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Rites and Rights in Afghanistan: The Hazara and the 2004 Constitution

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INTRODUCTION

It seems rather natural to respond with ambivalence to the news of Afghanistan's recent foray into constitution-making. On the one hand, the emergence of a national charter allegiant to the United Nations, international law, and the promotion of women's rights makes for a hopeful optimism.[2] Perhaps after decades of near-constant warfare and centuries of intermittent ethnic strife, Afghanistan is finally turning a rough and ugly corner towards a genuinely self-determined democratic prosperity. What the United States has done in Afghanistan, according to Donald Rumsfeld, is a "breath-taking accomplishment."[3] On the other hand, 2004 marked the arrival of Afghanistan's sixth constitution since 1923.[4] This less than encouraging track record includes attempts from agents at various ends of the political spectrum to consolidate what many scholars have cited as being amongst the world's most ethnically fragmented states.[5] Given this past and what was effectively the imposition of an American-styled constitutional order in the wake of a post-September 11 American invasion, a so-called realism might predict a quick and unavoidable collapse.[6] In this view, the situation is hardly promising—it is frustrating, if not frightening.

This article is agnostic with respect to the normative stakes in Afghanistan's "breath-taking accomplishment." Part Two instead focuses on the plight of one of Afghanistan's less fortunate ethnic groups: the Hazara. The Hazara possess unique ethnic physiognomy and status as Shi'i in a predominantly

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Sunni Muslim country, making them perennial losers in the struggle for ethnic and sectarian parity. The 1990s saw an increasingly vocal maturation on the part of the Hazara through their political party, *Hizb-i-Wahdat*, and their increasing interest in achieving greater guarantees of legal rights and religious freedom. Part Three examines Afghanistan's 2004 Constitution, exploring both the sectarian and multicultural dimensions. It seeks to determine whether Hazara claims with respect to religious freedoms and ethnic parity have been met.

Part Four shifts from the doctrinal to the theoretical, teasing out the Islamic and liberal-democratic strands that blend in the new constitution. Its success or failure will likely turn on a number of political variables, and this part picks up on two of them. The first variable is Islamic constitutionalism: Islam has been criticized for being unable to meet the standards of liberal democracy, such as its requirement of state neutrality. Without joining the much larger debate on Islam and human rights generally, the question considered here will be whether the traditional complaint about state neutrality in Islamic governance holds water. The second variable is the relationship between Islamic law and minority rights. Afghanistan has a significant history of ethnic and sectarian strife and subsequently requires a legal system tuned to this heritage. When it comes to protecting minority rights, is Islamic law simply a bad idea? If not, is liberalism? This article concludes that the Constitution of 2004, while arguably better for the Hazara in terms of sectarian rights, does not go far enough in terms of bridging potentially volatile ethnic tensions. At the same time, however, it seems premature to assume constitutional collapse due to its heavy Islamic influence.

AFGHANISTAN'S HAZARA: A TROUBLED HISTORY

The Ethnic Landscape

Afghanistan has been called a "Nation of Minorities,"[7] and for good reason. Comprised of several ethnic groups—none of which constitute a majority of the population—Afghanistan has a history of segmented societies never having congealed into a unified nation-state.[8] The largest of these groups is the Pashtun, who predominate in the eastern and southern portions of the country adjacent to Pakistan, which includes the cities of Kandahar and Jalalabad. Pashtuns, comprising 38 percent of the total population, have traditionally held the dominant position in the state.[9] The Pashtuns have a customary code called Pashtunwali,[10] which serves—in conjunction with their Hanafi brand of Sunni Islam—as their standard for personal, social, and religious rectitude.[11] Tajiks, the second largest ethnic group in Afghanistan, comprise about 25 percent of the country's population and are concentrated in the northeast across from Tajikistan. Most Tajiks also belong to the Hanafi school of Sunni Islam, though some Shi'i Tajiks live in the west close to Herat. Hazaras form 19 percent of the

population and constitute the bulk of the Shi'i minority in Afghanistan. The Hazara are primarily found in the landlocked central highlands, known as the Hazarajat. The remainder of the population is largely Uzbek and Turkmen, who together constitute close to 20 percent and live in the north adjacent to their respective states, Uzbekistan and Turkmenistan. They are also Hanafite Sunnis and are ethnically and linguistically Turkic. All in all, Afghanistan is almost exclusively Muslim, with close to 80 percent of the population subscribing to Hanafi Sunnism.

Afghanistan's largely arbitrary borders, first determined by the British and Russians in the nineteenth century, have separated many of Afghanistan's ethnic groups from fellow brethren in neighboring states. This is evidenced in the large numbers of Pashtun in Pakistan and Tajiks, Uzbeks, and Turkmen in their home states across the border. Unique in this respect, however, are the Hazara, isolated from a "complementary" ethnicity in a neighboring state.[12] Clearly not limited to the Afghan context, the arbitrary separation of ethnic groups is nonetheless a prominent one, the impact of which is considerably felt in the present day.

The Hazara

The origins of the Hazaras are a mystery.[13] A source for queries is the fact that Hazaras are physically distinctive from the other ethnic groups in Afghanistan. With round faces and wide noses, it has been popularly believed that the Hazaras are the descendants of Genghis Khan's Mongol armies. This idea, though widely discredited, has given way to general theories that suggest that Hazaras are likely one of the oldest inhabitants of the region and a blend of Mongol, Turkic, and Persian genealogy.[14] Regardless of their origins, the Hazara phenotype has had a powerful influence on their collective identity. Having been subject to historical persecution, and having lived largely in a geographically isolated region, the physicality of the Hazaras has provided an easy means by which other groups can identify and stigmatize the Hazara people. This distinctiveness has also had the effect of making it increasingly difficult for Hazaras to assimilate into majority cultures, either voluntarily or by force. As for religion, Hazaras are Shi'a, unlike the Sunni majority in the rest of the country.[15] A common explanation for the occurrence of Shi'ism in the Hazarajat is that it was introduced by the Safavids of Persia in the sixteenth century. Another explanation posits that the Hazara converted upon following the influences of Ghazan Khan and Abu Sa'id, who came to Shi'ism in the thirteenth and fourteenth centuries, respectively. In either case, it is clear that Shi'ism did not experience the grassroots support enjoyed by Sunni Islam and only came into favor at the behest of foreign interventions.[16]

The baseline for understanding the contemporary condition of the Hazaras in Afghanistan is the kingship of Amir Abdul Rahman.[17] Coming into power in

1880, Abdul Rahman sought to establish an Afghan state forged on the European nation-state model,[18] which meant unifying the groups within Afghanistan's emerging borders, including the traditionally independent Hazara.[19] Abdul Rahman's task of subjugating the Hazara was a difficult one. In a biography, he is quoted as saying that "the Hazaras had raided and plundered the neighboring subjects [of the Afghan confederacy] for about three hundred years past, and none of the kings had had the power to make them absolutely peaceful."[20] Abdul Rahman's "pacification" of the Hazara during his nation-building campaign in the late 1880s quickly turned violent, erupting into large-scale rebellions and an eventual Hazara "war of independence."[21]

Abdul Rahman's war on the Hazara had tremendous consequences for their future in Afghanistan's muddled ethno-religious relations. Shrewdly manipulating both sectarian and ethnic sentiments, Rahman was able to piece together a coalition aimed at either assimilating or removing the Hazara from his nascent, Pashtun-dominated state.[22] To do this, he mobilized the chief Sunni clerics in Kabul who subsequently issued a declaration against the Shi'i Hazara, declaring them to be *kafir* (infidels). As Asta Oleson has reported, the Sunni position was that the "people of the Hazara tribe, being Shi'a, should not be considered Muslims and should not be left alive, wherever they might be found."[23] Inspired by the religious compulsion of *jihad*, as well as the plunder and slaves promised by subjugation of the Hazarajat, thousands of volunteers joined the battles, which would eventually crush the Hazara independence movement.[24]

The confluence of sectarian peculiarity and ethnic abstruseness has dealt the Hazaras an unfortunate blow amidst the segmented dynamics of Afghan society. Some writers have suggested that social demarcations in Afghanistan for the Hazaras have been so severe as to approximate a caste system, with the Hazaras occupying the lowest realm.[25] As one scholar on minority rights in Afghanistan has written, "Since their subjugation by Amir Abdul Rahman Khan and the resulting inclusion in the Afghan state in the late nineteenth century, the Hazara have faced slavery, taxation without representation, exploitation of their natural resources, and chronic economic underdevelopment."[26] The Hazaras have found themselves constrained in a class hierarchy—very much due to the lack of adequate educational resources—in which they typically fill the most menial occupations. A common insult for Hazaras is "porter" or "sweeper," referring to the type of job many Afghans believe to be most fitting for the Hazaras. Indeed, Hazaras outside of the Hazarajat are habitually employed as menial laborers, almost never attaining managerial positions beyond their "class." The rampant educational deficit among the Hazara has extended into religious areas as well, where Shi'i clerics are few and far between in the Hazarajat. All in all, the Hazara resources, both human and natural, have been among the most underdeveloped in all of undeveloped Afghanistan.[27]

THE 2004 CONSTITUTION

With this history in mind, it is necessary to address two types of questions: (1) How have Islam and liberal democracy managed to merge under the new constitution in Afghanistan? (2) How will the new constitution serve minority interests? The 2004 Constitution was mandated by the Bonn Agreement, which was signed shortly after the fall of the Taliban government in 2001. Among other things, the Bonn Agreement stipulated that a new constitution would be enacted according to a specific schedule that began when then-interim President Hamid Karzai appointed a Constitutional (Drafting) Commission in October 2002. A Constitutional Review Commission was then set up in April 2003, which, in conjunction with the United Nations Assistance Mission in Afghanistan (UNAMA), went about educating the public on the first draft. In December 2003, the final constitutional draft was presented to a 500-member *loya jirga* (grand council). After much wrangling and controversy as to which government officials were to be appointed or elected, and how, the constitution was approved on January 4, 2004. Ten days later, President Karzai signed it into law.

Afghanistan has taken clear steps towards entrenching Islam in its constitution.

In substance, the new constitution used as a benchmark the somewhat liberal Constitution of 1964 established during Zahir Shah's ill-fated "New Democracy" movement. This pleased the international community, which felt it especially important that the new constitutional order be committed to free elections, respect for human rights, and basic social justice. At the same time, Afghanistan has taken clear steps toward entrenching Islam in its constitution.

From the Hazara perspective, a more important question was how the provisions in the 1964 Constitution specifying *Hanafi fiqh* (the rules governing the personal relations of Muslims) would be amended to allow for greater sectarian freedom within the limits of greater Islam. Of course, this issue implicates the broader problems of innovation and dissent within the Islamic community-an issue of serious difficulty. Nonetheless, the Hazara sought self-validation through the elimination of the Hanafi references in the constitution and a new parity between the various *madhaab* (schools of legal interpretation). One might wonder why the Hazara would not be content with the more palpable claims for greater rights in Afghanistan, leaving well enough alone with respect to constitutional provisions marking Hanafi rites as the official national rites. Part of the answer surely has to do with the long history of sectarian violence in Afghanistan. For many years Shi'a were barred from practicing seemingly simple religious rites, and to the extent that present provisions tread on traditionally touchy territory, the Hazara insistence on ritualistic parity for their *fiqh* might be viewed as an identity claim.[28]

Islamic Democracy?

The 1964 Constitution and the Afghan civil and criminal codes were "Hanafized."[29] This is to say that Hanafi doctrine was threaded through Afghan constitutional and statutory law, providing either the explicit standard by which the rule was to be laid down, or the background trumping mechanism. For example, Article 2 of the 1964 Constitution reads: "Islam is the sacred religion of Afghanistan. Religious rites performed by the state shall be according to the provisions of the Hanafi doctrine. Non-Muslims shall be free to perform their rituals within the limits determined by laws for public decency and public peace." Similarly, Article 8 required the King to be Muslim and a follower of the Hanafi school; Article 64 required no law "repugnant to the basic principles of the sacred religion of Islam;" Article 69 provided that in areas where there was a gap in the law, "Hanafi jurisprudence of the Sharia" would fill the space; and Article 102 read, "Whenever no constitutional or statutory provisions are available, courts are obliged to follow the basic principles of Hanafi jurisprudence of the *Shari'aat* (ordinances given in the Qu'ran) in order to render a decision that in their opinion secures justice in the nest possible way."

The 2004 Constitution has a strong Islamic influence, but is less Hanafi-centric than its predecessor. Chapter One, concerning the State, unabashedly proclaims Islam to be the sacred religion of Afghanistan,[30] which itself is declared to be an Islamic Republic.[31] Article 3 invokes the trump language of the old Article 64, flatly stating, "no law can be contrary to the beliefs and provisions of the sacred religion of Islam." Additional references to Islam include a mandate that all educational curriculum be based not only on academic principles but also on Islamic principles and national culture, and that the curriculum of religious subjects be based on the Islamic sects existing in Afghanistan (Article 45); state adoption of measures necessary to ensure physical and psychological well-being of the family, such as the elimination of traditions contrary to the principles of Islam (Article 54); and numerous oaths required of elected and appointed officials to obey and safeguard the principles of Islam (Articles 63, 74, and 119). *Shari'a* may be less prominent in the 2004 Constitution than it was in 1964, but it is not entirely absent. Article 130 resuscitates the previous Article 102, where Hanafi jurisprudence is to act as a gap-filler whenever constitutional and statutory provisions do not adequately supply courts with a remedy. Of note, however, is the subsequent Article 131, which allows for Shi'i jurisprudence to be applied in "personal matters" involving Shi'i claimants and the general governability of Shi'i law in cases where both claimants are Shi'a and no constitutional or statutory provisions are otherwise applicable. The *coup de grace* is Article 149: "The provisions of adherence to the fundamentals of the sacred religion of Islam and the regime of the Islamic Republic cannot be amended."

The 2004 edition is not only less Hanafized than its 1964 predecessor, it is also more liberal. To be sure, the 1964 Constitution had a number of liberal components, with a fair amount of prescribed rights and freedoms. Afghanistan's 2004 Constitution, however—like many established in the late twentieth century—goes beyond the U.S. Constitution in its rights, commitments, and plans for social justice. Article 4 establishes a general equality among the various ethnic groups, assigning to each a cognizable claim on Afghan citizenship. Chapter Two, outlining the Fundamental Rights and Duties of Citizens, constitutes the largest section of the entire document with 37 articles. They include, *inter alia*, the right to non-discrimination and equal rights (Article 22), a presumption of innocence and a right to trial (Article 25), a prohibition on torture (Article 29), the right to freedom of expression (Article 34) and association (Article 35), and the right to property (Article 40). The constitution does not stop, however, at procedural guarantees, but attempts to secure substantive goods as well, such as the right to free education provided through university graduation (Article 43), the promotion of women's education (Article 44), the right to vocational opportunities (Articles 46 and 48), the promotion of science and the arts (Article 47), and the right to free health care (Article 52).

The 2004 edition of the Constitution further complicates the document's political status in two ways. Article 7 requires the state to abide by the United Nations Charter, all international legal instruments to which it is a party, and the Universal Declaration of Human Rights. Article 58 establishes the Independent Human Rights Commission of Afghanistan with jurisdiction over all violations of fundamental rights. These human rights provisions may not be as effective as they seem, since the Islamic provisions, as demonstrated in the 1964 Constitution, tend to operate as automatic trumps, leaving the rights provisions to serve more or less as window-dressing. However, what is potentially problematic about the 2004 Constitution is the introduction of language giving legal effect to international law and the formation of an independent commission presumably capable of giving such provisions force. Without these provisions, a Supreme Court adjudicating a constitutional question would be able to dismiss a traditional rights claim based on its conservative application of a particular Islamic legal rule. But is the court allowed the same degree of leeway when it is adjudicating, for example, the Convention on the Elimination of Discrimination Against Women, to which Afghanistan is a party? With Article 64 and its basic "repugnancy" clause lurking in the background, it is difficult to say that the court would be able to trump the UN Charter or the like just as it would an Afghan law deemed unconstitutional. The constitution itself, unfortunately, offers no guidance as to where the balance is to be struck, and the upshot appears to be that while the new constitution offers more resistance in terms of Islamic co-optation than the previous one did, only time will tell how much.

Rites and Rights

Of less concern to groups like the Hazara than the relationship between democracy and Islam has been the relationship between Islam and Islam. That is to say, the Hazara have historically found themselves the targets of both sectarian and ethnic discrimination by their Sunni neighbors and had hoped to find in the provisions of the new constitution a religious remedy. On the sectarian front, this meant either the removal of *madhaab* references altogether or the inclusion of a provision putting Shi'i jurisprudence on par with the Hanafi. As mentioned above, this largely amounted to the symbolic and identitarian interest in an autonomous control over religious rituals. To this end, there has clearly been a reduction in references to Hanafi, most explicitly with the excise of the old constitution's mandated use of Hanafi for official state rites. While Hanafi remains in Article 130, which may yet prove to be a judicial tool of considerable leverage, Article 131 allows for Shi'i jurisprudence in personal matters, presumably of family and inheritance law. It is impossible to predict how these provisions will actually operate in the scarred atmosphere of Afghan politics, but at the very least groups like the Hazara—seeking affirmation through the validation of their *madhaab* on a level comparable to that of other groups—should take some formal solace.

With a history of entrenched ethnic fragmentation, one would have expected something more substantial than two platitudinous articles [in the Constitution].

While the constitution may have made some headway in terms of rites, it appears far more naive with respect to rights. Although there was some debate over whether Afghanistan would adopt a federal or centralized system of governance, the Constitutional Commission ultimately went with a strong and centralized presidential power in Kabul. While it may not necessarily be accurate to say that a federal structure would have been of greater benefit to the disaggregated power base among groups and warlords, it does not appear that the constitution was established with much of an eye towards multiethnic democracy and minority rights. Indeed, with a history of entrenched ethnic fragmentation, one would have expected something more substantial than two platitudinous articles. Article 6 obliges the state to ensure national unity and equality among the ethnic groups and balanced development throughout the country, while Article 4 simply lists the groups comprising the nation of Afghanistan.[32]

These provisions must do battle, however, with the likes of Article 35, which bars ethnicity as a permissible ground for forming a political party, and Article 66, which prohibits the president from affirmative action based on lin-

guistic, ethnic, religious, political, or regional considerations. These prohibitions clearly emerge from the sentiment that Afghanistan as a nascent nation is to form and progress on the basis of civic virtues and not ethnic cores.[33] As Karzai stated in a speech at the close of the January 2004 *Loya Jirga*, "Our vision for Afghanistan is of a country where people relate to each other through reason and shared ideas, convictions and behaviour, not through ethnic bonds, because this is not the way of building nations."[34]

COMPARATIVE CONSTITUTIONALISM: LIBERAL POLITICAL THEORY AND ISLAM

Quite explicitly, the 2004 Constitution attempts to achieve a structural blend of liberal democratic and Islamic tenets, and a common complaint is that this kind of blending cannot work.[35] Although this section does not comprehensively address this critique, it does reference the issues at stake in the debate. It does so by outlining the place of neutrality in liberal political theory, and distinguishing the doctrine of minority rights from the basic non-discrimination norm. This is helpful inasmuch as one wonders whether the classic liberal system that has flourished in some parts of the world can readily be transplanted in the fragmented society of the Hazara. This parsing becomes especially important when one considers that the constitution—a hybrid of Islam and liberalism—provides no self-referential marks for when, in the case of a conflict, one theoretical plane trumps the other.

Liberal Neutrality

Nineteenth century classic liberalism was fundamentally individualistic.[36] It was premised on an apparently primordial idea about the right of the individual to set about defining his life in his own way.[37] Moral decision-making was a job that fell squarely on his shoulders, and, as each person worked towards his own benefit, social welfare naturally followed as the fruit of an invisible aggregation. This individual's role in defining "the good life" meant that the state was confined to a neutral position with respect to such matters; government would certainly outlaw harmful conduct, but would have little part to play in deciding what it meant to lead a good life. This neutrality in the moral sphere tracked the legal sphere, in which the law was to be applied equally and fairly to all without consideration (at least in theory) to characteristics such as sex, race, and national origin.[38] Naturally, state neutrality begat an egalitarianism that served as a chastening principle for individuals pursuing their own forms of the good life, but only so long as everyone had an equal chance to do the same. This initial dynamic was a thin one, and explicitly favored the libertarian impulse over the egalitarian one,

allowing for constraints on liberty only in the narrowest of circumstances.[39] The analogy for this relationship was the marketplace, in which it was the duty of the state to maintain fair and equal procedures by which individuals could pursue their variously constituted interests.[40]

The classic liberal spin on equality is therefore premised on a neutral state committed to procedural egalitarianism.[41] That is to say, equal rights should be maintained by securing procedural guarantees for all people, on the one hand, and an anti-perfectionist neutrality with respect to moral goods on the other. As Robert Dahl has explained, liberal democracy at its heart is defined by a single principle: "all the members [of the *demos*] are to be treated (under the Constitution) as if they were equally qualified to participate in the process of making decisions about the policies the association will pursue."[42] In order for political equality to be sustained, Dahl asserted, a democratic process must incorporate the following criteria: effective participation (with all members having an equal chance to present their views), voting equality, enlightened understanding (with all members having opportunities to learn about the issues on which they are deliberating and voting), control of the agenda (such that policies on the agenda are malleable and always susceptible to change by any of the members), and adult inclusion (with all adult members having the full rights implied in the previous four criteria).[43]

Procedural democracy of the early twentieth century emerged as a reified set of relationships between the market, government, and civil society.[44] Of course, what had appeared natural to one generation proved troublesome to the next, and in the wake of the Great Depression a new democratic project hoped to discipline a truculent libertarianism. Having dispensed with grander visions in democratic experimentalism for Keynesian tax-and-transfer programs, leftists settled on a compromise that would eventually herald the arrival of the welfare state, and a rather different idea of what "equality" meant in democratic governance.[45] In contrast to the classic liberal conception, a "social" or "substantive" ideal developed that considered it a duty to affirmatively further the interests of disadvantaged groups and emphasized equality of outcome over procedural guarantees.[46]

Can Theocratic States Be Neutral?

Ultimately, it would seem that a theocratic form of constitutionalism, whether Islamic or otherwise, is not very plausible. Any political order that derives its authority from essentially nonpolitical sources—that is, God—is subject more to the whims of divine interpretation that it is limited by earthbound constraints on the use of government or state power.[47]

Comparativist scholars Daniel Franklin and Michael Baun thus believe "religious democracy" to be unworkable and, to be sure, they are hardly alone.[48]

How can religious authority possibly sustain the neutrality necessary to ensure the freedom of individuals to pursue their own ideas of the good life, when that religious authority—which is also the state—has strictly defined moral conceptions? Despite the seemingly unassailable logic in this critique, there are a few possible *prima facie* ways of challenging the complaint that Islamic Constitutionalism is an oxymoron.

One argument is empirical, and it refers to the growing number of constitutions in the Arab world: Islamic Constitutionalism is clearly plausible in that it is a project in progress, with lesser and greater degrees of success. A second avenue contests the limited vision in which Islam is viewed as a monolithic entity defined by its most outspoken "fundamentalists." This argument entails an acceptance of liberal neutrality and an attempt to fit Islam within liberalism's broad embrace.[49] Modern Islam, this view would suggest, embodies a tradition of pluralism and equality, and can easily find within its doctrinal basis the capacity for reasoned, non-capricious, rights-based judgments. There is no disputing the fact that Islam has a moral concept, but there is no reason to believe that such a concept would ineluctably lead to its imposition on members of the *demos*.

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A third argument questions the coherence of the neutrality principle in the first place. What barrier could neutrality realistically claim to have against Islam if neutrality turned out to be a sham? Liberal neutrality might be attacked from any number of directions, but two of them include the critical legal[50] and "culturalist" approaches.[51] Critical legal theory has for many years exposed liberal presuppositions in the law as decidedly status quo and far more subjectively ideological than objectively neutral. It is a liberal fantasy, such an argument posits, to believe that adjudication of the law and the act of legislation are distinct projects, the former strictly legal and the latter political. Laws are ideological and favor certain segments of society, as do the structures that purport to equally balance such laws between citizens and the state. Not only does the discourse or method of adjudication in a liberal society favor status quo ideologies, the very structure of form and process colors the substance of the law as well.

From a different direction comes the culturalist attack on liberal neutrality. This argument suggests that the liberal state has traditionally viewed culture in the same way that it has viewed religion-with benign neglect.[52] This is to say that the neutrality described above is taken further in the realm of religion, where liberal democracies do not only turn a blind eye, but actively enforce a strict separation of church and state. It follows that the liberal state would view culture in

the same way, refraining from promoting any one culture above another through legitimating processes, yet allowing for the free expression of all. In this way, the burden of proof in liberal theory falls with the religion, culture, or morality to show why it is that the neutral position of the state should be disturbed by preferential policies.

The culturalist argument asserts, however, that a diagnosis of actual policy in almost any liberal state will expose "this idea that liberal-democratic states are indifferent to ethnocultural identities [as] manifestly false...[and that] the religion model is altogether misleading as an account of the relationship between the liberal-democratic state and ethnocultural groups."[53] Liberal states intentionally and deliberately promote a "societal culture" of tightly interconnected policies and programs that inform citizens as to what language they need to speak and what institutions they are to serve if they are to successfully integrate.[54] Liberal "neutrality" thus collapses into a process of liberal nation-building: Liberal states de facto encourage citizens to view their chances of achieving the good life as intimately tied up with participation within the state's institutional framework and its practices.[55]

If it is true that theocratic democracy is unworkable because it is rooted in the caprice of divine interpretation, it would seem that one would have the burden of showing how this is meaningfully different from the caprice borne of nation-building. The reason divinity is attacked as arbitrary is that it presumably lies disconnected from the rule of law, neutrally positioned as an arbiter and adjudicator. If the nationalist and critical legal arguments are correct, however, liberal neutrality is a façade, masquerading for precisely the same type of capricious decision-making theocracies are accused of committing. It may be that this line of thinking leads to a "two wrongs don't make a right," and that very well may be. The point, however, is that Islamic Constitutionalism should not be dismissed for failing a standard that in all probability, no liberal democracy has ever met.

Equal Rights vs. Minority Rights

Moving from the more general and abstract relationship between liberal theory and Islam to the case of the Hazara, it is well worth knowing how the two fields view the rights with which minority groups should be endowed. As for liberalism, minority rights have had a hard time finding a place for at least three reasons. One is that minority rights appear to require rights that belong to groups, rather than individuals.[56] This violates the liberal premise that the individual is the primary unit of analysis. A second problem, perhaps related to the first, is that minority rights have not historically been very popular, only making their way to prominence in the 1990s.[57] A third problem is the one identified above, that the idea of minority rights conceivably poses a threat to the nation-building projects of liberal democracies.

Problems aside, doctrinally, minority rights should be distinguished from general civil liberties entrenched in documents like the Universal Declaration of Human Rights or the U.S. Bill of Rights. As a subcommission of the United Nations Economic and Social Council (UNESCO) explained, equal protection doctrine differs from minority rights in that the latter seeks:

> Protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.[58]

Where the melting pot has been replaced by the mosaic, minority rights seek to actively sustain the viability of separate national, cultural, religious, and linguistic traditions. This affirmative approach necessitates eschewing blind justice in favor of a discriminating justice and multicultural democracy, and it goes beyond a general integration norm. The goal in minority rights doctrine is not necessarily integration, but instead viability, sustainability, and autonomy.

There are a number of international and regional instruments dedicated to minority rights protection, and some appear more successfully situated than others. For present purposes, a glance at the United Nations Minorities Declaration and the Council of Europe's Framework Convention on Minority Rights will be sufficient to get a sense of what such rights generally look like.

The Minorities Declaration[59] consists of nine articles and stylistically follows the individualistic orientation in Article 27 of the International Covenant on Civil and Political Rights.[60] The Minorities Declaration underscores the importance of cultural, religious, and linguistic independence in Article 2, framing these rights in a positive way by using the phrase "have the right to" as opposed to "shall not be denied the right to." This elaboration goes on to spell out rights to effectively participate in cultural, religious, social, economic, and public life.[61] Article Three provides that the rights of minorities may be exercised individually as well as in community and that no disadvantage shall result from either their exercise or non-exercise. Article 4 places a number of substantive obligations on states, including the duty "to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions, and customs, except where specific practices are in violation of national law and contrary to international standards;" "to take adequate opportunities to learn their mother tongue or to have instruction in their mother tongue;" and "to consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country."

Articles 5, 6, and 7 deal with the obligation of states to plan and implement national policies and programs that will cater to the interests of minorities

and emphasize the need for international cooperation. Article 8 sets about placing the rights previously mentioned in their international context, providing that its exercise should not collide with the right to equality found in other instruments like the Universal Declaration or other duties articulated in various treaty obligations. Article 9 provides that the United Nations and its specialized agencies shall contribute towards "full realization" of the Minority Rights Declaration. The focal point for minority rights work at the United Nations is now the Working Group on Minorities, created by the Sub-Commission in 1995 to help in the implementation process of the Declaration.

A regional example of a minority rights instrument is the Council of Europe's Framework Convention on Minority Rights, adopted by its Committee of Ministers in 1995 and entered into force in 1998.[62] The Framework Convention had been in the works since 1949, the first year of the Council's existence, in which the Parliamentary Assembly recognized the importance of wider protection for minorities.[63] It was initially suggested that this protection take the form of an additional article in the European Convention on Human Rights that could focus on minority rights, but after years of discussion and delay, the Parliamentary Assembly assigned the task of drawing up a convention on minority rights to the Steering Committee on Human Rights in 1991.[64]

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The Framework Convention sets out a programmatic prescription for states that highlights, in a "spirit of good faith," a number of obligations that the drafters intended to appear more as a set of progressive goal-oriented objectives than negative prohibitions. The Convention underscores, *inter alia*, that the protection of minorities exceeds the powers of any one state and is a problem for international cooperation, the individualistic orientation of minority rights, the right of equality, and the right to equal protection before the law, in addition to the right to freedom of language, assembly, religion, transfrontier and intercultural dialogue, and education. Article 15 again addresses the question of political participation, asserting, "The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."[65]

Minority Rights in Islam

Unfortunately, it is no easy thing to describe "minority rights in Islam." The description cannot accurately begin at any one point, as the answer will depend on which Islamic voice the author finds most compelling. This panoply is partially a product of Islam's lack of a centralized ecclesiastical authority, and so there are many views within Islam as to the protections minorities should be afforded, none of which preeminate above the rest. Another problem involves the structure of Islamic law itself: the laws of the state spelling out the rights and duties of citizens necessarily involve the public law administration of the state, an area traditionally left by Islam to the ruler's discretion. This implicates the distinction between *fiqh* and *siyasa* (the principles and practices left to the discretionary and circumstantial powers of the ruler).[66] Of course, this discretionary power was meant to be rooted in Islam, and Islamic jurists have historically made attempts at expanding the zones of *fiqh* over *siyasa*.

In spite of these problems, this section will try to find the Islamic voice(s). As a threshold matter, there are two ways of thinking about minority rights in Islam in the abstract. The first is the extent to which Muslim minorities in non-Muslim states must follow Islamic law. This has long been a hotly contested question, dating back to the Middle Ages,[67] and involves the conceptual realm of *dar al-Islam* (the domain of Islam) and *dar al-harb* (a state ruled by non-Muslims) or *dar al-kufr*.[68] Muslims residing within *dar al-Islam* are obliged to live under Islamic law, both in its private and public manifestations. What happens, however, when a Muslim is living in *dar al-harb*?

The second way of thinking about minority rights in the Islamic context concerns Muslim majorities and the protections that Islamic law affords both sectarian and religious minorities living in a Muslim-majority state. While it may appear at first glance that these two perspectives are quite distinct, the complexities of the first invariably infect the way that Muslims have thought about the protections they can faithfully afford non-Muslims living in their own territories. After all, if Islam commands the legal supremacy of its own legal system, is there not the potential of a contradiction in allowing for a pluralistic vision of religious freedoms in an Islamic state?

The traditional view on minority rights tends toward answering this question in the affirmative, and typically begins by distinguishing between Muslims, People of the Book, and non-Muslims.[69] The People of the Book (*ahl al-kitab*) have scriptures, are monotheistic, and are typically understood as being the Jews and Christians. In the traditional understanding, Jews and Christians were obviously non-Muslim, and thereby non-believers. Their status as *dhimmis* (protected peoples), however, ensured the security of their person and property, their religious freedom to the extent that it did not violate the rules of the Muslim state, and a

degree of communal autonomy. These freedoms were provided in exchange for a poll-tax (*jizyh*), which signified a tribute by the *dhimmi* to the Muslim ruler. *Dhimmis* were prohibited from both holding leadership positions over Muslims and prosyletizing their faith. This latter issue makes sense considering the Islamic law of apostasy, which forbids any Muslim from recanting his beliefs.[70]

The upshot of these principles is a rights regime with very little leeway. Few protections are offered non-Muslims, especially those without scriptures, and as regards sectarian differences, the rules for determining the legitimacy of theological boundaries have been thin at best. Relatively speaking, medieval Islamic governance was often identifiable for its leniency with regard to ethnic, religious, and sectarian minorities. When Islam was introduced to India in the fourteenth century, for example, Hindus were regularly treated as *dhimmi* and, as long as they paid taxes to the Muslim sultanate, were allowed religious freedoms.[71] A pluralistic Islamic governance structure was the result, with various types of Muslim practice operating alongside Hindus, Jews, and Christians. This Mughal pluralism in India reached its peak under Akbar (1556-1605), who repealed all aspects of Islamic law discriminating against religious minorities. Not only did Akbar allow for Hindus to build new temples, but he also abrogated apostasy laws and the *jizyh*. This liberalism extended to the Shi'a as well, who were at the time experiencing heavy persecution by the Ottomans.[72]

The Ottoman Empire was also quite amenable to ethnic and religious minorities. As the empire included a vast number of such peoples, the Ottoman rulers implemented a pragmatic policy of self-government through their millet system, allowing for minority leaders to rule their communities in accordance with their own courts, laws, customs, and religious practices. As Antony Black has written, "Such ethnic and creedal diversity was a continuation of the 'tribal' policy of the first Ottomans" as well as the "Islamic emphasis on creed rather than race."[73] These allowances were largely political, however, and a function of running a multiethnic, multi-religious empire. This liberality was not all-inclusive: it did not include the Shi'a, who at that time dominated the hostile Safavid empire, and it did not protect ethnic and religious minorities when it was politically expedient to violate their rights. As Black notes, an example of deterrent punishment within the Ottoman Empire "was when, after the murder of a Muslim household, some 800 non-Muslim vagrants were rounded up and executed."[74]

In the modern era, the rights of Muslim sectarian minorities within Islamic states are protected more on the basis of country-specific decisions than strict universal rules of Islamic law. Pakistan, for example, has long experienced problems with both the Shi'a and Ahmadis.[75] Pakistan's Constitution does, however, have noteworthy language for the prospects of such sects:

> All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions. [Footnote 242 reads:] Explanation: *In the application of this clause to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by that sect.* (emphasis added)[76]

Pakistan thus allows for Shi'i *fiqh* to govern their personal legal matters. Other Islamic states dominated by Sunnis, like Oman,[77] Egypt,[78] and even Saudi Arabia,[79] are similarly agnostic on the question of whether particular sects should be constitutionally mandated. While the constitutions of these states are all Islamic, they refrain from specificity beyond that.

Despite this absence of codified treatment, there is, nonetheless, a great deal of de facto concern attending the plight of Muslim minorities in Muslim states.[80] A number of Islamic scholars have attempted to resurrect the pluralism extant within pre-modern Islamic systems as standing in contradistinction to what they perceive as the fundamentally un-Islamic Islamic fundamentalism of today. This would not mean, however, going back to a millet system of religious autonomies. Fathi Osman, for example, has argued that contemporary Islam is not only pluralistic in and of itself, but is also amenable to religious freedom in general. He writes, "Each group should have the rights to organize and develop, to maintain its identity and interests, and each should enjoy equality of rights and obligations in the state and in the world."[81] Abdullahi An-Naim has also written extensively on not only the need but also the propitiousness of realizing Islam's true perspective on equality and human rights.[82]

Does liberalism pose greater promise for minority rights than an Islamic perspective?

Does liberalism pose greater promise for minority rights than an Islamic perspective? From the preceding discussion it is clear enough that it is quite hard to say. One problem is that liberal states have a rough track record of their own with respect to minority rights, only having come to seriously consider the matter in the 1990s. The minority rights project is therefore a young one. Another problem is that, at least on the liberal culturalist view, liberal states are often directly threatening to minority cultures due to the latent and backgrounded promotion of certain languages, religions, and social mores. From the Islamic side, it appears that Islam might be considerate to minority needs, but the question very much turns on which brand of Islam a state happens to implement. Liberal democracies and Islamic states both have the wherewithal for minority rights protection, both theoretically and as a matter of practice. It boils down to a matter of political will.

CONCLUSION

The foregoing discussion has sought to highlight the contours of the debate on whether Islamic Constitutionalism is either at theoretical loggerheads or simply a bad idea when it comes to protecting minority groups. In the first case, it seems like a bad faith argument to insist that Islamic Constitutionalism cannot work because Islam, as a theological entity, by definition prescribes a moral code and thus cannot match the neutrality so important to liberal democracies. This seems an unfair criticism because Islam's relationship with pluralism is a work in progress, and at least in the view of some prominent Muslims, Islam is indeed capable of achieving a pluralistic state. It also may be a bad faith argument if one is persuaded by the claim that liberal neutrality has never worked in the first place. There also appears to be substantial room for argument as to whether Islamic Constitutionalism is a patently bad idea for minority rights. There are weighty traditions within Islam guaranteeing both religious and ethnic diversity, and while some Islamic strains have not proved as friendly as others, there is no lack of examples in "liberal" states of practices hostile to minority interests.

This article has also attempted to examine Islamic Constitutionalism in Afghanistan from the perspective of the Hazara. This has entailed a two-part analysis that has asked whether Islam can co-exist with a healthy democratic experimentalism despite its alleged inability to maintain neutral governance and a pluralistic politics safe for minorities. It began by first outlining the history of the Hazara in Afghanistan and the perennial difficulties they have faced because of their ethnicity and religion. Emerging from this background, the Hazara have fought for sectarian freedoms and affirmative action on the part of the state, which would develop their educational and vocational deficits.

On the sectarian side, the Hazara complaint is complicated by the fact that they are Muslims seeking religious freedom in a state where Islam is the official religion. The lines are muddied between the rights that would ordinarily inhere for non-Muslims, and the rights of minority Muslim sects against the Muslim majority. Ann Mayer has written:

> When a state imposes an ideologized version of Islam, Muslims who dissent from this version may be effectively relegated to a subcategory where they are exposed to discrimination similar to that meted out to non-Muslims and where they are subjected to mistreatment that may at times be even more severe, because the regime may feel directly threatened by their challenges to the official orthodoxy.[83]

Despite this, the 2004 Constitution may prove adequate insofar as the largely symbolic problem of rites language has been excised. The ethnic question,

however, received equivocal treatment, and where it is raised, it is done so in a manner that may damage minority rights. Taking Karzai's comments as illustrative of the general move away from an explicit multicultural governance scheme, it should be pointed out that emphases on civic unity have been tried and have failed in Afghanistan before. Further problems creep in as the liberal culturalist argument gathers force: will the central push towards an "Afghan nation" masquerade as a nation-building exercise in which the historically disadvantaged foot the bill? Thus, the Hazara may have gained ground with respect to religious rituals and the applicability of Shi'i law to familial matters, but, along with other minority groups, have failed to the extent that they have sought minority protections above the basic, liberal, individualist non-discrimination norm.

This deficiency has been targeted by practitioners who see in Afghanistan a conglomeration of tribes tied by bonds of kinship with highly segmented cultural allegiances. As explained above, a liberal focus on non-discrimination simply misses the mark when the structural problems of multiculturalism loom in the background, constantly threatening the stability of the system. There is hardly a better example than Afghanistan, perpetually poised for balkanization. ■

NOTES

1 Many thanks go to the members of and advisors to the Afghanistan Legal History Project at Harvard Law School.

2 See the text at <www.Constitution-afg.com/resrouces/Draft.Constitution.pdf> (accessed February 26, 2004).

3 U.S. Department of State International Information Programs, "Rumsfeld Calls Afghanistan Model of Success for Iraq," August 9, 2002, <http://usinfo.state.gov/topical/pol/terror/02080901.htm> (accessed February 2, 2004).

4 Afghanistan has adopted constitutions in 1923, 1964, 1976, 1987, 1990, and 2004.

5 See, e.g., Barnett Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System* (New Haven: Yale University Press, 2002); Olivier Roy, *Afghanistan: From Holy War to Civil War* (Princeton: Darwin Press, 1995).

6 See, e.g., International Crisis Group, "Afghanistan's Flawed Constitutional Process," June 12, 2003, <www.crisisweb.org//library/documents/report_archive/A401002_12062003.pdf> (accessed February 26, 2004). In testimony before Congress, Human Rights Watch reported on the new constitution, saying: "Afghanistan recently adopted a new Constitution. It is a solid framework for Afghanistan's future. It seeks to protect human rights. It shows how determined Afghans are to settle their problems with words instead of guns. But the institutions needed to protect the Afghan people's rights, including their right to religious freedom, are still weak. And the Constitution does not adequately address the role of Islamic law, and its relationship to human rights protections. The Constitution will be interpreted by the Afghan Supreme Court. And there are powerful factions in Kabul who, if given the chance, may try to stack the Court with justices who will implement conservative interpretations of Islam that are rejected by the majority of Afghans and that may violate human rights." Human Rights Watch, "Status of International Religious Freedom: An Analysis of the State Department's 2003 Annual Report," February 10, 2004, <http://hrw.org/english/docs/2004/02/17/uzbeki7481.htm> (accessed February 26, 2004).

7 Nassim Jawad, *Afghanistan, A Nation of Minorities* (London: Minority Rights Group, 1992).

8 J. Alexander Thier argues that Afghanistan has never really met the international legal standards for "statehood" and, until the international community recognizes this deficit, responsibilities will be placed on Afghan leaders that they will have little chance of fulfilling. See J. Alexander Thier, "Afghanistan: Minority Rights and Autonomy in a Multi-Ethnic Failed State," *Stanford Journal of International Law* 35 (1999): 351.

9 These statistics have been compiled by the U.S. Department of State, <www.state.gov/r/pa/ei/bgn/5380.htm> (accessed February 26, 2004). It should be emphasized that all statistics on population in Afghanistan are highly controversial due to the lapse of time since a reliable census.

10 See, e.g., Thomas Barfield, *The Central Asian Arabs of Afghanistan: Pastoral Nomadism in Transition* (Austin: University of Texas Press, 1981); and Frederik Barth, "Pathan Identity and Its Maintenance," in Frederik Barth, ed., *Ethnic Groups and Boundaries* (London: Brown, 1969).

11 It is not uncommon, though it is quite contentious, for "Afghan" to function synonymously for "Pashtun." With this in mind, "national solidarity" in Afghanistan becomes especially complex. See Hafizullah Emadi, "The Hazara and their role in the process of political transformation in Afghanistan," *Central Asian Survey* 16 (3) (1997); and Sayed Askar Mousavi, *The Hazaras of Afghanistan* (New York: St. Martin's Press, 1998). Mousavi argues that Afghan nationalism has provided powerful means for discriminating against Afghanistan's smaller minorities. This is actually a quite common characteristic of nationalist movements, where the culture, style, and language of the dominant group is passed off as the national culture, style, and language.

12 Smaller in size and significance than other complimentary ethnicities, there is nonetheless a Hazara minority in the Pakistani town of Quetta.

13 The name "Hazara" itself is generally understood to come from the Persian "hazar" which means one thousand.

14 Most writers dealing with the Hazaras' ethnic origins seem to agree that the stories of Genghis Khan's armies having given rise to the current population are exaggerated at best, fallacious at worst. See Mousavi, 19-37, for what is probably the best available discussion of the alternative explanations for the Hazaras' origins.

15 A central difference between Shi'i and Sunni brands of Islam is their perspectives on succession. Whereas Shi'a believe that Muhammad's rightful successors were his son-in-law, Ali, and his descendants, Sunni look to the leadership of the caliphs, beginning with Abu Bakr, as the legitimate line of succession. Despite this fundamental theological divergence, there are few practical differences between the implementation of Sunni and Shi'i jurisprudence. For further information on this division, see Moojan Momen, *An Introduction to Shii Islam* (New Haven: Yale University Press, 1985). For background on jurisprudential differences between the schools, see Muhammad Baqir as-Sadr, *Lessons in Islamic Jurisprudence* (Oxford: Oneworld, 2003); and Hossein Modarressi, *An Introduction to Shii Law* (London: Ithaca Press, 1984).

16 Mousavi, 34-35.

17 Human Rights Watch, "Afghanistan: Massacres of Hazaras," <http://www.hrw.org/reports/2001/afghanistan/index.htm> (accessed February 26, 2004).

18 See Hasan Kakar, *Government and Society in Afghanistan* (Austin: University of Texas Press, 1979); and Pierre Centlivres and Micheline Centlivres-Demont, "State, National Awareness, and Levels of Identity in Afghanistan from Monarchy to Islamic State," *Central Asian Survey* 19 (1) (March 2000): 419-428.

19 They were "traditionally independent" in that the Hazaras, situated in the center of the country among the harsh and geographically isolated highlands of the Hazarajat, had built a sturdy reputation as aggressive and hostile, both as raiders and fighters. Rivalries were so deep that non-Hazara would not venture through the Hazarajat alone, for fear of ambush. These fears were also nourished by a long-standing feeling that the Hazaras had been foreign agents, acting under orders from religious and political authorities outside of Afghanistan. For all the trouble the Hazaras would later experience, it would be misleading to suggest they had been wholly innocent themselves and exempt from their share of malevolence. See Olaf Caroe, *The Pathans* (New York: St. Martin's Press, 1958).

20 Canfield, 2.

21 For a detailed analysis of Rahman's policy on the Hazara, see Hassan Poladi, *The Hazaras, 182-235* (Stockton: Mughal, 1989); Harpviken, 32; and Thier, 376-377.

22 Canfield, 4.

23 Asta Olesen, *Islam and Politics in Afghanistan* (Richmond, Surrey, UK: Curzon, 1995), 78.

24 See, e.g., Arnold Fletcher, *Afghanistan: Highway of Conquest* (Ithaca: Cornell University Press, 1965), 148-159; and Percy Sykes, *A History of Afghanistan* (London: Macmillan, 1940), 192.

25 Kristian Berg Harpviken, *Political Mobilization Among the Hazara of Afghanistan: 1978-1992* (Oslo: University of Oslo, 1996); and Robert Canfield, "Hazara Integration into the Afghan Nation, Some Changing Relations Between Hazara and Afghan Officials," *Occasional Paper, no. 3* (New York: Afghanistan Council of the Asia Society, 1970).

26 Thier, 375.

27 Roy, 93-94. For an examination of the humanitarian implications of the Hazara situation, see Iesha Singh, "Exploring Issues of Violence within the recent context of the Hazarajat, Afghanistan," *Central Asian Survey* 20 (2) (June 2001), 195.

28 State-sponsored religious rites are typically tied to the beginning and ending of festivals, and in this sense, do not appear especially intrusive as a matter of personal belief. Examples of such rites are the dates which set the bounds of the month of Ramadan, as well as the annual pilgrimage festival to Mecca. Hanafi rituals also come into play with army codes for prayer, where individuals are obliged to genuflect with hands held at their waists, as opposed to down at their sides as Shi'a would have them. For further discussion on distinctions between schools and their rituals, see Arthur Gribetz, *Strange Bedfellows: Mut'at al-nisa' and Mut'at al-hajj* (Berlin: K. Schwartz, 1994).

29 Amin Tarzi, *The Judicial State: Evolution and Centralization in Afghanistan* (2003), Dissertation on reserve with the Islamic Legal Studies Program, Harvard Law School; and Mohammad Kamali, *Law in Afghanistan* (Leiden: E.J. Brill, 1985).

30 Afghanistan Constitution of 2004, Article 2.

31 Ibid., Article 1.

32 The nation of Afghanistan is comprised of the following ethnic groups: Pashtun, Tajik, Hazara, Uzbek, Turkman, Baluch, Pashai, Nuristani, Aymaq, Arab, Qirghiz, Qizilbash, Gujur, Brahwui and others.

33 For a discussion on ethnic and civic forms of nationalism, see Anthony Smith, *National Identity* (Reno: University of Nevada Press, 1984).

34 See <www.hipakistan.com/en/detail.php?newsId=en50169&F_catID=&f_type=source> (accessed Feburary 26, 2004).

35 The typical issues are discussed, for example, in Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder: Westview Press, 1999); Lawyers Committee for Human Rights, *Islam and Equality*(1999); Fatema Mernissi, *Islam and Democracy: Fear of the Modern World* (Cambridge: Perseus Publishing, 2002); and John Esposito, *Islam and Democracy* (New York: Oxford University Press, 1996). Cf. Harvard program on Humanitarian Policy and Conflict Research, "Human Rights and Rule of Law: Constitutional and Legal Reform," September 2003, <www.preventconflict.org/portal/centralasia/AIHRC_Roundtable.pdf> (accessed February 26, 2004).

36 See generally, John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988); and Immanuel Kant, *Groundwork of the Metaphysics of Morals* (New Haven: Yale University Press, 2002).

37 John Stuart Mill, *On Liberty* (New Haven: Yale University Press, 2003); and John Stuart Mill, *Utilitarianism* (Oxford: Oxford University Press, 1998). More recent articulations of this principle have been John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972); Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977); and Michael Waltzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Oxford: Blackwell, 1983). The masculine pronoun is not intended to be gender-neutral, as it was historically the case that these privileges applied to white, property-holding men. This notion clearly invokes the idea of the invisible hand. See Adam Smith, *An Inquiry into the Nature and Cause of the Wealth of Nations* (New York: Modern Library, 1994).

38 See, e.g., Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1) (1959).

39 See Friederich Hayek, *The Constitution of Liberty* (Chicago: Regnery, 1960). This is evidenced by what is commonly called the Lochner era in American Constitutional legal history. See, e.g., Cass Sunstein, "Lochner's Legacy," *Columbia Law Review* 87 (873) (1987), 873-919.

40 Arthur Okun, *Equality and Efficiency, the Big Tradeoff* (Washington: Brookings, 1975).

41 For a critique, see Michael Sandel, *Democracy and Its Discontents* (Cambridge: Harvard University Press, 1996).

42 Robert Dahl, *On Democracy* (New Haven: Yale University Press, 1998), 37.

43 Ibid, 37-43.

44 See Roberto Unger, *What Should Legal Analysis Become?* (London: Verso, 1996).

45 See Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1944); and John Ruggie, *Constructing the World Polity* (London: Routledge, 1998).

46 In international law, this division is clearly visible with the separation of the two covenants on human rights: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The division also tracks legal analysis in which substantive due process clashes with procedural due process.

47 Daniel P. Franklin & Michael J. Baun, eds., *Political Culture and Constitutionalism: A Comparative Approach* (Armonk: M.E. Sharpe, 1995).

48 See, e.g., Noah Feldman, *After Jihad: America and the Struggle for Islamic Democracy* (New York: Farrar, Straus and Giroux, 2003).

49 Among the most prominent of such scholars is Abdulahi Ahmed An-Naim. See Abdulahi Ahmed An-Naim, *Toward an Islamic Reformation* (Syracuse: Syracuse University Press, 1990).

50 See, e.g., Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review* 89 (1976): 1685; Mark Tushnet, "Critical Legal Studies and Constitutional Law: An Essay in Deconstruction," *Stanford Law Review* 36 (1984): 623; David Kairys, *The Politics of Law: A Progressive Critique* (New York: Basic Books, 1998).

51 This formulation draws explicitly on Will Kymlicka's argument on multiculturalism and minority rights in his *Contemporary Political Philosophy* (Oxford, Oxford University Press, 2002) and *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995). Multicultural critiques are also found in Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); and Amy Guttmann, ed., *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1992).

52 Kymlicka, 343-347.

53 Ibid., 345.

54 Ibid., 346. This could also be phrased to say that liberal states engage in nation-building. For more on this, see Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993); and David Miller, *On Nationality* (Oxford: Oxford University Press, 1995).

55 Ibid., 348.

56 The distinction between group and individual rights is explored, e.g., in Peter Jones, "Human Rights, Group Rights, and People's Rights" *Human Rights Quarterly* 2 (1) (1999): 80-107; Peter Jones, "Group Rights and Group Oppression" *Journal of Political Philosophy* 7 (4) (1999): 353-377; Will Kymlicka, *supra*; and Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press 1986).

57 For a history, see Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination* (Philadelphia: University of Pennsylvania Press, 1990); and Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (United Nations, 1991), 35. Caportoti describes some of the problems: "In the system of protection of minorities established in 1919-1920, rights were accorded to individuals only. The theory of an international personality of minorities developed later...but the treaties and other international instruments relating to minorities were concerned expressly with individual rights...The second reason was the need for a coherent formulation of the various provisions of [the Covenants]. The only right of collective bodies is the right of peoples to self-determination. But this is an entirely different matter from the rights of members of minorities...Lastly, there is a political reason. The fact of granting rights to minorities and thus endowing them with legal status might increase the danger of friction between them and the state, in so far as the minority group, as an entity, would seem to be invested with authority to represent interests of a particular community vis-à-vis the state representing the interests of the entire population."

58 UN Doc E/CN.4/52, Section V.

59 For the text, see "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities," *United Nations Office of the High Commissioner for Human Rights* <http://www.unhchr.ch/html/menu3/b/d_minori.htm> (accessed February 26, 2004).

60 The text of the ICCPR's Article 27 reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." For a discussion of the evolution of Article 27, see Patrick Thornberry, *International Law and the Rights of Minorities* (New York: Oxford University Press; 1991), 39-53.

61 For a thorough treatment of the question of minority rights to political participation, see Kymlicka, *Contemporary Political Philosophy*, 348-365; Frank Horn, ed., *Minorities and Their Right of Political Participation* (Rovaniemi: Northern Institute for Environmental and Minority Law, 1996); and Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995).

62 For the text, see "Text of the Framework Convention for the Protection of National Minorities," *Council of Europe*, <http://www.coe.int/T/E/human_rights/Minorities/2._FRAMEWORK_CONVENTION_(MONITORING)/1._Texts/default.asp#TopOfPage> (accessed February 26, 2004).

63 Council of Europe website on minorities, Explanatory Report, <http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/Explanatory%20report/explreport.htm> (accessed November 4, 2004).

64 Ibid. The Preamble of the Framework Convention announces the document's mission: "Considering that the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent; Considering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity; Considering that the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society; Considering that the realisation of a tolerant and prosperous Europe does not depend solely on co-operation between States but also requires transfrontier co-operation between local and regional authorities without prejudice to the Constitution and territorial integrity of each State...Have agreed as follows..."

65 Ibid.

66 For an overview, see Sherman Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qirafi* (New York: E.J. Brill, 1996).

67 See Khlaid Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eight to the Eleventh/Seventeenth Centuries," *Islamic Law and Society* 1 (1994).

68 See El Fadl, ibid, for an overview of these terms. See also Tamara Sonn, *Islam and the Question of Minorities* (Atlanta: Scholars Press, 1996) for an analysis of Muslim minority rights issues in non-Muslim majority states.

69 Abdullahi An-Naim, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," *Human Rights Quarterly* 9 (1987). See also Majid Khadduri, *Islamic Jurisprudence: Shafi'i's Risala* (1961); C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (New York: St. Martin's Press, 1988); and Charles Butterworth and I. William Zartman, eds., *Between the State and Islam* (2001).

70 An-Naim explores the issue of apostasy in his article, "The Islamic Law of Apostasy in Its Modern Application: A Case from the Sudan," *Religion* 16 (1986).

71 The status of Hindus in Islamic Law was far from settled. For a discussion of the issue, see Aziz Ahmad, "Trends in the Political Thought of Medieval Muslim India," *SI* 17.

72 Whether these reforms went so far as to no longer be legitimately called Islamic is a question beyond the scope of this paper.

73 Antony Black, *The History of Islamic Political Thought: From the Prophet to the Present* (New York : Routledge, 2001), 209.

74 Ibid., 211.

75 For a discussion of the Pakistani case, see Andreas Rieck, "The Struggle for Equal Rights as a Minority: Shia Communal Organizations in Pakistan, 1948-1968," in Rainner Brunner and Werner Ende, eds., *The Twelver Shia in Modern Times* (Leiden: Brill Academic Publishers, 2001); and Musa Khan Jalalzai, *The Sunni-Shia Conflict in Pakistan* (1998). For the Ahmadi case, see Amjad Mahmood Khan, "Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations," *Harvard Human Rights Journal* 16 (2003): 217.

76 Article 227, Constitution of the Islamic Republic of Pakistan, <http://www.pakistani.org/pakistan/Constitution/> (accessed February 26, 2004).

77 Oman's Article 2 states that Islam is the official religion of the state, and that the *shari'a* will serve as the basis of legislation. Article 28 allows for people to use their own religious customs as long as they do not violate genral principles of Islamic law, but not any particular madhaab. "Oman's 1996 Constitution," *International Constitutional Law Project Information*, <http://www.oefre.unibe.ch/law/icl/mu00000_.html> (accessed November 5, 2004).

78 Egypt's Article 2 simply states that the shari'a shall be the principal source of legislation, but makes no reference to sects of madhaab. "The Constitution of the Arab Republic of Egypt," <http://www.uam.es/otroscentros/medina/egypt/egypolcon.htm> (accessed November 5, 2004).

79 Saudi Arabia's Article 8 states that its law will be in accordance with the Islamic *shari'a*, but without reference to sects or madhaab. "Saudia Arabia's 1992 Constitution," *International Constitutional Law Project Information*, <http://www.oefre.unibe.ch/law/icl/sa00000_.html#C001_> (accessed November 5, 2004).

80 Mayer, 141-174.

81 Mohamad Faithi Osman, *The Children of Adam: An Islamic Perspective on Pluralism* (Washington: Center for Muslim Christian Understanding Occasional Paper Series, Georgetown University), 1-2.

82 Abdullahi An-Naim and Francis M. Deng, eds., *Toward An Islamic Reformation; Human Rights in Africa: Cross-Cultural Perspectives* (Washington: The Brookings Institution, 1990).

83 Mayer, 142.