

Iraq's Draft Permanent Constitution:

Analysis & Recommendations

(Revised September 28, 2005)

A. Overview

In 2004, the Commission worked successfully with senior Administration officials, Members of Congress, and others to encourage that explicit guarantees of freedom of thought, conscience, and religion or belief for every Iraqi be included in the country's interim constitution, the Transitional Administrative Law (TAL). This work followed the Commission's engagement on Afghanistan, where, despite significant efforts by the Commission, the constitutional process resulted in a document which lacks explicit protections for the individual right to freedom of religion or belief, contains a repugnancy clause forbidding any law contrary "to the sacred religion of Islam," and empowers a judicial system to apply sectarian Hanafi jurisprudence to cases where there is no other applicable law.[1]

This year, in the face of a redrafting of Iraq's permanent constitution and the mixed outcome in Afghanistan, the Commission has redoubled its efforts to urge the U.S. government to remain highly engaged in the process of restoring freedom and building democracy in Iraq.[2] The Commission has argued that this process, at a minimum, should include vigorously advocating the inclusion in Iraq's permanent constitution of guarantees for each individual Iraqi to the right to freedom of religion or belief and other related human rights in accordance with Iraq's international commitments.[3] In addition, since Iraqis began their constitution-drafting process several months ago, the Commission has undertaken and distributed analyses of various drafts that have been made public, assessing how draft articles measure up to international standards and the expectations of the international community.

On August 28, 2005 a final draft constitution was submitted to the Iraqi National Assembly. Although this draft has yet to be officially released to the general public, the Commission has undertaken-and is now releasing publicly-an analysis of articles identified as being of potential concern to the future status of individual human rights and freedoms in Iraq.[4] The Commission believes it is urgent to share this analysis with U.S. policymakers, the international community, and the general public, to ensure that any potential opportunity for changes to the final draft be used to strengthen and clarify individual human rights guarantees therein.

B. Summary of Analysis & Recommendations

A reading of Iraq's draft permanent constitution reveals some positive language directed at protecting human rights. However, the Commission is deeply concerned by the overarching ambiguities and contradictions which exist in this draft and threaten to compromise the scope and extent of human rights protections. Constitutional references to Islam ultimately may be interpreted to negate these guarantees and to discriminate against and repress non-Muslims and non-conforming Muslims alike.

In essence, the draft's contradictions underscore two competing visions of Iraq, and leave up to the future how-if at all-these visions may be reconciled. On the one hand, the draft promises a country based on protections for individual freedoms and rights, and on the other, the draft augurs a country where every Iraqi is required to conform to the religious strictures of one group. If Iraq is to indeed become a beacon of freedom for the region, and a state that genuinely respects fundamental liberties, including freedom of thought, conscience, and religion or belief, and the principles of equality and non-discrimination, the scales must be tipped from the outset in favor of individual human rights guarantees and all ambiguity and contradictions with respect to these rights should be clarified to leave no uncertainty with respect to their supremacy.

Key points:

Article 2

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

- A. No law that contradicts the established provisions of Islam may be established.
- B. No law that contradicts the principles of democracy may be established.
- C. No law that contradicts the rights and basic freedoms stipulated in this constitution may be established.

Second: This Constitution

guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice such as Christians, Yazedis, and Mandi Sabbeans.

- Despite the apparent effort to constrain any potential interpretation of Islam from going beyond its "undisputed rules" or running counter to human rights guaranteed in the constitution, the Commission remains concerned, as in the case of the TAL, that the constitutional arrangement establishing a role for Islam as a source of legislation nevertheless may be used by judges to abridge international human rights standards, particularly with respect to the rights of political and social reformers, those voicing criticism of prevailing policies, religious minorities, women, and others. This concern is amplified by the fact that the draft constitution currently allows for the appointment of "experts in Islamic jurisprudence" to the Supreme Federal Court, as discussed under analysis of article 90 below.
- In addition to prohibiting any law deemed contrary to the human rights guarantees specified in the constitution, this article should explicitly prohibit any law that is contrary to Iraq's international human rights obligations or the principles of equality and nondiscrimination.

Article 39

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

- The provision does not specify what system of law-religious or civil-will apply, or how or by whom the alternate system may be invoked.
- The Commission recommends that the article explicitly establish civil law as the default legal system for personal status matters, require the full and informed consent of both parties before submitting to a religious court, and finally, make religious court rulings subject to final review by Iraq's civil

courts.

Article 89

...

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

- This article enables the appointment of experts in Islamic jurisprudence to Iraq's highest court, the Federal Supreme Court. According to the draft, these experts are not required to have any traditional civil law training.

- Opening the Court to individuals whose only background is in sharia will place Iraq's judiciary in the company of Iran, Saudi Arabia, Afghanistan, and Pakistan-some of the only countries in the world to allow individuals without traditional legal training to serve as judges in matters pertaining to civil law.

- This potential for a Supreme Court bench that reads down human rights provisions in light of sharia is tempered by the requirement that the law determining the selection process be approved by a 2/3 parliamentary majority.

- That said, given the tenuous nature of the human rights guarantees in the draft constitution, the Commission recommends that Iraq's highest court be immunized from judges having no traditional legal training and expertise only in a single religious tradition. Only by preserving the Court as a dispassionate, objective body trained in law, can the human rights guarantees provided in this constitution be adequately

safeguarded as a source of freedom and liberty for all Iraqis.

Article 99

The High Commission for Human Rights, Independent Electoral High Commission and Commission on Public Integrity are independent commissions, which shall be subject to monitoring by the Council of Representatives. A law shall regulate their functions.

- Provides for a High Commission for Human Rights but without elaboration, and subject to monitoring by the Iraqi parliament.

- The Commission recommends that the draft constitution clearly provide for the independence of the High Commission for Human Rights and include specific reference to the Paris Principles as the basis for the High Commission's functions and operations.

C. Analysis of Select Articles

Article 2

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

- A. No law that contradicts the established provisions of Islam may be established.
- B. No law that contradicts the principles of democracy may be established.
- C. No law that contradicts the rights and basic freedoms stipulated in this constitution may be established.

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

Summary

- Under international standards, a state may declare an official state religion, provided basic rights, including the individual right to freedom of thought, conscience, and religion or belief, are respected for all without discrimination.
- The framework of article 2, including establishing Islam as a source of legislation and prohibiting any law contrary to Islam or human rights, follows the compromises developed in Iraq's Transitional Administrative Law (TAL), with some slight variations.
- Part Two of Art. 2 potentially places the state in the role of protector of Islamic identity.
- Part Two of Art. 2 also follows the TAL's provision of "full religious rights for all individuals," however with modified language and an explicit acknowledgement of the religious practices of several specific non-Muslim groups.

Commentary

Under the International Covenant on Civil and Political Rights (ICCPR),^[5] the fact "that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant."^[6] In other words, a state is entitled to declare an official state religion, provided that this does not result in discrimination against or the impairment of any rights of non-believers or adherents of other religions enumerated under the ICCPR.

Article 2 establishes Islam as "a fundamental source of legislation." According to a recent study undertaken by the Commission, a number of Muslim countries where Islam is the state religion, including Egypt and the Gulf states, establish Islamic law, principles, or jurisprudence as "the basis for," "the principal source of," "a principal source of," or "the source of legislation."^[7] However, in many of these cases, "no additional constitutional guidance is given to address the question of what governmental body, process, or mechanism, if any, is charged with assessing the conformity of legislation with Islamic principles or law. Moreover, many of these constitutions fail to provide any further definition of terms such as Islam or sharia to facilitate or limit interpretation of what "sharia" means.^[8]

In the case of Iraq, the draft constitution makes Islam "a fundamental source of legislation," and specifies that the Federal Supreme Court will be tasked with "interpretation of the provisions of the constitution."^[9] It appears that the draft also attempts to limit the scope of possible interpretation under which the legislature or judiciary might determine that a law is in fact contrary to Islam by stating that no law can contradict "the undisputed rules of Islam." This formulation of article 2 follows closely the framework originally set out in the TAL,^[10] with two modifications:

- Islam is declared "a fundamental source" rather than "a source of legislation"; and
- No law can contradict "the undisputed rules of Islam" rather than its "universally agreed tenets."^[11]

While the task of defining the scope and legal meaning of the term "undisputed rules of Islam" ultimately is expected to fall to the Federal Supreme Court, the constitution also requires, again following closely the TAL formula, that the Court simultaneously ensure that no law is contrary to the human rights guarantees set out in the constitution. The inclusion of this provision represents a significant improvement over prior draft language, as it appears to place respect for Islam and human rights on an equal level. Moreover, this approach is favorable to other "repugnancy clause" models, such as the one in Afghanistan's constitution, which fail to explicitly require the interpretation of Islam to be in accordance with recognized human rights protections.

Despite the apparent effort to constrain any potential interpretation of

Islam from going beyond its "undisputed rules" or running counter to human rights guaranteed in the constitution, the Commission previously has expressed concern, in the case of the TAL, that a constitutional arrangement establishing a role for Islam as a source of legislation nevertheless "could be used by judges to abridge the internationally recognized human rights of political and social reformers, those voicing criticism of prevailing policies, religious minorities, women, or others." [12]

This concern is amplified by the fact that the draft constitution now allows for the appointment of "experts in Islamic jurisprudence" to the Federal Supreme Court, as discussed under analysis of article 89 below. [13]

Part Two of article 2 also mirrors the TAL formulation, with some changes:

- The draft "guarantees" rather than "respects" the Islamic identity of the majority
- The draft specifically references religious groups "such as" Christians, Yazedis, and Mandaean Sabeans as being protected by the guarantee of the full religious rights of all individuals to freedom of religious belief and practice.

Guaranteeing Islamic identity may place the state in the role of protecting Islam, which in turn may permit the criminalization of apostasy, blasphemy, and other "offenses against religion" as well as result in discrimination against non-Muslims in a variety of areas. In recent years, the Supreme Court of Sri Lanka interpreted a similar provision in their constitution (protecting Buddhism) to permit restrictions on the ability of the Catholic Church to obtain legal status in that country.

This draft also contains promising language regarding the right to freedom of religion with respect to belief and practice, and specific mention of Yezidis may signal a positive development insofar as this religious group, which constitutes less than 1% of Iraq's population, is regarded by some Muslims as a religion of "devil worshippers." That said, there is still an open question as to whether the right to choose not to believe in any particular religion will be protected under this provision or whether other religions, such as the Baha'i faith will also be able to practice freely.

According to article 3 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, "Persons belonging to minorities may exercise their rights...individually as well as in community with other members of their group, without any discrimination." [14] Furthermore, any attempt to discriminate against any religion or belief for any reason, including the fact that it may represent a minority population that is subject to the hostility of the predominant religious community, is suspect under international standards. [15]

Recommendations

- Strengthen protection of human rights by specifying that no law shall contradict "the rights and basic freedoms stipulated in this constitution, including the principles of equality and nondiscrimination, or the human rights guaranteed under international agreements to which Iraq is a state party."
- Define more explicitly what the "established provisions of Islam" encompasses or excludes or the possible sources available for making such a determination.
- Revert the constitution's guarantee concerning "the Islamic identity of the majority" to an expression of "respect for" that identity. This would reflect TAL language and take a step back from the state's positive obligation to guarantee Islamic identity.
- Clarify and expand the provision in Part Two by "guaranteeing the full rights of all individuals to freedom of religion, belief, and practice, including Christians, Yezidis, and Mandaean Sabaeans."

Article 3

Iraq is a country of many nationalities, religions and sects; it is a part of the Islamic world and is a founding and effectual member of the Arab League and is obligated to its charter.

Summary

- Article 3 acknowledges Iraq's multi-religious and multi-sect makeup and is a positive provision that may be used to underscore the need for a robust understanding of the individual right to freedom of thought, conscience, and religion or belief.

Article 4

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

...

Summary

- Article 4 guarantees the right to educate in and preserve the use of languages other than Arabic and Kurdish. This provision is intimately linked with the right to freedom of religion or belief, and is an important component in ensuring that minority religious groups are able to practice their religion in a full and unfettered manner.

Article 7

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

...

Summary

- Explicitly prohibiting the labeling of an individual or group as an "infidel" may have a spillover positive effect on building greater understanding about the need to protect freedom of religion and a state culture that promotes tolerance.

Commentary

This article, not found in the TAL, has the potential to be a positive provision in that it prohibits racism and the labeling of individuals as "infidels,"[16] problems that could impede democratic development and the exercise of human rights. However, the current wording of the article is very broad and, without further refinement, the provision could limit the exercise of the right to freedom of thought, expression, association and other fundamental rights and freedoms.

Recommendation

- Clarify intent and scope of the prohibition on the "calling of others infidels."

- Add language from the TAL prohibiting the arrest or detention of any individual "by reason of...religious beliefs." [17]

Article 10

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

Summary

- This article is intimately linked to the right to freedom of religion or belief, since safeguarding places of worship and guaranteeing the right to practice rituals are key components of the broader right.

Commentary

This article improves on previous draft language by identifying holy shrines and religious places generally as "religious and civilizational entities." Earlier drafts specifically cited Shi'a religious shrines only. That said, this provision still omits the word "all" from the text leaving open to interpretation which shrines and religious places merit recognition and/or safeguarding.

Recommendation

- Revise text to explicitly provide equal protection and safeguard of right to practice rituals to "all holy shrines and religious places in Iraq."

Article 13

...

Second: No law shall be enacted that contradicts this constitution. Any text in any regional constitutions or any other legal text that contradicts it is deemed void.

Summary

- Article 13 is promising insofar as it may be used as a further means of guaranteeing the human rights provided in the constitution. It establishes that if a law is contrary to the constitution's human rights provisions, the constitution will be supreme.

Article 14

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

Summary

- Unlike the TAL, this draft provision does not include an explicit statement that all Iraqis "are equal in their rights,"[18] although this may be inferred from the prohibition on discrimination.

- International human rights standards require a state to extend equal status to "all individuals within its territory and subject to its jurisdiction," not only to its citizens.[19]

- The UN Human Rights Committee has specifically commented that States parties to the ICCPR should ensure that traditional, historical, religious, or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights.[20]

- Principles of sharia should not be allowed to limit or restrict human rights guarantees, including the right to equality and nondiscrimination, particularly for women and religious minorities. Such action could potentially undermine the very object and purpose of international treaties such as the ICCPR.

Recommendation

- Modify language to apply to "all individuals" rather than "Iraqis" only.

Article 19

...

Second: There is no crime or punishment except by a stipulation. The punishment shall only be for an act that the law considers a crime when perpetrated. A harsher sentence than the applicable sentence at the time of the offense may not be imposed.

...

Fifth: The accused is innocent until proven guilty in a fair legal trial. The accused may not be tried on the same crime for a second time after acquittal unless new evidence is produced.

...

Ninth: Laws shall not have a retroactive effect unless the law stipulates otherwise. This exclusion shall not include taxes and fees laws.

...

Tenth: The criminal law shall not have a retroactive effect, unless it is to the benefit of the accused.

Summary

- This article makes significant improvements over previous drafts and follows more closely the language used in the TAL to ensure that sharia law cannot be used by judges as a source of defining crimes and/or punishment.

Commentary

According to the recent Arab Human Development Report, prepared by the United National Development Program, it "is imperative...that the constitution of those states which adopt the Shari'a, stipulate the principle that there is no crime or punishment other than prescribed by law." [21] Such a provision helps to protect against judicial imposition of crimes and punishments based on the judge's individual interpretation of Islamic law, rather than application of statutory law passed by the legislature.

Recommendation

- Use of the term "except by a stipulation" should be replaced by "except in accordance with a law passed by the legislature."

Article 29

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

...

Summary

- This article may be used to justify or impose government-sanctioned religious values or principles on Iraqi families.

Commentary

According to the ICCPR, if a set of beliefs is treated as official ideology in a constitution, this shall not result in any impairment of the freedom of thought, conscience or religion, or in any discrimination against persons who do not accept the official ideology, or who oppose it. [22]

Iraq is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[23] The Committee overseeing this treaty's implementation has recommended that "States parties should resolutely discourage any notions of inequality of women and men which are affirmed by laws, or by religious or private law or by custom,"[24] and has been critical of reservations taken by States Parties which invoke a religious vision of the family as a basis for noncompliance with the treaty, especially as regards articles 2 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women.

In fact, Iraq previously has submitted reservations to CEDAW on both of these articles, basing its objection to the treaty's equality provisions in part on the need to protect a role for sharia.[25] The Committee has recommended that "Whatever form [or concept the family] takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires." [26] Moreover, it maintains "the view that article 2 is central to the objects and purpose of the Convention" and that "reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn." [27]

Given the problematic nature of Iraq's existing reservations to CEDAW and the possible interpretation that may evolve from article 29, there is a basis for concern that the draft language may be used to limit women's rights specifically-or the rights of all Iraqis generally-based on the imposition of state-interpreted and state-sanctioned values flowing from a single religious tradition.

Furthermore, under international standards, children should not be compelled to receive teaching on religion or belief that is against the wishes of the parents or guardians as a result of general programs prescribed by law. International standards dictate that the freedom of parents to ensure a religious and moral education cannot be restricted.[28]

Recommendations

- Remove the term "religious" from the article
- Alternatively, add "while upholding equality and nondiscrimination for all Iraqis."

Article 31

...

Second: Individuals and institutions may build hospitals or clinics or places for treatment with the supervision of the state and this shall be regulated by law.

Summary

- This provision may have repercussions on the right of religious groups to establish and maintain religious institutions, including appropriate charitable or humanitarian institutions such as hospitals or other care facilities

Recommendations

- Clarify that any limitations here will be in accordance with international standards and will not undermine freedom of thought, conscience, and religion or belief, including the right of religious groups to establish humanitarian institutions including hospitals.

- Specify that any state supervision will only apply to standard of medical care and related matters, and will preserve independence over administration and other aspects of a given institution.

Article 35

...

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

Summary

- The ICCPR bars coercion that would impair the right to have or adopt a

religion or belief, and this article improves on previous drafts that omitted altogether any provision prohibiting coercion in matters of religion. This provision is also promising insofar as it protects individuals rather than groups only.

Commentary

Under international law, no limitations are allowed on the freedom to have or to adopt a religion or belief, or on the freedom from coercion that would impair those rights.[29] This includes a prohibition on the "use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment" or other rights guaranteed under the ICCPR are similarly inconsistent with the treaty.[30]

This draft article omits a clause found in the TAL that no one could be detained "by reason of political or religious beliefs." [31] Such a clause is critical to prevent the restriction of debate and dissent on religious and political questions based on the use of laws on blasphemy, apostasy, and other so-called "religious offenses."

Recommendation

- Reinstate TAL provision that prohibits detention of individuals "by reason of political or religious beliefs."

Article 36

The state shall guarantee in a way that does not violate public order and morality:

- A. Freedom of expression using all the means.
- B. Freedom of press, printing, advertisement, media and publication.
- C. Freedom of assembly and peaceful demonstration and this shall be regulated by law.

Summary

- The qualifications on the fundamental rights to freedom of expression, press, and assembly may have implications for the protection of human rights.

Commentary

Under international law, any restrictions placed on the exercise of rights must be both prescribed by law and necessary in pursuit of specific public interests. Specifically, the ICCPR requires that any limitation on the right to freedom of opinion and expression must be necessary for respect of the rights or reputations of others or for the protection of national security or of public order, or of public health or morals.[32] Any restriction on the rights to freedom of assembly and association must be "necessary in a democratic society in the interests of national security or public safety, public order...the protection of public health or morals or the protection of the rights and freedoms of others." [33]

In all cases, any limitations must be directly related and proportionate to the specific need on which they are predicated. Finally, the Human Rights Committee has found that "the concept of morals derives from many social, philosophical and religious traditions." Consequently, limitations imposed on Covenant rights "for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition." [34]

Recommendations

- A consistent limitations clause-compatible with international standards-would be preferable.
- Remove qualification on freedom of assembly and peaceable demonstration.

Article 37

First:

The freedom of forming and joining associations and political parties shall be guaranteed. A law shall regulate this.

...

Summary

- See commentary and recommendations for article 36, above.

Article 39

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

Summary

- This article apparently seeks to address personal status issues, and under what conditions religious or civil law will govern such matters.
- Given the ambiguous draft language, it is unclear what legal system-religious or secular-will apply and what steps will be required by the parties involved to opt out of the default legal system.
- Certain religious systems may be omitted or excluded from this arrangement, resulting in unrecognized minority groups potentially having to submit to the dominant group's religious court.

Commentary

As currently formulated, this article leaves open to the legislature how Iraqis will access civil courts for matters relating to personal status. Ultimately, this decision may result in individuals being compelled to submit to religious courts on matters of personal status. Such a variegated system also may raise concerns with respect to equality and nondiscrimination between men and women, as well as between the various religious communities in Iraq.

There are additional complications that may arise by not expressly guaranteeing that civil courts will be the default option for personal status matters:

- Requiring individuals who are non-believers to submit to religious rulings.[35]

- Given significant concern that women will be unable to freely exercise their right to opt into a civil court without the consent of the spouse, that women will be forced to submit to a religious court.

- Cases involving mixed marriages or individuals whose religious beliefs may not be recognized officially in Iraq are typically resolved by using the country's dominant religion as the default.

Finally, international human rights organizations such as Amnesty International have previously observed that criteria for appointing religious court judges may fall short of international standards with regard to training for judicial personnel.[36]

Recommendations

- The article should clearly state that the default system is civil courts, and that the free and informed consent of both parties is required to move a hearing regarding personal status to the religious court system to be agreed upon by the parties.

- To ensure equality and nondiscrimination within the religious court system, and to further guarantee the human rights enshrined in the constitution, this article should affirm that religious court rulings are subject to the final review of Iraq's civil courts.

- Appointment of judges to the religious courts should meet international standards with respect to judicial training.

Article 40

Each individual shall have the freedom of thought, conscience and belief.

Summary

- This is a positive article reflecting international human rights guarantees that was missing from earlier drafts. However, omission of the term "religion" from these guaranteed freedoms may allow judges greater leeway to permit the practice only of acceptable or "divinely revealed" religions.

Recommendation

- This article can be strengthened by adding "religion" to the list of freedoms.

Article 41

First:

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

A. Practice of religious rites, including the Husseinian ceremonies.

B. Management of the endowments (Awqaf), its affairs and its religious institutions. The law shall regulate this.

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

Summary

- Some language remains a possible basis for narrow interpretation of the right to freedom of religion or belief.

- In particular, the second part of article 41 reflects an improvement on previous draft language.

Commentary

Freedom of thought, conscience and religion or belief encompasses more than the "practice of religious rites." Use of the term "religious rites" may be narrowly interpreted and result in constraints against the right to freedom of religion or belief. The full scope of the right to manifest religion or belief includes the rights of worship, observance, practice, and teaching, broadly construed.

Under international law, these rights, including the management of religious institutions, may be subject to only such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Limitations are not allowed on grounds not specified under article 18 of the ICCPR, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Finally, limitations on the freedom to manifest a religion or belief that rely on morality must be based on principles not deriving from a single tradition.[37]

Recommendation

- Modify Part One of article accordingly:

First: All individuals are free in the right to manifest religion or belief, including:

- A. Worship, observance, practice, and teaching, including the Husseini ceremonies.
- B. The management of religious trusts, affairs, and institutions.

Article 43

First:

The State shall seek to strengthen the role of civil society institutions, to support, develop and preserve its independence in a way that is consistent with peaceful means to achieve its legitimate goals. A law shall regulate that.

Second: The State shall seek the advancement of the Iraqi clans and tribes and shall attend to their affairs in a manner that is consistent with religion and the law and upholds its noble human values in a way that contributes to the development of society. The State shall prohibit the tribal traditions that are in contradiction with human rights.

Summary

- This article has the potential to be a positive provision in that it promotes the role of civil society organizations, one tool that can facilitate democratic development and the exercise of human rights.

- This article also takes the positive step of explicitly prohibiting tribal practices that are deemed inconsistent with human rights.

- The current wording however, is very broad and, without further refinement, may in theory be used to limit the exercise of the right to freedom of assembly, association, and other fundamental rights and freedoms.

Recommendations

- Remove language regarding "legitimate goals" to ensure that the state is not positioned to approve only those civil society organizations that reflect the views of the government.

- The current wording of Part Two makes a reference to "manner that his consistent with religion..." The meaning of this provision should be clarified.

NB: According to reports on September 14, 2005, draft article 44 was excised from the final version of the constitution submitted to the United Nations for distribution within Iraq. This move signals a potentially significant shift away from human rights protections for the Iraqi people by removing any reference to Iraq's international human rights obligations within the constitution.

Draft Article 44 (excised)

All individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified and that do not contradict with the principles and provisions of this constitution.

Summary

This is a positive provision insofar as it acknowledges Iraq's obligation to respect its international human rights commitments. However, the provision as currently drafted limits those rights to the extent that they "do not contradict the principles and provisions" of the constitution.

Commentary

Although the qualification on rights has a generalized formulation in this draft, article 44's drafting history demonstrates that the limitation on international human rights guarantees was originally construed as a means of ensuring that no guarantee of rights could contradict Islamic law. This qualification also appeared in the provision on women's rights (since removed), and similarly sought to limit women's equality in accordance with sharia.

This article, as currently drafted, can potentially serve as a post-facto reservation to all of Iraq's international treaty commitments, including the ICCPR. As noted above, the sweeping reservation Iraq undertook with respect to CEDAW signals that a particular interpretation of sharia may run counter to the provision of equality and nondiscrimination among Iraq's citizens, and particularly among women.[38] Accordingly, if this limitation clause results in Iraq's failure to uphold its international human rights obligation based on the role of Islam, it may be considered "incompatible with the object and purpose of the treaty," and therefore deemed non-applicable.[39]

Recommendations

Remove the qualification from this provision.

Alternatively, reference international human rights in article 2 and establish these international standards as basic principles of the Iraqi constitution which cannot be violated.

Article 44

There may not be a restriction or limit on the practice of any rights or liberties stipulated in this constitution, except by law or on the basis of it, and insofar as that limitation or restriction does not violate the essence of the right or freedom.

Summary

- This article is problematic as it opens the door to curtailing of broadly interpreted human rights guarantees.
- This article also appears to contradict or at least narrow application of the supremacy of the constitution established at article 13.

Commentary

Although international treaties such as the ICCPR permit certain limitations on human rights guarantees under specific, narrowly constructed conditions, this article open the door to limitations on rights that may go far beyond these conditions, and result in the possible undermining of the right while preserving its "essence." Judicial or legislative interpretation of what might violate the "essence of the right" leaves substantial room for diluting the scope of a given right and rendering human rights protections essentially ineffective.

Recommendations

- Remove this article from the draft constitution.
- Alternatively, state that any limitation shall comply with the standards set forth under the ICCPR and other international human rights treaties, and will not limit these rights in any other manner.

Article 48

The Council of Representatives member shall take the constitutional oath before the Council prior to assuming his duties as follows:

(I swear by God the Almighty to carry out my legal tasks and responsibilities devotedly and honestly and preserve the independence and sovereignty of Iraq, and safeguard the interests of its people, and watch over the safety of its land, skies, waters, resources and federal democratic system, and I shall endeavor to protect public and private liberties, the independence of the judiciary and adhere to the applications of the legislation neutrally and faithfully. God is my witness).

Summary

- This oath is reasonably drafted and omits some of the more discriminatory language that exists in oaths required by the constitutions of other predominantly Muslim countries.

Commentary

It is instructive to note that the constitutions of a number of predominantly Muslim countries may restrict to Muslim citizens the right to serve in government positions, and particularly to hold executive power based on the use of a specific Islamic oath. For example, in Yemen, the president, vice-president, members of the House of Representatives, prime minister, and other ministers must take the following constitutional oath: "I solemnly swear to God the Almighty that I shall abide by the Holy Koran and the Sunnah of Prophet Muhammed..."[40]

Recommendation

- Continue to monitor draft language related to the oath to ensure that it can be applied equally and without discrimination to all Iraqis.

Article 87

The Higher Juridical Council shall

oversee the affairs of the Judicial Committees. The law shall specify the method of its establishment, its authorities, and the rules of its operation.

Recommendation

- Given the significant scope of powers that will rest with the Higher Juridical Council, the guidelines for its establishment and operation should, at a minimum, require a 2/3 majority vote within the Iraqi parliament.

Article 88

The Higher Juridical Council shall exercise the following authorities:

First: To manage the affairs of the Judiciary and supervise the Federal Judiciary.

Second: To nominate the Chief Justice and members of the Federal Court of Cassation, the Chief Public Prosecutor, the Chief Justice of the Judiciary Oversight Commission and present them to the Council of Representatives to approve their appointment.

Third: To propose the draft of the annual budget of the Federal Judiciary Authority and present it to the Council of Representatives for approval.

Recommendation

- See recommendation provided in article 87, above.

Article 89

...

Second: The Federal Supreme Court shall be made up of number of judges, and experts in Islamic jurisprudence and law experts whose number, the method of their selection and the work of the court shall be determined by a law

enacted by a two third majority of the members of the Council of Representatives.

Summary

- This article is problematic insofar as it legalizes the possibility of experts in Islamic jurisprudence and without any traditional civil law training being appointed to the country's highest court.

Commentary

Previous drafts of this article allowed for up to four out of nine justices to be trained in Islamic jurisprudence without any additional prerequisite of educational background or experience in civil law. Opening the Court bench to individuals whose only background is in sharia will place Iraq's judiciary in the company of Iran, Saudi Arabia, Afghanistan, and Pakistan-some of the only countries in the world to allow individuals without traditional legal training to serve as judges in matters pertaining to civil law. Even Pakistan, which has sharia courts, also has a civil Supreme Court, which has overturned some of the worst excesses of sharia, including death sentences for blasphemy. According to basic principles formulated by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law." [41]

The rationale behind installing experts in Islamic jurisprudence on the bench is premised on the need to interpret the implications of having sharia as a fundamental source of legislation. However, the Federal Supreme Court can still reach these decisions based on the expert testimony of Islamic scholars that will inevitably be provided in the lower courts, or by consulting with additional experts as required by the Court. Moreover, requiring the appointment of experts in Islamic jurisprudence to Iraq's highest court may also run afoul of the UN General Assembly's view that methods of judicial selection shall not discriminate "against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status." [42]

The 2004 UNDP Arab Human Development Report has observed that independence of the judiciary is threatened in the Arab world in part as a result of the interference by undemocratic, ideological regimes. These regimes interfere with judicial independence under the pretext of "protecting the ideological foundations" of the state. [43] The system used for making judicial appointments is one means by which the executive or legislature may exert control over the judiciary. Indeed, those justices appointed to the Supreme Court who are trained in Islamic jurisprudence may be more likely to reflect an interpretation which favors the dominant religious sect.

That said, the requirement of a 2/3 majority in this draft may be used to ensure an implementing statute that can prevent egregious attempts to abuse this article. However, from this draft it remains an open question whether actual appointment of judges ultimately will require a similar 2/3 majority.

Recommendations

- Remove the ability of making appointments to the Federal Supreme Court based on training in Islamic jurisprudence alone. At a minimum, require that all judges have training in civil law, including a law degree.
- Clarify the appointment procedure to specifically state that a 2/3 majority of parliament is required to appoint a judge to the Federal Supreme Court.

Article 99

The High Commission for Human Rights, Independent Electoral High Commission and Commission on Public Integrity are independent commissions, which shall be subject to monitoring by the Council of Representatives. A law shall regulate their functions.

Summary

- This article does not explicitly guarantee the independence of the High Commission for Human Rights or specify that its functions shall be in accordance with the UN's Paris Principles.

Commentary

Art. 50 of the TAL called for the creation of a National Commission for Human Rights, in accordance with the Paris Principles issued by the United Nations, "for the purpose of executing the commitments relative to the rights set forth in this Law and to examine complaints pertaining to violations of human rights." The TAL further envisioned that this Commission would "include an Office of the Ombudsman to inquire into complaints, [and have] the power to investigate, on its own initiative or on the basis of a complaint submitted to it, any allegation that the conduct of the governmental authorities is arbitrary

or contrary to law." The importance of an independent body designed to monitor and investigate human rights complaints in Iraq cannot be overstated.

Recommendations

- Clearly provide for the independence of the High Commission for Human Rights
- Remove monitoring by the Council of Representatives
- Include reference to the Paris Principles as the basis for the High Commission's functions and operations.

Article 121

This Constitution shall guarantee the administrative, political, cultural and educational rights for the various nationalities, such as Turkmen, Chaldeans, Assyrians and all other components. A law shall regulate this.

Summary

- ChaldoAssyrian representatives have expressed concern over the separate listing of Chaldeans and Assyrians in article 121 as an attempt to weaken their unified ability to preserve their culture and heritage, particularly in Kurdistan. In the TAL, these groups were merged under the term "ChaldoAssyrians".

Commentary

Many of Iraq's smaller ethnic and religious groups feel strongly that their group should be cited by name or else they fear they will be forced to assume Kurdish or Arab identity, as has occurred in the past. Some representatives of Iraq's indigenous Christian population are demanding that they be treated as one nation through the term "ChaldoAssyrian". These representatives want the term reinstated in the current draft as a means of better enabling them to protect their identity.

Article 122

...

Second: The fundamental principles mentioned in Section One and the rights and liberties mentioned in Section Two of the Constitution may not be amended except after two successive electoral terms, with the approval of two-thirds of the Council of Representatives members, and the approval of the people in a general referendum and the ratification of the President of the Republic within seven days.

Summary

- This provision is improved over previous drafts by entrenching the chapter on rights and liberties in addition to the fundamental principles enumerated under Section One.

Recommendation

- As a means of further securing the human rights provided in the constitution, the amendment formula should state that human rights guarantees and protections cannot be subject to any amendment that would weaken their application or effect. For example, Kuwait's constitution prevents amendments with respect to "the principles of liberty and equality... [unless such an amendment serves] to increase the guarantees of liberty and equality."^[44]

[1] Arts 2 and 130, Constitution of Afghanistan (2003).

[2] In addition to meetings during the past year with President George W. Bush and senior Administration officials, including and Ambassador Zalmay Khalilzad, the Commission also met with Members of Congress, senior Iraqi government officials, Iraqi political party leaders, Iraqi minority ethnic and religious community leadership, and Iraqi civil society leaders. Across all of these levels of engagement, the Commission has continually stressed the need to ensure that Iraq's human rights commitments, as defined under the International Covenant on Civil and Political Rights (ICCPR), are enshrined in the permanent constitution as a means of affording human rights protections for each and every Iraqi in line with recognized international standards.

[3] As part of its effort to provide information to policymakers with regard to the content of constitutions in predominantly Muslim countries, the Commission released a study in March 2005 surveying how these countries address issues related to the relationship between religion and the state, and the provision of human rights guarantees, including the right to freedom of religion or belief. This study is available for download in English and Arabic from the Commission's website, <http://www.uscirf.gov>.

[4] This analysis is based on an unofficial translation of Iraq's draft permanent constitution prepared by the United Nations on September 14, 2005.

[5] Iraq signed the International Covenant on Civil and Political Rights (ICCPR) on March 23, 1976, without declaration or reservation. See Office of the United Nations High Commissioner For Human Rights, "Status of Ratifications of the Principal International Human Rights Treaties," June 9 2004.

[6] Para. 9, Human Rights Committee, "General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)," UN Doc. # CCPR/C/21/Rev.1/Add.4, 30 July 1993. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument) (hereinafter, HRC General Comment No. 22).

[7] Tad Stahnke and Robert C. Blitt, "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries" (U.S. Commission on International Religious Freedom), March 2005, 10. See Oman Constitution (art. 2); Egypt Constitution (art. 1); the 1971 Provisional Constitution of the United Arab Emirates (art. 7); and Yemen Constitution 1994 (art. 3). Although the Syrian constitution does not establish Islam as the official state religion, it does make Islam a basis for legislation.

[8] Stahnke and Blitt, 10. In Egypt, the interpretive role has fallen to the Supreme Constitutional Court, whereas in Pakistan, the constitution specifically assigns this role to the Federal Shariat Court.

[9] Art. 90, Iraq Draft Constitution.

[10] The Transitional

Administrative Law (TAL) provides under Art. 7(a), that "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. This Law respects the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice" (emphasis added).

[11] The judiciary likely will

be tasked with determining the significance, if any, of this shift in wording.

[12] U.S. Commission on

International Religious Freedom, "Iraq: USCIRF Commends Extensive Protection of Human Rights in Interim Constitution," Press Release, March 8, 2004. Available at http://uscirf.gov/mediaroom/press/2004/march/03082004_iraq.html.

[13] Art. 89, Iraq Draft

Constitution. It has been argued by some parties to the drafting process that experts in Islamic jurisprudence would be a necessary component on the Federal Supreme Court given that the constitution establishes Islam as a source of legislation and prohibits any law that is deemed contrary to its "undisputed rules."

[14] Art. 3(1), Declaration

on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by UN General Assembly resolution 47/135, December 18, 1992 (emphasis added). The ICCPR notes under article 7 that persons belonging to minority groups "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[15] Para. 2, HRC General
Comment No. 22.

[16] In theory, this article

may, by extension, cover accusations of apostasy as well.

[17] Art. 15(c), Transitional
Administrative Law (TAL).

[18] Art. 12, TAL.

[19] Art. 2(1),
International Covenant on Civil and Political Rights (ICCPR).

[20] Para. 5, Human Rights
Committee, "General Comment No. 28: Equality of Rights Between Men and Women
(Art. 3)," UN Doc. # CCPR/C/21/Rev.1/Add.10, March 23, 2000. Available at
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument).

[21] Arab Human Development
Report 2004 (AHDR), United Nations Development Program (UNDP), at
115.

[22] Para. 10, HRC General
Comment No. 22.

[23] August 13, 1986.

[24] Para. 44, CEDAW, "General
Recommendation No. 21: Equality in Marriage and Family Relations," U.N. Doc. #
A/49/38 February 4, 1994. Available at
<http://www.unhchr.ch/tbs/doc.nsf/0/7030ccb2de3baae5c12563ee00648f1f?Opendocument>
(hereinafter, CEDAW General Recommendation No. 21).

[25] Iraq's reservation reads
in part: "1. Approval of and accession to this Convention shall not mean that
the Republic of Iraq is bound by the provisions of article 2, paragraphs (f) and
(g), of article 9, paragraphs 1 and 2, nor of article 16 of the Convention. The
reservation to this last-mentioned article shall be without prejudice to the
provisions of the Islamic Shariah according women rights equivalent to the
rights of their spouses so as to ensure a just balance between them." A number
of countries have protested the legitimacy of this reservation on the basis that
it undermines the object and purpose of CEDAW. See [http://www.un.org/womenwatch/daw/cedaw/reservations-
country.htm#N31](http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N31)
and http://www.bayefsky.com/html/iraq_t2_cedaw.php.

[26] Para. 13, CEDAW General

Recommendation No. 21.

[27] CEDAW, "Reservations to CEDAW," August 12, 2005. Available at <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>.

[28] Para. 8, HRC General Comment No. 22; Art. 5(2), Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, November 25, 1981.

[29] Para. 8, HRC General Comment No. 22.

[30] Para. 5, HRC General Comment No. 22.

[31] Art. 15(c), TAL.

[32] Art. 19, ICCPR.

[33] Arts. 18, 19, 21, & 22, ICCPR; see also Art. 29, Universal Declaration of Human Rights.

[34] Para. 8, HRC General Comment No. 22.

[35] It should be noted that the right to freedom of religion and belief also protects the right to hold non-theistic or atheistic beliefs. International standards protecting these rights are not limited in application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. Para. 2, HRC General Comment No. 22.

[36] Amnesty International,

"BAOBAB for Women's Human Rights and Amnesty International

Joint Statement on the Implementation of New Sharia-based Penal Codes in Northern Nigeria," March 25, 2002

AI Index AFR 44/008/2002. Available at <http://web.amnesty.org/library/index/engaf440082002>.

[37] Para. 8, HRC General Comment No. 22.

[38] See analysis of article 29, above.

[39] Art. 19, Vienna Convention on the Law of Treaties.

[40] Art. 159, Constitution of Yemen.

[41] Art. 10, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders "Basic Principles on the Independence of the Judiciary," adopted September 6, 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (hereinafter "Basic Principles on the Independence of the Judiciary"), emphasis added. Available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm.

[42] Art. 10, "Basic Principles on the Independence of the Judiciary."

[43] UNDP, Arab Human Development Report 2004 (AHDR), at 122.

[44] Art. 175, Constitution of Kuwait.

