

**United Nations Human Rights Council
Universal Periodic Review
Iraq**

Submission of The Becket Fund for Religious Liberty

1 September 2009



1350 Connecticut Avenue NW
Suite 605

Washington, D.C. 20036

T: +1 (202) 955 0095

F: +1 (202) 955 0090

The Becket Fund is a nonpartisan, nonprofit, public interest law firm dedicated to protecting the free expression of people of all faiths.

United Nations Human Rights Council
Universal Periodic Review of Member-State Iraq

The Becket Fund for Religious Liberty, in special consultative status with ECOSOC, submits this analysis of the rule of law and religious freedom law in Iraq as a contribution to the Universal Period Review of UN member-state Iraq.

1. Background

Iraq is an ethnically and religiously diverse state where religious conflict tends to occur along sectarian lines, largely targeting minority groups. Ninety-five per cent of the country is Muslim, and the remaining five per cent is comprised of Chaldean Christians, Assyrians, Syriacs, Armenians, Protestants, Mandeans, Zoroastrians, Edizis, and Bahá'ís, and others.¹ Shiite Muslims form the majority of Iraq's population, followed by Sunnis, most of whom are ethnic Kurds.²

Although all citizens are guaranteed religious freedom rights in the Iraqi constitution; in practice, the Iraqi government has largely failed to protect its many religious minority groups from widespread sectarian violence that began in 2003 following the United States and coalition-led overthrow of Saddam Hussein's Ba'athist regime. Under Hussein's regime, Shiite Muslims as well as Kurdish Muslims were subject to brutal repression. His regime also sought systematically to undermine the religious identity of other non-Muslim religious minorities. For example, the Bahá'í religion was outlawed and their religious activity was made punishable by death.³

The new Iraqi constitution is praiseworthy for many elements that reference rights of religious expression and freedom of conscience. However, provisions in the constitution that give preference to Islam and elevate Sharia law, along with a high incidence of unprosecuted religiously motivated violence, continue to present major challenges to Iraq's *de jure* efforts to secure religious freedom for all.

2. Legal Framework

2.1 Constitutional Framework

The new constitution of Iraq provides general protections for religious freedom; however these gains may be superseded by other provisions that guarantee the supremacy of Islamic law.⁴

Article 2 of the Iraqi constitution pronounces Islam as the State religion and the fundamental source of all law, while at the same time recognizing the "full religious rights of all individuals to freedom of religious belief and practice."⁵ Article 14 recognizes additional rights of all Iraqis (but not all individuals) to equality before the law and freedom from discrimination based on "religion, sect, belief or opinion."⁶ These freedoms are rooted in the "liberty and dignity of man", acknowledged in Article 35, which demand that individuals be free from "intellectual, political and religious coercion."⁷ Additionally, Articles 36 through 38 of the Iraqi constitution reference freedom of expression, freedoms of the press, freedoms of communication, and freedoms of assembly and association.⁸ Conscience rights are buttressed in Articles 40 and 41, which provide for "freedom of thought, conscience, and belief", "freedom of worship", and "protection of the places of worship."⁹

These appeals to religious freedom in Iraq's constitution are commendable for their breadth as well as for their foundation in the dignity of man as the reference point for religious freedom. However, constitutional provisions guaranteeing religious freedom are rendered meaningless insofar as they can be preempted if they are found to conflict with Islamic law, as interpreted.

The primacy of Islam in the creation and enforcement of legislation is established in Article 2 of Iraq's constitution, known as the Supremacy Clause. Article 2 states that "Islam is the official religion of the State and fundamental source of

¹ See Hudson Institute's Center for Religious Freedom, *Religious Freedom in the World* 211-14 (Paul Marshall ed. 2008).

² See id.

³ See U.S. Comm. on International Religious Freedom, Iraq: Religion and Reconstruction (2003).

⁴ See U.S. Dep't of State, International Religious Freedom Report, 2008 [hereinafter "IRF Report 2008"].

⁵ See The Constitution of the Republic of Iraq, art. 2, Oct. 15, 2005, [hereinafter "Iraqi Constitution"], unofficial translation available at: <http://www.unhcr.org/refworld/docid/454f50804.html> [last visited Aug. 31, 2009].

⁶ See Iraqi Constitution, art. 14.

⁷ See id., art. 35. Similarly, Article 39, titled the Personal Status Law, states: "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices." Id., art. 39.

⁸ See id., arts. 36-38. These rights are qualified by the State's proclaimed interest in preserving "public order" and "morality", which is subject to broad interpretation. See id.

⁹ See id., arts. 40-41.

legislation.”¹⁰ The clause carves constitutional provisions for religious freedom and “principles of democracy” out of “the established provisions of Islam” and invites legislative bodies to conform all legislation to Sharia law.¹¹ To this end, Article 2 commands the preemption of any law or right that is determined to be inconsistent with Islam: “No law that contradicts the established provisions of Islam may be established.”¹²

The potential for confusion and threats to religious freedom in Article 2 are more pronounced in light of the fact that Sharia law admits an extremely broad spectrum of interpretation and of the reality that Iraq lacks a well-established juridical culture to interpret Sharia law in a way that comports with international principles of human rights. As it stands, the Islamic Supremacy Clause does not afford sufficient guarantees that the particular variety of Sharia law that Iraqi officials employ as the “fundamental source of legislation” will be one that can harmonize with the rights and freedoms guaranteed elsewhere in the constitution.

Neither does Article 2 specify who will be authorized to elect the particular variety of Sharia to be employed, providing only the troubling judicial counter-part to Article 2, which states that the Federal Supreme Court

shall be made up of a number of judges and experts in Islamic jurisprudence and law experts whose number, the method of 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.¹³

In other words, membership on the Court is determined in part on a judge’s expertise in Islamic jurisprudence. In effect, this creates a mechanism to ensure judicial bias in cases involving “established principles of Islam”. The requirement of Islamic expertise also increases the likelihood that Sharia law will dominate the Iraqi court system. Most importantly, Article 89 effectively creates a religious test for a public office intended to embody neutrality.¹⁴

2.2 Government Structure and Agencies

Governmental bodies of particular relevance to religious affairs in Iraq include: the Higher Juridical Council, which manages and oversees the judiciary, the Federal Supreme Court, the government’s highest court as well as the final authority on legal and constitutional matters, and the Judiciary Oversight Commission.¹⁵ In June 2008, Prime Minister Maliki established the Minorities Committee, headed by a presidential cabinet official, to inform the executive branch on matters related to minority religions in Iraq. The most recent development is the High Commission for Human Rights, established in December 2008 by constitutional mandate as an independent commission charged with building institutions within Iraq that promote and protect human rights. Also of note is the United Nations Assistance Mission for Iraq, created to promote the “protection of human rights and judicial and legal reform in order to strengthen the rule of law in Iraq.”¹⁶

2.3 International Commitments

In 1971, Iraq acceded to the International Covenant on Civil and Political Rights (ICCPR)¹⁷, which guarantees freedom of religion or belief.¹⁸ Additionally, as a member of the United Nations, Iraq has agreed to the principles expressed in the Universal Declaration of Human Rights, which also protects the fundamental right to freedom of religion or belief, including the rights to change one’s faith.¹⁹ Iraq is also a signatory to the Convention on the Elimination of All Forms of

¹⁰ See *id.* art. 2.

¹¹ See *id.* While all Sharia-inspired law is not inherently problematic, stating that Islam is the official state religion and the “fundamental source of legislation” essentially commands law-makers to look to one particular religion, as opposed to the overall dignity of man, justice, and the rule of law, as the highest aim of the law. While Islamic law and principles of freedom and justice will not always be in conflict, when interpretations of Islamic law do contradict these principles, the Supremacy Clause leaves it unclear, at best, which principle is to prevail.

¹² There is a discrepancy in English translations of this clause. Some translations state, “Islam is ... **the** fundamental source of legislation” [Emphasis added]. If the original text reflects this meaning, then the potential for conflict with religious freedom provisions is exacerbated.

¹³ Iraqi Constitution, art. 89.

¹⁴ “This requirement to include Shari’a experts who need not have education in civil law follows a model found only in Iran, Saudi Arabia, and Afghanistan.” Religious Freedom in the World, *supra* note 1.

¹⁵ See U.S. Dep’t of State, Bureau of Near Eastern Affairs, Background Note: Iraq (Feb. 2008), available at <http://www.state.gov/r/pa/ei/bgn/6804.htm>.

¹⁶ See United Nations Assistance Mission for Iraq, Mandate, S.C. Res. 1830 (Aug. 7, 2008) available at <http://www.uniraq.org/aboutus/mandate.asp>.

¹⁷ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter “ICCPR”].

¹⁸ See *id.* art. 18 (“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”).

¹⁹ Universal Declaration of Human Rights, G.A. Res. 217A, art. 18, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

Discrimination Against Women (“CEDAW”)²⁰, which seeks “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”²¹

3. Implementation

Analysis of both the implementation of principles embodied in the 2005 Constitution and the impact of the constitution on pre-existing laws related to religion, has been impeded by the on-going civil unrest since the 2003 invasion of Iraq. The nation’s instability, compounded by the indeterminate influence of Sharia law on the judicial and legislative system, and the government’s persisting requirement of religious registration present continuing challenges to religious freedom.

3.1 Sharia Law

The designation of Islam as the official state religion is not necessarily problematic for religious freedom, since religious freedom can exist and even thrive in a State that has adopted an official state religion, as long as individual rights of non-believers or adherents of other religions are genuinely respected.²² Problems tend to arise when the constitution or statutes fail to designate a governmental body to adjudicate controversies surrounding the interpretation of Islamic law or to detail the variety of Islamic law or “Sharia law” that will be invoked.

By stating that Islamic law is a “fundamental source of legislation” the Iraqi constitution instructs legislators to create statutes based on the tenets of one particular religion, rather than on the dignity of human beings, justice, and the common good, as the source and aim of the law. Islamic law and broadly shared principles of freedom and justice will frequently agree. However, when religious or government officials determine that Islamic law contradicts principles of human rights contained in international declarations and covenants, the Iraqi Constitution does not afford adequate protection to human rights, especially the rights of non-Muslims.

Although the Iraqi Constitution does establish that the Federal Supreme Court will oversee “interpreting provisions of the Constitution,” this does not necessarily prevent the government from abridging religious freedom as defined in the Constitution.²³

Article 39 of the new constitution states that “Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices.”²⁴ However, it does not explain how an individual’s “personal status” and religious affiliation will apply to matters such as marriage, inheritance, child custody, and divorce. Article 39 of the Constitution merely states: “This [family law] shall be regulated by law.”²⁵ Presumably, although it remains unclear, family law would then fall under the jurisdiction of the Personal Status Law of 1959, which requires the application of Sharia law when a legislative text is unclear or does not provide for a particular matter.²⁶ Such terms of the 1959 law conflict with the equal protection guarantees contained in Article 14 of the 2005 Iraqi Constitution, as it applies Islamic law to Muslims and non-Muslim alike.²⁷

The status of the 1959 law under the new constitution remains unclear. However, the constitution’s requirement that Islamic law scholars be placed on the Supreme Court in a proportionality to be determined by the legislative body, as well as ambiguity in certain key constitutional clauses defining the contours of religious rights, leave room for an amorphous form of Sharia law to retain a firm foothold in Iraq’s legal system.²⁸

²⁰ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

²¹ Id. art. 2(f).

²² See Human Rights Comm., Gen. Cmt. 22, art. 18, para. 9 (forty-eighth sess., 1993), U.N. Doc. #CCPR/C/21/Rev.1/Add.4 (1994), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument).

²³ “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.” See id.

²⁴ Iraqi Constitution, art. 39.

²⁵ See Religious Freedom in the World, supra note 1.

²⁶ “If there is no applicable legislative text, the judgment shall be adjudicated in accordance with the Islamic Sharia principles that are most relevant to this law.... Courts find guidance in all of this in the stipulations adopted by the judiciary and the Islamic jurisprudence (*Fiqh*) in Iraq and other Islamic countries where laws are close to Iraqi ones.”

²⁷ Iraqi Constitution, art. 14.

²⁸ See Religious Freedom in the World, supra note 1.

3.2 Religious Registration and Identification

Under present Iraqi law, religious groups are required to register with the government, and individuals are required to indicate their religion on their national identification card. These policies place a burden on religious minorities, especially since the law also requires that a religion claim a minimum of 500 members in order to be permitted to register.²⁹ Religious minorities have complained of abuse in the process to obtain a national identification card, which is required to engage in basic civic functions, such as registering children for school or applying for a passport.³⁰

4. Rule of Law and Religious Freedom

The ongoing civil unrest in Iraq has made it extremely difficult for the government to enforce protections of religious freedom it guarantees in its constitution. Sectarian violence, especially targeted at religious minorities, has been a continual problem. The government has explicitly denounced religiously motivated violence, but has taken few measures to protect religious minorities from persistent threats of violence or to prosecute actual cases of religiously motivated abuse. This has resulted in swelling numbers of religious refugees.³¹ The pervasive, largely unpunished sectarian violence has deeply undermined the rule of law in Iraq, as the principles established in the Constitution are disregarded and inter-religious tensions are more deeply entrenched.³²

4.1 Sectarian Violence

Lawless acts motivated by religious differences in Iraq have ranged from harassment and intimidation to kidnapping, rape, forced relocations, murder, and terrorism. Most religiously motivated violence in Iraq after 2003 has been waged between Shiites and Sunnis and is connected to retaliation for persecutions of Shiites by the Sunnis during Saddam Hussein's regime.³³

Religiously motivated violence in Iraq has been so extensive that tracking exact numbers of those harmed, killed, or displaced has been unfeasible. However, reports estimate that the number of Christians in the country, including Chaldean Catholics, Assyrian Orthodox, Assyrian Church of the East, Syriac Orthodox, Armenians, and Protestants have been reduced by approximately fifty per cent in a period of six years³⁴, as a direct result of sectarian violence.³⁵ Smaller, clan-oriented religions such as Sabeian Mandaean, report approximately ninety per cent of their community either killed or displaced.³⁶ Yazidis, whose religion is thought of as a derivative of Zoroastrianism, have faced violence and persecution in Mosul. Radical Islamic groups have reportedly published numerous fatwas labeling Yazidis "devil worshippers," resulting in nearly 100 deaths in their region.³⁷

4.2 Government Failure to Protect

Although the Iraqi government has condemned sectarian violence, it has done very little to follow through on the promises of its nascent constitution by prosecuting perpetrators of religiously-motivated violence in courts of law and protecting endangered religious minorities.

²⁹ See [IRF Report 2008](#).

³⁰ See [id.](#) For example, in 2007, although a regulation prohibiting Bahá'í adherents from obtaining national identification cards was rescinded, Bahá'ís whose cards were changed to read "Muslim" have still been unable to have their cards changed to reflect their religion.

³¹ See [id.](#)

³² Approximately forty members of the judiciary, roughly five per cent, have been murdered since 2003; demonstrating that violence poses a severe obstacle to establishing rule of law within Iraq's fledgling judicial system. See [Global Justice Project: Iraq Report](#), available at <http://www.gjpi.org/central-activities/judicial-independence/>.

³³ See [Religious Freedom in the World](#), *supra* note 1.

³⁴ These populations are estimated to have dropped from roughly 1.4 million in 2003, to between 500,000 and 700,000 today.

³⁵ Public awareness regarding violence towards Christians in Iraq was heightened by the brutal murder of Iraqi Chaldean Archbishop Paulos Faraj Rahho in March of 2008. The Archbishop was kidnapped after leading afternoon prayers in Mosul, and was found dead weeks later. See [Kidnapped Iraqi Archbishop Dead](#), BBC News (Mar. 13, 2008), available at http://news.bbc.co.uk/2/hi/middle_east/7294078.stm. Months later, the international press reported that large waves of Christians leaving Iraq (nearly 12,000 in a period of months), fleeing sectarian violence. See [Iraqi Christians' Fear of Exile](#), BBC News (Oct. 28, 2008), available at http://news.bbc.co.uk/2/hi/middle_east/7696242.stm.

³⁶ See U.S. Comm. on International Religious Freedom [Annual Report: Iraq](#) (May 2008) [hereinafter "USCIRF Iraq 2009"], available at <http://www.uscirf.gov/images/AR2009/iraq.pdf>.

³⁷ See [Religious Freedom in the World](#), *supra* note 1. On April 22, 2007, gunmen stopped a bus full of people outside of Mosul. They demanded to see the identification cards of all those on board, and ordered all non-Yazidis off the bus. They then drove the men to Mosul and executed all 23 of them. This story made international news and brought significant awareness to the increasing level of violence towards religious minorities in Iraq, as the Kurdish region where the men were abducted and killed was previously considered a largely peaceful area. See [USCIRF Iraq 2009](#).

The Iraqi government should be commended, however, for taking a vocal stand against sectarian violence. Following the kidnapping and death of the Chaldean Archbishop in Mosul, for example, Prime Minister Maliki stated that: “The Christian sect is one of the basic components of Iraqi society and can never be parted from its people and civilization. Any assault on its sons represents an assault on all Iraqis.”³⁸ Senior government officials have repeatedly made public the government’s commitment to unity and harmony among religious sects and the government’s commitment to religious equality.³⁹

However, as the government has been forced to devote most of its attention to the ongoing insurgency and reconstruction effort, it has failed to protect its people from religiously motivated violence⁴⁰ or to use its judicial system to formally overturn laws that conflict with basic principles of religious freedom.⁴¹

4.3 Religious Refugees

The sectarian violence over the past six years has led to a surge in religious refugees both within and outside of Iraq’s borders. Current estimates point to roughly two million displaced religious minorities inside of Iraq and another two million who have fled sectarian violence to neighboring countries.⁴² While prior to 2003, Christians represented only three per cent of Iraq’s population, they now account for approximately twenty per cent of registered refugees in Jordan and Syria and thirty-five per cent in Lebanon and Turkey. Iraq’s non-Christian religious minorities constitute close to 65 percent of registered refugees in Lebanon and Turkey.⁴³ Some minority religious groups that are particularly communal by nature, such as the Sabeen Mandaeans and the Yazidi, have experienced the uprooting of their entire communities.

5. Recommendations

During the Universal Periodic Review, the UN Human Rights Council should commit to considering religious freedom in its evaluation of Iraq. We respectfully recommend that UNHRC not only base its evaluation of Iraq on constitutional assurances of religious freedom, but also on instances of religious violence and the government’s failure to protect religious minorities and prosecute those who commit lawless acts against them.

The UNHRC may wish to request more information on the role of Islamic law in the judicial system, particularly its impact on religious minorities.

The Iraqi government should use its court system to overturn laws that threaten religious freedom, and establish judicial precedent that guarantee religious freedom and foster an overall sense of rule of law with regard to religious controversies. In addition, the Iraqi government should consider enhancing the role of the Minorities Committee in its dealings with persecution of religious minorities.

Finally, the government should integrate a religious pluralism component into its education system that cultivates understanding of the importance of religious freedom in a pluralistic society and the possibility of a civic religious dialogue in the midst of real religious differences in Iraq. The Toledo Guiding Principles, produced by the Organization for Security and Cooperation in Europe, offer a good model of such a curriculum.⁴⁴

³⁸ See IRF Report 2008.

³⁹ See *id.*

⁴⁰ In particular, the government has not taken action to increase security in areas with high concentrations of religious minorities, such as Ninevah and Kurdish-controlled areas, including Mosul.

⁴¹ For example, law No. 105, enacted in 1970, outlaws the Bahá’í religion, and a 2001 resolution prohibits the Wahhabi sect of Islam. Although principles in the new constitution would overturn these discriminatory laws, no actual cases have been brought and no legislation has addressed these laws, making their status, like that of the Personal Status Law of 1959, unclear.

⁴² See Religious Freedom in the World, *supra* note 1.

⁴³ See generally USCIRF Iraq 2008.

⁴⁴ Available at <http://www.osce.org/item/28314.html?ch=993>.