



INSTITUTE FOR INTERNATIONAL LAW AND HUMAN RIGHTS

Women and the Law in Iraq

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Executive Summary

This report analyses the main body of Iraqi law to see how it affects women's lives, women's position and women's safety in Iraq today. From an objective standpoint, this report aims merely to provide information about the current legal situation, to accurately assess that situation in terms of Iraq's Constitutional and international obligations, to demonstrate possibilities for reform using examples from other countries and from Iraq itself, and to highlight suggestions as to where the law could improve its protection of women.

This legal analysis found a balanced and complex system that sometimes offers women more protections and rights than do other countries in the Middle East, while at other times leaving women unable to live their lives fully. Occasionally, the legal system leaves women without protection from harm.

The report first analyses Iraq's obligations under International law. Iraq has signed up to a number of key conventions such as CEDAW, the ICCPR and the ICESCR (see list of Acronyms, page 19), although reservations to certain provisions may limit the efficacy of the commitments that have been made. The Constitution of Iraq sets out some strong equality rights and protections for women, but leaves an uncomfortable balance between these provisions and the protection of religious freedom and protection of Islamic principles.

Criminal law in the main sets out comprehensive protection for both women and men. Yet there are serious concerns about defences and mitigation for domestic violence and honour crimes, adultery crimes that may place women under prosecution, lack of protection for rape victims who may be forced to marry their abusers, harsh penalties for those who are forced into prostitution, and no provisions for abortion even in life-threatening situations.

Laws regulating obligations in contract, tort and property consistently offer women freedom and protection, both on equal terms with men and also recognising their differences. Legislation dealing with the former Ba'athist regime, laws regulating elections, and laws regulating nongovernmental organisations (NGOs) continue this trend, generally both allowing women freedom to participate equally with men and also recognising their vulnerabilities and ensuring their protection. The law of citizenship has made significant improvements since the new Constitution, granting women the opportunity to pass on citizenship in a much wider group of situations. The social security system is generally extensive, non-discriminatory and protective of women. However, certain regulations for workers do not apply to occupations dominated by women, and if others are not enforced through a central system, they may engender discrimination against women in the workforce.

The validity of personal status law is in doubt following Article 41 of the Constitution allowing freedom of personal status according to religion; as it stands, it does contain a number of discriminatory provisions, particularly dealing with the rights of men and women in marriage. Reform in this area is controversial. Regulations dealing with criminal court procedure, in the main, do not discriminate against women on their face, but may present difficulties for women in their application. Civil provisions and evidence rules are also non-discriminatory, although the different rules for personal status courts may leave women without protection.

It is important to recognise the many practical difficulties faced by women and women's activists in Iraq in dealing with the law. Security concerns, economic problems and societal expectations all come into play when assessing the efficacy of law, as does women's position in Iraq generally. While these difficulties are in no way ignored in this report, and provide important context and background to the recommendations, this paper focuses on the specific legal issues presented by current legislation. Women for Women International's 2005 Survey of Iraq found that 93.7% of women in Iraq want to secure legal rights for women.¹ In 2007, 77.4% of women surveyed said that 'legal protections for the rights of women were either very important or extremely important to the welfare of their communities.'² 43.6% of women thought that women were not being considered by the people making decisions about Iraq's future.³ This report seeks to address these specific legal concerns, without going into detail on other issues faced by Iraqi women.⁴

These other issues may include policy and budgetary matters. Reform in this area may be linked to legal reform. For example, in Morocco the 2004 Family Code prompted the establishment of a strategy for gender equality in government policy and included in the state budget a new program for fighting violence against women.⁵ In 2007 Morocco passed legislation mandating that women would receive one-third of jobs at governmental institutions, and colleges were founded to train women to work.⁶ In Jordan in 2004 the Prime Minister 'sent a note to all ministries and government agencies asking them to develop criteria that took gender into account in appointment procedures and to take measures against anyone found to be discriminating against

¹ Women for Women International, *Windows of Opportunity: The Pursuit of Gender Equality in Post-War Iraq*, 2005, http://www.womenforwomen.org/news-women-for-women/files/Iraq_Paper_0105.pdf

² Women for Women International, *Stronger Women Stronger Nations: 2008 Iraq Report, Amplifying the Voices of Women in Iraq*, http://www.womenforwomen.org/global-initiatives-helping-women/files/IraqReport_03.03.08.pdf pg 27

³ Women for Women International, *Stronger Women Stronger Nations: 2008 Iraq Report, Amplifying the Voices of Women in Iraq*, http://www.womenforwomen.org/global-initiatives-helping-women/files/IraqReport_03.03.08.pdf pg 27

⁴ For a discussion of how Iraqi law affects women in fact, see ABA, *Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards*, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf

⁵ See American Islamic Congress, *A Modern Narrative for Muslim Women in the Middle East: Forging a New Future*, 2010, http://www.aicongress.org/prog/Women/AIC_Womens_Narrative_2.pdf pg 24

⁶ See American Islamic Congress, *A Modern Narrative for Muslim Women in the Middle East: Forging a New Future*, 2010, http://www.aicongress.org/prog/Women/AIC_Womens_Narrative_2.pdf pg 18

women.⁷ The Iraqi Parliament has made steps in this direction, as can be seen in the quota requirements for the Human Rights Commission, which require that one-third of its members be women.⁸

Reform is also needed in providing practical help for women. An example of such help is shelters. In Iraq there are no regulations or legislation mandating shelters,⁹ although in Kurdistan there are three shelters, one run by the Ministry of Interior and two run by NGOs.¹⁰ Kurdistan's Constitution states that 'the government of the Region shall guarantee the establishment of special homes to protect and care for women who have, for social reasons, lost their family security.' The benefit of reform in these peripheral legal areas is evident, and may be a welcome bonus to legislative reform, but it is not the central focus of this report.

Iraqi legal experts have acknowledged that this report addresses key areas of law and raises legitimate concerns about the legal rights afforded to Iraqi women. However, they note that amending and repealing certain laws may pose considerable legal and constitutional challenges, since many consider the basis for the leading provisions in the Iraqi Constitution, Penal Code and Civil Code to be Islamic Law. They point out that it may be difficult to amend and accept changes to the laws if such changes would ultimately render Iraqi law inconsistent with Islamic law. However, potential conflicts between Islamic law and reforms to current Iraqi law that would improve the status of women in Iraq, assist in developing the Iraqi economy, and further democratic goals within the country should not prevent policy-makers from reviewing and considering potential reforms. Rather, the relationship between Islamic law, current legislation and policies, and goals for reform based on gender equity should be considered in context, and the efficacy of possible reforms should be evaluated by Iraq's political leaders in consultation with civil society, the judiciary, and international experts as necessary.

This report does not aim to be a compendium of Iraqi law and policy, or an assessment of the overall women's or human rights situation in Iraq. What it does aim to do is to provide a useful summary of the main body of Iraqi law and how that law affects the status of women, in a way that may be helpful to those who are pursuing reform in this area.

⁷ Committee, Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Combined Third and Fourth Report of States Parties: Jordan, CEDAW/C/JOR/3-4, 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No6/263/01/PDF/No626301.pdf?OpenElement>, pg 12

⁸ Article 8(4), Law No. 53 of 2008

⁹ Unlike, for example, in Jordan under the Family Shelter Regulation 2004

¹⁰ UNAMI Human Rights Report, January-June 2009, http://www.ohchr.org/Documents/Countries/IQ/UNAMI_Human_Rights_Report15_January_June_2009_EN.pdf pg 13

Overview and Key Recommendations

International Law

Iraq has signed up to a number of the key conventions, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the International Convention on the Elimination of All Forms of Discrimination Against Women--demonstrating its commitment to abide by international law in this area. All of these conventions require non-discrimination on the basis of sex,¹¹ but CEDAW sets out the most comprehensive obligations in terms of women's position in society. Iraq has accepted most obligations under CEDAW, but has placed reservations to Article 2 demanding changes in the law to reflect the obligations of CEDAW, and Article 16 granting equal rights in marriage. Yet both of these reservations are considered to be 'central to the object and purpose of the convention.'¹² Removing these reservations and ratifying the Optional Protocol to CEDAW would ensure the full efficacy of these instruments.

Key Recommendations

- Withdraw reservations to CEDAW Articles 2 and 16.
- Ratify the Optional Protocol to CEDAW.

Constitutional Law

The Constitution is 'the preeminent and supreme law in Iraq,'¹³ and 'any text' that contradicts it 'shall be considered void.'¹⁴ It was passed in 2005 following intense negotiations and a referendum, and while provisions have been made for its amendment, none has yet been passed. Article 14 contains a strong guarantee of equality, stating that 'Iraqis are equal before the law without discrimination based on gender.' This is backed up by equality provisions in many of the key rights, and also by a number of articles that recognise the potential vulnerability of women and seek to protect women and their position. Article 2 of the Constitution raises some concern as to the apparent contradiction between the component sections; also as there is some danger that Article 2 may remove protection for women by mandating changing the law to a version of Islamic principles that diminishes women's legal and social status from its current position. It is argued that reading Article 2 as a whole, including the obligation to respect the rights and freedoms set out in the Convention, may alleviate the latter concern. Article 41 of the

¹¹ Article 15 of CEDAW, Article 26 of the ICCPR, and Article 2 of the ICESCR

¹² See <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>, and CEDAW General Recommendation No. 21 (13th Session, 1994) paras 41-43

¹³ Article 13 (1)

¹⁴ Article 13(2)

Constitution, allowing ‘freedom of commitment’ in personal status according to religion, may also present some concern for women in the area of personal status law, where they are currently granted certain rights under the Personal Status Code.

Key Recommendations

- Amend Article 17 concerning the sanctity of the home to ensure that law enforcement may enter homes in an emergency or if the safety of Iraqi citizens is in danger.
- Repeal Article 41 granting choice in personal status to ensure that women’s position is protected, or at least ensure that this provision is interpreted alongside the other articles in the Constitution including the Article 14 commitment to equality, in order to prevent women’s position from being diminished.
- Repeal or amend Article 2 to ensure internal consistency between sections on Islamic principles and rights and freedoms. A hierarchy within the three sections, guaranteeing that the rights and freedoms of the Constitution are superior, would help safeguard women’s position in law.

Criminal Law

Criminal Law in Iraq is governed in the main by the comprehensive Penal Code No. 111 of 1969. This Code goes some way towards protecting women, and the vast majority of provisions ensure both men’s and women’s safety. It also addresses certain issues specific to women, such as a number of articles dealing with women’s rights to privacy, enforcing familial support laws, penalties for seduction of women with promise of marriage, provisions on indecent assault, and a law of rape that is noteworthy for providing essential protection for both women and men.

However, a number of articles discriminate against women both in law and in fact. Potentially severe domestic violence is sanctioned; adultery laws are skewed towards prosecuting women; there are significant defences for crimes committed in the name of honour, sanctioning violence against female family members; rapists may marry their victims and avoid punishment; and abortion is punishable by severe penalties, with no exception for life-threatening situations.

Other noteworthy legislation in this area includes the Prostitution Law No. 8 of 1988, amended by RCC Resolution Number 234. These contain strong punishments for those who organise prostitution, but also punish the prostitutes themselves, potentially punishing such women for their own abuse.

Key Recommendations

- Repeal Article 41(1) of the Penal Code granting a ‘legal right’ to a husband to punish his wife. At the very least, clarify in law the boundaries of the ‘legal right’ to ensure that physical abuse is not sanctioned.
- Repeal the mitigating excuse of ‘honourable motives’ in Article 128 of the Penal Code, or at least provide for lesser reduction in sentencing than currently.

- Repeal offences relating to adultery in the Penal Code. At the very least, ensure that the provisions on adultery affect men and women equally, and that non-consensual adultery or adultery under duress is not criminalised.
- Repeal Article 398 of the Penal Code, so that those who have committed rape are not exonerated by marrying their victims, forcing their victims into a permanent relationship with their abuser.
- Repeal Article 409 of the Penal Code and RCC Order No. 6 of 2001 so that there is no mitigation in penalty or defence for those committing 'honour' killings, and remove the extra penalty for those who kill in revenge.
- Amend Article 417 of the Penal Code, to allow abortion in certain circumstances, particularly where the mother's life is threatened.
- Amend Articles 394 and 403 of the Penal Code to state that those working to help women and prostitutes in education and health cannot be charged with incitement to fornication, prostitution, or pornography.
- Repeal Article 3 of RCC Resolution Number 234, which punishes prostitutes with life imprisonment. This would reinstate the provisions of Combating Prostitution Law No. 8 of 1988.
- Amend the Combating Prostitution Law No. 8 of 1988 to ensure that reformatory houses for prostitutes are not for punishment and are not compulsory. Instead, such houses should ensure help for those who formerly worked as prostitutes.
- Consider introducing legislation banning female genital mutilation (FGM) as a step towards regulating or curbing the practice.

Law of Obligations

The law of obligations regulates interaction between citizens in the key areas of contract, tort and property law. Laws in this area include the Civil Code No. 40 of 1951, based on a system of law that includes both continental European influences and Islamic law. It is unclear how Article 2 of the Constitution would affect the interpretation of this law. This report submits that an interpretation that recognises an inclusive reading of Article 2, recognising that 'no law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution,' would ensure that the Civil Code fully protects women.

Bearing this in mind, the law of obligations is generally sensitive to women's concerns, both providing gender-neutral rules and also recognising where women may be vulnerable.

Key Recommendations

- Amend Articles 102, 588 and 1327 of the Civil Code dealing with guardianship so that not just 'fathers' but 'parents' are considered the natural guardians of children.
- Amend or add a provision to Articles 210, 212 and 213 of the Civil Code to ensure that defences to compensation, including 'contribution through the victim's own fault' do not include 'honour,' to help protect women from violence in the home.

- Consider implementing legislation that would provide for protective or restrictive orders for victims of violence, as well as compensation for them.
- Repeal RCC Order Number 1610 of 1982 to ensure equal property rights for men and women married to non-Iraqis.
- Amend Articles 89 and 91 of the Personal Status Code so that inheritance legislation ensures full provision for women.

Legislation Dealing with the Former Ba'athist Regime

A number of recent laws have sought to address concerns arising from the treatment of Iraqi citizens under the former Ba'athist regime. They are part of a process to help Iraqis move forwards from that regime, set up reconciliation mechanisms, to provide compensation and reparations to victims, and criminalise certain acts under the previous regime. They generally ensure protection for both women and men, and at times recognise women's vulnerability. They are in compliance with both the Constitution and International Law.

Key Recommendations

- Amend the Law on the Reinstatement of the Politically Discharged to include a cause of action for persons discharged for gender-based reasons.
- Amend the Law on the Organisation for the Resolution of Disputes in Real Property to include a cause of action for persons whose real property was seized for gender-based reasons.

Elections Law

The laws that regulate voting and elections in Iraq are generally non-discriminatory, and also at times use positive discrimination through quotas to ensure that women are represented in all levels of government, starting with the Council of Representatives. This ensures women's protection and participation, and is a leading example of such laws both in the Middle East and around the world.

Law of Non-Governmental Organisations

This area of law is regulated in the main by the Law of Non-Governmental Organisations No. 12 of 2010. It aims to enhance the role of NGOs in Iraqi society. NGOs are a key factor in ensuring the position of women in Iraqi society, and therefore this law helps to protect women.

Key Recommendations

- Repeal Article 226 of the Penal Code to ensure that NGOs have the freedom of speech guaranteed to them by the Constitution.

Citizenship Law

The Nationality Act No. 26 of 2006 goes some way towards complying with the Constitution and ensuring that women and men have rights to citizenship that they can pass to their family. This is a significant improvement for women from the previous law, and goes further than other countries in the region.

Key Recommendations

- Ensure that information about the substance and extent of the rights in the Nationality Act is disseminated publicly so that women may enjoy their new rights.

Social Security

Iraqi law sets out a sophisticated social security system that covers the distribution of social welfare as well as regulating health, education, labour, pensions and compensation for work. Generally these laws both regulate in a gender-neutral fashion the key rights and duties under the scheme, and recognise and seek to ameliorate the difficulties women face. However, some schemes indirectly discriminate against women by excluding areas of work that are dominated by women, and the practical repercussions of some of the laws that seek to promote women in the workplace need to be assessed. Furthermore, it appears that these benefits may not be felt at the ground level, so it is important to ensure that the Constitutional and legislative rights set out in this area are made accessible to women in their everyday lives.

Key Recommendations

- Ensure that under Articles 81 and 83 of the Labour Code women are not forbidden to perform certain kinds of work in which they might be able to find employment.
- Amend Article 3 of the Workers' Pension and Social Security Act and Article 3 of the Pension and Social Security for Workers Act to include all professions within the workers and pensions scheme.
- Under the Labour Code, the Workers' Pension and Social Security Act, the Pension and Social Security for Workers Act and the Civil Code, ensure that schemes that force private-sector employers to provide certain benefits to women are distributed indirectly so that employers do not discriminate against women due to expensive benefits, while also ensuring that women retain the benefits granted to them under such schemes.
- Ensure that the Public Health Law is supported by regulations and infrastructure that allow it to function effectively on the ground.
- Ensure that the Constitutional right to education is fully realised by legislation.

Personal Status/Family Law

This area of law is primarily regulated by the Personal Status Code No. 188 of 1959, which granted women extensive rights and protection when it was first enacted. Subsequent amendments,

however, have removed some of these benefits. As it stands, the Personal Status Code has an uneasy relationship with the Constitution, as the Article 2 requirements for laws to align with Islamic principles but also with the rights and freedoms set out in the Constitution most often come into contradiction in the area of family law. Furthermore, the effect of Article 41 of the Constitution is unclear, which may appear to mandate the abolition of the Code altogether, or certain parts of it, or may compel the institution of different systems for different religions. In accordance with the Constitution, this law has been analysed as it currently remains in force. It is important to note that legal reform in this area is extremely controversial and generates significant disagreement, as can be seen by the Resolution 137, which, while defeated, demonstrates the very diverse opinions of different sectors of Iraqi society on how personal status law should be regulated.

Key Recommendations

- Amend Article 9 of the Personal Status Code to ensure that women forced or duped into marriage can annul their marriages even after consummation.
- Repeal or amend Article 17 of the Personal Status Code to allow Muslim women to marry non-Muslim men.
- Repeal Article 3 of the Personal Status Code permitting polygamy.
- Amend or repeal Articles dealing with the husband and wife's duties and authority in the household, such as Articles 26 and 33 of the Personal Status Code to allow women and men equality in marriage, with mutual rights and duties. At minimum, restrict situations in which the wife must obey the husband and allow the wife equal say in the composition of the household.
- Amend the divorce options under Articles 34, 37, 40-43 and 46 of the Personal Status Code so that men and women have equal opportunities to end and leave marriages.
- Repeal Articles 47 and 48 of the Personal Status Code requiring *iddat* [the waiting period before remarriage can occur] or make them equal for men and women.

Court Procedure

The laws setting out regulations on how cases may be brought to trial and the rules for trial itself are set out by a number of laws that may differ for different areas of law. In the main they do not discriminate against women on their face, although they may present *de facto* discrimination in their application.

Key Recommendations

- Amend Article 1 of the Criminal Procedure Code to allow criminal proceedings and investigation to be initiated without a written complaint, if police or investigative judges have sufficient information.

- Repeal or amend Article 3 of the Criminal Procedure Code to ensure that rape, polygamy and other offences that are currently 'private' can be prosecuted without a complaint from the victim, while taking the victim's wishes into account.
- Amend Article 9 of the Criminal Procedure Code to allow prosecution of a crime to continue if there is sufficient evidence, even if the victim removes his complaint.
- Amend Articles 194-196 of the Criminal Procedure Code to ensure regulation of conciliation proceedings, preventing the risk of improper pressure on victims.
- Repeal or amend Article 57 of the Criminal Procedure code, removing provisions allowing interested parties to observe the investigation of crimes.
- Amend Articles 58, 87, 59, 63 and 176 of the Criminal Procedure Code to allow witnesses to opt out from giving testimony in court.
- Amend Articles 72 and 73 of the Criminal Procedure Code to ensure that the police have authority to enter a home in cases of emergency without the necessity of a judicial order.
- Amend Articles 92, 93 and 103 of the Criminal Procedure Code so that, in emergency situations, police may arrest suspects and ensure their detention.
- Ensure that for Articles 152, 199, 338 and 339 of the Criminal Procedure Code there are efficient appeals procedures to regulate discretion by the investigative judge.
- Amend Article 4 of the Public Prosecutor Law so that the victim's wishes are taken into account when the Public Prosecutor is considering whether to continue a case on the basis of the victim's privacy.
- Repeal Article 93 of the Civil Actions Law, to ensure that judges are recused from all cases of possible bias.
- Repeal Article 98 of the Civil Actions Law, so that religious courts follow the provisions of the Civil Actions Law and the Evidence Law, ensuring that women are not discriminated against in giving testimony.

ABOUT THIS REPORT

The purpose of the project was to produce a report in plain language that could serve as a reference document on the position of women in Iraq, for use by activists and lawyers, parliamentarians and practitioners. The goal of this report is not to present a 'Western' viewpoint on Iraqi law. Rather, it is to examine where the law is consistent with Iraq's Constitutional, International and moral obligations to ensure that women are accorded respect and fair treatment before the law, and where present law falls short of these obligations.

This report is primarily authored by Jennifer MacLeod, Senior Fellow at Law & Rights in Summer and Autumn 2010. She has worked on a wide range of human rights issues, including domestic violence law in the United States, mental disability law in Europe, detention issues in Massachusetts, and post-conflict claims stemming from the Ethiopian-Eritrean war. She is a graduate of Cambridge University in the United Kingdom, and holds an LL.M. from Harvard Law School in Cambridge Massachusetts.

Law & Rights was also aided on this project by its partners at the University of Virginia Human Rights Law Clinic, and particularly by Nathaniel Prum and Professor Deena Hurwitz, who contributed considerable time and effort to researching laws and developing the analysis below. The editing of Judith Dollenmayer was very helpful in polishing and clarifying our presentation. On the ground in Iraq, Erin Houlihan and William Spencer conducted the consultation process with invaluable assistance from Najim Al Khaphaj'i, Nahla Arif, and Hanaa Edwar, who also offered her own considerable expertise.

We are particularly grateful for the support of the following leading Iraqi jurists and activists: Ghazi Al-Jenabi, Ibtisam Al-Shimmary, Athra Fadhil Al-Hassani, Dr. General Abdul Kadhim Joda, Judge Hadi Aziz, Athra Dakheel, Eiman Jawad Al-Barazanji, Amira Al-Baldawi, Dr. Suha Al-Azawi, Suha Al-Kafaie, Zainab Qasim Ali, Elham Makki, Shatha Al-Mosawi, Ayad Muhsin Dhamad Judge Salim Rodhan, Emad Al-Timeemi Tameem Al-Azawi, Shirouq Al-Abaychi, and Dr. Nehla Al-Nadawi. We are especially grateful to the office of Medhat Al-Mahmoud, Chief Justice of Iraq's Federal Supreme Court, for their attention to this document.

The legal system of the Republic of Iraq is predominantly based on comprehensive Codes enacted in the mid 20th Century. The rules set out in these Codes have been gradually amended and added to; by legislation, Revolutionary Command Council (RCC) Resolutions and Orders under the Ba'athist Regime; by orders from the Coalition Provisional Authority (CPA); and by the legislation of the Iraqi Council of Representatives. In producing this report the main body of this law -- including all key Codes and subsequent amendments -- was analysed to determine the status of women and the protections for women within the text itself.

The first task in producing this report was to assess what legislation is currently in force in Iraq, and to get copies of that legislation. To do this, the author, Jennifer MacLeod, consulted specialist librarians at the Library of Congress and Harvard Law School, as well as Iraqi legal experts, and used their paper and online resources, in particular the Official Gazette wherein all laws are

published. The Global Justice Project: Iraq website¹⁵ contains amended versions of many key laws in English; it was an important research tool, as was the Iraqi Legal Database,¹⁶ which has legislation in Arabic. The Global Legal Information Network¹⁷ and International Labour Organisation Database¹⁸ were also helpful.

Every effort has been made to ensure that the laws cited in this report are accurate and in force; as this report notes, there may be concerns about this. However, the difficulty in researching, locating and verifying the current status of these laws must be noted, and the full text has been cited wherever detailed comments are given on the law.

Each piece of legislation that was discovered in this process was then analysed specifically with regard to the treatment of women. The report identifies examples of best practices in Iraqi law, highlights any omissions or holes in gender protection, and sheds light on discriminatory provisions. For those provisions of the law that discriminate against women, suggestions are included as to how improvements can be made, using international examples where applicable.

The analysis in this report is arranged by chapters, organised by broad sections of law--International, Constitutional, Criminal, Obligations, Former Regime Reparations, Elections, NGOs, Citizenship, Social Security, Personal Status and Court Procedure. Within each of these sections the law is analysed by topic, with specific comments on each article where such commentary is merited. Each section opens with this report's key recommendations, which also appear in the Overview section above.

The report has presented a number of potential suggestions for reform, including examples from other countries with comparable systems. The report does not include comments on Islamic principles or Shari'a law due to the complexity of the subject, but this is an area that could well be explored in future work.

¹⁵ <http://www.gipi.org/>

¹⁶ <http://www.iraq-ild.org/AboutEn.htm>

¹⁷ <http://www.glin.gov/search.action>

¹⁸ http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=IRQ

METHODS OF REDRESS/MOVING FORWARDS

The Constitution, as the ‘preeminent and supreme law in Iraq,’ takes precedence over all other laws, and ‘any text...that contradicts this Constitution shall be considered void.’¹⁹ However, under Article 130, ‘existing laws shall remain in force, unless annulled or amended in accordance with this Constitution.’ Therefore those laws that contradict the Constitution, many of which are mentioned below for their discrimination on grounds of gender in violation of Article 14, will remain in place until they are annulled or amended. Furthermore, under Article 30 of the Civil Actions Law No. 83 of 1969, ‘no court may refrain from resolving a dispute on the pretext that the relevant law is ambiguous, insufficient or inconsistent,’ as that ‘shall be considered as denying justice.’ Therefore the laws in existence will be carried out to their full extent. Advocates must ensure that the interpretation of these laws is consistent with the Constitution to the greatest extent possible.

Amendment must be accomplished by the Council of Representatives, and annulment may also be completed in this manner. The Federal Supreme Court has jurisdiction over ‘overseeing the constitutionality of laws and regulations in effect,’ as well as ‘interpreting the provisions of the Constitution.’ Therefore, for those laws in clear violation of the Constitution, it may be more profitable to ask the Supreme Court for a ruling on the matter than to push for legislative amendment. Furthermore, if a provision can be removed without the need for further legislation as the area is already covered by law--such as, for example, the removal of defences in the Penal Code or the annulment of RCC Orders or Resolutions--the Court may also offer a useful route to redress.

A number of bodies in Iraq are tasked to deal with issues discussed in this paper. These include Ministries within the executive such as the Ministry of Human Rights,²⁰ the Ministry for Women’s Affairs and the Ministry for National Dialogue.²¹ These bodies’ mandates include presenting proposed amendments to legislation, and they are therefore important in achieving the legal reform needed to ensure equality in Iraqi legislation. The Parliamentary Committee for Women and Children and the Department for the Welfare of Widows and Divorcees, part of the Ministry of Labour and Social Affairs, may also be potentially useful in pushing for reform in this area.²²

The Bylaws of the Iraqi Council of Representatives 2006 establish a Human Rights Committee and a Women, Family and Childhood Committee, each to consist of between seven and fifteen

¹⁹ Article 13

²⁰ Which according to the NGO Stakeholders report to the Human Rights Council, 2010, <http://www.amnesty.org/en/library/info/MDE14/022/2009/en> , pg 2, has 14 regional offices

²¹ See Iraq’s submission to the Human Rights Council, February 2010, pg 8

²² See Iraq’s submission to the Human Rights Council, February 2010, pg 9, 12, 25

members,²³ which can propose laws related to its jurisdiction, and give opinion on draft laws.²⁴ The Women, Families and Childhood committee is mandated to ‘propose draft laws that support the role and status of women in the society and in the political process, put emphasis on the rights of women and defend them,’ and ‘monitor violations by the executive branch of women’s rights.’²⁵

Independent bodies include the proposed Higher Commission for Human Rights, established in Act 53 of 2008, which is mandated to receive complaints on human rights abuses and carry them through, including to legal cases if necessary, and the Higher Commission for the Advancement of Women. The Department of Community Policing was set up to deal with violence against women, as was the National Institute for Human Rights for implementing human rights education plans.²⁶ All of these institutions may be able to push for reform in these areas, although their operational status, financial capability and political power may be questionable.

Iraq could improve the position of bodies that are tasked with improving this area. For example, Tunisia has a number of complementary agencies supporting the Ministry of Women’s and Family Affairs, including the National Council for Women and the Family, the Commission on Women and Development, and the Research, Study, Documentation and Information Centre. The national council is a ‘framework for discussion on women’s issues,’ the commission focuses on ‘reflection and for the orientation of policies,’ and the research centre ‘is a scientific body responsible for developing studies and research work on women.’²⁷ Granting the abovementioned Iraqi institutions more capacity to change the situation would strengthen the protection of women.

There are also developments that could ensure that the principle of non-discrimination is enshrined in law so that women may have the right to appeal to the courts, as is the case in Jordan, where men and women can both bring actions for compensation for discrimination.²⁸

²³ Articles 70 and 73

²⁴ Article 87

²⁵ Article 107. The Committee also has other obligations listed in that Article.

²⁶ See Iraq’s submission to the Human Rights Council, February 2010, pg 9, 12, 25

²⁷ See World Bank, Report on the Status and Progress of Women in the Middle East and North Africa, 2007, http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Overview_2007.pdf pg 116

²⁸ Committee, Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Combined Third and Fourth Report of States Parties: Jordan, CEDAW/C/JOR/3-4, 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No6/263/01/PDF/No626301.pdf?OpenElement> ,pg 12

ACRONYMS

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women

CESCR Committee on Economic, Social and Cultural Rights

FGM Female Genital Mutilation

ILO International Labour Organisation

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic Social and Cultural Rights

ICG Iraqi Governing Council

RCC Revolutionary Command Council

NGO Non-Governmental Organisation

UN United Nations

UNAMI United Nations Mission to Iraq

EVALUATION OF LEGISLATION

I. GENERAL OBSERVATIONS

Gender-Neutral Language

Under Article 3 of the Law on Publication in the Official Gazette, 'masculine forms shall cover the feminine references.' In Iraqi legislation, therefore, 'his' should be read to include 'hers', 'he' to include 'her' and so on. In this report the use of masculine forms is consequently not noted and is presumed to include the female reference unless such an interpretation is difficult or impossible.

However, this is not to say that language that does not discriminate by gender should not be preferred or encouraged in the future, and there are many examples of such non-discriminatory language in current laws. In the Civil Code for example, Article 950, states that 'a trust is the property which has reached de facto or de jure the hand of a person with the permission of the owner...;' Article 113 states that 'the alluvium which is brought by a river to the land of a person will belong to that person;' and Article 1193 states that 'if the husband or the wife existed with the persons entitled in the first order he/she will take one fourth.' Such gender-neutral language is to be encouraged, as it explicitly recognises the fact that either sex can be involved in the specified activities, and reinforces women's role as partners and equals with men.

RCC Resolutions/Orders

The Revolutionary Command Council (RCC) issued a great number of resolutions and orders under the former Ba'athist Regime. Unless expressly stated, such orders did not necessarily repeal the laws that then existed in those areas, but did supersede certain elements of them. For ease of reference, in this report the relevant sections of such resolutions/orders have been analysed alongside the original legislation, and are not organised separately, although the origin of each provision is noted.

II. INTERNATIONAL LAW

Key Recommendations

- **Withdraw reservations to CEDAW Articles 2 and 16.**
- **Ratify the Optional Protocol to CEDAW.**

Iraq has acceded to the following Conventions:

- Convention on the Prevention and Punishment of the Crime of Genocide in 1959
- International Convention on the Elimination of All Forms of Discrimination against Women in 1986
- Convention on the Rights of the Child in 1994, and the two Optional Protocols in 2007²⁹

Iraq has ratified the following Conventions:

- International Convention on the Elimination of All Forms of Racial Discrimination in 1970
- International Covenant on Economic, Social and Cultural Rights in 1971
- International Covenant on Civil and Political Rights in 1971³⁰

Iraq appears to have gone through all the internal procedures, including signing into law, necessary to ratify the Convention Against Torture and All Forms of Racial Discrimination, and the International Convention for the Protection of Persons from Involuntary Disappearance, although the international deposit of these ratifications has not yet been received.³¹

Iraq is also a party to a number of International Labour Organisation Conventions, including:

- Forced Labour Convention
- Discrimination (Employment and Occupation) Convention
- Right to Organise and Collective Bargaining Convention
- Equal Remuneration Convention
- Minimum Age Convention
- Worst Forms of Child Labour Convention³²

²⁹ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en

³⁰ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en

³¹ According to the Human Rights Council, Report of the Working Group on the Universal Periodic Review: Iraq, 14th Session, 8th June 2010, A/HRC/14/14/Add.1, http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.14.Add.1_en.pdf, para 2. See also UNAMI Human Rights Report, July-December 2008, http://www.uniraq.org/documents/UNAMI_Human_Rights_Report_July_December_2008_EN.pdf, para 7

³² International Labour Organisation website: <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?ctychoice=0850&lang=EN&hdroff=1>

These Conventions form the basis of Iraq's obligations under International Law, and many of them refer explicitly to the status of women. Under the ICESCR, 'the rights enunciated in the present Covenant will be exercised without discrimination of any kind,'³³ and under the ICCPR, State parties must respect and ensure 'the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant,'³⁴ and 'without distinction of any kind,' including sex.³⁵

It is the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), however, that sets out comprehensive obligations relating to women's position in society. CEDAW forbids discrimination on the grounds of gender, specifying areas in which this is most likely and setting out an expansive, comprehensive definition of discrimination, including distinctions that have a discriminatory effect as well as purpose.³⁶ Discrimination 'is not limited to action by or on behalf of Governments,' and the obligations under CEDAW include ensuring that women do not face discrimination by other parties.³⁷

Iraq acceded to the convention in 1986, but entered reservations to Article 2 (paragraphs F and G) under which states are obligated to eliminate, amend or repeal all laws discriminatory to women; Article 9.1 and 9.2, dealing with equality in citizenship and nationality; and Article 16 regarding marriage and family relations.³⁸ According to the Human Rights Council, 'Iraq lifted its reservation to Article IX of the Convention on the Elimination of All Forms of Discrimination against Women related to women's right to grant citizenship to their children on equal footing with men.'³⁹

CEDAW is one of the most important conventions in the protection of the rights of women in Iraq.

***Ghazi Ibrahim Al-Janabi
Chairman, State Shura Council***

- COMMENTS: Given that the reservation to Article 9 conflicts with Article 18 of the Constitution, and with the core provisions of the Nationality Act of 2006, which guarantee non-discrimination on nationality grounds, it is right that this reservation be removed.

³³ Article 2(2)

³⁴ Article 3

³⁵ Article 2

³⁶ Article 1

³⁷ CEDAW Committee General Recommendation No. 19 (11th Session, 1992), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> para 9

³⁸ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#29

³⁹ According to the Human Rights Council, Report of the Working Group on the Universal Periodic Review: Iraq, 14th Session, 8th June 2010, A/HRC/14/14/Add.1, http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.14.Add.1_en.pdf, para 2, although this update has not yet appeared on the UNHRC website, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en

There is no such reservation in Djibouti, Yemen or Libya.⁴⁰ This removal of a previously entered reservation to women's rights shows the potential for the other reservations to be removed to comply with Iraqi Constitutional law.

- 'Articles 2 and 16 are considered by the Committee to be core provisions of the Convention. Although some States Parties have withdrawn reservations to those articles, the Committee is particularly concerned at the number and extent of reservations entered to those articles.'⁴¹ Article 2 is 'central to the object and purpose of the convention',⁴² making reservations to it in violation of Article 18 of the Vienna Convention. Furthermore, 'neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention,' and therefore reservations to Article 16 are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn.⁴³ Iraq has not entered a reservation to Article 23 of the ICCPR,⁴⁴ which states that State Parties 'shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.' The reservation to Article 16 is therefore of little use given the obligations under Article 23 of the ICCPR.
- The Committee recommended in 2000 that the Government of Iraq repeal these recommendations.⁴⁵ This is an area in which other countries in the region have gone further than Iraq towards protecting gender equality. Djibouti, Jordan, Kuwait, Lebanon, Libya, Oman, Saudi Arabia, Tunisia and Yemen do not reserve any part of Article 2,⁴⁶ and Djibouti, Jordan and Libya have not entered reservations to Article 16.⁴⁷
- SUGGESTIONS: The remaining reservations to CEDAW should be withdrawn.

The Optional Protocol to CEDAW, providing for a communications and an inquiry procedure, has not been ratified by Iraq.

- COMMENTS: Ratifying this would help ensure that women's concerns were brought to international attention.

⁴⁰ See World Bank, Report on the Status and Progress of Women in the Middle East and North Africa, 2007, http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Overview_2007.pdf pg 23

⁴¹ See <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>

⁴² See <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>, and CEDAW General Recommendation No. 21 (13th Session, 1994) paras 41-43

⁴³ See <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>

⁴⁴ According to http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

⁴⁵ Report of the CEDAW Committee, 22nd and 23rd session, A/55/38, 2000, <http://www.universalhumanrightsindex.org/documents/826/688/document/en/pdf/text.pdf> paras 186 and 188

⁴⁶ See World Bank, Report on the Status and Progress of Women in the Middle East and North Africa, 2007, http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Overview_2007.pdf pg 23

⁴⁷ See World Bank, Report on the Status and Progress of Women in the Middle East and North Africa, 2007, http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Overview_2007.pdf pg 23

- SUGGESTIONS: The Optional Protocol to CEDAW should be ratified.

A previous draft of the Constitution contained an article stating that “all individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified and that do not contradict the principles and provisions of this Constitution.”⁴⁸ Article 37 of the Constitution of Kurdistan is similar; ‘everyone shall have the right to enjoy the rights mentioned in the international agreements, charters, covenants and declarations on human rights that have been ratified and acceded to by Iraq. In addition, everyone shall have the right to enjoy the rights guaranteed by this Constitution and by International Law.’ Yet Iraq’s Constitution contains no such provision. ‘The main effect of Article 44 would have been to transform the rights mentioned in the treaties from promises that Iraq made to other signatory states into rights that individuals could claim directly--with no implementing legislation--in Iraqi courts.’⁴⁹ As it is, individuals cannot claim these individual rights directly.

- COMMENTS: A provision such as the proposed Article 44 would ensure the efficacy of international law, including the provisions ensuring that women do not suffer discrimination.
- SUGGESTIONS: In future legislation dealing with international law or in case of Constitutional amendment, a similar provision should be inserted.

⁴⁸ Article 44, see Nathan Brown, The Final Draft of the Iraqi Constitution: Analysis and Commentary, Carnegie Endowment for International Peace, <http://www.carnegieendowment.org/files/FinalDraftofIraqiConstitution1.pdf>

⁴⁹ Nathan Brown, The Final Draft of the Iraqi Constitution: Analysis and Commentary, Carnegie Endowment for International Peace, <http://www.carnegieendowment.org/files/FinalDraftofIraqiConstitution1.pdf>, pg 2

III. CONSTITUTIONAL LAW

Key Recommendations:

- **Amend Article 17 concerning the sanctity of the home to ensure that law enforcement may enter homes in an emergency or if the safety of Iraqi citizens is in danger.**
- **Repeal Article 41 granting choice in personal status to ensure that women's position is protected, or at least ensure that this provision is interpreted alongside the other articles in the Constitution including the Article 14 commitment to equality to prevent women's position being diminished.**
- **Repeal or amend Article 2 to ensure internal consistency between sections on Islamic principles and rights and freedoms. A hierarchy within the three sections, guaranteeing that the rights and freedoms of the Constitution are superior, would help ensure women's position in law.**

CONSTITUTION OF IRAQ (2005)

The constitution is 'the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception.'⁵⁰ 'No law that contradicts [it] shall be enacted,' and 'any text' that contradicts it 'shall be considered void.'⁵¹ It was passed in 2005 following intense negotiations and a referendum; while provisions have been made for its amendment, no amendments have yet been passed.

The Constitution states in Article 14 that 'Iraqis are equal before the law without discrimination based on gender.' This is a strong constitutional guarantee of equality of the sexes. It does not go as far as the Kurdistan Constitution, which states that 'men and women shall be equal before the law. The government of the region must seek to remove all obstacles hindering equality in all spheres of life, and in civil, political, social, cultural and economic rights.' But the prohibition on discrimination is an important protection for women, and this guarantee is reiterated within other rights; for 'equal opportunities shall be guaranteed to all Iraqis';⁵² 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;⁵³ the 'right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office';⁵⁴ the right to work;⁵⁵ the right to own

⁵⁰ Article 13 (1)

⁵¹ Article 13(2)

⁵² Article 16

⁵³ Article 15

⁵⁴ Article 20

property;⁵⁶ the right to health care;⁵⁷ the right to free education,⁵⁸ the right to practice sports;⁵⁹ the right to choose their religion;⁶⁰ and the right to 'freedom of movement, travel, and residence inside and outside Iraq.'⁶¹

Furthermore, a number of provisions refer specifically to, or directly affect, women and women's issues.

Article 17

First: *Every individual shall have the right to personal privacy so long as it does not contradict the rights of others and public morals.*

Second: *The sanctity of the homes shall be protected. Homes may not be entered, searched, or violated, except by a judicial decision in accordance with the law.*

- **COMMENTS:** This provision respects the right to privacy, especially in the home. However, it does not strike a balance between the right to privacy and other constitutional rights such as the right to life and dignity. Preventing homes from being searched without a judicial decision puts victims of family or domestic violence at risk, as they cannot be helped except through a slow-moving process.
- **SUGGESTIONS:** An amendment to this provision allowing homes to be entered in cases of emergency or peril to the safety of Iraqi citizens would ensure that victims of domestic violence are adequately protected.

Article 29

First:

A: The family is the foundation of society; the State shall preserve it and its religious, moral and national values.

B: The State shall guarantee the protection of motherhood, childhood and old age, shall care for children and youth, and shall provide them with the appropriate conditions to develop their talents and abilities.

Fourth: *All forms of violence and abuse in the family, school, and society shall be prohibited.*

- **COMMENTS:** The explicit condemnation of family abuse is an unusual and welcome step in protecting those who suffer violence in the home, commonly women. Furthermore, the positive obligation on the state to guarantee the protection of motherhood offers further

⁵⁵ Article 22

⁵⁶ Article 23

⁵⁷ Article 31

⁵⁸ Article 34

⁵⁹ Article 36

⁶⁰ Article 41

⁶¹ Article 44

protection for women in a vulnerable situation. However, the preservation of the family, including its 'religious, moral and national values,' may mean that women are forced to stay in traditional roles that they could otherwise elect to be free from.

Article 30

First: *The State shall guarantee to the individual and the family--especially children and women--social and health security, the basic requirements for living a free and decent life, and shall secure for them suitable income and appropriate housing.*

- COMMENTS: This recognises the vulnerable situation of women and the State's obligation to provide for them.

Article 37

Second: *The State shall guarantee protection of the individual from intellectual, political and religious coercion.*

- COMMENTS: This recognises the possibility of coercion by others in the realm of religion (amongst others) and therefore may provide women with a guarantee against certain practices being forced upon them in the name of a particular religion.

Article 37

Third: *Forced labour, slavery, slave trade, trafficking in women or children, and sex trade shall be prohibited.*

- COMMENTS: This section recognises a harm particular to women and, by criminalising conduct leading to that harm, recognises the value of women's bodily integrity and attempts to protect it.

Article 49

Fourth: *The elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives.*

- COMMENTS: This is the first step towards a quota for women in the Council of Representatives.⁶²

Some articles of the Constitution are beset by issues of internal tension or contradiction:

Article 2:

First: Islam is the official religion of the State and is a foundation source of legislation:

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

⁶² See below in the section on Elections law

B. No law may be enacted that contradicts the principles of democracy.

C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.

- COMMENTS: A number of key laws are not founded on Islam and do depart from Shari'a law to the benefit of women,⁶³ and therefore there is concern that if Section A of this Article is taken without looking at the other parts of the Article, laws that currently provide protection to women may be voided. However, it is submitted that when read with Section C, a balancing act is necessary that forbids the interpretation of Islam in a way that abrogates the basic rights granted to women, as enumerated above.

There is also the problem that Sections A and C appear in tension with one another. Khawam has stated that 'Article 2 is arguably inherently contradictory and not open to any genuine or consistent method of interpretation.'⁶⁴ According to Nathan Brown, 'the impact on future legislation is completely dependent on who has authority to interpret the article. The primary burden, at least in theory, would seem to fall on the parliament: It is to use Islam as a source for legislation and take care to avoid violating the fixed rulings of the religion...The Supreme Federal Court would probably be called on to play a major interpretative role as well, and the composition of that body is therefore critical.'⁶⁵ Whosoever is the final arbiter of this interpretation, it is important to ensure that the interpretation of this Article as a whole does not change women's position under Iraqi law to take away the rights they currently hold. Some Iraqi legal commentators have expressed doubt that such Constitutional amendments can be reconciled with Islamic law.

Article 41

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

- COMMENTS: According to El-Karma, 'this Article will allow individuals to claim on legal grounds that sectarian religious laws can supersede obedience to the laws of the state,' compromising women's status by placing 'women's rights at the mercy of the interpretations by the religious leaders and not the law or elected leaders.'⁶⁶ However, it is

⁶³ For example equal inheritance rights for tassaruf under the Civil Code Article 1188

⁶⁴ Joseph Khawam, 'A World of Lessons: The Iraqi Constitutional Experiment in Comparative Perspective', 37 Colum. Hum. Rts. L. Rev. 717 2005, pg 747

⁶⁵ Nathan Brown, The Final Draft of the Iraqi Constitution: Analysis and Commentary, Carnegie Endowment for International Peace, <http://www.carnegieendowment.org/files/FinalDraftofIraqiConstitution1.pdf>

⁶⁶ El-Karama, Iraq: Stakeholder Report to the UN Universal Periodic Review Process by Karama, February 2010

submitted that this is not the proper interpretation of this article. Indeed, Resolution 137 was introduced so that this effect could be realised, and did not come into force.⁶⁷

NATIONAL SAFETY LAW
(NO. 1 OF 2004)

This law deals with the declaration of a state of emergency in Iraq should that become necessary. While, as is common with laws on states of emergency, it contains restrictions that affect human rights, it is gender-neutral in both intent and substance. While measures such as curfews may increase domestic violence, there is nothing in the law to raise concern for women's position.

⁶⁷ For further discussion, see the section on Personal Status/Family law, below

IV. CRIMINAL LAW

Key Recommendations:

- Repeal Article 41(1) of the Penal Code granting a ‘legal right’ to a husband to punish his wife. At the very least, clarify in law the boundaries of the ‘legal right’ to ensure that physical abuse is not sanctioned.
- Repeal the mitigating excuse of ‘honourable motives’ in Article 128 of the Penal Code, or at least provide for lesser reduction in sentencing than currently.
- Repeal offences relating to adultery in the Penal Code. At the very least, ensure that the provisions on adultery affect men and women equally, and that non-consensual adultery or adultery under duress is not criminalised.
- Repeal Article 398 of the Penal Code, so that those who have committed rape are not exonerated by marrying their victims, which forces victims into permanent relationships with their abusers.
- Repeal Article 409 of the Penal Code and RCC Order No. 6 of 2001 to offer no mitigation in penalty or defence for those who commit ‘honour’ killings, and the extra penalty for those who kill in revenge is removed.
- Amend Article 417 of the Penal Code, to allow abortion in certain circumstances, particularly where the mother’s life is threatened.
- Amend Articles 394 and 403 of the Penal Code to state that those working to help women and prostitutes in education and health cannot be charged with incitement to fornication, prostitution or pornography.
- Repeal Article 3 of RCC Resolution Number 234, which punishes prostitutes with life imprisonment. This would reinstate the provisions of Combating Prostitution Law No. 8 of 1988.
- Amend the Combating Prostitution Law No. 8 of 1988 to ensure that reformatory houses for prostitutes are not for punishment and are not compulsory. Instead, such houses should ensure help for those who used to work as prostitutes.
- Consider the introduction of legislation banning FGM as a step towards regulating or curbing the practice.

Criminal law is a key element of any legal system, as it governs the choices a society makes to define tolerable behaviour. Iraq’s Penal Code and associated legislation therefore highlights the values of Iraqi society, by showing what is allowed and what is forbidden. It is consequently essential to analyse the criminal law to see women’s position within it, and to ensure that crimes and their punishments match Iraq’s Constitutional and International Law obligations to prevent discrimination against women.

PENAL CODE
(NO. 111 OF 1969)

The Penal Code contains a number of provisions which demonstrate a commitment to ensuring that both men and women's rights are fully protected. A number of articles deal with women's rights to privacy, and the law of rape is noteworthy for providing essential protection for both women and men.

However, there remain a number of articles that discriminate against women both in law and in fact. Adultery laws are skewed towards prosecuting women; killings of female spouses in the name of honour are sanctioned; rapists may marry their victims and thus avoid punishment; and abortion is punishable by severe penalties, with no exception for life-threatening situations.

Article 41- Immunity for the Exercise of a Legal Right

There is no crime if the act is committed while exercising a legal right. The following are considered to be in exercise of a legal right:

(1) The punishment of a wife by her husband... within certain limits prescribed by law or by custom ...

- COMMENTS: This Article affirms a husband's legal right to punish his wife. Such punishment is not defined, and therefore appears to provide legal justification for abuse including physical assault as well as mental abuse and chastisement. There appear to be no limits 'prescribed by law or custom' to keep this in check, and, in any event, customary limits are inadequate protections for women's safety. Iraqi legal experts have noted their concerns that an amendment to this provision might be inconsistent with prevailing Iraqi custom and some interpretations of Islamic Law. However, this discrimination violates Article 14 of the Constitution, as well as Articles 9 and 26 of the ICCPR, Article 2(b) and (c), Articles 4, 5 and 15 of CEDAW. It violates Article 29 (4) of the Constitution, which states that 'all forms of violence and abuse in the family ...shall be prohibited' and it interferes with victims' 'life, security and liberty' without the law, in violation of Article 15. In Turkey, not only is there no such right accorded to husbands, but the Penal Code calls for a prison sentence of up to 30 months if a family member is treated in a manner other than that of affection or mercy.⁶⁸ In Jordan, according to the CEDAW Committee, 'social awareness of the issue of domestic violence is steadily increasing...studies indicate that a majority of individuals in Jordanian society understand that it is the wife who is the primary victim of domestic violence, and connect this with an erroneous understanding of

⁶⁸ Article 478. See Women for Women's Human Rights, The New Legal Status of Women in Turkey, April 2002

the rights and duties associated with different social roles, and an erroneous understanding of the teachings of the Islamic religion.’⁶⁹

- SUGGESTIONS: The portion of Article 41(1) that refers to a husband’s legal right to punish his wife should be removed.

Article 128

1: *...The commission of an offence with honourable motives ... is considered a mitigating excuse.*

- COMMENTS: ‘Honourable motives’ are not defined in the Penal Code, and therefore provide a very broad mitigating excuse. Such an excuse leads to a considerable reduction in penalty under Article 130; a penalty of death is reduced to no less than 1 year of imprisonment, and a penalty of life imprisonment to not less than 6 months. Given that ‘dishonour’ is most likely to fall on a woman, and to be ‘solved’ by a man, this provision is discriminatory because it provides sanction to men who commit offences against women. This violates Article 14 of the Constitution, guaranteeing equality and non-discrimination based on sex, as well as Articles 9 and 26 of the ICCPR, Articles 2(b) and (c), 4, 5 and 15 of CEDAW. The CEDAW Committee has stated that legislation must remove the defence of honour in criminal cases.⁷⁰ It also violates Article 29 (4) of the Constitution, which states that ‘all forms of violence and abuse in the family ...shall be prohibited.’ The Constitution forbids punishment or revenge outside the law or without trial; stating that ‘deprivation or restriction of’ the rights to life, security and liberty ‘is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority,’⁷¹ that ‘there is no crime or punishment except by law,’⁷² and that ‘the Accused is innocent until proven guilty in a fair trial.’⁷³ There is potential for reform in this area, as, according to the Human Rights Council, ‘the Ministry of Human Rights has submitted a proposal to amend this article and abolish the alleviation...and will take the actions required for amendment.’⁷⁴
- SUGGESTIONS: ‘Honourable motives’ should no longer form a defence to a crime. The reduction in sentence should certainly be lessened.

⁶⁹ CEDAW Committee, Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Combined Third and Fourth Report of States Parties: Jordan, CEDAW/C/JOR/3-4, 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No6/263/01/PDF/No626301.pdf?OpenElement>, pg 9

⁷⁰ CEDAW Committee, General Recommendation No. 19 (11th session, 1992) <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> para 25 (r) (ii)

⁷¹ Article 15

⁷² Article 19 (2)

⁷³ Article 19 (5)

⁷⁴ Human Rights Council, Report of the Working Group on the Universal Periodic Review: Iraq, 14th Session, 8th June 2010, A/HRC/14/14/Add.1, http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.14.Add.1_en.pdf, para 10

Article 236- Wrongful Publication of Court Case Information

Any person who publishes the following information is punishable by a period of detention not exceeding 2 years plus a fine not exceeding 200 dinars or by one of those penalties...

(2) Information concerning the investigations or proceedings of cases of genealogy, marriage, inheritance or adultery...

(5) The names or photographs of the victims of rape or sexual assault...

- COMMENTS: This article is a good example of the protection of women in the Penal Code. It takes substantive action to protect the identities of victims of sexual assault and the subjects (overwhelmingly women) of marriage and adultery hearings.

Article 376- Issuance or Receipt of an Invalid Marriage License

Any person who obtains a marriage certificate knowing it to be invalid for any reason in secular or canonical law and any person who issues such certificate knowing the marriage to be invalid is punishable by a term of imprisonment not exceeding 7 years or by detention. The penalty will be a term of imprisonment not exceeding 10 years if the spouse, in respect of whom the reason for the invalidity has arisen, conceals that fact from his partner or consummates the marriage on the basis of the invalid certificate.

- COMMENTS: This article may protect women against fraud or deception by predatory men posing as potential husbands. However, there is a possibility that this article may be used to prosecute women who for social or religious reasons must conceal certain “invalidating” factors about themselves such as their virginity, for their personal safety, social standing or economic necessity.
- SUGGESTIONS: Further inquiry is needed in order to ascertain the full impact of this article, particularly regarding the culturally sensitive issue of “virginity” within canonical law.

Article 377- Adultery

(1) An adulteress and the man with whom she commits adultery are punishable by detention. The offender is assumed to be aware of the marriage unless he can prove that he was not capable of being aware of it.

(2) The same penalty applies if the husband commits adultery in the conjugal home.

- COMMENTS: This article is problematic, as it distinguishes between female and male participants in adultery. In applying a penalty to the husband only if the adultery takes place in the conjugal home, and providing different conditions for male and female adulterers, it leaves women open to more severe punishment. This is in violation of Article 14 of the Constitution, Article 26 of the ICCPR⁷⁵ and Article 15 of CEDAW. Furthermore,

⁷⁵ See Human Rights Committee of the ICCPR General Comment No. 28, 03/2000, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument) para 16

there is no suggestion in this article that the adultery must be consensual, leaving victims of rape at risk of being labelled adulterers. There is also no limit to the time of detention that can be served under this provision, unlike under Article 274 of the Egyptian penal code, which states that not more than two years' detention may be imposed on a woman who commits adultery (although the penalty for men is less).⁷⁶ Furthermore, 'adultery' is a highly problematic crime when looking at women's position in law, as it tends to be overwhelmingly enforced against women. In Tunisia, the law has been reformed to ensure that both men and women can be punished for adultery.⁷⁷ In Jordan, the crime is entirely equal for both men and women, and indeed both participants in adultery must be prosecuted if one is, and irrefutable evidence is required.⁷⁸ In Turkey, adultery is no longer a punishable crime under the Penal Code, demonstrating a number of potential amendments to the law that would ensure that women are not persecuted.

- SUGGESTIONS: This article, and other adultery provisions, should be removed from the Penal Code. At a minimum, the differences between male and female spouses should be removed to prevent discrimination against women. It would also be a welcome reform to ensure that only consensual adultery could be punished.

Article 378- Adultery. Spouse Must Be Accuser

(1) No action for adultery may be brought against either spouse nor may any measures be taken in respect of that action except on the basis of an accusation by the other partner. Such accusation will not be accepted in the following circumstances:

- (a) If it is made after 3 months from the day when the complainant first became aware of the offence.*
- (b) If the complainant is content to resume married life despite having become aware of the offence.*
- (c) If it is established that the offence was committed with the consent of the complainant.*

(2) By spouse in this Article is meant any person who meets that description at the time of the commission of the offence or who causes to do so following the offence. The right of the husband to bring an action for adultery committed by his wife continues for 4 months after he has divorced her.

'Laws which impose more severe penalties on women than on men for adultery or other offences also violate the requirement of equal treatment'

⁷⁶ See Women for Women's Human Rights, Dr. Sherifa Zuhur, Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: A Comparative Study, 2005, <http://www.wwhr.org/files/GenderSexualityandCriminalLaws.pdf> pg 22

⁷⁷ See Women for Women's Human Rights, Dr. Sherifa Zuhur, Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: A Comparative Study, 2005, <http://www.wwhr.org/files/GenderSexualityandCriminalLaws.pdf> pg 22

⁷⁸ Committee, Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Combined Third and Fourth Report of States Parties: Jordan, CEDAW/C/JOR/3-4, 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No6/263/01/PDF/No626301.pdf?OpenElement> ,pg 12

- COMMENTS: This article appears gender-neutral on its face, which is an improvement on other adultery provisions. It is difficult to assess the impact of the lack of provision for a third party to bring adultery actions, as it may leave without recourse women who are threatened or intimidated into not bringing actions, but it may also protect women from false or damaging outside accusations. A second issue is the lack of clarity, difficult to establish in any legal system, over 'contentment to resume married life', or 'consent' to adultery. In light of women's economic and social dependence on their husbands, these provisions may operate discriminatorily. Thirdly, the final sentence raises concern because it appears that only the husband may bring an action for adultery after divorce, which is discrimination in violation of Article 14 of the Constitution, Article 2 and 3 of the ICCPR and Article 15 of CEDAW. Finally, as above, adultery provisions are ultimately a concern for women due to discriminatory enforcement of such laws.

Article 379- Adultery, Lapse of Charges for Failure to Prosecute

(1) *An action for adultery becomes void and the civil right of action lapses with the death of the complainant or if he drops the charges against the offending party or with the agreement of the complainant to resume normal relations with the offending party before a final judgment of the case is made. The dropping of the charges by the husband against the offending spouse is considered also to apply to the charges against the man with whom she has committed adultery.*

(2) *A spouse may therefore prevent the implementation of the sentence imposed on the other spouse.*

If the complainant dies, any of the children of the accused spouse or guardian of such child may prevent the implementation of the sentence.

- COMMENTS: While Article 3 of the Law on Publication in the Official Gazette states that male pronouns should include feminine versions, in such a gender-specific crime with different penalties, this article cannot be taken to refer to both sexes. It therefore discriminates against women, in violation of Article 14 of the Constitution, Article 26 of the ICCPR and Article 15 of CEDAW. It is unclear whether a woman may bring the charge against her husband, since the language suggests that she cannot. Furthermore, there may be some concern that the voiding of an action of adultery on death may endanger those who pursue adultery charges against their spouses, particularly for vulnerable women. There is also some concern that female spouses may be coerced or intimidated into dropping charges.

Article 380- Adultery, Inciting One's Spouse to Commit

Any husband who incites his wife to commit adultery and she does so on the basis of such incitement is punishable by detention.

- COMMENTS: While on its face this appears to be a form of redress for women by imposing liability on the husband, in fact this article may not help women a great deal. It is unclear

what exactly constitutes ‘incitement’, under what circumstances an adulterer is considered to be incited, and the extent of proof that would need to be brought on the matter. This also does not appear to provide a defence to a wife convicted of adultery; rather, it imposes liability on the husband as well. Clearly, in such circumstances of duress it is unconscionable and deeply inequitable to punish the wife in this manner.

- SUGGESTIONS: If it is proven that a husband has incited his wife to commit adultery, this should provide a clear defence to the wife.

Article 384- Failure to Fulfill Familial Support Obligations

Any person who is issued with a legal order to provide support for his wife, parent, child or other person or to pay nursing, suckling or accommodation charges and refrains from carrying out such order within a month of its issue, while being able to do so, is punishable by a period of detention not exceeding 1 year plus a fine not exceeding 100 dinars or by one of those penalties.

An action may only be brought on the basis of a complaint by the person concerned and that action ceases with the withdrawal of the complaint by such person or with the discharge by the defendant of his indebtedness to the complainant. If the withdrawal of the complaint or discharge of the debt occurs after any judgment is made in the case, the penalty will not be carried out.

- COMMENTS: In making the failure to pay support to a wife or child a criminal offense, this article ensures that women are supported and that civil sanctions are enforceable. One concern, however, is that the complaint may only be made by the ‘person concerned,’ and may be withdrawn by her with immediate effect. This could mean that the wife, as the only potential claimant, could be intimidated by her husband and/or family into relinquishing her claim.
- SUGGESTIONS: Consider amending the article to allow claims to be made by persons other than the ‘person concerned,’ and/or to allow the claim to stand even if it is withdrawn, in order to prevent intimidation.

Article 385- Statutory Rape

Any person who has carnal knowledge of a girl to whom he is not married with her consent when she has not yet reached the age of 18 is punishable by a term of imprisonment not exceeding 10 years or by detention.

It is considered an aggravating circumstance if the victim is forced or if she loses her virginity or contracts venereal disease as a result of the offence or if the offender is responsible for the victim's upbringing or supervision or has some measure of authority over her. Any action or measure in respect of such action may only be brought on the basis of a complaint by the victim or her ancestor, descendant, brother or sister.

- COMMENTS: This article provides important and necessary protection for Iraqi women under 18. However, there is no similar provision banning men from consensual sexual

relations under the age of 18, demonstrating paternalism in Iraqi legislation in regards to women and sexual autonomy. This raises concerns over both women's sexual autonomy and protection for young men. It presents discrimination therefore in violation of Article 14 of the Constitution, Article 26 of the ICCPR and Article 15 of CEDAW. Additionally there are concerns regarding the listed "aggravating circumstances," as it is unclear how a

victim must demonstrate that she has lost her virginity or contracted venereal disease, which may leave a victim open to embarrassing tests. Furthermore, the fact that a complaint can only be brought by the victim or her relatives, while largely reflecting traditional conceptions of family as the basic unit for individual advocacy, could potentially limit a woman's ability to make a claim if she is intimidated by her family into not making a claim (especially if the perpetrator is a relative).

[Our] Council has opened units to handle cases of violence against women in 4 centers belonging to the Council...our dialogues emphasize the importance of rule of law to maintaining the freedom of individuals.

***Eiman Jawad Al-Barazanji
Member, Baghdad Provincial
Council***

- SUGGESTIONS: Lowering the age limit to 16 would allow young women and men greater sexual autonomy, as in Jordan.⁷⁹ Another option for reform would be to extend the protection in this article to both sexes, which would help secure the protection of Iraqi boys, as the following articles below provide examples for. It is also worth considering whether people outside the victim's family--such as social services, women's centres or law enforcement--should be able to bring a rape claim.

Article 393- Rape and Non-Consensual Buggery

(1) Any person who has sexual intercourse with a female without her consent or commits buggery with any person without their consent is punishable by a term of imprisonment not exceeding 15 years.

(2) The following are considered to be aggravating circumstances for this offense:

(a) If the victim at the time of the act was under 18 years old

(b) If the offender was a relative of the victim to the third generation, or if the offender is the guardian, protector, or custodian of the victim or has authority over the victim or the victim is the offender's servant.

(c) If the offender was a public official, religious leader, or doctor and used the power of his position or the trust in him.

⁷⁹ It appears that there is no consistent practice in the Middle East, as in Morocco and Syria the age limit is lower, although a number of other countries in the region place it higher. See <http://www.avert.org/age-of-consent.htm>.

(d) If the offense is committed by two or more people in order to prevail over the resistance of the victim or if they commit the offense multiple times.

(e) If the victim contracts venereal disease as a result of the offense.

(f) If the victim loses her virginity or loses her virginity as a result of the offense.

(3) If the offense leads to the death of the victim, the penalty will be life imprisonment.

(4) If the victim was a virgin, the court must order that she receive appropriate compensation.

- COMMENTS: This article clearly sets out women's and men's right to be free from sexual violence. The list of "aggravating circumstances" recognises the reality of women's lives under the power of others, by gravitating towards harsher penalties for perpetrators who are relatives, guardians, officials or those acting in groups. There is some concern that the venereal disease and virginity aggravating circumstances might lead to women being subject to invasive tests to ascertain them.

Article 394- Fornication and Consensual Buggery of Minors

(1) Any person who, outside of marriage, has sexual intercourse with a woman with her consent, or commits buggery with a person with their consent, is punishable by a period of imprisonment not exceeding 7 years if the victim is between the ages of 15 and 18. If the victim was under the age of 15, the offender is punishable by a period of imprisonment not exceeding 10 years.

(2) It will be considered an aggravating circumstance if the act occurred under circumstances described in Article 393.

(3) If the victim was a virgin, the court must order that she receive appropriate compensation.

- COMMENTS: While providing important protection to minors, this article again raises concern about inequality in sexual autonomy between the sexes.

Article 395- Seduction of an Adult Woman

Any person who seduces a woman over the age of 18 with a promise of marriage, has sexual intercourse with her and subsequently refuses to marry her, is punishable by detention.

- COMMENTS: This article is a valuable recourse for women to pursue actions against male 'seducers.' As with other articles related to sexual intercourse, it is important to find out how this article is enforced and what evidentiary basis is required for the charge. It is conceivable that this action may rarely be pursued due to the embarrassing or socially uncomfortable nature of the testimony required of victims.

Article 396- Forcible Sexual Assault

(1) Any person who sexually assaults a man or woman or attempts to do so without his or her consent and with the use of force, menaces, deception or other means is punishable by a term of imprisonment not exceeding 7 years or by detention.

(2) The penalty will be a term of imprisonment not exceeding 10 years if the person against whom the offence is committed is under 18 years of age or the offender is a person described in Sub-Article 2 of Article 393.

- COMMENTS: This article again demonstrates a strong example of the assertion of women's and men's right to be protected from sexual violence. This article covers liability for a broad range of forms of sexual assault or attempted sexual assault. It also includes additional protection for victims under the age of 18. However, because it includes the "aggravating circumstances clause" (Sub-Article 2 of Article 393), the same concerns regarding venereal disease and virginity testing apply (see Comments to Article 393).

Article 397- Sexual Assault of a Juvenile, Non-Forceful

Any person who sexually assaults a boy or girl under the age of 18 without the use of force, menaces or deception is punishable by detention. The penalty will be a term of imprisonment not exceeding 7 years or detention if the offender is a person described in Sub-Article 2 of Article 393.

- COMMENTS: This article contains important protection for boys and girls, however it is somewhat unclear what a 'non-forceful' sexual assault is. Due to its inclusion of the "aggravating circumstances clause" (Sub-Article 2 of Article 393), the same concerns regarding venereal disease and virginity testing apply (see Comments to Article 393).

Article 398- Sexual Assault of a Juvenile, Non-Forceful, Effect of Subsequent Marriage

If the offender mentioned in this Section then lawfully marries the victim, any action becomes void and any investigation or other procedure is discontinued and, if a sentence has already been passed in respect of such action, then the sentence will be quashed. Legal proceedings will resume or the sentence will be reinstated, according to the circumstances if such marriage ends in divorce brought about by the husband without legal justification or in a divorce ordered by the court for wrongs committed by the husband or for his bad behaviour within 3 years following the cessation of the proceedings. The public prosecutor, the accused, the victim or any person who has an interest in the proceedings may, according to the circumstances, make application for the proceedings, investigation, procedures or execution of the sentence to be stopped or for their resumption or for the reinstatement of the sentence.

- COMMENTS: Such an article is justified by preventing unfair criminal prosecution of consenting individuals whose sexual interactions would have been legal had they been married (for example a 19-year-old man and his 17-year-old girlfriend). However, in practice, it is a severely problematic clause. It forces the victim of a serious assault into marriage with the offender, with no criminal prosecution available--at best a traumatic outcome for victims, and at worst truly dangerous. It gives incentive for offenders to marry victims to prevent criminal charges. While this may be justified on the basis of family honour, and on potential difficulties for the woman should her honour not be upheld, this patriarchal provision puts women at severe risk of further harm. While the

article does provide that the victim or anyone with “interest in the proceedings” (including the prosecutor) can reinstate the proceedings on divorce, this is slight protection. While in theory the consent of both parties to a marriage is necessary for validity,⁸⁰ that provides insufficient protection from coercion into marriage in the name of family honour. In Egypt, the identical provision was abolished, and a similar provision was removed from the Turkish Penal Code Draft.⁸¹

- SUGGESTIONS: This article should be repealed. While Article 398 is likely seen as creating an equitable balance between the protection of minors and leniency for specific relationships, it is fraught with potential for abuse.

RCC Resolution No 234

There shall be punishment with life imprisonment⁸² for whoever

1: commits the crime of sodomy with male or female or violates the honour of a male or female without his consent or her consent and under the threat of arm or by force in a way that the life of the victim (male or female) is threatened.

- COMMENTS: This raises the penalty for armed or life-threatening rape, providing protection for those subject to severe sexual violence (often women).

Article 399- Incitement of a Juvenile to Fornication or Prostitution

Any person who incites a boy or girl under the age of 18 to indulge in fornication or resort to prostitution as a profession or assists him or her to do so is punishable by detention. The penalty will be a term of imprisonment not exceeding 10 years or by detention if the offender is a person described in Sub-Article 2 of Article 393 and intends to profit by his action or receives money for such action.

COMMENTS: This article provides important protection for women, who form the majority of prostitutes. It is unclear, however, if this could be applied to someone seeking to help prostitutes from a charitable perspective. The meaning of encouraging someone to indulge in fornication is also unclear, raising the potential for this article to be abused. Iraqi jurists agree such clarification should be provided to better understand the breadth of the law.

- SUGGESTIONS: A legal clarification, ensuring that those working to help prostitutes, specifically in education and health, would ensure that this article truly protects women's interests.

⁸⁰ See the Personal Status Code

⁸¹ Women for Women's Human Rights, Dr. Sherifa Zuhur, Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: A Comparative Study, 2005, <http://www.wwhr.org/files/GenderSexualityandCriminalLaws.pdf> pg 37

⁸² Originally 'death sentence,' reduced by CPA Order 7 Section 3(1) and not subsequently retracted

Article 402- Indecent Acts or Indecent Public Assault

(1) *The following persons are punishable by a period of detention not exceeding 3 months plus a fine not exceeding 30 dinars or by one of those penalties:*

- (a) *Any person who makes indecent advances to another man or woman.*
- (b) *Any person who assails a woman in a public place in an immodest manner with words, actions or signs.*

(2) *The penalty will be a period of detention not exceeding 6 months plus a fine not exceeding 100 dinars if the offender, having been previously convicted for such offence, reoffends within a year of the date of such conviction.*

- COMMENTS: This is an example of a law that protects women and ensures their safety.

Article 403- Production, Importation, or Possession of Pornography

Any person who produces, imports, publishes, possesses, obtains or translates a book, printed or other written material, drawing, picture, film, symbol or other thing that violates the public integrity or decency with intent to exploit or distribute such material is punishable by a period of detention not exceeding 2 years plus a fine not exceeding 200 dinars or by one of those penalties. The same penalty applies to any person who advertises such material or displays it in public or sells, hires or offers it for sale or hire even though it is not in public or to any person who distributes or submits it for distribution by any means.

If the offence is committed with intent to deprave, it is considered to be an aggravating circumstance.

- COMMENTS: As there is no definition of that which 'violates the public integrity or decency,' it is difficult to determine the effect of this statute. While it appears to protect women from a particular form of violence, that of pornography, it is possible that information regarding women's health, birth control and other gender-related material could be considered to be an infringement of this provision, and indeed also become an aggravated offence if determined to be 'with intent to deprave.' Given the Constitutional aim in Article 30 to provide health and social services for women specifically, it is important that the article is not interpreted in that fashion.
- SUGGESTIONS: A legal clarification, making specific exceptions for educational or health resources, would ensure that this article truly protects women's interests.

Article 407- Murder of a Child Conceived Through Fornication by a Mother, Out of Shame

Any mother who, having become pregnant through fornication, kills her newly born child out of shame is punishable by a term of imprisonment not exceeding 10 years or by a period of detention of not less than 1 year.

- COMMENTS: The article imposes a penalty for infanticide, lower than that for murder which would otherwise be imposed. It therefore represents leniency for women who may be under considerable pressure and even danger for becoming pregnant out of wedlock.

Article 409- Killing/Maiming a Spouse or Lover upon Finding Them in the Act of Adultery

Any person who surprises his wife in the act of adultery or finds his girlfriend in bed with her lover and kills them immediately or one of them or assaults one of them so that he or she dies or is left permanently disabled is punishable by a period of detention not exceeding 3 years. It is not permissible to exercise the right of legal defence against any person who uses this excuse nor do the rules of aggravating circumstance apply against him.

Revolutionary Command Council Order No. 6 of 2001

Considering the killing of one's wife or a close female relative (maharem) for honour reasons a mitigating factor under law.

Subject to the conditions of clause (1) of Article 42 of the Constitution, the Revolutionary Command Council decided the following:

First: For the purpose of implementing Article 130 of the Penal Code Number 111 of 1969, it shall be a mitigating factor if a man kills his wife or maharem for honour reasons, or if one of the relatives of the deceased woman killed the one who imputed dishonour to any of them by making reference to her disgraceful deed, which she was killed for.

Second: Anyone who intentionally and for the purposes of revenge of the deceased kills the killer specified in the first clause shall be punished by execution. No legal excuse or mitigating factors shall apply to him, and he will not be entitled to any partial or general pardon.

Third: Anyone who, in accordance with tribal procedures, issues a ruling or attempts to issue a ruling in relation to the crimes referred to in the first and second clauses of this decision shall be imprisoned for not more than 7 years and not less than 3 years.

- COMMENTS: This article and the accompanying RCC order are extremely problematic. Firstly, the defence/mitigation applies only to males who kill their adulterous spouses or those who have 'imputed dishonour' to any of them (the specific use of 'wife' and 'girlfriend' precludes the operation of Article 3 of the Law on Publication in the Official Gazette, which allows for feminine forms of masculine references). It removes the blame almost entirely from a man who kills in this fashion, offering state sanction for the murder of the female victim. It furthermore only provides such sanction to a male offender, not to a female. This represents discrimination in violation of Article 14 of the Constitution, Article 15 of CEDAW and Article 26 of the ICCPR. Iraqi legal commentators acknowledge that amendments to these laws should be considered; however, they note that such changes may pose constitutional challenges given the country's adherence to Islamic customs.
- 'Honour reasons' or 'imputing dishonour' are far too vague and therefore provide no acceptable limits to this defence. Under Article 130 the mitigation under the RCC order means that when the full penalty would be death, the actual penalty can be one year, and

should the full penalty be life imprisonment, it may be merely six months. This punishment fails to protect women or to deter offenders. There is further injustice in the fact that those who might attempt to avenge the female victim's death are subjected to the penalty of death, an even harsher punishment than could ordinarily be expected.

- The frequency of honour killings has concerned a number of human rights bodies, including UNAMI,⁸³ which has recommended the abolition of this defence.⁸⁴ The CEDAW Committee has urged Iraq 'to condemn and eradicate honour killings and ensure that these crimes are prosecuted and punished in the same way as other homicides.'⁸⁵ Furthermore, the Committee recommends that 'measures that are necessary to overcome family violence should include legislation to remove the defence of honour in regard to the assault or murder of a female family member.'⁸⁶ Honour killings have also been stated to be a violation of the ICCPR.⁸⁷ Mitigation for honour killings flies in the face of Article 29 (4) of the Constitution, which states that 'all forms of violence and abuse in the family ...shall be prohibited.' It violates the right to 'life, security and liberty' set out in Article 15. The Constitution forbids punishment or revenge outside the law or without trial; stating that 'deprivation or restriction of the rights to life, security and liberty 'is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority,'⁸⁸ that 'there is no crime or punishment except by law,'⁸⁹ and that 'the Accused is innocent until proven guilty in a fair trial.'⁹⁰
- In Tunisia, reforms have ensured that only a 'crime of passion' rather than 'honour,' can reduce the sentence for murder, and it is only mitigated to 5 years.⁹¹ In Egypt, the penalty is 3 to 7 years.⁹² In Lebanon, the punishment is equal for men and women,⁹³ as it is in

⁸³ See UNAMI Human Rights Report, January-June 2009,

http://www.ohchr.org/Documents/Countries/IO/UNAMI_Human_Rights_Report15_January_June_2009_EN.pdf pg 3

⁸⁴ UNAMI Human Rights Report, January-June 2009,

http://www.ohchr.org/Documents/Countries/IO/UNAMI_Human_Rights_Report15_January_June_2009_EN.pdf pg 5

⁸⁵ Report of the CEDAW Committee, 22nd and 23rd session, A/55/38, 2000,

<http://www.universalhumanrightsindex.org/documents/826/688/document/en/pdf/text.pdf> paras 194

⁸⁶ CEDAW Committee, General Recommendation No. 19 (11th session, 1992)

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> para 25 (r) (ii)

⁸⁷ By the Human Rights Committee of the ICCPR General Comment No. 28, 03/2000,

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument) para 16

⁸⁸ Article 15

⁸⁹ Article 19 (2)

⁹⁰ Article 19 (5)

⁹¹ Women for Women's Human Rights, Dr. Sherifa Zuhur, Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: A Comparative Study, 2005,

<http://www.wwhr.org/files/GenderSexualityandCriminalLaws.pdf> pg 26

⁹² Women for Women's Human Rights, Dr. Sherifa Zuhur, Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: A Comparative Study, 2005,

<http://www.wwhr.org/files/GenderSexualityandCriminalLaws.pdf> pg 27

⁹³ Women for Women's Human Rights, Dr. Sherifa Zuhur, Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: A Comparative Study, 2005,

<http://www.wwhr.org/files/GenderSexualityandCriminalLaws.pdf> pg 26

Jordan.⁹⁴ In Kurdistan, the defence to honour killings has been abolished by Decree No. 59 of 2000 and Law No. 14 of 2002, within the framework of the Iraqi Penal Code, and, in fact, 'honour' is now considered an aggravating not a mitigating circumstance. In Turkey, the defence has also been eliminated.⁹⁵ All of these changes to Iraqi law would be beneficial.

- SUGGESTIONS: This article and the RCC order should be repealed. Such an extensive defence to so-called 'honour' killings leaves women with no legal protection from murder, and allows men to kill with impunity. Furthermore, the commission of an offence due to 'honourable motives or in response to the unjustified and serious provocation of a victim of an offence is considered a mitigating excuse' under article 128 (1). This existing provocation and honour defence renders Article 409 unnecessary and unduly lenient, as there already exists some measure of mitigation for extenuating circumstances. To reduce the punishment to less than three years--or even to one year in a gender-unequal fashion--goes too far. The aggravated penalty for avenging honour killings should also be repealed.

Article 417- Abortion: Willful Procurement of Miscarriage

(1) Any woman who willfully procures her own miscarriage or enables another to do so with her consent is punishable by a period of detention not exceeding 1 year plus a fine not exceeding 100 dinars or by one of those penalties.

(2) The same penalty applies to any person who willfully procures such woman's miscarriage with her consent. If the abortion or the means used to procure such abortion, even though the pregnancy is not terminated, results in the death of the victim, the penalty will be a term of imprisonment not exceeding 7 years.

(3) If the offender is a doctor, pharmacist, chemist, midwife or assistant of such person, it is considered an aggravating circumstance.

(4) If a woman, having become pregnant through fornication, procures her own miscarriage out of shame it is considered to be a legally mitigating circumstance.

The same is true in respect of any woman whose pregnancy is terminated by a relative to the second generation.

- COMMENTS: Abortion is a complex issue. The criminal provisions in this article, however, violate a woman's right to bodily integrity, and her right to choice. There is some mitigation for a miscarriage 'out of shame,' but it is unclear what this means. Abortion has been legalised in Turkey, Turkmenistan, Uzbekistan and Tunisia. In Lebanon, Jordan, Egypt, Syria, Indonesia, Brunei and Yemen it is permitted if a woman's life is in danger.⁹⁶

⁹⁴ Committee, Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Combined Third and Fourth Report of States Parties: Jordan, CEDAW/C/JOR/3-4, 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No6/263/01/PDF/No626301.pdf?OpenElement>, pg 12

⁹⁵ 2004 Turkish Penal Code

⁹⁶ Women for Women's Human Rights, Dr. Sherifa Zuhur, Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: A Comparative Study, 2005, <http://www.wwhr.org/files/GenderSexualityandCriminalLaws.pdf> pg 52

In Morocco, Algeria, Pakistan, Malaysia and Saudi Arabia it is allowed to preserve the woman's physical or mental health; Sudan and Israel allow it in cases of rape and incest, and Qatar permits it in cases of foetal impairment.⁹⁷ The Iranian Parliament passed a bill that would have allowed abortion during the first four months of pregnancy if the foetus was found to be mentally or physically handicapped, although this was rejected by the Guardian Council.⁹⁸ In Tunisia, the government subsidises abortions, and those entitled to receive free health care can obtain an abortion free of charge in public hospitals.

- SUGGESTIONS: Allowing abortion, even subject to limits similar to those described above, would support women and allow them bodily autonomy. It is important that abortion is allowed in life-threatening circumstances.

Article 418- Abortion: Procurement of a Miscarriage Without the Consent of the Mother

(1) Any person who willfully procures the miscarriage of a woman without her consent is punishable by a term of imprisonment not exceeding 10 years.

(2) The penalty will be a term of imprisonment not exceeding 15 years if the abortion or means to procure such abortion, even though the pregnancy is not terminated, results in the death of the victim.

(3) If the offender is a doctor, pharmacist, chemist, midwife or assistant of such person it is considered an aggravating circumstance. The court must order that he be prevented from continuing his profession or work for a period not exceeding 3 years.

- COMMENTS: This article protects a woman from unwanted abortions, and therefore protects her right to bodily integrity and choice.

Article 419- Assault on a Pregnant Woman Resulting in Miscarriage

Without prejudice to any greater penalty prescribed by law, any person who assaults a pregnant woman, while being aware of her condition, by beating or injuring her or with the use of violence or by administering to her toxic substances or by committing any other unlawful act without intending to procure the miscarriage of such woman and thereby causes her to miscarry is punishable by detention.

- COMMENTS: This gives further legal protection for women in a unique situation of physical vulnerability. While the purpose appears to be to

Drafting education curricula at all levels, using international law, as well as offering training workshops for teachers, will help promote concepts of human rights.

Recommendation of Gender Roundtable, Dec. 2010

⁹⁷ Women for Women's Human Rights, Dr. Sherifa Zuhur, Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: A Comparative Study, 2005, <http://www.wwhr.org/files/GenderSexualityandCriminalLaws.pdf> pg 53

⁹⁸ See World Bank, Report on the Status and Progress of Women in the Middle East and North Africa, 2007, http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Overview_2007.pdf pg 61

protect the foetus, as the attacker must be aware of the woman's pregnancy, and must cause a miscarriage, this undoubtedly protects the woman as well.

Article 422: Kidnapping of a Juvenile

Any person who himself or through another kidnaps a person under the age of 18 with the use of force or deception is punishable by a death sentence if the victim is female or by a death sentence if the victim is male.

- COMMENTS: Prior to the 2004 amendments, the penalty for kidnapping a female was higher than the penalty for a male. The current law therefore no longer discriminates between women and men, and represents clear protection for children, particularly from traffickers. However, the penalties remain starkly harsh.

Article 423- Kidnapping of an Adult Woman

Any person who himself or through another kidnaps a woman over the age of 18 with the use of force or deception is punishable by a death sentence. If the kidnapping is accompanied by any sexual intercourse with the victim or an attempt to have intercourse with her, the penalty will be death or life imprisonment.

- COMMENTS: This article provides needed protection for women against kidnapping, and also targets sex trafficking. Under the 2004 amendments the penalty was increased to death, demonstrating the legislature's serious stance on trafficking in women, although the penalties are worryingly harsh.

Article 501- Indecent Exposure

Any person who washes themselves in a city, town or village in an indecent manner or appears in a public place in an indecent state of undress is punishable by a period of detention not exceeding 10 days or by a fine not exceeding 5 dinars.

- COMMENTS: While this article does not raise any issues on its face, it is possible that it could be enforced discriminatorily by those who regard female modesty as of serious cultural importance. This is particularly so because the penalty may seem harsh as it includes imprisonment.

COMBATING PROSTITUTION LAW
(NO. 8 OF 1988)

This legislation has been superseded by a number of RCC resolutions. The overall effect of the legislation and the resolutions is to put strong restrictions and deterrent penalties on those involved with prostitution, either by practicing it or by marketing, forcing or selling it. While strong penalties may be appropriate for those who make money out of forcing others to prostitute

themselves, it is inappropriate to punish those who are forced into the profession without meaningful choice, and therefore some changes need to be made. Given that most prostitutes are women, it has been assumed that provisions protecting prostitutes are to the benefit of women. However, it is important to recognise the significant minority of men who are also prostituted. Specific provisions for men are noted in the analysis below.

Article 1:

Prostitution: The practice of fornication or sodomy with more than one person in exchange of payment.

Brokerage: The mediation between two persons with the intention of facilitating the act of prostitution in any way. This includes the incitement even with the consent or request of one of them. It also includes the exploitation for prostitution of a person whether complicit or under duress.

The Brothel: It is a place geared to the act of prostitution, facilitating, publicising, inciting or doing any act that leads to prostitution.

Article 2:

Prostitution and Brokerage are banned.

- COMMENTS: Banning prostitution provides some deterrence and punishment for those who exploit women. This provision is in compliance with Article 6 of CEDAW, mandating the suppression of traffic in women and exploitation of the prostitution of women.

Punishment of Prostitutes

Resolution No. 234

There shall be punishment with life sentence⁹⁹ for whoever...

3. It is proven that she is practicing prostitution

- COMMENTS: Punishing women involved in prostitution is inappropriate, particularly if they have suffered abuse. This penalty (life imprisonment) is particularly harsh for those forced into prostitution without their consent. In Turkey, Lebanon, Bangladesh, Djibouti and Indonesia, there is no punishment of the women working as prostitutes themselves.¹⁰⁰ In Jordan, there are penalties of varying amounts for those organising or coercing prostitution, but not for the women themselves.¹⁰¹

⁹⁹ Originally 'death sentence,' amended by CPA Order 7 Section 3(1)

¹⁰⁰ Women for Women's Human Rights, Dr. Sherifa Zuhur, Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: A Comparative Study, 2005,

<http://www.wwhr.org/files/GenderSexualityandCriminalLaws.pdf> pg 58

¹⁰¹ CEDAW Committee, Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Initial Report of States Parties: Jordan, CEDAW/C/JOR/1, 2000, <http://www.un.org/womenwatch/daw/cedaw/cedaw22/jori.pdf>

- SUGGESTIONS: This portion of resolution No. 234 needs to be repealed to ensure that women who have been subject to abuse are protected rather than punished.

Article 10:

First: On the enactment of this law, the Ministry of Labour and Social Affairs shall prepare houses for reforming, directing and rehabilitating women as needed, and in the places it deems necessary to implement ethical, cultural and professional programs for the prostitutes aiming to empower them to earn their living by decent means.

Third: The Ministry shall allocate a special section...to lodge males convicted with practicing prostitution.

Article 13:

A bylaw shall be issued to define the management of Reformatory Houses, study, vocational education, food, clothing, payments for the detainee in exchange for tasks assigned to her.

Article 4:

The prostitute, if her practicing of prostitution is proved, shall be punished by lodging her into one of the reforming houses established for the direction and rehabilitation of women, for a period not less than three months and not to exceed two years.

Article 12:

Every person sentenced with detention and escaping from Reformatory Houses shall be punished with no more than one year imprisonment or with a fine of not less than 100 Dinar and shall be returned to the house to complete the duration of detention.

- COMMENTS: If the RCC Resolution should be repealed, these would be the main provisions for those involved in prostitution itself. While it is important to provide services for prostitutes to allow them to learn new skills, punishing women is inappropriate, particularly if they have suffered abuse. The recognition that payment should be allocated and education granted is a good step towards helping these women move forwards with their lives.
- The provision for separation and recognition of male prostitutes recognizes that such men have also suffered abuse and may need separate help.
- SUGGESTIONS: Reforming houses should not be mandatory or for punishment. They should aim expressly to help women who need their services after suffering a traumatic experience. The provisions regarding those escaping from Reformatory Houses should be repealed, as should those 'punishing' women by putting them there.

Article 11:

The competent judge, with the agreement of the detained prostitute, may terminate the reformatory detention in the following cases:

- 1: If one of the ascendants of the detainee, her spouse, guardian or a relative made a pledge committing him to her good upbringing, behaviour and ethics and to pay the amount determined by the court in the pledge if a breach occurred.*
- 2: If the detainee got married and the court is satisfied that the marriage is not for the purpose of evading provisions of this law.*
- 3: If it is proved to the court by official reports that the detainee became capable of living with honour.*

- COMMENTS: These provisions are patriarchal and only allow women to escape the 'punishment' of the Reformatory houses if they have a male representative to look after them. While the provisions allowing the court to decide that the detainee became 'capable of living with honour' may somewhat mitigate this, an honourable lifestyle is never defined, and official reports may be difficult to come by, making the provision less helpful.
- SUGGESTIONS: As above, the reformatory houses should aim to help women, rather than to punish them, and women should be free to leave when they choose.

Punishment of brokerageRCC resolution No. 234

There shall be punishment with life imprisonment for whoever...

- 4. It is proven that he omits the crime of brokerage whether he is a man or a woman and shall be punished with the same punishment whoever takes part in this crime.*
- 5. Uses or manages public place and any other place allowing the public to enter in it using individuals dealing with prostitution in order to use them in craving for his place.*
- 6. Owns or manages a house or rooms or hotels allowing others to deal with prostitution therein or facilitating or assisting the same.*

Article 3:

A prison sentence of no more than seven years shall be imposed on:

- a. Every broker, his associate or whoever assisted him in the act of brokering.*
- b. Every user or a manager of a public place or any place open to the public, making use of persons engaged in prostitution for the purpose of exploiting them.*
- c. Whoever owns or manages a house, rooms or a hotel allowing others to practice, facilitate or assist in the act of prostitution.*

- COMMENTS: These provisions punish those who broker prostitution, and those who manage or enter brothels, including those who do so indirectly. This criminalisation is

important to protect those subject to prostitution and to help society as a whole. Given that most persons prostituted are women, this protects vulnerable women.

Article 5:

1: One who kept, in some place, a male or a female of more than eighteen years of age for prostitution or sodomy by deception, coercion, force or threat shall be punished with imprisonment for a period not to exceed ten years.

2: If the age of the victim is less than eighteen years, the penalty shall not exceed fifteen years of imprisonment.

3: The court must decide on a fair compensation for the victim in both cases.

- COMMENTS: In punishing severely those who keep others for prostitution, this offers valuable protection for vulnerable people. The provisions for compensation to the prostitutes themselves are also very welcome in providing economic protection after the fact.

Article 6:

Every person with direct or indirect relations to a case initiated out of acts of brokering or prostitution or claiming a civil right initiated or resulting accordingly may be considered a party in the case.

- COMMENTS: this allows NGOs and others to help women if they themselves are afraid to come forwards to report prostitution. It is therefore valuable in allowing women to seek outside help. However, it must be ensured that prostitutes are not punished for the abuse they have suffered.

Article 7:

1: It is banned for enforcement departments to process bonds signed by a prostitute to a broker.

- COMMENTS: This ensures that prostitutes have some protection in economic terms as well as under the criminal law.

JUVENILE WELFARE LAW (NO. 76 OF 1985)

This law is aimed at reforming juvenile delinquents.¹⁰² Juveniles are those under 18, and minors those under 9.¹⁰³ There are many examples of delinquency given, including 'disobeying the power

¹⁰² Article 1

¹⁰³ Article 3

of [the juvenile's] legal guardian."¹⁰⁴ It includes provisions for examining and detaining youths in observation, detention and reformatory houses. It sets out procedures for juvenile trials. Criminal provisions allow for lenient sentences, juvenile detention, probation or returning to the guardian with a financial guarantee. This law seems to be structured around boys.

- COMMENTS: While this law presents issues of arbitrary detention and other human rights issues, it does not present specific gender-equality issues.

MISSING LEGISLATION

There is no legislation that specifically bans FGM.

- COMMENTS: The adoption of such legislation has been recommended by UNAMI,¹⁰⁵ and Amnesty International.¹⁰⁶ General Recommendation No. 14 of the CEDAW Committee recommends that States Parties 'Take appropriate and effective measures with a view to eradicating the practice of female circumcision,'¹⁰⁷ and No. 24 states that parties should ensure 'the enactment and effective enforcement of laws that prohibit female genital mutilation.'¹⁰⁸ Under the Constitution Article 29 (3) 'all forms of violence and abuse within the family' are prohibited, and respecting the obligation to ensure the highest standards of health under the ICESCR states must 'prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation.'¹⁰⁹ The practice is outlawed in Egypt,¹¹⁰ where a 2003 Act stipulated that doctors may not permit it in hospitals and clinics, and a 2007 Ministerial Decree (no. 271) criminalises doctors who perform it in any place.¹¹¹
- SUGGESTIONS: Introduce legislation banning FGM. Given the grave psychological and social implications of FGM, Iraqi experts contend that laws prohibiting the practice should be enacted.

¹⁰⁴ Article 5

¹⁰⁵ UNAMI Human Rights Report, January-June 2009, http://www.ohchr.org/Documents/Countries/IQ/UNAMI_Human_Rights_Report_15_5_January_June_2009_EN.pdf pg 5

¹⁰⁶ Iraq: Decades of Suffering-Now Women Deserve Better, 2005 (AI Index: MDE 14/001/2005), <http://www.amnesty.org/en/library/info/MDE14/001/2005> pg 20

¹⁰⁷ Ninth Session, 1990, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

¹⁰⁸ CEDAW Committee, General Recommendation No. 24 (20th Session, 1999) Para 15 (d) <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

¹⁰⁹ See CESCR, General Comment No. 14, E/C.12/2000/4. August 2000, <http://www.unhcr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En> para 35

¹¹⁰ Women for Women's Human Rights, Dr. Sherifa Zuhur, Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: A Comparative Study, 2005, <http://www.whr.org/files/GenderSexualityandCriminalLaws.pdf> pg 61

¹¹¹ See American Islamic Congress, A Modern Narrative for Muslim Women in the Middle East: Forging a New Future, 2010, http://www.aicongress.org/prog/Women/AIC_Womens_Narrative_2.pdf pg 12

There is no legislation banning sexual harassment in the workplace.

- COMMENTS: The adoption of such legislation is urged by the CEDAW Committee.¹¹² It may not be the top priority on reform agendas.

¹¹² CEDAW Committee, General Recommendation No. 19 (11th session, 1992)
<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> para 25 (t) (i)

V. LAW OF OBLIGATIONS

Key Recommendations:

- **Amend Articles 102, 588 and 1327 of the Civil Code dealing with guardianship so that not just ‘fathers’ but ‘parents’ are considered the natural guardians of children.**
- **Amend or add a provision to Articles 210, 212 and 213 of the Civil Code to ensure that defences to compensation, including ‘contribution through the victim’s own fault’ do not include ‘honour,’ to help protect women from violence in the home.**
- **Consider the implementation of legislation that would provide for protective or restrictive orders for victims of violence as well as compensation.**
- **Repeal RCC Order Number 1610 of 1982 to ensure equal property rights for men and women who are married to non-Iraqis.**
- **Amend Articles 89 and 91 of the Personal Status Code so that inheritance legislation ensures full provision for women.**

The law of obligations sets out the basic conditions for interaction between citizens. It develops individual rights, and its effects are felt across the legal system and the culture. It is therefore important to assess the provisions of the Civil Code and other legislation to ensure that they allow women the freedom to live their lives fully.

CIVIL CODE (NO. 40 OF 1951)

Squaring the Civil Code with the Iraqi Constitution of 2005 presents a number of challenges. Article 2 of the Constitution, which states that: ‘no law may be enacted that contradicts the established provisions of Islam,’ gives some cause for concern in the interpretation of the code. Stigall states that this will ‘at a minimum plac[e] a stronger Islamic influence on all Iraqi law, and at most, serv[e] to uproot the majority of the Iraqi Civil Code and replace it with Shari’a.’¹¹³ However, the Constitution states in Article 130 that ‘existing laws shall remain in force, unless annulled or amended in accordance with this Constitution,’ and there have been no annulments or amendments to this effect.

¹¹³ Stigall, *Iraqi Civil Law: Its Sources, Substance and Sundering*, J. of Transnational Law and Policy, Vol 16:1., pg 64

However, the concerns raised by Stigall are still relevant because Article 2 does state that all rules must be rooted in Shari'a and not contradict rules of Islam. As he states, this 'calls into question the continued applicability of the majority of laws and provisions in the Iraqi Civil Code' which derive from the West, as 'a literal reading of Article 2...would abrogate those provisions and require that they be replaced by traditional Islamic rules.'

This could have a worrying effect on women's position, as the Civil Code does depart from Shari'a, often to the benefit of women's rights.¹¹⁴ However, it is important to remember that the Constitution also provides support for gender equality, as under Article 14, 'Iraqis are equal before the law without discrimination based on gender,' and under Article 2, 'no law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.' As yet, while the friction between the two abovementioned articles has been noted,¹¹⁵ neither one has emerged as a singular guiding principle. Therefore, the important protection for rights in Article 2 could lead to positive developments, and advocates working to improve gender equality can and may be advised to use this constitutional provision to press for interpretations of the Civil Code that adequately reflect the gender-equality provisions of the Constitution.

The Iraqi law of obligations, which covers so much of everyday life and transactions, is remarkably sensitive to women's concerns, not just in providing gender-equal provisions but also in affirmatively recognising the differentiation between the sexes and providing legal protection for those in need.¹¹⁶ It demonstrates the possibilities of an inclusive Iraqi law that promotes the welfare of all Iraqi people by refusing to exclude women from activities in society. In allowing inclusive rules for contract and property holding, it provides a framework for women to operate on an equal basis in the marketplace and the home. While there are discriminatory and patriarchal provisions, as well as provisions that may perpetuate discrimination in fact, such provisions can best be addressed by interpreting them alongside the Constitutional guarantee of equality.

Sources of Law, Custom and Interpretation of Law

The Preliminary Part, Paragraph 12

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

¹¹⁴ See, for example, Article 1188, describing the inheritance laws of *tasarruf*

¹¹⁵ See, for example, Stigall, *Iraqi Civil Law: Its Sources, Substance and Sundering*, J. of Transnational Law and Policy, Vol 16:1, 1,

¹¹⁶ See for example, Article 116 below

Article 1

(2) In the absence of any applicable legislative provisions in the law the court shall adjudicate according to custom and usage; in the absence of custom and usage in accordance with the principles of the Islamic Shari'a which are most consistent with the provisions of this Law but without being bound by any specific school of thought; and otherwise in accordance with the laws of equity.

(3) The court shall in all the foregoing be guided by the adjudication determined by the judiciary and jurisprudence in Iraq and then of the other countries the laws of which are proximate to the laws of Iraq.

Article 2

Where there is a provision no independent judgment (ijithad) is permissible.

Article 5

The change of provisions (rules) to conform to changing times is not denied.

(What is intended here is that the rules which have their bases in custom and usage and not in texts and proofs will change with the change of customs and usages on which they have been based.)

Article 164

In relation to contract

(1) Custom be it universal or specific is a rule (to establish a shari'a rule).

(2) The usage common among people is proof which must be observed (admitted).

- COMMENTS: While these articles reinforce the supremacy of the legal provisions set out in the Code and other legislation, they still present a number of problems. Firstly, 'The Islamic jurisprudence,' in such nonspecific form, offers little protection for the rights of women. Furthermore, as the stability of Iraqi society is still unfortunately in question, with certain areas turning to violence and discrimination against women,¹¹⁷ 'usage' and 'custom' do not offer significant protection for the rights of women. This can be seen from the following article:

Article 165

In relation to contract

Custom will be considered (to be effectual) if it is in continuous practice or predominantly widespread...

(that is why jurists...estimated the age of nursing at seven years for a male minor and nine for a female minor because they allowed a male minor to stay with his mother until he would be able to do without her, i.e. then he would be able to eat and drink without needing help and the female minor to be entrusted to the care of her mother until she becomes attractive...)

¹¹⁷ See Iraq Legal Development Project: The Status of Women in Iraq: Update to the Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards

- COMMENTS: While the explanation to this article does not offer a worrying distinction between the sexes, it demonstrates the potential for custom to become a tool for differentiation between the sexes, and in an unstable climate that may become an issue. However, these concerns are lessened with the introduction of the 2005 Constitution. In accordance with Articles 2 and 14, any introduction of custom must now respect equality and may not discriminate on the grounds of gender. Interpreted in this way, custom, usage and Islamic jurisprudence do not present such a grave threat to the basic gender equality of the Code.

Contractual Capacity

The law of contractual capacity demonstrates clear *de jure* equality:

Article 93

Every person has the (legal) capacity to conclude a contract unless the law has determined his incompetence or restricted it.

The use of 'person' is furthermore encouraging. Women have a clear basis at law in the equality of contract. To be valid a contract must be made 'by parties of full capacities', with lawful cause, and valid attributes.¹¹⁸ Minors (under 18),¹¹⁹ the insane and mentally retarded persons cannot contract, and the court may by declaration prevent a rash or retarded person (who squanders his property) from contracting.¹²⁰ Disposals of an irrational minor (under 7) or completely insane person are void even if sanctioned by his guardian;¹²¹ but a rational minor, court-declared imprudent or mentally retarded person's contracts will stand if they are 'totally to his benefit'.¹²² A partially insane person's disposals while 'in a state of full perception' are the same as those of a sane person.¹²³

- COMMENTS: This section of the Civil Code gives women the *de jure* power to formulate contracts on an equal basis with men. It is possible that some *de facto* discrimination could be found, as a person could be wrongly deemed 'imprudent' by the court, and this may be more likely against a woman with less socio-economic and cultural power. However, this problem would not be solved easily by further legal safeguards, but rather by the improvement of women's position in society.

¹¹⁸ Article 133

¹¹⁹ Article 106

¹²⁰ Articles 94 and 95

¹²¹ Articles 96 and 108

¹²² Articles 97, 107 and 109

¹²³ Article 108

Article 102

The natural guardian of a minor is his father, then his father's guardian, his sane (of sound mind) grandfather, the grandfather's guardian, the court or the selected guardian appointed by the court.

- COMMENTS: This demonstrates discrimination at law, in violation of Article 14 of the Constitution, Article 15 of CEDAW and Article 26 of the ICCPR. The patriarchal system described here deprives women of a role in the adjudication of the assets of minors. While under the Law on Publication on the Official Gazette, masculine forms in legislation include the female references, the clear choice of 'father' rather than 'parent' demonstrates that this is not the choice of the legislature, and practice furthermore indicates that this is not a favoured interpretation.¹²⁴ In Morocco both parents have equal rights of guardianship over minors.¹²⁵
- SUGGESTIONS: While the Law on Publication on the Official Gazette, read alongside the Constitutional guarantee of equality, could demand such interpretation in the future, amending the article to provide for 'parent,' rather than 'father,' would best protect gender equality.

Duress*Article 116*

A husband has influence on his wife: if he coerced (forced) her by beating, for example, or by forbidding her from visiting her parents in order to abandon her dowry which she did such abandonment shall not be performed nor his liability thereon will be released.

- COMMENTS: This article is an excellent example of the recognition of men's power in the family, demonstrating awareness that a husband has 'influence' in many senses over his wife. By preventing women from being prejudiced by this reality of disempowerment, this article is a sophisticated example of the development of *de facto* equality.

Torts

The Civil Code sets out the civil remedies available to those who are subject to injurious acts. 'Every act which is injurious to persons... [through] any kind of inflicting injury entails payment of damages by the perpetrator,'¹²⁶ or to the victim's dependants if death resulted.¹²⁷ The damages are estimated by looking at the injury, the loss of gains and benefits (including wages) that are a

¹²⁴ See Stigall, *Iraqi Civil Law: Its Sources, Substance and Sundering*, J. of Transnational Law and Policy, Vol 16:1, 1,

¹²⁵ See Moroccan Family Code, <http://www.wluml.org/sites/wluml.org/files/moudawana-english.pdf>

¹²⁶ Article 202

¹²⁷ Article 203

natural result of the act,¹²⁸ and the victim may have the right to apply in the future for reconsideration of the amount.¹²⁹

- **COMMENTS:** These articles do not include any restrictions on who may claim damages. They may provide legal protection to women who are subject to violence in the home and elsewhere, particularly if criminal protections are insufficient. These provisions are therefore an important guarantee of legal responsibility for violence against women. However, the remedy for such infractions is only for damages, with no provision for protective orders or restrictive orders. This may not give women the protection that they need from violence inside and outside the home. The CEDAW Committee has stated that it is necessary to overcome family violence by 'criminal penalties where necessary and civil remedies.'¹³⁰ Jordan in 2008 passed the Family Protection Law, which allows either the Family Protection Unit or victims to bring claims to court to get restrictive orders, backed by criminal penalties for breaches. Turkey has similar provisions under the Protection of the Family Law.
- **SUGGESTIONS:** Consider the implementation of legislation to provide for protective or restrictive orders for victims of violence as well as for compensation.

Article 205

(1) The right to compensation also covers moral injury: any encroachment (assault) on the freedom, morality, honour, reputation, social standing, or financial position (credibility) of a third party renders the perpetrator liable for compensation (damages).

(2) Damages may be adjudged to spouses and the next of kin of the family in respect of the moral injury sustained by them as a result of the victim's disease.

(3) Damages for moral injury do not pass to a third party unless its value has been determined pursuant to an agreement or a final judgment.

- **COMMENTS:** The right to compensation for assault on freedom, morality, honour and reputation, amongst others, provides relatively extensive protection for those suffering from non-physical damage, including rape and imprisonment, which tend to affect women disproportionately.

The burden of proof is on the plaintiff to produce evidence and innocence is presumed until proven otherwise.¹³¹

¹²⁸ Article 207

¹²⁹ Article 208

¹³⁰ CEDAW Committee, General Recommendation No. 19 (11th session, 1992)

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> para 25 (r) (i)

¹³¹ Articles 444 and 448

- COMMENTS: While making it more difficult for plaintiffs to prove their claims than for claims to be defended, including claims for gender-based violence, this accords with international practice and gender equality. It is important that innocence is presumed in the paying of damages. This adds to the need for restrictive/protective orders, which can be made on the basis of the victim's safety being at risk rather than on the basis of innocence or guilt.

Article 206

(1) The civil damages shall not be prejudicial to imposition of the criminal penalty if its elements have been satisfied.

(2) The court will decide the civil liability and the amount of the compensation (damages) without being bound by the principles of criminal liability or by the judgment rendered by a criminal court.

- COMMENTS: By allowing the court to decide civil liability without regard to the possible criminal penalty, this provides more protection to women seeking remedy for violence without recourse to the stricter evidentiary standards of the criminal courts.

Article 210

The court may reduce the sum of or refuse to adjudge payment of any compensation whatsoever if the injured person has contributed through his fault to causing or aggravating the injury or had worsened the debtor's situation.

- COMMENTS: The interpretation of this article could be problematic. Contribution through one's own fault could be considered to include violation of family 'honour', and provide sanction to those acting to mete out punishment for this vague violation. However, given the specifics of the defences set out in the below articles, it is submitted that this interpretation would not be in accordance with the rest of the Code and should be rejected. It would also be against the Constitutional provisions for equality and respect for rights in Articles 2 and 14. In light of the fact that the Civil Code is to a degree based on Islamic Law however, some Iraqi experts indicate that amending the Code may pose a challenge.
- SUGGESTIONS: Ensure that 'honour' is not considered to be the victim's fault for the purposes of excluding compensation, by inserting a statement to that regard in the legislation.

Article 212

(1) Exigencies permit (legitimise) prohibitions and will be assessed commensurately with the need for them.

(2) He who in legitimate self defence or in defence of a third party had caused injury shall not be liable provided in so doing he does not use force more than is needed (for the defence) otherwise he will be obligated to pay compensation (damages) where the principles of equity must be observed.

Article 213

(1) The lesser of two evils will be chosen and in case of conflict of two evils the evil with greatest injury will be considered (taken into account): the greater injury will be eliminated by the lesser injury; but an exigency (the compelling circumstances) will not nullify completely the right of a third party.

(2) He who has caused injury in order to protect himself or a third party against a much greater impending danger than the injury he has caused shall not be liable except on the compensation which the court deems appropriate.

- COMMENTS: These very specific defences demonstrate that reprisals for violations of 'honour' should not be considered to be a defence to these civil actions. Furthermore, these defences take into account situations where it was absolutely necessary to use force, and do not allow for lesser justifications. While this differs from the Penal Code, this accords with the different nature of civil remedies, which are private and do not carry the weight of societal condemnation that penal provisions do. Therefore it is submitted that these defences should be restrictively interpreted, allowing for a gender-equal, Constitutional system that guarantees protection for all, by refusing to allow 'honour' to be used as a defence.

Ownership and Dispensation of Property

Under the Civil Code 'perfect ownership vests unto the owner a right to dispose absolutely of that which he owns,'¹³² including everything which is an 'essential element thereof.'¹³³ Under this system, 'no one can be deprived of his ownership except in the cases and in the manner provided for by law and in consideration of a fair compensation.'¹³⁴

- COMMENTS: This system allows women to participate in property holding at an equal level, and provides them with equal protection for their investments.

The following sets out examples or exceptions.

¹³² Article 1048

¹³³ Article 1049

¹³⁴ Article 1050

Article 588

(1) A father who has guardianship over his son may sell his property to his son and may purchase the property of his son himself in consideration of the comparable value thereof and with insignificant and not excessive difference (lesion).

(2) If he has sold his own property to his son or has purchased his son's property for himself the price and the thing sold will be deemed as having been received immediately upon concluding the contract.

(3) A grandfather will be governed by the same rule as the father.

- COMMENTS: This article suffers from the same criticisms as those laid out against Article 102 above. It excludes women from dispensation of property in a significant manner, and it would be difficult to interpret it in any other way.
- SUGGESTIONS: This article should be amended to state that a 'parent' with guardianship may sell property.

Article 612

The grants and presents which are offered in betrothal by either fiancé to the other or by a third party to either or jointly to both of them shall have to be restituted by the grantee to the grantor if the betrothal is annulled and if the grantor has claimed restitution if the thing granted or presented still existed and the restitution thereof itself is possible.

- COMMENTS: The recognition that this may be made from either party to a marriage is a positive example of non-discriminatory language. Furthermore, as it is likely that the prospective wife would be the grantor, provisions allowing her to receive her property back in the event that the marriage does not proceed provide protection for her property.

Inheritance

PERSONAL STATUS CODE
(NO. 188 OF 1959)

This lays out the basic inheritance law.

Article 74

1: If the child, male or female, dies before his father or mother, he shall be considered as alive upon the death of any of them. His share of the legacy shall be handed down to his own children, males or females, according to Shari'a laws.

Article 89

The inheritors by kinship and the way to bequeath them

1: *The two parents and the children even if the male gets a portion equal to that of two females.*

4: *The full sister is treated the same way as the full brother regarding disinheritance.*

Article 91

The husband is entitled to a quarter of the legacy when there is an inheriting descendent to his wife; and to half when the latter does not exist. As for the wife she is entitled to one-eighth of the legacy where there is an inheriting descendant, and to a quarter when the latter does not exist.

- COMMENTS: This inheritance scheme does not allow for equal inheritance between men and women. This is linked to the fact that men are required to support their wives;¹³⁵ however, it prevents women without husbands from receiving their full share, as well as those with husbands who may not spend the full amount of inheritance on their wives. The original Personal Status Code accorded men and women equal rights in inheritance,¹³⁶ and the 2004 Moroccan Family Code allows spouses mutual and equal rights to inherit from one another.¹³⁷
- SUGGESTIONS: This provision is closely linked to other societal and legal obligations on husbands and wives. That makes it difficult to reform. However, examples of gender-neutral inheritance provisions can be found in the Civil Code.

CIVIL CODE (NO. 40 OF 1951)

Article 1188

Discussing the right of disposal (*tasarruf*) in government owned land (*amiri*)

(1) The first order in the rank of the successors in interest are the branches of the deceased: children, grandchildren, males and females taking equal shares.

Article 1194

Discussing *tasarruf*

(1) Consideration must always be had in representation that the male will have a share equal to the share of the female irrespective of the order upon which this right has devolved.

- COMMENTS: This gender-equal inheritance law only covers a small area of inheritance, which is primarily governed by the Personal Status Code. However, this law is 'in contrast

¹³⁵ See Personal Status section

¹³⁶ See ABA, Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf, pg 2 and Stigall, Iraqi Civil Law: Its Sources, Substance and Sundering, J. of Transnational Law and Policy, Vol 16:1, 1, pg 62

¹³⁷ Article 31, See <http://www.wluml.org/sites/wluml.org/files/moudawana-english.pdf>

to traditional Islamic inheritance law which draws distinction between the sexes and allots greater shares and rights to male heirs.¹³⁸ It is therefore a positive example of Iraqi legislation that incorporates gender equality norms into Islamic tradition. It could be considered to fall foul of Article 2 of the Constitution guaranteeing the supremacy of 'the established provisions of Islam,' but is likely to remain in light of the Article 2 guarantee of rights in the Constitution, including that on equality in Article 14. However, in only providing for *tasarruf*, unfortunately the reaches of this provision are extremely limited.

There is some minor differentiation in the right of representation of each of the spouses:

Article 1193

(2) The right of representation of each of the spouses is established even where either of them has died before the valid repudiation or before the expiration of the count of (al'idda) a revocable repudiation; where the husband has repudiated irrevocably his wife during the illness of death and died before the expiration of the count (al'idda) the right of representation is established to the wife.

- COMMENTS: This differentiation has little effect and the provision as a whole still fits within the non-discriminatory system set up for this area of inheritance.

RCC Order Number 1610 of 1982

- 1. An Iraqi woman who is married to a foreigner is forbidden from giving property to her foreign husband...*
- 2. When she dies all her property will go to her Iraqi successors and her non-Iraqi husband will be deprived from any inheritance.*

- COMMENTS: Despite the fact that under Article 12 of the Nationality Law; 'if an Iraqi woman marries a non-Iraqi and acquires the nationality of her husband, then she shall not lose her Iraqi nationality unless she surrenders her Iraqi nationality in writing,' this order has not been repealed, leaving Iraqi women unable to transfer property to their husbands. This is clearly discriminatory, in violation of Article 14 of the Constitution, as well as Article 44 which gives each Iraqi freedom of movement, and Article 15 of CEDAW.
- SUGGESTIONS: This order should be repealed.

¹³⁸ Stigall, *Iraqi Civil Law: Its Sources, Substance and Sundering*, J. of Transnational Law and Policy, Vol 16:1, 1,, pg 62

REAL ESTATE LAW
(NO. 34 OF 1971)

This law deals with the registration and legal transfer of interests in land, and determining land boundaries. Its provisions are gender-neutral; under Article 5, the owners of real estate are 'those that own its liability and rights;' and continues a system of property holding that presents little problem from a gender-equity perspective.

Regarding the inheritance of land, however, there may be some concern over discriminatory enforcement.

Article 187

Registering the inheritance depends on either a legal divider or a final court decision for the specialised court, these two can decide the inheritors and everyone's share in it.

Article 189

The inheritor will gain the right of estate ownership from the date of the inherited death, but he cannot dispose or control it until it is registered in the estate registration record.

- COMMENTS: It is important that these specialised courts determine the ownership of the land in a way that does not discriminate against women.

Usufructs

Article 1262

The scope of the right of user (enjoyment) and of habitation is determined according to the personal need of the right holder and of his family.

- COMMENTS: While this provision is gender-neutral on its face, it could be enforced in a gender-discriminatory fashion, particularly in the context of female-headed households. It is possible that a woman may be considered to have less need, and she may be considered less responsible for her family than a male head of household. It is important to ensure that this provision is not enforced in such a manner.

Mortgages

Article 1327

(1) The provisions of Article 1289 concerning authentic mortgages shall subject to the following section be applied where a father has constituted a possessory mortgage over his property in favour of his minor child or where the father has taken a possessory mortgage over his child's property in favour of himself and when he constitutes a possessory mortgage over his child's property to secure a debt owing from him or from the minor; and also where any of the guardians has constituted a

possessory mortgage over his property in favour of an interdicted person or taken a possessory mortgage over an interdicted person's property in favour of himself.

(2) Where the father has constituted a mortgage over his minor child's property to secure a debt owing from him if the property has perished he shall not be liable except to the extent of the sum of the debt which has been extinguished.

- COMMENTS: This patriarchal language is subject to the same criticisms as Article 102 and 588.

VI. LEGISLATION DEALING WITH THE FORMER BA'ATHIST REGIME

Key Recommendations:

- Amend the Law on the Reinstatement of the Politically Discharged to include a cause of action for persons discharged for gender-based reasons.
- Amend the Law on the Organisation for the Resolution of Disputes in Real Property to include a cause of action for persons whose real property was seized for gender-based reasons.

...Having a better understanding of Iraqi society, traditions, religion and problems will help us focus on the most significant possible reforms and regulations so as not to waste time and effort.

*Former Member of Iraqi Parliament
Roundtable, Dec. 2010*

These laws are mechanisms by the new Iraqi legislature to deal with specific policies carried out by the former regime, and to set

up reconciliation mechanisms, provide compensation or reparations, and criminalise certain acts arising out of the Ba'athist regime in Iraq. They are generally enacted in the spirit of the Constitutional provisions of equality, and treat men and women equally.

LAW ON THE REINSTATEMENT OF THE POLITICALLY DISCHARGED (NO. 24 OF 2005)

This law is the result of the previous Iraqi regime's widespread practice of firing government officials on the basis of their political, ethnic or religious affiliations. It provides for the reinstatement of Iraqi government civilian, military and law enforcement personnel who were dismissed in a wide variety of circumstances from their positions for these reasons between July 17, 1968 and April 9, 2003. It calls for the formation of formal governmental commissions to undertake an investigation into the claims and to assist in the reinstatement/reparations process.

- **COMMENTS:** This law makes no differentiation between the genders, and creates an important reparations procedure to help both men and women in the regime. However, it omits any mention of wrongful discharge made on the basis of gender.
- **SUGGESTIONS:** An amendment to the law to include a cause of action for persons discharged for gender-based reasons would be a benefit to ensure that all those suffering discrimination under the last regime received redress.

LAW ON THE ORGANIZATION FOR THE RESOLUTION OF DISPUTES IN REAL PROPERTY
(NO. 2 OF 2006)

This law is a result of the prior Iraqi regime's widespread practice of arbitrary property seizures and transfers on the basis of ethnic, political and religious affiliation. It provides for the establishment of a governmental organization to adjudicate disputes over real property from property seizures made for such reasons or to carry out the Ba'athist political agenda between July 17, 1968 and April 9, 2003, including property taken without reimbursement or with token reimbursement. The law outlines the process of adjudicating claims, sets up a judicial committee to do so, and sets out in detail how claims are to be assessed and property is to be distributed.

- COMMENTS: This law presents no problems for women. However, as above, it omits any mention of wrongful seizure made on the basis of gender discrimination.
- SUGGESTIONS: Amend the law to include a cause of action for persons whose real property was seized for gender-based reasons.

LAW ON THE RIGHTS AND PRIVILEGES OF THE FAMILIES OF THE MARTYRS AND VICTIMS IN THE IRAQI
KURDISTAN TERRITORY
(NO. 9 OF 2007)

This law was passed in order to compensate the families of the victims of the former Iraqi regime in Iraqi Kurdistan. The law defines a martyr broadly, including three general categories: militant martyrs (those dying as the result of participation in the Kurdish liberation movement), genocide martyrs (those dying as a result of criminal genocide actions) and national martyrs (those dying as a result of military or terrorist attacks specifically directed against the people of Kurdistan).

Paragraph 1, Line 7

The law defines the family of the victim as the “*husband, wives, son, daughter, mother, father, brother, sister, or whoever was dependent on the martyr pursuant to a judicial order.*”

- COMMENTS: This law presents no problems for women. It does not differentiate claims based on the gender of the claimant. It provides a cause of action equally for female and male family members of the martyr, a commendable achievement when inheritance is normally distributed unequally.¹³⁹

¹³⁹ See the section on inheritance, above

LAW ON THE POLITICAL PRISONERS FOUNDATION
(NO. 4 OF 2006)

This law was passed in order to compensate victims of political imprisonment, a policy widely practiced by the former Iraqi regime. It established the Political Prisoners Foundation, to materially and morally compensate political prisoners 'in proportion to the size of the sacrifice' they made, and for the suffering that they continue to experience today. This compensation is made by providing them with health, education and vocational resources. The law outlines the mission statement, financial and administrative aspects of the foundation.

- COMMENTS: This presents no problems for women and it invokes no gender- specific issues.

LAW ON THE MARTYRS FOUNDATION
(NO. 3 OF 2006)

This law was passed to compensate those killed under the former regime, and it established the Martyrs' Foundation, to materially and morally compensate martyrs 'in proportion to the size of [their] sacrifices' and the suffering of their relatives left behind. A martyr is defined as 'any Iraqi who lost their life due to their opposition to the former regime.' The foundation provides health, education and vocational resources for the martyrs' families and links them to services offered by official and NGO organizations. The law outlines the mission statement, financial and administrative aspects of the foundation.

Paragraph 5 Line 2

The martyr's family is defined as the "*husband, wives, son, daughter, father, or mother of whoever was dependent on the pursuant to a judicial order.*"

- COMMENTS: This law presents no problems for women, and mandates the provision of services for both male and female family members. Furthermore, several articles of this law address issues related to the mother, female children and wife of the martyr. This treatment recognises the practical differences that such relatives may suffer, and is therefore a welcome recognition of the necessity of protection for women.

LAW ON THE REPEAL OF LEGAL PROVISIONS THAT PREVENT THE COURTS FROM HEARING CASES
(NO. 17 OF 2005)

This law repeals provisions preventing Iraqi courts from hearing cases arising between July 17, 1968 and April 9, 2003, allowing the courts to address cases that arose during the former regime.

- COMMENTS: This law presents no problems for women.

THE SECOND AMENDMENT TO THE DIRECTIVES ON THE COMPENSATION OF MARTYRS AND VICTIMS OF
THE RESULT OF TERRORIST ACTIVITY NUMBER 3 FOR THE YEAR 2005
(NO. 2 OF 2007)

This law amends a prior law dealing with the compensation of victims of terrorist attacks. The amendments include minor changes in the definitions of articles in the original statute.

- COMMENTS: These amendments do not present any problems for women.

GENERAL AMNESTY LAW
(NO. 19 OF 2008)

This law deals with those imprisoned in the previous regime. It is to 'allow the opportunity, to those Iraqis who strayed to commit certain crimes, to return to the right and to join the social life, and to spread the spirit of forgiveness.' It therefore favours the release of a number of prisoners. Under Article 1, 'A general amnesty applies on convicted Iraqis and people residing in Iraq', who may now be released following application under Article 5 to a committee which may release them to start a new life. However, under Article 2 there are a number of crimes for which amnesty may not be granted.

Article 2

First: Those sentenced to death in accordance with the Iraqi Penal Code No. 111 of 1969

Second: People convicted of the following crimes:

A: The crimes provided for in Paragraph 2 of the article 1 of Iraqi High Criminal Court Law, No 10 of 2005

B: Terrorist crimes, if they caused a death or permanent disability

C: Crimes of voluntary killing

D: Crimes of involuntary manslaughter in which those related (to the crime) people refuse to abandon their personal rights

E: Crimes of abducting people

G: Crimes of embezzlement of state funds or despoiling of them

H: Crimes of rape or of homosexuality

I: Crimes of Incest

J: Crimes of counterfeiting Iraqi or foreign currency or of forging official documents

K: Crimes related to drugs

L: Crimes of trafficking in artefacts

M: Crimes which are laid out by the Military Penal Law, No. 19 of 2007

- COMMENTS: This law presents no problems from a gender-equality perspective. Indeed, those crimes which are considered sufficiently serious to prevent amnesty in Article 2 include crimes against women such as rape, incest, manslaughter and voluntary killing.

There is no mention that honour defences change this; therefore this law demonstrates that crimes against women are considered to be among the most severe crimes.

SUPREME NATIONAL COMMISSION OF ACCOUNTABILITY AND JUSTICE LAW
(NO. 10 OF 2008)

This law sets up a Supreme National Commission of Accountability and Justice to try and remove the Ba'ath Party and its officials from Iraqi society. Its de-Ba'athification procedures include collecting information on former Ba'athist officials and referring those who may be guilty of crimes to the courts, as well as ensuring that they are removed from public positions and civil society. It details the structure of the commission, including a Public Prosecutor to oversee investigations into crimes and to gather evidence.

- COMMENTS: This law presents no issues from a gender-equality perspective.

THE STATUTE OF THE IRAQI HIGH TRIBUNAL
(NO.10 OF 2005)

This statute sets up a special court to deal with crimes committed by the former regime, including providing jurisdiction for international crimes. It deals with the structure of the court, including qualifications for membership of the judiciary and the structure of the prosecutions department. It lays out the procedure and rules under which such trials can be conducted. None of this presents any issues of gender inequality.

The crimes for which Iraqis may be tried are genocide, crimes against humanity, war crimes, or violations of certain listed Iraqi laws.¹⁴⁰ In the definition of these crimes there is a recognition that crimes of violence against women are among the worst crimes for which serious penalties may be handed down:

Article 12.

a) For the purposes of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

Enslavement

Rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under

¹⁴⁰ Article 10

international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Tribunal;

Article 13.

For the purposes of this Statute, "war crimes" means:

a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: ...

Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

Committing rape, sexual slavery, enforced prostitution, forced pregnancy or any other form of sexual violence of comparable gravity; ...

d) Serious violations of the laws and customs of war applicable in armed conflict not of an international character, within the established framework of international law, namely, any of the following acts: ...

Committing rape, sexual slavery, enforced prostitution, forced pregnancy or any other form of sexual violence of comparable gravity...

This recognition is an important step towards taking violence against women seriously in all areas of the law.

VII. ELECTIONS LAW

The Law regulating elections in Iraq is an excellent example of laws that are both non-discriminatory in many provisions, but that also employ positive discrimination to ensure that women are represented at all levels of government. They are a leading model for countries around the world.

ELECTIONS LAW (NO. 16 OF 2005, AMENDED BY LAW NO. 26 OF 2009)

This law applies to the election of the House of Representatives.¹⁴¹ The right to vote is granted to those of Iraqi citizenship, legally competent, who are over 18 and registered.¹⁴² This upholds the right to vote of men and women equally, in compliance with Article 25 of the ICCPR, Article 7 of CEDAW and Article 20 of the Constitution, which states that ‘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.’

***Spreading a culture of human rights
requires academic and educational efforts
in our society, which can enhance the
performance of women parliamentarians
and activate the positive role they can play
in establishing the rule of law.***

***Recommendation of Gender Roundtable,
Dec. 2010***

The right to be a candidate and the organisation of such candidates is slightly more complicated. There are a number of provisions that discriminate by gender, either positively or negatively.

Article 6

A candidate must be a voter, in addition to the following:

- 4. He must not have been convicted of a crime that violates honour and must be known for his good conduct.*
- 5. He must have at least a high school certificate or its equivalent.*

- COMMENTS: While both of these provisions are gender-neutral, it may be harder for women to gain a high school certificate due to the difference in the number of women and men attending school.¹⁴³ It is also more likely that women may be convicted of crimes

¹⁴¹ Article 1

¹⁴² Article 3

¹⁴³ See ABA, Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf, pg 134

‘violating honour,’ although these are not defined, as offences such as adultery are likely to affect women in greater proportion.¹⁴⁴

Article 3 of 2009 Amendments

Third: seats shall be divided by re-arranging the candidates’ order based on the number of votes acquired by each candidate. The first winner shall be the candidate who gets the highest number of votes. The same applies to other candidates provided that the proportion of women is no less than one-quarter of the winners.

- This Amendment enforces a 25% quota of women members of the House of Representatives. This is a stronger requirement for female representation than the previous quota, which stated that 1/3 of the list of candidates for parties should be female. It complies with the Constitutional aim of ‘a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives,’¹⁴⁵ and is a leading figure both in the Middle East and throughout the world.¹⁴⁶ Only Tunisia comes close in the Middle East, with 22.7 percent of seats for women in the Chamber of Deputies, and 20.6 percent of local government representatives in 2007.¹⁴⁷ It is important that this one-quarter principle be translated into representation at high-level executive and ministerial positions in the future.¹⁴⁸

Article 14

First: If a member of the House loses his seat for any reason he shall be replaced by the next candidate on the list according to the order on the list.

Second: If the vacant seat belonged to a woman, it is not necessary that the woman be replaced by a woman unless not doing so would affect the percentage of women’s representation.

- COMMENTS: While the language used is somewhat confusing, this ensures that the minimum quota of 25% of women is kept even if a woman should lose her seat. This is a positive enforcement of the original quota.

¹⁴⁴ See Penal Code section

¹⁴⁵ Article 49 (4)

¹⁴⁶ See World Bank, Report on the Status and Progress of Women in the Middle East and North Africa, 2007, http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Overview_2007.pdf pg 50-58.

¹⁴⁷ See World Bank, Report on the Status and Progress of Women in the Middle East and North Africa, 2007, http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Overview_2007.pdf pg 56

¹⁴⁸ See ABA, Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq’s De Jure and De Facto Compliance with International Legal Standards, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf, pg 22-3

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

This law regulates local elections, and is an important mechanism for ensuring equality at all levels of government. As with the national law, it begins by ensuring equality for all in voting.

Article 3

This law shall aim to achieve the following:...

Second: The equality in the electoral participation

Third: Guaranteeing the rights of both the voter and candidate in the electoral participation

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...

Article 16

Third: Every individual that fulfills the voting conditions shall have the right to ask that his/her name be added to the initial registry of voters...

- COMMENTS: These provisions reinforce Article 20 of the Constitution, by ensuring that equality in voting is felt at all levels of election.

Article 13

Second: The seats shall be distributed to the candidates of the list and the candidates shall be re-ranked based on the number of the votes obtained by a candidate. The candidate who secures the highest number of votes within the list shall be deemed the winner and so on for the rest of candidates and to have a woman at the end of all three winners regardless of men winners.

- COMMENTS: This ensures that there is a quota of 25% female representation at the local government level.

Article 15

First: If the Council member loses his seat for any reason, the next candidate on the list in terms of the number of votes obtained shall replace him, and if the member is on a single list, run-off elections shall be held within the same electoral district.

Second: If the vacant seat belongs to a woman it would not be necessary to be replaced by another woman unless that would affect the percentage of women's representation.

- COMMENTS: This ensures that the quota is not disturbed by women losing seats after the election.

IECI REGULATION 09/2004 ON ELECTORAL CAMPAIGNING

IECI 09/2004 sets about the campaign period and conditions for electoral campaigns in Iraq pursuant to its authority under Coalition Provisional Authority (CPA) Order Number 92 of May 31, 2004.

- COMMENTS: This regulation does not implicate any specific women's issues.

IECI REGULATION 13/2005 POLLING AND COUNTING IN IRAQ

IECI 13/2005 establishes the polling and counting procedures for electoral campaigns in Iraq as authorized under CPA Order Number 92 of May 31, 2004.

- COMMENTS: This regulation does not implicate any specific women's issues.

Quotas have been introduced in Jordan for women's membership of the Judicial Institute of Jordan of 15%.¹⁴⁹

¹⁴⁹ See American Islamic Congress, A Modern Narrative for Muslim Women in the Middle East: Forging a New Future, 2010, http://www.aicongress.org/prog/Women/AIC_Womens_Narrative_2.pdf pg 20, and Bureau of Democracy, Human Rights and Labour, 2008 Human Rights Report: Jordan, 2009

VIII. REGULATION OF NON-GOVERNMENTAL ORGANISATIONS

Key Recommendations:

- **Repeal Article 226 of the Penal Code to ensure that NGOs have the freedom of speech guaranteed to them by the Constitution.**

LAW OF NON-GOVERNMENTAL ORGANISATIONS (NO. 12 OF 2010)

The NGO law's stated purpose is to 'enhance the role played by NGOs' in Iraqi society, and 'to promote the freedom of citizens to establish and join NGOs.'¹⁵⁰ It gives 'all natural or legal Iraqi persons' the 'right to establish, join, or withdraw from an NGO,'¹⁵¹ and 'any two or more NGOs registered in Iraq have the right to establish an NGO network.'¹⁵² It gives benefits to such NGOs, exempting them from income tax, VAT, customs duties and sales tax if an NGO 'seeks to achieve a public interest,' making it a 'public utility.'¹⁵³

- **COMMENTS:** Such provisions benefit women's rights in Iraq, as a strong civil society is essential to maintaining women's freedoms. This is in compliance with the Constitution, which states that 'the State shall seek to strengthen the role of civil society institutions, and to support, develop and preserve their independence in a way that is consistent with peaceful means to achieve their legitimate goals.'¹⁵⁴ It removes restrictions for NGOs under the previous law, allowing them to have a political focus and allowing them to merge.¹⁵⁵

However, NGOs must obtain legal personality,¹⁵⁶ and for an NGO to be classified as a public utility a proposal must be made by the Secretary General of the Council of Ministers to the Council of Ministers themselves, which may then grant such capacity.

- **COMMENTS:** While these conditions are commonplace in the region,¹⁵⁷ such conditions for registering NGOs may not be easy to achieve. Under the previous system, there were

¹⁵⁰ Article 2

¹⁵¹ Article 4

¹⁵² Article 28

¹⁵³ Article 17

¹⁵⁴ Article 45

¹⁵⁵ See Kareem Elbayar, NGO Laws in Selected Arab States, International Journal of Not-for-Profit Law, vol 7 no 4, September 2005, http://www.icnl.org/knowledge/ijnl/vol7iss4/special_1.htm

¹⁵⁶ Article 1

¹⁵⁷ See Kareem Elbayar, NGO Laws in Selected Arab States, International Journal of Not-for-Profit Law, vol 7 no 4, September 2005, http://www.icnl.org/knowledge/ijnl/vol7iss4/special_1.htm

concerns about the efficacy of the registration system,¹⁵⁸ and therefore it is important that the new system ensures that it is efficient, to guarantee that the full benefits of this law are felt. In Lebanon, a law from 1909 states that associations must only notify the government that they exist, rather than registering themselves.¹⁵⁹

PENAL CODE
(NO. 111 OF 1969)

Article 226

Any person who publicly insults the National Assembly or the government or the courts or the armed forces or any other constitutional body or the public authorities or official or semi-official agencies or departments is punishable by a term of imprisonment not exceeding 7 years or detention or a fine.

- COMMENTS: This provision violates Article 38 of the Constitution, which provides for freedom of expression, press and assembly. It undermines the ability of NGOs to speak out in support of measures or to criticise bad practices.
- SUGGESTIONS: This provision should be repealed or curtailed to ensure that it does not punish NGOs that speak out for women's rights.

¹⁵⁸ See Kareem Elbayar, NGO Laws in Selected Arab States, International Journal of Not-for-Profit Law, vol 7 no 4, September 2005, http://www.icnl.org/knowledge/ijnl/vol7iss4/special_1.htm

¹⁵⁹ See Kareem Elbayar, NGO Laws in Selected Arab States, International Journal of Not-for-Profit Law, vol 7 no 4, September 2005, http://www.icnl.org/knowledge/ijnl/vol7iss4/special_1.htm

IX. CITIZENSHIP LAW

Key Recommendations:

- **Ensure that information is disseminated so that women's new rights may be fully enjoyed.**

NATIONALITY ACT (NO. 26 OF 2006)

This Act represents a significant improvement in women's position in the law, and goes some way towards realising Article 18 of the Constitution. Iraq provides a leading example of respect for women in this area. It is highly important that information regarding the rules set out in this Act is fully disseminated to ensure that officials and all Iraqi women are aware of their new rights.¹⁶⁰

Article 3

A person shall be considered Iraqi if:

- a. he/she is born to an Iraqi father or an Iraqi mother*
- b. he/she is born in Iraq to unknown parents*

- **COMMENTS:** This change in the law allows all Iraqi nationals to pass on Iraqi citizenship by birth. This was the case under the Nationality Law of 1924, which was repealed by the 1963 Nationality Law, which only allowed men to pass on nationality to their children. Returning to the 1924 standard therefore marks an improvement in ensuring respect for women's status, and, in doing so, goes further than most countries in the region.¹⁶¹ It complies with Article 18 of the Constitution; that 'Iraqi citizenship is a right for every Iraqi' and 'anyone who is born to an Iraqi father or to an Iraqi mother shall be considered an Iraqi.'

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 the Iraqi nationality.

¹⁶⁰ Some concerns to this effect were noted in ABA, Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf

¹⁶¹ See World Bank, Report on the Status and Progress of Women in the Middle East and North Africa, 2007, http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Overview_2007.pdf pg 59-67

Article 5

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: These provisions mean that passing on nationality is not yet entirely equal for men and women, in violation of Article 14 of the Constitution, Article 26 of the ICCPR and Article 15 of CEDAW. Also, as it appears that Iraq has removed its reservation to Article 9 of CEDAW,¹⁶² this is in violation of Iraq's obligations under that provision. It places conditions on the equality guaranteed to children in this matter set out in Article 18 of the Constitution. However, this law does represent a significant improvement on the previous rule.
- SUGGESTIONS: These conditions and discriminatory provisions should be removed to leave Article 18 of the Constitution governing nationality.

Article 7

The Minister may approve naturalisation of a non-Iraqi married to an Iraqi woman subject to the conditions set forth in Article 6 hereof, provided the period of residence stipulated in Paragraph c of Item I of Article 6 hereof shall be no less than five years and on condition of continued wedlock.

Article 6

The minister may approve naturalization of non-Iraqis subject to the following conditions:

- a. That the person concerned has come of age*
- b. That the person concerned has legitimately entered Iraq into and has residing within Iraq at the time of applying for naturalisation*
- c. That the person concerned has been legitimately residing within Iraq for ten consecutive years prior to applying for naturalisation*
- d. That the person concerned is of good conduct and reputation and was not convicted on an offense or dishonourable misdemeanour*
- e. That the person concerned has conspicuous means of livelihood; and*
- f. That the person concerned is free of communicable diseases*

Article 11

A non-Iraqi woman married to an Iraqi shall have the right to acquire Iraqi nationality subject to the following conditions:

- 1. That he has submitted an application to the Minister;*
- 2. That she has been married and resident within Iraq for five years; and*

¹⁶² See Above, section on International Law

3. *That she has been engaged in wedlock up to the date of application. Exempted from this condition shall be any divorced or widowed woman, who has a child from her divorcee or deceased husband*

- COMMENTS: Again, it can be seen that the provisions for non-Iraqi spouses are different for men and women, in violation of Articles 14 of the Constitution, 15 of CEDAW and 26 of ICCPR. However, this represents an improvement on the previous law.

X. SOCIAL SECURITY

Key Recommendations

- **Ensure that under Articles 81 and 83 of the Labour Code women are not forbidden from certain areas of work in which they might be able to find employment.**
- **Amend Article 3 of the Workers' Pension and Social Security Act and Article 3 of the Pension and Social Security for Workers Act to include all professions within the workers and pensions scheme.**
- **Under the Labour Code, the Workers' Pension and Social Security Act, the Pension and Social Security for Workers Act and the Civil Code, ensure that schemes that force private-sector employers to provide certain benefits to women are distributed indirectly so that employers do not discriminate against women due to expensive benefits, while also ensuring that women retain the benefits granted to them under such schemes.**
- **Ensure that the Public Health Law is supported by regulations and infrastructure that allow it to function effectively on the ground.**
- **Ensure that the Constitutional right to education is effected by legislation.**

Iraqi Law sets out a sophisticated system of social security laws, with laws covering social welfare as well as regulations surrounding health, labour, pensions and compensation for work. These laws are in the main gender-neutral, and at times recognise the differences and difficulties that women face, by offering women extra services. However, the way such provisions are played out in real life may mean that such protective provisions may in fact harm women's economic health. Furthermore, women are not covered by certain schemes.

The Ministry of Labour and Social Affairs has founded a number of institutes in this area; the Social Security Institute and the Cultural Foundation of Labour,¹⁶³ the General Organisation of Work and Vocational Training,¹⁶⁴ the National Centre for Social and Criminal Research,¹⁶⁵ and the Public Institution for Social Welfare and the Public Institution for Social Reform.¹⁶⁶ It is important to ensure that these institutions work to help ensure that women are protected by policy and practice, as well as by law.

¹⁶³ Introduced by Law No. 39 of 1967, according to the Ministry website:

<http://www.molsa.gov.iq/english/enubtha.aspx>

¹⁶⁴ Set up by the Employment Act No. 151 of 1970, according to the Ministry website:

<http://www.molsa.gov.iq/english/enubtha.aspx>

¹⁶⁵ Act No. 3 of 1972, according to the Ministry website: <http://www.molsa.gov.iq/english/enubtha.aspx>

¹⁶⁶ Act No. 196 of 1978, according to the Ministry website: <http://www.molsa.gov.iq/english/enubtha.aspx>

Social Welfare for Women

According to the Ministry of Labour and Social Affairs, the Social Welfare Law No. 126 of 1980 remains in force¹⁶⁷ and states that the State shall endeavour to ensure the social welfare of every citizen during his lifetime and of his survivors after his death.¹⁶⁸ Article 3 states that the State has a goal of providing for the social security of all citizens in the event of disability and old age. Under Article 13, low-income families¹⁶⁹ and zero-income families,¹⁷⁰ as well as widows and divorcees with minor children, are entitled to a family welfare allowance.¹⁷¹

- COMMENTS: While it is unclear if the practical application of this scheme lives up to its aspirations, under these provisions women and families are specifically provided for to ensure that they receive some form of security when they are in need. This is in compliance with Article 30 of the Constitution, which mandates that the ‘State shall guarantee to the individual and the family--especially children and women--social and health security, the basic requirements for living a free and decent life, and shall secure for them suitable income and appropriate housing.’ It appears also to be yielding some real practical benefit; according to the Iraqi Submissions to the Human Rights Council, the renewed social security policy at the end of 2008 had benefited 86,095 widows, 2,939 divorcees and 1,114 refugees in Baghdad.¹⁷² It is important that women become fully aware of their rights to receive such security.

¹⁶⁷ See <http://www.molsa.gov.iq/english/enubtha.aspx>. It is also cited in the CEDAW Committee’s Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of all Forms of Discrimination Against Women, CEDAW C/IRQ/2-3. However, the author has been unable to get a copy of this law to verify the provisions

¹⁶⁸ Article 2

¹⁶⁹ Less than the minimum wage of an unskilled worker where the family is five or more, less than 75% of that amount where the family is four, less than 70% when the family is three, 66% when it is two and 33% if it is one.

¹⁷⁰ No incoming wage at all

¹⁷¹ According to the CEDAW Committee’s Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of all Forms of Discrimination Against Women, CEDAW C/IRQ/2-3, pg 21

¹⁷² Pg 12

Right to WorkLABOUR CODE
(NO. 71 OF 1987)

This sets out strong guarantees of equality in the introductory chapter.

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...

Article 4

This Code guarantees every worker the right to earn a wage which is adequate to meet his essential needs and those of the worker's family and to enable the worker to benefit for the results of economic progress. The following factors shall therefore be taken into account in determining wages:

(2) The principle of equality of remuneration for the same type and the same quantity of work performed under identical circumstances

Article 8

(2) For purposes of this code, 'worker' means any person who performs work in return for wages, in the service of an employer and under the employer's authority and supervision. 'Employer' means any individual or legal entity who employs one or more workers in return for wages.

- COMMENTS: These provisions are in compliance with Iraq's Constitutional Obligations under Article 22 and 16 of the Constitution, as well as international obligations regarding the right to work under CEDAW (Article 11(1)(a)) and the ICESCR (Article 6), the right to equal remuneration for work of equal value under ICESCR (Article 7 (a) (i)) and CEDAW (Article 11 (1) (d)) and the ILO Equal Remuneration Convention No. 100 of 1951.

However, there are a few provisions regarding the right to work that treat women and men differently:

Article 81

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 Section 57 of this Act.

Article 82

It shall be prohibited to assign pregnant women additional work which is likely to endanger their health or the health of the foetus.

Article 83

(1) *It shall be prohibited to make women work at night, unless the performance of night work is required by the necessity of preventing loss of raw materials or perishable products.*

(2) *Women workers shall be entitled to a period of at least 11 consecutive hours of rest each day, and that period must include 7 hours falling between 9pm and 6am.*

(3) *Subsection (1) of this section does not apply to:*

- (a) *women workers engaged in administrative work;*
- (b) *women workers employed in health or recreational services; or*
- (c) *women workers employed in transport or communication services*

- **COMMENTS:** These provisions are intended to protect women from being forced to undertake difficult or strenuous work. Article 82 fulfils Iraq's obligations under CEDAW Article 11 (1) (f) and 11 (2) (d). However, they demonstrate a paternalistic attitude towards women workers and may prevent women who wish to work in these areas from doing so.
- **SUGGESTIONS:** Ensure that women are granted the opportunity to work in all areas.

CIVIL CODE
(NO. 40 OF 1951)

Article 907

(3) *It is allowed in certain industries such as hotels, restaurants, coffee houses, and beverage places that the worker will not receive any wages other than the tips he gets and the food he eats.*

We need to ensure there are projects for women within all projects to enhance Iraqi industry, especially for women in the category of family breadwinner. We need to create incentives for employers to hire more women, for example in banking.

***Recommendation of Gender Roundtable,
Dec.2010***

- **COMMENTS:** Such industries may be more likely to employ female workers, and therefore this provision could allow *de facto* discrimination in pay between female and male workers. However, in a difficult economic climate where work is somewhat hard to come by, such a provision may actually allow women to gain some employment and income when, without such a provision, no work may be available.

Regulation of Work and Work BenefitsLABOUR CODE
(NO. 71 OF 1987)

The Labour Code deals with the 'Protection of Women Workers' in Part VI, Chapter 1. This guarantees women certain rights in the workplace:

Article 80

Any employer employing one or more women is required to post at the workplace a copy of the provisions regarding the protection of women workers.

Article 88

Every employer employing women shall provide them with special facilities in relation to the particular requirements of their work.¹⁷³

- COMMENTS: These provisions recognise that there are societal issues in the workplace that may hinder women's participation, and take steps to deal with them, in compliance with ILO Discrimination (Employment and Occupation) Convention No. 111.

The Labour Code also entitles those women not working in family businesses¹⁷⁴ to maternity leave:

Article 84

(1) Every woman worker is entitled to 62 days maternity leave at full pay.

(3) The competent medical service may extend the period of leave referred to in subsection (1) for up to 9 months in the case of a difficult childbirth, the birth of more than one child, or the appearance of complications before or after confinement. Days which exceed the length of the leave provided for in subsection (1) shall be counted as unpaid leave, unless the woman is subject to the Law on Pensions and Social Security for Workers.

Article 86

(1) A worker mother may, with the consent of her employer, take a special unpaid maternity leave for a period of up to one year in order to take care of her child, provided the child has not reached one year of age.

¹⁷³ This does not include women working in family businesses, Article 89

¹⁷⁴ Article 89

Article 87

(1) Nursing mothers shall have a nursing break of up to 1 hour during working hours; the nursing break shall count as an hour of work.

(2) A woman worker with one or more children under the age of six may be absent from work without pay for a period of up to 3 days whenever one of her children is sick and needs her care.

- COMMENTS: This in many ways demonstrates a sophisticated system for protecting women's right to work, and recognises the necessity of maternity leave for allowing women access to the workplace. According to CEDAW, such provisions are necessary under the provisions of Article 11 (2), as well as Article 10 (2) of the ICESCR. However, these provisions place the burden of providing maternity benefits directly on the employer. According to statements made at the Committee on Economic, Social and Cultural Rights' meeting regarding Iraq, the State pays the greatest share in such schemes (although not in other schemes such as pensions)¹⁷⁵ If the State does not pay a greater share, or if the scheme is not administered indirectly, this may lead to manifest discrimination in employing female workers.
- SUGGESTIONS: Studies have demonstrated that these provisions do help women to gainful employment, so long as they are administered in a way that places no immediate burden on employers, either by social security funding or taxes. If the scheme can be organised centrally, so that the benefits are accorded not by the number of female employees, but by the total number of employees of both sexes, then the burden is indirect and the risk of discrimination is greatly reduced. It is important, therefore, to ensure that employers do not bear the immediate financial burden of providing these benefits, to ensure that there is no discrimination against women based on these provisions.¹⁷⁶

Article 89

The provisions of this Chapter do not apply to women who are engaged in a family enterprise in which only family members work and which is under the authority and supervision of the woman's spouse, father, mother or brother.

- COMMENTS: In excluding women working in family businesses, this deprives such women from protection during pregnancy. According to the CEDAW Committee, States must 'take the necessary steps to guarantee payment, social security and social benefits for women who work without such benefits in enterprises owned by a family member.'¹⁷⁷ However, in an economic climate where it is very difficult for both women and men to

¹⁷⁵ 35th Meeting: Iraq 11/27.1997, E/C.12/1997/SR.35, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G97/194/40/PDF/G9719440.pdf?OpenElement>

¹⁷⁶ See World Bank, *The Economic Advancement of Women in Jordan: A Country Gender Assessment*, 2005, pg xvii and 17

¹⁷⁷ General Recommendation No. 16 (Tenth Session, 1991)

find work, this may ensure that these women can contribute to a business and be employed, even if they may be under hardship during pregnancy.

The Labour Code sets out rules on the hours of work that employees can perform. However, under Article 66, these provisions 'do not apply to workers in agriculture or to domestic workers.' Such workers are more likely to be women than in other sectors,¹⁷⁸ and therefore this may be discriminatory in its effect. However, the lack of regulation of hours in these sectors may actually allow women to increase their participation in the economy without overregulation, therefore yielding a benefit.

WORKERS' PENSION AND SOCIAL SECURITY LAW (NO. 112 OF 1969)

This sets up a comprehensive scheme, funded in part by the government and in part by private employers, to ensure that workers are fully protected.

Article 3

The provisions of this Law cover all workmen including apprentices, with the exception of the following groups:

- (b) Those employed by their husbands or wives or father or mothers or sons or daughters.*
- (c) Those in casual, emergency and temporary employment or seasonal works except where otherwise provided for¹⁷⁹*
- (f) Domestic servants and the like*
- (g) Those working in agriculture, sheep and cattle breeding and forestry, with the exception of those employed by the Government in her official and semi-official departments...*

- COMMENTS: The areas of employment here listed are dominated by women workers and are the traditional sector in which women may work.¹⁸⁰ Therefore this discriminates

¹⁷⁸ See ABA, Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf, pg 162, and the World Bank, Report on the Status and Progress of Women in the Middle East and North Africa, 2007, http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Overview_2007.pdf pg 44, stating that the agricultural sector has 90 percent women labourers

¹⁷⁹ Article 1:

7: *Casual or Emergency Work: The work which occurs to an employer who is covered by this Law, and shall be out of the scope of his work, provided that the period fixed for its completion does not exceed a six months limit*

8: *Temporary work: The work limited within a certain period, so that the period fixed for its completion does not exceed a six months limit...*

9: *Seasonal Work: The work of which the nature restricts its completion to certain seasons or intervals of the year, provided that its period does not exceed the six months limit*

against women by excluding those professions dominated by women from this workers' insurance and pension scheme. Under Article 11 (1) (d -e) of CEDAW, the right to equal remuneration includes the right to benefits, and also includes the right to social security while incapable of work. The Constitution in Article 30 stipulates that women have a right to 'social and health security.'

- SUGGESTIONS: Include all workers, including domestic servants and agricultural workers, within the scheme.

The scheme grants an insured woman maternity benefit under Article 32 if she abstains from work, and if the contributions paid on her behalf are paid in at least 6 of the 12 preceding months. This shall be payable for 12 weeks, 6 before the expected date and 6 afterwards.¹⁸¹ She will also be entitled to receive 5 dinars if 'labour resulting in the birth of a live child' results.¹⁸²

- COMMENTS: This allows insured women further benefits than those granted under the Labour Code. These contributions must be made by the employer in advance, although they are partly funded by the government. As above, to ensure the full efficacy of these provisions, the employer must not be directly responsible for the benefits.
- SUGGESTIONS: Ensure that the payment of maternity benefits does not come directly from the employer.¹⁸³

The scheme allows a funeral grant of 15 dinars on death of the insured person, to the spouse (husband or wife) or, if not existing, then to the most sensible major of his children or that person who has made the payment.¹⁸⁴

- COMMENTS: This provision provides for funeral expenses to whoever is likely to need them most, and is a good example of laws recognising need regardless of gender.

Article 38

(1) An insured person shall be entitled to receive an old-age pension on the fulfillment of the following conditions:

(a) Has attained the age of sixty in the case of a man and fifty-five in the case of a woman...

¹⁸⁰ See ABA, Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf, pg 162

¹⁸¹ Article 32

¹⁸² Article 34

¹⁸³ See World Bank, The Economic Advancement of Women in Jordan: A Country Gender Assessment, 2005, pg xvii and 17

¹⁸⁴ Article 35

- COMMENTS: While this differentiation appears advantageous to women, it ‘hampers the expansion of women’s participation in the economy,’ as it lowers compensation, and ‘may reinforce the perception of women as secondary and unequal contributors to the labour force and household income.’¹⁸⁵ However, it does give both women and men (who fall under the scheme) a pension at the specified age.

The scheme also provides for a survivor’s pension:

Article 39

(2) The following dependants shall be eligible to survivor’s pension. The words ‘son’ and ‘grandson’ shall include males and females, unless otherwise provided.

First group:

(a) Widow or widows

(b) The widower, if at the death of his wife, he was being maintained by her and was permanently incapable of self-support

(c) The son (male) Who has not attained the 15th year of his age or the son (male) who has not attained the 23rd year of his age unmarried and continuing his studies, or the son (male) who is permanently incapable of self-support irrespective of his age. The girls shall continue to receive pension, which shall be terminated on her marriage, death or employment in normal work.

Second group:

(a) The father or the mother, who at the death of the insured person or the pensioner was being supported by him, provided that the father is incapable of earning.

(b) The unmarried sister who at the death of the insured person or the pensioner, was being supported by him and who is not employed in normal work.

(c) The full orphan grandson under 15 years of age, who at the death of the insured person or the pensioner was being supported by him.

(3) Dependents of the Second group shall be entitled to survivor’s pension, if there are no dependents in the First Group or in case of their existence, their claims to survivor’s pension do not attain the maximum provided for in Para 8 of Article 49.

(4) Subject to the provisions of Paras (2 and 3) of Article 53, survivor’s pension payable upon the death of the insured person shall be terminated in the following cases:

(a) In case of marriage or death of the widow or widower or employment in normal work

(b) If the son (male) attains the age of 15 years or the age of 23 years if he is continuing his studies or upon employment in normal work, or upon his marriage or death or discontinuation of his studies, after attaining the age of 15 years

(c) On the death of the father or mother their marriage or employment in normal work

(d) On the marriage or death of the sister or employment in normal work

¹⁸⁵ See World Bank, *The Economic Advancement of Women in Jordan: A Country Gender Assessment*, 2005, pg 45

(e) When the grandson attains the age of 15 years or the age of 23 years if he is continuing his studies or employed in normal work or, upon his marriage or his death or discontinuation of his studies, after attaining the age of 15 years.

Article 49

Calculation of benefits for survivor's pension

Widow or widows or widowers: 50%

Child (full orphan): 50%

Child (half orphan): 25%

Father: 25%

Mother: 25%

Sister: 25%

Grandchild: 25%

- COMMENTS: This provides a scheme that ensures non-discrimination in distributing pensions, both in terms of whether the deceased is male or female and whether the survivor is male or female.

Article 68

If the employment of an insured person is terminated for one of the following reasons, the institute may pay him a compensation for one time only...

(1) Resignation of a married woman

- COMMENTS: Allowing women who may be forced to retire resignation compensation provides them with support that they may otherwise not be eligible for.

PENSION AND SOCIAL SECURITY FOR WORKERS ACT (NO. 39 OF 1971)

This works alongside the above act, and organises the contributions that workers and employers make to fund a social security, disability and pension payment scheme, representing 'the minimum of social securities.'¹⁸⁶

Article 3

A. This law shall apply ...to all workers contained in the provisions of the Law of Pension and Social Security No. 112 of 1969

- COMMENTS: Therefore it excludes the same areas of employment as those under the 1969 law, which are dominated by women. The same concerns and suggestions may be made under this law as under Article 3 of the 1969 Law.

¹⁸⁶ Article 4

Under this scheme, pregnant women may leave work a month before birth, and may remain off work for at least six weeks afterwards on full pay.¹⁸⁷ This leave may be extended by the medical authority in cases of difficult birth, or more than one child, or complications or disease for up to 9 months on sick leave pay.¹⁸⁸ She is granted health care at treatment either in the clinic or at home, including X rays, laboratory analysis, domestic service in case of disability, hospitalization, consulting specialists, treatment and clinical examination.¹⁸⁹ If at the end of this period she is still unable to return to work, she shall be granted a sickness pension, which may be modified periodically.¹⁹⁰

Under this scheme workers are granted up to 8 days of full paid sick leave, with treatment and medicine paid for.¹⁹¹

Article 65

The secured worker shall be entitled at the termination of his service to pension salary in one of the following cases:

- A. If the man completed his sixtieth year of age or if the woman completed her fifty-fifth year of age and any one of them has twenty secured years of service at least*
- B. If the man has thirty years of secured service at least or the woman has twenty-five years of secured service at least*
- C. If he dies during the process of his secured service and his registration in the establishment is proved and the subscription is paid for it before the death without consideration to the period of his service or the quantity of paid amounts.*

- COMMENTS: This provision provides for different ages before pensions may be granted for men and women. The Comments to Article 38 of the 1969 scheme apply.

Article 78

If the service of a secured worker is terminated and he has not fulfilled the conditions of entitlement to the pension salary he shall be granted a lump sum cash compensation in one payment... The fraction of a year shall be considered as a complete year in one of the following cases:

- B. If the secured woman worker resigned from her work because of her marriage or delivery.*

- COMMENTS: This entitles women forced to resign from work to some compensation.

There are further provisions for a survivor's pension.

¹⁸⁷ Article 48

¹⁸⁸ Article 48

¹⁸⁹ Article 45

¹⁹⁰ Article 50

¹⁹¹ Article 43

Article 72

In this Law the successor shall mean the following:

A. The husband if he is not able to work during the death of his secured wife and he was dependent on her in his maintenance and he has no private revenues.

B. The wife if she has no work and she did not marry after the death of her secured husband and she has no private revenue. Wives in cases of polygamy shall be considered as one person.

The entitlement shall be shared in equal among them.

C. Male children, the age of each one of them is not exceeding seventeenth year, except if he is unable to work or continuing his secondary study until the age of twentieth. The girls except those who got married of them or who trespass the seventeenth of age if she has private revenue or an ordinary work or post.

D. The father if he is unable to work during the death of secured worker and he was dependent in his maintenance on him. And the mother who has no private revenue and she was dependent in her maintenance on her secured son.

E. Brothers who are under the sixteenth year and dependent in their maintenance on the secured worker. Sister each who is not married if she has no private revenue and no permanent wage work and no post and she was dependent in her maintenance on the secured worker.

Article 74

A. If all entitled successors were of those persons who are mentioned in Paras A B and C of article 72, the salary shall be divided equally among them...

B. If all the entitled successors were of those persons mentioned in Paras D and E of Article 72 of this Law the salary shall be distributed equally among them

C. If among the entitled successors exist individuals of the preceding two Paras of this Article the salary shall be distributed on the basis of two shares to each of entitled to Para A of this article and one share to each entitled to Para B of this Article

Article 75

The share of any of the successors shall not be less than three Dinars provided that the total of distributed entitlements on successors must not exceed the original pension salary. But if it exceeds then the minimum limit for successor entitlement shall be in all cases two Dinars at least without considering the excess. The minimum limit shall be raised anew to three Dinars whenever the total of distribution decreased from the original pension salary and in the limits of this amount.

- COMMENTS: This demonstrates limited discrimination between men and women. However, the differences set out mirror the practical position of the sexes in Iraqi law and do not present a threat to women's position.

Health LawPUBLIC HEALTH LAW
(NO. 89 OF 1981)

This sets out the general scheme of health care for Iraq. It is an ambitious piece of legislation, guaranteeing equality to all. It grants to everyone the right to 'full medical fitness, physical, mental and social,' and places obligations on the state to provide the 'requirements conducive to the enjoyment of this right.'¹⁹² This is in compliance with the right to health, broadly defined in the ICESCR,¹⁹³ and with the Constitutional guarantees of the right to health: 'the State shall guarantee to the individual and the family--especially children and women--social and health security,'¹⁹⁴ and 'every citizen has the right to health care.'¹⁹⁵

It furthermore incorporates concerns about women's needs:

Article 3

The organs of the Ministry of Health shall...

3: Provide family health care, maternity and childhood nursing and old age care.

Article 6

The aim of the maternity, childhood and family health care is to fulfill the duty of the community and the State towards the mother and the child from the fertilisation stage.

Article 7

In the area of maternity, childhood and family health care, the Ministry shall endeavour to attain its objectives by the following means:

- 1: Set up maternity, childhood and family health care centres all over the Country.*
- 2: Perform the necessary medical examinations on couples seeking marriage to show their eligibility and soundness and to furnish the couples concerned with appropriate health certificates.*
- 3: Ground the wife medically and psychologically to abiding her role and future responsibilities as a mother.*
- 4: To monitor the health of the pregnant mother and her foetus by periodical examinations, and to capacitate her nutritionally.*
- 5: To offer guidance to the family to allow a reasonable time interval between one pregnancy and the next as will best suit the health of the mother, the child and the family.*

¹⁹² Article 1

¹⁹³ See ESCR Committee, General Comment No 14, para 4

¹⁹⁴ Article 30

¹⁹⁵ Article 31

Article 8

1: Permissions shall be obtained from the health authority for the opening of nurseries in accordance with instructions issued for this purpose.

2: The health authority shall exercise periodical supervision over the nurseries to ensure the continuing presence of the conditions laid down and the soundness of the personnel of the centres.

Article 22

...The Ministry shall, in cooperation with the authorities....

7: Undertake offering nutritional care for children, pregnant women, nursing mothers and the elderly for prevention or to cure malnutrition.

- COMMENTS: This is an excellent example of legislation that cares for women's needs without discriminating against them, in compliance with the ICESCR, which requires a gender perspective be included in health-related policies and programs.¹⁹⁶ However, there are concerns as to whether, in fact, this translates into services for women on the ground. The ABA Report on the Status of Women in Iraq reports that the distribution of health services is disproportionate, security factors are a barrier to access to health care, and that there has been significant mismanagement of health resources.¹⁹⁷ Furthermore, it reports that, while public health services such as immunisation, prenatal care and health education are provided free of charge at public health centres, there is a user charge applied for visits outside of this, as well as economic difficulties in purchasing medicines and travelling to clinics, as well as long wait times and short consultations.¹⁹⁸ Societal factors such as young marriage and restrictive use of family planning services, increased childbirth rates, and lack of education or information on services are hindering the utility of such legislation.¹⁹⁹ It is important to ensure that the legal guarantees set out in this legislation, alongside the strong Constitutional rights to health set out in Article 30 and 31, actually provide help on the ground to people in need.

There are also provisions in other legislation to provide health services at work or privately,²⁰⁰ including the Pension and Social Security for Workers Act, which requires the establishment to formulate 'a special program for construction of hospitals for maternity, woman and children diseases,'²⁰¹ and the establishment of 'social centres and building of hospitals, houses of delivery, nursery and kindergarten.'²⁰²

¹⁹⁶ See ESCR Committee, General Comment, No 14, para 20

¹⁹⁷ Iraq Legal Development Project, The Status of Women in Iraq, De Jure and De Facto Compliance with International Standards, pg 42-43

¹⁹⁸ Iraq Legal Development Project, The Status of Women in Iraq, De Jure and De Facto Compliance with International Standards, pg 43

¹⁹⁹ Iraq Legal Development Project, The Status of Women in Iraq, De Jure and De Facto Compliance with International Standards, pg 45-6

²⁰⁰ See maternity leave provisions, above

²⁰¹ Article 48

²⁰² Article 81

Education Law

Under Article 34 of the Constitution, ‘education is a right guaranteed by the state. Primary education is mandatory and the state guarantees that it shall combat illiteracy...free education in all its stages is a right for all Iraqis.’ Under Article 16, ‘equal opportunities shall be guaranteed to all Iraqis, and the state shall ensure that the necessary measures to achieve this are taken.’

- COMMENTS: This is in compliance with Article 13 of the ICESCR. However, it does not lay out more detailed rights or policies on education, as the 1970 Constitution did. In that Constitution, Iraq set out commitments to education in rural areas, adult learning, and education as a tool for development of the person.²⁰³ Furthermore, there are concerns over whether the security and economic situation in Iraq allows these rights to be realised.²⁰⁴ A survey of women in Iraq conducted by Women for Women International in 2005 found that an overwhelming 95.1% felt that it was important to educate women and girls,²⁰⁵ and in 2008, 65.1% maintained that it was extremely important to the welfare and development of their communities that women and girls could access education.²⁰⁶
- SUGGESTIONS: In legislation on education or constitutional amendments, more detailed commitments to education could ensure the efficacy of the general rights. Further legislation is needed to lay out the details of how the right to education will be realised.

²⁰³ Articles 27 and 28

²⁰⁴ See ABA, Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq’s De Jure and De Facto Compliance with International Legal Standards, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf pg 134

²⁰⁵ Women for Women International, Windows of Opportunity: The Pursuit of Gender Equality in Post-War Iraq, 2005, pg 16, http://www.womenforwomen.org/news-women-for-women/files/Iraq_Paper_0105.pdf

²⁰⁶ Women for Women International, Stronger Women Stronger Nations: 2008 Iraq Report, Amplifying the Voices of Women in Iraq, <http://www.womenforwomen.org/global-initiatives-helping-women/files/IraqReport.03.03.08.pdf>

XI. PERSONAL STATUS/FAMILY LAW

Key Recommendations:

- **Amend Article 9 of the Personal Status Code to ensure that women forced or duped into marriage can annul the marriage even after consummation.**
- **Repeal or amend Article 17 of the Personal Status Code to allow Muslim women to marry non-Muslim men.**
- **Repeal Article 3 of the Personal Status Code permitting polygamy.**
- **Amend or repeal Articles dealing with the husband's and wife's duties and say in the household, such as Articles 26 and 33 of the Personal Status Code, to allow women and men equality in marriage with mutual rights and duties, or at least restrict the situations in which the wife must obey the husband and allow the wife equal say in the composition of the household.**
- **Amend the divorce options under Articles 34, 37, 40-43 and 46 of the Personal Status Code so that men and women have equal opportunities to end and leave marriages.**
- **Repeal Articles 47 and 48 of the Personal Status Code requiring *iddat*, or make them equal for men and women.**

PERSONAL STATUS CODE (NO. 188 OF 1959)

The Iraqi Personal Status Code sets out the main body of rules regulating family practices. When it was enacted more than 50 years ago it was groundbreaking--granting rights to women that were not found elsewhere in the Middle East and extending the rights available to women in Iraq. However, a number of Resolutions and Orders by the RCC reduced these rights significantly, and there has been little progress in subsequently repealing these orders.

Legal reform of personal status laws is controversial. Resolution 137 was proposed by the Iraqi Governing Council at the end of 2003; 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, willing, holding of estate, and all Religious Courts in accordance with the mandates of their Sect.'

A large advocacy campaign supported by many women's activists and human rights groups led to the withdrawal of this resolution by the IGC. However, the threat of such a law being passed in the future cannot be ignored, as support for the resolution was significant. Therefore, reform of

the Personal Status Code is controversial, and may also stimulate those who believe that the Personal Status Code should be abolished altogether. However, other countries have been successful in reforming this area of the law in a way that conforms with women's rights--through sustained advocacy campaigns, collaboration with international actors, gender-neutral language and interpretations of Islam that have allowed reforms to be sanctioned.²⁰⁷

The Personal Status Code is one of the areas in which the tension between the component parts of Article 2 of the Constitution is most keenly felt. While a number of the articles in the Personal Status Code conflict with the Constitutional and International Law provisions on equal rights and freedoms for men and women, they may be in compliance with Islamic principles, and vice versa. Therefore it is here where much of the discussion on the effect of the Constitution will be felt at a practical level. Iraqi activists point out that changes to family laws might pose challenges, given that they are rooted in Islamic laws and Iraqi customs.

There has also been concern expressed at the effect of Article 41 of the Constitution,²⁰⁸ which states that 'Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs or choices, and this shall be regulated by law.' This has many different potential ramifications for women. According to El-Karama, 'this Article will allow individuals to claim on legal grounds that sectarian religious laws can supersede obedience to the laws of the state,' compromising women's status by placing 'women's rights at the mercy of the interpretations by the religious leaders and not the law or elected leaders.'²⁰⁹ 'Although Article 2 of the new constitution dictates that such rules must comply with the Constitution, including Article 14's equal protection requirements, application of similar provisions in other Arab states, along with the current dominance of religious conservatism in Iraq, casts serious doubt on whether any new system of confession-specific personal status regulations would be consistent with a constitutional framework that clearly supports both supremacy of the Constitution over other forms of law and equal protection under the law for all people regardless of gender, religion or sect.'²¹⁰ It is therefore submitted that this interpretation of Article 41 should be resisted if women's equal position in society and under the Constitution is to be maintained. The withdrawal of Resolution 137, which would have achieved a similar effect, supports this position.

Article 41 could also be interpreted as mandating different courts for Sunni, Shi'a and non-Muslims, or it could result in a court system with different courts for each recognised religion in

²⁰⁷ See Women Living Under Muslim Laws, *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World*, 2006, <http://www.wluml.org/node/588> pg 4

²⁰⁸ See UNIFEM, Regional Office Amman, *Suggestions for Amendments to Iraqi Constitution*, March 12 2006

²⁰⁹ El-Karama, Iraq: Stakeholder Report to the UN Universal Periodic Review Process by Karama-February 2010

²¹⁰ ABA, Iraq Legal Development Project, *the Status of Women in Iraq: Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards*, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf pg 5

Iraq, as in Lebanon.²¹¹ This would allow Iraqis ‘a menu of choices,’ rather than ‘boundless freedom of choice,’ which would be impractical.²¹² It finally could be interpreted as allowing all citizens freedom of religion and practices while being bound by the secular Personal Status Code, or that it could continue to govern as a non-sectarian or civil option for those who wish to use it.²¹³

In any event, it appears that the Personal Status Code is still in force, as under Article 130 of the Constitution, ‘existing laws shall remain in force, unless annulled or amended in accordance with the provisions of this Constitution.’ The below analysis therefore is premised on the Personal Status Code being in force.

Article 1

2: If there is no applicable legislative text, the judgment shall be adjudicated in accordance with the Islamic Shari’a principles that are most relevant to this law.

3: Courts find guidance in all of this in the stipulations adopted by the judiciary and the Islamic jurisprudence (Fiqh) in Iraq and other Islamic countries where laws are close to Iraqi ones.

- **COMMENTS:** The first part of this article may represent an obstacle for women’s rights, depending on how ‘Islamic Shari’a principles’ are interpreted. ‘Islamic Shari’a principles’ are not fixed, and may refer to a number of different rules, some of which do not allow women a full position in society. If such rules were favoured, this could represent a damaging diversion from the Constitutional guarantees of equality. This appears to be the basis for the practice in Iraqi Personal Status Codes requiring the testimony of two women to be equal to that of one man, based on the Quran Verse 282,²¹⁴ in violation of Article 15.2 of CEDAW.²¹⁵ See further section on Court Procedure.
- **SUGGESTIONS:** It is suggested that this article now must be read in accordance with Article 2 of the Constitution and therefore that there is a balance between the rights and freedoms accorded in the Constitution and the Islamic principles, ensuring that women’s rights are respected. The practice of requiring the testimony of two women for that of one man should be repealed.

²¹¹ See ABA, Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq’s De Jure and De Facto Compliance with International Legal Standards, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf pg92

²¹² Nathan Brown, The Final Draft of the Iraqi Constitution: Analysis and Commentary, Carnegie Endowment for International Peace, <http://www.carnegieendowment.org/files/FinalDraftofIraqiConstitution1.pdf> pg 6

²¹³ See Nathan Brown, The Final Draft of the Iraqi Constitution: Analysis and Commentary, Carnegie Endowment for International Peace, <http://www.carnegieendowment.org/files/FinalDraftofIraqiConstitution1.pdf> pg 6

²¹⁴ See ABA, Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq’s De Jure and De Facto Compliance with International Legal Standards, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf , pg 94

²¹⁵ See the section on Court Procedure

Marriage is regulated entirely by the Code. It is a 'contract between a man and a woman who is lawfully permissible to him...to establish a bond for a mutual life and procreate children.'²¹⁶ A contract of marriage is 'an offer expressed by one of the two parties...either verbally or customarily, and the acceptance of the other party' or that party's agent.²¹⁷ This contract is valid if each party understands that marriage is offered, and that offer is accepted.²¹⁸ Under Article 6, the wife may revoke the contract if the husband fails to fulfill the conditions set out in it.²¹⁹ Normally both parties must be sane and 18.²²⁰ The woman 'must not be lawfully forbidden to the man who wants to marry her,'²²¹ and this includes 'men from the same category of kinship.'²²²

- COMMENTS: There may be some concern that offers of marriage can be accepted by a party to a marriage's agent, as this may mean that a woman's family can arrange or consent to a marriage without her knowledge or consent. However, these provisions generally lay out a version of marriage that ensures consent from and protection for the woman, in particular ensuring that the wife cannot be tricked into marriage if the husband fails to fulfill the conditions that he has promised. In requiring the consent of both spouses, it complies with Article 23 of the ICCPR. However, there are concerns regarding the extent to which in practice these provisions are actually complied with.²²³

Article 8

1: If a 15-year-old person asks to be married, the judge can authorise his marriage if the eligibility and physical ability of the person in question was proven to him, after obtaining the approval of his legal guardian. If the guardian abstains from responding the judge calls upon him to state his answer during a defined period. Thus, if the guardian does not object or if he submits an objection that is unworthy of consideration, the judge shall proceed to authorising the marriage.

2: The judge can authorise the marriage of a 15-year-old person if he sees in it an urgent necessity. Giving such authorisation is also conditional upon the attainment of legal puberty and physical ability.

- COMMENTS: As women tend to be married younger than men, this provision may sanction marriage for young women before they may wish to be married. While this is contingent either on the asking of the 15-year-old or 'urgent necessity,' these concepts are not defined. Therefore the 'urgent necessity' could stem from the loss of virginity of a young

²¹⁶ Article 3 (1)

²¹⁷ Article 4

²¹⁸ Articles 5 and 6

²¹⁹ FN 219 Article 6

²²⁰ Article 7

²²¹ Article 12

²²² Article 14

²²³ See ABA, Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf pg 107

woman, whether consensual or not, and thus force her into a marriage that she does not wish. It therefore could violate Article 23 of the ICCPR.

Article 9

1: No relative or non-relative has the right to force marriage on any person, whether male or female, without their consent. The contract of a forced marriage is considered void if the marriage is not yet consummated. Moreover, none of the relatives or other people has the right to prevent whoever is eligible for marriage from being married by virtue of the provisions of this marriage law.

2: A first degree relative who breaches the provisions of paragraph 1 of this article shall be sentenced to no more than three years imprisonment and charged with a fine of a specified amount...

- COMMENTS: This provides some protection against forced marriages. However, if the marriage is consummated, it cannot be voided by this provision, leaving those subject to forced marriages (often women) with no protection. Morocco offers more protection for women, as under Articles 12 and 63 of the Family Code of 2004 the marriage is annulled if the injured party protests within 'two months from the date when the duress was lifted, or she or he discovered the fraud,' and 'she or he has the right to demand compensation.'²²⁴ Furthermore, the penalty for breaching this provision is relatively mild. In practice, it would also appear that this is not enforced often enough. In Senegal, Tunisia, Morocco, Pakistan and Turkey such a marriage is void.²²⁵
- SUGGESTIONS: An amendment ensuring that a party coerced or duped into marriage can annul the marriage even after coercion would increase protection for women at risk of abuse.

Article 11

1: If a man avows to a woman that she is his wife and there is no legal or lawful impediment to the marriage and she believes him, her marriage to him is validated by his avowal.

2: If a woman avows that she has married a man and he believes her as she is alive and there is no legal or lawful impediment to the marriage, their marriage would be validated. But if he admits believing her only after her death, marriage between them will not be validated.

- COMMENTS: While this presents slightly different conditions for men and women avowing marriage, in practice this is unlikely to create any disadvantage for women.

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.

²²⁴ See <http://www.wluml.org/sites/wluml.org/files/moudawana-english.pdf>. There is also a criminal penalty for defrauding a party into marriage

²²⁵ See Women Living Under Muslim Laws, Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World, 2006, <http://www.wluml.org/node/588>, pg 82, 90

- **COMMENTS:** This provision is straightforwardly discriminatory and deprives Muslim women of the choice to marry whomsoever they choose. While acknowledging the discrepancy between the choices afforded to men and women, some Iraqi legal experts point out that to repeal this provision would be contrary to Islamic law which sets out that Muslim women may not marry non-Muslim men. These reservations notwithstanding, this provision violates Article 23 of the ICCPR. In the 1998 proposed code in Lebanon, there is no mention of the religion of the intending spouses.²²⁶ In Morocco, rather than allowing both Muslim men and women to marry whomever they choose, both Muslim men and women are subject to constraints on marrying those from other religions.²²⁷
- **SUGGESTIONS:** This provision should be repealed.

Article 3

4: *Marrying more than one woman is not allowed except with the authorisation of the qadi (judge). Granting this authorisation is dependent on the fulfilment of the following two conditions:*

A: *The husband should have the financial capacity to provide for more than one wife.*

B: *There is a legitimate interest.*

5: *If justice between wives is feared, polygamy may not be allowed. The issue would then be left to the judge's determination.*

6: *Each person who concludes a marriage contract with more than one wife, contrary to the stipulations of paragraphs 4 and 5, shall be sentenced to no more than one year of imprisonment or charged with a fine not exceeding 100 Dinars or both.*

7: *Exception from the provisions of paragraphs 4 and 5 of this article: marriage to more than one woman is permissible when the prospective wife is a widow.*

- **COMMENTS:** There are concerns that the restrictions placed on polygamy here may not be being followed in full, leaving even less protection for women.²²⁸ But allowing polygamy, even if it is restricted as above, deprives women of an equal partnership in marriage. Current wives appear to have no power to override the judge's determination in this matter. Furthermore, according to the ABA translation of this Code, taking back a wife after having pronounced divorce upon her is not considered as a marriage to more than one woman in the sense mentioned above, which allows a man to take back a wife after remarriage. The CEDAW Committee has noted that in Iraq 'insufficient attention is being given to modifying harmful traditional and cultural practices, such as polygamy,' and

²²⁶ See Women Living Under Muslim Laws, *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World*, 2006, <http://www.wluml.org/node/588> pg 102

²²⁷ Although the provisions allow Muslim men to marry Christians and Jews, but not Muslim women. See <http://www.wluml.org/sites/wluml.org/files/moudawana-english.pdf> Article 39

²²⁸ See ABA, Iraq Legal Development Project, *the Status of Women in Iraq: Assessment of Iraq's De Jure and De Facto Compliance with International Legal Standards*, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf, pg 108

‘urges the Government to work towards the elimination of the practice of polygamy.’²²⁹ Under the original Penal Code polygamy was regulated more strictly,²³⁰ and in Kurdistan, polygamy is only allowed in cases of chronic disease, infertility and recalcitrance, with a penalty of three years’ imprisonment and a fine up to 2 million Dinars for violating these provisions,²³¹ demonstrating the potential for this provision to be repealed. In Tunisia polygamy is illegal;²³² in Djibouti, the consent of the first wife is required;²³³ and in Morocco ‘exceptional and objective motives’ must be proven,²³⁴ and the first wife is given a say in a specified arbitration procedure.²³⁵

- SUGGESTIONS: This provision should be repealed.

Article 26

1: *A husband should not house with his wife, without her consent, her fellow wife in the same dwelling....*

3: *A husband has the right to house his parents or one of them with his wife in the marriage dwelling, and the wife has no right to object to that.*

4: *A husband has the right to house with his wife in the same dwelling whoever is legitimately responsible for their maintenance, provided that no harm would be inflicted on her as a consequence.*

- COMMENTS: As above, polygamy is in violation of Iraq’s commitments under International Law. This provision as a whole demonstrates a patriarchal view of family life that deprives women of a meaningful say in the running of the household. It violates Iraq’s obligations under Article 23 ensuring that equal rights of spouses include ‘running of the household.’²³⁶ In Morocco, as part of the ‘mutual rights and duties’ of spouses, they are both entitled to ‘consultation on decisions concerning the management of family affairs, children, and family planning,’ and ‘good relations with each other’s parents and close

²²⁹ Report of the CEDAW Committee, 22nd and 23rd session, A/55/38, 2000, <http://www.universalhumanrightsindex.org/documents/826/688/document/en/pdf/text.pdf> paras 186 and 191

²³⁰ See ABA, Iraq Legal Development Project, the Status of Women in Iraq: Assessment of Iraq’s De Jure and De Facto Compliance with International Legal Standards, 2006, http://www.abanet.org/rol/publications/iraq_status_of_women_update_2006.pdf, pg 2

²³¹ See Stigall, Iraqi Civil Law: Its Sources, Substance and Sundering, J. of Transnational Law and Policy, Vol 16:1, 1, pg 51

²³² See Women Living Under Muslim Laws, Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World, 2006, <http://www.wluml.org/node/588> pg 204

²³³ See World Bank, Report on the Status and Progress of Women in the Middle East and North Africa, 2007, http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Overview_2007.pdf pg 60

²³⁴ See Moroccan Family Code, Article 42, <http://www.wluml.org/sites/wluml.org/files/moudawana-english.pdf>

²³⁵ See Moroccan Family Code, Articles 43-45, <http://www.wluml.org/sites/wluml.org/files/moudawana-english.pdf>

²³⁶ Human Rights Council, General Comment No 19, para 8

relatives, respecting, visiting and hosting them within accepted standards.²³⁷ In Turkey, spouses have joint decision-making powers regarding the family,²³⁸ and in Algeria, spouses have mutual rights and responsibilities including mutual consultation in the management of family affairs and birth spacing and respect for each other's relatives and the right to visit them.²³⁹

- SUGGESTIONS: The husband and wife should have equal say in the composition of the household.

Article 33

The wife shall not obey her husband in any matter that conflicts with the rulings of the Shari'a and the judge has the right to decide on alimony for her.

- COMMENTS: While this provision is framed to allow the wife to disobey her husband in certain areas, it leaves the wife obligated to obey her husband so long as his order does not conflict with Shari'a rulings, meaning that in the vast majority of situations she must obey his order. The limited nature of the defence to disobeying a husband is therefore a far-reaching provision that deprives women of their decision-making ability in many situations. It violates Iraq's obligations under Article 23 of the ICCPR. In Morocco, the 2004 Family Code has completely removed women's submission to male family members, leaving spouses with 'mutual rights and duties,' including 'mutual respect and affection'.²⁴⁰ In Tunisia the 1956 Personal Status Code gives legal equality to men and women, changing the law from 'a woman must respect her husband's prerogative and obey him' to 'each of the spouses shall treat the other kindly and avoid any prejudicial action.'²⁴¹
- SUGGESTIONS: Repealing this provision would mean that the wife is granted full respect in her own autonomy. Another possible reform would be to amend this provision to state that the wife must *only* obey her husband in situations demanded by Shari'a law, allowing her more freedom to make decisions.

²³⁷ Article 31 of the Moroccan Family Code, <http://www.wluml.org/sites/wluml.org/files/moudawana-english.pdf>

²³⁸ See Women Living Under Muslim Laws, Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World, 2006, <http://www.wluml.org/node/588> pg 160

²³⁹ See Women Living Under Muslim Laws, Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World, 2006, <http://www.wluml.org/node/588> pg 161

²⁴⁰ Article 31, see <http://www.wluml.org/sites/wluml.org/files/moudawana-english.pdf> See also World Bank, Report on the Status and Progress of Women in the Middle East and North Africa, 2007, http://siteresources.worldbank.org/INTMENA/Resources/MENA_Gender_Overview_2007.pdf pgs 64 and 65

²⁴¹ Article 23 of the Tunisian Personal Status Code, according to World Bank, Gender and Development in the Middle East and North Africa: Women in the Public Sphere, 2004

The Code also regulates divorce, ‘to sever the bond of marriage,’ which can be done by the husband, wife, an authorised representative or the judge, and ‘must be performed according to Shari’a.’²⁴² While the husband can perform the divorce ‘by pronouncing three repudiations,’²⁴³ the wife may only have recourse to the provisions on ‘separation,’ available to both spouses.²⁴⁴

The right to separation occurs if one spouse has injured the other or the children to make marital life impossible, infidelity, marriage before 18, forced marriage that was consummated, the husband taking another wife without permission of the court²⁴⁵ or dissension verified by arbitrators and failing to be resolved.²⁴⁶ The wife has the right to ask for separation if the husband is facing three or more years of incarceration; if he has abandoned her for two years or more; if the husband has not had a wedding two years after the conclusion of the contract and it has not been consummated; if he is impotent or infertile with no child, or has a disease making sexual intercourse harmful; if he abstains from spending money on her without excuse; if no alimony has been collected from the husband if he has been absent for a year; if no alimony is settled; if the husband is an Iraqi living outside Iraq for at least three years; or if the husband was declared missing four years previously. In these cases the wife must return the entire amount of the dowry and expenses for the marriage if this is before consummation.

Under article 46, the bond of marriage may also be severed by ‘pronouncing the formula of *khul*’ before a judge, by offer and acceptance, and the husband must be qualified to divorce his wife. The husband may divorce his wife in this manner in return for compensation.

- COMMENTS: The different provisions for men and women in separation or divorce make it considerably harder for women to separate from their husbands than for men to divorce their wives. While there are a number of situations enumerated wherein wives can be separated from their husbands, this is not enough to give them sufficient freedom to leave marriages in which they no longer want to remain. The different standards violate Article 23 of the ICCPR, which includes obligations ensuring that there is no discrimination with respect to the grounds and procedures for separation and divorce.²⁴⁷ In Morocco, divorce rights are equal for both men and women, and either party may petition for divorce on the basis of ‘irreconcilable differences.’²⁴⁸ According to the World Bank, women also have a right to get a divorce by the court in Algeria, Bahrain, Djibouti, Egypt, Iran, Jordan, Kuwait, Libya, Oman, Qatar, Syria, Tunisia and the UAE (although this may be under

²⁴² Article 34

²⁴³ Article 37

²⁴⁴ Articles 41-43

²⁴⁵ Article 40

²⁴⁶ Article 41

²⁴⁷ Human Rights Council, General Comment No. 19, para 9

²⁴⁸ See Part Four of the Moroccan Family Code, <http://www.wluml.org/sites/wluml.org/files/moudawana-english.pdf> See also American Islamic Congress, A Modern Narrative for Muslim Women in the Middle East: Forging a New Future, 2010, http://www.aicongress.org/prog/Women/AIC_Womens_Narrative_2.pdf pg 25

different circumstances than men).²⁴⁹ In Algeria, Morocco and Tunisia, divorce by mutual agreement or consent is recognised,²⁵⁰ and the husband may not unilaterally renounce his wife.²⁵¹ Furthermore, allowing men to divorce their wives so easily leaves women without protection when marriages end against their wishes.

- SUGGESTIONS: The provisions should be amended to provide women and men with equal rights to leave marriages if they so choose.

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

2: *If the woman reached puberty but has never menstruated, her iddat after separation shall be of three full months.*

3: *The iddat of the woman whose husband is deceased is four months and ten days. If a woman is pregnant, she must observe an iddat of four months or for the period remaining until delivery of her child, whichever is longer.*

- COMMENTS: The provisions on *iddat* clearly discriminate against women, as only women are required to observe the waiting period. That is in clear violation of Article 14 of the Constitution, Article 26 of the ICCPR and Article 15 of CEDAW.
- SUGGESTIONS: The provisions on *iddat* should be eliminated.

The Code also sets out a number of duties for members of the family: a mother should breastfeed her child if possible,²⁵² while the expense of nursing that child is the responsibility of the one in charge of his alimony.²⁵³ Each person shall provide for their own maintenance apart from wives who shall be maintained by their husbands,²⁵⁴ a father shall provide for a child without money if he can afford to, and parents shall provide for their children until the girl gets married and the

²⁴⁹ Report on the Status and Progress of Women in the Middle East and North Africa, 2007, pg 21

²⁵⁰ See Women Living Under Muslim Laws, Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World, 2006, <http://www.wluml.org/node/588> pg 253

²⁵¹ See Women Living Under Muslim Laws, Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World, 2006, <http://www.wluml.org/node/588> pg 262

²⁵² Article 55

²⁵³ Article 56

²⁵⁴ Article 58

boy's peers are earning money,²⁵⁵ a rich child shall provide for poor parents²⁵⁶ and a poor person shall be taken care of by his rich relatives.²⁵⁷

- COMMENTS: These provisions force both men and women into traditional roles in which they may not be comfortable. They violate Article 23 of the ICCPR which requires equal rights of spouses in the duties of each party during marriage.²⁵⁸ However, in the context of Iraqi society, these provisions may actually represent protection for women.

While CEDAW's Article 16 also places a number of obligations on States Parties on equality before, during and after marriage, Iraq has entered a reservation on that Article. However, Iraq has not placed a reservation on its obligations under Article 23 of the ICCPR, meaning that the reservation does not absolve Iraq of its right in this regard.

- SUGGESTIONS: Iraq should withdraw its reservation to Article 16 of CEDAW, as the CEDAW Committee called upon it to do.²⁵⁹

JUVENILE WELFARE LAW (NO. 76 OF 1985)

As well as dealing with juvenile delinquency,²⁶⁰ this law also regulates the removal of paternal authority over the minor where the interest of the minor, juvenile or community requires it.²⁶¹ The Court may remove guardianship if a judgment has been passed against the guardian as regards a crime derogatory to honour or public morals, if the guardian has been convicted of a crime of assault on the juvenile, or if the guardian has committed a crime, the penalty for which is at least three years.²⁶²

It then provides for 'annexation' of these minors, which places the burdens of a parent on those annexing the minor. While the applicants must pay the minor's expenses 'until the female shall get married or work and the boy reaches the limit which his similars could be earned [the time at which his peers begin to earn] unless he is a pupil or incapable of learning,' the provisions in the main present no gender equality obstacles.

²⁵⁵ Article 59

²⁵⁶ Article 61

²⁵⁷ Article 62

²⁵⁸ See Human Rights Council, General Recommendation No. 19

²⁵⁹ CEDAW 'Consideration of Reports of States Parties under Article 18 of CEDAW: Iraq', 23d Session, 2000, para 23

²⁶⁰ See the section on Criminal Law,

²⁶¹ Article 2

²⁶² Article 32

XII. COURT PROCEDURE

Key Recommendations:

- Amend Article 1 of the Criminal Procedure Code to allow criminal proceedings and investigation to be initiated without a written complaint, if police or investigative judges have sufficient information.
- Repeal or amend Article 3 of the Criminal Procedure Code to ensure that rape, polygamy and other offences that are currently 'private' can be prosecuted without a complaint from the victim, while taking the victim's wishes into account.
- Amend Article 9 of the Criminal Procedure Code to allow prosecution of a crime to continue if there is sufficient evidence, even if the victim removes his complaint.
- Amend Articles 194-196 of the Criminal Procedure Code to ensure regulation of conciliation proceedings, preventing the risk of improper pressure on victims.
- Repeal or amend Article 57 of the Criminal Procedure code, removing provisions allowing interested parties to observe the investigation of crimes.
- Amend Articles 58, 87, 59, 63 and 176 of the Criminal Procedure Code to allow witnesses to opt out from giving testimony in court.
- Amend Articles 72 and 73 of the Criminal Procedure Code to ensure that the police have authority to enter a home in cases of emergency, without the necessity of a judicial order.
- Amend Articles 92, 93 and 103 of the Criminal Procedure Code so that in emergency situations police may arrest suspects and ensure their detention.
- Ensure that for Articles 152, 199, 338 and 339 of the Criminal Procedure Code there are efficient appeals procedures to regulate discretion by the investigative judge.
- Amend Article 4 of the Public Prosecutor Law so that the victim's wishes are taken into account when the Public Prosecutor is considering whether to continue the case on the basis of the victim's privacy.
- Repeal Article 93 of the Civil Actions Law, to ensure that judges are recused from all cases of possible bias.
- Repeal Article 98 of the Civil Actions Law, so that religious courts follow the provisions of the Civil Actions Law and the Evidence Law, ensuring that women are not discriminated against in giving testimony.

CRIMINAL PROCEDURE CODE
(NO. 23 OF 1971)

This sets out the procedure for criminal trials. On their surface, the provisions cited below do not appear to discriminate against women. However, on deeper inspection it appears that many of the provisions may, in fact, make it more difficult for women to bring complaints to trial.

Article 1

A: Criminal proceedings are initiated by means of an oral or written complaint submitted to an investigative judge, a [judicial] investigator, a policeman in charge of a police station, or any crime scene officer by an injured party, any person taking his place in law, or any person who knows that the crime has taken place. In addition any one of those listed can notify the Public Prosecution unless the law says otherwise. In the event of a witnessed offence the complaint may be submitted to whichever police officers or sub-officers are present.

- COMMENTS: This may be problematic for women in a number of situations. Many crimes affect women disproportionately, such as domestic violence and honour killings; such crimes may be difficult to report, or crimes which victims themselves may not wish to report. Without independent investigation by police or investigative judges this may leave victims of such crimes without a remedy because they may be unwilling to report the crime themselves for fear of repercussion. Given that Article 1 of CEDAW states that the obligation to prevent discrimination against women includes that which has the *effect* of discrimination, as well as the purpose, this violates Article 15 of CEDAW against non-discrimination.
- SUGGESTIONS: Allow criminal proceedings and investigations to be initiated without a written complaint, if police or investigative judges have sufficient information to begin.

Article 3

A: The complaint can only be set in motion on the basis of a complaint from the aggrieved party or someone taking his place in law in relation to the following offences:

- i. Adultery or polygamy in contravention of the law of personal circumstance.*
- ii. Slander, verbal abuse, divulging secrets, threats or slight injury provided that the offence was not committed against someone in the performance of a public service or because of it.*
- iii. Theft, rape, breach of trust, fraud, or acquisition of items by these means, if the aggrieved party is a spouse or descendent of the perpetrator and these items were not seized legally or administratively or legally transferred to another person.*

- COMMENTS: This sets out those offences that are ‘private,’ in that only the victim or his agent at law may report them. This means that there is no public prosecution for rape, adultery or polygamy. Yet all these offences affect women in greater numbers than men;

women are overwhelmingly the victims of rape, those who would complain in cases of polygamy, and those accused of adultery. This means that victims need to come forwards themselves to ensure that cases are prosecuted, which may be very difficult if they are pressed by their abuser not to report, or influenced by concerns over 'family honour.' This discriminatory effect violates Article 15 of CEDAW.²⁶³ While taking a victim's wishes into account in these circumstances is important, particularly if the victim is in danger of being branded an adulterer, or accused of violating the family honour, this goes too far in forcing victims to bring the complaint themselves.

- SUGGESTIONS: Ensure that rape, polygamy and other 'private' offences can be prosecuted without a complaint from the victim, while taking the victim's wishes into account.

Article 9

A: The submission of the complaint should include the claim for criminal justice, which is a petition that penal measures be taken against the perpetrator of the offence and for the penalty to be imposed on him. The written complaint includes the claim for civil justice as long as the complainant does not declare otherwise.

C: The person who submitted the complaint has the right to withdraw from it...

F: If the plaintiff withdraws his complaint, he will, as a consequence, lose his right to criminal justice but will not lose his right to submit a civil case unless by his own declaration.

- COMMENTS: Allowing the victim to withdraw a complaint may be important for that victim's protection. However, the fact that if a complainant withdraws then there can be no 'criminal justice' means that complainants may face intense pressure from defendants, families, or friends to withdraw a complaint and leave an offender at large. This is concerning for cases such as honour killings or domestic violence, which overwhelmingly involve female victims, as there is no protection from the law for bringing the cases if a complaint is withdrawn due to pressure from others.
- SUGGESTIONS: The prosecution should be able to continue if there is sufficient evidence to prosecute, even if the victim removes his complaint, while taking the victim's wishes into account.

Article 194

Conciliation is acceptable by decision of the investigative judge or court if requested by the victim or the person representing him legally in the case. Action on the complaint will be suspended in accordance with the provisions laid out in the following paragraphs:

²⁶³ When interpreted alongside Article 1

Article 195

A: If the offence indicated in Article 194 is punishable by a term of detention of a year or less or by a fine, conciliation is acceptable without reference to the judge or court.

B: If the offence is punishable by a period of detention exceeding a year, conciliation is only possible through reference to the judge or court.

Article 196

B: Conciliation is not acceptable if accompanied by conditions.

- COMMENTS: These conditions may save court time and money, but they again raise concern over intimidation or pressure on the witness or victim. The fact that conciliation maybe accepted without reference to the judge or court for offences of a year or less would include offences such as honour killings, and therefore could subject victims and witnesses to intense pressure to conciliate outside the court.
- SUGGESTIONS: Conciliation proceedings should be regulated to prevent the risk of improper pressure on victims.

Article 10

A person who has suffered direct material or ethical damage from any offence has the right to bring a civil case against the accused and the person responsible under civil law for the actions of the accused, under the provisions of Article 9.

Article 21

The civil plaintiff has the right to abandon his civil case under any circumstances. This abandonment will have no effect on the criminal proceedings except in circumstances stipulated by the law.

Article 22

The absence of the plaintiff or his representative without an acceptable excuse will be considered an abandonment of the criminal proceedings at the first court session after legal notification has been carried out.

- COMMENTS: Allowing civil complaints by those affected by criminal actions provides extra support to victims, while streamlining criminal and civil procedures. The right to abandon the case is less problematic for civil proceedings than for criminal proceedings and therefore this is not problematic.

The Code also sets out the procedure for investigating and prosecuting offences. Crime scene officers, defined broadly in Article 30, are authorised to receive complaints and inquire into

offences, to assist judges and police and to apprehend defendants.²⁶⁴ If they become aware that an offence has been committed in the presence of witnesses, they are required to notify the investigative judge and the public prosecution and to investigate thoroughly.²⁶⁵ If a victim discovers that an offence is being investigated without their complaint, and anyone learning that a suspicious death has occurred, may inform the investigative judge, the Public Prosecution or the police.²⁶⁶ Policemen receiving information on a felony or misdemeanour must immediately record the informant's statement and get it signed, but if the information concerns an infraction, a summary report of the offence is sent to the judicial investigator or investigative judge, giving the names of the informant and witnesses and the charged offence.²⁶⁷ If the policeman or the judicial investigator thinks that action is necessary immediately, the policeman may conduct an investigation immediately.²⁶⁸ Normally the investigation is conducted by the judicial investigator or the investigative judges. Under Article 57, 'an accused person, a plaintiff, a civil plaintiff, a person responsible in civil law for the actions of the accused and their representatives may attend the investigation while it is in progress.'

- COMMENTS: Having the accused present at the investigation may raise concerns of influence over the investigation so that it is not fully independent. This is particularly the case for controversial crimes such as honour killings or domestic violence, which tend to affect women more than men. The potential for the plaintiff to attend may also cause problems for women accused of adultery. The potential for influence over the prosecution by either side limits the independence of the prosecution, which is essential for ensuring that women's rights are upheld--particularly as women are less likely to be able to leave the house and attend an investigation. This discriminatory effect may violate Article 15 of CEDAW.²⁶⁹
- SUGGESTIONS: Remove provisions allowing interested parties to observe the investigation of crimes.

Article 58

An investigation is to commence with the recording in writing of the deposition of the plaintiff or informant, then of the testimony of the victim, and other prosecution witnesses and of anyone else whose evidence the parties wish to be heard...if such information will be of benefit to the investigation, and the testimony of any other persons who the investigative judge or [judicial] investigator learns is in possession of information concerning the incident.

²⁶⁴ Article 41

²⁶⁵ Article 42

²⁶⁶ Article 47

²⁶⁷ Articles 49 and 43

²⁶⁸ Article 50

²⁶⁹ When interpreted alongside Article 1

Article 87

The court, investigative judge, [judicial] investigator or policeman in charge of a police station may issue a summons to the accused or to a witness or to anyone connected with the case.

- COMMENTS: It appears that the testimony given in the investigation process is compelled, as there are no provisions for opting out. For women who fear repercussions or family dishonour if they testify, this provision may place them in danger. While clearly witness and plaintiff testimony is important, compelling it may imperil women or force them to remove their complaint.
- SUGGESTIONS: Allow witnesses to opt out from giving testimony in the investigation process, or at least consider the concerns of witnesses regarding compelled testimony.

We must attend to the education, training and support to build a culture of impartial judges--they are the tool for enforcing the Constitution and our laws.

Recommendation of Gender Roundtable, Dec. 2010

Article 59

A: Witnesses are to be summoned by the investigative judge or [judicial] investigator to attend during the investigation by means of a writ of summons...

Article 63

B: The accused and other parties may make observations on evidence given and may ask for a witness to be questioned again, or for other witnesses to be questioned about other facts to which they refer, unless the investigative judge considers that a response to the request would be impossible or impracticable or would delay the investigation unjustifiably or would pervert the course of justice.

Article 176

If the witness refuses to swear the oath or give testimony, other than in cases where this is permissible by law, the court may issue a sentence against him as prescribed by law for refusal to testify and may order the reading of his previous statement which should then be treated as a testimony which was given in front of the court.

- COMMENTS: The same concerns apply to these provisions for the courtroom as to the investigation itself (see Article 58 comments).
- SUGGESTIONS: Allow witnesses to opt out from giving testimony in court, or at least consider the concerns of witnesses regarding compelled testimony.

Article 68

A: No married person shall be a witness against his or her spouse unless he or she is accused of adultery or an offence against the spouse's person or property.

- COMMENTS: The exception here for offences against the spouse's person and property is important to ensure that in cases of domestic violence, honour crimes and rape, spouses may testify against one another, protecting women who may have been abused to ensure that prosecutions may continue.

Article 70

The investigative judge or [judicial] investigator may compel the plaintiff or accused in a felony or misdemeanour case to cooperate in physical examination or the taking of photographs, or through fingerprinting or analysis of blood, hair, nails, or other items for the purposes of the investigation. Physical examination of a female should be conducted by another female.

Article 80

If a female is to be searched, the search must be conducted by a female appointed for the purpose.

- COMMENTS: The recognition that the physical examination of a female should be performed by another female was added by a subsequent amendment to the Code. This recognises the difficulties with women undergoing physical examinations and tests. It ensures that women's privacy and modesty is protected.

Article 72

A: The searching of any person or entry of any house or any business premises for the purposes of search are not permitted other than in cases stipulated by law.

B: The search should be undertaken by the investigative judge, [judicial] investigator or a member of the police force by order of the judge, or anyone granted authority by the law.

Article 73

The searching of any person or entry of a house or other business premises for the purpose of a search is not permitted unless based on an order issued by the competent legal authority.

Article 83

The search should take place in the presence of the accused and the owner of the house or place of business, if appropriate, and in the presence of 2 witnesses, along with the mayor or his appointee.

- COMMENTS: These provisions ensure the privacy of homeowners, as recognised by Article 17 of the Constitution, which states that 'every individual shall have the right to personal privacy so long as it does not contradict the rights of others and public morals,' and 'the sanctity of the homes shall be protected. Homes may not be entered, searched, or

violated, except by a judicial decision in accordance with the law.’ However, this raises concern in situations of domestic violence, leaving those subject to abuse (often women) without fast recourse, as to enter a house requires a decision by the investigative judge. This may potentially violate the right to life, security and liberty found in Article 15 of the Constitution and Article 6 of the ICCPR, as in *A.T. v Hungary*²⁷⁰ the CEDAW Committee recognized that ‘women’s human rights to life and to physical and mental integrity [endangered by domestic violence] cannot be superseded by other rights, including the right to property and the right to privacy.’²⁷¹ The fact that the accused and the owner of the house and two witnesses are supposed to be present, as well as the necessity for a judicial order, leaves women in need without protection from law enforcement. This discriminatory effect may also violate Article 15 of CEDAW.²⁷²

- SUGGESTIONS: Ensure that the police have authority to enter a home in cases of emergency without the necessity of a judicial order.

Article 92

Arrest or apprehension of a person is permitted only in accordance with a warrant issued by a judge or court or in other cases as stipulated by the law.

Article 93

The arrest warrant should contain the full name of the accused, with his identity card details and physical description if these are known, as well as his place of residence, his profession, and the type of offence to which the warrant relates, the legal provision which applies and the date of the warrant. It should be signed and stamped by the court. In addition to the details given, the warrant should contain an instruction to members of the police force to arrest the accused, by force if he will not come voluntarily.

Article 103

Any policeman or crime scheme officer must arrest any of the following if they encounter them:

- i. *Any person against whom an arrest warrant has been issued...*
- iii. *Any person thought, based on reasonable grounds, to have deliberately committed a felony or misdemeanour and who has no particular place of residence.*

- COMMENTS: These articles make it very difficult for the police to arrest someone without a detailed arrest warrant. This is a time-consuming exercise that gives rise to the same concerns as under the previous articles. While the right to privacy must be protected, there must be the power to arrest suspects so that the right to life, security and liberty of persons under Article 15 of the Constitution remains intact.

²⁷⁰ Communication No: 2/2003

²⁷¹ *Id.*, para 9.3. See also *Yildirim v Austria*, Communication No. 6/2005 para 12.1.5; ‘the perpetrator’s rights cannot supersede women’s human rights to life and to physical and mental integrity’

²⁷² When interpreted alongside Article 1

- SUGGESTIONS: In emergency situations it must be possible for police to arrest suspects and ensure their detention.

The Code sets out the provisions for how offences are sent to court,²⁷³ 'if the act is punishable by law and the investigative judge finds that there is sufficient evidence for a trial.'²⁷⁴ Trial sessions are open 'unless the court decides that all or part should be held in private and not attended by anyone not connected with the case, for reasons of security or maintaining decency,' and the court 'may forbid the attendance of certain groups of people.'²⁷⁵ If the witness is excused from attending due to inability, the investigative judge may travel to the witness' home to interview them there and send a written report back to the court.²⁷⁶

- COMMENTS: These provisions on their face present no problems for women, and may offer protection from intimidation in the courtroom. However, due to the broad discretion granted to the judge in such cases, it is important that effective appeals mechanisms are set in place to ensure that this discretion is not abused to prevent women from having a fair say in court.

Article 199

A: The Chief Prosecutor may request that the Court of Cassation put an end to the procedures of examination or trial, either temporarily or permanently, in any case up to the point of the issue of the final verdict, if there is a reason justifying this action.

B: The request must include the justification...

C: The Court of Cassation checks the request and decides whether to accept it and suspend proceedings permanently or temporarily...

- COMMENTS: The broad discretion accorded to the Court in this case raises the same concerns as in the previous comments. It is important to ensure that appeals mechanisms limit the possibility for abuse of this discretion.
- SUGGESTIONS: Ensure that there are efficient appeals procedures to regulate discretion by the investigative judge.

Article 338

The court which issued a judgment, or its successor, may issue a decision to pardon a given custodial sentence for an offence for which conciliation is possible...

²⁷³ Article 134

²⁷⁴ Article 130

²⁷⁵ Article 152

²⁷⁶ Article 173

Article 339

A: The request for a pardon is submitted by the victim, or anybody representing him in law.

- COMMENTS: These provisions show two of the concerns often raised in this area of law; the possibility of intimidation of the victim and witnesses, and the possibility of abuse of unchecked discretion by officials.
- SUGGESTIONS: Ensure that there are efficient appeals procedures to regulate discretion by the investigative judge. Ensure that the court can check that no improper influence has been brought to bear on victims requesting pardons.

PUBLIC PROSECUTOR LAW
(NO. 159 OF 1979)

This law lays out in detail the institution of the Public Prosecution and how it operates. As a general rule Public Prosecutors do not bring cases themselves, but intervene on behalf of one side or another.

The Public Prosecutor can express his opinion on various matters in a criminal trial, including the secrecy of the trial and the excuses of absent witnesses. The prosecution may attend and follow up civil cases where the state is a party or there is a criminal element, to make statements and express views.²⁷⁷ The Public Prosecutor in the appellate district shall consider cases that have special importance, and supervise the work of investigators and members of law enforcement.²⁷⁸

Article 4

A Public Prosecutor must express his opinion, prior to issuance of orders, on the following:

Second: Forcing the accused or the victim, in a misdemeanour or a felony, to participate in inspecting his body, taking his photo, his finger prints, and small amount of his blood, hair, nails or other things that may benefit the investigation.

- COMMENTS: This provision could be very useful for victims of rape and other sexual crimes in terms of the prosecution being sensitive to the victim's privacy. However, it is possible that it could also be used to override women's choice, if prosecutors chose to say that women should not be subject to these procedures even if they wished to be.
- SUGGESTION: If this Article contained a statement that the victim's wishes had to be considered in this decision, a number of the concerns expressed would be eliminated.

²⁷⁷ Article 14

²⁷⁸ Article 34

Article 13

First: The Public Prosecution may appear before Personal Status Courts or Civil Courts on cases related to minors, incapacitated persons, absentees, missing persons, divorce, separation, permission for polygamy, family abandonment and child homelessness, and any other cases that the Public Prosecution deems it necessary to intervene in order to protect family and childhood.

Second: The Public Prosecution may issue statement and express opinion on the cases stated in clause 1 of this article, review and follow on methods of appeal orders and decisions issued on these cases.

- COMMENTS: The condition that the Public Prosecution may intervene in such cases ‘to protect family and childhood’ is open to interpretation in more than one way. ‘Protecting the family’ could be read to mean that the Public Prosecution could see fit to intervene on issues of honour, and to attempt to keep the family together at all costs. But it is submitted that this article has to be read in light of the Constitutional guarantees of equality for all persons and of protection from abuse in the family. If this is the case, the article could be used to help protect and support women in court, when their families have failed so to do.

Article 50

First: After the enforcement of this law, it is not permissible to

- a. Appoint a member of Public Prosecution of Grade Four except in districts and sub districts.*
- b. Transfer a member of Public Prosecution of Grade Three to Baghdad.*

Fourth: The Minister of Justice may exempt from the provisions of Clause 1 of this article the female graduates and the first three graduates from the Judicial Institute each year... to work anywhere including Baghdad Province.

- COMMENTS: This Article demonstrates positive discrimination, as female graduates are favoured by allowing them to work anywhere. This recognises that having women on the staff of the Public Prosecution is beneficial to both women and men by ensuring that women’s view is expressed within the department.

Article 19

If a female convict is found to be pregnant, the adult rehabilitation directorate must, upon the receipt of the order to implement the sentence, refer it to the Public Prosecutor in the State Institution for Social Reform to express his opinion to the Chief Prosecutor, and the Chief Prosecutor must present it to the Minister of Justice, substantiated by his opinion providing reasons for delaying or changing the sentence in accordance with procedures stipulated in the law.

- COMMENTS: This Article recognises the special protection that pregnant women in custody need, and allocates a flexible system for dealing with that issue.

CIVIL ACTIONS LAW
(NO. 83 OF 1969)

This regulates how civil law cases proceed. It is very comprehensive, setting out how cases are brought to court and appealed, jurisdictional issues and procedural issues during trial.

Article 51

The court may in magistrate religious and civil affairs suits, accept the litigants to be represented by their spouses, children, brothers-in-law or relatives until the fourth degree.

- COMMENTS: While this may offer protection to women who would otherwise not be able to bring suits for fear of repercussions against befouling the family honour, this may also risk depriving women of their autonomy to bring court cases themselves.

Article 91 excludes the judge from hearing the case if there is a degree of proximity between him and the litigants that would increase the risk of bias/abuse. If the judge hears the suit despite this, the judgment is repealed.

- COMMENTS: This provides important protection for litigants who may otherwise be subject to bias, including vulnerable women who seek a fair day in court.

Article 93

The judge or the judge commissair may not be recused for the following reasons:

- 1. If one of the litigants was his employee or he used to dine or live with one of the litigants, or if he has received a gift therefrom shortly before or after the suit was lodged.*
- 2. If there was enmity or friendship between him and one of the litigants, whereby it is unlikely for him to preserve his impartiality.*
- 3. If he has given a premature opinion in the respective case.*

- COMMENTS: This robs the above provisions of their effect, by listing a number of ways in which a judge may be at severe risk of either perceived or actual bias, and by letting the judge continue anyway. This risks both the appearance and the substance of a fair trial.
- SUGGESTIONS: Ensure that judges are recused from all cases of possible bias.

Article 98

3. The process of proof in religious cases shall be conducted through using the methods of evidence contemplated in the civil status law and the provisions of the Islamic Shari'a.

- COMMENTS: In leaving the methods of evidence up to Shari'a law in family cases, discrimination against women is evident, in violation of Article 14 of the Constitution, Article 15 of CEDAW and Article 26 of the ICCPR. In Iraq it appears that Courts follow the

Quran Verse 282, which makes the testimony of two women equal to that of one man. This violates the specific obligations for equality in trials set out in Article 15.2 of CEDAW. When compared to other countries, such as Article 33 of the Moroccan Family Code, which states that ‘when the payment of the dowry before the marriage is consummated is in dispute, the wife’s declaration takes precedence over the husband’s,’ and ‘when the payment of the deferred dowry is in dispute, the husband must prove that he has paid it,’²⁷⁹ it is clear that this Iraqi provision does not offer the same amount of protection for women who may be vulnerable in family matters. In Jordan, Family Courts accord women and men equal rights in court.²⁸⁰

- SUGGESTIONS: The requirements for evidence in religious courts should comply with the Constitutional and International guarantees of equality, and should therefore fall under the normal provisions of the Civil Actions Law.

Article 254

Arbitration is only allowed in matters that can be subject to reconciliation, and by parties who are entitled to dispose of their rights. Arbitration may be implemented among spouses according to the civil status law and the provisions of the Islamic Shari’a.

- COMMENTS: In making the course of arbitration subject to Islamic Shari’a, the law undermines the provisions set out in the Civil and Personal Status Codes that accord spouses equal rights. It therefore violates Article 14 of the Constitution, Article 15 of CEDAW and Article 26 of the ICCPR, as well as the specific obligation requiring equality at trial in Article 15.2 of CEDAW. In Jordan, Family Courts accord women and men equal rights in court.²⁸¹

Article 299

The following provisions shall apply to the religious suits. In the absence of a legal provision in this section, the provisions of civil actions stipulated in this law shall apply, in so far as they are compatible with the nature of religious suits.

Article 300

The following matters shall be under the jurisdiction of religious courts:

1. Marriage, and all other matrimonial matters including dowry, maintenance, parentage (lineage), custody, separation, and divorce.

²⁷⁹ See <http://www.wluml.org/sites/wluml.org/files/moudawana-english.pdf>

²⁸⁰ CEDAW Committee, Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Combined Third and Fourth Report of States Parties: Jordan, CEDAW/C/JOR/3-4, 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No6/263/01/PDF/No626301.pdf?OpenElement> pg 8

²⁸¹ CEDAW Committee, Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Combined Third and Fourth Report of States Parties: Jordan, CEDAW/C/JOR/3-4, 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No6/263/01/PDF/No626301.pdf?OpenElement> pg 8

2. *Custody, guardianship, curatorship, will, appointment of a custodian or a guardian (and discharging, calling to court, and permitting the same to undertake legal and religious dispositions).*
3. *Appointing a trustee to administer lineage (waqf) (mort main), discharging and calling the same to court, and nominate a trustee for charitable and joint waqf.*
4. *Placing a person under guardianship, removing the same and establishing rationality.*
5. *Recording the death incident, releasing estates, and specifying the heritage shares and distributing the same among heirs.*
6. *The missing and all matters relating thereto.*

Article 301

The religious court shall organise the waqf and the will deeds, and other types of deed which the court is in charge of, and register the foregoing according to the law. The religious court shall be also in charge of ratifying the powers of attorney pertaining to the suits filed thereto.

Article 307

1. The judge may place a person under guardianship if the requirements of such are satisfied, without the need for another litigant/counterpart to exist. However, the counterpart in the suit for removal of guardianship is the guardian/curator himself.

- COMMENTS: The religious courts may follow their own rules on evidence in the above cases. This may present women with less opportunity to present their case than the Constitutional guarantee of equality under Article 14 and International guarantees under Article 15 of CEDAW and Article 26 of the ICCPR. It therefore may fall foul of Article 15.2 of CEDAW mandating equality at trial. In Jordan, Family Courts accord women and men equal rights in court.²⁸²
- SUGGESTIONS: Religious courts should follow the provisions of the Civil Actions Law and the Evidence Law to ensure that women are not discriminated against in giving testimony.

Article 308

The court shall in its own initiative, put the plaintiff upon oath in the following cases:

1. *If the wife claimed maintenance from her absentee husband's property, and she was able to prove her right therein. In this case the court shall require her to swear the following oath: 'I swear to God that my husband has not left for me any maintenance, nor anything of maintenance nature, and I was not a recalcitrant nor a divorced whose period of waiting (iddat) has expired'.*
2. *If a person other than a father or a grandfather has approved the marriage of a minor (girl) who decided upon maturity to 'choose/release herself' and thus requested the marriage contract to be rescinded and to repudiate her husband, and was able to establish her case, the court shall require*

²⁸² CEDAW Committee, Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Combined Third and Fourth Report of States Parties: Jordan, CEDAW/C/JOR/3-4, 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No6/263/01/PDF/No626301.pdf?OpenElement> pg 8

her to take/swear the following oath: 'I swear to God that I decided to choose my self as soon as I got mature.'

- COMMENTS: As these are the only times in which it is necessary to take an oath, this discriminates against women by forcing women to swear that they are telling the truth in two very specific situations. This violates the provisions in Article 14 of the Constitution, Article 15 of CEDAW and Article 26 of the ICCPR. Furthermore, under Article 15.2 of CEDAW, 'States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity...in particular it shall treat them equally in all stages of procedure in courts and tribunals.' This provision is in clear violation of that obligation. In Jordan, Family Courts accord women and men equal rights in court.²⁸³
- SUGGESTIONS: Repealing this provision would ensure compliance with International Law.

Article 309

1. Judgments made against the treasury, mort main (waqf), minors, absentees, insane, idiots, or others lacking in capacity, and all judgments rescinding marriage contracts and deeds shall have the effect of judgments (such as deeds relating to replacing, permitting consensual division of property). If these judgments and deeds were not challenged by cassation by the relevant parties, then the judge shall as soon as possible send the suit's file to the court of cassation to be scrutinised by such court.

EVIDENCE LAW (NO. 107 OF 1979)

This law sets out the evidentiary rules to be applied in court for all civil, commercial and family matters (unless conflicting with the Personal Status Code).²⁸⁴ The law presents no discrimination between women and men, and indeed 'the court may rely on the testimony of one witness and the oath of the claimant if convinced of its validity...or 'reject the testimony of one or more witnesses if not convinced of the validity.'²⁸⁵ This shows that the law judges witnesses by the value of their testimony rather than by their sex, which goes further than many other countries in the region. The witness may be questioned by all parties and the court for anything deemed useful to establish the truth.²⁸⁶ This law poses no problems for women.

²⁸³ CEDAW Committee, Consideration of Reports Submitted by States Parties under Article 18 of CEDAW, Combined Third and Fourth Report of States Parties: Jordan, CEDAW/C/JOR/3-4, 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No6/263/01/PDF/No626301.pdf?OpenElement> pg 8

²⁸⁴ Article 11

²⁸⁵ Article 84

²⁸⁶ Article 96

