

MEMORANDUM

TO: BEVERLY HILLS BAR ASSOCIATION
FROM: Kenneth G. Petrusis
DATE: January 12, 2010
RE: Bar Brief Article/Natural Law and the Iraqi Constitution

Recently, I took a trip to Sacramento with the Bench Bar Coalition to lobby on behalf of increased judicial appointments and court funding. Subsequently, I have begun a dialog with an assemblyman, whom I lobbied. We are discussing the relative merits of the Rule of Law as opposed to what is referred to as "Natural Law" which equates to religious moral values. From the legislator's point of view, this is an important question. The Rule of law requires that laws be fair. Does this mean reasonable or does it mean complying with some higher, Natural Law?

Our Constitution separates religion and state. A contrast is seen in the Iraqi Constitution now being proposed. It chooses the Natural Law (Islamic Law as determined by clerics) approach. Natural Law invokes a constant, superior law, while the Rule of Law invokes fairness and reason, within the limits of our Constitution. Instead of the process which is the Rule of Law, a set of natural laws is postulated which are determined by clerics and obeyed. Basing the Iraqi Constitution on Islamic Law relegates Iraq law to the vagaries of the disputes between clerics. Were we to make our Constitution subject to Natural Law, we would face the same fate.

The Natural Law approach features obedience to a religious decision, placing in the hands of clerics the ultimate decisions of what is right or wrong. When does life begin, when does it end, what are the rights of women? Natural Law, as a fixed set of laws, once announced by clerics resists change because they are seen as immutable. These laws and decisions will change, if at all, only very slowly. Clerics nevertheless debate these issues and then provide answers which their followers must obey. This is in contrast to the Rule of Law model which leaves everyone free to agree or disagree with a

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court's or a legislature's answers to these questions.

The Rule of Law allows for an ever evolving response to these questions to meet changing circumstances or simply to improve upon itself. The Rule of Law as a process, does and will make mistakes. It is also agreeable to change when the circumstances present themselves. Over time, if there is sufficient independence from pressure groups, those mistakes are, hopefully, corrected.

While we might initially comfort ourselves by seeing the problems of a religious state in Iraq and then dismissing the possibility in the United States, it would be wrong. Women's rights are one example of how wrong it could be. While we openly fear for women's rights in Iraq, our Constitution, secular as it might be, did not adequately provide for women's rights or even give them the right to vote. The process of the Rule of Law and at least one amendment to our Constitution glacially move us closer to women's equality under the law. Still, Natural Law, with frequency, declares women to be subservient and to be unqualified to be leaders in their religion. Some religions will differ on these issues. If Constitutional law is expected be consistent with Natural Law, how does a court choose which competing view to adopt? Do we outright adopt Judeo Christian moral pronouncement and reject conflicting pronouncements for the Hindus, Buddhists and Muslims? Our right of freedom of religion means not having to choose and being able to rely the process of the Rule of Law as applied to the Constitution.

The obedience aspect of the Natural Law approach is particularly destructive. It fosters obedience as morality. Dissenters become immoral. Suggesting that one set of clerics has the correct answer to a moral question sets the stage for a battle between right and wrong. We see the extreme in Iraq with the obedient committing suicide and killing

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others with themselves all in the name of a moral right. We, including most Muslims, see this as morally wrong.

This differs only in degree from a declaration that life must begin at conception and that killing an abortion clinic worker is a moral act because it is in defense of life. The abortion clinic worker, operating within the moral framework of our Constitution, is railed at by religious leaders as a murderer. While most condemn such killing, a significant minority would say they understand it. There are websites and databases that facilitate it. How is this grounded in Natural Law when we know that, over the centuries, views have changed? Noted religious scholars, including St. Augustine, have disagreed. Yet instead of an acknowledgment of differing opinions, Natural Law proponents see a violation of morals to be denounced.

Our Constitution guarantees freedom of religion and with it the right to develop our own personal morality, subject to the law. It is not a perfect document. There have been 32 amendments over the years. Not all of them were successful. Despite the need for amendment from time to time, we all agree that the limit of our courts, our laws and our conduct is our Constitution. If the Iraqi constitution is made subject to Islamic law, the Iraqis will find themselves embroiled in a fight over the very content of their constitution. We should not support it for the Iraqis nor should we invite such a fate for ourselves. Having established our freedom of religion the Constitution, not Natural Law, must be allowed to stand, as it has for the last 230 years, as the boundary and definition of our national mores.

KGP/ct

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