executing more Muslim scholars and jurists than any other leader in the modern history of Islam. Suddenly, the staunchly secular Saddam discovered religion and made a point of getting himself filmed performing his prayers, or would interrupt media interviews, announcing that he must pause for prayers. Saddam's implementation of Islamic law was equally theatrical. On occasion, he would announce that a group of individuals will have their hands cut off for theft, or will be executed for adultery. The carrying out of these punishments were something of public spectacle, in which people would be forced to watch the gruesome affair at the risk of being shot. Since the charges and trials, and often even the names and identities of the suspects were not made public, strong suspicions persisted that those being punished were actually people accused of being opponents of the regime. It is not an exaggeration to conclude that since the late 1970's the Iraqi legal experience can be summed up as the following: There was no rule of law in Iraq, but only the rule of fear.

Comparative Models Regarding the Role of Islam in the Constitutions of Modern Muslim States and a Cost and Benefit Analysis of Each Model:

Considering the wide range of technical and symbolic roles that Islam, in general, and Islamic law, in particular, have come to play in the world, it is useful to summarize the dynamics between Islam and the modern state in four basic models. These models will help place the various constitutional experiences, as far as Islam is concerned, in comparative perspective. In the process of explaining the four models, I will also analyze some of the costs and benefits associated with each. This will enable us to better assess the risks associated with any particular policy implemented in modern day Iraq.

Number One: The Strict-Separationist Model
According to this model, there is strict separation between Islam and the state. The state represents purely secular interests, and religion is not formally integrated in the political or legal system. Although the country in question might be predominately Muslim, there is no reference to Islam in the constitution or civil code, and personal laws are not based on nor inspired by Shari'a law. In this model, religious scholars and institutions may exist as a part of civil society, and they may even receive limited subsidies from the state, but they do not play an institutional role in the power structure, and they do not formally participate in formulating policy or the production of law.
This model, however, has not been widely adopted in Muslim countries. The prime examples of such a model are Turkey, Mauritania, Albania, and some of the former Soviet republics. Usually this model engenders wide opposition, and therefore, it tends to require heavy-handed repression by the state. Alternatively, as is the case with Turkey, it requires the dissemination of a widely popular civic ideology, such as Attaturkism, which thoroughly revises and reinvents the inherited cultural and religious convictions and practices. In the case of the former Soviet republics and Albania, this ideological role was played by Communism.
It is debatable whether this model is necessary for the existence of a liberal democracy. While all democracies generally recognize the necessity of separation between religion and state, according to this model, the separation is strict, dogmatic, and unwavering. Religion is not accommodated in any facet of public life, and the state has no religious identity whatsoever--it is not Muslim, Christian, or Jewish. The state does not fund religious institutions, and does not participate in any public displays of religion. But not all democracies have found it necessary to maintain a rigidly separationist policy as far as religion is concerned. Poland, Israel, India, and even England cannot be considered strict separationists, although they have managed to establish strong democratic systems. These four countries, and many others, have a very complex dynamic, where the government does not rule in God's name, but it does accommodate various aspects of religious practice and identity. In these countries, although the government guarantees the rights of all religious minorities, the government is not entirely impartial towards all religions. Even

more, the countries, these governments represent, might even have a certain religious identity, such as Jewish, Catholic, or Protestant.
While the strict separationist model can guarantee absolute equality of religious freedom, its uncompromising secularism often puts it at odds with the religiously based sentiments of the majority of citizens. If the majority of the citizenry has a strong sense of religious identity, often the state is forced to clash with the sentiments of the majority, and as a result, the state ends up using heavy-handed tactics, largely at the expense of human rights. Consequently, the state becomes alienated from its citizenry, and the country exists in a perpetual condition of political turmoil and instability.

Number Two: The Accommodationist Model
This is the model adopted by a large number of Muslim countries including nations such as Syria, Algeria, Tunisia, and Iraq. In general, the institutions of the state are separated from religion, and Shari'a is excluded as a formal source of law. The personal and family law codes, however, are based on Islamic law, and are implemented by Shari'a courts. Although the constitution may assert the Muslim character of the nation, Shari'a is not indicated as a source or the source of legislation. In addition, the impact of Islamic legal precepts or precedents upon the commercial and civil codes is very limited. The most distinctive aspect of this model is that except for the personal and family law fields, Islamic law is not integrated in the mechanisms of the state, and Islam does not provide the guiding principles for the polity. Islam is accommodated in the sense that it dominates the field of inheritance, marriage, and divorce, and Islamic religious practices are permitted to exist, and often thrive, as a part of civil society, but the state does not actively promote the precepts of the religion, and does not give religious parties or interests a formal role in governance. In the Accommodationist Model, the religious endowments, usually inherited from previous eras, are allowed to exist, but they are placed under state control, and are permitted a very limited degree of autonomy. Mosques are often licensed and administered by the state, and imams (preachers who perform the call for prayer and lead prayer) are typically appointed by the state as well. Usually, the state will determine the appropriate subjects and content of the Friday sermons given in these mosques.
At the official and formal levels, this model keeps religion at a considerable arms-length. But there are two distinctive risks in this model. Like the strict separationist model, it could generate considerable amount of religious opposition, and lead to a polarizing confrontation with Islamist forces. The other risk, and the more subtle one, is that unwittingly it could lead to considerable involvement with religion. Often in an effort to limit the popularistic and charismatic potential of the religion, the state is forced to involve itself with the regulation of religious expression, which, in turn, could invite greater repressive powers by the state.

Number Three: The Integrationist Model
In this model, there is greater formal involvement by the state with religion, but the political institutions continue to maintain their autonomy and separate existence from the religious institutions. Particularly in the decade of the 1970's, this model became more widespread and influential. Currently, examples of the integrationist model may be found in Egypt, the United Arab Emirates, Kuwait, Oman, Pakistan, Bangladesh, and Indonesia. The distinctive paradigm of this model is that while the state does not seek to implement all the technical prescriptions of Islamic law, and the state does not pretend to be the enforcer of canonical Islam, Islam and the Shar'iah are recognized as formal sources of moral and ethical inspiration. Furthermore, within the contextual limits of each country, there is an effort to integrate Islamic legal principles not just in the civil and commercial law fields, but also as they pertain to social justice, and public ethical norms. As mentioned above, Islamic law is identified as one of the main sources of legislation in the constitutional framework of the country, and the jurisprudential tradition of Islam could be referenced in order to resolve possible ambiguities in statutory law. Pursuant to this model, however, Islamic law is not self-executing, and Shari'a is considered a second frame of reference after statutory law. Therefore, only in the absence of statutory law on point will courts resort to Shari'a law or customary law, and in most countries judges are given guidance on which of the two, Shari'a or custom, is to take priority. Considering the vastness of the Islamic legal tradition, some countries instruct judges to apply a particular school of thought, for instance, the Hanafi School, or even to refer to a particular text, for instance, the Hidayah and/or the Majalla. In principle, it is possible for this instruction to vary from one province to another, within a single country, in order to accommodate the demographic differences within the country. For instance, in the absence of statutory law judges in one province may refer to Hanafi jurisprudence, while in a different province judges may refer to Ja'fari jurisprudence. Because Islamic law is applicable only in the absence of statutory law, and possibly in the absence of customary law as well, at the national level, the differences in legal application will be minor and technical.
There are many potential institutional frameworks that make it possible to formally integrate the ethical and moral principles of Islam without creating a theocratic state in which a group of religion experts override the will and choice of the people. For instance, a group of religious scholars may contribute input to proposed legislation, but without

having veto power over such law making efforts. Such a group of religious scholars may be elected or appointed to the legislative or parliamentary body, and may constitute a percentage of such body. In this fashion, the religious scholars may comment directly on proposed legislation, and their view of what is Islamically acceptable or mandated may be given due consideration. In several countries, especially if appointed by the executive, this group of religious scholars does not have the power to vote on legislation, but are given an opportunity to comment or advocate a particular point of view. In some countries, instead of reserving a place for religious scholars in the legislative branch, there is a separate body, often at the level of ministry, which is regularly consulted by the legislative body and asked to comment on proposed legislation. The comments of this religious consultative body are either read or distributed in the legislature or parliament, and are often printed and published as well.

The earmark of the integrationist model is that, on principle, it does not seek to exclude Islam from the public manifestations of life. However, the Integrationist Model formally recognizes Islam's leading ethical and social educational role, and it allows Islam to manifest itself in public life through the personal convictions and commitments of lawmakers. Importantly, the Integrationist Model is consistent with the historical experience of Islam, and the traditional role of Shari'a. The Qur'an itself asserts that there can be no coercion or duress in religion, and the Integrationist Model attempts to avoid transforming religion into the coercive instrument of the state. It also attempts to avoid institutionalizing a particular group of spokesmen as the enforcers of the Divine Will. In addition, the Integrationist Model tends to respect the enormous diversity and richness of the Islamic jurisprudential tradition by refusing to enforce one particular view to the exclusion of all others.

The main shortcoming of the Integrationist Model is that at the level of political symbolism, this model is not always capable of leveraging itself politically in order to emphasize its consistency with Islamic paradigms. In other words, because the state does not position itself as the strict enforcer of the Divine law, at times, it is challenging for the state to avail itself of the perception of Islamic authenticity and legitimacy. However, this model is not as vulnerable to accusations of being disconnected from its Islamic heritage, or accusations of excluding Islam from public life, as the previous two models.

Number Four: The Requisitionist Model

This model is the closest to a theocratic government, except for the fact that there is no consecrated church in Islam. The state selects the canonical doctrine, which the state believes represents the correct Islamic position, and enforces it both as the will of the state and God. This model has been adopted by a few countries, which include Saudi Arabia, Iran, and for a period of time, Sudan. The Requisitionist Model has taken different shapes and forms, some of which are able to achieve a greater degree of democratic practices than others. For instance, Iran gives a council of jurist-consuls and other high-ranking clergymen a near absolute veto power over legislation and policy. In Saudi Arabia, the executive empowers the judiciary to implement Islamic law, assisted by executive orders or regulations that dictate policy or particular limits. The important element in this model is that depending upon one's perspective, the state is requisitioned in the service of religion, or religion is requisitioned in the service of state. In all cases, there is an institutional body that determines the Will of God, and enforces it as such. As such, typically in this model, all courts are considered Shari'a courts charged with the enforcement of Islamic law, as defined by the state. Courts follow the instructions of the state as to what constitutes Islamic law, and in some cases and in particular fields, courts are granted wide law making powers.

The difficulty with this model is two-fold: One, an institution or group of institutions becomes empowered with the gloss of divinity, and therefore, it is very difficult to reconcile this model with democracy. Second, this model tends to narrowly define orthodoxy because it favors one particular Islamic perspective over all others. Arguably, this has the serious potential of undermining the richness and diversity of the Islamic tradition.

The Spectrum of Models:

It is important to note that the four models identified here are approximations of the earmarks of actual practices of modern Muslim states. However, there is a spectrum that exists within each model and between one model and the other. Therefore, it is possible that an Accommodationist state borders on being Integrationist, and it is also possible that an Integrationist state would act as Requisitionist over some issues and under certain circumstances. For example, Egypt, over most issues, is Integrationist, but at times, acting upon the instructions of the Azhar University, it bans certain books that it considers religiously offensive. In those instants, it is acting pursuant to the Requisitionist model. Furthermore, some countries, such as Jordan, have experimented with the Integrationist model but of lately have drifted towards the Accommodationist model. On the other hand, for example, Sudan has drifted from a Requisitionist orientation to a more integrationist stance.

The Case of Iraq and the Iraqi Constitution:

There is little doubt that many Iraqis are aspiring for a democratic order that would guard against the kind of abuses that they for long have had to endure. The formidable challenges confronting Iraqis include how to overcome the absolute jurisprudential impoverishment that they suffered under the Ba'th, while reclaiming their creative legacy; how to find justice in post-Saddam Iraq, while avoiding the destructiveness of vengeance; and how to make the law a shield and tool in the hands of the people; and not an oppressive sword in the hands of the state. On the legal front, the challenge will be how to establish order and stability, while still allowing the law to be an agent of progressive change. It is important in this regard to note that the rule of law is a necessary condition for a democracy to exist, but it is not enough. Democracy is not just about the objectivity and fairness of process or the division and separation of power between various branches of the government. Democracy is also not just about giving effect to will of the majority, or accountability to the people. Democracy is about a moral commitment to the fundamental and basic worth and dignity of each and every member of the citizenry, and the conscientious engineering of government and society so as to make human beings secure in their rights.

Importantly, this moral commitment can be expressed through law, but it cannot be not created or invented by legal command. Democracy is not secured by drafting good laws alone, but it must be made a part of one's cultural and ethical view. Considering Iraq's rich civilizational heritage, there is no doubt that Iraqis will be looking, and rightly so, into their pre-Ba'th legal and moral history for inspiration and guidance on how to make the moral commitment and develop the ethical worldview necessary for a democracy. In this context, it is important for American policy makers to understand that Iraq's legal and ethical history did not start with the overthrow of Saddam. A major component of the Iraqi heritage is the Islamic faith, and the leading role that Iraq played in the development of Islamic law. But here is where Iraq's creative legacy is most needed. A dual commitment to Islamic law and democracy is possible, but only if Muslims understand Islamic law to reinforce the same commitments made by democracy to individual human rights and dignities. This is exactly where Iraq might be able to reclaim its leading educative and inspirational role towards the rest of the Muslim world. It will be a revolutionary step if Iraqi legal minds are able to reinterpret and re-think the Islamic classical tradition in a way that upholds the basic individual rights necessary for a democratic order.

Opting for either the Strict-Separationist or Requisitionist (theocratic) Models in Iraq will be nothing short of a disaster for the Iraqi people, Muslims, in general, and the West. The establishment of a theocracy in Iraq will inevitably lead to a denial of human rights, the marginalization and exclusion of Iraq from the world community, and considerable sectarian tensions between Shi'i and Sunni Muslims. But even more, a theocracy is an affront to the wisdom of Islam, the diversity and richness of Shari'a, and to the historical legacy and established precedent of Muslims around the world. But the forcible exclusion of Islam from public life, state sponsorship, and all legal and constitutional documents will be a disaster of equal proportions. The worse thing that the government of the United States can possibly do, while acting as an occupying power in Iraq, is to impose upon the Iraqi people a political condition that is so artificial--that is so alien to the collective consciousness of the Iraqis, and that is at odds with their historical experience and aspirations--that it appears that the United States is, in fact, acting like a power of occupation and domination, not persuasion and liberation. The danger is that if the United States appears hostile or insensitive to the religious sentiments of the Iraqis, this will invite resistance. It will be a real tragedy if the democratic experiment in Iraq fails, not because the Iraqis do not believe in democracy, but because democracy is seen as part of the ideological package of an aggressive or imperialistic occupying force.

The United States government must successfully communicate to the Iraqi people its desire to help them to practice their religion, if they so desire, more fully and freely, not force upon them a situation that they will view as hostile, deprecating, or insensitive towards their faith based commitments and beliefs. More concretely, the United States government should not resist, and, in fact, should tolerate and support, any efforts by the Iraqis to 1) define the religious identity of their country; 2) preserve the sanctity and inviolability of Islamic law in certain areas of legal practice that the Iraqis define as highly personal and intimate to their identity and will as a people; and 3) define Islam in such a way that it is consistent with democracy and human rights. For instance, if the Iraqis wish to proclaim a bill of individual rights, in their constitutional document, and further wish to assert that this bill of rights is derived from their Islamic commitments and understandings, the United States should encourage such a move. The United States government ought not be suspicious of any effort by the Iraqis to anchor their human rights and democratic commitments in novel or original interpretations of the Islamic tradition. It should be noted that I am not advocating that the government of the United States dictate any Islamic positions or establish any religious doctrine. The key here is that whatever efforts are made on behalf of Islam must be driven by Iraqis themselves. I am only addressing possible responses or reactions by our government to anticipated Iraqi initiatives on behalf of their religious identity and faith. If the Iraqis are able to articulate their democratic and human rights choices in terms of Islamically compelling positions, this will have the long-term advantage of transforming the Iraqi experience into a normative precedent for all Muslim nations. If Iraqis can successfully establish that it is their Islamic faith that inspired them to commit to democracy and human rights, this is bound to have a far reaching impact upon Muslim countries and

nations around the globe, and United States would have played the role of partnership and sponsorship in generating this pivotal development in Muslim history.

The Japanese and German Post World War II Model and the Democratic Challenge in Iraq:

When evaluating the chances of democracy in Iraq, in many ways, the establishment of capitalist democracies in Germany and Japan in the Post World War II period becomes an encouraging precedent. One can rightly take pride in the transformation of these two countries into democratic world powers under American sponsorship. The precedent of both these countries does indicate that democracy can be taught and transplanted, and that it does not necessarily have to emerge through the natural socio-political processes within a particular country. There are, however, several elements that counsel against assuming that whatever worked in Germany and Japan will necessarily work in Iraq. The following are some of these elements of difference and distinction:

1) Both countries before their democratic transformation were heavily industrialized countries with advanced economies and very high productivity. The United States was able to inject capital into the war torn, but developed, economies of both countries, and by doing so, the United States was able to re-set both nations on their path of economic progress. Although highly despotic governments dominated both Germany and Japan, there were strong, developed, and sophisticated entrepreneurial classes ready and set to share power once these despotic governments fell. In this regard, the situation in Iraq is markedly different. Iraq is not an industrialized or technologically advanced country. Furthermore, Saddam had severely weakened the entrepreneurial class and forced them into a symbiotic relationship with the state in which they were more like economic leeches heavily dependent on a very corrupt government for their survival. This is bound to make the distribution of economic base and power in Iraq more challenging, and will require a much heavier investment of venture capital in order to create a productive economic system that can support a democracy.

2) Levels of literacy, education, and technological development were already very high at the time of the American occupation of Japan and West Germany. Democracy is much better secure and supported in societies enjoying a high level of literacy and education. Literacy and education contribute to the creation of sophisticated civil societies and are conducive to the development of civic virtues, such as social and political responsibility, accountability, compromise, and the sharing of power, which are importing for nourishing and guarding a democracy. Literacy and education levels in Iraq, although higher than some of the countries in the region, are low when compared to West German and Japanese standards.

3) Historically, both Germany and Japan were colonizing, not colonized, nations. Unlike Iraq, Germany and Japan did not have to deal with a collective historical memory that labors under the trauma of colonialism. This meant that both countries were relatively more receptive to the influx of ideas and influences coming from the United States, specifically, and the West, more generally. Unlike Iraq, there was no national trauma induced by long periods of occupation and domination, and a deeply ingrained sense of distrust and suspicion focused on the West.

4) Before the war, Germany and Japan followed a particular ideology that had become utterly undermined and discredited after World War II. The ideological defeat was complete and thorough, and the German's and Japanese were ready for an ideological transformation. In the case of Iraq, even if one asserts that the defeat of Ba'athism, the secular nationalist ideology of Saddam and the ruling government of Syria, is complete, Ba'athism is not the issue. The issue is the inclusion or exclusion of Islam in the constitutional document of Iraq. Not only is Islam not a discredited ideology, it is not an ideology at all. As a religious faith, it has its own set of demands on its followers. If the United States forces Iraqis into a position in which they have to choose between the demands of their religion and demands of their constitution, the constitutional document will not penetrate deeply into the socio-political fabric of Iraq, and these competing demands are bound to generate tensions and strong resistance.

5) Iraqis, as Arabs and Muslims, are firmly situated within a particular socio-historical context. Iraq does not only influence the countries and people situated within its region, but is also, in turn, influenced by them. It is important that the United States not contribute to a situation in which Iraq becomes, by our decree, artificially alienated from its context. If Iraq's distinctive Muslim and Arab character is artificially diluted, and its policies become a replica of American preferences and policies, this will only confirm the status of Iraq as a country occupied by an alien power. Put differently, it is important to avoid giving the impression that Iraq is a mirror of the United States, and no longer authentically Iraqi. Such an impression is bound to further radicalize and polarize the region, and will in the long term, inevitably, backfire. The regional contexts of Germany and Japan were completely different. Any possible German or Japanese opposition to American policies could not gain inspiration or support from its regional surroundings. Obviously, the situation in Iraq is decisively different. It is important that in the process of saving Iraq, the United States does not end up losing the region.

Respecting the Iraqi Choice:

These material differences, among many others, between Japan and Germany, on the one hand, and Iraq, on the

other, are mentioned here to emphasize the distinctiveness and particularity of the challenge in Iraq. In my view, we cannot afford to deal with Iraq as the vanquishing victors, and expect the Iraqis to mold themselves after our image. It is important that the United States displays a considerable amount of sensitivity and respect for the Iraqi history, civilization, and religion. Therefore, it would be a serious mistake to deny Iraqis the opportunity to define themselves--even if this self-definition would include choices regarding the public role of religion that would not be our own.