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Judicial Independence in Post-Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy

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JUDICIAL INDEPENDENCE IN POST-CONFLICT IRAQ: ESTABLISHING THE RULE OF LAW IN AN ISLAMIC CONSTITUTIONAL DEMOCRACY

David Pimentel and Brian Anderson *

INTRODUCTION

Contemporary Iraq is facing the full range of challenges that come with post-conflict transitional justice. That includes the backward-looking issues of restorative and retributive justice, for the atrocities and mass human rights violations they suffered during the Saddam Hussein regime and the conflict that followed his downfall.¹ It also includes the forward-looking efforts, “paving the road toward peace and reconciliation” and establishing a functional state, characterized by the Rule of Law, in the society torn apart by conflict.²

Among the critical institutions demanding attention in the post-conflict reconstruction is the judiciary, particularly the need for an independent judiciary.³ There is increasing recognition that a functional legal system, one that protects rights and redresses wrongs, is vital to restoring the peace and stability to a war-torn society. Only with such a sound legal system—and a fair, impartial and independent judiciary—will people trust their disputes to the state, and refrain from the vigilante score-settling that signals the breakdown of the Rule of Law.

There is nothing routine about post-conflict justice. Every post-conflict society faces a unique set of circumstances, and Iraq is no exception. The problem of creating an independent judiciary in Iraq is exacerbated by a number of factors. Among these are the explicit recognition of the law of Islam in the Iraqi Constitution,⁴ the inability to pass legislation on the

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¹ M. CHERIF BASSIOUNI, *POST-CONFLICT JUSTICE*, xv (2002).

² *Id.*

³ ANGELINE LEWIS, *JUDICIAL RECONSTRUCTION AND THE RULE OF LAW* 22 (2012).

⁴ Iraqi Constitution, Art. 2(A).

Federal Courts of Iraq, leaving several provisions of the Iraqi Constitution unimplemented,⁵ and the impact of the de-Ba'athification authority in Iraq, which has power effectively to remove judges from office based on allegations that they were too closely tied to the prior regime.⁶ The absence of a law on federal courts leaves several other critical elements of judicial independence unaddressed, including provisions for the tenure, reappointment, and removal of judges. Serious concerns about security for judges in Iraq only further complicate the prospects for judicial independence there in the foreseeable future. Any hope for a functional state competent to establish and maintain the Rule of Law in Iraq depends on the success of efforts to address each of these challenges. It is a tall order.

I. POST-CONFLICT RULE OF LAW IN IRAQ: CORE ELEMENTS

A. *Functional Legal Institutions, Including Courts*

When A.V. Dicey first coined the phrase “Rule of Law,” he was careful to articulate that punishment for crime could come only for violating pre-existing laws and after sentencing *by regular courts*, and that rights are protected by *ordinary legal processes*.⁷ It follows that a functional court system—one that will dispense justice according to these pre-existing laws, and following ordinary legal processes—is essential to the Rule of Law. Corrupt court systems cannot deliver justice; inefficient ones cannot deliver timely justice, and are therefore incapable of upholding or enforcing the Rule of Law.⁸

Moreover, a judiciary that is not independent is by definition dysfunctional, as it is incapable of carrying out its core function in a constitutional democracy. Absent independence, a court cannot be impartial, and history is replete with examples of judicial system shamelessly manipulated by political actors, who exploit the lack of independence to make courts tools of political control.⁹

⁵ See Iraqi Constitution, Art. 92.

⁶ Accountability and Justice Law of 2008, available online at <http://ictj.org/publication/unofficial-translation-iraqs-accountability-and-justice-law>

⁷ JANE STROMSETH, DAVID WIPPMAN, AND ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 70 (2006).

⁸ Under the principle of “justice delayed is justice denied,” there is no such thing as untimely justice. If it is untimely, it is not justice.

⁹ See, e.g., discussion of “telephone justice” in Russia, Alena Ledeneva, *Behind the Façade: “Telephone Justice” in Putin’s Russia*, available online at https://iris.ucl.ac.uk/research/browse/show-publication?pub_id=87897&source_id=1

B. Public Confidence in Legal Institutions, Including Courts

The independence of the judiciary is good thing only if the courts are worthy of the public's trust; otherwise it will undermine the Rule of Law rather than enforce it.¹⁰ A judge should be independent, insulated from outside pressure, precisely so she can feel free to do the *right* thing, without fearing adverse personal consequences, no matter how unpopular the decision may be. At the same time, of course, independence similarly helps a corrupt judge feel free to do the *wrong* thing without fearing adverse personal consequences. So judicial independence is a virtue only if the courts are already fair, impartial, and functional.

But neither is it enough that the public institutions, particularly the courts, be worthy of the public trust.

For them to function appropriately to support the Rule of Law, the public must actually trust them. Otherwise, the public legal institutions will be under-utilized or actively disregarded, and individuals will resort to self-help to resolve their legal and disputes. . . . Public confidence in the system is essential, and until it is achieved, Rule of Law institutions will be plagued with dysfunction: the public will not trust their disputes to the system, will not abide by the decisions of those institutions, and will actively undermine or circumvent the efforts of such institutions.¹¹

The fundamental importance of public confidence to the judiciary is reflected in the statement of Alabama Chief Justice Sue Bell Cobb: "All the court system has is the public's respect . . . If we lose the respect, we don't have anything."¹²

The challenge, therefore, in a post-conflict setting, is not just to build functional court system, one worthy of public confidence, but also to foster the necessary confidence itself. And that is not a short-term enterprise; it will likely take at least one generation, and probably more, to overcome

¹⁰ David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*, 57 CLEV. ST. L. REV. 1 (2009).

¹¹ David Pimentel, *Culture and the Rule of Law: Cautions for Constitution-making*, ___ FORDHAM INT'L L. J. ONLINE ___ (2013); published separately, in Turkish, as a chapter in FATİH ÖZTÜRK, ED., YENİ ANAYASA İÇİN YOL HARITASI (Roadmap to the New Constitution) 67 (2012)

¹² John Schwartz, 'Uncertainty in Law Circles Over New Rules for Judges', *N.Y. Times*, 10 June 2009, at A20, available at: <http://www.nytimes.com/2009/06/10/us/10judges.html> (last visited 20 May 2013).

resistance to untrusted institutions.¹³

C. Lustration/Vetting

Lustration, widely employed as part of the post-conflict justice strategy in the Central European countries that were once members of the Soviet Bloc, has been used to identify and expose collaborators with the prior regime, and often to bar them from positions of power or influence in the post-conflict state.¹⁴ The lustration (also known as “vetting”) procedure adopted in the Czech Republic in 1991 has served as a model for many other states.¹⁵

Effective lustration can be critical to effective post-conflict justice, because it is essential to restoring public confidence in the institutions of government. If the same personalities who oppressed the public before and during continue to wield power an authority in the new regime, the public will continue to fear the system. They will have little reason to trust their disputes to it, or to turn to formal legal institutions for protection of their interests and vindication of their rights.

At the same time, lustration itself can be problematic for human rights as it may easily assume the characteristics of a witch hunt, where collective guilt is applied without assessment of individual responsibility.¹⁶ Due process concerns, both substantive and procedural, arise quickly in this setting as well, where individuals may be branded with guilt by association.¹⁷ “Those subject to banning are not necessarily implicated in past human rights violations; they may only have associated with a particular group (e.g., political party, ethnic or religious group, military) that committed widespread human rights abuses.”¹⁸

While lustration has gained wide acceptance and legitimacy as an

¹³ Pimentel, *Culture and the Rule of Law*, *supra* note 11.

¹⁴ Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice* at 345, in BASSIOUNI, *POST-CONFLICT JUSTICE*, *supra* note 1; *see also* Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former communist Block*, *LAW AND CONTEMPORARY PROBLEMS* 59, no. 4 (1996).

¹⁵ *Id.* at 346.

¹⁶ *Id.* at 346, (citing, *e.g.*, MORTON H. SKLAR & KRASSIMIR KANEV, *DECOMMUNIZATION: A NEW THREAT TO SCIENTIFIC AND ACADEMIC FREEDOM IN CENTRAL AND EASTERN EUROPE* vi-vii (1995)).

¹⁷ *Id.* at 346..

¹⁸ TRICIA D. OLSEN, LEIGH A. PAYNE, AND ANDREW G. REITER, *TRANSITIONAL JUSTICE IN BALANCE* 38 (2010).

important tool in post-conflict justice, it must be implemented with great care and sensitivity to avoid running afoul of basic human rights norms and protections.¹⁹ If it is not, it can run the risk of interfering with the independence of the judiciary by allowing politically-motivated lustration proceedings to threaten and coerce judges.

D. Other Key Principles of Judicial Independence

The post-conflict situation in Iraq raises some other concerns for judicial independence, issues that need to be addressed to ensure that the Rule of Law prevails in Baghdad and throughout Iraq. The “Basic Principles on the Independence of the Judiciary” adopted by the United Nations in 1985 include a fairly comprehensive list of issues.²⁰ In the context of the Iraqi judiciary, it is worth calling attention to a few of them in particular, including issues of (1) improper influence and unwarranted interference,²¹ (2) deficiencies in terms of “established legal procedures,”²² (3) training and qualification of judges,²³ particularly to rule on the applicability of principles of Islam,²⁴ and (4) the terms, conditions, and tenure of judges being adequately secured by law.²⁵ Each of these will be addressed separately in Section II.C. below.

II. RULE OF LAW CONCERNS AS THEY APPLY TO IRAQ AND THE IRAQI CONSTITUTION

A. Article 2 and protection of minority populations

A key principle of the Rule of Law is the protection of minority populations in a given society, including religious minorities. Indeed this issue arises under the latter two of the three “kindred concepts” A.V. Dicey identified as key elements of the Rule of Law: “[1] a government limited by

¹⁹ Boed, *supra* note 14 at 378 (Criticizing the Czech approach, but concluding that “[a] lustration scheme could be conceived which would satisfy the applicable requirements of human rights law. Such a scheme would need to avoid impermissible discrimination by proposing a legally-tenable objective, such as, for example, the development and preservation of a democratic order, and by closely tailoring its differentiation criteria to this objective.”).

²⁰ Basic Principles on the Independence of the Judiciary, Para. 2 (endorsed by General Assembly Resolutions 40/32 and 40/146 in 1985) *available online at* <http://www.unrol.org/doc.aspx?d=2248> (last checked 20 May 2013).

²¹ *Id.* paras. 2 & 4; *see discussion infra* at notes 117 & 118.

²² *Id.* para. 5; *see discussion infra* at notes 129.

²³ *Id.* para. 10.

²⁴ *See discussion infra* at section C(4).

²⁵ *Id.* paras. 11 & 12; *see discussion infra* at note 138.

law; [2] equality under the law for all citizens; and [3] the protection of human and civil rights.”²⁶ It can be difficult to secure these principles—equality under the law and protection of human and civil rights—for religious minorities, however, when the state has declared a national religion. A fortiori, the incorporation of Islamic law as a foundational source of law in the Constitution that cannot be contradicted in later legislation, makes the protection of the rights of religious minorities even more difficult.

Article 2 of the Iraqi Constitution notes that “Islam is the official religion of the State and is a foundational source of legislation.”²⁷ Further, it notes that “[n]o law may be enacted that contradicts the established provisions of Islam.”²⁸ While Iraq is not unique in its incorporation of some form of Islamic law into its legal system,²⁹ the precise scope and effect of this restriction on legislation in Iraq remains, eight years after adoption of the new Iraqi Constitution, unclear.

It is worth noting, at this juncture, that the Constitution does not use the term *shari’a*. As with any issue of constitutional or legislative drafting, the terminology chosen has great significance, and the Constitution speaks only of the “provisions of Islam.”³⁰ While Islamic law is broadly defined as “law that is either embodied in or derived from Islam’s foundational legal sources,”³¹ the terms *shari’a* and *fiqh* have more specific meanings and applications. *Shari’a* (commonly mischaracterized in the West as “*shari’a* law”) literally translates to “the path,” and is divinely ordained by God, and is known only to Him.³² Alternatively the term *fiqh*, meaning discernment, is a human attempt to understand and articulate the divine law.³³ As such, it

²⁶ RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD* 13 (2012) (citing A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 175-84 (1885)).

²⁷ Constitution of the Federal Republic of Iraq, Sec. I, art. 2(1).

²⁸ Iraqi Constitution, Sec. I, art. 2(1)(A). The constitution continues to declare that legislation may not contradict the “principles of democracy” nor the rights and freedoms enumerated elsewhere in the Constitution. Iraqi Constitution, Sec. I, arts. 2(1)(B)-(C).

²⁹ Globally, at least twenty-five countries incorporate some form of Islamic law directly into their constitutions, while others either allow courts to apply Islamic law in matters of personal status, or convene special courts to apply Islamic law for Muslim minority populations. Intisar A. Rabb, “*We the Jurists*”: *Islamic Constitutionalism in Iraq*, 10 U. Pa. J. Const. L. 527, 527 n1, 540 (2008) (providing a comprehensive list of countries and the method of incorporation or application of *shari’a* / Islamic law into their legal systems).

³⁰ Iraqi Constitution, Sec. I, art. 2(1)(A).

³¹ Rabb, *supra* note 29, at 541.

³² *Id.* at 542.

³³ *Id.*

is inherently imperfect and therefore, unlike *shari'a*, subject to debate.³⁴ Moreover, there are various schools of *fiqh*, and a long tradition of Islamic legal pluralism recognizing the differing *fiqh* that may exist related to a single law.³⁵

Prior to the enactment of the Iraqi Constitution, the Transitional Administrative Law incorporated a similar provision, stating: “Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the *universally agreed* tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period.”³⁶ It is unclear whether this clause in the Transitional Administrative Law influenced the ultimate adoption of Article 2. However, negotiations during the drafting history of the Constitution are instructive as to the challenges associated with its implementation and interpretation.³⁷

One early draft of Article 2 stated that “No law may be enacted that contradicts [Islam’s] tenets and provisions (its universally agreed principles).”³⁸ The notion of “universally agreed principles” created a long-running debate over the scope of Article 2, including questions about how widely these principles must be agreed to before they are invoked to invalidate laws.³⁹ During negotiations, multiple phrasings of this provision were proposed and discussed, including “Islam’s confirmed rulings,” the “universally agreed tenets of Islam,” and “tenets of [Islamic] provisions.”⁴⁰ In the end, a compromise was reached with the phrase “established provisions,” which was considered to reside somewhere between the restrictive “universally agreed” and the overly-broad “tenets.”⁴¹

The degree to which the resulting Article 2 presents a danger to the protection of minority rights is unclear, primarily because the Constitution

³⁴ *Id.*

³⁵ Asifa Quraishi-Landes, Institute for Social Policy and Understanding, *Sharia and Diversity: Why Some Americans are Missing the Point* 14-5, Jan. 2013, *available at* <http://www.ispu.org/GetReports/35/2620/Publications.aspx> (last visited May 22, 2013). For a more complete history of the development of the pluralistic legal system in Islam, see Rabb, *supra* note 29, at 544-47.

³⁶ Coalition Provision Authority, *Law of Administration for the State of Iraq for the Transitional Period*, Art. 7(A) (Mar. 8, 2004) (emphasis added).

³⁷ See Ashley S. Deeks and Matthey D. Burton, *Iraq’s Constitution: A Drafting History*, 40 CORNELL INT’L L.J. 1, 12 (2007).

³⁸ Deeks & Burton, *supra* note 37, at 13.

³⁹ Deeks & Burton, *supra* note 37, at 13.

⁴⁰ Deeks & Burton, *supra* note 37, at 13-4.

⁴¹ Deeks & Burton, *supra* note 37, at 14.

fails to define is the term “established provisions” itself. It is certainly broader than “universally agreed tenets of Islam” as used in the Transitional Administrative Law.⁴² The requirement of “universal agreement” implies bridging differences between Sunni and Shi’a, and incorporating only those provisions accepted by all Muslims as a matter of consensus.⁴³ Because the “universal agreement” language was proposed but not used, the phrase “established provisions” presumably connotes a broader incorporation of Islamic law into the Constitution, *i.e.* “established provisions” sufficient to strike down a piece of legislation need not carry universal acceptance by all Muslims. What is unclear, however, is the extent of agreement required to render a provision of Islamic law as “established.”⁴⁴ Some concern arose during drafting that the term could be used to rely on fatwas to strike down otherwise valid legislation under Article 2.⁴⁵ Additionally, there was concern about whether the term “provisions” related only to incorporations from Shi’a Islam.⁴⁶ Taken to the logical extreme, any single school of *fiqh* could be considered to be an established provision of Islam.⁴⁷

The significance of understanding the extent to which Article 2 incorporates Islamic law into the Constitution is revealed when considering the protection of the rights of minority religious populations. Anything short of the rigid “universally agreed” provisions leaves open the possibility of undermining the rights of Muslim minorities, whose particular *fiqh* may be disfavored by the government and therefore unprotected by Article 2. Even non-Muslim minorities will enjoy better protection if the scope of Article 2 is narrow, *i.e.* if the range of Islamic tenets that enjoy the force of law is small, and limited to those tenets that all Muslims can agree upon. Anyone whose belief system lies outside the “established provisions” recognized under Article 2 of the Constitution is, therefore, at risk.⁴⁸

⁴² Transitional Administrative Law, *supra* note 36.

⁴³ Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT’L L. REV. 695, 743-44 (2004) (citing Ali Juma, *Al-Thabit wa-l-Mutaghayyir fi al-Sharia al-Islamiya [The Permanent and the Impermanent in the Islamic Sharia]*, 7 AL-MANAR AL-JADID [THE NEW MINARET] 45 (1999)).

⁴⁴ Intisar A. Rabb, “*We the Jurists*”: *Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527, 548-49 (2008).

⁴⁵ Deeks & Burton, *supra* note 37, at 14.

⁴⁶ Deeks & Burton, *supra* note 37, at 14.

⁴⁷ Rabb, *supra* note 44, at 548.

⁴⁸ Consider one hypothetical as an example. Suppose that a legal exception is legislated to the prohibitions on alcoholic beverages that would allow Catholics to take wine in their communion services. Article 2 *might* be interpreted, notwithstanding Article 43 (a provision protecting free exercise of religion, *see infra* discussion at note 52), to strike down this provision, because Islam does not tolerate consumption of wine for *any* purpose. Under these circumstances, Article 2’s effect is to deny the Catholics’ right to

In several places the Iraqi Constitution specifically recognizes the rights of religious minority populations, however. At Article 2, the Constitution guarantees the “full religious rights to freedom of religious belief and practice of all individuals.”⁴⁹ Similarly, at Article 14, it notes that Iraqis are equal before the law without discrimination based on religion.⁵⁰ Article 41 declares Iraqis free in their “commitment to their personal status according to their religions, sects, beliefs, or choices.”⁵¹ Finally, Article 43 declares that the followers of *all religions* are free in the practice of religious rites and the management of their religious endowments and institutions.⁵² What is unclear is how the Federal Supreme Court will strike the balance between these provisions. Until there is clarity as to how the court will apply the Article 2 requirement of “established provisions” of Islam, it cannot be clear how those minority religious populations will be protected under Articles 2, 14, 41 and 43 of the constitution.

The implications of religious freedom, and of the rights of religious minorities, for post-conflict justice should not be underestimated. The civil war in Sudan that finally ended with a peace agreement in 2005 and ultimately partitioned Sudan into two separate countries was driven almost entirely by the imposition of *shari’a* on the non-Muslim population in the South.⁵³ Thus the violation of religious rights, and specifically the imposition of Islamic provisions on a nonbelieving populace can give rise to violence and conflict. Thus respect for the religious freedoms of minorities becomes an important element of post-conflict justice. As Iraq and its neighbors are already plagued by sectarian violence, prospects for peace and reconciliation in the region may depend on it.⁵⁴

free exercise of their religion.

⁴⁹ Iraqi Constitution, Sec. I, art. 2(2).

⁵⁰ Iraqi Constitution, Sec. II, ch. 1, art. 14.

⁵¹ Iraqi Constitution, Sec. II, ch. 2, art. 41.

⁵² Iraqi Constitution, Sec. II, ch. 2, art. 43.

⁵³ Francis M. Deng, *Sudan - Civil War and Genocide: Disappearing Christians of the Middle East* 8 MIDDLE EAST QUARTERLY 13 (2001) (“[T]he identity of southern Sudan has been shaped primarily by the prolonged resistance to the imposition of Arab and Islamic culture from the North. This has had the effect of unifying the Southerners as black Africans and has geared them toward Christianity and the English language as means of combating Islam and Arabism.”) available online at <http://www.meforum.org/22/sudan-civil-war-and-genocide> (last checked 21 May 2013).

⁵⁴ Radio Free Europe/Radio Liberty, *UN: Iraq sectarian violence worst in years* (June 1, 2013) <http://www.dw.de/un-iraq-sectarian-violence-worst-in-years/a-16853048>; Tim Arango, Anne Barnard, Duraid Adnan, *As Syrians Fight, Sectarian Strife Infects Mideast* NY Times (June 1, 2013) <http://www.nytimes.com/2013/06/02/world/middleeast/sunni-shiite-violence-flares-in-mideast-in-wake-of-syria-war.html?pagewanted=all&r=0>.

B. Article 92 and the Failure to Pass a Law on the Supreme Court

1. Background and History of the Federal Supreme Court

The Federal Supreme Court, as established by the Iraqi Constitution, was initially a creation of the Coalition Provision Authority's Transitional Administrative Law.⁵⁵ The law formed the Federal Supreme Court, and gave it jurisdiction to rule on (1) disputes between the transitional government and regional governments, (2) inconsistencies between the Transitional Administrative Law and other laws, and (3) ordinary appeals as prescribed by law.⁵⁶ The only specificity in the Transitional Administrative Law with respect to membership of the Court was that it contain "nine members."⁵⁷ There was no provision that the Federal Supreme Court include scholars or experts in Islamic jurisprudence, despite Article 7's provision that laws may not contradict "universally agreed tenets of Islam."⁵⁸

Early in the negotiations and drafting of the Iraqi Constitution, Shi'a Islamists advocated creation of a "Constitutional Council" separate from the regular judiciary, which would function as a body of jurists and legal experts to ensure the constitutionality of legislation.⁵⁹ The functions of this Council would have included judging laws based on the Article 2 requirement that no enacted law contradict the established provisions of Islam.⁶⁰ This proposed body was to be comprised of eleven members, with only six judges, and the remainder "legal experts," whether in religion or law generally.⁶¹ Drafts of this proposal would have granted the Council the ability to rule on the constitutionality of laws *prior to enactment*.⁶² Supporters of this proposal presumed that judges, given their relative unfamiliarity with Islamic law, were unlikely to outvote Islamic experts on any point so far from their expertise, thus giving power to the Islamic

⁵⁵ Coalition Provision Authority, Law of Administration for the State of Iraq for the Transitional Period, Ch. 6, art. 44 (Mar. 8, 2004).

⁵⁶ Transitional Administrative Law, *supra* note 55 at Ch. 6, art. 44(B).

⁵⁷ Transitional Administrative Law, *supra* note 55 at Ch. 6, art. 44(E).

⁵⁸ Transitional Administrative Law, *supra* note 55 at Ch. 1, art. 7.

⁵⁹ Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 7 U. ST. THOMAS L.J. 692, 697-8 (2010) (citing Shi'a Islamist Proposal, Article 92 from unsigned constitutional records).

⁶⁰ *Id.* Other versions of this proposal had differing numbers of members, all containing only a bare majority of judges and the remainder Islamic or legal experts. *Id.*

⁶¹ Ala Hamoudi, *supra* note 59 at 697-98.

⁶² Ala Hamoudi, *supra* note 60 at 698.

scholars to judge these laws for consistency with provisions of Islam under Article 2.⁶³

The Constitutional Council, however, was not to be. The compromise that was ultimately struck, in Article 92, entrusted Article 2 determinations to the Supreme Court, with compromise language specifying that the members of the Court should include not only judges but also “legal scholars,” and “experts in Islamic jurisprudence.”⁶⁴ The Constitution stopped short, however of establishing how many experts (or judges or scholars, for that matter) must sit on the Court, or how they are selected and appointed, leaving those determinations for later legislation.⁶⁵

At the time of the ratification of the Constitution, the Federal Supreme Court already existed as created by the Transitional Administrative Law in 2004, and established under an implementing “Supreme Court Law” in 2005. In terms of the Court’s membership, the Supreme Court Law merely states that it shall consist of one president and eight members, all nine of which have been judges.⁶⁶ The Supreme Court law contains no provisions for removal of judges from the Court, although the Transitional Administrative Law says that they can be removed if they have become permanently incapacitated, or if they have been convicted of corruption or of a crime of moral turpitude.⁶⁷

Because it was enacted prior to the Constitution the 2005 Supreme Court Law does not create a Court as envisioned by the Constitution. It does not give any direction to court membership, nor provide any detail how seats on the Court shall be apportioned.⁶⁸ Additionally, the law does not specify the qualifications needed to be nominated to the Court, and merely refers to the Transitional Administrative Law giving appointment authority to the Higher Judicial Council.⁶⁹ The jurisdiction of the Court as defined in

⁶³ Ala Hamoudi, *supra* note 5960 at 698.

⁶⁴ Constitution, Art. 92(2).

⁶⁵ Iraqi Constitution, arts. 92-94.

⁶⁶ Iraq Federal Supreme Court Law, Law No. 30 (2005). art. 3. The law does not establish qualifications for the “members,” leaving open, at least theoretically, the possibility that they be legal scholars or experts on Islamic jurisprudence. In practice, however, the Court has been staffed exclusively with judges. Ala Hamoudi, *supra* note 60 at 701; *see also* Transitional Administrative Law, *supra* note 57 (providing for “nine members.”).

⁶⁷ Coalition Provisional Authority, Law of Administration for the State of Iraq for the Transition Period, Art. 47 (8 March 2004).

⁶⁸ *See generally* Law No. 30 of 2005, *supra* note 66.

⁶⁹ Law No. 30 of 2005, art. 3, *supra* note 66.

the law is also somewhat at odds with that in the Constitution.⁷⁰

The end result of the Supreme Court Law of 2005 and subsequent Constitution is that the Federal Supreme Court, as established under the Transitional Administrative Law, continues to operate today under the terms of its pre-Constitution enabling legislation. With no change in the membership requirements of the Court—notwithstanding Article 92’s requirement that it include legal scholars and experts on Islamic jurisprudence—it remains composed entirely of judges and functions, more or less, as a *de facto* secular Federal Supreme Court.⁷¹ Some have taken this argument a step further, saying that this makes the Federal Supreme Court itself an implied supporter of a secular legal system, despite the Constitution’s clear contrary intent.⁷²

In an effort to fully implement a Federal Supreme Court as contemplated by Article 92 of the Constitution, in 2007, a draft law was presented that sought to redefine the organization and jurisdictional mandate of the court.⁷³ The draft law would have maintained a judicial panel of 9 judges, but would have created an “advisory commission” consisting of 2 legal experts and 2 experts in Islamic jurisprudence.⁷⁴ While the draft law sought to minimize the power of these non-judge members of the Court, limiting the advisory commission’s participation to deliberations and not allowing them to join in issuing judgments, it at least would have defined a role for legal scholars and experts in Islamic jurisprudence.⁷⁵ The draft law also went a great deal further to specify the qualifications and compensation for all members of the court, and to harmonize the statement of the Court’s jurisdiction with that in the Constitution.⁷⁶

Ultimately the draft law was never adopted, and subsequent attempts to

⁷⁰ Law No. 30 of 2005, art. 4, *supra* note 66. The Constitution’s recitation of the Supreme Court’s jurisdiction is significantly more specific and detailed than that provided in Supreme Court Law of 2005.

⁷¹ Ala Hamoudi, *supra* note 59 at 701.

⁷² Ala Hamoudi, *supra* note 59 at 701. In his article, Ala Hamoudi notes that sitting judges on the Federal Supreme Court at its inception were “as unenthused as any over the prospect of jurists who knew not a thing about the methodologies of law sharing a bench with them.” Further, the existing panel of judges repeatedly opposed proposals to include legal scholars and Islamic experts, and at most were willing to have a small number sit as advisors only for the Court. *Id.*

⁷³ 2007 Draft Federal Supreme Court Law, available at <http://gjpi.org/library/primary/statutes/> (last visited May 20, 2013).

⁷⁴ 2007 Draft Law, *supra* note 73, art. 2(1)-(2).

⁷⁵ 2007 Draft Law, *supra* note 73, art. 13.

⁷⁶ 2007 Draft Law, *supra* note 73, arts. 3-5, 8, 11-12.

craft an implementing law that more closely resembles the requirements of the Constitution have met with no more success.⁷⁷ Complicating the picture, the Constitution requires that the implementing law establishing the membership and defining the work of the Court be passed by a two-thirds majority in the Council of Representatives.⁷⁸ Given the current political climate and makeup of the Council of Representatives, it is unlikely that a satisfactory compromise will soon be reached.⁷⁹

2. The Federal Supreme Court – A Functioning Legal Institution?

The fact that Article 92 of the Constitution remains unimplemented has serious implications on the rule of the Rule of Law in Iraq. The structure and makeup of the Federal Supreme Court articulated in the Constitution, however loosely, has yet to be put in place. This raises the question of whether the Court has the competence to exercise its judicial authority to judge laws pursuant to Article 2 of the Constitution. In practice, the Supreme Court represents one of the most meaningful Rule of Law institutions in Iraq, and it is not operating consistently with its constitutional mandate. While the overall threat to the Rule of Law this poses may be limited because the Court is nonetheless functioning, it still raises questions as to the Court's legitimacy.

One of the core problems this presents is the failure of the Court to carry out its constitutional duties. Article 93 of the constitution enumerates the

⁷⁷ Several articles and blogs have reported in the subsequent years the attempt, and failure, to pass an implementing law. Jeffrey J. Coonjohn and Zuhair al-Maliki, Chaos in the Courts 3-4, *available at* <http://jcoonjohn.com/middle-east/chaos-in-the-courts> (last visited May 21, 2013); National Alliance seeks to pass Law on the Federal Supreme Court, Iraqi Media Network, Jan. 22, 2013, *available at* <http://www.alrafedain.net/index.php?show=news&action=article&id=94375> (last visited May 21, 2013). (ROUGH TRANSLATION OF TITLE); Iraqi Parliament postpones vote on Federal Court, Supreme Judicial Council law drafts, All of Iraq News Agency, Dec. 3, 2012, *available at* http://www.alliraqnews.com/en/index.php?option=com_content&view=article&id=23814:iraqi-parliament-postpones-vote-on-federal-court-supreme-judicial-council-law-drafts-&catid=35:political&Itemid=2 (last visited May 21, 2013); Political leaders forbid endorsing Federal Court, Political Parties' law drafts, All of Iraq News Agency, June 30, 2012, *available at* http://www.alliraqnews.com/en/index.php?option=com_content&view=article&id=13320:political-disputes-hurdle-endorsing-federal-court-political-parties-law-drafts&catid=35:political&Itemid=2 (last visited May 21, 2013).

⁷⁸ Iraqi Const., Ch. 3, art. 92(2).

⁷⁹ Inter-Parliamentary Union Website, Iraq (Council of Representatives of Iraq), <http://www.ipu.org/parline/reports/2151.htm> (last visited May 20, 2013) (providing a breakdown of political party power in the Council of Representatives).

jurisdictional powers of the Federal Supreme Court.⁸⁰ The first jurisdictional power of the court listed is to oversee the constitutionality of laws and regulations in effect, including laws challenged under Article 2.⁸¹ Despite this charge to rule on whether laws conform with “established provisions of Islam,”⁸² the Federal Supreme Court is not doing so. By 2010, the Court had only rendered one such ruling dealing with established provisions of Islam under Article 2.⁸³ Since that time, the Court has been successful avoiding issues related to Islamic jurisprudence, mostly by deferring to the legislature as better qualified to interpret Islamic law, or by using procedural mechanisms to dismiss cases altogether.⁸⁴ One commentator noted that as long as the Supreme Court is unwilling to exercise it, the power to void laws that contradict Islam under Article 2 is “from a legal standpoint . . . largely an empty one devoid of legal content.”⁸⁵

Under the current system, the Federal Supreme Court is acting without a proper implementing law as required by Article 92 of the Constitution. Moreover, the Court, by declining to exercise its Article 2 power, has in essence rendered that jurisdiction meaningless.⁸⁶ As long as the spirit and terms of the Iraqi Constitution, particularly those governing the Supreme Court, are not being implemented, the result is a serious breakdown of the Rule of Law, specifically the core Rule of Law principle that the government institutions themselves are subject to duly enacted law, and must act consistently with it. The fact that the Court is functioning at all is laudable, in terms of minimizing the impact of the Rule of Law breakdown, but makeshift operations cannot afford legitimacy to a system where the terms of the Constitution remain unimplemented.

3. The Federal Supreme Court – Eroding Public Confidence in the Judiciary

⁸⁰ Iraqi Const., Ch. 3, art. 93.

⁸¹ Iraqi Const., Ch. 3, art 93(1).

⁸² Constitution, Art. 2(A).

⁸³ Ala Hamoudi, *supra* note 59 at 692.

⁸⁴ Haider Ala Hamoudi, *Judicial Review of Islamic Law Under Iraq's Constitution*, JURIST - Forum, Apr. 26, 2012, <http://jurist.org/forum/2012/04/haider-hamoudi-iraq-islam.php> (last visited May 21, 2013); Haider Ala Hamoudi, *The Iraq Federal Supreme Court Avoids Interpreting Shari'a – Again*, Islamic Law in Our Times, Apr. 24, 2012, <http://muslimlawprof.org/2012/04/24/the-iraq-federal-supreme-court-avoids-interpreting-sharia--again.aspx> (last visited May 21, 2013).

⁸⁵ Ala Hamoudi, *supra* note 59 at 711.

⁸⁶ Ala Hamoudi, *supra* note 59 at 702 (supporting this proposition).

A second and significant effect of the failure to properly implement a law on the Federal Supreme Court is the erosion of public confidence in Rule of Law institutions. The Constitution states in four different places that judges, the judiciary, or the judicial power is independent.⁸⁷ Mere aspirational overtures, however, do not create judicial independence, nor do they establish public confidence—especially when other parts of the Constitution remain unenforced.⁸⁸ Therefore, to establish public confidence, it is not enough to create a functional court system worthy of trust, but it must cultivate and generate that confidence itself.⁸⁹ The failure to pass a proper implementing law and the avoidance to act on Article 2 issues creates a real challenge to foster a sense of confidence in the judiciary.

While the Constitution provides that the Supreme Court shall include not only judges, but also legal scholars and experts on Islamic jurisprudence, considerable doubt remains as to the role that the non-judge members would play in Court operations. The legislation proposed in 2007 would have made them mere advisors.⁹⁰ In 2012, Mohamed Fadhil, the legal advisor to the Prime Minister, argued that the Constitution is “very clear” that experts in the Islamic Religion are to be original members rather than mere advisors within the Court.⁹¹ Regardless of the Constitution’s intent on this point, no one can argue that the Court presently complies with the Constitutional requirements for its composition. Fadhil’s is a powerful public statement condemning the status quo, which, along with the statement, can do little to inspire public confidence in the Court, or perception that it is functioning as the Constitution intended.

On the positive side, one commentator notes that in recent years the judiciary has been “robust and increasingly outspoken, willing to address core legal questions that constrain executive power.”⁹² One such example is the Federal Supreme Court’s certification of electoral results that favored the rival of the sitting Prime Minister.⁹³ On the other hand, there are several

⁸⁷ Iraqi Const., Sec. II, Ch. 1, art. 19(1); Sec. III, Ch. 3, arts. 87, 88, 92.

⁸⁸ See text accompanying notes 80-85.

⁸⁹ See text accompanying notes 10-13.

⁹⁰ *Supra* notes 74-76, and accompanying text.

⁹¹ Religious Experts members not advisors within Federal Court, assures Maliki’s advisor, All of Iraq News Agency, Aug. 14, 2012, available at http://www.alliraqnews.com/en/index.php?option=com_content&view=article&id=16429:religious-experts-members-not-advisors-within-federal-court-assures-malikis-advisor-&catid=35:political&Itemid=2 (last visited May 21, 2013).

⁹² Haider Ala Hamoudi, *International Law and Iraqi Courts* in INTERNATIONAL LAW IN DOMESTIC COURTS: RULE OF LAW REFORM IN POST-CONFLICT STATES 107, 108 (2012).

⁹³ Ala Hamoudi, *surpa* note 92, at 108-9.

instances of the Federal Supreme Court issuing decisions that may erode the public's trust. For instance, one commentator characterized as political maneuvering the Chief Justice's tendency to support executive authority over perceived legitimate legislative action.⁹⁴

While the Court technically functions, and while it may on occasion be "robust and outspoken," it does so operating under an existing law that is contrary to the relevant provisions in the Constitution. Some of Court's activity, and certainly that of its Chief Justice,⁹⁵ has raised serious questions about the Court's independence. Together, this creates a real danger of public perception that the Federal Supreme Court—and as a result the judiciary as a whole—is not a legitimate, functional institution, worthy of the public's confidence and trust.

C. Other Issues Related to Judicial Independence

1. De-Ba'athification as a Threat to Judicial Independence

The process of lustration in post-conflict Iraq, known as de-Ba'athification, involves legal and administrative measures to prevent the Ba'ath party from regaining political power after the fall of Saddam Hussein's regime.⁹⁶ Introduced in April 2003, the Coalition Provisional Authority (CPA) was initially charged with implementing the process.⁹⁷ At that time, de-Ba'athification excluded top-ranking individuals from public administration positions based upon prior membership in the Ba'ath party.⁹⁸ When control shifted to the Iraqi Governing Council in August 2003, de-Ba'athification fell under the control of the newly established Higher National De-Ba'athification Commission (the Commission).⁹⁹ The Commission quickly expanded the scope of de-Ba'athification by broadening the categories of covered persons under the law.¹⁰⁰ The CPA, however, was critical of the Commission, which operated without the due process protections the CPA attempted to include when it created the process.¹⁰¹ In 2008, after a controversial vote, the new al-Maliki

⁹⁴ Coonjohn and al-Maliki, *supra* note 77, at 1-2.

⁹⁵ *Id.*

⁹⁶ Miranda Sissons & Abdulrazzaq Al-Saiedi, *A Bitter Legacy: Lessons of De-Baathification in Iraq*, INT'L CTR. FOR TRANSITIONAL JUSTICE, 9 (Mar. 4, 2013), <http://ictj.org/publication/bitter-legacy-lessons-de-baathification-iraq>.

⁹⁷ Sissons & al-Saiedi, *supra* note 96, at 10.

⁹⁸ Sissons & al-Saiedi, *supra* note 96, at 11.

⁹⁹ Sissons & al-Saiedi, *supra* note 96, at 12.

¹⁰⁰ Sissons & al-Saiedi, *supra* note 96, at 12-3.

¹⁰¹ Sissons & al-Saiedi, *supra* note 96, at 13.

government reformed the de-Ba'athification process by creating the Higher National Commission for Accountability and Justice (HNCAJ) to take over the program.¹⁰² The reformed Commission included significant changes on paper, but continued to operate in much the same way.¹⁰³

For example, in 2008 the HNCAJ called for all former Ba'ath party members still in government to re-apply under the new law.¹⁰⁴ The HNCAJ became embroiled in controversy in 2010 when it invalidated over 500 nominees for the upcoming parliamentary elections.¹⁰⁵ Based upon these and other actions, some scholars have criticized de-Ba'athification as improperly emphasizing an individual's status rather than an individual's conduct.¹⁰⁶ In many cases, no assessment of specific criteria, such as one's human rights record or one's integrity, was made; rather, individuals were barred from public employment solely for prior Ba'ath party membership.¹⁰⁷ Critics have also noted the inadequacy of oversight to review the actions of the Commission and the HNCAJ, allowing the potential for unfettered discretion in implementing de-Ba'athification.¹⁰⁸ Complications like these implementing lustration—wide discretion to remove officials from office with little cause, and with scant attention to the individual's procedural due process rights—can have significant implications on judicial independence.

These issues manifested themselves during the *Dujail* trial against Saddam Hussein.¹⁰⁹ The *Dujail* trial was convened to investigate and try Saddam and others related to charges of crimes against humanity committed in the town of al-Dujail.¹¹⁰ Although the Iraqi High Tribunal (IHT) had its

¹⁰² Sissons & al-Saiedi, *supra* note 96, at 17-9. (citing the Law of the Supreme national Commission for Accountability and Justice, law No. 10 of 2008).

¹⁰³ Sissons & al-Saiedi, *supra* note 96, at 18-9.

¹⁰⁴ Sissons & al-Saiedi, *supra* note 96, at 19 (resulting in some 41,000 applications to the Commission).

¹⁰⁵ Trumbull IV and Martin, *supra* note 122, at 355-60; Sissons & al-Saiedi, *supra* note 96, at 19-20.

¹⁰⁶ See Eric Stover, Miranda Sissons, Phuong Pham & Patrick Vinck, *Justice on Hold: Accountability and Social Reconstruction in Iraq*, INT'L REVIEW OF THE RED CROSS, no. 869, Mar. 2008, at 5, 20; see also Sissons & al-Saiedi, *supra* note 96, at 31-37.

¹⁰⁷ Stover et al., *supra* note 106, at 22.

¹⁰⁸ Sissons & Al-Saiedi, *supra* note 96, at 34-35.

¹⁰⁹ Stover et al., *supra* note 106, at 13-5.

¹¹⁰ See Sissons & Al-Saiedi, *supra* note 96, at 16-17; Stover et al., *supra* note 106, at 15-16; Symposium, *Transcript: Analysis of the Dujail Trial*, 39 CASE W. RES. J. INT'L L. 209, 210-11 (2006-2007); Symposium, *A Poisoned Chalice: The Substantive and Procedural Defects of the Iraqi High Tribunal*, 39 CASE W. RES. J. INT'L L. 261, 295-99 (2006-2007).

own rules for dismissing judges based upon de-Ba'athification concerns, the Commission intervened on three separate occasions to remove administrative staff and judges involved in that case.¹¹¹ Reasons for this interference ranged from criticism over one judge's liberal leanings, to ousting judges that were suspected of reluctance to apply capital punishment.¹¹² Similar allegations of interference were also made in the subsequent *Anfal* trial before the IHT, where the Commission supposedly implemented de-Ba'athification purges that impacted the composition and fairness of the Tribunal.¹¹³

The potential threat to judicial independence persists even today. In February 2013 the long-time Chief Justice of the Federal Supreme Court, Medhat al-Mahmoud, was deemed ineligible for public office, and removed from office, by the HNCJA because of positions held during the Saddam Hussein regime.¹¹⁴ The allegations characterized Medhat a "Saddamist" who taught judges "to commit offenses against the Iraqi people,"¹¹⁵ although it has been suggested that the real motivation for seeking Medhat's removal came from his controversial decision to strike down term-limits legislation, a ruling that purportedly insulates the Prime Minister from serious political challenge in years to come.¹¹⁶ While Medhat was later reinstated after appeal to the Court of Cassation, his removal undoubtedly sent a message to judges throughout the system that any one of them could be targeted for removal in this way.

The interference of the de-Ba'athification Commission with the judicial process of the IHT raises serious issues with the Rule of Law and judicial independence in Iraq. In other words, it appears that de-Ba'athification proceedings were used to influence members of the judiciary in the outcome of these cases, and past patterns of abuse can easily intimidate sitting judges, undermining judicial independence in future cases.

¹¹¹ Sissons & Al-Saiedi, *supra* note 96, at 16-17.

¹¹² Stover et al., *supra* note 106, at 15.

¹¹³ Symposium, *Analysis of the Dujail Trial*, *supra* note 110, at 211; Jennifer Trahan, *Remarks Regarding the Iraqi High Tribunal's "Anfal" Trial: Speech Delivered at International Law Weekend*, 15 ILSA J. Int'l & Comp. L 587, 598 (2009).

¹¹⁴ Haider Ala Hamoudi, *Salem Witch Trials and De-Ba'athification in Baghdad*, JURIST - Forum, Mar. 15, 2013, <http://jurist.org/forum/2013/03/haider-hamoudi-debaathification.php> (last visited May 22, 2013);

¹¹⁵ Ala Hamoudi, *supra* note 114.

¹¹⁶ Coonjohn, *supra* note 77, at 4.

2. No “improper influences” or “interference with the judicial process”

Paragraph 2 of the UN’s Basic Principles on the Independence of the Judiciary states that the judiciary shall decide matters before them “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”¹¹⁷ Paragraph 4 condemns any “inappropriate or unwarranted interference with the judicial process.”¹¹⁸

a. Religious influence and interference

A concern for Iraq here is that the Constitution accords juridical significance to established provisions of Islam, which opens the door to influence from religious leaders or authorities.¹¹⁹ Depending on how the courts address these issues, and on whom they must rely for determinations on questions of what Islamic principles require, the courts may well be open to outside influences, seriously compromising their independence. For example, if Article 2 is interpreted to require judicial fealty to fatwas,¹²⁰ then anyone authorized to issue a fatwa would have direct power to dictate outcomes in judicial cases.

b. Political influence and interference

In addition to this potential for religious influence, there are noted instances of political (executive) influence of the judiciary.¹²¹ One such case that raised much controversy was the case shortly before the 2010 parliamentary elections in Iraq, when the Supreme Commission for Accountability and Justice announced that pursuant to relevant de-Ba’athification laws it had disqualified over 500 nominees from participating in the election.¹²² The Court of Cassation overturned the Commission’s ruling, holding that there was not sufficient time prior to the election to complete a proper review of the claims against the nominees, and they should be allowed to participate in the election subject to post-election

¹¹⁷ Basic Principles, *supra* note 20, Para. 2.

¹¹⁸ *Id.*, Para. 4.

¹¹⁹ Constitution of the Federal Republic of Iraq, Sec. I art. 2(1); *see* discussion of Article 2 *infra*.

¹²⁰ *See supra* note 45 and accompanying text.

¹²¹ *See, e.g.* Coonjohn and al-Maliki, *supra* note 77, at 1-2. One 2006 report noted that judges “face intense pressure from external forces and individuals.” American Bar Association Iraq Legal Development Project, *Judicial Reform Index for Iraq*, 2 (July 2006) <http://apps.americanbar.org/rol/publications/jri-iraq-2006.pdf>.

¹²² *Supra* note 105.

review.¹²³

The Court's decision, however, was largely unpopular with the Prime Minister and his political allies.¹²⁴ Under great pressure, and after meetings with the Prime Minister and other political leaders, the Court reversed the decision and ultimately allowed only 26 candidates to stand for election.¹²⁵ This reversal was generally perceived among Iraqis as evidence that the judiciary was susceptible to political pressure, and thus lacking independence.¹²⁶

Another example came in 2011, when the Federal Supreme Court rendered a decision, authored by the Chief Justice, ruling that a series of previously powerful and independent agencies were subject to direct cabinet oversight.¹²⁷ One commentator referred to this case as the Prime Minister utilizing his "increasingly pliable judiciary" to weaken oversights and empower the executive.¹²⁸

Cases like these raise serious doubts about the judiciary's ability to withstand pressure and interference from a very powerful executive. At the very least, the situation seriously undermines public confidence in the judiciary and, more particularly, in its independence.

3. "Right to be tried ... using established legal procedures"

Paragraph 5 of the UN's Basic Principles is designed, it would appear,

¹²³ Trumbull IV and Martin, *supra* note 105122, at 358 (citing Mahkamat al-Tamiez, Court of Cassation, decision no. 108 of February 3, 2010, available at www.gjpi.org/2010/02/03/appeal-panel-overturms-election-ban-and-postpones-de-baathification-examination (last visited May 21, 2013)).

¹²⁴ Ala Hamoudi, *supra* note 92, at 110.

¹²⁵ Trumbull IV and Martin, *supra* note 122, at 359-61; Ala Hamoudi, *supra* note 92, at 110.

¹²⁶ Trumbull IV and Martin, *supra* note 122, at 360 (citing Adeed Dawisha, *Iraq: A Vote Against Sectarianism*, 21(3) J. Democracy 26, 39 (2010); Ranj Alaaldin, *Iraq's Troubled Elections*, *Guardian*, Feb. 15, 2010, <http://www.guardian.co.uk/commentisfree/2010/feb/15/iraq-elections-baath-ban> (last visited May 21, 2013)).

¹²⁷ Toby Dodge, *State and society in Iraq ten years after regime change: the rise of a new authoritarianism*, 89(2) INT'L AFFAIRS 241, 248 (2011) (referring to the Court's ruling that the Committee of Integrity, the IHEC, the Central Bank of Iraq, and the High Commission for Human Rights—all independent institutions created by the CPA—were under the direct oversight of the cabinet).

¹²⁸ Dodge, *supra* note 127, at 248.

to avoid the creation of a special court to hear a specific case and thereby circumvent the regular court system:

Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.¹²⁹

In Iraq, the problem is not necessarily the creation of special courts that do not follow the “established legal procedures,” but the fact that such procedures—at least for the Iraqi Supreme Court—have never been established in the first place. The Constitution states that “[t]he law shall regulate the establishment of courts,”¹³⁰ and that “the work of the [Supreme] Court shall be determined by a law enacted by a two-thirds majority.”¹³¹ However, the Council of Representatives has been unable to pass such a law (on the Supreme Court) in the eight years since the Constitution was adopted,¹³² so the Supreme Court at least is arguably without “duly established procedures,” in violation of Paragraph 5 of the UN Basic Principles.

4. Judges “with appropriate training or qualifications”

Paragraph 10 of the UN Basic Principles sets standards for qualification and selection of judges, and requires that those selected have “appropriate training or qualifications in law.”¹³³ There are some concerns regarding this principle under Iraq’s present Supreme Court. The Constitution is silent as to the requirements of any of its members, whether they are judges, legal scholars, or experts in Islamic jurisprudence.¹³⁴ While there is no indication that the Court’s current members lack the qualifications needed to be effective judges, at the very least the qualifications of successor members may be questioned if this is not clearly defined as the Constitution requires.¹³⁵

Especially problematic is that the Federal Supreme Court is entrusted

¹²⁹ Basic Principles, *supra* note 20, Para. 5.

¹³⁰ Constitution of the Federal Republic of Iraq, Sec III, Chapter 3, art. 96. *See also* discussion of Article 92 of the Constitution, *infra*.

¹³¹ *Id.*, art. 92. *See also* discussion of Article 92 of the Constitution, *infra*.

¹³² Coonjohn, *supra* note 77.

¹³³ Basic Principles, *supra* note 20, Para. 10.

¹³⁴ *See* Iraqi Const., Ch. 6, art. 92, 96.

¹³⁵ Iraqi Const., Ch. 6, art 92.

with the enforcement of Article 2's prohibition on laws that conflict with "established provisions of Islam," yet there is no evidence that its current members have training or qualifications on principles of Islam.¹³⁶ The Constitution attempts to address this by providing for "experts in Islamic jurisprudence" to be members of the court.¹³⁷ But unless and until an implementing law is adopted to put this into effect, the members of the Iraqi Supreme Court may lack the training and qualification necessary to decide these issues that come before them.

5. Conditions of service and tenure, including security

Paragraphs 11 and 12 of the UN Basic Principles requires that judges security, salaries, terms of office, and tenure be secured by law.¹³⁸ Of course, the lack of a Law on Courts means that these very provisions are not protected or even identified by law. Again, the continued reliance on the laws of the transitional administration, before the Iraqi Constitution was adopted, is destructive of general Rule of Law principles.

Something worthy of particular attention here is a judge's personal security, which is specifically mentioned in the UN Basic Principles as an element of judicial independence,¹³⁹ and which remains a constant challenge in post-conflict Iraq.¹⁴⁰ Early on in the occupation of Iraq, judicial security was so weak that the CPA issued an order to provide pensions to the families of judges assassinated after the start of the occupation.¹⁴¹ One report in August 2010 indicated that judicial security improved somewhat

¹³⁶ Ala Hamoudi, *supra* note 59, at 701 (noting that the Federal Supreme Court as it existed at ratification was staffed entirely by judges).

¹³⁷ Iraqi Const., Ch. 6, art 92.

¹³⁸ Basic Principles, *supra* note 20, Para. 11-12.

¹³⁹ Basic Principles, *supra* note 20, Para. 11.

¹⁴⁰ Duraid Adnan, Attacks in Iraqi Cities Raise Fears of Renewed Sectarian Conflict, N.Y. Times, May 20, 2013, available at <http://www.nytimes.com/2013/05/21/world/middleeast/baghdad-basra-iraq-bombings.html> (noting that recent attacks "sharpened concerns that sectarian violence was pushing the country toward a conflagration similar to the widespread fighting of 2006 and 2007, before the withdrawal of American forces."); France concerned about deteriorating security in Iraq, Kuwait News Agency, May 21, 2013, <http://www.kuna.net.kw/ArticleDetails.aspx?id=2312204&language=en> (noting the current violence as "the worst security climate in Iraq for years).

¹⁴¹ Angeline Lewis, Judicial Reconstruction and the Rule of Law: Reassessing Military Intervention in Iraq and Beyond 132-33 (2012) (*citing* Coalition Provisional Authority Order No. 52: Payment of Pensions for Judges and Prosecutors who Die while Holding Office (8 Jan. 2004)). One report from 2006 claimed that "the most serious issue facing Iraqi judges . . . is survival." Judicial Reform Index, *supra* note 121, at 2.

due to increased levels of personal security and to equipping judges with weapons and ballistic vests,¹⁴² but judicial intimidation nonetheless remained, and remains, a serious issue.¹⁴³ As recently as 2011, there were still high numbers of targeted attacks against government officials, with approximately ten per month, two-thirds of which resulted in death.¹⁴⁴ In mid-2012, a criminal court judge was gunned down as he was returning home from work.¹⁴⁵ As long as a significant risk remains to the health and safety of judges and their families, there is risk they are susceptible to coercion and corruption, threatening the independence of the judiciary.

Judicial compensation is one issue that *is* addressed by the 2005 Federal Supreme Court Law.¹⁴⁶ It notes that the members of the Court are awarded the same compensation and benefits as government ministers.¹⁴⁷ Additionally, members are entitled to a pension equal to 80% of their monthly salary as long as they are not removed for conviction of a crime involving moral turpitude or resign without permission of the Presidency Council.¹⁴⁸ The 2007 Draft Law would have added a detailed pay scale based on rank and providing paid leave by law.¹⁴⁹

Term of office and tenure for members of the Federal Supreme Court is an issue that presents a great challenge to the Court's judicial independence. The 2005 law does not specify a term of years for members of the Court, and indicates that the Court may "continue to exercise their functions without determining a maximum age limit."¹⁵⁰ With respect to tenure, the Constitution again calls for an implementing law, stating that "judges may

¹⁴² U.S. Dept. of Defense, *Measuring Security and Stability in Iraq* vi (June 2010), available at http://www.defense.gov/home/features/iraq_reports/.

¹⁴³ *Measuring Security and Stability*, *supra* note 142, at 7.

¹⁴⁴ Brookings Institution, *Iraq Index – Tracking Variables of Reconstruction & Security in Iraq*, 5 (July 2012), available at <http://www.brookings.edu/about/centers/saban/iraq-index> (last visited May 21, 2013).

¹⁴⁵ *Bombs kill 4, judge shot as Iraq attacks grind on*, USA Today (July 1, 2012) ("In the northern city of Mosul, gunmen killed criminal court judge Abdul-Latif Mohammed in a drive-by shooting as he was returning home from work, police said. ...Government officials and security forces are among the chief targets of al-Qaeda-affiliated insurgents, who experts say have been emboldened by political feuding that has paralyzed the government and are hoping to reignite fighting among the country's ethnic and sectarian factions.") <http://usatoday30.usatoday.com/news/world/iraq/story/2012-07-01/iraq-qaeda-attacks/55963002/1>

¹⁴⁶ Federal Supreme Court Law, *supra* note 66, art. 6.

¹⁴⁷ Federal Supreme Court Law, *supra* note 66, art. 6(1).

¹⁴⁸ Federal Supreme Court Law, *supra* note 66, art. 6(2).

¹⁴⁹ 2007 Draft Law, *supra* note 73, arts. 11-12.

¹⁵⁰ Federal Supreme Court Law, *supra* note 66, art. 6(3).

not be removed except in cases specified by law.”¹⁵¹ The 2005 law—the only one in place—states that members of the Court may be removed, however, based on “disqualification due to conviction for a crime involving moral turpitude or corruption,”¹⁵² but it is silent on any procedural provisions for such a removal from office.¹⁵³ This failure to properly adopt a law that defines the term of office and tenure, and to specify appropriate due process requirements for a judge facing removal,¹⁵⁴ could be problematic for judicial independence.

Overall, there remains considerable uncertainty about judges’ terms and conditions of service, as the system is still relying on laws that predate the Constitution. Until these conditions are defined and secured by law, and adequate personal security is provided to ensure the safety of judges and their families, judicial independence in Iraq will remain elusive.

CONCLUSION

The challenges for the Iraqi judiciary are manifold, and the promise of judicial independence and of, more generally, the Rule of Law is tenuous. Article 2 poses inherent challenges, as it blurs the delineation between church and state, casting doubt on the Supreme Court’s ability to protect religious minorities or to function independently of religious influence and pressure. The failure to pass implementing legislation for the Court, as called for in Article 92, further imperils the Court’s legitimacy and efficacy. Indeed, the Court is established and operating under statutes that pre-date, and that are inconsistent with the present-day Iraqi Constitution. The absence of a law governing the Court raises a series of other concerns about specific aspects of judicial independence, including judicial qualifications, conditions of service, and security. Moreover, the actual political influence of the executive branch, and of the de-Ba’athification authorities, on Iraqi judges give them little hope of achieving the degree of independence required to establish the Rule of Law in a deeply troubled and conflict-ridden society.

¹⁵¹ Iraqi Const., Ch. 6, art. 97.

¹⁵² Federal Supreme Court Law, *supra* note 66, art. 6(2).

¹⁵³ *See generally* Federal Supreme Court Law, *supra* note 66.

¹⁵⁴ It is easy to imagine, for example, that a judge might be arrested for trespass incident to a dispute over ownership of land. Whether conviction for such a crime warrants removal from office will depend on whether this is a crime of “moral turpitude,” and a judge should be entitled to a hearing on that and other issues.

Hopes for the Rule of Law in post-conflict Iraq depend heavily on their ability to address these deficiencies in judicial independence. Failure to remedy these shortcomings may doom Iraqi society to further injustice, conflict, and even violence in the years to come. On the other hand, effective legal institutions could make all the difference in the world, setting the stage for effective anti-corruption, reconciliation, peace-building and justice among a people who desperately need it, and who have lived without it for far too long.