



INSTITUTE FOR INTERNATIONAL LAW & HUMAN RIGHTS

Minorities and the Law in Iraq



Minorities and the Law in Iraq

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EXECUTIVE SUMMARY

Overview and Key Concerns

The report examines Iraqi legal codes that might disparately affect Iraqi minorities and assesses how those laws may be consistent with the Iraqi Constitution and Iraq's international obligations under various treaties. It then makes suggestions on how to improve protections for all minority groups¹ and advance their economic, social, political, and cultural rights within Iraq.

The analysis found a sophisticated legal system in Iraq. Most legal codes were drafted in a manner that took into careful consideration the position of various Iraqi components, and guaranteed broad protections under the law. However, several important areas of the law did not adequately guarantee certain basic rights.

The Iraqi Constitution of 2005, which is the “preeminent and supreme law in Iraq,”² offers robust protection against discrimination and guarantees equal treatment of all Iraqis irrespective of gender, race, ethnicity, origin, color, religion, creed, belief or opinion, or economic or social status³. It sets out strong equality rights and sets a solid basis for the rest of Iraq's body of legal texts. However, several key provisions of the Constitution are yet to be implemented, leaving minorities and other vulnerable groups without protection from harm in certain instances.

Changes to the Constitution – either in the form of Constitutional amendments or the implementation of certain provisions – are necessary. While several key amendments are suggested, the most prominent amongst them is Article 2(1)(A), which disallows any law that contradicts the established provisions of Islam. This Article renders void many legal provisions that strive to include and provide legal protections to minorities. An amendment that broadens the provision to include all heavenly religions rather than just Islam, could effectively validate many existing legal guarantees as well as encourage draft legislation that purports to improve the legal status of minorities.

Several key Constitutional provisions, which facially offer protections to minorities, need to be implemented in order to have meaningful impact. For instance, Article 125 calls for enhancing local administration, where the administrative, political, cultural, and educational rights of various nationalities are guaranteed. This provision envisions supporting smaller or more scattered minority groups in Iraq. Building a decentralized administration as called for in the Constitution can provide much needed support for minority communities across Iraq.

¹ The term “minority” has been construed in the broadest possible sense; it encompasses groups who are in the minority based on their religion, ethnicity, political affiliation, language, origin, skin color, economic or social status, nationality and citizenship and disability status.

² Article 13(1)

³ Article 14

Iraq has signed a number of key international human rights and minority rights conventions, including the ICESCR, ICERD and the ICCPR (see list of Acronyms). However, international obligations must be consistently incorporated into domestic law through legislation. Though much of the body of Iraqi law reflects the principles of the international instruments to which it is a party, revision of many laws—including amendments, repeals, and new provisions—is required in order for Iraq to adequately meet its international obligations to protect minority rights.

While this report identifies several key areas for reform, significant changes need to occur especially in the areas of governance and personal status legislation.

Governance: Minority representation at all levels of government needs to be instituted in a meaningful way. Article 49 of the Constitution states that the Council of Representatives (COR) should consist of a number of members, at a ratio of one representative per 100,000 Iraqis. Related implementing legislation should reflect how fair representation of the Iraqi components might be achieved within the COR. For instance, if a quota system based on the percentages of minorities in the population is suggested, the proposed amendment should ensure that the goal of such a system would be not to appoint token officeholders, but to include, engage, represent and empower all components of Iraqi society.

Governance issues need to be addressed through Electoral Law reform as well. For instance, the Independent Higher Electoral Council (IHEC) relies on an antiquated system of voter registration, which skews the statistical presence of Iraqi minorities in certain areas and undermines their representation in elected offices. Certain quotas that have been mandated by the law are at times arbitrary and do not adequately represent the ethnic and religious make-up of the population.

Personal Status: The current Personal Status law in Iraq is largely applicable only to Muslim communities. However, the Code contains a key provision, which permits communities not governed by Shari'a to enact their own separate laws. While such separate laws have not yet been enacted, from a minority rights perspective, the permissive provision makes legal reform possible.

Reform in the area of Personal Status is however controversial. Legal experts differ on whether reform in Personal Status legislation should come in the form of a uniform law that is not rooted in a particular religion that would govern all Iraqis, or whether separate laws are required for the separate communities. In the meantime, however, minorities are left with very little protection in key areas of personal status, including marriage, dissolution of marriage, testamentary dispositions and inheritance.

Much of the legal analysis in this report addresses specific drafting patterns within Iraqi codes that have adversely impacted Iraqi minorities. Several key legal codes, including the Electoral Law and Nationality Act, on their face, afford sufficient nominal protection for

all citizens, and do not contain any overtly discriminatory provisions. However, these Codes do not take into consideration the fact that years of violence and civil unrest in Iraq has uprooted and displaced many communities, and that the effect of such instability has resulted in certain segments of society being more vulnerable and unprotected than others. In order to ensure that they, too, are in a position to enjoy the basic privileges afforded to all Iraqis, it is necessary that the law makes some allowances for these groups and places them on a level playing field.

For instance, basic citizenship rights are guaranteed in the Iraqi Nationality Act of 2006. However, since some minorities do not have access to citizenship documents due to historical discrimination or recent events, they may be denied access to basic human rights such as the right to education, health care, property rights and the freedom of movement.

Recommendations

In order to improve protections afforded to minorities, legal reform is necessary in Iraq. The final chapter in this report provides a detailed analysis of certain recommendations and sets out suggestions for the way forward.

Changes may be instituted in the form of positive discrimination, where vulnerable groups who have been routinely discriminated against and excluded from various social processes are provided with legally mandated mechanisms that would grant them additional benefits for a specific time period. The Iraqi Constitution and other domestic legislation are scattered with provisions that call for equality and nondiscrimination in employment, housing, education, access to resources, political participation, security and other areas. Iraq could explore the possibilities of enacting nondiscrimination legislation – either by embracing an overarching approach where an omnibus piece of nondiscrimination legislation would protect all components of Iraqi society, or by embracing a piecemeal approach, passing separate pieces of legislation in a variety of areas.

Changes may also come in the form of establishing effective independent human rights institutions such as the Iraqi High Commission for Human Rights (HCHR); a body currently mandated with the task of evaluating human rights violations, coordinating with civil society groups, reporting on violations and submitting recommendations to the government. Law No. 53 of 2008, which establishes how a Commission will be formed and how it will operate, is certainly a good start, yet it could be improved to more closely conform to international best practices.

Iraq should also give priority to consistently applying international law; international legal principles, and especially those contained in the treaties to which Iraq is a signatory, must be incorporated into the domestic legal framework. This should be followed up by

efforts by the judiciary to apply these laws in a meaningful manner that guarantees the human rights of all Iraqis.

Conclusion

Iraqi experts and jurists have acknowledged the need to address key areas of law and raise legitimate concerns about the rights and protections afforded to Iraqi minorities. However, they note that amending and reforming certain areas of law can pose considerable legal and constitutional challenges. Specifically, some Iraqi jurists reference Article 2 of the Constitution – stating that no law may be enacted which contradicts the established provisions of Islam – as posing a particular challenge for reforms. Significant progress can also come with the passage of implementing legislation for dozens of Articles in Iraq’s Constitution.

This report does not aim to be a compendium of Iraqi law and policy, or an overall assessment of the situation of minorities in Iraq. Certain important regulatory acts, such as education reform, are not dealt with. This report does, however, aim to summarize the main body of Iraqi law and analyze how that law may affect minorities, in a way that may be helpful to those who seek to build a stronger role for minorities in the new Iraq.

ACRONYMS

BOC	Board of Commissioners (High Commission for Human Rights)
COE	Committee of Experts (High Commission for Human Rights)
COR	Council of Representatives
FC	Federation Council
HCHR	High Commission for Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPAPED	International Convention for the Protection of All Persons from Enforced Disappearance
IDP	Internally Displaced Person
IGC	Iraqi Interim Governing Council
IHEC	Independent High Electoral Commission
IILHR	Institute for International Law and Human Rights
NGO	Non-Governmental Organization
RCC	Revolutionary Command Council (defunct)
UN	United Nations
UNAMI	United Nations Mission to Iraq
VCLT	Vienna Convention on the Law of Treaties

OVERVIEW AND KEY RECOMMENDATIONS

1. International Law

Iraq has ratified many key human rights treaties, including several that directly affect the status of minorities. By ratifying the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Iraq has committed itself to abide by international law in protecting the civil, social, economic, political and cultural rights of Iraqi minorities. Additionally, by acceding to the International Convention for the Protection of All Persons from Enforced Disappearance, Iraq has obligated itself to ensure that its laws adequately criminalize inhumane conduct and protect victims, that its judiciary and security forces effectively enforce such laws, and that victims have access and means to obtain compensation and reparation through institutions, litigation, or both.

Key Recommendations

- Enact a law detailing how an international treaty may be ratified under Article 61(4) of the Constitution, and specify how international treaties may be implemented within the national legal framework.
- Amend, repeal, or enact laws to implement obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.
- Amend, repeal, and enact laws to implement and reflect obligations under the ICESCR.
- Amend, repeal, and enact laws to implement and reflect obligations under the ICCPR.
- Amend, repeal, and enact laws to implement and reflect obligations under the ICERD.
- Amend, repeal, and enact laws to implement and reflect obligations under the International Convention for the Protection of All Persons from Enforced Disappearance.
- Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2. Constitutional Law

The 2005 Iraqi Constitution grants all Iraqis a wide array of civil, political, economic, social and cultural rights.⁴ It offers robust protection against discrimination and asserts the right to equal treatment and equal access under the law. Most notably, Article 14 of the Constitution contains an equal protection clause for all--irrespective of gender, race,

⁴ Iraqi Constitution, 2005.

ethnicity, origin, color, religion, creed, belief or opinion, or economic or social status.⁵ Article 2 raises severe questions about the role of non-Islamic religions within the legal framework of Iraq and amendment or clarification of this provision is necessary. All of Iraq's components must be protected from discrimination and afforded equal protection under Iraqi law. To this end, amendments to the Constitution should be adopted to ensure internal consistency and the protection of the rights therein afforded to Iraq's Components and other vulnerable groups.

Key Recommendations

Constitutional Amendments

- Amend the Preamble of the Constitution to reflect the historical and continuing participation and contribution of Iraq's minority components to Iraq's cultural and political heritage, and to the development of its democratic system.
- Amend Article 2(1)(A), which disallows any law that contradicts the established provisions of Islam, to include the commonly-held practices or tenets of all heavenly religions, rather than just Islam.
- Amend Article 23(second) to ensure that the expropriation of private property for public benefit in return for just compensation shall be accomplished without discrimination of any kind or to foster demographic change both within and between governorates.
- Amend Article 23(third)(B) to prohibit ownership of property for the purposes of demographic change both within and between governorates.
- Amend Article 92(2) to require the Federal Supreme Court to include persons who have broad expertise in Iraqi law in general, and develop legislation ensuring that judges and jurists will have the skill and capacity to implement Iraq's current legal regime.
- Amend Article 9 to note that equal representation should be reflected throughout the ranks of Iraqi security forces and require implementing legislation to regulate how to ensure such equality.
- Amend Article 14 to include "language" and "other status" as prohibited bases for discrimination.
- Amend Article 50 to require the oath for members of the Council of Representatives to include a pledge of non-discrimination toward all religious, cultural, ethnic or religious groups.

Amend Article 125 to eliminate reference to "the various nationalities, such as Turkomen, Chaldeans, Assyrians, and all other constituents," and substitute a reference to "all of Iraq's Minority Components" to ensure representation of all Components and eliminate discrimination within the illustrative list.

Constitutional Implementation

- Implement a statutory framework, consistent with the goals of Article 125, to delegate greater power to governorates and grant districts within the governorates

⁵ Article 14.

additional powers from the governorate, and clarify the scope and jurisdiction of such local administrative powers.

- Enact separate personal status laws to address the needs of non-Muslim minorities consistent with Article 41.
- Enact implementing legislation as required under Article 23 to both regulate such expropriation and protect against discrimination in such processes.
- Implement Article 65 and create a Federation Council that could represent Iraq's minorities and serve as a potential political platform for Iraqi minorities.

3. Personal Status Law

The Personal Status Code governs legal matters that determine the legal status of a person, including marriage, the dissolution of marriage, maintenance, child custody, testamentary dispositions and inheritance. Article 1 of the Personal Status Code gives prominence to Shari'a law; this is in tension with Article 41 of the Iraqi Constitution, which states, "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices." In order to protect minorities and to secure their legal rights in the important areas of family law, wills and inheritance, clarification and amendments to the Code are necessary to ensure that non-Muslim individuals are not bound by laws that contradict their religions, sects, beliefs, and choices.

Personal Status Law jurisprudence has reflected changing social circumstances. For example, in a 1976 decision by the Court of Cassation upholding a decision by the Personal Status (Articles) Court in Al Karada, Baghdad,⁶ a minor who was registered as a Muslim as a result of the conversion to Islam of his or her father, retains the right to chose his or her religion upon reaching legal adulthood, if the conditions of adult legal capacity are met. In that case, a woman had been registered as a Muslim as a minor child as a result of her father's conversion to Islam. Upon reaching legal adulthood, she chose to revert to Christianity and married a Christian man in 1974, obtaining a deed of marriage. The Director of Civil Status refused to unify the registration files of wife and husband under the law. The wife sought a judgment to certify the marriage deed and to require the Director of Civil Status Directorate to unify her registration file with her husband's in the Directorate files, reaffirming her Christian status.

The Court of Cassation held that the wife, in choosing to be a Christian upon the age of adulthood, exercised her legal right according to Shari'a and her marriage contract was valid. The Court of Cassation held that the Director does not have the right, in his professional capacity, to object to unifying her file with the file of her husband under the

⁶ Court of Cassation of Iraq, 25 December, 1976, No. 218, 2nd General Commission-1976, (holding that, a minor, if she or he became registered as a Muslim according to the conversion of his or her father to Islam, retains the right to chose his or her religion upon reaching the age of adulthood if the legal conditions of adult capacity are met.)

law. The unification of the registration files was so ordered. The Court of Cassation refused the appeal of the Director as having no basis under the law.

Key Recommendations

- Enact separate special personal status laws for non-Muslim minorities as permissible under Article 2 of the current Code, or amend the current Personal Status Code so that its provisions do not discriminate non-Muslim minorities.
- Amend Articles 12, 13 and 17 so that marriages between the various faiths are not rendered void.
- Unless special provisions are made for non-Muslim minorities to govern their Personal Status issues, Article 34 should be amended to eliminate the sentence mandating divorce to occur according to Shari'a. Article 37 should contain an exception for non-Muslims.

4. Nationality Act

The Nationality Act of 2006 effectively repeals and replaces Iraqi Nationality Law No. 43 of 1963 and Law No. 5 of 1975. In doing so, the current version makes significant strides in granting citizenship to Iraqis who were denied citizenship by older versions of the Nationality law, including, but not limited to, Fails Kurds, Baha'is, and Jews. However, the procedures required to reinstate nationality are onerous and time requirements and deadlines may prove difficult or impossible to adhere to. These challenges may prevent individuals entitled to citizenship from obtaining reinstatement and citizenship documents. Additionally, several amendments to the law are necessary to ensure that minorities who fled the country due to past persecution and violence may still return and regain their citizenship without facing unnecessary limitations.

Key Recommendations

- Amend the Nationality Act to clarify and specify and clarify the procedures by which nationality may be reinstated, including feasible or flexible time requirements, notice, access, appeals processes, and transparency.
- Place an affirmative burden on the government to reach out to those minorities whose citizenship has been denied in order to commence reinstating their citizenship.
- Amend Article 4 to make accommodations for persons who have lost documents proving their birth date, due to past violence and displacement in the country.
- Amend Article 5 to provide that "the Minister may consider Iraqi anyone who was born within Iraq."
- Amend Article 9(2) to reduce the 10-year waiting period to ensure that individuals who have been temporarily displaced from Iraq due to factors beyond their control do not have to wait as long as a decade to reintegrate into the political process.

5. High Commission for Human Rights Law

This important 2008 law establishes the Iraqi High Commission for Human Rights (HCHR) to redress human rights violations and act as a mechanism to help deter future violations. While this is a much-needed apparatus in combating human rights abuses in Iraq, the Law has very limited authority for a human rights commission. For instance, the HCHR may monitor, evaluate and offer advice; it may not, however, initiate lawsuits or intervene in existing lawsuits. The Commission lacks the power to issue binding decisions in arbitration or mediation.⁷ Under the structure of Iraqi law, the Courts and prosecutors are the primary implementers and enforcers of the law. However, mediation, arbitration, and other non-traditional forms of dispute resolution may be more effective in the human rights setting than would the forms of justice available under the existing justice system. The High Commission for Human Rights, to be effective, should therefore have a greater ability to utilize these non-traditional forms of justice. Several amendments are needed to expand the powers of the Commission and ensure that minorities are equitably represented on the Board of Commissioners.

Key Recommendations

- Amend Article 4 to give the HCHR powers to issue binding decisions after listening to the merits of a case under specified circumstances.
- Amend Article 4(3) to require the HCHR to examine and provide commentary on draft legislation, as well as legislation in force, to determine whether it conforms with the Constitution and adequately protects the human rights of all Iraqis.
- Amend Article 4(7) to grant the HCHR greater authority over the preparation and content of human rights reports submitted to the United Nations.
- Amend Article 5 to grant the HCHR the power to independently initiate lawsuits without the need for an external complaint.
- Amend Article 5 to grant the HCHR the power to intervene or participate in lawsuits as an *amicus curiae* (friend of the court).
- Amend Article 7 to guarantee reserved seats for minority representatives on the Committee of Experts charged with recommending Commissioners to the Council of Representatives for approval.
- Amend Article 8(fifth) to increase the quota for minority Commissioners from “no less than one original member and one reserve” to ensure appropriate representation of Iraq’s Minority Components.

6. Elections Law

The laws regulating elections in Iraq are fairly progressive as they strive to be inclusive of all components of Iraqi society in local and national representation. Article 4 of the Elections Law, for instance, contains a nondiscrimination provision that affirms the rights of all Iraqis to run for office as well as to vote for public officers. However, several provisions in the Law may discriminate against and marginalize components, deny or

⁷ See Iraqi Law No. 53 (2008).

hinder their right to obtain political office, and thereby operate to effectively remove them from the political process. Several other provisions fail to take into account and involve minority communities in the electoral process. Additionally, observers have noted that the IHEC has been criticized for alleged corruption and undue political party influence and have called for reform.

Key Recommendations

- Amend Article 4 to state that election participation is the right of every citizen without discrimination of any kind and provide an illustrative, but not exhaustive, list of impermissible grounds for discrimination.
- Amend the law to include an affirmative obligation that the State will take effective measures to ensure that all persons who are entitled to vote are able to exercise that right free from discrimination.
- Amend the Elections Law to specifically state that the Independent Higher Electoral Commission (IHEC) must not exercise its discretion in any way that has the purpose or effect of discriminating against any group on any basis listed in the Election Law's nondiscrimination provision in Article 4.
- Amend the Elections Law to guarantee reserved seats in the IHEC for minority representatives.
- Amend the Elections Law to mandate that the IHEC should conduct a full voter registration.
- Amend Article 1 of the Elections Law to enable the IHEC to consider developing mechanisms whereby minorities can vote for their representatives through special lists, special ballots, or other means as appropriate, including amending calculations for compensatory seats.
- Amend Articles 6 and 7 to allow the IHEC to formulate and implement a mechanism to allow IDPs to express their intent to remain in, and integrate into, their place of displacement and to allow them to vote and run for office in their place of displacement after such a determination is made
- Amend Article 1 to reconcile Articles 1(1) and 1(3) to provide maximum protection practicable for all ethnic, linguistic and religious minorities
- Amend Article 4 to make clear that generalized fear of violence is sufficient grounds to qualify as an IDP.

7. Political Prisoners' Foundation Act

This important law makes significant strides toward recognizing the injustices that occurred during the Ba'athist regime, and strives to compensate persons who were imprisoned or detained for political reasons. While comprehensive provisions seek to provide compensation for such persons, a few amendments could be considered to make the law more responsive to the concerns of Iraq's components.

Key Recommendations

- Amend Article 10 to state that the Private Committee may not exercise its discretion in a discriminatory manner when determining who qualifies as a political prisoner.
- Amend Article 10 so that an applicant may have additional time to appeal the decision of the Private Committee and ensure timely notification to the applicant of Committee decisions.
- Amend Article 5 to include persons who were detained or imprisoned as a result of the previous regime's discriminatory practices, including those detained because of their ethnic, religious, linguistic or national origin backgrounds.
- Amend the law to include a provision prohibiting the State from exercising its discretion in a discriminatory manner when making decisions pertaining to compensation or benefits to be paid to political prisoners and detainees.

8. Martyrs' Institution Law

The Martyr's Institution Law of 2005 contains language identical to that of the Political Prisoners' and Detainees Institution Law. Similarly, this law sets out provisions to protect and provide for the next of kin of those Iraqis who died due to their opposition to the Ba'athist regime. Several provisions are necessary to ensure that the law grants broad protection to minority communities who may have been particularly targeted by the previous regime.

Key Recommendations

- Amend Article 10 to state that the Private Committee may not exercise its discretion in a discriminatory manner when determining who qualifies as a martyr.
- Amend Article 10 so that an applicant may have additional time to appeal the decision of the Private Committee and ensure timely notification to the applicant of Committee decisions.

9. Issues Surrounding Potential Political Party Legislation

Guaranteeing individuals the right to participate in the political process is essential to building a democracy. These rights include the right to form political or other associations, to campaign, to stand for office and vote. These guaranteed rights extend beyond those of individual voters to the rights of political parties and other associations to garner support and campaign.⁸

The draft law analyzed in this report is under consideration by the Council of Representatives and has not yet been enacted. While IILHR recognizes that the eventual

⁸ Organization for Security and Cooperation in Europe (OSCE), Office for Democratic Institutions and Human Rights. "Guidelines to Assist National Minority Participation in the Electoral Process" 16, (2003), hereafter "OSCE Guidelines."

legislation might differ from the language addressed here, the report's analysis addresses concerns that are likely to be raised as the legislation comes under consideration.

Key Recommendations

- Add "Iraq's international legal obligations" to the list of instruments and concepts the law should not contradict.
- Include a nondiscrimination provision, including mechanisms for positive discrimination, such as voluntary party quotas within party leadership positions and party lists.
- Stipulate a review process by which "unqualified" candidates can appeal restrictions on their participation in party activities.

10. Civil Code

The Iraqi Civil Code No. 40 of 1951 is based on a system of law that includes both Islamic Law and continental European influences and mirrors similar reforms in Egypt during the same time period. This law regulates interaction between citizens in the key areas of contract, tort and property.

Key Recommendations

- Amend Article 1106 and create a specific provision for non-Muslims who are not obligated by Shari'a principles, so that their private property rights are not abrogated.
- Amend Article 164 to broaden the definition of "custom" to include the customs and practices of all religious and ethnic minorities, clarifying that non-Muslims are not governed by Shari'a principles.

11. Penal Code

The Coalition Provisional Authority Order Number 7 of April 2003 was incorporated by reference to the Penal Code of July 1969. The law contains an important anti-discrimination clause to protect minorities' rights: "In exercising their official functions, all persons undertaking public duties or holding public office, including all police, prosecutors and judges, must apply the law impartially. No person will be discriminated against on the basis of sex, race, color, language, religion, political opinion, national, ethnic or social origin or birth."⁹ Given its sweeping applicability, the significance of this excellent non-discrimination provision cannot be overstated. This provision, together with Article 372 of the Penal Code criminalizing acts which harm, attack, insult, disrupt, or destroy the religious practices and holy sites of Iraq's religious minorities, have created a strong body of law that protects the interests of Iraqi minorities.

Key Recommendations

⁹ See Coalition Provisional Authority Order Number 7 at § 4.

- Increase the fine penalty for violations of Article 372 from the current 300 Iraqi dinars to reflect a stronger condemnation of such prohibited acts and the degree of harm inflicted by such acts on the religious practices and holy sites of Iraq's religious minorities.

12. Criminal Procedure Code

The Coalition Provisional Authority Order Number 3, signed in July 2003, was incorporated by reference to the Code of Criminal Procedure No. 23 of 1971. That law outlines procedures to be used in conducting criminal investigations and trials. The Iraqi criminal procedure system has come under fire for many shortcomings in comparison to international standards of due process as enumerated in Articles 9, 14, and 15 of the ICCPR.

Key Recommendations

- Amend Article 152 of the Code of Criminal Procedure to clarify “certain groups of people” in a manner that ensures minorities may not be excluded from court proceedings without due cause or a reasonable belief that their presence would adversely affect the proceedings or harm a party to the case.

13. Unified Labor Code

The Unified Labor Code of 1987 is a progressive set of rules governing labor and employment laws in Iraq, including setting standards for worker safety and compensation. However, several provisions could be amended to better protect the interests of minority workers.

Key Recommendations

- Amend the law to explicitly provide that the Ministry of Labor and Social Affairs must not exercise its discretion in any way that has the purpose or effect of discriminating against any group on any basis listed in the Code's nondiscrimination provision.
- Amend Article 2 to clarify that racial discrimination means *any* distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin.
- Amend Article 2 to apply the principle of non-discrimination to all provisions of the Code, not simply to the section that states the right to work and the possibility of pursuing vocational training.
- Amend Article 10 to eliminate the requirement that Arabic be the only language used in all employment relationships and ensure that the language used in employment relationships reflects the linguistic needs of the employee.
- Amend Article 107 to require employers to inform workers of occupational hazards and protective measures, both orally and in writing.

- Repeal section (2) and amend section (1) of Article 60 to reflect that each employee's day of rest will be determined on an individualized basis, occur on a pre-determined day, with all feasible measures taken to accommodate the religious views or traditions of the employee.

14. Non-Governmental Organizations Law

The Law of Non-Governmental Organizations Number 12 (NGO Law), passed on January 25, 2010 by the Iraqi Council of Representatives, replaced four older NGO laws, including Law Number 34 of 1962, Law Number 13 of 2000, CPA Order Number 45 of 2003, and the Detachment of NGO Assistance Office Order Number 16 of 2005 (Order Number 16).¹⁰ This new law is a significant development for Iraq's minority components because NGOs are an important advocacy device for underrepresented groups. While no provisions of this law prove specifically problematic for Iraq's minorities, observers have noted that, to date, the registration process is difficult and, due to some contradictory instructions, prevents the proper registration of many NGOs.

¹⁰ Article 34, NGO Law No. 12 of 2010.

ABOUT THE REPORT

This report reviews the main body of Iraqi law and analyzes how it affects the lives of Iraqi minorities, and their position and safety in Iraq today. It does not strive to offer a “Western” viewpoint on Iraqi law. Rather, the report is the product of extensive consultation and collaboration with Iraqi jurists, government officials, civil society, and legal experts. It examines Iraqi legal codes that might disparately affect Iraqi minorities and assesses how those laws may be harmonized with the Iraqi Constitution and the nation’s international obligations under various treaties.

For the purposes of this report, the term “minority” is construed in the broadest possible sense. Minorities are not merely defined by ethnicity or religion, but where applicable, also by their political affiliations, language, origin, economic or social status, nationality or citizenship status and disability status. Of course, it is impossible to assess every law and provide comprehensive suggestions and detailed amendments specifically targeting every minority group. As such, this report seeks to identify general areas of concern. Further, simple amendments to the legal language are suggested to eliminate potential disparate treatment of certain groups.

The first task in producing this report was to assess the legislation currently in force in Iraq in order to identify laws that especially affect the lives of Iraqi minorities. To this end, IILHR’s drafting team consulted with Iraqi legal experts in the United States and in Iraq, used printed materials and online sources, as well as the Institute for International Law and Human Rights’ (IILHR) own institutional database.

Each piece of legislation was then assessed to see whether it complies with the Iraqi Constitution and whether it fulfills Iraq’s international treaty obligations.

Significant effort went toward ensuring that the legislation cited in this report contains the most accurate versions of the laws in force in Iraq today. However, it must be noted, it is challenging to locate, research and verify Arabic texts and their most accurate English translations. In order to eliminate concerns and confusion to the greatest extent possible, this report cites the full text of a relevant Code whenever it discusses a particular provision of that Code, though slight variations in the Arabic and English versions may well remain.

The Project Coordinator who oversaw the drafting of this report was Nilakshi Parndigamage, Washington Coordinator for the Institute for International Law and Human Rights. Judith Dollenmayer edited and copyedited this report, adding clarity and polish to our analyses.

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ABOUT IILHR

The Institute for International Law and Human Rights (known as IILHR) is a 501(c)(3) non-profit charity registered in Washington, D.C., and Brussels, Belgium. IILHR helps states in the early stages of democracy develop the capacity to strengthen the rule of law and build respect for human rights. With a staff of diplomats, parliamentarians, human rights activists and attorneys, IILHR has a strong track record of implementing successful programs that help local partners strengthen support for human rights and the rule of law. Members of IILHR's staff have participated in legal, legislative and civil society capacity-building programs in the Middle East, South Asia, Africa, and Central and Eastern Europe.

IILHR has been a strong, supportive presence in Iraq since July 2005. It collaboratively engages with leaders of both Iraqi government and civil society to strengthen approaches to human rights issues by a) developing draft legislation; b) working to enact that legislation; c) helping local partners in and out of government to develop the capacity to advocate about specific issues as well as to assess, develop and draft legislation; and d) building consensus on priorities, tactics and strategies for achieving stronger systems of law and human rights protection.

Examples of IILHR's work include extensive participation in drafting more than 70 different legislative and constitutional issues. IILHR has also provided commentary on draft legislation related to Women's Care, the establishment of the Human Rights Commission, Social Services development, Freedom of Information and Minority Rights.

Currently, IILHR actively supports human rights in Iraq through several ongoing government and civil society initiatives. In addition to work on gender issues, including collaboration on a draft law on domestic violence and publication of a sister assessment of Iraq's legal framework, *Women and the Law in Iraq*, IILHR works with the U.S. Institute of Peace to bring together minority leaders from across the country, forge links among minority members of parliament and conduct outreach on minority issues —seeking to build capacity to pursue a legislative and advocacy agenda for the benefit of minority rights.

IILHR also plays a lead role in advising and mentoring the development of the Human Rights Commission as an institution that will protect and support the human rights of Iraqi citizens. IILHR is additionally undertaking rule of law and justice projects, including a program on safeguarding and protecting judicial archives and records throughout Iraq.

I. GENERAL OBSERVATIONS

The analysis of the main body of law found a sophisticated legal system in Iraq. Most of the legal Codes acknowledged and accounted for the various components of Iraqi society and were drafted with the intent of creating an inclusive legal system. There were no overtly discriminatory provisions in the Codes that were analyzed, however, several facially neutral laws permitted an adverse impact on minority communities because they failed to make exceptions or include them in the legal provisions. Almost all of these laws resulted in potential discrimination against minorities, because they were rooted in Islamic Shari'a principles that did not account for non-Muslim communities.

In order to fully understand the current legal framework however, it is important to understand Iraq's rich legal history. Current Iraqi law has been shaped not just by Islamic Shari'a principles, but also by European and Middle Eastern legal traditions. As a result of these internal and external influences, the Iraqi legal system is robust and progressive in certain areas, yet does not take into account minority needs in other areas.

Historical Overview of the Iraqi Legal System

The genesis of Iraq's contemporary civil legal system stretches back to the comprehensive codification of the law carried out by the Ottoman Empire and Egypt in the wake of European codifications. The codification of the law in European countries began in earnest in the eighteenth century and reached its apex in the early nineteenth century with the Napoleonic Code and other codifications of French law under Napoleon I.¹¹ The drafters of the Napoleonic codifications intended them to be comprehensive¹² and exclusive, such that customary law and equitable solutions would be consigned to a secondary role.¹³

The Ottoman Empire joined in the European codification process in the mid-nineteenth Century and primarily passed adaptations of the Napoleonic codifications, with the notable exception of the *Mejelle*, which codified the law of torts and contracts according to the Hanafi School of Islamic jurisprudence.¹⁴ Unlike the Napoleonic codifications, the *Mejelle* did not supersede preexisting authority on torts and contracts.¹⁵ Moreover, the drafters of the *Mejelle* intended it to be a digest of opinion to guide judges rather than an

¹¹ Herbert J. Liebesny, *A Symposium on Muslim Law*, 22 GEO. WASH. L. REV. 127, 129 (1953).

¹² *Id.* (stating that “[m]ost of these codifications were to cover exhaustively a large field of law, such as family relationships, marriage and divorce, inheritance, contracts and torts, or civil and criminal procedure or substantive criminal law.”)

¹³ *Id.*

¹⁴ *Id.* at 130.

¹⁵ *Id.* at 131.

independent source of law.¹⁶ In essence, the *Mejelle* functioned more like a restatement of law than a code.

Egypt, though ostensibly still part of the Empire, developed its own system of law separate from the Ottoman Empire.¹⁷ In contrast to the Ottoman Empire, the Code Napoléon formed the basis of nineteenth-century Egyptian legal codes with relatively little reliance on Islamic law outside the realm of personal status.¹⁸ After World War II, however, Abd al-Razzāq al-Sanhūrī, a French-educated Egyptian jurist, promoted the idea of a synthesis of Islamic and Western principles in the legal codes of Arab states.¹⁹ Al-Sanhūrī revised the Egyptian Civil Code in 1949 to create such a synthesis, selectively drawing from French legal principles and ending the complete supremacy of French law in Egypt.²⁰

Despite the British occupation of Iraq under the League of Nations Mandate of 1920, the British influence on Iraqi law was relatively minor.²¹ Instead, in its codification process, Iraq drew on the Ottoman and Egyptian examples, which were based on a mixture of continental and Islamic legal principles.

The 1951 Iraqi Civil Code is perhaps the most notable example of a synthesis between Islamic and continental legal principles.²² The two most influential sources of legislation in the creation of the Code were the *Mejelle* and the Egyptian Civil Code, the Code draws heavily upon Muslim law and Iraqi local customs, in addition to French civil law jurisprudence.²³ In 1943, the Iraqi government invited al-Sanhūrī to prepare a preliminary draft of the Code.²⁴ Al-Sanhūrī was preoccupied with incorporating Islamic legal tradition into the modern civil codes.²⁵ Together with the assistance of Professor Munir Al-Qadi of the Iraq Law College,²⁶ al-Sanhūrī drafted a code that integrated and maintained equilibrium between elements of Islamic and French law in order to “preserve the best of both legal systems.”²⁷

¹⁶ *Id.* at 131-32.

¹⁷ *Id.* at 132.

¹⁸ *Id.* at 133.

¹⁹ *Id.* at 139.

²⁰ *Id.* at 140.

²¹ *Id.* at 138.

²² Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 GEO. WASH. L. REV. 176, 176 (1953) (stating, “the code represents a remarkable synthesis of an ancient legal system, age old local usages, and the most modern legal theories.”).

²³ *Id.*

²⁴ *Id.* at 180.

²⁵ Since the enactment of the Egyptian Civil Code in 1949, the Franco-Egyptian model has been accepted not only in Iraq, but also in Libya, Qatar, Sudan, Somalia, Algeria, Jordan and Kuwait.

²⁶ *Id.*

²⁷ Dan E. Stigall, *From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code*, 65 LA. L. REV. 131, 132 (2006).

The Iraqi Civil Code sets out a hierarchy of legal sources, so that the Code is the primary, but not exclusive, source of law. The code governs “all questions of law which come within the letter or spirit of any of its provisions,” but when the Code does not “furnish an applicable provision,” the court should look first to customary law, second to Shari’a, and third to principles of equity.²⁸ The drafters of the Code intended for this hierarchy of sources to preserve an “unbroken nexus” between traditional Shari’a law and those concepts of Western legislation that would prove useful in maintaining Iraqi relationships with the nations of the West.²⁹ When looking to Shari’a, the Code specifies that judges need not consult a “particular school of jurisprudence.”³⁰ According to Zuhair Jwaideh, the drafters included this stipulation as a guarantee to the Shiite population that the use of Shari’a need not be limited to the Hanafi School as in the *Mejelle*.³¹ When al-Sanhūrī and the Iraqi drafters promulgated the Code, this inclusive stipulation was innovative in comparison to the Egyptian and Syrian civil codes, which contained no such stipulation.³²

One of the reasons behind the passage of unified Iraqi Codes such as the 1951 Iraqi Civil Code was to acknowledge diversity within Iraq and to promote the national coexistence of Iraq’s different religious and ethnic groups.³³ As such, the consideration of Iraq’s minorities played a substantial part in the formation of Iraq’s legal system, including the enactment of the civil code and the code of personal status.³⁴

The Current Legal System and its Impact on Minorities

The rules set out in the current Iraqi Codes have been gradually amended and augmented--by legislation, Revolutionary Command Council (RCC) Resolutions and Orders under the Ba’athist Regime; by orders from the Coalition Provisional Authority; and by legislation of the Iraqi Council of Representatives.

Much of the legal analysis in this report centered on a few drafting patterns that resulted in the codes having an adverse impact on Iraqi minorities.

Facially Neutral Laws: As noted previously, the laws do not contain overtly discriminatory provisions that would effectively marginalize Iraq’s various components. However, several facially neutral laws may very well create a disparate impact on minorities that would

²⁸ Jwaideh, *Supra* note 3, at 181.

²⁹ *Id.* at 179.

³⁰ *Id.* at 181.

³¹ *Id.*

³² *Id.*

³³ Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, 16 J. TRANSNAT’L L. & POL’Y 1, 3 (2006) (stating, “from the moment modern Iraq was carved from the Ottoman Empire, its story has been that of a struggle to maintain disparate groups and traditions together in a single nation-state. Successive governments have sought to forge Shi’a, Sunni, Orthodox Christian, Arab, Kurdish, and other groups into a semblance of national coexistence.”).

³⁴ *Id.*

serve to further exclude and marginalize communities who have already faced persecution and discrimination in the past.

Facially Discriminatory: The facially discriminatory laws do not unjustly target minorities in an overt manner that persecutes vulnerable groups. However, certain laws like the Personal Status Code are based primarily in Islamic Shari'a and simply do not take into account non-Muslim minorities and other groups. Since these laws regulate important areas of life like marriage, inheritance and child custody, it is important to build a legal foundation that can provide remedies for all citizens.

A majority of the laws surveyed also contained several provisions, which referred to "morality"-- for instance, Article 17 of the Constitution guarantees an individual's personal privacy, as long as such private needs do not contradict the notion of morality. Article 287 of the Civil Code voids a contract if a condition is determined to be immoral. While these provisions and requirements are not overtly discriminatory towards a certain segment of the population, if left vague and undefined, these terms could potentially discriminate against certain components. For instance, if law enforcement personnel or members of the judiciary construe "morality" in a religious sense and inject religious principles and biases into the proscribed behaviors, this could potentially harm those who are not strictly governed by Islamic law. While the notions of morality are largely the same across religions, within a legal framework that is heavily influenced by one particular religion, the law should show restraint, and avoid using terms that may have a heavy religious connotation.

II. INTERNATIONAL LAW

Key Recommendations

- **Ratify the Convention on the Prevention and Punishment of the Crime of Genocide.**
- **Ratify the International Convention for the Protection of All Persons from Enforced Disappearance.**
- **Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.**

Constitutionality of International Treaties

Although Iraq has not ratified the Vienna Convention on the Law of Treaties (VCLT), the law of treaties still applies since the provisions of the VCLT are nevertheless considered binding customary international law.³⁵ Customary international law is formed by repeated State practice and *opinio juris*—the widely held belief that such State practices are based on legal obligation.³⁶

Article 13(1) of the Iraqi Constitution proclaims that the Constitution is the “preeminent and supreme law of Iraq”³⁷ and Article 8 states that Iraq shall “respect” international obligations.³⁸ However, no provision specifies the explicit implementation mechanism for international treaties within the framework of *domestic* legislation.³⁹

Article 61(4) of the Iraqi Constitution states that the powers of the Council of Representatives (COR) include:

*“Regulating the ratification process of international treaties and agreements by a law, to be enacted by a two-thirds majority of the members of the Council of Representatives.”*⁴⁰

- **COMMENTS:** As commentators have noted, this provision does not give COR the power to ratify international treaties, instead it authorizes the COR to enact a law

³⁵ International Human Rights Treaties – Iraq, Max Planck Institute for Comparative Public Law and International Law, Heidelberg 2010, p. 4.

³⁶ Id.

³⁷ Article 13 (1) Iraqi Constitution.

³⁸ Article 8, Iraqi Constitution.

³⁹ Supra Note 12 at 5.

⁴⁰ Article 61(4) Iraqi Constitution.

that defines the ratification process in detail.⁴¹ Such a law has not yet been enacted.

- A law that defines a treaty ratification process should explain whether and to what extent a duly ratified treaty may or may not override a domestic legal provision.
- SUGGESTION: Enact a law detailing how an international treaty may be ratified in accordance with Article 61(4) of the Constitution, explaining how conflicts of laws will be resolved and specifying how international treaties may be implemented within the national legal framework.
- Note that most countries follow a dualist approach in fulfilling their international legal obligations: International and domestic laws are considered separate, and international law may only be applied at the local level after it has been incorporated into domestic legislation.

TREATIES AFFECTING MINORITIES RATIFIED BY IRAQ

Iraq has ratified several important Conventions, which explicitly refer to nondiscrimination and the status of minorities. The ratification of these treaties means that Iraq is obligated under international laws and norms to afford broad protections to all Iraqis, including minorities.

1. International Covenant on Economic, Social and Cultural Rights⁴²

- COMMENTS: Under the ICESCR, States undertake to guarantee the rights contained in the Covenant, “without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴³ These rights include the rights to work;⁴⁴ just and favorable working conditions;⁴⁵ social security;⁴⁶ adequate standard of living including adequate food, clothing and housing;⁴⁷ and highest attainable standard of health⁴⁸ and education.⁴⁹

⁴¹ Supra, note 12 at 5.

⁴² International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21. U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

⁴³ Article 2, ICESCR.

⁴⁴ Article 6, ICESCR.

⁴⁵ Article 7, ICESCR.

⁴⁶ Article 10, ICESCR.

⁴⁷ Article 11, ICESCR.

⁴⁸ Article 12, ICESCR.

⁴⁹ Articles 13 & 14, ICESCR.

- SUGGESTIONS: Amend, repeal, and enact laws to implement and reflect obligations under the ICESCR.

2. International Covenant on Civil and Political Rights⁵⁰

- COMMENTS: Iraq further expanded its international legal obligations by ratifying the International Covenant on Civil and Political Rights (ICCPR). Under the ICCPR, Iraq is obliged to provide existing legislation or other measures necessary to give effect to the rights recognized by the Covenant without distinction of any kind--such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁵¹
- The ICCPR recognizes important rights such as the inherent right to life;⁵² right not to be subjected to torture;⁵³ right not to be arbitrarily arrested or detained;⁵⁴ liberty of movement and freedom to choose one's residence;⁵⁵ freedom of thought, conscience and religion;⁵⁶ and equality before courts and tribunals.⁵⁷ It also calls on State parties to ensure that no person shall be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence, and not to be targets of unlawful attacks on honor and reputation.⁵⁸
- SUGGESTIONS: Amend, repeal, or enact laws to implement obligations under the ICCPR.

3. International Convention on the Elimination of All Forms of Racial Discrimination⁵⁹

- COMMENTS: The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is the most important international treaties that exclusively focuses on eliminating racial discrimination. The instrument has particular significance for Iraq, given its continuing sectarian violence and past State-sanctioned discrimination toward certain parts of the population. By

⁵⁰ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

⁵¹ Article 2, ICCPR.

⁵² Article 6, ICCPR.

⁵³ Article 7, ICCPR.

⁵⁴ Article 9, ICCPR.

⁵⁵ Article 12, ICCPR.

⁵⁶ Article 18, ICCPR.

⁵⁷ Article 14, ICCPR.

⁵⁸ Article 17, ICCPR.

⁵⁹ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969.

ratifying the ICERD, Iraq reaffirmed that discrimination between human beings on grounds of race, color, or ethnic origin is an obstacle to peace and security.⁶⁰

- ICERD defines racial discrimination in the broadest possible terms. Article 1 of ICERD explicitly sets out that,

"[R]acial discrimination shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."⁶¹

- Therefore, by ratification, Iraq is obliged to recognize that “race” is not limited to skin color or origin and the State may not discriminate on the above-stated grounds.
- In ratifying the ICERD, Iraq stated that it does not accept the provisions of Article 22 of the Convention, which states that any dispute between two or more State Parties with respect to the interpretation or the application of the Convention, will be referred to the International Court of Justice at the request of any of the disputing parties.⁶² Instead, Iraq deemed it “necessary that in all cases the approval of all parties to the dispute be secured before” such a referral.⁶³ This clarification does not in any significant way detract from Iraq’s commitment to protect its minorities.
- SUGGESTIONS: Amend, repeal, or enact laws to implement obligations under the ICERD.

4. International Convention for the Protection of All Persons from Enforced Disappearance (ICPAPED)

- COMMENTS: Iraq acceded to the ICPAPED in 2010.⁶⁴ This instrument calls on State Parties to ensure that no person will be arrested or detained by the State and then be placed outside the protection of the law,⁶⁵ among other obligations to victims. As such, Iraq has obligated itself to ensure that its laws adequately criminalize inhumane conduct and protect victims, that its judiciary and security

⁶⁰ Preamble, ICERD.

⁶¹ Article 1, ICERD.

⁶² Article 22, ICERD.

⁶³ Convention on the Elimination of All Forms of Racial Discrimination.

⁶⁴ United Nations Treaty Collection, Chapter IV, Human Rights, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en

⁶⁵ Article 2, ICPAPED.

forces effectively enforce such laws, and that victims have access and means to obtain compensation and reparation through institutions, litigation, or both.

- **SUGGESTIONS:** Amend, repeal, and enact laws, establish rights, and develop institutions to reflect and implement obligations under the ICPAPED.

TREATIES AFFECTING MINORITIES NOT YET RATIFIED BY IRAQ

Iraq has acceded to the following human rights treaties that may offer important protections to minorities:

5. Convention on the Prevention and Punishment of the Crime of Genocide

- **COMMENTS:** The Genocide Convention outlaws, among other things, genocide and conspiracy, incitement, complicity and attempt to commit genocide.⁶⁶ More importantly, the Convention defines the act of genocide as an act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.⁶⁷ These provisions specifically address the targeting of various groups in society. Ratification of the Convention would ensure that Iraq would be held to international legal standards if genocide were to occur within the country.
- **SUGGESTIONS:** Ratify the Genocide Convention and amend, repeal, and enact laws to reflect and implement obligations under the Convention.

6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

- **COMMENTS:** Iraq has completed domestic formalities for ratification of the Torture Convention.⁶⁸ Under the Convention, a State Party is obligated to several things, including taking effective legislative, administrative, judicial or other measures to prevent acts of torture. This prohibition is to be upheld also in a state of war.⁶⁹ Ratification of this Convention would ensure that Iraq's legal system categorically rejects torture as a State practice, and would provide additional assurances to minorities about their safety.
- **SUGGESTIONS:** Ratify the Convention against Torture and amend, repeal, and enact laws to reflect and implement the obligations under the Convention.

⁶⁶ Article 3, Genocide Convention.

⁶⁷ Article 2, Genocide Convention.

⁶⁸ Human Rights Council, Working Group on the Universal Periodic Review, National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1, Iraq, Seventh Session, Geneva, February 2010.

⁶⁹ Article 2, Torture Convention.

Additionally, Iraq is party to the following International Labor Organization (ILO) Conventions. All of these Conventions serve to secure the rights of the Iraqi labor force, including ensuring nondiscrimination in the workplace.

- ❖ The Forced Labor Convention
- ❖ The Discrimination (Employment and Occupation) Convention
- ❖ The Right to Organize and Collective Bargaining Convention
- ❖ The Equal Remuneration Convention
- ❖ The Minimum Age Convention
- ❖ The Worst Forms of Child Labor Convention⁷⁰

All of these Conventions serve to secure the rights of the Iraqi labor force, including ensuring nondiscrimination in the workplace.

⁷⁰ Supra, note 39.

III. CONSTITUTIONAL LAW

Key Recommendations

- Amend the Preamble of the Constitution to reflect the historical and continuing participation and contribution of Iraq's minority components to Iraq's cultural and political heritage, and to the development of its democratic system.
- Amend Article 2(1)(A), which disallows any law that contradicts the established provisions of Islam, to include the commonly-held practices or tenets all heavenly religions, rather than just Islam.
- Amend Article 23(second) to ensure that the expropriation of private property for public benefit in return for just compensation shall be accomplished without discrimination of any kind or to foster demographic change both within and between governorates.
- Amend Article 23(third)(B) to prohibit ownership of property for the purposes of demographic change both within and between governorates.
- Amend Article 92(2) to require (1) the Federal Supreme Court to include persons who have broad expertise in Iraqi law in general, and develop legislation ensuring that judges and jurists will have the skill and capacity to implement Iraq's current legal regime; and (2) that Minorities shall be represented on the Federal Supreme Court either by quota or other means.
- Amend Article 9 to note that equal representation should be reflected throughout the ranks of Iraqi security forces and require implementing legislation to regulate how such equality may be ensured.
- Amend Article 14 to include "language" and "other status" as prohibited bases for discrimination.
- Implement a statutory framework, consistent with Article 125, which delegates greater power to the governments and grants districts within the governorate additional powers from the governorate.
- Amend Article 50 to require the oath for members of the Council of Representatives to include a pledge of non-discrimination toward all religious, cultural, ethnic or religious groups.
- Amend Article 125 to eliminate reference to "the various nationalities, such as Turkomen, Chaldeans, Assyrians, and all other constituents," and substitute a reference to "all of Iraq's Minority Components" to ensure representation of all Components and eliminate discrimination within the illustrative list.

Constitutional Implementation

- **Implement a statutory framework, consistent with the goals of Article 125, to delegate greater power to governorates and grant districts within the governorates additional powers from the governorate, and clarify the scope and jurisdiction of such local administrative powers.**
- **Enact specific personal status laws for non-Muslim minorities consistent with Article 41.**
- **Enact implementing legislation as required under Article 23 to both regulate expropriation and protect against discrimination in such processes.**
- **Implement Article 65 and create a Federation Council that could represent Iraq's components, as well as serve as an efficient political platform for Iraqi minorities.**

CONSTITUTION OF IRAQ (2005)

The 2005 Iraqi Constitution is the “preeminent and supreme law in Iraq,”⁷¹ and “any text” that contradicts it would be considered void.⁷² It was passed in 2005 after intense negotiations and a referendum; while provisions have been made for its amendment, no amendments have yet been passed.

The Iraqi Constitution grants all Iraqis a wide array of civil, political, economic, social and cultural rights.⁷³ It offers robust protection against discrimination and asserts the right to equal treatment and equal access under the law. Most notably, Article 14 of the Iraqi Constitution contains an equal protection clause for all--irrespective of gender, race, ethnicity, origin, color, religion, creed, belief or opinion, or economic or social status.⁷⁴ Therefore, all Iraqi components must be protected from discrimination and afforded equal protection under Iraqi law.

The Iraqi Constitution deems unequivocally that all Iraqis have the right to enjoy life, security and liberty--deprivation of which is prohibited except by a judicial authority in accordance with the law.⁷⁵ It also states that Iraqis have the right to participate in public affairs and enjoy political rights including the right to vote, elect and run for office;⁷⁶ the right to work;⁷⁷ the right to own property;⁷⁸ healthcare;⁷⁹ free education;⁸⁰ to practice

⁷¹ Article 13(1).

⁷² Article 13(2).

⁷³ See Iraqi Constitution.

⁷⁴ Article 14.

⁷⁵ Article 15.

⁷⁶ Article 20.

⁷⁷ Article 22.

sports;⁸¹ choose their own religion;⁸² and the right to freedom of movement, travel and residence inside and outside Iraq.⁸³

In some respects, the Constitution of the Kurdistan region provides broader protections for minorities and other vulnerable groups than does the National Constitution. Though the Iraqi Constitution does not delineate an obligation to “remove all obstacles hindering equality in all spheres of life,”⁸⁴ its protection of civil, political, economic, social, and cultural rights is extensive and far-reaching. Implementing legislation and amending laws that contradict the principles and provisions of the Iraqi Constitution are necessary next steps to ensure that the protections in the Constitution are realized.

Constitutional Amendments

Religion

Islam is the majority religion within Iraq and the principles of Shari’a are represented throughout much of the legal system, including the Constitution. However, Iraq is a religiously and culturally diverse nation with a long history of inclusion and cooperation among its groups. The role of Islam within the Iraqi legal system and cultural history is not to be underestimated, but the Constitution should reflect Iraq’s diversity and the connections among all heavenly religions practiced within its borders. By elevating the role of Islam -- as opposed to principles of morality and decency shared by all of Iraq’s components -- the Constitution is internally contradictory and risks hindering the free exercise of religion. Thus, the Constitution might well be amended to reflect the principles common among Iraq’s many components and to avoid entrenching sectarianism or suggesting a hierarchy among religions or groups.

Preamble

- **COMMENTS:** The Preamble of the Constitution of Iraq reflects the deep and long history of Iraqi culture, as well as its past struggles with violence, political oppression, and rise to democracy and freedom. In recognizing the role of Iraq’s Components in the development of the modern state and Iraq’s rich cultural and historical heritage, some components are specifically mentioned and others are referred to only generally. Given the rich tapestry of Iraq’s cultural and religious heritage, the Preamble should more directly reflect the deep roots of all of Iraq’s

⁷⁸ Article 23.

⁷⁹ Article 31.

⁸⁰ Article 34.

⁸¹ Article 36.

⁸² Article 41.

⁸³ Article 44.

⁸⁴ Id.

Components and their contribution to the development of Iraq's history and rise to democracy.

- **SUGGESTIONS:** Amend the Preamble of the Constitution to reflect the historical and continuing participation and contribution of Iraq's minority components to Iraq's cultural and political heritage, and to the development of its democratic system.

Article 2

First, Islam is the official religion of the State and it is a fundamental source of legislation:

A. No law that contradicts the established provisions of Islam may be established...

Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice such as Christians, Yazidis and Mandaean Sabaeans.

- **COMMENTS:** According to Article 2(1) Islam is "a fundamental source of law." This effort to preserve the principles of Islam within the Constitution permits other sources of law and thus seeks to protect the interests of non-Muslim minorities. However, when read in conjunction with Article 2(1)(A), which outlaws any other law that contradicts Islamic principles, Islam is construed as the locus for making and interpreting Iraqi law. The centrality of Islam may adversely affect a range of rights of non-Muslim minorities and other vulnerable groups, including, for example, rights of religion, expression, equality before the law, the right to participate in government affairs, the right to participate in work of one's own choosing, family rights and women's rights.
- Many of Iraq's religious minorities have noted, "all religions forbid all actions against humanity, including crimes such as theft, murder, adultery, etc."⁸⁵ Iraq's components then, share common principles of morality, decency, and prohibited behaviors. The commonality among the heavenly religions, however, is not reflected in Article 2. Additionally, Article 14 notes that all Iraqis are equal under the law without regard to religion, sect, belief or opinion. Given this protection, and the common understanding among all of Iraq's components as to principles of morality, decency and prohibited behaviors, Article 2 may be amended to reflect Iraq's diverse religions and adhere to the principles of equality enshrined in other provisions.
- **SUGGESTIONS:** Amend Article 2(1)(A), which disallows any law that contradicts the established provisions of Islam, to include the commonly-held practices or tenets all heavenly religions, rather than just Islam.

Article 23

⁸⁵ Report from the Working Group on *Minorities and the Law in Iraq*, May 7, 2011, Baghdad, Iraq.

First: Private property is protected. The owner shall have the right to benefit, exploit and dispose of private property within the limits of the law.

Second: Expropriation is not permissible except for the purposes of public benefit in return for just compensation, and this shall be regulated by law.

Third:

- A. Every Iraqi shall have the right to own property anywhere in Iraq. No others may possess immovable assets, except as exempted by law.*
- B. Ownership of property for the purposes of demographic change is prohibited.*

- COMMENTS: Article 23, on its face, provides strong protection for property rights within Iraq for “all Iraqis.” The language of this Article therefore does not distinguish between Iraq’s Components and ensures equal rights and protections.
- However, some Iraqi minorities have noted that gaps in the law and inequitable implementation of the protections afforded under the Article have resulted in discriminatory effects, including efforts to shift demographics within governorates and the targeting of minorities for expropriation of property.⁸⁶
- SUGGESTIONS: Amend Article 23(second) to ensure that the expropriation of private property for public benefit in return for just compensation shall be accomplished without discrimination of any kind or to foster demographic change both within and between governorates.
- Amend Article 23(third)(B) to prohibit ownership of property for the purposes of demographic change both within and between governorates.
- Enact implementing legislation as required under Article 23 to both regulate expropriation and protect against discrimination in such processes.

Article 43

First: The followers of all religions and sects are free in the:

A. Practice of religious rites, including the Hussein rituals.

B. Management of religious endowments (waqf), their affairs and their religious institutions, and this shall be regulated by law.

Second: The State shall guarantee freedom of worship and the protection of places of worship.

- COMMENTS: This provision further bolsters Article 2(2) of the Constitution, which guarantees the full rights of all individuals to freedom of religious belief.

⁸⁶ Discussion at the Consultation on *Minorities and the Law in Iraq*, Hamdanyia, Iraq, June 10, 2011.

While Article 2(2) mentions Christians, Yazidis and Mandaean Sabeans by name, Article 43 strives to include members of all religions and sects.

- However, as previously mentioned, this guarantee might be at odds with Article 2(1)(A). If the religious rites and rituals of non-Muslim minorities seem to contradict Islamic principles, then they might be held ineffective, since Article 2(1)(A) holds that Islam is the official religion of the state and that provisions contradicting established Islamic principles cannot exist.
- SUGGESTION: Amend Article 2(1)(A) to reconcile that provision with Article 43, thereby providing religious protections to all Iraqis, including non-Muslims.

Article 92

...Second: The Federal Supreme Court shall be made up of a number of judges and experts in Islamic jurisprudence and legal experts whose number, method of selection and the work of the court, shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives.

- COMMENTS: Although the Constitution guarantees full religious rights to all individuals, this provision risks prioritizing the religious rights of Muslims over those of other groups within the judicial system. Additionally, in the judiciary, judges should be experts in all relevant areas of law, including Islamic jurisprudence. The requirement to have experts in Islamic jurisprudence in addition to otherwise qualified judges may be redundant.
- SUGGESTIONS: Amend Article 92(2) to require (1) the Federal Supreme Court to include persons who have broad expertise in Iraqi law in general, and develop legislation ensuring that judges and jurists will have the skill and capacity to implement Iraq's current legal regime; and (2) that Minorities shall be represented on the Federal Supreme Court either by quota or other means.

Language

Article 4

First: The Arabic language and Kurdish language are the two official languages of Iraq. The right of Iraqis to educate their children in their mother tongues, such as Turkmen, Syriac and Armenian, in government educational institutions in accordance with educational guidelines, or in any other language in private educational institutions, is guaranteed.

Second: The scope of the term "official language" and the means of applying the provisions of this Article shall be defined by law, which shall include:

A. Publication of the official gazette, in the two languages;

B. Speech, conversation and expression in official settings, such as the Council of Representatives, the Council of Ministers, courts and official conferences, in either of the two languages;

- C. Recognition and publication of the official documents and correspondences in the two languages;*
- D. Opening schools that teach the two languages, in accordance with the educational guidelines;*
- E. Use of both languages in any settings enjoined by the principle of equality such as bank notes, passports and stamps...*

Fourth: The Turkomen language and the Syriac language are two other official languages in the administrative units in which they constitute density of population.

- **COMMENTS:** Designating any official language in a Constitution can be problematic, especially as they relate to linguistic minorities and while many Iraqis remain internally displaced. This Article follows the mandate of the ICCPR and explicitly guarantees that, where linguistic minorities exist, persons belonging to such minorities will not be denied the right, in community with other members of their group, to use their own language.⁸⁷ However, Article 4(1) is at odds with 4(4); it creates questions of how much “density” of the relevant population is necessary for Turkomen and Syriac to become official languages in certain administrative units. Article 4 may also disadvantage minority groups such as Chaldo-Assyrians, Kaka’i, and Shabaks, who speak different languages.⁸⁸ Additionally, it may lend legitimacy to discrimination against linguistic minorities by government officials and by private citizens.
- **SUGGESTIONS:** Amend the Constitution to state that Arabic and Kurdish could be used in the settings outlined in subsections A-D of the second part of Article 4, while limiting the necessity of an official common language in other areas.
- An amendment to Article 4(4) may set out how much population density is required for Turkomen and Syriac to be the official languages, but should consider current challenges to determining population density in some areas of Iraq. Similarly, the amendment could affirm the right of other linguistic minorities to use their own language in communities with other members of their group as determined at the local, district, or community level. To this end, implementing legislation would be necessary.

Non-discrimination

Article 9

First: A: The Iraqi Armed Forces and Security Services will be composed of the components of the Iraqi people with due consideration given to its balance and its similarity without

⁸⁷ ICCPR, Art. 27.

⁸⁸ Mumtaz Lalani, *Still Targeted: Continued Persecution of Iraq’s Minorities*, Minority Rights Group International, 2010, 5-8.

discrimination or exclusion and shall be subject to the control of the civilian authority. The Iraqi Armed Forces shall defend Iraq and shall not be used as an instrument of oppression against the Iraqi people, shall not interfere in the political affairs and shall have no role in the transfer of authority.

- COMMENT: This provision recognizes the importance of non-discrimination and equitable representation in official Iraqi armed and security services that are tasked with protecting all sectors of the population, including minorities. To this end, the Article prohibits discrimination and requires the representation of all components of the Iraqi people within security services, but it does not specify any mechanism to ensure that these principles of the Article are enforced. Members of Iraq's minority communities have reported that, though all components are represented within the security services, all components are not equitably represented throughout the ranks of the security services. Specifically, members of Iraq's minority groups remain underrepresented in leadership positions.⁸⁹
- SUGGESTIONS: Amend Article 9 to state that equitable representation of Iraq's components will be reflected throughout the ranks of the security and police forces, including among positions of authority. Additionally, Article 9 could require that such equitable representation will be ensured through implementing legislation. This amendment and the passage of implementing legislation may further solidify the notion of non-discrimination, thereby ensuring the safety of minorities at times of civil unrest and the equitable representation in the security system of all Iraq's components within the security system.

Article 14

Iraqis are equal before the law without discrimination based on gender, race, ethnicity, origin, color, religion, creed, belief or opinion, or economic and social status.

- COMMENTS: This provision contains the Constitution's basic non-discrimination principle and succeeds in recognizing that all Iraqis, including women and all minority groups, are equal. While this provision assures equal protection under the law, it does not prohibit discrimination based on language and property, as suggested in the ICCPR. Prohibiting discrimination based on language and property, in addition to the identities currently protected under Article 14, would extend protection to internally displaced Iraqis and other groups who, because of discrimination under the past regime, may have been stripped of property or compelled to reside in areas in where they are a linguistic minority.
- SUGGESTIONS: Article 14 could be amended to prohibit discrimination based on language and property, in addition to the identities already enumerated therein. Such an amendment would more closely mirror the language of ICCPR Article 2(1),

⁸⁹ Report from a Meeting of the Alliance of Iraqi Minorities, January 31, 2011, Hamdaniya, Iraq.

effectively guaranteeing the rights recognized in the Constitution for all individuals within Iraq's territory and subject to its jurisdiction, without distinction of any kind.

Non-discrimination Reinforced

The following articles seek to redress the abuses of the past regime and ensure that official duties carried out under the Constitution and in public office are performed in a non-discriminatory manner.

Article 7

First: No entity or program, under any name, may adopt racism, terrorism, the calling of others infidels, ethnic cleansing, or incite, facilitate, glorify, promote or justify thereto, especially the Saddamist Ba'ath in Iraq and its symbols, regardless of the name that it adopts. This may not be part of political pluralism in Iraq. This will be organized by law.

- **COMMENTS:** This provision of the Constitution prohibits organizations that employ violence or hate and ensures that the pluralism of Iraq reflects tolerance, diversity, peace, and respect. These prohibitions serve to protect the political, cultural, ethnic, and religious pluralism of Iraq by unambiguously outlawing racism, terrorism and ethnic cleansing.

Article 50

Amendment: Members of the Council of Representatives shall take the constitutional oath in front of the council before starting their work, as follows: I swear by God the Almighty to carry out my legal tasks and responsibilities devotedly and honestly and preserve the independence and sovereignty of Iraq, and safeguard the interests of its people, and watch over the safety of its land, skies, waters, resources and federal democratic system, and I shall endeavor to protect public and private liberties, the independence of the judiciary and adhere to the applications of legislation neutrally and faithfully. God is my witness.

- **COMMENTS:** This proposed amendment describes the oath that must be taken by members of the Council of Representatives. It requires the oath-taker to swear to protect important social and political rights, as well as the federal democratic system and the interests and liberties of the people of Iraq. These guarantees are essential to building a society where minority rights are protected by the state and the judiciary. However, the oath does not explicitly require the oath-taker to undertake the duties of office in a non-discriminatory manner.
- **SUGGESTIONS:** Article 50 could be broadened to require the oath to include a pledge of non-discrimination toward all religious, cultural, ethnic or religious groups. Additionally, legislation could be developed to ensure training in and awareness of the cultural, religious, and linguistic elements of Iraq's components

to ensure that the parliament has the capacity to deal fairly and equitably with all Iraqis while safeguarding the interests of the nation as a whole.

Article 10

The holy shrines and religious places in Iraq are religious and cultural entities. The State is committed to confirming and safeguarding their sanctity, and guaranteeing the free practice of rituals in them.

- COMMENT—This provision recognizes and seeks to preserve the diverse religious and cultural history of Iraq and its various components. The protection of religious places and cultural entities guaranteed in this provision provides a necessary safeguard toward preserving Iraq's diversity and the religious and cultural rights protected in other provisions. Monitoring the authority of the Constitutional provision, however, may prove challenging, as it is unclear what legal remedies are available to individuals or groups whose rights under this provision are violated.
- SUGGESTIONS: With the passage of Law No. 53 of 2008 establishing the Iraqi High Commission for Human Rights, the monitoring and implementation of the protections offered under Article 10 and other Constitutional provisions may prove more efficacious and effective than is currently possible. The Commission is charged with investigating and reporting on the state of human rights within Iraq. This mandate applies to the right to the free practice of religion and to the cultural rights (among others) of religious and ethnic minorities. Therefore, the Commission can assess the status and effectiveness of Article 10's protection of holy shrines, religious places, and the free exercise of rituals, and make recommendations to the Iraqi government and other relevant bodies.

Right to Work

Article 22

First: Work is a right for all Iraqis in a way that guarantees a dignified life for them.

- COMMENTS: The Constitution's guarantee of the right to work is much narrower than the right granted by Articles 6, 7 and 8 of the ICESCR. The ICESCR sets out many aspects of the right to work, beyond simply the right to a dignified life. These include, among other rights, freely chosen work, training, fair wages, safe working conditions, rest and leisure as well as trade union rights.⁹⁰ Article 22 specifically grants all aspects of the right to work as described in ICESCR Articles 6, 7 and 8.

⁹⁰ ICESCR Arts. 6, 7, 8.

Constitutional Implementation

Non-Discrimination

Article 125

This Constitution shall guarantee the administrative, political, cultural and educational rights for the various nationalities, such as Turkmen, Chaldeans, Assyrians and all other components. This will be organized by law.

- **COMMENTS:** Article 125 envisages sustaining minority self-government at the district and sub-district levels and ensures the administrative, political, cultural and educational rights of all minority components. This is an extremely important provision, which, if implemented properly, could serve as an important political tool for Iraq's minority communities.
- The statutory frameworks in place in Hungary and Croatia, both countries that allow minority self-governments at the local and national levels, are pertinent to Iraq's implementation of Article 125. Hungary provides a right to minorities to create their own communities and to govern themselves at the local and national level.⁹¹ The minority self-governments within Hungary have the right to maintain a budget, maintain local basic education, protect historical monuments, and set aside property for the minority government entity, among other rights.⁹² Minority self-governments in Hungary also have the power to reject any proposal regarding that minority group.⁹³
- Croatia provides a right to minorities to representation at the local and national levels within administrative, judicial, and legislative bodies when the minority population represents at least 1.5% of the entire population of Croatia.⁹⁴ When the minority population constitutes more than 15% of the total population of the local territory and there are 200 members, that minority group gains the right to self-governance.⁹⁵ Finally, when there are 500 or more members of a minority group in the local territory, the minority group is allowed to elect members of the National Minorities Council, which has influence over self-government and administrative offices.
- **SUGGESTIONS:** Implement a statutory framework, consistent with Article 125, which delegates greater power to the governments and grants that districts within the governorate receive additional powers from the governorate.⁹⁶

⁹¹ Hungarian Act LXXVII of 1993 on the rights of National and Ethnic Minorities, Article 5, Clause 1.

⁹² Hungarian Act LXXVII of 1993 on the rights of National and Ethnic Minorities, Article 27.

⁹³ Hungarian Act LXXVII of 1993 on the rights of National and Ethnic Minorities, Article 26.

⁹⁴ The Constitutional Act on the Rights of National Minorities in the Republic of Croatia, Article 19.

⁹⁵ *Id.*

⁹⁶ For additional suggestions, see, *infra* p. 103.

Health Care

Article 30

First: The State guarantees to the individual and the family—especially children and women—social and health security and the basic requirements for leading a free and dignified life. The state also ensures the above a suitable income and appropriate housing.

Second: The State guarantees the social and health security of Iraqis in cases of old age, sickness, employment disability, homelessness, orphanage or unemployment, and shall work to protect them from ignorance, fear and poverty. The State shall provide them housing and special programs of care and rehabilitation. This will be organized by law.

Article 31

First: Every citizen has the right to health care. The State takes care of public health and provides the means of prevention and treatment by building different types of hospitals and medical institutions.

- **COMMENTS:** Article 30 guarantees health security in certain cases, and Article 31 grants the right of health care to Iraqis. The ICESCR grants the right to “the enjoyment of the highest attainable standard of physical and mental health” to “everyone.” The ICESCR obligates states to take steps to achieve the full realization of this right. This includes, among other things, creating conditions that assure medical services and medical attention to everyone who falls sick.⁹⁷ This is especially relevant in Iraq, where violence against minorities restricts freedom of movement, and where minorities have reported discrimination by healthcare providers.⁹⁸ Minorities especially minority women reportedly have limited access to health services especially since targeted violence deters them from travelling to health facilities.⁹⁹
- **SUGGESTIONS:** Implementing legislation should specifically note that the right to healthcare also includes the guarantee of equal access to health services and healthcare providers.

Assuring Representation

Article 49

First: The Council of Representatives (COR) shall consist of a number of members, at a ratio of one representative per 100,000 Iraqi persons representing the entire Iraqi people. They shall be elected through a direct secret general ballot. The representation of all components of the people in it shall be upheld...

⁹⁷ ICESCR Art. 12.

⁹⁸ Lalani, 15.

⁹⁹ Lalani, 15.

- **COMMENTS:** Article 49 asserts that the COR shall represent “all” components of Iraqi society. While it is important that such representation is Constitutionally mandated, it may be necessary for the Constitution to recognize the importance of the political inclusion, engagement and empowerment of minorities, and therefore to go beyond a mere nominal call for representation. Although Article 20 of the Constitution guarantees all citizens the right to participate in public affairs, violence against minorities has threatened this right in previous elections.¹⁰⁰ While a quota system might raise questions of efficacy and may further entrench divisions between the components of society, such a system may also have merits that could give legitimacy and breadth of representation to minority groups.¹⁰¹
- **SUGGESTIONS:** Implementing legislation should reflect how fairer representation of the components might be achieved within the Council of Representatives. Additionally, implementing legislation should address the challenges of obtaining accurate demographic data and the problem of accounting for internally displaced persons, and should allow for revised measurements as Iraqis return home from abroad in the future.

Article 65

A legislative council shall be established named the “Federation Council” to include representation from the regions and the governorates that are not organized in a region. A law, enacted by a two-thirds majority of the members of the Council of Representatives, shall regulate the Federation Council formation, its membership conditions and its specialization and all that is connected with it.

- **COMMENTS:** While a Federation Council has not yet been instituted, this could be an extremely important political platform for Iraqi minorities and other vulnerable groups. A legislative body, which would also include representatives from the regions and governorates that are not organized into regions, can serve as an important mechanism in the political process to highlight minority issues and bring them into the national discussion.
- With respect to establishing a Federation Council, Iraq may wish to model such a Council after the mixed-member proportional representation system employed in nations such as Germany, the United Kingdom, and New Zealand. Under such a system, the overall total of party members in the elected body is intended to mirror the overall proportion of votes received; it also includes a set of members elected by geographic constituency who are deducted from the party totals so as to maintain overall proportionality. For instance, in Iraq each voter may receive two

¹⁰⁰ Lalani, 12.

¹⁰¹ See Ensuring Minority Representation at All Levels of Government in METHODS OF REDRESS AND THE WAY FORWARD.

votes: one for a specific candidate and another for a particular party, with each party most likely representing a singular minority interest. Should a party with a specific candidate receive both the party as well as candidate vote, the candidate would not be entitled to two seats. Rather, the party would gain the seat and the candidate would be replaced with the individual next down on the party list. This would allow Iraqis to vote for candidates regardless of party or minority affiliation since the partisan makeup of the legislature would be determined only by the party vote. At the same time, such a voting system would allow for adequate minority representation.

- **SUGGESTIONS:** Implement Article 65 and create a Federation Council that would firmly represent Iraq's minority components as well as be an efficient political platform for Iraqi minorities.

Personal Status

Article 41

Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs or choices. This shall be regulated by law.

- **COMMENTS:** Article 41 grants the right of Iraqis to determine their personal status according to their beliefs. This provision is further strengthened by Article 2 of the current Iraqi Personal Status Code which states that "the provisions of this law apply to all Iraqis except for those who are exempted by virtue of a special law." Even though the Constitution and the current Personal status Code allows for specific provisions for non-Muslim minority groups, such legislation has not yet been enacted.
- **SUGGESTIONS:** Enact separate special personal status laws for non-Muslim minorities as permissible under Article 2 of the current Code and consistent with Article 41 of the Constitution, or amend the current Personal Status Code so that its provisions do not discriminate non-Muslim minorities.¹⁰²

¹⁰² For a more detailed analysis, see Reforming Personal Status Law in METHODS OF REDRESS AND THE WAY FORWARD.

IV. PERSONAL STATUS LAW

Key Recommendations

- **Enact separate special personal status laws for non-Muslim minorities as permitted under Article 2 of the current law, or amend the current Personal Status Code so that they may not discriminate non-Muslim minorities.**
- **Amend Articles 12, 13 and 17 so that marriages among various faiths are not rendered void.**
- **Unless special provisions are made for non-Muslim minorities to govern their Personal Status issues, Article 34 should be amended to eliminate the sentence mandating divorce to occur according to Shari'a. Article 37 should contain an exception for non-Muslims.**

PERSONAL STATUS CODE (NO. 188 OF 1959)

Although the Civil Code governs most legal affairs, the Personal Status Code No. 188 of 1959 (Personal Status Code) governs an important set of legal matters that determines the legal status of a person. In Iraq, as in several other Middle Eastern countries, the Personal Status Code deals with issues such as marriage, testamentary dispositions and inheritance.¹⁰³

The Personal Status Code is a highly progressive law compared to other states in the region. Even though it is primarily rooted in Islamic Shari'a and regulates various areas of personal status such as marriage, dissolution of marriage, bequeathing and other personal affairs, it also frees non-Muslim minorities from being governed by Shari'a-based laws. Article 2 of the law states that the Code applies to "all Iraqis, except for those who are exempted by virtue of a special law." This claim is further bolstered by Article 41 of the Iraqi Constitution, which states that all Iraqis are "free in their commitment to their personal status according to their religions, sects, beliefs or choices."

Despite these assurances, no separate specific Personal Status legislation has yet been enacted for non-Muslim minorities. In the absence of such special laws, the Personal Status Code governs non-Muslim minorities and other groups and applies Shari'a principles in areas such as marriage and inheritance. Some Iraqi experts have pointed out that specific provisions for separate minority communities will create a complicated legal system at the expense of expedient judicial processes and the equal treatment of all

¹⁰³ See J. N. D. Anderson, *A Law of Personal Status for Iraq*, 9 INT'L & COMP. L.Q. 542, 543 (1960).

citizens.¹⁰⁴ Some minority communities, on the other hand, have advocated for and already drafted separate laws.¹⁰⁵

As the analysis below illustrates, the lack of protection for non-Muslim minorities in the area of personal status does not necessarily result from the Personal Status Code itself. Rather, the challenges stem from the absence of any relevant and applicable laws governing their personal status.¹⁰⁶

Specific Provisions for Non-Muslim Minorities

Article 2

(1) The provisions of this law apply to all Iraqis except for those who are exempted by virtue of a special law.

- **COMMENTS:** The current Iraqi Personal Status Code, enacted in 1959, applies its rules to Muslims. However Article 2 of the Code also allows for non-Muslim minorities to create separate personal status laws. Article 41 of the Constitution, which states that “Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices,” further bolsters this.
- However, to date, such legislation has not been enacted. In the absence of such laws, minorities’ basic rights of personal status may remain unprotected. In many respects, the lack of specific provisions means minorities are not free to practice the traditions and customs of their own faiths and practices, but must instead adhere to the tenets of Shari’ah as codified in the Code. Additionally, the law as currently enacted might expose some minorities to persecution and discrimination on the basis of non-adherence to Islamic principles.
- **SUGGESTIONS:** Enact separate personal status laws for non-Muslim minorities or amend the current Personal Status Code so that they may not discriminate non-Muslim minorities.¹⁰⁷

Marriage

Article 12

In order for the marriage to be sound, the woman must not be lawfully forbidden to the man who wants to marry her.

¹⁰⁴ Report from the Working Group on *Minorities and the Law in Iraq*, May 7, 2011, Baghdad.

¹⁰⁵ IILHR was able to review several informal versions of such draft laws.

¹⁰⁶ For a more detailed analysis of possible solutions for Personal Status Laws, see *Methods of Redress and The Way Forward*.

¹⁰⁷ For a more detailed analysis, see *Reforming Personal Status Law in METHODS OF REDRESS AND THE WAY FORWARD*.

Article 13

Temporary [restrictions on marriage] are...adherence to a non-divine religion...

Article 17

For a Muslim man, marriage is permissible with an individual who practices one of the religions of the Book, while a Muslim woman may not marry a non-Muslim man.

- COMMENTS: Articles 12 and 13 in tandem render void any marriage between a man and a woman of a “non-divine” religion. Article 17 renders void any marriage between a Muslim woman and a non-Muslim man. These provisions affect the marital rights of Muslims as well as non-Muslim minorities, and particularly discriminate against women of both Muslim and other faiths.
- These three articles violate Article 14 of the Iraqi Constitution, which guarantees equality before the law for all Iraqis without discrimination based on “gender...religion, sect, belief or opinion.” This also contravenes Article 23 of the ICCPR, which enshrines “the right of men and women of marriageable age to marry and to found a family.”
- These provisions also violate the rights enshrined in Article 5 of ICERD, to which Iraq is a state party. Article 5 of the ICERD affirms that state parties must “undertake to prohibit and to eliminate racial¹⁰⁸ discrimination” and to “guarantee the right of everyone...to equality before the law...” Article 5 then enumerates rights that must be guaranteed equally, including “the right to marriage and choice of spouse.”
- SUGGESTIONS: Amend Articles 12, 13 and 17 so that marriages among various faiths are not rendered void.

Dissolution of Marriage*Article 34*

- (1) *Divorce means to sever the bond of marriage. It is done by the man, the woman, any authorized representative or the judge. The divorce must be performed according to the Shari’a.*
- (2) *A proxy is not accepted in the procedures of social investigation, arbitration and divorce.*

Article 37

- (1) *The husband performs the divorce by pronouncing three repudiations.*

¹⁰⁸ While ICERD expressly addresses racial discrimination, it defines “racial” discrimination in Article 5 to include discrimination based on race, color and national or ethnic origin.

(2) *Three verbal or gestural repudiations pronounced at once will count as only one divorce.*

Article 47

The wife must observe a waiting period called iddat in the two following cases:

- (1) *If she and her husband are separated after consummation, whether through revocable divorce, minor or major irrevocable divorce, legal separation, annulment, peaceful suspension, or choice of termination.*
- (2) *If her husband died, even if such death occurred before consummation.*

Article 48

(1) *In cases of divorce and annulment, the waiting period of the woman whose marriage was consummated takes three possible forms.*

- COMMENTS: Article 34 can be problematic for religious minorities, because it mandates that divorce must be performed pursuant to a specific faith.
- Article 37 is also problematic. It grants the right to *talaq*, or repudiation, which allows the husband to end a marriage simply by pronouncement.¹⁰⁹ While the Bahá'í religion, for example, grants no such a power to the husband¹¹⁰, Article 37(2) does not directly conflict with the right of the Bahá'í to practice their faith because the article does not make *talaq* mandatory. Similarly, while the Kaka'i do not recognize *talaq*,¹¹¹ they do not need to opt-in to the provisions of Article 37(2). The opt-in nature of Article 37(2), however, does contradict the Mandaean belief system, which does not recognize any divorce as valid.¹¹²
- In contrast to the opt-in nature of Article 37(2), Article 47 mandates that a waiting period must occur before a wife can remarry. Article 48 further specifies the types of *iddat* that may occur. The Bahá'í have a practice that differs in important ways from *iddat*. If a Bahá'í wants a divorce, he or she must ask the Bahá'í assembly to set a "year of patience," which gives the couple a year to attempt to reconcile their differences. If no reconciliation occurs before the end of the year, then the divorce is automatically effectuated.¹¹³ The *iddat* and the year of patience are at odds, yet Article 47 mandates that the former must be observed.

¹⁰⁹ Amira Mashhour, *Islamic Law and Gender Equality—Could There Be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 572 (2005).

¹¹⁰ Peter Smith, *An Introduction to the Bahá'í Faith* (2008) at 166.

¹¹¹ C. J. Edmonds, *The Beliefs and Practices of the Ahl-i Haqq*, *Journal of the British Institute of Persian Studies* (1969) at 100.

¹¹² E.S. Drower, *The Mandaeans of Iraq and Iran: Their Cults, Customs, Magic Legends, and Folklore*, 59 (2002) (stating that "divorce is not recognized," though a *separation* is possible).

¹¹³ Smith, *supra* note 110, at 166.

- Articles 34, 37, 47 and 48 of the Personal Status Law violate Article 27 of the ICCPR, because they deny religious minorities the right “to profess and practice their own religion.”
- SUGGESTIONS: Unless special provisions are made for non-Muslim minorities to govern their Personal Status issues, Article 34 should be amended to eliminate the sentence mandating divorce to occur according to Shari’a. Article 37 should contain an exception for non-Muslims.

V. NATIONALITY ACT

Key Recommendations

- **Amend the Nationality Act to clarify and specify and clarify the procedures by which nationality may be reinstated, including feasible or flexible time requirements, notice, access, appeals processes, and transparency.**
- **Place an affirmative burden on the government to reach out to those minorities whose citizenship has been denied, to commence the citizenship reinstatement process.**
- **Amend Article 4 to make exemptions for persons who have lost documents proving their birth date, due to past violence and displacement in the country.**
- **Amend Article 5 to simply provide that “the Minister may consider Iraqi anyone who was born within Iraq.”**
- **Amend Article 9(2) to reduce the 10-year waiting period so that individuals who have been temporarily displaced from Iraq due to factors beyond their control do not have to wait as long as a decade to get involved in the political process.**

IRAQI NATIONALITY ACT (NO. 26 OF 2006)

The Iraqi Nationality Act No. 26 of 2006 (Nationality Act) is a largely progressive, inclusive law in comparison to its predecessors. The Nationality Act effectively repeals and replaces Iraqi Nationality Law No. 42 of 1924, No. 43 of 1963 and Law No. 5 of 1975. These laws differentiated between Arabs and non-Arabs in the naturalization process. The Nationality Act also explicitly repeals RCC Decision No. 666 of 1980, which revoked the citizenship of 220,000 to 300,00 Fails Kurds.¹¹⁴ The Nationality Act makes significant strides in facilitating the grant of citizenship to Iraqis who were denied citizenship by past versions of the law, but it contains several provisions that may discriminate certain minority groups.

Individuals who lack citizenship lack access to basic human rights such as the right to education, health care, inheritance rights and freedom of movement.¹¹⁵ Without a

¹¹⁴ Campbell Susan, *The Fails Kurds of Iraq: Thirty Years Without Nationality*, Refugees International, April 2010, available at <http://www.refugeesinternational.org/blog/fails-kurds-iraq-thirty-years-without-nationality>.

¹¹⁵ Internal Displacement Monitoring Centre, *Statelessness: Many Iraqis Stripped of their Nationality and Ethnicity Face Difficulties in Obtaining Documentation (2004-2008)*, available at [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/D2D6CC7B789487C6C1257520004D2AD7?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/D2D6CC7B789487C6C1257520004D2AD7?OpenDocument)

nationality document, minorities whose citizenship has not yet been reinstated find it extremely challenging to obtain civil status documents such as birth, death and marriage certificates.¹¹⁶ Citizenship thus is essential in Iraq to access the basic rights afforded by the 2005 Constitution and enshrined in international human rights law.

Restoring Citizenship

Article 1

For the purposes of this law, the following terms shall have the following meanings:

b. An Iraqi: a person who enjoys Iraqi nationality

Article 2

Anyone who has acquired Iraqi nationality by virtue of the provisions of the repealed Iraqi Nationality Law No. 42 of 1924, the Iraqi Nationality Law No. 43 of 1963 and No. 5 of 1975 on granting Iraqi nationality to Arabs, and the decisions by the defunct Revolutionary Command Council granting Iraqi nationality, shall be considered Iraqi.

Article 17

Decision No. 666 of 1980 issued by the (defunct) Revolutionary Command Council shall be repealed and Iraqi nationality shall be restored to all Iraqis deprived of their Iraqi nationality under the said Council as well as repealing all other unfair decisions issued by the (defunct) Revolutionary Command Council in this respect.

Article 18

1- Any Iraqi, who was denaturalized on political, religious, racist or sectarian grounds, shall have the right to restore his Iraqi nationality, subject to submission of an application to this effect. In the case of his death, his children, who have lost their Iraqi nationality consequent to their father's loss of nationality, shall have the right to submit an application to restore Iraqi nationality.

- COMMENTS: On the whole, these provisions together make significant progress towards restoring citizenship to minorities whose citizenship rights were denied by past State discriminatory practices. This is an important first step.
- The former Baa'thist regime made consecutive efforts to strip various Iraqi minorities of their citizenship. In 1974, the Iraqi government deported around 130,000 Faili Kurds to Iran and claimed that the Faili Kurds were not Iraqi citizens.¹¹⁷ In 1980, Decree 666 stripped between 220,000 and 300,000 Iraqi Faili

¹¹⁶ *Id.*

¹¹⁷ Jane Chanaa, Forced Migration Online, FMO Research Guide: Iraq, (July 2007) available at <http://www.forcedmigration.org/guides/fm0015/fm0015-2.htm>.

Kurds of their citizenship, and the government seized their properties.¹¹⁸ Even though these Nationality Laws attempted to restore citizenship to various Iraqi minorities, including the Faili Kurds, it is estimated that at the very least, roughly 100,000 Faili Kurds still lack nationality.¹¹⁹ Despite the repeal of the denaturalization provisions of past Nationality Laws and Decrees, the Iraqi Ministry of Displacement and Migration has reported that, since 2003, only about 20,000 families have had their citizenship reinstated.¹²⁰

- Like the Faili Kurds, the Baha'is also suffered at the hands of discriminatory State practices. For instance, many Baha'is born in Iraq in the last 30 years have no citizenship documents, including passports.¹²¹ In 2008 the Iraqi Ministry of Interior (MOI) revoked a previous regulation that prohibited providing national identity card to Baha'is.¹²² Despite the revocation, Baha'is who had been forced to identify themselves as "Muslim" could still not change their identity cards to indicate their faith.¹²³ Without official and accurate documentation, Baha'is in Iraq have difficulty registering in schools, leaving the country and, most importantly, being guaranteed fundamental freedoms afforded by the Constitution to all "Iraqi citizens."
- The Bedouin peoples within Iraq are broadly defined as those without permanent residence who live a nomadic lifestyle.¹²⁴ The Iraqi national census of 1997 estimated their population at 100,000.¹²⁵ The nomadic lifestyle of the Bedouin has made it difficult for them to acquire the necessary documents to establish their Iraqi nationality. As such, it is difficult for the Bedouin to gain citizenship and enjoy all benefit that derive from citizenship.
- Without documents proving that their origins are indeed in Iraq, minorities, including those mentioned here, cannot reinstate their citizenship. Therefore, the Nationality Laws should go beyond merely repealing the previous discriminatory citizenship laws and provide alternate means of proving citizenship, such as oral testimony from community members, evidence of long-time residence in Iraq, and knowledge of local dialects, geography and culture.

¹¹⁸ Susan Campbell *The Faili Kurds of Iraq: Thirty Years Without Nationality*, Refugees International, April 2010, available at <http://www.refugeesinternational.org/blog/faili-kurds-iraq-thirty-years-without-nationality>.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Lalani, 5.

¹²² Lalani, 5.

¹²³ U.S. Department of State, *Issuance of Identity Cards for Baha'is*, 11 March 2008.

¹²⁴ Radio Free Europe/ Radio Liberty, *Iraq Census Takers to Focus on Bedouin*, (May 14, 2010), available at http://www.rferl.org/content/Iraqi_Census_Takers_To_Focus_On_Bedouin/2041952.html.

¹²⁵ Refugees International, *The State of Kuwait: Submission to the United Nations Universal Periodic Review, Session 8, 2* (May 2010).

- The Law on Citizenship in Bosnia and Herzegovina (BiH) of 1999 establishes procedures for individuals who lack evidentiary documentation to prove citizenship, including “statements made by or for such persons.”¹²⁶
- SUGGESTIONS: Amend the Nationality Laws to clarify and specify the means by which nationality may be reinstated. If the process involves submitting documentation to prove that a person originated from Iraq, either allow alternative evidence as in Bosnia and Herzegovina or make reasonable exemptions for those who lost documents and possessions during past civil unrest and targeted persecutions.
- Place an affirmative burden on the government to reach out to those minorities whose citizenship has been denied to commence the citizenship reinstatement process.

Article 4

The Minister may consider Iraqi any person born outside Iraq to an Iraqi mother and an unknown or stateless father, if he chooses the Iraqi nationality, within one year from coming of age (reaching the age of maturity), unless he fails to do so, due to difficult circumstances, provided that he is residing within Iraq at the time of application for Iraqi nationality.

- COMMENTS: This provision recognizes the importance of granting citizenship to the offspring of an Iraqi mother and an unknown or stateless father. However, age of maturity may be difficult to prove in writing, especially in light of the destruction of records that occurred during the Gulf War and more recently due to the fall of the Ba’athist regime. This requirement may adversely affect Iraqi minorities, who have been persecuted in the past and may have lost records due to displacement or violence.
- Article 4 places strict term limits and locale restrictions on applications for nationality--limits such as allowing only one year after attaining the age of maturity to apply for citizenship--that may be impossible to meet in light of current conflict in the region and the extent of displacement of persons.
- SUGGESTIONS: Amend Article 4 to make exemptions for persons who have lost documents proving their birth dates, due to past violence and displacement in the country. The Amendment could allow the government to make a case-by-case determination of applications that fail to meet the stated requirements due to misplaced or destroyed documentation.

Article 5:

¹²⁶ Law on the Citizenship of Bosnia and Herzegovina No. 01/97 (1999, as amended 2003).

The Minister may consider Iraqi anyone who was born within Iraq to a non-Iraqi father, who was also born in Iraq, had come of age and had been habitually residing therein at the time of child's birth, provided the child will apply for the Iraqi nationality.

- **COMMENTS:** This provision sets out a narrow conception of *jus solis*, the conception of citizenship based on birth within the territory of the state.¹²⁷ This is in contrast to the main way a person gains citizenship through the Nationality Act, which is by descent.
- Article 1(2) of the Turkish Citizenship Law provides citizenship to all those born in Turkey, regardless of their parents' citizenship *in addition to* citizenship by descent.¹²⁸ It would be useful for Iraq to enact a similar law founded on several bases of citizenship in order to decrease the future risk of arbitrary repeal of citizenship and to provide additional bases on which minority groups could make their citizenship claims.
- **SUGGESTIONS:** Amend Article 5 to simply provide that “the Minister may consider Iraqi anyone who was born within Iraq.”

Article 9

1-A non-Iraqi who is granted Iraqi nationality by naturalization pursuant to Articles 4, 5, 6, 7 and 11 hereof shall enjoy the same rights as an Iraqi, unless those are excluded by a special law.

2- A non-Iraqi who is granted Iraqi nationality by naturalization pursuant to Articles 4, 6, 7 and 11 hereof shall not be a minister or member of a parliamentary body before the lapse of ten years from the date of acquiring Iraqi nationality.

3- A non-Iraqi who is granted Iraqi nationality pursuant to Articles 4, 6, 7 and 11 hereof shall not occupy the post of president or vice-president of Iraq.

4- An Iraqi who holds another acquired nationality shall not assume a top-level sovereign or security position, unless he/she has renounced that nationality.

- **COMMENTS:** This provision sets out limits for Iraqis who have been granted nationality pursuant to Article 4, 5, 6, 7 and 11. For instance, it excludes Iraqis who have been granted nationality from parliamentary participation for ten years. Rules and limitations on political participation should be eased in light of Iraq's developing democracy and the temporary departure of many minorities due to the State's past discriminatory acts, civil war and ongoing security threats. Returning Iraqis should be encouraged to participate in the political process rather than being made to wait as long as a decade to have their voices heard.

¹²⁷ Andrew Vincent, *Nationalism and Particularity* 80 (2002).

¹²⁸ *Turkish Citizenship Law* [Turkey], Law No. 403, 11 February 1964, available at: <http://www.unhcr.org/refworld/docid/4496b0604.html>.

- **SUGGESTIONS:** Amend Article 9(2) so that individuals who have been temporarily displaced from Iraq due to factors beyond their control do not have to wait ten years to get involved in the political process.

Article 21

I-The Iraqi Nationality Law No. 43 of 1963 shall be repealed. However, the instructions issued under this law shall remain in effect insofar as they do not conflict with the provisions of this present law, pending the issuance of instructions that will replace or repeal them.

II- Law No 5 of 1975 on granting Iraqi nationality to Arabs shall be retroactively repealed, unless it will lead to statelessness.

III-The (inactive) Nationality and Civil Information Law No. 46 of 1990 shall be repealed.

Any text contradictory to the provisions of this law shall be repealed.

- **COMMENTS:** Article 8 of the Iraqi Nationality Law No. 43 of 1963 sets out naturalization requirements according to different classes of persons. The least restrictive requirements are set out in Article 8(1) and apply only to Arab Nationals. These requirements are: majority; legal entry into Iraq; legal residence in Iraq for ten years; good conduct and reputation; and lack of disease and mental and physical deficiencies. Only the Minister of the Interior needs to approve these applications. Article 8(3) sets out more restrictive requirements for non-Arabs born in Iraq, such as fulfillment of military service. The most restrictive requirements are set out in Article 8(4) and apply to all aliens not born in Iraq. This last category requires approval by both the Minister of the Interior and the President of the Republic of Iraq. In addition, it requires 15 years of residence and a relative with Iraqi nationality, (no more than second degree of affinity). This law discriminated against non-Arabs by heightening the naturalization requirements according to race.
- Article 1 of Law No. 5 of 1975 reduces the naturalization requirements of Iraqi Nationality Law No. 43 of 1963, but only for Arabs. Specifically, Article 1 struck down the 10-year legal residency requirement, legal entry requirement, the obvious means of living requirement, and the freedom from physical and mental deficiencies requirement, leaving only the requirements of good conduct and majority alongside the attainment of majority. Arab applicants for naturalization could ignore these requirements under Law No. 5 of 1975. The law discriminated against non-Arabs who wished to gain Iraqi citizenship through naturalization, as it only reduced the requirements for Arabs.
- As such, the repeal of Laws No. 5 of 1975 and Law No. 43 of 1963 represents an extraordinary, praiseworthy effort to restore citizenship to those Iraqis who lost

their citizenship during the former Ba'athist regime. The repeal unifies the naturalization process to ensure that all non-Iraqi citizens are treated equally.

VI. HIGH COMMISSION FOR HUMAN RIGHTS LAW

Key Recommendations

- **Amend Article 4(3) to require the HCHR to examine and provide commentary on draft legislation, as well as legislation in force, to determine whether it conforms with the Constitution and adequately protects the human rights of all Iraqis.**
- **Amend Article 4 to give the HCHR powers to issue binding decisions after listening to the merits of a case under certain circumstances**
- **Amend Article 5 to grant the HCHR the power to independently initiate lawsuits without the need for an external complaint.**
- **Amend Article 7 to guarantee reserved seats for minority representatives on the Committee of Experts charged with recommending Commissioners to the Council of Representatives for approval.**
- **Amend Article 8(fifth) to increase the quota for minority Commissioners from “no less than one original member and one reserve” to ensure appropriate representation of Iraq’s Minority Components.**

THE HIGH COMMISSION FOR HUMAN RIGHTS LAW (NO. 53 OF 2008)

The High Commission for Human Rights Law No. 53 of 2008 (HCHR Law) was enacted to redress human rights violations and to help deter future violations. While this is a much-needed apparatus in combating human rights abuses in Iraq, the HCHR Law grants limited authority to the High Commission for Human Rights (HCHR). For instance, the HCHR Law states that the HCHR may monitor, evaluate and offer advice; it may not, however, initiate lawsuits or intervene in existing suits. The HCHR Law does not grant the HCHR the power to issue binding decisions in arbitration or remediation, or order parties involved in complaints to pay fines or make reparations. Under the structure of Iraqi law, the courts and prosecutors are the primary implementers and enforcers of the law. However, non-traditional forms of justice, such as remediation or arbitration, and equitable remedies to harms, may prove well-suited to address certain human rights violations, though such approaches are not readily available in the current court system.

Additionally, the HCHR Law designates the HCHR to serve as an expert body, monitoring and evaluating human rights in Iraq. The HCHR should have the authority not only to engage in such non-traditional remedial actions and initiate and participate in litigation, but also to employ its expertise and knowledge of human rights to exercise a degree of authority over reports submitted to the United Nations, and to provide input on draft

legislation. Therefore, several key amendments to the HCHR Law are needed to expand the powers and jurisdiction of the HCHR, bring the institution into better harmony with international best practices and ensure that minorities are represented in its membership.

Scope of Authority

Article 4

The HCHR will perform the following functions:

First: Coordinate with relevant bodies to develop strategies and action mechanisms in order to ensure the achievement of HCHR objectives provided in Article (3) of this Law.

Second: Conduct studies and researches; submit recommendations and express opinions on issues related to the promotion and development of human rights.

Third: Examine and evaluate legislations in force to determine to what extent they conform to the constitution and submit recommendations to the Council of Representatives.

Fourth: Submit proposals and recommendations concerning Iraq's accession to international human rights treaties and conventions.

Fifth: Cooperate and coordinate with civil society organizations that work in the human rights field in Iraq, and communicate with international independent and non-governmental institutions in a manner that ensures the achievement of the HCHR objectives.

Sixth: Work on spreading the human rights culture through the following:

a) Inclusion of the human rights culture in the educational curricula.

b) Organizing conferences, symposiums and artistic and social events, issue publications and prepare media materials on human rights related topics.

Seventh: Submit recommendations and proposals to committees entrusted with the preparation of reports, which the state is obliged to submit to the United Nations.

Eighth: Submit an annual report to the Council of Representatives containing general assessment of the human rights situation in Iraq and publish such report in different media outlets.

- **COMMENTS:** The establishment of a HCHR is an important, commendable step toward ensuring the protection of the rights of minorities and other vulnerable groups in Iraq. The HCHR will fill a critical research and advisory role, and its ability to initiate lawsuits would be a key mechanism for enforcing human rights laws.

- However, the Code does not grant the HCHR the authority necessary to achieve its potential. For instance, Article 4 limits the scope of the HCHR to--among other things--coordinating, conducting studies, evaluating legislation, submitting recommendations to the government about international treaty obligations and United Nations reports, coordinating with civil society organizations and organizing symposiums. Moreover, the HCHR may only evaluate legislation in force, as opposed to draft legislation, when it submits recommendations to the Council of Representatives.
- In order to empower the HCHR to effectively address human rights violations, the Commissioners could have the power to issue binding decisions, or require parties to pay fines after hearing the merits of a case.
- SUGGESTIONS: Amend Article 4 to give the HCHR powers to issue binding decisions after hearing the merits of a case.
- Amend Article 4(3) to require the HCHR to examine and provide commentary on draft legislation and legislation in force to determine whether it conforms with the Constitution and adequately protects the human rights of all Iraqis.
- Amend Article 4(7) to grant the HCHR greater authority over the preparation and content of human rights reports submitted to the United Nations.

Article 5

The HCHR must:

First: Receive complaints from individuals, groups and civil society organizations on violations committed before and after this Law comes into force while maintaining complete confidentiality of the names of the complainants.

Second: Conduct initial investigations on violations of human rights based on information.

Third: Ascertain the veracity of complaints received by the HCHR and conduct initial investigations, if necessary.

Fourth: Initiate lawsuits related to violations and refer them to the Public Prosecution to take the [necessary] legal action and notify the HCHR of the outcomes.

Fifth: Conduct visits to prisons, social rehabilitation centers, detention centers and all other places without the need for the prior authorization of the said bodies, meet with those convicted and those detained, document cases of human right violations and inform the relevant authorities to take the proper legal action.

- **COMMENTS:** While the law grants the Commission the authority to initiate lawsuits based on complaints from individuals, groups and civil society organizations, it does not grant authority to pursue lawsuits or intervene in existing cases. The law also fails to grant the HCHR the power to participate in lawsuits as an *amicus curiae* (friend of the court).
- The Commission has the authority to conduct visits to prisons, social rehabilitation centers and detention centers, but grants no authority to remedy the human rights violations HCHR discovered during such visits beyond asking authorities to take proper action.
- **SUGGESTIONS:** Amend Article 5 to grant the HCHR the power to independently initiate lawsuits without the need for an external complaint.
- Amend Article 5 to grant the HCHR authority to intervene in existing lawsuits, including lawsuits against prisons, rehabilitation centers and detention centers if they fail to correct human rights violations discovered by the HCHR.
- Amend Article 5 to grant the HCHR the power to intervene or participate in lawsuits as an *amicus curiae* (friend of the court).

Minority Representation

Article 7

The Council of Representatives shall establish a committee of experts (COE) whose number shall not exceed 15 members. The COE shall include representatives from the Council of Representatives, the Council of Ministers, the High Judicial Council, civil society organizations and the United Nations Human Rights Office in Iraq. The selection of candidates shall be conducted through a public announcement.

Article 8

First: The Board of Commissioners (BOC) shall consist of eleven original members and three reserves to be selected from among the members previously nominated by the COE. The selection of such members shall be approved by absolute majority of the attending members of the Council of Representatives.

Second: A member of the BOC must meet the following conditions:

- a. An Iraqi national who is a permanent resident of Iraq.*
- b. At least 35 years of age.*
- c. Has a primary university degree, as a minimum.*
- d. Has experience in the field of human rights.*
- e. Not affiliated with any political organization, and not banned from becoming a member of the BOC in accordance with the Accountability and Justice Law....*
- f. Of good reputation and conduct, and was not convicted of a dishonorable crime....*

Article 10

Second: The BOC may invite representatives of state departments, public, mixed and private sectors, as well as civil society organizations to attend meetings as observers....

- **COMMENTS:** Article 7 strives to be inclusive in creating a competent COE, which will then select the Commissioners for the BOC and recommend these selections to the Council of Representatives for approval. The composition of the COE is extremely important since that body will be responsible for the eventual composition of the BOC, which will preside over HCHR proceedings and maintain impartiality. Given the significance of the COE, it is important that the COE has Iraqi minority representation. Religious and ethnic minorities have reported discrimination in the appointment of administrative positions within state bodies, and an absence of minorities from COE positions may result in discrimination in COE decision-making.¹²⁹
- Potential unequal treatment of minorities by the COE and unequal access of minorities to COE positions violate Article 16 of the Iraqi Constitution, which guarantees equal opportunities to all Iraqis. It also violates Article 14, which enshrines the principle of non-discrimination. The Code's requirement of only one minority seat on the HCHR heightens this potential for inequality.
- This further violates Article 25 of the ICCPR, which guarantees every citizen the right and opportunity to take part in the conduct of public affairs and to have access, on general terms of equality, to public service in his or her country.¹³⁰ The ICCPR also requires states to take affirmative measures to ensure that citizens have an effective opportunity to enjoy this right and to eliminate conditions that cause or perpetuate discrimination in the enjoyment of the right.¹³¹
- **SUGGESTIONS:** Amend Article 7 to guarantee reserved seats for minority representatives on the Committee of Experts charged with recommending Commissioners to the Council of Representatives for approval.
- Amend Article 8(fifth) to increase the quota for minority Commissioners from "no less than one original member and one reserve" to ensure appropriate representation of Iraq's Minority Components.

¹²⁹ Lalani, 26.

¹³⁰ ICCPR Art. 25.

¹³¹ General Comment No. 18: Non-discrimination, 10th November 1989, CCPR General Comment No. 18 (General Comments),

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8doe?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8doe?Opendocument).

General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public services (Art. 25), 12th July 1996, CCPR/C/21/Rev.1/Add.7, General Comment No. 25 (General Comments),

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/dob7fo23e8d6d9898025651e004bc0eb?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/dob7fo23e8d6d9898025651e004bc0eb?Opendocument).

VII. ELECTIONS LAW

Key Recommendations

- Amend Article 4 to state that election participation is the right of every citizen without discrimination of any kind and provide an illustrative, but not exhaustive, list of impermissible grounds for discrimination.
- Amend the law to include a provision that the State will take effective measures to ensure that all persons who are entitled to vote are able to exercise that right.
- Amend the Elections Law to specifically state that the IHEC must not exercise its discretion in any way that has the purpose or effect of discriminating against any group on any basis listed in the Election Law's nondiscrimination provision in Article 4.
- Amend the Elections Law to guarantee reserved seats in the Commission for minority representatives.
- Amend the Elections Law to mandate that the IHEC should conduct a full voter registration.
- Amend Article 1 of the Elections Law to enable the IHEC to consider developing mechanisms whereby minorities can vote for their representatives through special lists, special ballots, or other means as appropriate, including amending calculations for compensatory seats.
- Amend Articles 7 and Article 4(a) to clarify that fear of generalized violence is a sufficient basis for a person to qualify as an IDP.
- Amend Articles 6 and 7 to allow the IHEC to formulate and implement a mechanism to allow IDPs to express their intent to remain in, and integrate into, their place of displacement and to allow them to vote and run for office in their place of displacement after such a determination is made.
- Amend Article 1 to reconcile Articles 1(1) and 1(3) to provide maximum protection practicable for all ethnic, linguistic and religious minorities.

ELECTIONS LAW OF THE PROVINCIAL, DISTRICTS
AND SUB-DISTRICTS COUNCILS
(NO. 36 OF 2008)

The laws regulating elections in Iraq are progressive and strive to include all components of Iraqi society in local and national representation. Article 4 of the Elections Law of the Provincial Districts and Sub-Districts Council No. 36 of 2008 (Elections Law) contains a nondiscrimination provision that sets out the rights of all Iraqis to run for office as well as

to vote for public officers. These rights are rooted in the Iraq Constitution: Article 20 states, “Iraqi citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office.”¹³² However, several provisions in the Elections Law may discriminate against and marginalize minorities, deny their right to office and thereby remove them from the important political process. Several other provisions in the Elections Law fail to take into account and involve minority communities in the electoral process.

Nondiscrimination

Article 4

First: The election is the right of every Iraqi male and female of those who fulfill the conditions stipulated in this law for exercising such right, without discrimination based on gender, race, nationality, origin, color, religion, religious affiliation, belief or opinion, or economic and social status...

- **COMMENTS:** This provision contains the Elections Law’s nondiscrimination provision, which guarantees the right to participate in elections to every qualified Iraqi and enumerates impermissible grounds for discrimination in exercising this right. It is a progressive provision that works toward ensuring nondiscrimination in voting.
- While the grounds of discrimination covered by this law are broad, it is possible to expand the nondiscrimination bases, and thus the protection of rights. Article 4 of the Elections Law protects against discrimination based on “gender, race, nationality, origin, color, religion, religious affiliation, belief or opinion, or economic and social status.” This language closely tracks the language in Article 14 of the Iraqi Constitution.
- However, Article 25 of the ICCPR guarantees the right to vote and take part in public affairs to “[e]very citizen...without any of the distinctions mentioned in Article 2 and without unreasonable restrictions.”¹³³ Article 2(1) guarantees this right “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹³⁴ The Convention requires States to adopt legislative provisions necessary to ensure that citizens have an effective opportunity to enjoy this right.¹³⁵

¹³² Article 20, Iraqi Constitution.

¹³³ ICCPR Art. 25.

¹³⁴ ICCPR Art. 2(1).

¹³⁵ General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12th July 1996, CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments).

- SUGGESTIONS: Amend Article 4 to state that election participation is the right of every citizen without discrimination of any kind and provide an illustrative, but not exhaustive, list of impermissible grounds for discrimination.

Access to Participation

Article 7

Adopt the conditions of candidacy provided in Article (5) of the Law of the Governorates Not Organized Within a Region, No. 21 of 2008. [Article 5, Law of the Governorates Not Organized Within a Region, No. 21 of 2008: A candidate for membership of a council is to meet the following conditions...Second: Must hold, at a minimum, a secondary school certificate or its equivalent....]

- COMMENTS: This provision requires that candidates for office hold a secondary school certificate or its equivalent. While basic standards for qualification are necessary, linguistic minorities in Iraq face substantial obstacles in accessing public education. While Article 4 of the Iraqi Constitution recognizes the right of education in a mother tongue, the majority of all minorities have reported that school curriculum was unavailable in their mother tongue.¹³⁶
- ICERD requires that, to the extent that private institutions influence the exercise of rights or the availability of opportunities, States must ensure that the result has neither the purpose nor the effect of perpetuating racial discrimination.¹³⁷ The Article 7 requirement, coupled with obstacles to educational opportunities, may in effect discriminate against minority candidates by limiting their opportunity for candidacy.
- The ICCPR requires that any conditions that apply to the right to be elected should be based on objective, reasonable criteria.¹³⁸ In light of the discrimination faced by linguistic minorities in accessing educational services, the condition that candidates hold a secondary school certificate or its equivalent will likely create an unreasonable obstacle for otherwise qualified minority candidates.
- For instance, in the aftermath of the 2005 elections in Indonesia, the international human rights community condemned the country's educational requirements for candidates to political office.¹³⁹ The general election law raised the educational

¹³⁶ Lalani, 24.

¹³⁷ General Recommendation No. 20: Non-discriminatory implementation of freedoms (Art. 5), 15th March 1996, Gen. Rec. No. 20 (General Comments),

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/8b3ad72f8e98a34c8025651e004c8b61?Opendocument_](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/8b3ad72f8e98a34c8025651e004c8b61?Opendocument_)

¹³⁸ General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25).

¹³⁹ The Carter Center, *Final Report of the Carter Center: Limited Observation Mission to the April 9, 2009 Legislative Elections in Indonesia* (2009) at 39.

requirements for legislative candidates from junior high school to “high school or equivalent” qualifications.¹⁴⁰ The Carter Center found that imposing such education requirements upon candidates had a discriminatory effect on certain components of the population, including women and residents of rural areas with little access to educational facilities.¹⁴¹ Therefore, even though it is important to set minimal standards, those standards should not create unfair barriers to holding political office for minorities and vulnerable groups and should be construed in light of the particular challenges faced by many Iraqis in accessing higher education.

- **SUGGESTIONS:** Amend Article 7 to eliminate the requirement that candidates hold a secondary school certificate or its equivalent.

Article 16

...Fourth: Registration shall be performed in person or in accordance with instructions issued by the Commission.

Article 17

...Third: The initial registry of voters shall be announced after its completion to allow local and international observers and media men to monitor and view it.

Article 18

The Commission shall display the registry of voters of each electoral district in which the names of voters are listed in alphabetical order. This should be done in a prominent place at the registration centers, to facilitate its viewing.

Article 20

The initial registry of voters shall be final and shall be used for voting after the expiration of the periods of appeal or after objections presented against the registry are settled. The Commission shall publish it at the registration centers after a period to be determined by the Commission.

- **COMMENTS:** Article 16 requires that voters register in person. Articles 17, 18 and 20 require that the registry of voters be publicized. In-person registration and publication of voter registration lists are positive measures to prevent corruption and electoral fraud.
- There have been reports that Iraqi minorities face difficulties accessing their rights to political participation due to threats and intimidation intended to discourage them from voting. Threats of violence may restrict the freedom of movement of

¹⁴⁰ Id. at 39.

¹⁴¹ Id. at 76.

minorities, especially minority women.¹⁴² In-person registration may limit minorities' ability to exercise their right to vote if threats of violence limit their freedom of movement to such an extent that they cannot travel to the registration site. The publication of voter registration lists may also increase the likelihood that minorities would become easy targets for ethnic-based violence. Therefore, the advantages of requiring in-person voter registration must be balanced with the risk of denying voting rights to vulnerable populations who may not be able to register in person.

- For instance, in Costa Rica, the Supreme Electoral Tribunal has enacted various regulations and implemented programs to ensure that no discrimination occurs when registering voters such as those with disabilities. The Tribunal has maintained auxiliary registration sites in the nations central hospitals, offered mobile voter registration booths, visited distant areas and even undertaken domiciliary voter registration.¹⁴³
- SUGGESTIONS: Amend the law to include a provision that the State will take effective measures to ensure that all persons who are entitled to vote are able to exercise that right, including the expansion of voter registration options.

Article 39

Shall be punished by imprisonment for a period of not less than a year any of the following persons:

First: Any individual who uses force or threats to prevent a voter from using his/her right to vote to force the voter to vote in a certain way or to abstain from voting;

Second: Any individual who gives, offers or promises to give a voter any benefits for himself or others in return for voting in certain way or abstaining from voting;

Third: Any individual who accepts or requests a benefit for himself or others from the person who is assigned to perform a public service in the electoral process;

Fourth: Any individual who disseminates or announces incorrect information to voters regarding a candidate's behavior or his/her reputation in order to influence the voters' opinions and the results of the elections;

Fifth: Any individual who enters a place allocated for voting carrying a weapon or a wounding tool in contradiction to the provisions of the law;

Sixth: Any individual who insults, defames, or assaults the election committee or one of its members during the election process;

Seventh: Tampering with ballot boxes, electoral tables or any documents dealing with the electoral process.

Article 40

¹⁴² Lalani, 10, 15.

¹⁴³ Organization of American States, *Access to Voting for People with Disabilities in Costa Rica*, available at http://www.oas.org/sap/docs/DECO/7_EMBs/presentaciones/Seign_Jimenez_e.pdf

The following shall be punished by imprisonment for a period of not less than a year, and a fine of not less than (100,000) a hundred thousand Iraqi dinars and not to exceed (500,000) five hundred thousand Iraqi dinars:...

Second: Any individual who violates the freedom of election or its order by using force or threats.

- COMMENTS: These are positive protections to guarantee that no Iraqi-- whatever his or her background--will be intimidated or coerced when exercising the right to vote. It is noteworthy that these provisions, by delineating the types of misconduct and relevant punishments, go beyond a mere warning against interference with voting rights.

The Independent High Electoral Commission (IHEC)

Generally, observers have noted that the IHEC has been criticized for alleged corruption and undue political party influence.

Article 8

...Second: The candidates shall be subject to the approval of the [Independent High Electoral] Commission.

Article 37

...Third: It is prohibited to place advertisements, distribute action programs, brochures, or cards in the name of a candidate not registered on the candidates' list.

- COMMENTS: Article 37 prohibits campaigning for office unless the candidate's name has been approved by the IHEC. To ensure free and fair elections, it may be necessary to have a centralized authority with control over voting. However, there should be a guarantee that this centralized body functions impartially in a free and fair manner and acts only in the best interests of all Iraqi minority groups regarding the candidate list.
- Unless minorities are fairly represented in the IHEC and unless the minority candidates' interests align with the interests of the IHEC, the IHEC has the authority and power to discriminate against potential candidates by rejecting their applications. Therefore, the IHEC may prevent minority candidates from running for office and restrict minority voters' access to elected office.
- SUGGESTIONS: Amend the Elections Law to specifically state that the Commission must not exercise its discretion in any way that has the purpose or effect of discriminating against any group on any basis listed in the nondiscrimination provision in Article 4.

- Amend the Elections Law to guarantee reserved seats in the Commission for minority representatives.

Representation

Article 17

The Commission shall rely on the most recent statistical database of the Ministry of Trade pertaining to ration cards for establishing the registry of voters and determining the number of seats of the electoral district until a general census of the population is conducted...

Article 24

The Provincial Council shall consist of 25 seats, with one additional seat to be added for each 200,000 people for any population of more than 500,000 in accordance to the latest approved census based on the ration card, on which the registry of voters was established.

Article 25

The District Council shall consist of 10 seats with one additional seat to be added for each 50,000 people in accordance to the latest approved census based on the ration card, on which the registry of voters was established.

Article 26

The Sub-District Council shall consist of 7 seats with one additional seat to be added for each 25,000 people in accordance to the latest approved census based on the ration card, on which the registry of voters was established.

- **COMMENTS:** These provisions determine the number of seats in electoral districts based on the registration of ration cards until the State conducts a general census. While using ration cards might have been expedient in the aftermath of the collapse of the Ba'athist regime, it is less and less a viable option. A significant number of Iraqis have died or have been displaced due to the civil unrest; further, ration cards are an unreliable, inaccurate form of accounting for the population.
- UNAMI has reported that this method of determining local population statistics has skewed the statistical presence of minority groups in certain areas. For example, members of the Yazidi community in Nineveh complained of being forced to collect their food aid in neighboring Dohuk, which reduced their statistical presence in Nineveh. Additionally, minorities report pressure, threats and intimidation to make them identify as Arabs or Kurds, which dilutes the statistical representation of their distinct minority group in their district.¹⁴⁴

¹⁴⁴ Lalani, 18.

- SUGGESTIONS: Amend the Elections Law to mandate that the IHEC should conduct a full voter registration, rather than continue its practice of updating electoral rolls based on ration card lists, and make similar adjustments at the district and sub-district levels.

Internally Displaced Persons (IDPs)

Article 1

...Displaced Voter: An Iraqi who has been forcefully displaced from his permanent place of residence to another place within Iraq after 9 April 2003, for any reason.

Article 6:

...Second: Specific electoral centers shall be designated for the displaced in their areas for the purpose of casting their votes for their candidates in the areas from which they had been displaced. The High Commission shall handle determining their registration mechanism in accordance with instructions.

Article 7

Adopt the conditions of candidacy provided in Article (5) of the Law of the Governorates Not Organized Within a Region, No. 21 of 2008. [Article 5, Law of the Governorates Not Organized Within a Region, No. 21 of 2008: A candidate for membership of a council is to meet the following conditions... Fourth: Must be a native of the Province according to the Civil Status Record, or to have been continuously residing in it for a period no less than 10 years, provided that his residency is not for demographic change....]

- COMMENTS: Articles 6 and 7 limit the ability of IDPs to vote for candidates and run for elective office in the areas in which they are displaced. While Article 6 states that displaced voters may cast votes for candidates from the areas from which they have been displaced, Article 7 states that a candidate must be a native of the province or a resident for at least 10 years. These provisions reflect an assumption that IDPs will eventually return to their original places of residence.
- While return is the preferred option only for an estimated 56 percent of minority IDPs, a reported 24 percent would prefer to integrate into their current locations.¹⁴⁵ The Elections Law discriminates against this latter group of IDPs by limiting their right to participate in public life in the locations where they plan to stay indefinitely.
- The ICCPR's guarantee of the right to participate in public life dictates that persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as residence. Additionally,

¹⁴⁵ Lalani, 19.

residency requirements for voter registration must be reasonable and should not be imposed to discriminate based on homelessness or property ownership.¹⁴⁶

- SUGGESTIONS: Amend Article 7 to make clear that fear of generalized violence is a sufficient basis for a person to qualify as an IDP.
- Amend Articles 6 and 7 to allow the IHEC to formulate and implement a mechanism to allow IDPs to express their intent to remain in, and integrate into, their place of displacement and to allow them to vote and run for office in their place of displacement after such a determination is made.¹⁴⁷

AMENDMENTS TO ELECTIONS LAW (NO. 16 FOR 2005)

Article 1

Article (1): Article 15 of the Law shall be repealed and replaced by the following:

The Council of Representatives shall consist of a number of seats at a ratio of one seat for each 100,000 individuals based on the most recent Ministry of Trade statistics, including 5% of the Seats allocated as compensatory seats, which shall be distributed on the lists based on the percentage of seats they acquired

The Iraqi Components shall be guaranteed a quota of substantial seats, which should not affect their percentages if they participate in the national lists, as follows:

- 1. The Christian component: 5 seats to be distributed to the Governorates of Baghdad, Nineveh, Kirkuk, Dahuk, and Erbil.*
- 2. The Yezidi Component: One seat in Nineveh Governorate.*
- 3. The Sabean Mandeian Component: One seat in Baghdad Governorate.*
- 4. The Shabak Component: One seat in Nineveh Governorate.*

Fifth: Christian quota seats shall be within one electoral district.

- COMMENTS: Article 1 acknowledges the importance of having minorities represented in elected office, and sets out provisions for reserved seats for minority candidates. However, Article 1 is at odds with Article 49 of the Constitution. Even though minority representation is extremely important, these provisions are contradictory and also fall short of taking into account several other Iraqi

¹⁴⁶ General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25).

¹⁴⁷ One method may be to follow the model of the Amendments to the Elections Law No. 16 of 2005 and allow an IDP to vote in the constituency he was displaced to, if he moved his ration card to that province or district.

minorities. For instance, many minority groups, including Black Iraqis, have expressed frustration about their lack of political representation and disparate treatment compared to other minority groups.¹⁴⁸ Additionally, absent a full voter registration or a census from which registration information could be derived, it is difficult to appropriately calculate compensatory seats.

- SUGGESTIONS: Amend Article 1 of the Elections Law to enable the IHEC to consider developing mechanisms whereby minorities can vote for their representatives through special lists, special ballots, or other means as appropriate, including amending calculations for compensatory seats.

Article 4(a)

The IDP voter is the Iraqi citizen who was displaced by force from his permanent area of residence to another area inside Iraq after 09-04-2003 for any reason.

- COMMENTS: Article 4(a) defines displaced voters as Iraqis who have been displaced by force, but it fails to define the term “force.” While many internally displaced Iraqis cite direct threats to life as their reason for displacement, another common reason is more general fear and violence.¹⁴⁹ While the law states that a displaced voter may be displaced “for any reason,” the provision may be interpreted to apply only to displaced voters whose displacement was due to direct threats on their lives.
- SUGGESTIONS: Amend Article 4(a) to make clear that generalized fear of violence is sufficient grounds to qualify as an IDP.

¹⁴⁸ Lalani, 23; Office of the UN High Commissioner for Human Rights, *The Rights of Non-Citizens*, 26 <http://www.ohchr.org/Documents/Publications/noncitizensen.pdf>

¹⁴⁹ Lalani, 19.

VIII. POLITICAL PRISONERS' FOUNDATION ACT

Key Recommendations

- **Amend Article 10 to state that the Private Committee may not exercise its discretion in a discriminatory manner when determining who qualifies as a political prisoner.**
- **Amend Article 10 to require the Private Committee to provide timely notification to an applicant of its decision and to grant applicants at least 30 days to appeal the decision of the Committee.**
- **Amend the law to include a provision prohibiting the State from exercising its discretion in a discriminatory manner when making decisions about compensation or benefits to be paid to political prisoners and detainees.**
- **Amend Article 5 to include persons who were detained or imprisoned as a result of the previous regime's discriminatory practices, including those detained because of their ethnic, religious, linguistic or national origin backgrounds.**

THE POLITICAL PRISONERS' AND DETAINEES INSTITUTION LAW (NO. 11 OF 2005)

The Political Prisoners' and Detainees Institution Law No. 11 of 2005 (Prisoners' Law) makes significant strides toward recognizing injustices that may have occurred during the Ba'athist regime, and strives to compensate persons who were imprisoned or detained for political reasons. The Prisoners' Law sets out comprehensive provisions to compensate those who have been wrongfully imprisoned or detained. In order to ensure that the law is reflective of and sensitive to the plight of minorities--especially those who were particularly targeted for wrongful imprisonment due to their ethnic or religious background-- the law requires a few amendments.

Compensation

Article 2

The political prisoners' and detainees' institution law shall seek to remedy the general condition of political prisoners and detainees and give them a financial and moral compensation to comply with their sacrifices and suffering from being prisoners.

Article 3

The institution's purposes:

The institution seeks to provide political prisoners and detainees with care in addition to the privileges that are stipulated in this law according to the legal basics.

First- identify the political prisoners and detainees according to the rules of this law.

Second- provide many of the privileges to the groups covered by the rules of this law through coordination with the NGOs in different areas.

Third: provide work and study opportunities for them according to their qualifications and give them the priority.

Fourth: provide the facilities and assistance that give them and their families the ability to achieve social and economic welfare in legal and economic matters, and health care and social security and other benefits.

Fifth: glorify the sacrifices and its value to the society and immortalize their sacrifices through social and political works in the arts and media.

Sixth: the typical work of the institution seeks to attract and stimulate both local and international donors in order to provide the institution with funds.

- **COMMENTS:** Articles 2 and 3 recognize the sacrifices of those who may have been wrongfully detained or imprisoned and lay the foundation for both financial and moral compensation. They make a significant and commendable effort to recognize that such victims *and their families* would need assistance in employment, education, health care and social security beyond mere monetary compensation. Article 3 also states the importance of engaging with NGOs and local and international donors in these worthwhile efforts.

Article 17

1- The prisoners and detainees who are not employees shall have an adequate retirement salary that complies with their sacrifices and sufferings.

2- The jail and prison period such persons spent shall be considered as actual work service for the employee, for the purpose of promotions and retirement eligibility.

3- The prison period shall be considered as actual service for persons who are employed in an occupation but were not in this occupation before.

4- If the prisoner or the detainee was an employee, he shall have the right to combine the occupation and retirement salary only for 10 years; after that he will lose his retirement right.

Article 18

1- A tract shall be allocated to the political prisoner and detainee and an adequate loan for the tract will be provided.

2- A ten million dinars financial reward shall be allocated to the prisoners and detainees to indemnify their sacrifices and damages they sustained.

Article 19

1- Giving the prisoners and detainees priority to undertake general occupations.

2- Prisoners and detainees shall be exempt from government transportation fees for both airplanes and trains from and to Iraq for one time only; each prisoner/detainee shall have the right to be escorted on this trip by one member of his family, also at no cost.

- **COMMENTS:** Articles 17, 18 and 19 set out ways in which the State can help a wrongfully detained or imprisoned person reintegrate into society and his community. More importantly, these articles address how such person's imprisonment should not stand against him when he is considered for retirement and promotions in the workplace, and sets out various benefits he should be afforded. These provisions contain necessary, progressive protections for such prisoners and detainees and are sensitive to their wants and needs.
- **SUGGESTIONS:** Amend the law to include a provision prohibiting the State from exercising its discretion in a discriminatory manner when making decisions about compensation or benefits to be paid to political prisoners and detainees.

Scope of the Law

Article 5

This law pertains to both political prisoners and detainees who were imprisoned or detained by the previous Baa'thist regime. For purposes of the law, the following terms shall have the following meanings:

- *Prisoner: A person who was jailed or imprisoned because of his opposition to the previous regime, either in opinion, belief or political party affiliation, or as a result of his sympathy and support to opponents of the regime.*
- *Detainee: A person who was detained for no more than one year for the above reasons.*
- **COMMENTS:** While it is necessary that the law clarify which prisoners and detainees qualify to be treated as political prisoners and detainees, it is necessary not to classify them by political affiliation alone. The definition should be broadened to include Iraqis who were wrongfully detained and imprisoned by the former regime as a result of their ethnic, religious, linguistic or national origin background. This change would reflect and acknowledge the systematic use of State power under the former regime to discriminate against and persecute not only political opponents, but also religious and ethnic minorities.
- **SUGGESTION:** Amend Article 5 to include persons who were detained or imprisoned as a result of the previous regime's discriminatory practices, including

those who were detained because of their ethnic, religious, linguistic or national origin background.

Minority Representation

Article 4

The cabinet, in coordination with the political prisoners' association, shall undertake enacting decisions and regulations that facilitate the implementation of these purposes.

Article 7

A Council of Political Prisoners and Detainees Care shall be established and the Prime Minister shall appoint its members. The Council will consist of:

- *The President: A person who is of a minister grade and has been appointed by the majority of the institution's administrative council and is one of its members.*
- *The Deputy: A person of a deputy minister grade who has been appointed by the majority of the institution's administrative council and is one of its members.*
- *Council of Political Prisoners and Detainees Care: shall be considered the institution's administrative council.*
- *The Private Committee: this shall consist of the chief of the committee; one of the nominated judges of the supreme judicial council; and representatives from the ministries of Finance, Interior, Work and Social Affairs. Their responsibility will be to review the incoming requests of prisoners by categories in this law in order to decide if such persons are covered by this law.*
- *The Financial and Administrative Office.*
- *The Legal Office.*
- *The Social and Economic Office.*

Article 10

The Work Mechanism in the Private Committee:

- *The Private Committee shall decide the authenticity of requests submitted by prisoners and detainees in figuring out whether such requests fall under the protections of this law.*
- *The Committee shall issue its decisions by the majority.*
- *Any person appealing the Committee's decision has 10 days to do so from the date of the decision.*

- **COMMENTS:** Articles 4, 7 and 10 set out the working mechanism of the Cabinet, the Council and the Private Committee for Political Prisoners and Detainees Care. The law gives the Committee great discretion in deciding the "authenticity" of complaints, and therefore has unchecked authority to determine whether a prisoner or detainee qualifies as a "political prisoner." Further, a person who chooses to appeal a Committee decision only has 10 days from the date of the decision to appeal and there is no provision requiring the Committee to provide timely notification to an applicant that a decision has been rendered. Coupled with

the overbroad discretion granted to the Private Committee and the lack of notification requirement, 10 days is likely an insufficient time to appeal an arbitrary disqualification by the Committee and therefore places an applicant at a disadvantage.

- **SUGGESTIONS:** Amend Article 10 to state that the Private Committee may not exercise its discretion in a discriminatory manner when determining who qualifies as a political prisoner.
- Amend Article 10 to require the Private Committee to provide timely notification to an applicant of its decision and to grant applicants at least 30 days to appeal the decision of the Committee.

IX. MARTYRS' INSTITUTION LAW

Key Recommendations

- **Amend Article 10 to state that the Private Committee may not exercise its discretion in a discriminatory manner when determining who qualifies as a martyr.**
- **Amend Article 10 so that an applicant may have at least 30 days to appeal the decision of the Private Committee and to obligate the Private Committee to timely inform all applicants of its decisions**

THE MARTYRS' INSTITUTION LAW (LAW NO. 27 OF 2005)

The Martyrs' Institution Law No. 27 of 2005 (Martyrs' Law) contains language identical to that of the Prisoners' Law. Similarly, the Martyrs' Law sets out provisions to protect and provide for the next of kin of Iraqis who died as a result of their opposition to the Ba'athist regime. Several provisions are necessary to ensure that the law broadly protects minority communities who may have been targets of the previous regime.

Article 7

A Council of Martyrs' Family Care shall be established and the Prime Minister shall appoint its members. The Council will consist of:

- *The President: A person who is of a minister grade and has been appointed by the majority of the institution's administrative council and is one of its members.*
- *The Deputy: A person of a deputy minister grade who has been appointed by the majority of the institution's administrative council and is one of its members.*
- *Council of Martyrs' Family Care: shall be considered the institution's administrative council.*
- *The Private Committee: this shall consist of the chief of the committee; one of the nominated judges of the supreme judicial council; and representatives from the ministries of Finance, Interior, Work and Social Affairs. Their responsibility will be to review the incoming requests of prisoners by categories in this law in order to decide if such persons are covered by this law.*
- *The Financial and Administrative Office.*
- *The Legal Office.*
- *The Social and Economic Office.*

Article 10

The Work Mechanism in the Private Committee:

- *The Private Committee shall decide the authenticity of requests submitted by prisoners and detainees in figuring out whether such requests fall under the protections of this law.*
- *The Committee shall issue its decisions by the majority.*
- *Any person appealing the Committee's decision has 10 days to do so from the date of the decision.*

- COMMENTS: Articles 7 and 10 set out the working mechanism of the Council and the Private Committee for Martyrs' Family Care. The Committee is given great discretion in deciding the "authenticity" of complaints, and therefore has unchecked authority to determine whether a prisoner or detainee qualifies as a "political prisoner." Further, a person who chooses to appeal a Committee decision only has 10 days from the date of the decision to appeal and there is no provision requiring the Committee to provide timely notification to an applicant that a decision has been rendered. Coupled with the overbroad discretion granted to the Private Committee and the lack of notification requirement, 10 days is likely an insufficient time to appeal an arbitrary disqualification by the Committee and therefore places an applicant at a disadvantage.

- SUGGESTIONS: Amend Article 10 to state that the Private Committee may not exercise its discretion in a discriminatory manner when determining who qualifies as a martyr.

- Amend Article 10 to require the Private Committee to provide timely notification to an applicant of its decision and to grant applicants at least 30 days to appeal the decision of the Committee.

X. ISSUES SURROUNDING POTENTIAL POLITICAL PARTY LEGISLATION

Key Recommendations

- **Add “Iraq’s international legal obligations” the list of instruments and concepts the law should not contradict in Article 8(1).**
- **Amend Article 8 to include a nondiscrimination provision, including mechanisms for positive discrimination, such as voluntary party quotas within party leadership positions and party lists.**
- **Stipulate a review process by which “unqualified” candidates can appeal restrictions on their political participation in Article 9.**

Guaranteeing individuals the right to participate in the political process is essential to building a democracy. These rights include the right to form political or other associations, to campaign, to stand for office and vote. The guaranteed rights extend beyond those of individual voters to the rights of political parties and other associations to garner support and campaign.¹⁵⁰

The law analyzed below is a draft political parties law that has not yet been enacted. While IILHR recognizes that the eventual legislation might differ from the language addressed below, this analysis addresses current concerns with the draft.

DRAFT POLITICAL PARTIES LAW

Article 8

Founding any party or continuation of any party requires the following:

First: The principles of the party, its objectives, and its platforms in exercising its activities do not contradict with:

A - Provisions of the Constitution

B - Principles of human rights

C - Principle of national unity

D - Principle of peaceful transfer of power

Second: The party’s platform to achieve its objectives is clearly distinct from the platforms of other parties.

Third: Founding the party and its actions do not take the form of military or paramilitary organizations, also it may not link to any armed force.

¹⁵⁰ Organization for Security and Cooperation in Europe (OSCE), Office for Democratic Institutions and Human Rights. “Guidelines to Assist National Minority Participation in the Electoral Process” 16, (2003), hereafter “OSCE Guidelines.”

Fourth: Should not be among the founders of the party, its leadership, or its members any person who was conclusively proved to have called for, promoted, or participated, in any public manner, ideas that contradict the general principles set forth in the Constitution.

- COMMENTS: Article 8 of the Iraqi Constitution states that Iraq should respect its international obligations. Accordingly, Article of 8 of the draft Political Parties law should include language to reflect Iraq’s treaty obligations.
- Further, in accordance with Article 14 of the Constitution, the draft law should include nondiscriminatory language stating that, when joining a political party, no person shall be discriminated against on the basis of gender, race, ethnicity, national origin or any other factor.
- SUGGESTIONS: Add “Iraq’s international legal obligations” to the enumerated instruments and concepts the law should not contradict in Article 8(1).
- Amend Article 8 to include a nondiscrimination provision, including potential mechanisms for positive discrimination, such as voluntary party quotas within party leadership positions and party lists.

Article 9

The person who will set up a party should be:

First: Iraqi citizen.

Second: More than twenty-five years old, and with a legal capacity.

Third: Not convicted by a competent court of a crime of murder, an offense involving moral turpitude, crimes of terrorism, financial or administrative corruption, or international crimes.

Fourth: Not joining another party at the time of founding the party.

Fifth: Not being a member of the judicial system, Commission of Integrity, Independent High Electoral Commission, army forces, and internal security forces; and any such official who joins a party must choose between resignation from the party or from the function.

- COMMENTS: Creating restrictions on how a political party may be formed, how it should operate, and who should have the right to participate in the process, is key for establishing legitimacy and creating norms. However, restrictions must not be so narrow and vague as to limit access to the political process for one group, while simultaneously enhancing access for another group. Article 9 may lead to the marginalization of minorities and the denial of their access to all levels of the political process.
- SUGGESTIONS: Allow for a review process by which “unqualified” candidates can appeal restrictions on their political participation in Article 9.

Article 12

First: Founding request to be referred by the chief of the court to collect the registration fees of (1,000,000) one million Iraqi Dinar, and to register it in the records of the court.

Second: Determine a specific date to consider the request within (15) fifteen days from the date of the payment of the fees.

Third: The Court to consider the request at a public session unless the court decided on a closed session, if it is necessary, taking into account the public interest, public order, or public morals, by a decision of the chief of the court.

Fourth: The provisions of Code of Civil Procedure No. 83 of 1969 and Law of Evidence No. 107 of 1979 to be applied, unless it is specifically mentioned in the law of State Consultative Council.

- **COMMENTS:** While it is true that political parties require financing and should have entry requirements so as not to flood the system with numerous groups seeking status over substance, financial restrictions could serve to discriminate against minority groups without sufficient financial means or the capacity to organize themselves and collect large revenue.
- **SUGGESTIONS:** Reduce the one million Dinar registration requirement to a nominal fee in order to encourage more widespread political participation in Article 12.

Article 21

First: According to the statute of the Party, the chairman of the party represents it before the judiciary and other entities with regard to its affairs.

Second: The chairman of the party delegates one or more of the party's leaders to represent him, according to the statute of the party.

- **COMMENTS:** This provision grants much authority to the party leader. In political parties where minorities are also members, it is important for the party leader to represent the interests of all members. To this end, it might be necessary to ensure that the election of party chairs is transparent.
- **SUGGESTIONS:** Include a provision in Article 21 to ensure that the process of electing a party chairman is transparent so that political parties will not only gain legitimacy, but will more readily gain the support of minorities.

Article 39

Each political party according to its statute may:

First: Cut off its activities.

Second: Self-dissolve.

- **COMMENTS:** While freedom of choice is crucial to electoral politics in a democracy, it is vital to ensure that non-participation is voluntary, not coerced by

external influences. This level of protection is necessary especially for political parties whose primary mandate includes advocating for minority groups.

- **SUGGESTIONS:** Amend Article 39 to specify that the term “self-dissolve” means a truly voluntary self-dissolution free from external influence

XI. CIVIL CODE

Key Recommendations

- **Amend Articles 1106 and create specific provisions for non-Muslims who are not obligated by Shari'a principles, so that their private property rights are not abrogated.**
- **Amend Article 164 to broaden the definition of "custom" to include the customs and practices of all religious minorities, clarifying that non-Muslims are not governed by Shari'a principles.**

CIVIL CODE (NO. 40 OF 1951)

The Iraqi Civil Code No. 40 of 1951 (Civil Code) sets out the basic conditions for interaction between citizens. The Civil Code is based on a system of law that includes influences from Continental Europe and Islam. The two pieces of legislation that have most influenced the Iraqi Civil Code are the *Mejelle* and the Egyptian Civil Code.¹⁵¹ The *Mejelle* is a European-style codification of Islamic law of the Hanafite School created by the Ottoman Empire in 1869.¹⁵² The Egyptian Civil Code is also heavily affected by European influences. Abd al-Razzaq Al-Sanhuri, a French-educated Egyptian jurist who was the principal drafter of the Egyptian Civil Code, was well known for his eclectic blend of European and Islamic legal principles and his preoccupation with incorporating Islamic legal tradition into modern civil codes.¹⁵³ In 1943, at the invitation of the Iraqi Government, Al-Sanhuri completed a draft of what would later be enacted as the Civil Code.

An analysis of the Civil Code today reveals a blend of French and Islamic legal systems, in a manner that has allowed Iraq to possess a modern civil code while maintaining ties to traditional Islamic principles. This has produced a progressive, largely compatible Civil Code. For instance, Paragraph 12 of the Preliminary Part of the Civil Code, states that:

The sources of the law are the legislation, then usage, then the Islamic jurisprudence without being restricted to one specific school of thought, and lastly the rules of equity; these are the formal sources which are assisted by two sources of interpretation, namely the Islamic jurisprudence and

¹⁵¹ Herbert J. Liebesny, *Impact of Western Law in the Countries of the Near East*, 22 GEO. WASH. L. REV. 127, 130 (1953).

¹⁵² *Id.*

¹⁵³ Since the enactment of the Egyptian Civil Code in 1949, the Franco-Egyptian model has been accepted not only in Iraq, but also in Libya, Qatar, Sudan, Somalia, Algeria, Jordan and Kuwait.

judiciary of Iraq and of the foreign countries the laws of which are comparable to the laws of Iraq.

This has created a clear hierarchy of sources to which a court must turn when the written law is silent on any topic. Only when there is no applicable custom and usage should a court look to Shari'a, thereby making Islamic law a subsidiary source.

However, Article 2 of the 2005 Iraqi Constitution states that Islam is the official religion of the State, the basis for all legislation, and that no law shall be passed that contradicts the established rules of Islam. The same article states that a law may not be passed if it contradicts the principles of democracy or basic rights and freedoms outlined in the Constitution. Article 2 seemingly places Shari'a atop the hierarchy of sources set out by the Civil Code. Yet it is unclear how this Constitutional provision may affect Shari'a's influence on the Civil Code.

The Egyptian Constitution, which exists alongside a similar Civil Code, also contains a provision that declares Islam to be the main source of legislation. In Egypt, however, Islamic legal principles are considered another source of legislation that co-exists alongside domestic legislation. This might not be the case in Iraq, since Article 2 of the Iraqi Constitution seems to repeal laws that contradict Islam.¹⁵⁴

This Constitutional quandary poses major challenges to the legal standing of Iraq's non-Muslims, who are not obliged to follow Islamic law. The use of Shari'a in the Civil Code may affect a range of rights of religious minorities--including, for example, rights of religion, expression, equality before the law, the right to participate in government affairs, the right to participate in work of one's own choosing, family rights and women's rights. Since the Civil Code regulates major areas of civilian lives, it is imperative that there be further clarification or amendments to the Constitution or to relevant provisions in the Civil Code.

Article 1106

...(2) Determining the heirs and fixing their shares of the inheritance and the conveyance of the property of the estate will be governed by the provisions of the Islamic Shari'a and the specific laws.

- **COMMENTS:** Using Shari'a to regulate the dispensations of one's property will discriminate against non-Muslim minorities and infringe on their property rights guaranteed by Article 23 of the Iraqi Constitution.
- **SUGGESTIONS:** Amend Article 1106 and create specific provisions for non-Muslims who are not obligated by Shari'a principles, so that their private property rights are not abrogated.

¹⁵⁴ Article 2.

Article 164

(1) *Custom be it universal or specific is a rule (to establish a Shari'a rule)...the origin of this rule is the saying of the Prophet: "That which Moslems consider to be good is good with God...."*

- **COMMENTS:** Article 1 requires that judges interpret the Code in accordance with Shari'a in the absence of legislative provisions and relevant custom and usage. Several other articles specifically refer to Shari'a as governing a particular issue. Although the Iraqi Constitution recognizes that "Iraq is a country of many nationalities, religions and sects," it also establishes Islam as the official State religion and prohibits any law that contradicts Islamic principles.¹⁵⁵
- **SUGGESTIONS:** Amend Article 164 to broaden the definition of "custom" to include the customs and practices of all religious minorities, clarifying that non-Muslims are not governed by Shari'a principles.

¹⁵⁵ Article 2.

XII. PENAL CODE

Key Recommendations

- **Insert a comprehensive, clear due process clause into the Penal Code to require that all defendants be informed of their due process rights as enumerated in Articles numbers 9, 14, and 15 in the ICCPR.**

THE PENAL CODE (NO. 111 OF 1969)

Coalition Provisional Authority Order Number 7 (Order Number 7), signed by L. Paul Bremer in June 2003, incorporated by reference Penal Code No. 111 of 1969 (Penal Code), thereby reinstating most of its provisions. This Order eliminated many of the offenses in the original Penal Code that conflicted with liberal governance, such as those that outlawed certain “publication offenses” or loosely defined national security offenses.

Order Number 7 contains an important antidiscrimination clause to protect minorities’ rights: “In exercising their official functions, all persons undertaking public duties or holding public office, including all police, prosecutors and judges, must apply the law impartially. No person will be discriminated against on the basis of sex, race, color, language, religion, political opinion, national, ethnic or social origin or birth.”¹⁵⁶ Given its sweeping applicability, the significance of this non-discrimination provision cannot be overstated. This provision, together with Article 372 of the Penal Code, which outlaws hate crimes, create a strong body of law to protect Iraqi minorities.

Despite broad guarantees in the legal text, commentators have pointed out that there are problems of under-enforcement of penal laws in Iraq when minorities are the victims:

Although the government publicly condemns violence against minority groups, it has not taken sufficient measures to bolster security in areas where minorities are particularly vulnerable to attacks, and community leaders say that attacks are almost never thoroughly investigated. Iraqi security forces rarely apprehend, prosecute, and punish perpetrators of such attacks, which has created a climate of impunity.¹⁵⁷

¹⁵⁶ See Coalition Provisional Authority Order Number 7 at § 4.

¹⁵⁷ Human Rights Watch, *The Quality of Justice: Failings of Iraq’s Central Criminal Court* (2008) available at <http://www.hrw.org/en/reports/2008/12/14/quality-justice-o>. See also *United Nations Assistance Mission for Iraq: Human Rights Report*, 15-16 (2009) documenting widespread violence aimed at religious, ethnic, religious and sexual minorities.

Currently, the Penal Code provides no affirmative guarantee that all crimes will be prosecuted or that victims' rights will be protected. This issue goes to the heart of protecting minorities in Iraq: It is imperative to investigate acts of violence targeting minorities and to duly prosecute perpetrators in accordance with Article 2(2) of the Constitution and Article 372 of the Penal Code.

The Coalition Provisional Authority created a Central Criminal Court to supplement the criminal adjudication authority of pre-existing criminal courts. The Central Court is charged with enforcing the 1969 Penal Code.¹⁵⁸ The Court has nationwide discretionary jurisdiction over all cases falling within a list of defined categories. One such category covers cases involving criminal defendants accused of crimes "that involve race, nationality, interethnic or religious based violence."¹⁵⁹ Once again, the law takes adequate measures to ensure that those who engage in violent acts motivated by ethnic, religious, or national origin biases are penalized. Broad legal protections, together with an impartial judiciary, may serve to penalize those who target Iraqi minorities and, in the long term, to deter such racially or ethnically motivated acts of violence.

Protection for Minorities

Article 372

The following persons are punishable by a period of detention not exceeding 3 years or by a fine not exceeding 300 dinars:

- 1) Any person who attacks the creed of a religious minority or pours scorn on its religious practices.*
- (2) Any person who willfully disrupts a religious ceremony, festival or meeting of a religious minority or who willfully prevents or obstructs the performance of such ritual.*
- (3) Any person who wrecks, destroys, defaces or desecrates a building set aside for the ceremonies of a religious minority or symbol or anything that is sacred to it.*
- (4) Any person who prints or publishes a book sacred to a religious minority and deliberately misspells the texts so that the meaning of the text is altered or who makes light of its tenets or teachings.*
- (5) Any person who publicly insults a symbol or a person who constitutes an object of sanctification, worship or reverence to a religious minority.*
- (6) Any person who publicly imitates a religious ceremony or celebration with intent to deceive.*

- **COMMENTS:** This highly progressive provision affords broad guarantees to minorities and recognizes the importance of different religious beliefs, rituals and cultural practices. It also acknowledges the sanctity of buildings, texts and symbols associated with minority religions. By outlawing desecrating acts against minority

¹⁵⁸ See Coalition Provisional Authority Order Number 7 at § 2.

¹⁵⁹ Id at § 20 (1)(a)(iii).

religions and their cultural practices, the Code admirably entrenches the notion of tolerance in a multi-ethnic society.

- However, some Iraqis have noted that the fine penalty for violations of Article 327 are very low and therefore do not adequately discourage acts of aggression or violence against minorities. Increasing the fine penalty would signify the State's commitment to protecting the rights of religious minorities and its strong condemnation of any acts which interfere with, harm, insult, destroy, or attack the religious rituals and sites of Iraq's minorities.
- SUGGESTION: Increase the fine penalty for violations of Article 372 from the current 300 Iraqi dinars to reflect a stronger condemnation of such prohibited acts and the degree of harm inflicted by such acts on the religious practices and holy sites of Iraq's religious minorities.

The Central Criminal Court

The Coalition Provisional Authority Order Number 3, signed by L. Paul Bremer in July 2003, created a Central Criminal Court to supplement the criminal adjudication authority of pre-existing criminal courts.¹⁶⁰ The Central Court is charged with enforcing the 1969 Penal Code.¹⁶¹ The Court has nationwide discretionary jurisdiction over all cases falling within a list of defined categories. One such category covers cases involving criminal defendants accused of crimes "that involve race, nationality, interethnic or religious based violence."¹⁶²

COMMENTS: While it is commendable that the Court has recognized the need to outlaw such hate crimes and take jurisdiction over such acts, mere authority to adjudicate may not be sufficient to safeguard minorities from discrimination and persecution. In the face of evidence that the Court might not adhere to Constitutional or international standards of due process when adjudicating matters,¹⁶³ it may be necessary to add safeguards to protect minorities.

SUGGESTIONS: Insert a comprehensive, clear due process clause into the Penal Code to require that all defendants be informed of their due process rights.

¹⁶⁰ Available online at <http://www.aina.org/books/cpapenalcode.htm>

¹⁶¹ See Coalition Provisional Authority Order Number 7 at § 2.

¹⁶² Id. at § 20 (1)(a)(iii).

¹⁶³ See Human Rights Watch, *The Quality of Justice: Failings of Iraq's Central Criminal Court* (2008) describing a Central Court that is "seriously failing to meet international standards of due process and fair trials," citing lack of speedy trials, reliance on coerced or otherwise unreliable testimony and lack of counsel for accused persons.

XIII. CODE OF CRIMINAL PROCEDURE

Key Recommendations

- **Amend Article 152 to clarify “certain groups of people” in a manner that ensures minorities may not be excluded from court proceedings without due cause or a reasonable belief that their presence would adversely affect the proceedings or harm a party to the case.**

CODE OF CRIMINAL PROCEDURE (NO. 23 OF 1971)

The Coalition Provisional Authority Order Number 3 (Order Number 3), signed by L. Paul Bremer in July 2003, incorporated by reference the Code of Criminal Procedure No. 23 of 1971 (Code of Criminal Procedure).¹⁶⁴ That Code of Criminal Procedure outlines a set of procedures for conducting criminal investigations and trials.

Article 152

Trial sessions must be open unless the court decides that all or part should be held in private and not attended by anyone not connected with the cases, for reasons of security or maintaining decency. It may forbid the attendance of certain groups of people.

- **COMMENTS:** This provision guarantees confidentiality and safety to a party or a witness involved in a trial; such protective measures are absolutely necessary. However, affording such broad discretion and forbidding the attendance of unspecified “certain groups of people” may hinder transparency and fairness, if used by the court arbitrarily. If abused, this process could discriminate and exclude minorities or other groups, such as the media, from attending a trial. This would undermine the fairness of the justice system, and could also marginalize and bar access to minorities who might otherwise have a right to be aware of the case at issue.
- **SUGGESTIONS:** Amend Article 152 to clarify “certain groups of people” in a manner that ensures minorities may not be excluded from court proceedings without due cause or a reasonable belief that their presence would adversely affect the proceedings or harm a party to the case. The amendment should also ensure that judicial decisions on exclusion should not discriminate on the grounds of gender, race, ethnicity, origin, color, religion, creed, or economic or social status.

¹⁶⁴ Available online at <http://www.aina.org/books/cpapenalcode.htm>.

XIV. UNIFIED LABOR CODE

Key Recommendations

- **Amend the law to explicitly provide that the Ministry of Labor and Social Affairs must not exercise its discretion in any way that has the purpose or effect of discriminating against any group on any basis listed in the Code’s nondiscrimination provision.**
- **Amend Article 2 to clarify that racial discrimination means *any* distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin.**
- **Amend Article 2 so that it applies the principle of non-discrimination to all provisions of the Code, not simply to the section that states the right to work and the possibility of pursuing vocational training.**
- **Amend Article 10 to eliminate the requirement that Arabic be the only language used in all employment relationships.**
- **Amend Article 107 to require employers to inform workers of occupational hazards and protective measures, both orally and in writing.**
- **Eliminate section (2) and amend section (1) of Article 60 to reflect that each employee’s day of rest shall be determined on individualized basis, must occur on a predetermined day, with all feasible measures taken to accommodate the religious views of the employee.**

UNIFIED LABOR CODE (NO. 71 OF 1987)

The Unified Labor Code No. 71 of 1987 (Unified Labor Code) is a progressive set of rules governing labor and employment laws in Iraq, including setting standards for worker safety and compensation. However, several provisions of the Unified Labor Code could be amended to better protect the interests of minority workers.

Ministry of Labor and Social Affairs

Article 15

The Labor Services of the Ministry of Labor and Social Affairs shall be responsible, through its employment offices, for organizing the placement of workers in relation to available jobs, and in such a way as to achieve equity and equality between workers.

Article 26

Instructions issued by the Ministry of Labor and Social Affairs shall determine the

occupations for which training is to be provided, the period of training for each occupation, the amount of compensation to be granted to trainees, the curricula in relation to theoretical and practical knowledge, the examination system, the certificates to be awarded and the information which will appear on such certificates.

Article 57

The number of hours of work per day shall be reduced for work that is arduous or harmful to health. Employers shall determine such types of work and the number of maximum working hours applicable to them in accordance with instructions drawn up by the Ministry of Labor and Social Affairs based upon proposals made by the National Center for Occupational Health and Safety.

- **COMMENTS:** The broad scope of powers and discretion given the Ministry of Labor and Social Affairs has several implications for minorities. While Article 15 of the Code dictates that employment offices place workers in such a way as to achieve equality among workers, no provision mandates the Ministry of Labor and Social Affairs to act non-discriminatorily. Reports highlight religious and ethnic discrimination against minorities by Iraqi authorities; this denies equal access to employment opportunities.¹⁶⁵
- Article 22 of the Iraqi Constitution guarantees the right to work for all Iraqis. The ICESCR recognizes the right of everyone to work and requires that States guarantee that the right be exercised “without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁶⁶
- **SUGGESTIONS:** Amend the law to explicitly provide that the Ministry of Labor and Social Affairs must not exercise its discretion in any way that has the purpose or effect of discriminating against any group on any basis listed in the Code’s nondiscrimination provision.

Nondiscrimination

Article 2

This Code guarantees the right to work, under equal conditions and with equal opportunity, to all citizens who are able to work, without any discrimination on the basis of sex, race, language or religion. Thus, every citizen shall have the possibility of pursuing vocational training within the limits established by the state in relation to the amount of work and the nature of the work in each occupational branch.

¹⁶⁵ See Concluding Observations of the Committee on the Elimination of Racial Discrimination: Iraq, 12th April 2001, CERD/C/304/Add.80 (Concluding Observations/Comments) [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.304.Add.80.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CERD.C.304.Add.80.En?Opendocument). Also see Lalani 26-27.

¹⁶⁶ ICESCR Art. 2(2), 6.

- **COMMENTS:** Article 2 contains the Code’s basic non-discrimination principle. It guarantees non-discrimination solely on the bases of sex, race, language or religion. The Iraqi Constitution and international treaties call for more grounds of nondiscrimination. For instance, Article 2 fails to protect against discrimination on the bases of color, political or other opinion, national or social origin, property, birth or other status as guaranteed by the ICESCR (regarding the right to work) and the Discrimination (Employment and Occupation) Convention (regarding equality of opportunity and treatment in employment and occupation).¹⁶⁷
- Second, the non-discrimination guarantee extends only to the right to work and to pursue vocational training. It does not specify the meaning of “the right to work” beyond having access to vocational training.
- The ICESCR specifically includes in the right to work the right to gain a living by work that one freely chooses and accepts.¹⁶⁸ It explicitly develops the individual dimensions of the right to work through recognizing everyone’s right to enjoy just and favorable conditions of work--in particular the right to safe working conditions, fair remuneration, equal opportunity for promotion, and reasonable rest and leisure.¹⁶⁹ It also enunciates the right of everyone to form trade unions and to join the trade union of his or her choice, as well as the right of trade unions to function freely.¹⁷⁰ By restricting the nondiscrimination principle to the right to work and failing to articulate specific legal obligations encompassed in the right to work--beyond the mere provision of vocational training--Article 2 leaves too much room for discrimination.
- **SUGGESTIONS:** Amend the Article to make clear that racial discrimination means *any* distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin as reflected in the ICERD.¹⁷¹
- Amend the Article to apply the principle of non-discrimination to all provisions of the Code, not simply to the section setting forth the right to work and the possibility of pursuing vocational training.
- Amend the Article to specify that “citizens” and “every citizen” includes Iraqis who were denied citizenship due to past State discrimination.

¹⁶⁷ ICESCR Art. 2(2). Discrimination (Employment and Occupation) Convention 1958, Art. 1(b).

¹⁶⁸ ICESCR Art. 6.

¹⁶⁹ ICESCR Art. 7. General Comment No. 18: The Right to Work, 24th November 2005, E/C.12/GC/18, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/Go6/403/13/PDF/Go640313.pdf?OpenElement>.

¹⁷⁰ ICESCR Art. 8, General Comment No. 18: The Right to Work.

¹⁷¹ ICERD, Art. 1(1).

Article 20

An employer may request the employment office in the region to present job candidates in accordance with the following procedure:

- (1) the employer shall make a request to the employment office in the region, specifying the type of work offered and the qualifications required to perform it;*
- (2) the employment office must reply to the request by referring workers who are registered with the office. If no worker so registered fulfills the requirements, the employment office shall contact other employment offices to see if they can meet the employer's request;*
- (3) within 15 days of receiving the request, the office shall inform the employer of the candidate proposed or shall inform the employer that the request cannot be fulfilled;*
- (4) if the employer has received no reply from the employment office in accordance with the provisions of (3), the employer has the right to engage any worker of his own choice.*

- **COMMENTS:** Article 20 does not specifically state that the employment office must refer qualified workers by order of registration priority, thus leaving discretion to assign workers in the hands of the employment office. This would allow officials to give special treatment to workers based on their religion or ethnicity. While positive discrimination, which gives special consideration to minorities who have been disadvantaged by discrimination for many years, may be encouraged, this provision may simply serve to further discriminate against already persecuted minorities instead of permitting positive discrimination.
- Additionally, the difficulties that many minority groups face in accessing public services may mean that members of some groups cannot register in employment offices and are thus denied access to job opportunities.¹⁷² Finally, the article does not mandate that employers act non-discriminatorily when they are permitted to engage workers of their own choice.
- **SUGGESTIONS:** Amend Article 20 to apply to all provisions of the Code.
- Amend Article 20 to specify that the employment office must fill requests for workers by order of registration priority of qualified workers and, further, to state that employers may not discriminate when hiring workers of their own choice.
- Amend Article 20 to allow positive discrimination in fields of employment where minority groups have been discriminated against in the past so that members of those minority communities may be allowed to enter that particular line of work and maintain their work status.

Provisions that may operate to exclude minorities from employment opportunities or treat minorities differently:

¹⁷² Lalani, 26-27.

Article 10

Arabic is the language to be used in all employment relationships, whether involving contracts, records, or other documents. The Kurdish language shall be used for the same purposes as Arabic in the autonomous region of Kurdistan. No one relying upon a document drawn up in another language may prevail in a claim against a worker, even if the document bears the worker's signature.

Article 30

A contract of employment must be drawn up in writing and shall stipulate the type of work to be performed and the amount of wages to be paid. If there is not a written contract, the worker shall bear the burden of proof to show that the contract exists and to present evidence in support of any claims arising under the contract.

Article 107

An employer shall inform the worker, in writing and prior to engagement, of the occupational hazards posed and the measures of protection to be taken. The employer shall also provide for prominent posting of instructions that indicate the occupational hazards and the measures of protection to be taken in accordance with instructions drawn up by the Ministry of Labor and Social Affairs.

- **COMMENTS:** By mandating that Arabic must be the language used in all employment documents, these articles may disadvantage minorities in contractual relationships and in their awareness of occupational hazards.
- Groups including Chaldo-Assyrians, Kaka'i and Shabaks speak non-Arabic languages and may not be able to contract in Arabic or to read and understand a notice of occupational hazards posted in Arabic. Additionally, although Black Iraqis speak Arabic, the illiteracy rate among this group is disproportionately high, at 80 percent by some estimates.¹⁷³
- The mandatory use of Arabic in employment documents does not comport with the ICCPR guarantee that, in States where linguistic minorities exist, persons belonging to such minorities will not be denied the right to use their own language.¹⁷⁴ Positive measures by States may be necessary to correct conditions that impair the enjoyment of the right of minorities to use their own languages. Such measures are permissible as long as they are based on reasonable and objective criteria and do not discriminate.¹⁷⁵

¹⁷³ Lalani, 5-8.

¹⁷⁴ ICCPR, Art. 27.

¹⁷⁵ General Comment No. 23: The rights of minorities (Art. 27), 8th April 1994, CCPR/C/21/Rev.1/Add.5, General Comment No. 23 (General Comments).

- **SUGGESTIONS:** Amend Article 10 to eliminate the requirement that Arabic be the only language used in all employment relationships and ensure that the linguistic needs of employees is accounted for in documentation relating to the employment relationship.
- Amend Article 107 to require employers to inform workers of occupational hazards and protective measures both orally and in writing.

Article 91

...(3) A minor may be employed only if his physical aptitude has been medically attested in a certificate issued by a competent service.

Article 99

(1) It shall be prohibited to employ workers in the industries and work covered by Section 98 [quarries] of this Act before the workers have undergone medical examinations to ascertain their physical suitability for the work assigned...

- **COMMENTS:** While these articles aim to protect workers from injury on dangerous jobs, they may also exclude minorities from employment in these occupations. Minority women and internally displaced persons in northern Iraq (many of whom are minority group members) face chronic difficulties in obtaining healthcare. These obstacles include linguistic barriers, restrictions on freedom of movement due to threat of violence, overburdened facilities, discrimination and even outright hostility from health practitioners.¹⁷⁶ If miners or quarry workers cannot access health services, they may be unable to qualify for employment.
- **SUGGESTIONS:** Amend these articles to specify that an employer for a position that requires a medical examination must provide potential employees with access to a healthcare practitioner.

Article 60

(1) Every worker has a right to at least one paid day of rest per week.

(2) The employer shall schedule the weekly day of rest on the same day for all staff, or shall grant the weekly day of rest on a rotating basis, as long as each worker can take his day of weekly rest on a predetermined day.

- **COMMENTS:** By mandating that the weekly day of rest must be scheduled either on the same day for all staff or on a rotating basis, this article falls short of providing flexibility to allow members of different religious groups to recognize the day of rest specified by their religion.

¹⁷⁶ Lalani, 15, 26.

- Article 41 of the Constitution protects the rights of all Iraqis to practice their religion. Further, the ICCPR protects the freedom to manifest one's religion or beliefs, subject only to limitations prescribed by law and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.¹⁷⁷ The freedom to manifest one's religion includes the observance of days of rest, and the grounds stated in the ICCPR justifying limitation of this right must be strictly interpreted.
- Limitations must be imposed only for a non-discriminatory purpose and in a non-discriminatory manner.¹⁷⁸ Further, the ICESCR protects the right of religious minorities to practice their own religions in community with other members of their group.¹⁷⁹ The ICESCR requires positive measures to protect this right against infringement not only by the State itself, but also by acts of people within the State.¹⁸⁰
- The likely reason for Article 60's limitation on available days of rest—orderly administration of employment relationships—is not necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others. The limitation will discriminate against members of religious groups whose day of rest does not fall on the day of rest chosen by the employer.
- SUGGESTIONS: Eliminate section (2) and amend section (1) to reflect that each employee's day of rest must occur on a predetermined day, with all feasible measures taken to accommodate the religious views of the employee.

Article 83

(1) *It shall be prohibited to employ women in arduous work or work which is harmful to health, as specified in the instruction referred to in Article 57 of this Act.*

- COMMENTS: This Article aims to protect women from dangerous working conditions. However, it may also operate to the detriment of internally displaced women, many of whom are minorities and also heads of households. These women have found it extremely difficult to find employment and provide for their families.¹⁸¹ Thus, this prohibition may limit employment options for these women more drastically than it does for other women.
- SUGGESTIONS: Eliminate this Article to allow women to work under arduous or potentially harmful conditions, subject to the same conditions as men.

¹⁷⁷ ICCPR, Art. 18(3).

¹⁷⁸ General Comment No. 22: The right to freedom of thought, conscience, and religion (Art. 18): 30th July 1993, CCPR/C/21/Rev.1/Add.4, General Comment No. 22 (General Comments).

¹⁷⁹ ICESCR, Art. 27.

¹⁸⁰ General Comment No. 23: the rights of minorities (Art. 27).

¹⁸¹ Lalani, 15.

XV. NON-GOVERNMENTAL ORGANIZATIONS LAW

On January 25, 2010, the Iraqi Council of Representatives passed the Law of Non-Governmental Organizations Number 12 (NGO Law). This law replaced all four older NGO laws, including Law Number 34 of 1962, Law Number 13 of 2000, CPA Order Number 45 of 2003, and the Detachment of NGO Assistance Office Order Number 16 of 2005 (Order Number 16).¹⁸² The NGO Law better comports with international best practices than its predecessors.¹⁸³ For example, the NGO Law specifies that the NGOs Department may only reject new NGO applications if they are in violation of a provision of the NGO Law¹⁸⁴, whereas Order Number 16 gave the government unlimited discretion in rejecting such applications.¹⁸⁵ Additionally, whereas Order Number 16 required NGOs to report their membership records to the government, including such sensitive information as personal addresses, professions, and nationalities¹⁸⁶, the NGO Law does not. Instead, the NGO Law merely requires NGOs to submit annual financial reports and a report of the NGO's activities in Iraq.¹⁸⁷ The requirement under Order Number 16 for NGOs to submit this sensitive information created a potential for the government to make target-lists in order to harm particular members of organizations and their causes. As such, the NGO Law reins in the government's discretionary power over NGOs, creating a more open environment for NGOs and minority groups who seek to form NGOs.

This law contained no provisions that may serve to discriminate minorities.

NON-GOVERNMENTAL ORGANIZATIONS LAW (NO. 12 of 2010)

Article (10): All NGOs are prohibited from the following:

First: Adopting any goals or conducting any activities that violate the Constitution or other Iraqi laws.

- **COMMENTS:** This Article represents an improvement over the provisions of Order Number 16, which set out a finite list of categories based on which NGOs could not discriminate. This list was not broad and inclusive and included only religion, race,

¹⁸² Article 34, NGO Law No. 12 of 2010.

¹⁸³ NGO Coordination Committee for Iraq, Interview about the New Iraqi NGO Law with Legal Advisor Kareem Elbayar, 13th July 2010, available at: http://www.ncciraq.org/index.php?option=com_content&view=article&id=100&lang=en

¹⁸⁴ Article 8(6), NGO Law

¹⁸⁵ Article 8(1), Order Number 16

¹⁸⁶ Article 33(1), Order Number 16

¹⁸⁷ Article 15, NGO Law No. 12 of 2010.

ethnicity, sex or social status. The new provision, by using the Constitution's protections, includes all the bases listed in Article 14 of the Iraqi Constitution.

METHODS OF REDRESS AND THE WAY FORWARD

There are many approaches to improving legal protections afforded to Iraqi minorities. There are several ways to affect change, including legislative amendments, constitutional implementation and judicial reform. In order to move forward and affect meaningful change, the Iraqi government, civil society and the international community should make a collaborative effort to enact legislation that creates change. The following topics represent only a subset of potential changes that can build a stronger legal fabric for Iraq's components.

I. Considering an Anti-Discrimination Law

The Iraqi Constitution and other domestic legislation are scattered with provisions that call for equality and nondiscrimination in employment, housing, education, access to resources, political participation, security and other areas. An antidiscrimination law would strive to protect minorities and other vulnerable groups from discrimination as guaranteed by the Iraqi Constitution and international treaties ratified by Iraq. The law would also provide specific causes of action for individuals and groups to seek redress within the justice system where discrimination arises.

This equality or anti-discrimination law should be rooted in the Iraqi Constitution, since the Constitution already offers robust protection from discrimination. The law should identify remedies for *de facto* or *de jure* discrimination and specify the role of courts in addressing violations of those protective measures. Given that Iraq is a Civil Law jurisdiction, judges and courts have very little discretion in expanding the scope of protections.¹⁸⁸ Accordingly, equality or anti-discrimination legislation must be drafted clearly and unambiguously; the protections it affords and the behaviors it prohibits must be as inclusive as possible.

Positive Discrimination

An anti-discrimination law should embrace the notion of "positive discrimination," where legally mandated mechanisms will provide additional benefits or priorities to particular groups. Current laws already mandate such positive discrimination. For instance, Article 49(4) of the Iraqi Constitution as well as Law No. 53 instituting the High Commission for Human Rights call for quota representation of women. However, more robust positive discriminatory measures for minorities and other groups may be set out in other fields, including in education, housing, employment and distribution of resources. "Positive Discrimination"--providing advantages to certain groups of people in specific sectors for a limited time--could prevent future State-sanctioned or private discrimination against

¹⁸⁸ By comparison, in Common Law Jurisdiction States such as Australia and the United States, Courts and judges may expand the protections afforded by a specific piece of legislation.

minorities and other vulnerable groups, as well as creating a level playing field and providing equal access to groups that have historically suffered from discrimination.

Various Approaches to Anti-Discrimination Legislation

Anti-discrimination legislation may be enacted in Iraq in one of two ways: either through an Overarching Approach or a Piecemeal Approach.¹⁸⁹

The *Overarching Approach* could result in an omnibus piece of legislation, which encompasses all protected groups and prohibited behaviors, where the law explicitly identifies these groups and behaviors. For instance, countries such as Serbia,¹⁹⁰ South Africa,¹⁹¹ and Canada¹⁹² have adopted such omnibus anti-discrimination legislation. Some countries, such as Canada, have gone beyond enacting an omnibus law--the *Canadian Human Rights Act*--to pass additional laws addressing equality and anti-discrimination relating to Employment, Official Languages, Multiculturalism and Race Relations.¹⁹³

The *Piecemeal Approach* entails passing separate pieces of legislation at different times, which provide protections and prohibitions in a variety of areas.¹⁹⁴ This approach may be particularly suitable for Iraq, since a large number of Constitutional protections require implementing legislation. Countries such as Australia, the United States and Morocco have opted for such piecemeal laws. For instance, Australia has at least four federal laws addressing anti-discrimination, as well as state and territory laws.¹⁹⁵ The US has enacted seventeen federal statutes¹⁹⁶ and individual states provide additional protections that may

¹⁸⁹ *Equality Legislation in Iraq*, IILHR, March 2008.

¹⁹⁰ *Zakon O Zabrani Diskriminacije (Law on the Prohibition of Discrimination)*, Serbia (April 26, 2009), available at <http://www.parlament.sr.gov.yu/content/lat/akta/zakoni/asp>. (available in English [unofficial]) at

http://translate.google.com/translate?hl=en&sl=sr&u=http://www.gayecho.com/Aktivizam.aspx%3Fid%3D8398%26grid%3D2001&ei=l9LxSdKgKZqstgfXyNi3Dw&sa=X&oi=translate&resnum=6&ct=result&prev=/search%3Fq%3Dzakon%2Bo%2Bzabrani%2Bdiskriminacije%2Brepublika%2Bsr%26hl%3Den%26rls%3Dcom.microsoft:en-us:IE-SearchBox%26rlz%3D17HPND_en).

¹⁹¹ *Promotion of Equality and Prevention of Unfair Discrimination Act*, Act No. 4 of 2000, Chapter 1 (S. Afr.), available at www.iwraw-ap.org/resources/pdf/South%20Africa_GE1.pdf.

¹⁹² *Canadian Human Rights Act*, R.S., 1985, c. H-6 (1985). Available at <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-h-6/latest/rsc-1985-c-h-6.html>.

¹⁹³ For a general discussion of multiple approaches to anti-discrimination, see European Commission, *Tackling Multiple Discrimination: Practices, Policies and Laws* (2007) at 24.

¹⁹⁴ *Equality Legislation in Iraq*, IILHR, March 2008.

¹⁹⁵ *Id.*

¹⁹⁶ See Jody Feder, *CRS Report for Congress: Federal Civil Rights Statutes: A Primer*, Congressional Research Service, 24 October 2008.

match or expand the federal protections.¹⁹⁷ Morocco's equality laws can be found in the Penal, Prison, Labor, Family, Press and Public Freedom Codes.¹⁹⁸

Suitable Approaches for Iraq

In choosing an approach for enacting and implementing anti-discrimination laws for Iraq, it is necessary to determine the scope of such laws. Drafters should first consider which groups have been, and continue to be, adversely affected by *de jure* and *de facto* discrimination in Iraq, and in which areas of public or private life they need the most protection.

Ethnic, religious, linguistic and national origin minorities are among those most adversely affected.¹⁹⁹ Members of the Alliance of Iraqi Minorities as well as international human rights groups have identified several key areas in which protections for minorities are most needed. These include:

- Education;²⁰⁰
- Housing;
- Representation in the security forces and military;²⁰¹
- Representation and participation in the public sector;²⁰²
- Access to healthcare;²⁰³

¹⁹⁷ See, for example, California Fair Employment and Housing Act (the "FEHA"), Government Code sections 12900 et seq.; the New York Human Rights Law, N.Y. Exec. Law §296; the Kansas Act Against Discrimination, Kan. Stat.

¹⁹⁸ Moroccan Penal code article 431 was supplemented by Dahir No. 1-03-207 of 16 Ramadan A.H. 1424 (11 November 2003), adding section II entitled "Discrimination", defined in article 431-1, as follows: "*Any distinction among individuals based on national or social origin, colour, sex, family status, state of health, disability, trade union membership, or affiliation or non-affiliation, whether actual or assumed, with a specific ethnic group, nation, race or religion shall constitute discrimination.*" Act No. 23/98 on the Organization of Prison Establishments, Dahir No. 200-99-1 25/08/99, see 2003 CERD State Party Report by Morocco available at: <http://www.unhcr.org/refworld/pdfid/3d5a73c86.pdf>; Labor Code article 9, see Concluding observations of the Committee on the Elimination of Racial Discrimination: Morocco. 21/03/2003, CERD/C/62/CO/5, Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.62.CO.5.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.62.CO.5.En?Opendocument); Moroccan FamiCode (Moudawana) of Feb. 25, 2004, amending the former Personal Status Code, substantially removes gender based discrimination in family law. available at: http://www.globalrights.org/site/DocServer/Moudawana-English_Translation.pdf?docID=3106.

¹⁹⁹ Other groups include, women, orphans, the elderly, children born out of wedlock, people with disabilities or health conditions, members of unions and organizations, people engaged in particular areas of employment, married or unmarried people, people past criminal convictions and people with different sexual orientations.

²⁰⁰ Noted at the January 31, 2011 Meeting of the Alliance of Iraqi Minorities in Hamdaniya; also noted throughout a 2010 Minority Rights Group International report on Iraq's minorities: Also noted in Lalani (2010), available at <http://www.minorityrights.org/10042/reports/still-targeted-continued-persecution-of-iraqs-minorities.html> (select "Download the Full Report" link on the right).

²⁰¹ Id.

²⁰² Id.

²⁰³ Id.

- Access to Social Security or Social Assistance;²⁰⁴
- Distributional access to federal funds at the regional or district level;²⁰⁵
- Access to safety and security;²⁰⁶
- Exercising freedom of movement;
- Exercising freedom of assembly and association;
- Exercising freedom of religion;
- Exercising equality of opportunity;²⁰⁷
- Personal Status;²⁰⁸
- Access to justice and judiciary;
- Exercising the right to protect cultural heritage.

Whether Iraqi lawmakers decide to embrace an omnibus anti-discrimination law, or opt for piecemeal laws, there is little doubt that the Iraqi Constitution provides much foundational assurance of minority protection and equality.²⁰⁹ The anti-discrimination law should also take into consideration those Articles in the Constitution relating to equality or non-discrimination that require implementing legislation.²¹⁰

Penalties and Remedies

Drafters of the law should consider the *Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination* (developed by the United Nations Office of the High Commissioner for Human Rights).

²⁰⁴ Id.; also discussed at the International Conference on *The Role of Peacebuilding, Reconciliation, and Accountability in Iraq*, January 27-28, 2011, Erbil, Kurdistan, Iraq.

²⁰⁵ Noted at the January 31, 2011 Meeting of the Alliance of Iraqi Minorities in Hamdaniya.

²⁰⁶ Id.

²⁰⁷ Id. Also discussed at International Conference on *The Role of Peacebuilding, Reconciliation, and Accountability in Iraq*, January 27-28 2011, Erbil, Kurdistan, Iraq.

²⁰⁸ See Institute for International Law and Human Rights, *Women and the Law in Iraq*, (December 2010), available at www.iilhr.org; also discussed at the International Conference on *The Role of Peacebuilding, Reconciliation, and Accountability in Iraq*, January 27-28, 2011, Erbil, Kurdistan, Iraq.

²⁰⁹ “The right of Iraqis to education their children in their mother tongue” (Article 4); “guaranteeing the free practice of [religious] rituals” (Article 10); “Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status” (Article 14); “Every person shall have the right to be treated with justice in judicial and administrative proceedings” (Article 19(6)); “Iraqi citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office” (Article 20); “The State shall promote cultural activities and institutions in a manner that befits the civilization and cultural history if Iraq, and it shall seek to support indigenous Iraqi cultural orientations” (Article 35); “The State shall seek the advancement of the Iraqi clans and tribes, shall attend to their affairs in a manner that is consistent with religion and the law, and shall uphold their noble human values in a way that contributes to the development of society...” (Article 45(2)); “Restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by law or on the basis of a law, and insofar as that limitation or restriction does not violate the essence of the right or freedom” (Article 46).

²¹⁰ These include, and are not limited to Article 7; 9(1); 16; 22; 24; 30(2); 31(1); 32; 39(1); 41; 43; 49(4); (122(4); 120; 125.

This *Model Law* provides guidelines on penalties and remedies for potential anti-discrimination legislation.

II. Ensuring Minority Representation at All Levels of Government

Unless minority groups are represented at all levels of Iraqi government, it will be a great challenge for the country to make progress in protecting its vulnerable populations. In order to go beyond mere nominal representation, it is imperative that minorities are positively represented throughout the political process at *all* levels, so that they are able to effectively participate in shaping the country's policies nationally and locally.

Positive Discrimination and a Quota System

Many countries around the world, including Iraq, use positive discrimination to engage marginalized groups in politics, by requiring a certain percentage of representatives--elected or otherwise--to be members of minority groups.

States use such quota systems to ensure minority representation where an unregulated distribution of representation would lead to unintentional inequalities and imbalances. A quota may achieve equal or balanced access to political power especially in a society such as Iraq, where minorities have faced *de jure* and *de facto* discrimination in the past.

Among countries that use quotas, *regional quotas* are common. They distribute parliamentary seats to representatives of all regions, not just according to their share of the population, but by giving non-proportional seats to certain regions over others. Over-representation for certain regions gives advantages to minority groups concentrated in particular regions of a country.

The *reserved seats system* is also widely used. It ensures the representation of minority groups in the legislature by guaranteeing a certain share of parliamentary seats for candidates from minority groups. The legal identification and recognition of minorities is an essential aspect of this system. Representatives for these reserved seats are often elected in the same manner as other representatives, but in some states, only members of these minority groups are entitled to vote for these candidates.

However, some people believe that quotas run contrary to the spirit of democracy by artificially constraining the composition of otherwise freely elected bodies. If political reform in Iraq is not accompanied by efforts to enhance the capacities and education of previously marginalized groups, quotas may simply be viewed as filling seats without the resources necessary to make a meaningful impact on the political process. If this happens, it is possible that minority representatives may either be marginalized within parliament, or fall under the control of colleagues.

Therefore, it is important to note that instituting positive discrimination by way of a quota system must be considered part of a *broader* process of political reform, not a stand-alone solution. Further, given the present difficulties associated with determining population numbers and percentages in Iraq, instituting a quota system presents several

challenges.

Instituting Legislative Quotas in Iraq

Whether a quota system is effective in achieving fair representation depends upon correct implementation of the system, its enforcement mechanism and sanctions for non-compliance. Legislative quotas, which include quotas mandated by the Constitution and quotas mandated by electoral laws already play a role in Iraq's political process. For instance, Article 1 of the Amendments to the Elections Law sets out a quota for the number of governorate seats set aside for ethnic minorities.²¹¹ Other provisions in the Constitution recognize the importance of minority representation in the political process, though they fail to specify the percentages and numbers required to eliminate any imbalance: Article 47 of the Constitution merely states that the COR should be represented by "*all components of the people.*"

In order to implement these pre-existing provisions meaningfully, it is perhaps necessary for Iraq to explore the possibility of instituting minority quota requirements.

Other areas of Iraqi law may serve well if drafters consider introducing the concept of positive discrimination when implementing certain Articles of the Constitution, which discuss the provisions for public commissions. Likewise, positions in the Executive and individual ministries and leadership of security services could also embrace the notion of positive discrimination.

*Advantages and Disadvantages of Legislative Quotas Mandated by the Constitution or Electoral Laws*²¹²

In the legislature, there are several advantages of engaging in positive discrimination and instituting quota representation for minorities:

- Quotas, legislated or voluntary, are among the most effective ways of achieving more balanced representation.
- More balanced representation can increase minority support for the political system in general and political stability in particular.
- Legislative quotas can circumvent conservative party leadership dominated by a social elite--often seen as the main obstacle to the nomination of minority candidates.
- Elected representatives can serve as role models for younger people and build trust in the political process.
- Legislative quotas engage political parties in finding suitable and diverse candidates.

²¹¹ Article 1(3), Amendments to Elections Law, No. 16 2005.

²¹² ACE Electoral Knowledge Network, *Advantages and Disadvantages of Legislated Quotas for Minority Representation* available at <http://aceproject.org/ace-en/topics/pc/pca/pcao3/pcao3b/pcao3b1>

- Legislative quotas are not discriminatory but rather compensate for existing discrimination.
- Rather than limit freedom of choice, quotas give voters a chance to elect candidates from a more diverse pool.

Disadvantages of using legislative quotas:

- Legislative quotas may be considered discriminatory by majority groups and breed resentment.
- Legislative quotas may lead to the perception of a less competent legislature and to greater distrust among ethnic groups.
- People elected through legislative quotas may be less respected and lack real power if they are perceived as less competent than their majority counterparts.
- Legislative quotas may be seen as removing voters' freedom of choice.
- Legislative quotas, especially those established by the Constitution, are difficult to pass as they require majority support where an imbalance already exists.
- Legislative quotas can act as an upper ceiling to minority participation rather than a lower floor. It could thus actually hinder minorities from achieving more balanced representation.

III. Enhancing Local Administration

States with diverse populations often use statutory and constitutional frameworks to ensure minority representation in local, municipal and national government. Many states have used mixed methods of federalism by creating asymmetrical structures with autonomous regions, delegating cultural responsibilities to lower levels of government within a federal structure and creating authorities and responsibilities on the other levels. Several states have implemented these measures to adequately protect minorities in the legislative process and assist minority groups in preserving their cultures.

As noted throughout this report, the Iraqi Constitution offers robust protection to minorities. For instance, Article 116 of Iraq's Constitution states, "the federal system in the Republic of Iraq is made up of a decentralized capital, regions and governorates, as well as local administrations." Articles 117 to 124 have provisions addressing regions, governorates and the capital. Article 125, titled "The Local Administration," states "this Constitution shall guarantee the administrative, political, cultural, and educational rights of the various nationalities, such as Turkmens, Chaldeans, Assyrians and all other constituents, and this shall be regulated by law."

Complying with the legislative requirements for local administration called for in Article 125 of the Constitution can provide a voice for Iraq's minorities.

Best Practices in Other Federal States

In a mixed federal system, it is possible to have local governments with different amounts of power depending on the territory, where some governments have more autonomy than others. It is not uncommon for national governments to design asymmetric systems that designate greater power to certain territories in regions that have a rich culture and history with a dominant linguistic, ethnic, religious or racial group, while keeping that territory within the overall federal system.

For instance, in Italy, the Constitution mandates that certain regions such as Sicily have greater control over their territories.²¹³ In Indonesia, the national government devised a statutory framework whereby Aceh, one of many provinces in Indonesia, received a large degree of autonomy.²¹⁴

Constitutional and Statutory Frameworks

In order to achieve best results, States have arranged their federal systems using various constitutional and statutory frameworks. Certain States, such as Italy and Spain, have devised through their constitutions a federal system by stating specific provisions on that

²¹³ Article 116, Section 2, Italian Constitution.

²¹⁴ Law of the Republic of Indonesia Number 11 of 2006 on The Governing of Aceh with Explanatory Notes.

allocate of power and responsibilities between national and local governments. For instance, Spain devised a constitutional framework with basic necessary provisions for a Self-governing Community. Each Self-governing Community must present its own Statute of Autonomy that is the basic institutional rule of the Community and contains at least the name of the Community; its territorial boundaries; the name, organization and seat of its autonomous institutions; and its powers within the framework of the Constitution.²¹⁵ Constitutional provisions, such as those found in Italy, can be used as a blueprint for statutory provisions elsewhere.

Other countries have created autonomous regions through statutory law. For example, the Indonesian national government created provisions that delineated the Aceh region, devised a framework for the authority of the Aceh District and Municipality governments, created customary institutions and gave the Aceh Government significantly greater responsibilities through a statute.²¹⁶

Generally, these regions give greater amounts of economic, security, educational and cultural responsibilities to their populaces. Their national governments devolve power through statutory or constitutional law. They also provide financial resources to local governments to implement various social programs. For example, Spain created Self-governing Communities that assume great authority over transportation, public works, agricultural and aqua-cultural industries and local security forces; they also undertake the promotion of regional culture.²¹⁷ In addition, the Spanish national government gave the Self-governing Communities the ability to gain greater responsibilities five years after their creation.²¹⁸ Another example is Indonesia, where the national government devolved all power to the Aceh region except for foreign policy,

²¹⁵ Spanish Constitution, Chapter 3, Article 147, Clauses 1 & 2.

²¹⁶ Law of the Republic of Indonesia Number 11 of 2006 on The Governing of Aceh with Explanatory Notes.

²¹⁷ Spanish Constitution, Chapter 3, Article 148, Clause 1. "The Self-governing Communities may assume competences over: organization over their institutions of government; changes in municipal boundaries; town and country planning and housing; public works of interest to the Self-governing Community; railways and roads whose routes lie exclusively within the territory of the Self-government; regulating ports of haven, recreational ports and airports which are not engaged in commercial activities; agriculture and livestock raising; woodlands and forestry; management of environmental protection; planning, construction and exploitation of hydraulic projects, canals and irrigation; mineral and thermal waters; inland water fishing, the shellfish industry, fish farming; hunting and river fishing; local fairs; promotion of economic development of the Self-government Community within the objectives of the national economic policy; handicrafts; museums, libraries and music conservatories; monuments of interest; the promotion of culture and research and, where applicable, teaching the Self-governing Community's language; promotion of tourism; promotion of sports and leisure; social assistance; health and hygiene; supervision and protection of buildings and installations; coordinating with local police forces in terms to be laid under an organic act.

²¹⁸ Spanish Constitution, Chapter 3, Article 147, Clause 2. "After 5 years, the Self-governing Communities may, by amendment to their Statutes of Autonomy, progressively enlarge their powers within the framework under Article 149."

defense, security, administration of justice, national monetary and fiscal policy and religion.²¹⁹

Creation of Local Minority Governments

Article 125 envisions supporting smaller or more scattered minority groups in Iraq. So statutory frameworks used in countries such as Hungary and Croatia are applicable to Iraq since both countries allow minority self-governments to be formed out of district and sub-district levels of government.

For instance, Hungary gives minorities the right to create their own communities and establish local self-governments at the local and national level.²²⁰ These governments have the ability to set aside property for the minority governing entity; maintain a budget; protect historical monuments; define their own organizational structure; establish name or insignia and local feasts; and maintain local basic education, printed and electronic media, adult education and socio-cultural animation.²²¹ In addition, the minority self-governments have the right to approach appropriate public bodies and request information, make proposals, initiate measures and reject any proposal regarding that minority group.²²²

Similarly, in Croatia, minorities are guaranteed representation at the local and national levels of administrative, judicial and legislative bodies if the population represents at least 1.5% of the general Croatian population.²²³ Furthermore, minority groups have the right to create units of self-government where national minorities make up at least 15% of the total population of that local territory and there are 200 members of that community. Minorities are also allowed to elect members of the National Minorities Council when there are 500 members of an individual national minority. In Croatia, the National Minorities Councils have substantial influence over self-governments and administrative offices.²²⁴ Therefore, statutory frameworks are available that allow smaller minority groups to be adequately represented at local and national levels.

²¹⁹ The Aceh Government is responsible for all planning, utilization and supervision of zoning; planning and control of development and construction; maintenance of public order; provision of public facilities and infrastructure; public health; education and human resource services; handling inter-district and municipality social problems; inter-district and municipality services for employment and labor; development of cooperatives; environmental management; land services; population and civil registry services; general government administration; and provision of any other basic services.

²²⁰ Hungarian Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, Article 5, Clause 1.

²²¹ Hungarian Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, Article 27.

²²² Hungarian Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, Article 26.

²²³ The Constitutional Act on the Rights of National Minorities in the Republic of Croatia, Article 19.

²²⁴ National Minorities Councils have the ability to propose measures to self-governments, nominate candidates for administrative offices or self-governments, to be informed about all issues before self-governments, and give opinions to local and regional radio and television stations aimed at national minorities.

Recommendations

In order to enhance local administration, Iraq may either undertake a piecemeal approach or a unitary approach. Under a piecemeal approach, drafters could enact a series of separate laws that would address separate subject areas, such as setting aside property for governing entities, maintaining local education systems, maintaining various budgets for minority related activities, protecting languages or safeguarding other religious, cultural and educational practices.

If Iraq chooses a unitary approach, the following recommendations may assist in creating a single, meaningful piece of legislation.

Legislative Structure:

1. Adopt and implement a statutory framework, consistent with Article 125, which devolves greater power from the national government to the governorates, while districts within the governorate receive additional powers from the governorate. These powers may include organization of institutions within the jurisdiction, promotion of culture and education, or creating local police forces, among others.
2. Amend the Provincial Powers Law as appropriate to protect minority groups as called for in Article 125.
3. Create legislation that will limit regions and governorates from gaining complete autonomy.
4. Establish a legislative framework that will allow governorates to gain greater control of public policies within their territory after five years from when decentralization first occurs with the consent of the Iraqi Parliament.
5. Adopt and implement legislation that will allow smaller minority groups to adopt minority local governments at the district level where a minority group is at least 10% of the district's population.
6. Create a local administration that would provide a national forum for local administrations established by Article 125 legislation.
7. Create Local Administrative Units independent of the national government, regions, governorates, or districts, with unique boundaries and authorities.

Funding and Administration:

1. Adopt and implement legislation that will allow the Iraqi Parliament to fund the governorates and districts for the cost of transferred services. This can come in two forms: donations from private persons, as well as foreign and domestic organizations and for-profit business ventures. For both, governments can support this process in two important ways: protecting and safeguarding property, organization and business rights, and establishing incentives to encourage private revenue generation, such as customs exemptions.
2. Districts implementing Article 125 provisions should establish an administrative

system from the district governments and provincial councils to the national government that will report estimated and actual budgets for each fiscal year.

3. Districts implementing Article 125 provisions should establish an administrative system from the district governments and provincial councils to the national government that will report for each fiscal year the direct expenditure of funds for projects and future projects.

IV. Reforming Personal Status Law

Background: Iraqi Civil and Personal Status Codes

Personal status laws govern issues relating to the personal affairs of individuals and their families. These include matters of marriage, divorce, separation, maternity, parentage, child custody, alimony, bequests, and inheritance. These laws are, for the most part, codified in sacred texts. Some of them are directly and explicitly mentioned in the Koran and in the Hadith, the sayings and proverbs of the Prophet. However, Iraqi civil and personal status laws have largely been influenced by both Islamic and Continental European legal principles. The Egyptian jurist Al-Sanhuri, who is responsible for drafting the Egyptian and the Iraqi Civil Codes, initially wished to draft a part of the Egyptian Code that would govern family law, in a manner that took into account both Muslims and Coptic Christians in Egypt.²²⁵

However, this was considered too dramatic a shift toward secularism, and Egyptian religious traditionalists opposed the proposed reform.²²⁶ As a result, family law was not included in the Egyptian Civil Code and remained separate as personal status law.²²⁷ The Iraqi civil law system has been greatly influenced by the same traditional elements as Egyptian law and has maintained a regime of family law somewhat separate from the relative modernity of its Civil Code.²²⁸ For instance, Article 1 of the current Personal Status Code states, “If there is no applicable legislative text, the judgment shall be adjudicated in accordance with the Islamic Shari’a principles that are the most relevant to this law.” From the perspective of non-Muslim minorities, the law remains flexible since it does not establish Islamic Shari’a as *the* authoritative source of legislation. However, this general area of law poses several significant challenges to minorities.

Law No. 188 and Non-Muslim Minorities

While the current Iraqi Personal Status Code applies to Iraqis who are Muslims, Article 2 of the law allows for separate Personal Status Codes to be enacted by non-Muslim communities.²²⁹ Even though certain minority communities have drafted model laws, no such laws have yet been enacted.²³⁰

The absence of such laws leaves the personal status of minority communities unprotected and unregulated. Until such laws are enacted, non-Muslim minorities and groups are expected to follow the Personal Status Code that is based on Islamic Shari’a principles.

²²⁵ See J. N. D. Anderson, *A Law of Personal Status for Iraq*, 9 INT’L & COMP. L.Q. 542, 543 (1960).

²²⁶ Id.

²²⁷ Id.

²²⁸ Id.

²²⁹ Article 2, Personal Status Code.

²³⁰ IILHR has been able to review several informal versions of such draft laws.

Therefore, this legal area remains largely problematic for minorities. For instance, the current Personal Status Code gives judges great discretion in applying the laws.²³¹ The opening statement to the Code states:

The committee has tried to bring together in this code the most important of the general principles of the law of personal status, leaving it to the qadī²³² to consult the legal compendia in order to extract detailed rules from those texts which are most suited to the provisions of this code, since the committee considers it impossible to draft a Law which includes all matters, general and detailed.

If specific provisions are not enacted for minorities, as some commentators note, this provision in the current Code may represent a “major sacrifice of sectarian principles on the altar of national unity.”²³³ The law as it stands makes no allowances for non-Muslims and may aggravate that problem by placing unchecked authority in the hands of the *qadi*. While this arguably means that a *qadi* may apply the law on a case-by-case basis and make exceptions for non-Muslim minorities, this may still lead to inadvertent discrimination against non-Muslim minorities since he will apply Shari’a principles. Therefore, it is important that drafters either create a unified Personal Status Law that equally applies to all Iraqis regardless of religion, or create specific provisions for various minority groups.

Legal Reform of Personal Status Laws

Attempts to reform Personal Status laws in Iraq have been controversial. In 2003 Resolution 137 was proposed by the Iraqi Governing Council where it sought to remove personal status legislation and leave matters to religious determination, so that “the provisions of Islamic Shari’a shall be applied in areas of marriage, engagement...marital rights...waiting periods, parentage, breastfeeding, custody, child support, kin support, parents’ support, will, holding of estate and all Religious Courts in accordance with the mandates of their Sect.” A large advocacy campaign launched by human rights groups led to the withdrawal of Resolution 137. However, the threat of such a resolution being passed in the future cannot be ignored. If such changes are made to the personal status laws, it would entrench Shari’a principles into the legal system in a manner that may serve to discriminate against non-Muslim minorities.

Reform could come in the form of creating allowances for non-Muslim minorities.

Best Practices in Other States: Unitary, Dual and Plural Legal Systems

²³¹ Anderson, 544.

²³² A judge who rules according to Islamic Shari’a.

²³³ Anderson, 547.

1. Unitary Approach

A unitary legal system may be either a secular legal system or a religious one. For instance, Saudi Arabia, a religious State where Islam is the source of legislation, has a unitary legal system, as does Senegal, where the Constitution declares the country to be a secular State.

Countries with unitary legal systems based on Islam have Constitutional provisions stating that Islam is the official religion of the country and that Shari'a is either the only source or a significant source of legislation.²³⁴ These countries include Saudi Arabia, Kuwait, Bahrain, Yemen, and the United Arab Emirates. Additionally, in countries such as Pakistan, Egypt or Iran, it is forbidden to enact legislation that is antithetical to Islam.²³⁵ Non-Muslims are not necessarily expected to obey Shari'a; the Personal Status of non-Muslim minorities in these countries may be governed by special committees and adjunct courts under the government's control.²³⁶

Muslim countries where the Constitution declares the government to be secular include Azerbaijan, Tajikistan, Chad, Somalia, and Senegal.²³⁷ Even though Islamist parties run for office in these countries and Shari'a often influences local customs, the Personal Status Laws do not exclude non-Muslim minorities.

2. Dualist Approach

Many countries with a Muslim majority have a dual system in which the government is secular but Muslims can choose to bring familial and financial disputes to Shari'a courts. The exact jurisdiction of these courts varies from country to country, but it usually covers marriage, divorce, inheritance and guardianship.

For instance, Nigeria and Kenya both have Shari'a Courts that rule on family law for Muslims.²³⁸ A variation exists in Tanzania, where civil courts apply Shari'a or secular law according to the religious backgrounds of defendants. Certain countries, such as Indonesia, have mixed jurisdiction courts based on residual colonial legal systems that are supplemented by Shari'a.²³⁹

Several Western nations are also exploring the idea of allowing Muslims to apply Islamic law in familial and financial disputes. In late 2008, Britain officially allowed Shari'a tribunals governing marriage, divorce, and inheritance to make legally binding decisions

²³⁴Toni Johnson, and Lauren Vriens, *Islam: Governing Under Shari'*, Council on Foreign Relations, November 10, 2010.

²³⁵ Id.

²³⁶ Id.

²³⁷ Id.

²³⁸ Id.

²³⁹ Id.

if both parties were in agreement.²⁴⁰ The new system is in line with separate mediation allowed for Anglican and Jewish communities in England. Criminal law remains under the gavel of the existing legal system. Supporters of this initiative, such as the Archbishop of Canterbury, Rowan Williams, argue that it helps maintain social cohesion in societies increasingly divided by religion.²⁴¹

However, some research suggests the dualist legal system has created grey areas. Britain's Muslims come from all over the world, as a spokesperson for the Council for Mosques in England notes, and this makes it difficult to discern "where the rulings of the Shari'a finish and long-held cultural practices start."²⁴²

3. Pluralist Approach

This category is an extreme variation of a dualist legal system: It includes countries that allow separate specific provisions for separate religious groups, so that each religious component is governed by religious laws that pertain specifically to them. Lebanon, for instance, has recognized seventeen official religions,²⁴³ and every religious group has its own personal status legislation and religious courts to adjudicate cases.²⁴⁴ The provisions of the Code of Civil Procedure organize the civil jurisdictions, while the community jurisdictions fall under the laws of the different religious communities recognized by the Lebanese State.²⁴⁵ However, supporting different laws and courts for many religious components within a single justice system can prove to be extremely complicated.²⁴⁶

Personal Status Law Reform in Iraq

Given the religious diversity of the Iraqi population and the influence of Shari'a law in existing Iraqi legislation, it might be appropriate for drafters to undertake a dualist or

²⁴⁰ Sciolino, Elaine, *Britain Grapples With Role for Islamic Justice*, New York Times, 18 Nov. 2008.

²⁴¹ British Broadcasting Corporation, *Shari'a Law in US is Unavoidable*, 7 February 2008 available at http://news.bbc.co.uk/2/hi/uk_news/7232661.stm

²⁴² Johnson and Vriens, supra note 234.

²⁴³ Maronite, Greek-Catholic, Armenian-Catholic, Syriac-Catholic, Latin Catholic, Chaldean-Catholic, Greek-Orthodox, Armenian-Orthodox, Syriac-monophysite, Assyrian, Protestant, Coptic-Orthodox, Chaldean-Orthodox, Sunni, Shiite, Druze, Alawite.

²⁴⁴ G. Tabet, *Women in Personal Status Laws: Iraq, Jordan, Lebanon, Palestine, Syria*, SHS Papers in Women's Studies/Gender Research, UNESCO, July 2005 available at

http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Women_in_Personal_Status_Laws.pdf

²⁴⁵ Id.

²⁴⁶ For instance, in Lebanon, as a general rule, the Lebanese civil courts are capable of hearing disputes which have arisen from a marriage contract concluded abroad between two Lebanese or between a Lebanese individual and a foreigner under the civil procedures of the country concerned. The provisions of the laws concerning the capabilities of the Shari'a and Druze courts are applicable if both spouses are Muslims and at least one of them holds Lebanese nationality. There is legislation applicable to all Lebanese, legislation applicable to Muslims, and legislation applicable to non-Muslims. See Article 79 of the Lebanese Constitution.

pluralist approach to Personal Status reform. A dualist approach would grant Muslim Iraqis the option of referring to Shari'a courts for matters relating to Personal Status, while granting non-Muslim minorities non-Shari'a-based secular legal protections for their Personal Status issues. However, if certain Iraqi minority components require specific legal protections for their Personal Status based on their particular religion, a pluralist approach might be more appropriate. Enacting specific provisions for the various Iraqi minorities might lead to a complicated legal system like that of Lebanon. Yet that would be one way of ensuring that all Iraqis are in fact "free in their commitment to their personal status according to their religions, sects, beliefs or choices," as Article 41 of the Iraqi Constitution guarantees.

Recommendations:

- Marriage
 - Marriage could be defined as a contractual arrangement and sacred bond between one man and one woman with the goals of the marriage to be defined by the parties entering it.
 - Agreement to enter into marriage could be privy to mutual consent.
 - A marriage could be permitted provided that the parties are of legal age, deemed mentally competent to enter into marriage, and not of blood relation.
 - A marriage could be deemed legal provided that the parties are mentally competent to enter into a contractual relationship, the parties have the intent to enter into such a contract in the absence of ulterior motives, and the marriage ceremony is performed by a legally recognized officiate after the parties meet the licensing requirements of the State.
 - Restrictions on entering into marriage could not be permitted on the basis of race, religion, national origin, and/or color.
- Divorce
 - Both husband and wife could have the right to petition for dissolution of marriage.
 - Upon dissolution of a marriage, both spouses could have the right to enter into a new marriage contract with a partner of their choosing, including, though not limited to, each other.
 - Establishing fault could not be necessary for the filing and granting of a divorce petition.
- Alimony, Support, and Property Division
 - Alimony could be granted to the party in the weaker financial position upon dissolution of marriage, provided that the receiving party is unable to maintain a reasonable standard of living in the absence of such support.
 - Alimony need not be permanent.

- Alimony could be terminated upon remarriage, financial rehabilitation or situations of the kind.
- Support for children of the marriage could be considered separate from spousal support and could not be privy to contractual opt-outs.
- The respective incomes of both parents could be considered in any and all claims for child support.
- Conditions for the termination and/or a reduction in child support could include, although are not limited to, remarriage, a change in financial position of one or both of the parties, and/or the child reaching the age of majority.
- A claim to title could not be required to establish property rights.
- Equitable division could be the aim of property apportionment, with weight being given to factors including, although not limited to, the caretaking roles of the spouses, lifestyle expectations/reasonable standards of living, and financial contribution towards the purchase of the property in question.
- Child Care and Custody
 - The primary goal of any and all child custody arrangements could be the best interests of the child.
 - Consideration could be given to the fairness of any child custody arrangement with respect to the access of the parents to the child/children.
 - Primary care giving roles could be taken into account, regardless of gender, when assigning weighted custody agreements.
 - Child custody arrangements could aim for consistency, but could be subject to change at any time shall it be in the best interests of the child.
 - Custody could not automatically pass from one parent to another upon death of a respective parent. Rather, the best interests of the child could be the primary focus.
- Inheritance
 - Inheritance decisions could be subject to review by a court of law under claims of inequity or unconscionability, among other things, by a party privy to the will.
 - Ultimate weight could be given to the grantor's intentions and wishes with respect to inheritances.