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# JUDICIAL INDEPENDENCE IN POSTCONFLICT IRAQ: ESTABLISHING THE RULE OF LAW IN AN ISLAMIC CONSTITUTIONAL DEMOCRACY

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## I. INTRODUCTION

Contemporary Iraq is facing the full range of challenges that come with postconflict transitional justice. This 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.<sup>1</sup> It also includes the forward-looking efforts of “paving the road to peace and reconciliation” and establishing a functional state characterized by the rule of law in a society torn apart by conflict.<sup>2</sup>

Among the critical institutions demanding attention in the post-conflict reconstruction is the judiciary—particularly with respect to its independence.<sup>3</sup> There is increasing recognition that a functional legal system, one that protects rights and redresses wrongs, is vital to restoring peace and stability to a war-torn society.<sup>4</sup> Only

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1. See generally POST-CONFLICT JUSTICE xv (M. Cherif Bassiouni ed., 2002) (defining postconflict justice).

2. *Id.*

3. See Angeline Lewis, *Judicial Reconstruction and the Rule of Law: Reassessing Military Intervention in Iraq and Beyond*, in 39 INTERNATIONAL HUMANITARIAN LAW SERIES 22 (Brill 2012).

4. See generally U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, U.N. Sec. Council, U.N. Doc. S/2011/634 (Oct. 12, 2011) (explaining rule of law and transitional justice findings and how to further promote the rule of law in conflict and postconflict societies to work toward international peace).

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 postconflict justice. Every postconflict society, including Iraq, faces a unique set of circumstances. 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,<sup>5</sup> the inability to pass legislation on the Federal Courts of Iraq leaving several provisions of the Iraqi Constitution unimplemented,<sup>6</sup> and the de-Ba'athification authority in Iraq, which has the power to effectively remove judges from office based on allegations that they were too closely tied to the prior regime.<sup>7</sup> 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.<sup>8</sup> Serious concerns about security for judges in Iraq only further complicate the prospects for judicial independence in the near 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.

## II. POSTCONFLICT RULE OF LAW IN IRAQ: CORE ELEMENTS

### A. *Functional Legal Institutions, Including Courts*

When nineteenth century constitutional theorist A.V. Dicey contemplated the “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

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5. Article 2, Section 1(A), Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, translated in *Iraq: Constitutions and Fundamental Laws*, HEINONLINE, [http://heinonline.org/HOL/COWShow?collection=cow&cow\\_id=204](http://heinonline.org/HOL/COWShow?collection=cow&cow_id=204) (expand “Iraqi Constitution, 2005” heading; then expand “Original Text” heading; then follow “Council of Representatives [consulted 2012]” hyperlink) (last visited Oct. 15, 2013) [hereinafter *Iraq: Constitutions and Fundamental Laws*].

6. See *id.* art. 92.

7. See Supreme National Commission of Accountability and Justice Law of 2008 (Iraq), translated in *Statutes*, GLOBAL JUST. PRAC.: IRAQ, <http://gjpi.org/library/primary/statutes> (follow “Supreme National Commission of Accountability and Justice Law No. 10 of 2008 (English)” hyperlink) (last visited Oct. 16, 2013).

8. See Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, It., Aug. 26–Sept. 6, 1985, *Basic Principles on the Independence of the Judiciary*, 60–61, U.N. Doc. A/CONF.121/22/Rev.1, Annex [hereinafter *Basic Principles*].

by ordinary legal processes.<sup>9</sup> 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, and inefficient court systems cannot deliver timely justice; and each therefore is incapable of upholding or enforcing the rule of law.<sup>10</sup>

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.<sup>11</sup> Absent independence, a court cannot be impartial, and history is replete with examples of judicial systems shamelessly manipulated by political actors who exploit the lack of independence to make courts tools of political control.<sup>12</sup>

### B. Public Confidence in Legal Institutions, Including Courts

The independence of the judiciary is a 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.<sup>13</sup> 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, independence similarly helps a corrupt judge feel free to do the *wrong* thing without fearing adverse personal consequences. Therefore, judicial independence is a virtue only if the courts are already fair, impartial, and functional.

It is not enough that the public institutions, particularly the courts, be worthy of the public trust. In order for courts to support and safeguard the rule of law, "the public must actually trust them."<sup>14</sup> Without public trust, courts and other legal institutions

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9. JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 70 (2006).

10. Under the popular maxim, "justice delayed is justice denied," there is no such thing as untimely justice. If it is untimely, it is not justice.

11. Cf. David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*, 57 CLEV. ST. L. REV. 1, 5 (2009) (noting that judicial independence is a requirement for the rule of law and that judges must be free to act independently in applying the law to ensure uniform protection of a democracy's citizens).

12. See, e.g., Alena Ledeneva, *Behind the Façade: 'Telephone Justice' in Putin's Russia*, in *DICTATORSHIP OR REFORM?: THE RULE OF LAW IN RUSSIA* 24, 25–26 (Mary McAuley et al. eds., 2006) (discussing the origins of corruption and the lack of transparency in the Russian legal system and emphasizing how the power of Russian politicians' oral commands interferes with judicial fairness).

13. See Pimentel, *supra* note 11, at 15.

14. David Pimentel, *Culture and the Rule of Law: Cautions for Constitution-making*, 36 *FORDHAM INT'L L. J. ONLINE* (forthcoming 2013) (manuscript at 11) (on file with author).

will be under-utilized and actively disregarded, as aggrieved persons will resort to self-help rather than the legal process to resolve their disputes.<sup>15</sup> Until the public institutions earn the public's confidence, they will be "plagued with dysfunction": the public will avoid such institutions, will choose to ignore their decisions, and will work to undermine their authority.<sup>16</sup>

Alabama Chief Justice Sue Bell Cobb's statement reaffirms that the courts' only claim to power and relevance lies in the trust and confidence of the public: "'All the court system has is the public's respect,' . . . 'If we lose the respect, we don't have anything.'"<sup>17</sup>

The challenge in a postconflict setting, therefore, is not just to build a functional court system worthy of public confidence, but also to foster the necessary confidence itself. This is not a short-term enterprise; it will likely take at least one generation, and likely more, to overcome resistance to distrusted institutions.<sup>18</sup>

### C. *Lustration/Vetting*

Lustration has been widely employed as part of the postconflict justice strategy in the Central European countries that were once members of the Soviet Bloc. It is a process designed to identify and expose collaborators with the prior regime, usually so they can be barred from positions of power or influence in the postconflict state.<sup>19</sup> The lustration (also known as "vetting") procedure adopted in the Czech Republic in 1991 has served as a model for many other states.<sup>20</sup>

Effective lustration can be critical to effective postconflict justice because it is essential to restoring public confidence in government institutions.<sup>21</sup> If the same personalities who oppressed the public before and during the conflict continue to wield power and

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15. *Id.*

16. *Id.*

17. John Schwartz, *Uncertainty in Law Circles over New Rules for Judges*, N.Y. TIMES, June 10, 2009, at A20 (quoting Justice Cobb).

18. Pimentel, *supra* note 14 (manuscript at 11).

19. Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, in POST-CONFLICT JUSTICE 345, 345 (M. Cherif Bassiouni ed., 2002); see also Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Block*, 59(4) LAW & CONTEMP. PROBS. 181, 181 (1996) (explaining the purpose of lustration).

20. See Boed, *supra* note 19, at 346, 352 n.33.

21. See Eric Brahm, *Lustration*, BEYOND INTRACTABILITY (June 2004), <http://www.beyondintractability.org/bi-essay/lustration>; see Boed, *supra* note 19, *passim* (describing how lustration has been effectively used as a tool in achieving postconflict justice); Ellis, *supra* note 19, *passim* (same).

authority in the new regime, the public will continue to fear the system.<sup>22</sup> They will have little reason to trust their disputes to the system, or to turn to formal legal institutions for protection of their interests and vindication of their rights.<sup>23</sup>

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.<sup>24</sup> Due process concerns, both substantive and procedural, arise quickly in this setting as well, where the lustration process may brand individuals with guilt by association.<sup>25</sup> “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.”<sup>26</sup>

While lustration has gained wide acceptance and legitimacy as an important tool in postconflict justice, it must be implemented with great care and sensitivity to avoid undermining basic human rights norms and protections.<sup>27</sup> Without this care, lustration can run the risk of interfering with the independence of the judiciary by allowing politically-motivated lustration proceedings to threaten and coerce judges.<sup>28</sup>

#### D. *Other Key Principles of Judicial Independence*

The postconflict situation in Iraq raises some other concerns for judicial independence—issues that the government needs to address to ensure that the rule of law prevails in Baghdad and throughout Iraq. The *Basic Principles on the Independence of the Judiciary* (U.N. Basic Principles), adopted by the United Nations in 1985,

22. See Brahm, *supra* note 21.

23. See *id.*

24. Boed, *supra* note 19, at 346 (citing MORTON H. SKLAR & KRASSIMIR KANEV, AM. ASS'N FOR ADVANCEMENT SCI., *DECOMMUNIZATION: A NEW THREAT TO SCIENTIFIC AND ACADEMIC FREEDOM IN CENTRAL AND EASTERN EUROPE* vi–vii (1995)).

25. Boed, *supra* note 19, at 346.

26. TRICIA D. OLSEN, LEIGH A. PAYNE & ANDREW G. REITER, *TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* 38 (2010).

27. See Boed, *supra* note 19, at 378. Boed criticizes the Czech approach, but concludes as follows:

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.

*Id.*

28. See *infra* Part III.C.1.

includes a fairly comprehensive list of issues to address.<sup>29</sup> For the Iraqi judiciary, it is worth calling attention to a few issues in particular, including (1) improper influence and unwarranted interference,<sup>30</sup> (2) deficiencies in terms of “established legal procedures,”<sup>31</sup> (3) training and qualification of judges,<sup>32</sup> particularly to rule on the applicability of principles of Islam,<sup>33</sup> and (4) the terms, conditions, and tenure of judges being adequately secured by law.<sup>34</sup> This Article addresses each separately in Section III.C below.

### III. 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.<sup>35</sup> Indeed, this issue arises under the latter two of the three “kindred conceptions” A.V. Dicey identified as key elements of the rule of law: “[1] a government limited by law; [2] equality under the law for all citizens; and [3] the protection of human and civil rights.”<sup>36</sup> 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 Iraqi Constitution, which cannot be contradicted in later legislation,<sup>37</sup> 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 foundation source of legislation.”<sup>38</sup>

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29. See *Basic Principles*, *supra* note 8, at 60–62.

30. See *id.* at 60; discussion *infra* notes 140–41.

31. See *Basic Principles*, *supra* note 8, at 60; *infra* text accompanying note 152.

32. See *Basic Principles*, *supra* note 8, at 61.

33. See discussion *infra* Part III.C.4.

34. See *Basic Principles*, *supra* note 8, at 61; *infra* text accompanying note 161.

35. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* chs. 15–16 (Alfred A. Knopf ed., 1980) (1835) (explaining the role of the judiciary to protect the minority from the tyranny of the majority).

36. RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD* 13 (2012) (summarizing A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 183–95 (8th ed. 1915)).

37. See Article 2, Section 1, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, *translated in Iraq: Constitutions and Fundamental Laws*, *supra* note 5.

38. *Id.*

Further, it notes that “[n]o law may be enacted that contradicts the established provisions of Islam.”<sup>39</sup> While Iraq is not unique in its incorporation of some form of Islamic law into its legal system,<sup>40</sup> 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 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.”<sup>41</sup> While Islamic law is broadly defined as “law that is either embodied in or derived from Islam’s foundational legal sources,”<sup>42</sup> 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 “path,” and is divinely ordained by God and known only to Him.<sup>43</sup> Alternatively, the term *fiqh*, meaning discernment, is a human attempt to understand and articulate the divine law.<sup>44</sup> As such, it is inherently imperfect and therefore, unlike *shari’a*, subject to debate.<sup>45</sup> Moreover, there are various schools of *fiqh*, and a long tradition of Islamic legal pluralism recognizes multiple, differing *fiqh* that may exist related to a single law.<sup>46</sup>

Prior to the enactment of the Iraqi Constitution, the Transitional Administrative Law, which governed Iraq until a constitution

39. *Id.* The Constitution continues to declare that legislation may not contradict the “principles of democracy” nor the rights and freedoms enumerated elsewhere in the Constitution. *Id.*

40. 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. See Intisar A. Rabb, “We the Jurists”: *Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527, 527 n.1, 540 (2008) (providing a comprehensive list of countries and the method of incorporation or application of *shari’a* or Islamic law into their legal systems).

41. Article 2, Section 1, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, translated in *Iraq: Constitutions and Fundamental Laws*, *supra* note 5.

42. Rabb, *supra* note 40, at 541.

43. See *id.* at 542.

44. *Id.*

45. *Cf. id.* (comparing Islamic law to American constitutional law and other common law systems).

46. See ASIFA QURAIISHI-LANDES, INST. FOR SOC. POL’Y & UNDERSTANDING, SHARIA AND DIVERSITY: WHY SOME AMERICANS ARE MISSING THE POINT 14–15, (2013), available at <http://www.ispu.org/GetReports/35/2620/Publications.aspx> (last visited Oct. 26, 2013). For a more complete history of the development of the pluralistic legal system in Islam, see Rabb, *supra* note 40, at 544–47.



could be adopted, 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."<sup>47</sup> 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.<sup>48</sup>

One early draft of Article 2 stated that "[n]o law may be enacted that contradicts [Islam's] tenets and provisions (its universally agreed principles)."<sup>49</sup> 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 the government, or a court, can invoke them to invalidate laws.<sup>50</sup> 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."<sup>51</sup> 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."<sup>52</sup>

The degree to which the resulting Article 2 presents a danger to the protection of minority rights is unclear, primarily because the Constitution fails to define the term "established provisions."<sup>53</sup> It is certainly broader than "universally agreed tenets of Islam" as used in the Transitional Administrative Law.<sup>54</sup> The requirement of "universal agreement" implies bridging differences between Sunni and Shi'a, and incorporating only those provisions accepted by all Mus-

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47. Article 7, Law of Administration for the State of Iraq for the Transitional Period of 2004 (emphasis added) (enacted under the Coalition Provisional Authority (CPA)).

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

49. *Id.* at 13.

50. *See id.*

51. *Id.*

52. *Id.* at 13–14.

53. See Article 2, Section 1, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, translated in *Iraq: Constitutions and Fundamental Laws*, *supra* note 5.

54. Article 7, Law of Administration for the State of Iraq for the Transitional Period of 2004.

lims as a matter of consensus.<sup>55</sup> 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.”<sup>56</sup> Some concern arose during drafting that the term could be used to rely on *fatwas*, non-binding scholarly interpretations of Islamic law, to strike down otherwise valid legislation under Article 2.<sup>57</sup> Additionally, there was concern about whether the term “provisions” related only to incorporations from Shi’a Islam.<sup>58</sup> Taken to the logical extreme, any single school of *fiqh* could be considered an established provision of Islam.<sup>59</sup>

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, those 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.<sup>60</sup>

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55. See 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)).

56. Rabb, *supra* note 40, at 548–49.

57. See Deeks & Burton, *supra* note 48, at 14. Secularists and non-Shi’a Islamic negotiators during the Constitution’s drafting raised concerns that Shi’a negotiators tried to incorporate a “wide-ranging and voluminous field of Islamic jurisprudence against which Iraqi law would be measured” in the Constitution. *Id.*

58. *See id.*

59. See Rabb, *supra* note 40, at 548.

60. 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 64), to strike down this provision, because Islam does not tolerate consumption of wine for *any* purpose.

In several places, however, the Iraqi Constitution specifically recognizes the rights of religious minority populations. At Article 2, the Constitution guarantees the “full religious rights to freedom of religious belief and practice of all individuals.”<sup>61</sup> Similarly, at Article 14, it notes that Iraqis are equal before the law, without discrimination based on religion.<sup>62</sup> Article 41 declares Iraqis free in their “commitment to their personal status according to their religions, sects, beliefs, or choices.”<sup>63</sup> 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.<sup>64</sup>

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 the rights of religious minorities for post-conflict justice should not be underestimated. The civil war in Sudan, which 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.<sup>65</sup> Thus, the violation of religious rights, and specifically the imposition of Islamic provisions on a non-believing populace, can give rise to violence and conflict.<sup>66</sup> Therefore, respect for the religious freedoms of minorities becomes an important element of postconflict justice. As Iraq and its neighbors are already plagued by sectarian violence, prospects for peace and reconciliation in the region may depend on it.<sup>67</sup>

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See N.J. COULSON, A HISTORY OF ISLAMIC LAW 11–12 (1990). Under these circumstances, Article 2's effect is to deny Catholics the right to free exercise of their religion.

61. Article 2, Section 2, Doustour Jounhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, *translated in Iraq: Constitutions and Fundamental Laws*, *supra* note 5.

62. *Id.* art. 14.

63. *Id.* art. 41.

64. *Id.* art. 43.

65. Francis M. Deng, *Sudan—Civil War and Genocide: Disappearing Christians of the Middle East*, MIDDLE E. Q., Winter 2001, at 13 (“[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.”).

66. *See id.*

67. *See UN: Iraq Sectarian Violence Worst in Years*, DW (June 1, 2013), <http://www.dw.de/un-iraq-sectarian-violence-worst-in-years/a-16853048>; Tim Arango et al., *As Syrians*

## 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 Provisional Authority's Transitional Administrative Law.<sup>68</sup> 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.<sup>69</sup> The only specificity in the Transitional Administrative Law with respect to membership of the Court was that it contains "nine members."<sup>70</sup> 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."<sup>71</sup>

Early in the negotiations and drafting of the Iraqi Constitution, Shi'a Islamists advocated for the 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.<sup>72</sup> 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.<sup>73</sup> This proposed body was to be comprised of eleven members, including six judges and five "legal experts" in religion or law generally.<sup>74</sup> Drafts of this proposal would have granted the Council the ability to rule on the constitutionality of laws *prior to enactment*.<sup>75</sup> Supporters of this pro-

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*Fight, Sectarian Strife Infects Mideast*, N.Y. 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>.

68. See Article 44, Law of Administration for the State of Iraq for the Transitional Period of 2004. See generally JAMES DOBBINS ET AL., *OCCUPYING IRAQ: A HISTORY OF THE COALITION PROVISIONAL AUTHORITY* (2009), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND\\_MG847.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG847.pdf) (explaining that the CPA is the body created by the invading forces to govern Iraq).

69. Article 44, Law of Administration for the State of Iraq for the Transitional Period of 2004.

70. *Id.*

71. *Id.* art. 7.

72. Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 7 U. ST. THOMAS L.J. 692, 697–98 (2010) (citing Shi'a Islamist Proposal, Article 92 from unsigned constitutional records).

73. *Id.* at 698. 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.*

74. *Id.* at 697–98.

75. *Id.* at 698.

posal 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 scholars to judge these laws for consistency with provisions of Islam under Article 2.<sup>76</sup>

The Constitutional Council, however, was not to be. The compromise that the drafters ultimately struck, in Article 92, entrusted Article 2 determinations to the Federal Supreme Court.<sup>77</sup> It included compromise language specifying that the members of the Court should include not only judges but also "legal scholars," and "experts in Islamic jurisprudence."<sup>78</sup> 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.<sup>79</sup>

At the time of the Constitution's ratification, 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.<sup>80</sup> In terms of the Court's membership, the Supreme Court Law merely states that it shall consist of one president and eight members, but in practice, since the Federal Supreme Court's adoption, all nine have been judges.<sup>81</sup> 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 become permanently incapacitated, or are convicted of corruption or a crime of moral turpitude.<sup>82</sup>

Because it was enacted before the Constitution, the Supreme Court Law does not create a Court as envisioned by the Constitu-

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76. *Id.*

77. *Id.* at 699.

78. Article 92, Section 2, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, translated in *Iraq: Constitutions and Fundamental Laws*, *supra* note 5.

79. *See id.* arts. 92–94.

80. Article 44, Law of Administration for the State of Iraq for the Transitional Period of 2004; Article 1, Federal Supreme Court Law No. 30 of 2005 (Iraq).

81. Article 3, Federal Supreme Court Law No. 30 of 2005 (Iraq). 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. *See* Ala Hamoudi, *supra* note 72, at 701; *see also* Article 44, Law of Administration for the State of Iraq for the Transitional Period of 2004 (providing for nine members).

82. Article 47, Law of Administration for the State of Iraq for the Transitional Period of 2004.

tion.<sup>83</sup> The Law does not give any direction to court membership, nor provide any detail as to how seats on the Court shall be apportioned.<sup>84</sup> Additionally, the law does not specify the qualifications needed for nomination to the Court, and merely refers to the Transitional Administrative Law, which gives the power to nominate candidates to the Higher Judicial Council and the authority to appoint such candidates to the Presidency Council.<sup>85</sup> The jurisdiction of the Court, as defined in the law, is also somewhat at odds with that in the Constitution.<sup>86</sup>

The end result of the Supreme Court Law 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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup>

In 2007, in an effort to fully implement a Federal Supreme Court as contemplated by Article 92 of the Constitution, a draft law was presented that sought to redefine the organization and jurisdic-

83. Indeed the Supreme Court Law did not anticipate the provisions of the Constitution, and therefore does not reflect the content of the Constitution later adopted. Compare Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, translated in *Iraq: Constitutions and Fundamental Laws*, *supra* note 5, with Federal Supreme Court Law No. 30 of 2005 (Iraq).

84. See Federal Supreme Court Law No. 30 of 2005 (Iraq).

85. *Id.* art. 3.

86. Compare Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, translated in *Iraq: Constitutions and Fundamental Laws*, *supra* note 5, with Federal Supreme Court Law No. 30 of 2005 (Iraq). The Constitution's recitation of the Supreme Court's jurisdiction is significantly more specific and detailed than that provided in the Supreme Court Law.

87. See Haider Ala Hamoudi, *The Iraq Federal Supreme Court Avoids Interpreting Shari'a—Again*, ISLAMIC L. OUR TIMES (Apr. 24, 2012, 3:12 PM), <http://muslimlawprof.org/2012/04/24/the-iraq-federal-supreme-court-avoids-interpreting-sharia—again.aspx>.

88. See Ala Hamoudi, *supra* note 72, at 701.

89. See *id.* 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.” *Id.* Further, the existing panel of judges repeatedly opposed proposals to include legal scholars and Islamic experts and, at most, was only willing to have a small number sit as advisors for the Court. *Id.*

tional mandate of the court.<sup>90</sup> The draft law would have maintained a judicial panel of nine judges, but sought to create an “advisory commission” consisting of two legal experts and two experts in Islamic jurisprudence.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup>

Ultimately, the draft law was never adopted, and subsequent attempts to craft an implementing law that more closely resembles the requirements of the Constitution have similarly failed.<sup>94</sup> Complicating the picture, the Constitution requires a two-thirds majority in the Council of Representatives to pass any law establishing the membership or defining the work of the Court.<sup>95</sup> Given the current political climate and makeup of the Council of Representatives, it is unlikely that a satisfactory compromise will soon be reached.<sup>96</sup>

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90. Draft Federal Supreme Court Law of 2007 (Iraq), *translated in Statutes*, GLOBAL JUST. PRAC.: IRAQ, <http://gji.org/library/primary/statutes> (follow “DRAFT Federal Supreme Court Law” hyperlink) (last visited Oct. 16, 2013).

91. *Id.* art. 2.

92. *Id.* art. 13.

93. *See id.* arts. 3–5, 8, 11–12.

94. Several articles and blogs have reported the attempt, and failure, to pass an implementing law. *See, e.g.*, JEFFREY J. COONJOHN & ZUHAIR AL-MALIKI, CHAOS IN THE COURTS 3–4, available at <http://jjcoonjohn.com/middle-east/chaos-in-the-courts> (last visited Oct. 18, 2013); *National Alliance Seeks to Pass Law on the Federal Supreme Court*, IRAQI MEDIA NETWORK (Jan. 22, 2013, 12:29 PM), <http://www.alrafedain.net/index.php?show=news&action=article&id=94375> (Arabic text); *Iraqi Parliament Postpones Vote on Federal Court, Supreme Judicial Council Law Drafts*, ALL IRAQ NEWS (Dec. 3, 2012, 11:56 AM), [http://www.alliraqnews.com/en/index.php?option=com\\_content&view=article&id=23814](http://www.alliraqnews.com/en/index.php?option=com_content&view=article&id=23814); *Political Leaders Forbid Endorsing Federal Court, Political Parties’ Law Drafts*, ALL IRAQ NEWS (June 30, 2012, 11:15 AM), available at [http://www.alliraqnews.com/en/index.php?option=com\\_content&view=article&id=13320](http://www.alliraqnews.com/en/index.php?option=com_content&view=article&id=13320).

95. Article 92, Section 2, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, *translated in Iraq: Constitutions and Fundamental Laws, supra* note 5.

96. *See Iraq: Council of Representatives of Iraq*, INTER-PARLIAMENTARY UNION, <http://www.ipu.org/parline/reports/2151.htm> (last visited Oct. 8, 2013) (providing a breakdown of political party power in the Council of Representatives).

## 2. The Federal Supreme Court—A Functioning Legal Institution?

Article 92 of the Constitution remains unimplemented, which has serious implications for 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.<sup>97</sup> 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 Federal 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 jurisdictional powers of the Federal Supreme Court.<sup>98</sup> The first jurisdictional power of the Court is to oversee the constitutionality of laws and regulations in effect, including laws challenged under Article 2.<sup>99</sup> Despite this charge to rule on whether laws conform with "established provisions of Islam,"<sup>100</sup> 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.<sup>101</sup> Since that time, the Court has been successful in avoiding issues related to Islamic jurisprudence, mostly by deferring to the legislature as better qualified to interpret Islamic law, or through procedural mechanisms to dismiss cases altogether.<sup>102</sup> One commentator noted that as long as the Federal 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."<sup>103</sup>

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97. See Ala Hamoudi, *supra* note 72, at 700–02.

98. Article 93, Doustour Jounhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, *translated in Iraq: Constitutions and Fundamental Laws, supra* note 5.

99. See *id.*

100. *Id.* art. 2.

101. See Ala Hamoudi, *supra* note 72, at 692.

102. See Haider Ala Hamoudi, *Judicial Review of Islamic Law Under Iraq's Constitution*, JURIST (Apr. 26, 2012), <http://jurist.org/forum/2012/04/haider-hamoudi-iraq-islam.php>; see also Ala Hamoudi, *supra* note 87 (describing how the Supreme Court used procedural issues to avoid deciding three recent cases on Shari'a law).

103. Ala Hamoudi, *supra* note 72, at 711.



Under the current system, the Federal Supreme Court is acting without a proper implementing law as required by Article 92 of the Constitution.<sup>104</sup> Moreover, the Court, by declining to exercise its Article 2 power, has in essence rendered that jurisdiction meaningless.<sup>105</sup> As long as the spirit and terms of the Constitution, particularly those governing the Federal Supreme Court, are not being implemented, the result is a serious breakdown of the rule of law. Specifically, it is a violation of the core rule of law principle that government institutions are subject to duly enacted law and must act consistently with it. 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.<sup>106</sup>

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

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 are independent.<sup>107</sup> Mere inspirational overtures, however, do not create judicial independence, nor do they establish public confidence—especially when other parts of the Constitution remain unenforced.<sup>108</sup> Therefore, to establish public confidence, it is not enough to create a functional court system worthy of trust, but it must establish and earn that confidence itself.<sup>109</sup> The failure to pass a proper implementing law and the avoidance of Article 2 issues create a real challenge for fostering a sense of confidence in the judiciary.

While the Constitution provides that the Federal Supreme Court shall include not only judges, but also legal scholars and experts on

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104. See *supra* note 94.

105. See Ala Hamoudi, *supra* note 72, at 702.

106. The ad hoc operation of the Federal Supreme Court, unauthorized by and inconsistent with the terms of the Constitution, helps the rule of law by providing *some* decision-making functions to fill the power vacuum. See Ala Hamoudi, *supra* note 72, at 692, 696. But it does so only by undermining the rule of law principle that courts should be functioning under according to the terms of the duly adopted Constitution. See *id.*

107. See Articles 19, 87–88, 92, Doustour Joumhouri al-Iraq [The Constitution of the Republic of Iraq] of 2005, translated in *Iraq: Constitutions and Fundamental Laws*, *supra* note 5.

108. See text accompanying notes 98–103.

109. See text accompanying notes 13–18.

Islamic jurisprudence, considerable doubt remains as to the role that the non-judge members would play in Court operations.<sup>110</sup> The legislation proposed in 2007 would have made them mere advisors,<sup>111</sup> but 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 advisors within the Court.<sup>112</sup> 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. Nonetheless, Fadhil’s powerful public statement condemning the status quo can do little to inspire public confidence in the Court or to strengthen the 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.”<sup>113</sup> One such example is the Federal Supreme Court’s certification of electoral results that favored the rival of the sitting Prime Minister.<sup>114</sup> On the other hand, there are several 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.<sup>115</sup>

While the Court technically functions and 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.<sup>116</sup> Some of the Court’s activity, and certainly that of its Chief Justice, has raised serious questions about the Court’s independence.<sup>117</sup> Together, this creates a real danger of public perception that the Federal Supreme Court—and as a result the judiciary as a whole—

110. See Article 92, *Doustour Joumhouriat al-Iraq* [The Constitution of the Republic of Iraq] of 2005, translated in *Iraq: Constitutions and Fundamental Laws*, *supra* note 5.

111. See *supra* notes 91–93 and accompanying text.

112. *Religious Experts Members Not Advisors Within Federal Court, Assures Maliki’s Advisor*, ALL IRAQ NEWS (Aug. 14, 2012, 1:59 PM), [http://www.alliraqnews.com/en/index.php?option=com\\_content&view=article&id=16429](http://www.alliraqnews.com/en/index.php?option=com_content&view=article&id=16429).

113. Haider Ala Hamoudi, *International Law and Iraqi Courts*, in *INTERNATIONAL LAW IN DOMESTIC COURTS: RULE OF LAW REFORM IN POST-CONFLICT STATES* 107, 108 (Edda Kristján-sdóttir et al. eds., 2012).

114. *Id.* at 108–09.

115. See COONJOHN & AL-MALIKI, *supra* note 94, at 1–2.

116. See Ala Hamoudi, *supra* note 113, at 108.

117. *Id.* at 110.

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 postconflict 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.<sup>118</sup> Introduced in April 2003, the Coalition Provisional Authority (CPA) was initially charged with implementing the process.<sup>119</sup> At that time, de-Ba'athification excluded top-ranking individuals from public administration positions based upon prior membership in the Ba'ath party.<sup>120</sup> 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 (Commission).<sup>121</sup> The Commission quickly expanded the scope of de-Ba'athification by broadening the categories of covered persons under the law.<sup>122</sup> The CPA was critical of the Commission, which operated without the due process protections that the CPA attempted to include when it created the process.<sup>123</sup> In 2008, after a controversial vote, the new al-Maliki government reformed the de-Ba'athification process by creating the Higher National Commission for Accountability and Justice (HNCAJ) to take over the program.<sup>124</sup> The HNCAJ included significant changes on paper, but continued to operate in much the same way.<sup>125</sup>

For example, in 2008 the HNCAJ called for all former Ba'ath party members still in government to re-apply under the new law.<sup>126</sup> The HNCAJ became embroiled in controversy in 2010 when it invalidated over five hundred nominees for the upcoming

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118. MIRANDA SISSONS & ABDULRAZZAQ AL-SAIEDI, INT'L CTR. FOR TRANSITIONAL JUST., A BITTER LEGACY: LESSONS OF DE-BAATHIFICATION IN IRAQ 9 (2013), available at <http://icj.org/publication/bitter-legacy-lessons-de-baathification-iraq>.

119. *See id.* at 10–11.

120. *Id.* at 11.

121. *Id.* at 12.

122. *Id.*

123. *See id.* at 13.

124. SISSONS & AL-SAIEDI, *supra* note 118, at 17–19 (citing the Supreme National Commission of Accountability and Justice Law of 2008 (Iraq)).

125. *See* SISSONS & AL-SAIEDI, *supra* note 118, at 18–19.

126. *Id.* at 19. This resulted in some forty-one thousand applications to the Commission. *Id.*

parliamentary elections.<sup>127</sup> 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.<sup>128</sup> In many cases, the HNCAJ did not assess specific criteria, such as one's human rights record or one's integrity; rather, the HNCAJ barred individuals from public employment solely for prior Ba'ath party membership.<sup>129</sup> 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.<sup>130</sup> Complications in implementing lustration—such as 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 for judicial independence.

These issues manifested themselves during the *Dujail* trial against Saddam Hussein.<sup>131</sup> The Iraqi High Tribunal (IHT) convened the *Dujail* trial to investigate and try Saddam Hussein and others related to charges of crimes against humanity committed in the town of al-Dujail.<sup>132</sup> Although the IHT had its 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 the case.<sup>133</sup> Reasons for this interference ranged from criticism over one judge's liberal leanings, to ousting judges that the Commission suspected of reluctance in applying capital punishment.<sup>134</sup> The Commission also made similar allegations of interference in the subsequent *Anfal* trial before the IHT, where the Commission supposedly imple-

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127. See *id.* at 19–20; Charles P. Trumbull IV & Julie B. Martin, *Elections and Government Formation in Iraq: An Analysis of the Judiciary's Role*, 44 VAND. J. TRANSNAT'L L. 331, 355–60 (2011).

128. See Eric Stover et al., *Justice on Hold: Accountability and Social Reconstruction in Iraq*, INT'L REV. RED CROSS, Mar. 2008, at 5, 20; SISSONS & AL-SAIEDI, *supra* note 118, at 31–37.

129. Stover et al., *supra* note 128, at 22.

130. See SISSONS & AL-SAIEDI, *supra* note 118, at 34–35.

131. See Stover et al., *supra* note 128, at 13–15.

132. See SISSONS & AL-SAIEDI, *supra* note 118, at 16–17; Stover et al., *supra* note 128, at 15–16; Symposium, *Transcript: Analysis of the Dujail Trial*, 39 CASE W. RES. J. INT'L L. 209, 210–11 (2006–2007); *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). The Iraqi High Tribunal (IHT) was a judicial body created by the Iraqi Interim Governing Council and later approved by the Iraqi National Assembly. Michael P. Scharf & Michael A. Newton, *The Iraqi High Tribunal's Dujail Trial Opinion*, ASIL INSIGHTS (Dec. 18, 2006), <http://www.asil.org/insights/volume/10/issue/34/iraqi-high-tribunals-dujail-trial-opinion>.

133. See SISSONS & AL-SAIEDI, *supra* note 118, at 16.

134. See Stover et al., *supra* note 128, at 14–15.

mented de-Ba'athification purges that affected the composition and fairness of the Tribunal.<sup>135</sup>

The potential threat to judicial independence persists even today. In February 2013, the HNCAJ deemed the long-time Chief Justice of the Federal Supreme Court, Medhat al-Mahmoud, ineligible for public office and removed him because of positions he held during the Saddam Hussein regime.<sup>136</sup> The allegations characterized Medhat as a "Saddamist" who taught judges "to commit offenses against the Iraqi people."<sup>137</sup> It has been suggested, however, 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.<sup>138</sup> While Medhat was later re-instated after appeal to the Court of Cassation,<sup>139</sup> 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 the Commission used de-Ba'athification proceedings 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.

## 2. No Improper Influences or Interference with the Judicial Process

Paragraph 2 of the U.N. 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."<sup>140</sup> Paragraph 4 condemns any "inappropriate or unwarranted interference with the judicial process."<sup>141</sup>

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135. See *Transcript: Analysis of the Dujail Trial*, *supra* note 132, 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).

136. See Haider Ala Hamoudi, *Medhat al-Mahmoud and De-Ba'athification in Baghdad*, JURIST (Mar. 15, 2013), <http://jurist.org/forum/2013/03/haider-hamoudi-debaathification.php>.

137. *Id.* (internal quotation marks omitted).

138. See COONJOHN & AL-MALIKI, *supra* note 94, at 1-4.

139. See *id.* at 5.

140. *Basic Principles*, *supra* note 8, at 60.

141. *Id.*

### a. Religious Influence and Interference

One concern for Iraq is that the Constitution accords juridical significance to established provisions of Islam, which opens the door to influence from religious leaders or authorities.<sup>142</sup> How the courts address these issues, and whom they must rely on for determinations on questions of what Islamic principles require, may well open them to outside influences, seriously compromising their independence. For example, if Article 2 were interpreted to require judicial fealty to *fatwas*,<sup>143</sup> 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 the potential for religious influence, there are noted instances of political (executive) influence on the judiciary.<sup>144</sup> One controversial case arose 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 five hundred nominees from participating in the election.<sup>145</sup> The Court of Cassation overturned the Commission's ruling, holding that there was not sufficient time before the election to complete a proper review of the claims against the nominees, and that they should be allowed to participate in the election subject to postelection review.<sup>146</sup>

The Court of Cassation's decision, however, was largely unpopular with the Prime Minister and his political allies.<sup>147</sup> Under great pressure, and after meetings with the Prime Minister and other political leaders, the Court of Cassation reversed its decision and ultimately allowed only twenty-six candidates to stand for elec-

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142. See Article 2, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, translated in *Iraq: Constitutions and Fundamental Laws*, *supra* note 5; discussion of Article 2 *supra* Part III.B.3.

143. Cf. *supra* note 57 and accompanying text (indicating that secularists feared the possibility of treating *fatwas* as a type of judicial ruling).

144. See, e.g., COONJOHN & AL-MALIKI, *supra* note 94, at 1–2. One 2006 report noted that judges “face intense pressure from external forces and individuals.” ABA IRAQ LEGAL DEV. PROJECT, JUDICIAL REFORM INDEX FOR IRAQ 2 (2006), available at <http://apps.americanbar.org/rol/publications/jri-iraq-2006.pdf> (emphasis omitted).

145. See *supra* note 127.

146. Trumbull & Martin, *supra* note 127, at 358 (citing Tamiez [Cassation, special chamber], decision No. 108 of February 3, 2010 (Iraq), translated in *Judicial Panel Overturns Election Ban*, GLOBAL JUSTICE PRACTICE: IRAQ (Feb. 3, 2010), <http://www.gjpi.org/2010/02/03/appeal-panel-overturns-election-ban-and-postpones-de-baathification-examination>).

147. See Trumbull & Martin, *supra* note 127, at 360 n.217.

tion.<sup>148</sup> Iraqis generally perceived this reversal as evidence that the judiciary was susceptible to political pressure, and thus lacked independence.<sup>149</sup>

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.<sup>150</sup> One commentator referred to this case as the Prime Minister utilizing his “increasingly pliable judiciary” to weaken oversights and empower the executive.<sup>151</sup>

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 U.N. Basic Principles is designed to avoid the creation of a special court to hear a specific case and thereby circumvent the regular court system. It states: “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.”<sup>152</sup>

In Iraq, the problem is not necessarily the creation of special courts that do not follow the “established legal procedures,” but that such procedures—at least for the Federal Supreme Court—have never been established in the first place. The Constitution states that “[t]he law shall regulate the establishment of courts,”<sup>153</sup> and that “the work of the [Supreme] Court shall be determined by

148. *Id.* at 359–61; Ala Hamoudi, *supra* note 113, at 110.

149. See Trumbull & Martin, *supra* note 127, at 360 (citing Adeed Dawisha, *Iraq: A Vote Against Sectarianism*, J. DEMOCRACY, July 2010, at 26, 39; Ranj Alaaldin, *Iraq’s Troubled Elections*, GUARDIAN (Feb. 15, 2010, 5:30 AM), <http://www.guardian.co.uk/commentisfree/2010/feb/15/iraq-elections-baath-ban>).

150. See Toby Dodge, *State and Society in Iraq Ten Years After Regime Change: The Rise of a New Authoritarianism*, 89 INT’L AFFAIRS 241, 248 (2011) (referring to the Court’s ruling that the Committee of Integrity, the Independent High Electoral Commission, 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).

151. *Id.* at 248.

152. *Basic Principles*, *supra* note 8, at 60.

153. Article 96, Doustour Jounhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, translated in *Iraq: Constitutions and Fundamental Laws*, *supra* note 5.

a law enacted by a two-thirds majority.”<sup>154</sup> Yet, 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.<sup>155</sup> So, the Federal Supreme Court is arguably without “duly established procedures” in violation of Paragraph 5 of the U.N. Basic Principles.

#### 4. Judges with Appropriate Training or Qualifications

Paragraph 10 of the U.N. Basic Principles sets standards for qualification and selection of judges, and requires that those selected have “appropriate training or qualifications in law.”<sup>156</sup> There are some concerns regarding this principle under Iraq’s present Federal 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.<sup>157</sup> While there is no indication that the Court’s current members lack the qualifications needed to be effective judges, the qualifications of successor members may be questioned if these are not clearly defined as the Constitution requires.<sup>158</sup>

Especially problematic is that Article 92 entrusts the Federal Supreme Court 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.<sup>159</sup> The Constitution attempts to address this by providing for “experts in Islamic jurisprudence” to be members of the Court,<sup>160</sup> but until an implementing law is adopted to put this into effect, the members of the Federal Supreme Court may lack the training and qualification necessary to decide these issues that come before them.

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154. *Id.* art. 92.

155. COONJOHN & AL-MALIKI, *supra* note 94, at 3.

156. *Basic Principles*, *supra* note 8, at 61.

157. See Articles 92, 96, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, *translated in Iraq: Constitutions and Fundamental Laws*, *supra* note 5.

158. *Cf. id.* art. 92 (requiring the Council of Representatives to pass legislation defining the number and method of selection of judges and the work of the judiciary).

159. *Cf. Ala Hamoudi*, *supra* note 72, at 701 (noting that the Federal Supreme Court as it existed at ratification was staffed entirely by judges).

160. Article 92, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, *translated in Iraq: Constitutions and Fundamental Laws*, *supra* note 5.



## 5. Conditions of Service and Tenure, Including Security

Paragraphs 11 and 12 of the U.N. Basic Principles require that judges' security, salaries, terms of office, and tenure be secured by law.<sup>161</sup> 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 Transitional Administrative Law, and not the more recent Iraqi Constitution, is destructive of general rule of law principles.

Particularly noteworthy is a judge's personal security, which is specifically mentioned in the U.N. Basic Principles as an element of judicial independence,<sup>162</sup> and which remains a serious challenge in postconflict Iraq.<sup>163</sup> 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.<sup>164</sup> One report in August 2010 indicated that judicial security improved somewhat due to increased levels of personal security and equipping judges with weapons and ballistic vests.<sup>165</sup> But judicial intimidation nonetheless persisted and remains a serious issue.<sup>166</sup> As recently as 2011, there were still high numbers of targeted attacks against government officials, approximately ten per month, two-thirds of which resulted in death.<sup>167</sup> In mid-2012, a criminal court judge was gunned down as he was returning home from work.<sup>168</sup> As long as a significant risk to the health and safety

161. *Basic Principles*, *supra* note 8, at 61.

162. *See id.*

163. *See, e.g.*, Duraid Adnan, *Attacks in Iraqi Cities Raise Fears of Renewed Sectarian Conflict*, N.Y. TIMES (May 20, 2013), <http://www.nytimes.com/2013/05/21/world/middleeast/baghdad-basra-iraq-bombings.html> (“[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, 5:35 PM), <http://www.kuna.net.kw/ArticleDetails.aspx?id=2312204&language=en> (“It is the worst security climate in Iraq for years.”).

164. *See* Lewis, *supra* note 3, at 132–33 (citing Coalition Provisional Authority Order No. 52: Payment of Pensions for Judges and Prosecutors who Die While Holding Office (Jan. 8, 2004)). One report from 2006 claimed that “the most serious issue facing Iraqi judges . . . is survival.” ABA IRAQ LEGAL DEV. PROJECT, *supra* note 144, at 2.

165. U.S. DEP'T OF DEF., *MEASURING SECURITY AND STABILITY IN IRAQ* vi (2010).

166. *Id.*

167. MICHAEL O'HANLON & IAN LIVINGSTON, BROOKINGS INSTIT., *IRAQ INDEX—TRACKING VARIABLES OF RECONSTRUCTION & SECURITY IN POST-SADDAM IRAQ* 5 (2012).

168. *Bombs Kill 4, Judge Shot as Iraq Attacks Grind On*, USA TODAY (July 1, 2012, 8:04 PM), <http://usatoday30.usatoday.com/news/world/iraq/story/2012-07-01/iraq-qaeda-attacks/55963002/1>. The article described this incident as follows:

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

of judges and their families remains, they will be more susceptible to exploitation—causing coercion and corruption, and threatening the independence of the judiciary.

Judicial compensation is one issue that is addressed by the 2005 Federal Supreme Court Law.<sup>169</sup> It notes that the members of the Court are awarded the same compensation and benefits as government ministers.<sup>170</sup> Additionally, members are entitled to a pension equal to eighty percent 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.<sup>171</sup> The failed 2007 Draft Law would have added a detailed pay scale based on rank and would have provided paid leave by law.<sup>172</sup>

Term of office and tenure for members of the Federal Supreme Court are issues that present a 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."<sup>173</sup> With respect to tenure, the Constitution again calls for an implementing law, stating that "[j]udges may not be removed except in cases specified by law."<sup>174</sup> 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,"<sup>175</sup> but it is silent on any procedural provisions for such a removal from office.<sup>176</sup> 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,<sup>177</sup> could be problematic for judicial independence.

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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.

*Id.*

169. Article 6, Federal Supreme Court Law No. 30 of 2005 (Iraq).

170. *See id.*

171. *Id.*

172. Articles 11–12, Draft Federal Supreme Court Law of 2007 (Iraq).

173. Article 6, Federal Supreme Court Law No. 30 of 2005 (Iraq) (author's translation).

174. Article 97, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, translated in *Iraq: Constitutions and Fundamental Laws*, *supra* note 5.

175. Article 6, Federal Supreme Court Law No. 30 of 2005 (Iraq) (author's translation).

176. *See id.*

177. 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 war-

Overall, there remains considerable uncertainty about judges' terms and conditions of service, as the system is still relying on laws that predate the Constitution.<sup>178</sup> Until the law defines and secures these conditions, and provides adequate personal security to ensure the safety of judges and their families, judicial independence in Iraq will remain elusive.

#### IV. 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 Federal 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 gives them little hope of achieving the degree of independence required to establish the rule of law in a deeply troubled and conflict-ridden society.

Hopes for the rule of law in postconflict Iraq depend heavily on Iraq's 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. Effective legal institutions, however, 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.

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rants removal from office will depend on whether this is a crime of "moral turpitude." *See id.* A judge should be entitled to a hearing on that or other potential issues.

178. *See supra* text accompanying note 80.