

OKLAHOMA LAW REVIEW

VOLUME 58

SPRING 2005

NUMBER 1

THE DEMOCRATIC FATWA: ISLAM AND DEMOCRACY IN THE REALM OF CONSTITUTIONAL POLITICS

NOAH FELDMAN*

The relation between Islam and democracy has become one of the great political questions of our age. But it is also a *legal* question, legal in the sense that Muslim scholars have addressed it from the perspective of Islamic law, and legal, too, in the sense that practical debates about it often take place in the context of constitutional drafting and negotiation. The purpose of this short essay is to consider one enormously influential, practically significant legal document touching on this great question: the constitutional fatwa of Ayatollah ‘Ali Sistani, who is today a household name but was, before the late summer of 2003, almost unknown outside the circle of Shi‘i clerics and those who study them.¹

Begin with a remarkable, little-noticed fact. Notwithstanding widespread skepticism about whether they could accept democratic practices and institutions, Iraq’s Shi‘i clerics who, in the pre-election period, spoke almost exclusively for Iraq’s Shi‘i Muslims, were from the fall of Saddam the loudest voices in the country calling for electoral democracy.² Most disclaimed an interest in running the country along the lines of what they called the failed Iranian model; but of course, as leaders of a majority, they called for elections

* Professor of Law, New York University School of Law. A.B., Harvard University, 1992; D. Phil., Oxford University, 1994; J.D., Yale Law School, 1997. This lecture was delivered on February 20, 2004 as the 2003-2004 Henry Lecture. Subsequently, parts were incorporated in NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* (2004) and are published here with the permission of Princeton University Press.

1. See, e.g., ROY MOTTAHEDEH, *THE MANTLE OF THE PROPHET: RELIGION AND POLITICS IN IRAN* (2000); YITZHAK NAKASH, *THE SHI‘IS OF IRAQ* (1995).

2. Cf. NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* (2004).

to ensure that the Shi'a would not be marginalized as they had been throughout Iraqi political history. The Shi'i politicians who seem to have been most politically successful are Islamic democrats, men like Ibrahim Ja'fari of the Islamic Da'wa Party, who profess the compatibility of Islam and democratic rights and values. They did not call for theocracy, but for a limited constitutional government that would protect individual rights and tolerate religious difference. Whether in office they will make good on these promises cannot be guaranteed; but as much might be said of any politician in a new democracy whose institutions are not yet firmly established.³

Ayatollah 'Ali Sistani emerged as the most prominent spokesman for electoral democracy in Iraq; and a glance at how he went from being a respected cleric — known mostly for his view that mullahs should not intervene in politics — to a sophisticated player conducting, in essence, multilateral negotiations between himself, the Secretary General of the United Nations, and the President of the United States, should reveal something about the prospects for democracy in Iraq. His strategy from the outset was one of caution. With just two or three extremely well-timed, carefully framed public statements in a period of six months, he created the impression of capturing the allegiance of millions of Shi'a, and as a result managed to become a figure whom no one could afford to ignore, and who played the most significant individual role in Iraqi politics during the period of occupation.

When Saddam fell, Sistani was first among equals in the leadership of the *hawza* of Najaf, a kind of commission of roughly a thousand Shi'i clerics who gain their authority over the community's religious affairs through advanced Islamic legal study and personal piety. There is no obvious or easy analogy for the *hawza*, which lacks the wealth or global reach of the Holy See; but perhaps it could be said that the *hawza* is a mix between the Roman curia and a distinguished faculty of arts and sciences in a major research university. Najaf competes with Qom for influence in the Shi'a world, and the status of the thousand-year-old *hawza* of Najaf is closely connected to this competition.⁴

Advancement within the clerical hierarchy is not based on constituencies that are easily transferable into broader political power. If it were, it would have been very difficult for Sistani, an Iranian by birth, to reach its apex. Sistani's Persian-accented Arabic was not suitable for rousing Iraqi audiences — and let us recall that Iraq's Shi'is fought for Iraq, not Iran, during the bitter war

3. Hamilton's disclaimers of dominant presidential power in the Federalist papers come to mind. See, e.g., JOHN LAMBERTON HARPER, *AMERICAN MACHIAVELLI: ALEXANDER HAMILTON AND THE ORIGINS OF U.S. FOREIGN POLICY* (2004).

4. The importance of the *hawza* of Qom is far more recent, dating only to the 1920s and the arrival of Abd al-Karim Ha'eri of Yazd. See MOTTAHEDEH, *supra* note 1, at 228-29.

between the two countries. Nor was Sistani exceptional in being a foreigner who rose within the *hawza*: of the four senior members at the time Saddam fell, there was also an Afghani and a Pakistani. So while the *hawza* certainly has its own complex internal politics, which exist in some relation to the broader Shi'a community, Sistani's political experience was not of the national or international variety. The only politics with which he had any experience was the small-group variety, in which representativeness counted for little, but intelligence, judgment, and getting things right counted for a lot.

Acting through intermediaries, the United States after toppling Saddam initially sought a statement from Sistani calling for cooperation with occupation forces. Sistani declined even to meet with U.S. officials, citing his traditional practice and widely recognized view that clerics should stay out of politics. He made it clear, however, that he also would not condemn the occupation. For a man who had survived Saddam's régime — more activist Shi'i clerics had not — this was simply prudence and a continuation of his previous strategy. It is possible that Sistani read the American request as a sign that Shi'a power was going to grow under U.S. occupation. Certainly Saddam had never demanded or asked for Sistani's blessing; doing so would have implicitly acknowledged some need for legitimation from outside the state structure, a sure sign of political weakness. But in any case, Sistani cautiously adopted a strategy of wait-and-see, and the Americans had to be satisfied with that, even though it fell short of the endorsement they sought.

At the same time he was declining to take a stand on national politics, Sistani had to fend off challenges to the authority of the *hawza* coming from two different directions. The more serious threat, from Sistani's perspective, came from Ayatollah Muhammad Bakr al-Hakim, who had spent the previous decade in Iran as the leader of an exiled political organization with the threatening name of Supreme Council for Islamic Revolution in Iraq (SCIRI), often referred to by the first word of its Arabic name as "the *majlis*," meaning council. The *majlis* was an Iranian creation with its own militia, the Badr Brigades, some 10,000 strong.⁵ Muhammad Bakr al-Hakim was a certified scholar, an ayatollah himself, even if not quite in Sistani's league. But he was primarily a professional politician, which Sistani assuredly was not. Bakr al-Hakim was tempered by the long experience of seeking support in the backrooms of Iranian politics, an environment of mind-boggling complexity where the mullahs and the government were profoundly interlocked, and Iraqi affairs were pieces in a game that would make chess look simple.⁶

5. See Nicholas Blanford, *Iraqi Force Elicits Hope – And Fear*, CHRISTIAN SCI. MONITOR, Dec. 9, 2003 (estimating militia membership).

6. It is sometimes said that Bakr al-Hakim was affiliated with the reformist wing of the

In May 2003, Bakr al-Hakim staged a triumphant return to Iraq and thousands of Shi'a turned out to escort him from the border to the holy cities of Najaf and Karbala. The *majlis* had been active in exile politics and in close contact with the United States. After some hesitation, the *majlis* chose to join the Governing Council, cementing those relations further and presenting itself to the Coalition as the true representative of Iraqi Shi'a. Simply by returning home, Bakr al-Hakim bid fair to become the major clerical figure in the country.

Sistani avoided direct confrontation. His supporters quietly emphasized the superiority of his scholarship and his apolitical stance. Then in August 2003 Bakr al-Hakim was assassinated by a car bomb as he left the shrine of Imam 'Ali in Najaf.⁷ The attack seemed to have come from Sunni quarters — it was unlikely that Shi'a would have profaned the holiest spot for their denomination, killing as many as one hundred bystanders in the process.⁸ Bakr al-Hakim's death left his academically undistinguished younger brother, 'Abdul 'Aziz, as the head of the *majlis*, and thereby effectively removed the *majlis* as a threat to Sistani's authority. 'Abdul 'Aziz, who was not an ayatollah himself, had to defer to Sistani to maintain clerical legitimacy. Sistani's political prominence, then, was in part accidental; he might never have gained the influence that he did if Ayatollah Muhammad Bakr al-Hakim had remained alive.

That left only the young mullah Muqtada al-Sadr to challenge the *hawza*. To Western eyes, Muqtada was a revolutionary straight from central casting. Son of the martyred Grand Ayatollah whom Sistani had succeeded, he called loudly for clerical rule on the Iranian model, and very quickly became popular in the poorest Shi'a slums of Baghdad. Just thirty-two himself, and surrounded by a group of angry and ambitious young clerics, Muqtada aimed to put the fear of God into the local population by spreading the warning that women without head scarves, sellers of alcohol, and cinema operators would be severely punished by vigilantes. Muqtada denounced the occupation from its outset, and even went so far at one point as to announce, rather optimistically, the creation of his own government.

Despite growing concern about Muqtada within the Coalition Provisional Authority (CPA), Sistani remained unfazed, adopting a strategy of ignoring the

Iranian clerical hierarchy and with President Mohammed Khatami. Bakr al-Hakim, however, was skilled enough as a politician to broaden his support beyond this reformist base.

7. See Neil MacFarquhar & Richard A. Opiel Jr., *Attack at Shrine: Car Bomb in Iraq Kills 95 at Shiite Mosque*, N.Y. TIMES, Aug. 30, 2003, at A1.

8. Thus even al-Qa'ida, which considers Shi'i Muslims as unbelievers, disclaimed responsibility for the March 2004 bombings of Shi'a shrines in Kadhimiyya and Karbala on the holiday of 'Ashura. Al-Qa'ida is always attuned to its Arab and Muslim audiences, who are less prepared to tolerate attacks on praying Muslims of whatever denomination.

upstart while emphasizing to his own community that Shi'a clerical authority could be exercised only by permission of the *hawza*. When Muqtada's followers tried to set up their own courts in the chaos of the postwar months, Sistani's supporters spread the word to the Shi'a community that these were unauthorized and illegitimate. This was a classic defense by institutional authority against incipient charismatic appeal.⁹

Sistani's strategy worked — and for a time, the CPA played along, declining to arrest Muqtada despite his provocations. By autumn 2003, Muqtada seemed to have faded. His resurgence in spring 2004 was largely a product of the botched CPA attempt to close his newspaper and arrest him, both of which reestablished his fading credibility.¹⁰ His small militia enhanced its prestige by a series of takeovers of police stations and municipal buildings in southern Iraq. This mini-insurgency required Sistani, working through intermediaries, to undertake to negotiate their withdrawal, which could only be accomplished at the cost of giving some recognition to Muqtada; despite this, Sistani remained the more important power player. In autumn 2004 the entire episode was to be replayed after Muqtada's militia, the Mahdi Army, occupied the Shrine of Imam 'Ali in Najaf; once again, Sistani's intervention would be instrumental in negotiating their withdrawal.

Sistani's first and critical political move, though, had come earlier in the summer of 2003. In a one-paragraph fatwa, he reacted to reports, which turned out to be accurate, that the CPA planned for the Iraqi constitution to be drafted by a constitutional drafting body, chosen by a selection process and not by direct elections. The fatwa — the equivalent of an opinion letter in contemporary U.S. legal terms — deserves quotation in full. The English text reads, in Sistani's approved translation:

9. Muqtada occasionally sought to deepen his institutional position by claiming the support of Ayatollah Kazem Husayn al-Ha'eri, resident during the occupation and for the years before it in Qom. Ha'eri had studied with Muqtada's late father, and himself had pretensions to clerical authority in Iraq; his relationship to Muqtada was therefore itself complex.

10. See Robert Collier, *U.S. Risks Turning Shiite Cleric into Contender: No Good Alternatives in Dealing with Firebrand al-Sadr or His Army*, S.F. CHRON., Apr. 12, 2004, at A11 (discussing Muqtada's popularity).

In the Name of The Almighty

Those forces have no jurisdiction whatsoever to appoint members of the Constitution preparation assembly. Also there is no guarantee either that this assembly will prepare a constitution that serves the best interests of the Iraqi people or express their national identity whose backbone is sound Islamic religion and noble social values. The said plan is unacceptable from the outset. First of all there must be a general election so that every Iraqi citizen — who is eligible to vote — can choose someone to represent him in a foundational Constitution preparation assembly. Then the drafted Constitution can be put to a referendum. All believers must insist on the accomplishment of this crucial matter and contribute to achieving it in the best way possible.

May Allah The Blessed Almighty, guide everyone to that which is good and beneficial.

Wassalamu alaikum warahmatullah wabarakatuh

(Peace and Allah's love and blessings be upon you)

Signed & Sealed

Ali Al-Hussaini Al-Seestani

25 Rabiul-Akhar 1424

26 June 2003¹¹

The fatwa was pure democratic theory, with nary a reference to Islamic legal texts. Sistani was exercising the distinctive authority of the Shi'i jurispude to formulate a legal argument based on the exercise of his own reason. It said simply that "those forces" — the Coalition, named by a circumlocution — had no authority to write a constitution for Iraq. According to the document, there must be elections for the constitution-drafting body, so that the constitution would reflect the social values and religious beliefs of the Iraqi people. Couched thus generally, the fatwa was designed to appeal not only to religiously observant Shi'is but to all Iraqis. Its conclusion and its reasoning were essentially indistinguishable from those of any competent international lawyer. Indeed, within the CPA, such views had been privately expressed by international lawyers from a variety of countries, experienced in nation-building elsewhere, who assumed the Iraqi constitution could only be written by an

11. The Reply by Grand Ayatullah Sayyid Ali Al-Hussaini Al-Sistani in response to an inquiry made by a group of Iraqi people regarding the preparation of the next Iraqi constitution, June 26, 2003, at <http://www.sistani.org/messages/eng/ir5.htm>.

elected constituent assembly, and were appalled by any suggestions to the contrary.

The document represented, then, an epochal event in the annals of the interaction between Islam and democracy: an unelected cleric laying down the law to the United States, holding that legitimate constitutional processes required democratic underpinnings. The irony that it was a religious scholar standing up for democratic process — and using his religious authority to do so — should not be lost on us. But neither should we miss the deeper irony that it was the democracy-exporting United States that was being reminded of the undemocratic character of its plans for the Iraqi constitutional process. Far from resisting U.S. pressure to democratize, Sistani was telling the Coalition how democracy ought to work.

It took some time for the impact of the fatwa to be fully felt by the CPA, which had charged the unelected Iraqi Governing Council to create a preparatory committee to investigate the possibilities of forming a constitution-drafting body. The preparatory committee found itself completely constrained by the legal logic of the fatwa. Although no state apparatus was prepared to enforce Sistani's ruling, that did not prevent it from having the effective force of law, not only for the committee's Shi'is but for all. Twenty-four of its twenty-five members eventually traveled en masse to Najaf for an audience with Sistani. They left unanimous in their certainty that his argument could not be refuted. The preparatory committee then dissolved without reporting back to the Governing Council. Sistani was now dictating policy.

In part as a reaction to the Governing Council's inability to recommend a strategy for constitution-writing without elections, Washington, acting through the CPA, changed course. In November 2003 it proposed that, to satisfy Sistani, the constitution would indeed eventually be written by an elected constituent assembly. In the time it would take for that to happen, the country would be governed, starting on June 30, 2004, by a transitional national assembly to be selected by caucuses, rather than direct elections.¹² This plan appeared to satisfy the letter of Sistani's fatwa, but entirely missed the spirit, which was for electoral democracy, not appointed rulers. In late 2003, a month after the CPA and the Governing Council had formally agreed to this two-tiered plan, Sistani made a statement expressing his disapproval of any process other than elections to choose even the interim government. He left open the possibility that elections by June 30, 2004, might not be possible — and his

12. For more information on the plan for Iraq's constitution, see, for example, Pamela Hess, *Iraqi Sovereignty on Ambitious Schedule*, UNITED PRESS INT'L, Nov. 17, 2003; Tod Robberson, *Iraqis Ready for Results: Many Growing Cynical of American Pledge to Usher in Democracy*, DALLAS MORNING NEWS, Nov. 30, 2003, at 1A.

staff indicated that the views of the Secretary General on this question would be appreciated.¹³ That sent Ambassador Bremer back to Washington, and on to Turtle Bay, accompanied by nine members of the Governing Council to meet with Kofi Annan. Ayatollah Sistani had done what Tony Blair could not: he had brought the United States to the U.N., hat in hand, seeking its involvement in nation-building in Iraq.

How did Sistani do it? He combined a preexistent institutional authority with a single, simple, and easily defended demand: if this is to be a democracy, where are the elections? It was almost unnecessary for Sistani's supporters to stage a 100,000-person march in Baghdad, as they did in late January 2004,¹⁴ to underscore the point that the overwhelming majority of Iraqi Shi'a — and not a few Sunnis — could agree that Iraqis want to choose their own leaders, rather than have leaders thrust upon them by some indirect process in which the United States would have disproportionate control.

Sistani also took his time. Almost every other would-be politician in Iraq, whether returning exile or domestically grown, moved too fast, too aggressively, trying to gain a foothold in the postwar environment. The politicians' belief, plausibly enough, was that it was now or never: almost no new political figure in Iraq had any name recognition. As a consequence of thrusting themselves forward, most of the aspiring Iraqi political class succeeded only in revealing the impossibility of jumping from political unknown to mobilizer of large constituencies. Political power in Iraq, as anywhere else, must be built one step at a time, according to the rules of the local game. There are no shortcuts, or at least none that are obvious. The overambitious attempts of the returnee politicians seemed particularly ineffective because they were closely connected to the wavering and unstable policies for the transfer of power proposed by the CPA.

In Iraq's extraordinary preconstitutional moment, Sistani was prepared to put aside his traditional political quiescence — the habit and practice of a lifetime. But knowing that his influence derived from being above ordinary politics, and careful not to lower his stature, Sistani tread gingerly when it came to particular political problems. In the negotiations leading to the Transitional Administrative Law (TAL), Sistani focused once again on high-level principles of majoritarianism, challenging the proposal of a minority regional veto of a final constitution, then grudgingly agreeing to the provision appearing in the

13. Sistani's official statements are available at <http://www.sistani.org/messages/eng/index.php> (last visited Apr. 15, 2005).

14. See Sonni Efron & Alissa J. Rubin, *U.S. Asks U.N. to Go to Iraq, Assess Feasibility of Vote; Annan Will Consider It. Tens of Thousands March in Baghdad for Direct Elections*, L.A. TIMES, Jan. 20, 2004, at A1.

TAL subject to subsequent renegotiation. Ultimately, Sistani urged the Security Council not to endorse the TAL in the resolution legitimating the transitional government, and his view proved decisive.¹⁵ By so doing, he vindicated the legal position of the fatwa. No agreement reached by unelected constitution-drafters would bind the elected constituent assembly. Apparently Sistani respected the legal authority of a Security Council resolution sufficiently to be concerned that if such a resolution were to endorse the TAL, its provisions might indeed have been binding on a subsequent assembly despite its lack of a democratic pedigree.

In the final analysis, the Shi‘a will inevitably be a majority in a democratic Iraq. Although elections may be vulnerable to terrorist attack, they will have to happen sometime. So Sistani, one can predict with confidence, will get his way. Eventually there will be national elections for a transitional government in Iraq.¹⁶ The really difficult and important question is what will happen once elections for the transitional government and constituent assembly occur. What sort of government and institutions will emerge? Do they have a chance of becoming durable? These problems will be with us for years to come. But we would do well to recognize that legal reasoning will play its part in their resolution — and that Islamic law and legal institutions may do as much, or more, to facilitate democratic thinking and outcomes as any other force.

15. S.C. Res. 1546, U.N. SCOR, U.N. Doc. S/Res/1546/Supplements (2004), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement>. U.N. Security Council Resolution 1546 makes no mention of the TAL, and indeed, as a result, the TAL operates only on the basis of a gentlemen’s agreement among the members of the transitional government. *Id.*

16. *Id.* at 3.