Socio-Religious Obstacles to Judicial Reconstruction in Post-Saddam Iraq

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NOTE

SOCIO-RELIGIOUS OBSTACLES TO JUDICIAL RECONSTRUCTION IN POST-SADDAM IRAQ

There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process.¹

INTRODUCTION

Given Iraq’s location and position of relative influence in the Middle East,² it is of the utmost importance that the power vacuum that was created by the coalition invasion is filled with an orderly system of governance, one that the Iraqi people, the rest of the Middle East and the world at large can look to as a model for the reestablishment of democracy in a post-conflict setting.³ The only way the reconstruction process can be successful in the long-term will be to establish a functioning judiciary that will be viewed as legitimate by the Iraqi people. In order to achieve this legitimacy, this system must take into account and provide representation to the myriad religious, ethnic, and

². See, e.g., Thomas Friedman, Editorial, Buy One Get One Free, N.Y. TIMES, June 24, 2003, at A9 (providing an editorial analysis of the diplomatic, political, and military importance of Iraq’s physical location in relation to neighboring Iran); Sen. John McCain, Editorial, Why We Must Win, WASH. POST, Aug. 31, 2003, at B7. Senator McCain had this to say on the potential importance of the American occupation of Iraq vis-à-vis the Middle East in general:
   Iraq’s transformation into a progressive Arab state could set the region... on a new course in which democratic expression and economic prosperity, rather than a radicalizing mix of humiliation, poverty, and repression, define a modernity in the Muslim world that does not express itself in ways that threaten its people or other nations.
   Id.
social groups within Iraq. As a prelude to proposing some means by which this goal might be achieved, this Note will analyze some of the various cultural and legal factors that will come to bear on this process. The discord between the Sunni and Shi’ite Muslims will be considered in terms of how these cultural trends may affect the process of re-staffing the nation’s courts, with specific attention to the potential effects of the de-Baathification process.

Amidst the initial talk of how this reconstruction effort was to proceed, the two primary goals of the interim administration were the creation of a Constitution, to be followed by elections. A U.N. resolution gave the Interim Government until December 15, 2003 to draft a charter timetable for these events. As of early December 2003, there was still a great deal of dispute over this timetable, as well as the method for establishing an interim government in the form of a “Transitional National Assembly.” Nearly one year later, elections are now tentatively planned for January of 2005, while an increasingly organized insurgency seems poised to disrupt the electoral process. The reestablishment of a functioning judiciary is a crucial co-requisite to each of these stages in the reconstruction process. Needless to say, there is also a great deal of talk about establishing basic security in Iraq. Given that the situation is still so volatile that even some of the judges who remain are being targeted for assassination, it seems as if the process of


8. In fact, it seems the Bush Administration was aware of this as well, in that they were preparing legal teams months before the invasion. See, e.g., PAUL M. LALONDE, FROM HAMMURABI TO GEORGE W.: THE OPERATIONAL, LEGAL AND BUSINESS ENVIRONMENT OF POST-SADDAM IRAQ 8 (Sept. 15, 2003) (prepared as notes for a presentation at the Annual Meeting of the International Bar Association) (“Since July 2002, the Iraqi Jurists’ Association has been in consultation with the State Department on its ‘Future of Iraq’ project.”). See also JAMES DOBBINS ET AL., AMERICA’S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ 171 (2003) (recognizing that “deep structural reform of the legal . . . system[ ] will be crucial to fulfilling Iraq’s economic potential”)

9. Phillip Coorey, Saddam Behind Attack on HQ in Baghdad: Bush, DAILY TELEGRAPH (Sydney, Australia), Nov. 6, 2003, at 35 (“In Mosul, Iraq’s third-largest city, gunmen killed a judge

http://scholarlycommons.law.hofstra.edu/hlr/vol33/iss1/8
establishing basic security must be carried on simultaneously with the reestablishment of a functioning judiciary. However, Iraq will not be able to establish security and basic law and order without some sort of criminal judicial process. A visit to the website for the Coalition Provisional Authority in December of 2003 revealed that the official word on this topic was as follows: "Iraq’s judicial system is functional, with criminals being tried in Iraqi courts by independent Iraqi judges. Senior Baathist and corrupt judges have been removed from their positions." A visit to the updated version of this website a year later reveals much of the same verbiage, although preceded with the admission that "much work needs to be done." The few press releases that tend to illustrate that the judiciary is in fact operational must be considered in light of the rampant crime and violence that come through the mainstream media’s portrayal of the current situation in Iraq. More recently, Iraq’s special criminal court, established by the Coalition Provisional Authority, brought charges against a member of the Iraqi National Congress under a law promulgated under the Baathists that forbade any contact with an enemy state. The politician’s crime was to attend an antiterrorism conference in Israel, at which he publicly suggested that Iraq and Israel open diplomatic ties. Thus it appears as if the newly established judiciary may already be subject to the influences of the recently deposed Baathist regime. Needless to say, a great deal of work does in fact remain to be done.

near his home. Ismail Youssef, a Christian, was the second Iraqi judge assassinated in as many days.


11. Coalition Provisional Authority (Iraq), at http://www.iraqcoalition.org/security/Judicial_System.html (last visited Nov. 8, 2004) (“While much work needs to be done, Iraq’s judicial system is functional, with criminals being tried in Iraqi courts by independent Iraqi judges. Senior Baathist and corrupt judges have been removed from their positions.”).

12. The CPA periodically puts out press releases about recent convictions handed down by the Central Criminal Court. See, e.g., Press Release, Coalition Provisional Authority (Iraq), Iraq’s Central Criminal Court Convicts Two Oil Smugglers (Oct. 13, 2003), available at http://www.iraqcoalition.org/pressreleases/20031014_OCT-14-Conviction.htm. These press releases are infrequent. One can hope that there are convictions being handed down that are simply not reported by the CPA.

13. Erik Eckholm, Iraqi Indicted for Proposal to Open Talks With Israel, N.Y. TIMES, Oct. 6, 2004, at A5. The man charged has claimed that former Baathists within the Iraqi intelligence network are behind the indictment. Id.
Part I of the Note will work to clarify what "the Law" has come to mean for Iraq as a nation given the influences of the shari'a, Islam generally, Ottoman Rule, the English Mandate, and eventually Saddam's regime. Part II will address some of the key cultural factors that will come to bear on the process of judicial reform in post-conflict Iraq, as well as some of the recent events, such as the Coalition invasion itself, that will have a great impact on the nature of those same efforts towards judicial reform.\textsuperscript{15} Part III will examine those cultural and logistical obstacles that the author believes will be the most complex as the judicial reform process continues over the coming years, with specific attention paid to the selection process for judges, as well as the issue of what sort of training mechanisms might be employed and/or established to support the nascent judiciary. This portion of the Note will also highlight some lessons learned in previous nation-building efforts that might prove helpful as this process advances.\textsuperscript{16}

Aside from concerns over an anti-American backlash,\textsuperscript{17} the real threat of a failed effort in this arena is that such a failure could have


15. In terms of physical infrastructure, 75% of Iraq's courts were damaged or destroyed in the war and subsequent looting. US-Led Coalition Launches Sweeping Judicial Reforms in Iraq, AGENCE FRANCE PRESSE, June 18, 2003. Similar destruction, caused by the Taliban, has severely impeded progress towards judicial reform in Afghanistan. CRAFT REPORT, supra note 3, at 10.

16. It may help the reader to know what this Note will not address. Whether this reconstruction process succeeds in establishing a stable democracy remains to be seen, and we all must bear in mind that such changes do not take place overnight. Recall that it took fifteen years for democracy to take hold in West Germany following WWII. See Diethelm Prowe, Foundations of West German Democracy: Corporatist Patterns in the Post-1945 Democratization Process, in COPING WITH THE PAST: GERMANY AND AUSTRIA AFTER 1945, at 105 (Kathy Harms et. al. eds., 1990). That said, this Note will not address a prospective timeframe during which these issues might be addressed. The process through which a new Iraqi Constitution will be drafted is similarly beyond the scope of this Note. While the establishment of basic criminal justice mechanisms will be referred to, the debate over war-crimes tribunals and other such matters will not be covered. This Note is designed to illuminate the medium- to long-term obstacles that the new Iraqi judiciary and its architects will face.

17. There is already a great deal of anti-American sentiment in Iraq and within the Muslim world as a whole. See Steven R. Weisman, U.S. Must Counteract Image in Muslim World, Panel Says, N.Y. TIMES, Oct. 1, 2003, at A1 (discussing the United States government's efforts to counteract America's "plummeting public image among Muslims and Arabs abroad").
absolutely devastating effects on the Iraqi people themselves, as well as the future political make-up of the Middle East and the rest of the World. That said, it matters little what one perceives as either the immediate or long-term goals of this judicial reconstruction process. In order for any sort of economic, political, or social growth to arise from this new Iraqi government, it must be established in such a way that Iraq will not be a breeding ground for either fundamentalist Islamic movements or a similarly repressive regime such as that which existed under Saddam Hussein. In the words of President George W. Bush, "The failure of Iraqi democracy would embolden terrorists around the world . . . and extinguish the hopes of millions in the region . . . . Iraqi democracy will succeed and that success will send forth the news, from Damascus to Tehran, that freedom can be the future of every nation."18 Political rhetoric aside, members of the global legal community must be aware of how much of a role the legal profession should play in the reconstruction process.

Drawing a distinction between mere "knowledge" and "wisdom," derived from life experience, one commentator on the present state of the Iraqi legal system stated that "[o]ne benefit of wisdom is its value in sorting through knowledge and ideas to discern what is right and judge what is true."19 This same commentator goes on to state simply that, "wisdom is in short supply [and] [g]iven the formation of a more benign state in Iraq, the years ahead will show whether the wisdom its people have accumulated will translate into effective reforms in . . . [the] law."20 An Iranian-trained attorney who left Tehran in 1974, Shalah Hodjat Samsami, echoed this sentiment. In a discussion with the author, she stressed that there was one word that ought to be kept closely in mind throughout this reconstruction process. The word is "wisdom."21 She went on to explain that "whoever guides the judicial reform process needs to use wisdom in doing this, and must not be arrogant or ignorant of the specifics of the region."22 This Note is designed to form some basis for this ultimately necessary wisdom.

20. Id.
21. Telephone Interview with Dr. Shalah Hodjat Samsami (Nov. 15, 2003).
22. Id.
I. WHAT IS THE LAW OF THE LAND IN IRAQ?

This section addresses the history of the Iraqi nation-state leading up to the point at which the Baath party took power, with a specific focus on those historical events and trends that will come to bear most directly on the project of rebuilding a functioning judiciary. It will also address the state of Iraq's modern judiciary under the Baath party just prior to the Coalition invasion. The end result of the historical details below will be familiar to many readers of this note given that tales of Saddam Hussein's brutality as a political leader are well-documented. However, Hussein's direct influence on Iraq's legal system must not be considered in a historical vacuum. One of the final issues of a Baath party-sponsored legal journal displayed the words of Saddam Hussein on the front page: "Justice is above the law." While Mr. Hussein's individual role in creating this appalling misconception of how justice ought to be administered cannot be overlooked, there were centuries of history that came before him.

A. Early Development of the Iraqi State

In order to understand what the law consists of in Iraq, it is necessary to have some understanding of the historical trends that shaped the current state of Iraq as it developed over the years. Present day Iraq began as a loosely configured group of city-states centered around the Tigris and Euphrates Rivers. The country's name is derived from the term al-'Iraq, which means "the shore of a great river along its length, as well as the grazing land surrounding it." The three cities of Baghdad, Basra, and Mosul were provinces under Ottoman rule beginning around the sixteenth century. The mamluk warrior class that ruled these provinces under the watchful eye of the Pasha in Istanbul was predominantly composed of Arabs and Shi'ite Muslims, yet their ruling class was primarily Sunni Muslim, a trend that would continue

23. The influence of Saddam Hussein and his Baath party on Iraq's judicial system will be addressed in Part III infra.
24. The author relied heavily on the second edition of A History of Iraq by Dr. Charles Tripp in creating this selective history of Iraq. See generally CHARLES TRIPP, A HISTORY OF IRAQ (2d ed. 2002). For those interested in a more thorough analysis, Dr. Tripp's work is an excellent starting point given its relative objectivity and the degree of detail found therein.
25. BRAUDE, supra note 19, at 168.
26. See TRIPP, supra note 24, at 8.
27. Id.
28. See id.
throughout Iraq’s development.\textsuperscript{29} Growing concern with the development of European political and military might during the nineteenth century led the Ottomans to oust the mamluks and reassert direct control over the three provinces of Baghdad, Basra, and Mosul.\textsuperscript{30} In so doing, the Ottomans provided the region’s first exposure to the “European Model” of government.\textsuperscript{31} One of the most influential reforms during this time was the Land Law of 1858, which effectively conceded a degree of tenured ownership to landholders, while also reestablishing state ownership of land.\textsuperscript{32} This changed the traditional dynamic of the predominantly tribal social groups in such a way that the more influential tribal leaders began to see the state as something that might be relied on to bring order to their leaseholds: “[E]ven in this [tribal agrarian] sector of society, traditionally wary of the state and disdainful of engagement with it, there was a growing number for whom the advantages of participation [with the state] in some effective form began to outweigh the advantages of keeping their distance.”\textsuperscript{33} This was the first inkling of representative government to come to this broad swath of land that encompassed the lands of ancient Mesopotamia.

As these reforms and the move to the “European model” slowly took hold, a degree of disenchantment with Ottoman rule developed along with an increased degree of participation with the state and its institutions.\textsuperscript{34} This resulted in a young educated class, “the Young Turks,” many of whom left the Mesopotamian provinces to attend Istanbul’s Law School.\textsuperscript{35} The Young Turk revolution in 1908 saw the reinstatement of the Ottoman Constitution and the public establishment of the Committee of Union and Progress (CUP), both of which breathed life into the developing state’s sense of political self-awareness.\textsuperscript{36} The formation of the CUP as a semi-autonomous political unit was to have a tremendous impact on the future course of Iraq’s development at the outbreak of the First World War. The CUP had aligned itself with Germany and was developing a contentious relationship with Russia.\textsuperscript{37} These factors were among those that the Ottomans considered in their

\begin{thebibliography}{99}
\bibitem{29} See id. at 12-13.
\bibitem{30} See id. at 14.
\bibitem{31} Id.
\bibitem{32} See id. at 15.
\bibitem{33} Id. at 17.
\bibitem{34} Id. at 20-21.
\bibitem{35} See id.
\bibitem{36} See id. at 22-23.
\bibitem{37} See id. at 28.
\end{thebibliography}
eventual alliance with the Central Powers in October of 1914. In November of that year, the British occupation of Basra marked the beginning of the end of Ottoman control of the region.  

B. Imperial Dominance

Following the invasion and occupation of Basra, Baghdad, and Mosul by the British, the three provinces were consolidated under a League of Nations Mandate through which the British were to rule the area until 1932. The goal of the British Mandate has been described as "the establishment of a recognizable state and the development of a social order appropriate to it." The British found that trends of "hierarchical and authoritarian" rule that had taken hold under the Ottomans were an obstacle to their nationalist goals. In an effort to counteract these trends, the British looked to two groups within Iraq in an effort to achieve these goals. These two groups consisted of predominantly Sunni members of the former Ottoman administrative engine, "for whom the new state of Iraq was the guarantee of their centrality and status," and the elite landholding members of society, "whose value lay in their dependence on a state which provided them with the means of ensuring social order." Shi’ites, who made up more than half of Iraq’s population, and the Kurds, who made up approximately twenty percent of the population, were almost completely excluded from roles of authority under the Mandate. Despite the fact that Sunni Arabs made up less than twenty percent of the population, their ranks dominated the various government ministries as well as the officer corps of the armed forces.

Following the dissolution of much of the Ottoman administrative apparatus, the British introduced the Tribal Civil and Criminal Disputes Regulation (codified into Iraqi law in 1924) which granted tribal leaders the authority to hear disputes among their constituents. While this

38. See id. at 29.
39. See id. at 30.
40. Id.
41. Id.
42. See id. at 31.
43. Id. at 31. See discussion supra note 33 and accompanying text.
44. See id. at 31.
45. See id.
46. Id. at 37. A similar technique was employed years later by Saddam Hussein. However, his apparent goal was to fracture the broader tribal community in hopes of reducing organized political opposition. See infra note 89 and accompanying text.
authority to hear disputes was not a departure from the system as it existed prior to the British, the Regulation also empowered the tribal sheikhs to collect taxes on behalf of the occupying British, thereby establishing a form of indirect, but powerful, rule over Iraq's tribal communities. This new means of affecting some degree of control over the tribal population spawned the growth of anti-British sentiment among this same population whose entire habit of living had existed almost completely independently of centralized authority until this point.

This growing degree of dissatisfaction came to a head when an armed revolt broke out in June of 1920. This revolt was born in the Shi'ite religious centers of Karbala and Najaf, but eventually spread to include the Kurdish areas in the North, as well as the tribally-dominated Shi'ite areas around Baghdad itself. While the revolt was eventually put down by superior British firepower, its occurrence created several currents in Iraqi government which were to have long-lasting effects. The revolt was one of the first, if not only times, that Sunni and Shi'ite Arabs collaborated against a common foe. Of the 6,000 Iraqis to have been killed during the revolt, most were Shi'ite given the geographical origins of the revolt. Much of the Sunni elite, who were to benefit from the political opportunities created by the revolt, were also concerned as it raged because it represented a growth in tribal and Shi'ite power which could directly affect their own privileged position in Iraq's government.

In an effort to discover what form of government would achieve the goals of the Mandate, the British reestablished much of the Ottoman administrative apparatus after the revolt, placing almost exclusively Sunnis into important ministerial and administrative roles. While the Sunnis certainly dominated the higher positions atop the various Ministries, including the Ministry of Justice, the Sunni-dominated atmosphere extended to include not only judges, but clerks and bailiffs as well. Given that the Shi'ites had been largely excluded from administrative positions under Ottoman rule, there were precious few with any experience in the governmental arena. For the Shi'ites whose blood had fueled the revolt of 1920, the continuation of a Sunni-

47. Id. at 37.
48. See id. at 43.
49. See id.
50. See id.
51. See id.
52. See id.
53. See id.
dominated atmosphere in the government "left a legacy of resentment against the emerging political establishment in Baghdad which few members of that establishment saw fit to address and which was to have troubling consequences for the politics of the new state."  

The British sought to elude Iraqi concern over the notion of a Mandate by structuring their relationship in the form of a treaty, whose formation coincided with the ongoing debate over the Constitutional framework of the new state. Debate over the latter had traditionally attracted the attention and energy of the Shi’ite religious leaders, or mujtahids, given their inclinations to preserve Iraq as an Islamic State. The ratification of the aforementioned treaty again drew the ire of the mujtahids as well as that of the lay Shi’ites. However, "[t]he powerful seduction of the state, with its positions, patronage and resources was beginning to exert its force on the tribal shaikhs." This influence began to create a divide between the mujtahids and the lay Shi’ites which marked the beginning of the decline of religious influence in the pattern of Iraqi government. It was during this period that Shi’ite issues relevant to the system of government were increasingly addressed by lay people. This resulted in the mujtahid’s retreat from the realm of political matters, leaving them to opine on matters of “Islamic jurisprudence and moral exhortation,” both of which were to have an increasingly less significant role in Iraqi government as the years progressed. Another major factor that contributed to the development of Iraq as a predominantly secular state, in terms of both its national identity and judicial structure, was that Sunni Islam, unlike the Shi’ite tradition, does not mandate that its followers adhere to the rulings (fatwa) handed down by their religious leaders (ulama). This “well-established fact” further marginalized the Shi’ite majority in that the highest authority under which their actions were to be considered was fundamentally different

54. *Id.* at 45.
55. See *id.* at 52.
56. See *id.* at 52-55.
57. See *id*.
58. *Id.* at 56.
59. See *id.* at 57.
60. *Id*.

http://scholarlycommons.law.hofstra.edu/hlr/vol33/iss1/8
from the authority to which the Sunni looked for guidance in the law, namely the State.\textsuperscript{62}

Once the Iraqi Constitution, whose composition had fueled so much debate, was adopted, the disparate treatment of Sunnis and Shi’ites was essentially codified. Article 16 of this document divided Iraqis into “original” and “non-original” Iraqis, the former being those who enjoyed citizenship under the Ottomans.\textsuperscript{63} Article 6, that which had previously declared the legal equality of all Iraqis, was amended to read, “Iraqis are equal in enjoying their civil and political rights and fulfilling their civic duties and tasks. \textit{Only original Iraqis} are entrusted with public jobs according to their ability and qualification without discrimination, \textit{except for cases specified by law.”}\textsuperscript{64} The Iraqi Nationality Law, enacted on October 9, 1924, established a similar division amongst the Iraqi populace.\textsuperscript{65} If one was not an Ottoman Citizen, then the only remaining category was those who were declared to be “of formerly Persian ‘dependency.’”\textsuperscript{66} This was true regardless of one’s actual birthplace and the categorization “would apply to their sons, grandsons and great-grandsons in perpetuity.”\textsuperscript{67} These laws remained in force until the end of Saddam Hussein’s regime.\textsuperscript{68} While neither of these laws still exists today, their effect on the judiciary, and the rest of the nation’s governmental apparatus, can not be overlooked.

In summary, the period of the British Mandate in Iraq saw many of the same trends that marginalized the nation’s Shi’ite and Kurd population during the time of the Ottomans; “Britain also institutionalized anti-Shi’ism when building up the nascent Iraqi state by installing a Sunni monarch with a government and bureaucracy that was virtually a Sunni preserve.”\textsuperscript{69} Given the existence of the de-Baathification policy in Iraq today, it is unlikely that any future government will retain this characteristic of being a “Sunni preserve.” However, we must nevertheless be mindful of the terribly detrimental

\begin{itemize}
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} Ali Babakhan, \textit{The Deportation of the Shi’is During the Iran-Iraq War}, in \textit{AYATOLLAHS, SUFIS, AND IDEOLOGUES; STATE, RELIGION AND SOCIAL MOVEMENTS IN IRAQ} 183, 189 (Faleh Abdul-Jabar ed., 2002).
  \item \textsuperscript{64} Id.
  \item \textsuperscript{65} See id.
  \item \textsuperscript{66} Id.
  \item \textsuperscript{67} Id.
  \item \textsuperscript{68} See id.
  \item \textsuperscript{69} Id. at 186.
\end{itemize}
effects that such factors have had on the Iraqi populace and their ability to support a functioning judiciary.

C. The Period of Independence

While British influence certainly continued, Iraq became the first of the League of Nations Mandates to be admitted into the League of Nations as a sovereign in October of 1932.\(^{70}\) One of the major concerns amongst the League’s assembly that was addressed prior to the vote was the need for some sort of formal declaration that the sovereign Iraqi state would respect fundamental human rights, with regard to both foreigners within their borders and Iraq’s existing Kurdish and Christian Assyrian communities, both of whom were greatly concerned that a sovereign Iraqi state run by predominantly Sunni Muslims would result in their being further subjugated.\(^{71}\) It is interesting to note that these concerns on the eve of independence from the British Mandate are very similar, if not identical to the concerns that have created such discord amongst the nascent Iraqi polity in the wake of the ouster of Saddam Hussein at the hands of the Coalition of the Willing. Iraqi state politics were “increasingly secular in nature” during this new period of independence, due in no small part to an overwhelming drive to strengthen the Iraqi state as such in order to maintain the systems of patronage and land-ownership that had come to define the basis of power for Iraq’s ruling elite.\(^{72}\) During this time, the conflict raged on between the Sunni and Shi’ite populations vis-à-vis their position in the government. As the new state government was forming under the guidance of King Faisal, the former leader of the Arab Revolt against the Ottomans,\(^ {73}\) the trend of Sunni elitism continued. The British were considering another man for the job, Shaykh Khaz’al of the Muhammara, a Shi’ite.\(^ {74}\) The British High Commissioner is said to have explained that Shaykh Khaz’al was “dismissed as a candidate for the Iraqi throne because the installation of a Shi’i king would not have been well received by the more powerful

70. See TRIPP, supra note 24, at 74-76.
71. See id.
72. Id. at 77.
73. See generally T.E. LAWRENCE, SEVEN PILLARS OF WISDOM (Wordsworth Classics 1997) (1942) (autobiographical account of the Arab Revolt as experienced by British Lieutenant T.E. Lawrence, popularly known as “Lawrence of Arabia”); LAWRENCE OF ARABIA (Columbia Pictures 1962) (cinematic interpretation of Lawrence’s Seven Pillars of Wisdom).
74. See Ali Babakhan, The Deportation of the Shi’is During the Iran-Iraq War, supra note 63, at 186.
The man chosen for the position, King Faisal, "was sensitive to this, but had no intention of overturning a system of patronage that privileged his own position as well as that of the almost exclusively Sunni Arab ex-Sharifian officers."\(^{76}\)

Following a decline in King Faisal's health, he was replaced in 1933 by his son, Ghazi, who has been described as "the product of a system which exacerbated Shi'i resentment of the Sunni-dominated state during the next few years."\(^{77}\) King Ghaza was to play a very small role in how the country was to develop. It was under his rule that regime changes originating from schisms within the government and the military were to become the norm.\(^{78}\)

In March of 1935, a group of Shi'ite tribal sheikhs and mutjahids met to discuss their grievances and subsequently presented *Mithaq al-Sha'b*, or "The People's Charter," to the government.\(^{79}\) One of the main focuses of this document was the lack of Shi'ite representation in the judiciary.\(^{80}\) A period of unrest followed the presentation of the *Mithaq al-Sha'b*, during which time violence broke out in the Kurdish north as well as the predominantly Shi'ite portions of southern and central Iraq. A coup d'etat in the Fall of 1936 established Hikmat Sulaiman as the prime minister and de facto leader of the Iraqi state.\(^{81}\) He was subsequently ousted by a military coup which was to have lasting effects on the way in which Iraq was governed. Following Sulaiman's resignation in August of 1937, the seven senior military officials who worked towards his removal "introduced an era in Iraqi politics during which civilian politicians held office only with the consent of these men."\(^{82}\)

This trend has continued and is a major factor to be considered as the judiciary, and the rest of the government, is rebuilt. For centuries, Iraq has been a country wherein those who worked in support of the government, such as members of the judiciary, could only do so with the prior approval of the ruling elite. This approval could only be gained by assuring this same elite that one would further their goals, no matter how

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75. Id.
76. See TRIPP, supra note 24, at 79.
77. Id. at 82.
78. See generally id. at 82-107.
79. Id. at 82.
80. See id.
81. See id. at 87-90.
82. Id. at 94.
contrary they may be to the needs of the country or the theoretical goal of democracy.

D. Under the Baath Party

This section will address Iraq’s legal system as it existed under the Baath party. Despite a relatively well-organized legal infrastructure, the administration of justice under the Baath party was anything but just. Iraq’s first “modern” judicial system following the fall of the Ottoman empire was created and staffed under the British Mandate. Until the coup that gave the Baath party power, the judiciary was successful in acting independently of, and sometimes in direct contravention to, the executive branch. After the Baath party came to power in 1968, a new constitution was established that effectively eliminated the separation of powers and made the civil court system “subservient to the [newly established] military court system.” In 1977, the Baathists stripped the nation’s highest court of the power to appoint judges and select their own cases and bestowed this right upon the newly created Revolutionary Command Council, at whose head sat Saddam Hussein. One commentator summarized the effect of the Baath party on Iraq’s legal system as follows: “During the Baathist era, whatever remained of the rule of law in Iraq—as passed down from Hammurabi, Islamic jurisprudence and British influence during the Hashemite monarchy—disappeared in favour of courts subject to the will of an authoritarian government.” In addition to establishing “special courts” to carry out the whims of his regime, Saddam Hussein’s Baath party made a “deliberate decision . . . to encourage a return to tribal justice as part of its policy of re-tribalizing Iraq to fragment political opposition.” This had the effect of minimizing contact between the judicial apparatus and a great extent of the nation’s population that lived outside of urban areas. Despite the fact that the ability of the judiciary to operate independently of the Baath party’s often capricious whims was severely

84. Id.
85. Id.
86. BRAUDE, supra note 19, at 174.
87. LALONDE, supra note 8, at 8.
88. See infra notes 88-108 and accompanying text.
89. DOBBINS, supra note 8, at 178.
90. Id.
impaired, there was a very firm judicial infrastructure whose topography will likely translate into the country’s post-Saddam judiciary.

In terms of substantive law, Iraq’s civil and criminal systems relied upon precedent set under the Ottoman canon from the nineteenth century, as well as British law that was applied under the Mandate. Issues of personal status were handled by religious courts divided such that the Sunni and Shi’ite Muslims might have their grievances heard and disposed of according to their own traditional beliefs. A third personal status court system, or “spiritual council,” was established for Christians and Jews. In 1951, an Egyptian jurist authored a national code for Iraq that sought to account for and unify these “concentric legal codes.” This code also established the three-tiered court structure that exists to this day, although the degree to which it is functional is up for debate. The author of the 1951 Civil Code had performed similar duties for Libya, Egypt, and Syria in the past but considered the Iraqi code to be his “masterpiece.”

It is also important to note that Iraq uses a civil law system, rather than the common law system used in the United States. This is especially relevant given the differences between the role of a judge in the civil system versus the role of a judge in the common law system. In the former, “judges apply a comprehensive legal code to resolve issues presented in the case, and they take an active role in making a determination of a person’s guilt or innocence.” Iraq, along with much of the Middle East, operates with a criminal investigative structure known as the niyaba system, wherein the judiciary fulfills the roles of both investigator and prosecutor. Under this system, prosecutors “direct the court’s attention to the facts in each case and advise the court on the law.” Ultimately, the prosecutor may argue for acquittal as well as conviction depending on the prosecutor’s perception of the facts.

91. Braude, supra note 19, at 174.
92. See id.
93. Id.
94. Id.
95. See, e.g., Frank J. McGovern, Rebuilding a Shattered System: American Lawyers are Helping to Restore and Reshape the Legal Structure of Iraq, 25 Penn. Law. 34, 38 (2003).
96. Id.
97. See id. at 38; see also Nathan J. Brown, Arab Judicial Structures 6 (2001) (presented to the United Nations Development Programme on Governance in the Arab Region in August of 2001) (chart listing systems of prosecution employed throughout much of the Middle East).
98. See McGovern, supra note 95, at 38.
99. See id.
Iraq's court system can be considered as an amalgamation of two independent judicial organs: "The first is composed of the judicial hierarchy that is supervised by the Ministry of Justice, and the second is composed of a number of courts and tribunals affiliated to, and supervised by, executive organs other than the Ministry of Justice."\(^{100}\)

The judiciary under the Minister of Justice was set up with somewhat specialized courts of first instance arranged to hear different types of disputes, an intermediate appellate level consisting of regional appellate courts, and a Supreme Court of sorts. Iraq's Highest Court, the Court of Cassation (Mahkamat al-Tamyeez), has appellate jurisdiction over all of the nation's civil and criminal courts.\(^{101}\) The Court of Cassation also heard appeals from the Religious Courts, applying shari'a law to personal status issues among Muslims.\(^{102}\)

The courts of first instance were divided into Criminal, Civil, and Religious Courts.\(^{103}\) The Criminal Court of First Instance (Makhamat al-Junah) heard cases arising from misdemeanors and felonies carrying a penalty of five years of less.\(^{104}\) More serious felonies and appeals from this court were heard at the Higher Criminal Court (Muhkamat al-Jinayat).\(^{105}\) Appeals from the decisions of this court would be heard in the Court of Cassation.\(^{106}\) The Civil Court of First Instance (Makhamat al-Bidaya) heard cases involving individuals and corporations that did not fall under the purview of the Religious Courts that dealt mostly with personal status issues (such as those dealing with family, marriage, and inheritance) among Muslims.\(^{107}\) Appeals from the Civil Court of First Instance arising from dispute between individuals and/or corporations would be heard in one of eighteen Courts of Appeal arranged throughout the country.\(^{108}\) Decisions from this intermediate appellate level, as well

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101. Id.
102. Id. at 6.
103. SPECIAL REPORT 104, supra note 83, at 5-6.
104. Id.
105. Id.
106. Id.
107. Id.
108. Id. There is conflicting information on the number of Courts of Appeal. The Special Report from which this number (18) is drawn was released by the United States Institute of Peace, a federal institution created by Congress. See http://www.usip.org for more information. Information made available by the United Nations Development Programme-Programme on Governance in the Arab Region (UNDP-POGAR) explains that there are seven judicial districts, each with their own
as decisions from the Civil Court of First Instance that addressed disputes with administrative bodies, would then be heard in the Court of Cassation.\footnote{See id. at 6.} Criminal proceedings that involved soldiers were heard by the Military Courts (al-mahkama al-Khasa and al-mahkama al-da’imiyyah), which operate under the jurisdiction of the Ministry of Defense.\footnote{See id. at 6; see also TRIPP, supra note 24, at 192.}

The most relevant aspect of Iraq’s pre-war judiciary for purposes of this analysis are those courts that do not fall under the guidance and control of the Ministry of Justice, namely the Law Enforcement Courts (Mahakem Qi’wa al-Amn al-Dakhili) and the Revolutionary and Special Courts established by the Baath party following the military coup that brought them to power on July 30, 1968.\footnote{See id. at 6; see also TRIPP, supra note 24, at 192.} These courts “had the right of first dibs to any case and a more reflexive disposition to rule according to the whims of the political leadership.”\footnote{See also id. at 4-5 (analyzing the organizational structure of the various security organizations).} The Law Enforcement Courts were responsible for hearing cases that involved the various security forces whose primary responsibility was to protect against plots to overthrow the regime.\footnote{See id. at 6.} These courts were independent of the nation’s Civil and Criminal court system and did not fall under the jurisdiction of the Court of Cassation.\footnote{See id. at 6.} This insulated the members of these security forces from potential criticism and attack from the nation’s judiciary, effectively establishing a police state in which the regime’s security apparatus was accountable to no one, save Saddam Hussein himself.\footnote{See id. (“In practice, the Law Enforcement and Military Courts have protected their constituents.”).}

The Revolutionary Courts were established to address matters of national security as well as issues arising from corruption within the regime.\footnote{See id.} These courts were also completely independent of the regular judiciary. They were typically staffed by high-ranking Baath party members, many of whom did not have legal training of any kind.\footnote{See id.} They also “ha[d] the power to ignore habeus corpus and their decisions
were final and without appeal." The overwhelming authority of these courts and their ability to directly carry out the will of Saddam Hussein severely impaired the functional worth of the regular judicial system, and contributed to widespread corruption among the judiciary, "which previously enjoyed a reputation for integrity."

Two examples of the way in which this independent judicial wing was used by the Baath party will prove helpful. In January of 1976, Hussein had then-acting President Hasan al-Bakr promote him to the rank of general. Simultaneously with this promotion, Hussein doubled the size of the army, "effectively deterring any other faction in the [Baath] party from challenging Saddam Husain's own leadership." He also enlarged the number of members in the Regional Command Council (RCC) in January of 1977, effectively "diluting the influence of those who still had reservations about his ascendancy." In response to these actions, and the general trend of marginalizing the Shi'ite majority that had characterized the Baathist rule, a large scale demonstration involving upwards of 30,000 people arose in and around the southern cities of Najaf and Karbala. Rioting broke out in the face of military intervention and, in addition to a number of casualties, over 2,000 people were arrested. A special ad-hoc court was established to try the demonstrators. This court sentenced eight of the Shi'ite religious leaders (ulama) to death and imprisoned a number of others. The court also took actions which resulted in the closing down of many of the Shi'ite study circles, and the subsequent exodus of many religious scholars from the country. Hussein thought that these sentences were "too lenient" and promptly dismissed the man he had hand-picked to be president of this special court, as well as one of the Shi'ite cabinet ministers who had only recently been appointed to the RCC.

This episode illustrates that Hussein's leadership would not tolerate any sort of popular uprising. Similarly, his creation of the special court and subsequent dismissal of those in charge of it from governmental service made clear that any judicial actions that did not meet with his ideals of how such insurrections ought to be repressed would be equally

118. Id.
119. Id.
120. TRIPP, supra note 24, at 216.
121. Id.
122. See id.
123. See id.
124. See id.
125. Id.
unacceptable, thereby establishing a system in which even his specially appointed judges could act only in the way that Hussein thought they should, leaving no room for actual judicial decision-making.

In July of 1979, President Hasan al-Bakr announced his resignation amidst rumors that he was considering nominating Hafiz al-Asad of Syria to act as his successor. However, Saddam Hussein had himself sworn in within hours of al-Bakr’s resignation. While it is unclear whether al-Bakr had ever truly considered placing the Syrian Baathist al-Asad into the office of president, Hussein reacted based on the simple fact that any possible alternative to his leadership was being discussed. Hussein convened a special convention of the RCC in late July of 1979, in which he declared that his security forces had uncovered a plot to overthrow the regime from within the RCC itself. Following the arrest of over sixty high-ranking members of the regime, a special court was created to address this alleged plot. The court sentenced many of those initial sixty arrestees to death, including five members of the RCC. The retribution that began with the actions of this special court resulted in the execution of approximately five hundred senior Baath party members, leaving others to be demoted or simply purged from public office altogether. Here again, we see Hussein using the judiciary as a tool to carry out his very specific will. This sort of behavior had the dual effect of undermining the authority and effectiveness of the judiciary to objectively address matters that came before it, as well as an equally damaging effect upon the Iraqi people’s perception of the judiciary as a mere enforcement mechanism for a ruthless and malevolent leader.

The level of corruption in Iraq’s judiciary under the Baath party is also of great concern and will need to be confronted head on as the process of judicial reconstruction moves forward. Some have claimed that “most judges [under the Baath party] earned more money accepting bribes than meting out impartial justice.” However, a group of Iraqi

126. See id. at 222.
127. Some scholars point to the fact that al-Bakr emerged from this episode alive and unimprisoned as evidence that at least Hussein himself did not believe that it was al-Bakr’s intention to place someone else in the position of President. See id.
128. See id.
129. See id.
130. See id.
131. See id.
132. See id.
133. BRAUDE, supra note 19, at 175.
(and by definition former Baath party members) judges that were interviewed by American military jurists in the Fall of 2003 claimed that corruption "was not much of a problem." Interestingly enough, the Iraqi lawyers with whom these Americans spoke had a different story to tell. They explained that corruption in the judiciary was a serious problem, and cited the fact that "the judicial institute that all judges had to attend provided no judicial training but rather a two-year indoctrination into the Baath party." In addition to bribery, justice was frequently delivered (or "not delivered" as the case may be) based upon interpersonal relationships. A female attorney that was interviewed by this same group from the 358th Civil Affairs Brigade told stories of lawyers, judges, and policemen gathering for a feast, at which "they would work things out regardless of the law." She also claimed that, in order to win a criminal case, she would have to have sex with the police officer involved in the prosecution. In addition to the aforementioned varieties of corruption, the Iraqi judiciary also suffered based upon the influence of Hussein's special courts, whose "gavel-happy judges punished the accused and rewarded the well-connected with the sort of swiftness Saddam liked best." The people's conditioning to this level of state-sponsored corruption will likely pose a great obstacle to the judicial reconstruction process, despite the absence of formal Baath party leadership.

II. CHANGES TO THE JUDICIARY SINCE THE COALITION INVASION

A. Under the Coalition Provisional Authority

The first action taken by the CPA towards the goal of judicial reform was the establishment of the Central Criminal Court of Iraq on July 11, 2003. This was a crucial step in that it was a necessary precedent to the establishment of security in Iraq. Its structure may also serve as a helpful guideline for establishing a model for the reformation

134. McGovern, supra note 95, at 35.
135. Id.
136. See id.
137. Id.
138. See id.
139. BRAUDE, supra note 19, at 175.
140. The Central Criminal Court of Iraq, Coalition Provisional Authority (Iraq), Ord. 13 (revised) (July 11, 2003).
of the rest of Iraq's court system.\textsuperscript{141} Iraq's Council of Judges was reestablished in October 2003 after having been abolished by Hussein's regime in 1979.\textsuperscript{142} The Council is designed to oversee the judicial system and investigate alleged "professional misconduct and incompetence."\textsuperscript{143} Perhaps most importantly, it exists and operates independently of the Ministry of Justice, a feature that will help to ensure some degree of judicial independence.\textsuperscript{144}

Given the current level of animosity towards the United States in Iraq, it seems as if the United States should consider granting as much lawmaking ability to the Iraqi people as possible, on as rapid a schedule as is feasible. One Iraqi attorney (a Sunni) had this to say about the United States' actions in Iraq: "They have destroyed our institutions, our people and our security . . . . They have totally erased us."\textsuperscript{145} While this attitude is not representative of the entire Iraqi population, it is relevant as a cautionary note given that such venom was delivered by a member of the Iraqi bar. It is important for all involved to know that the societal issues that must be addressed and confronted do not exist simply in the nation's rural areas, nor strictly among the vehemently religious.

1. The Perceived Threat of Equal Representation on the Bench

Iraq is home to numerous ethnic and socio-religious sub-groups, all of whom are hopeful that the new government will grant them the fundamental rights and respect that they were deprived of under Saddam Hussein, as well as many of his predecessors. The area of Northern Iraq that abuts Turkey and Iran is populated by an ethnic sub-group of Kurdish peoples, whose ethnic lineage is traced to the area in and around contemporary Kurdistan, rather than to the Arab peoples who inhabited \textit{al-Iraq} prior to the establishment of Ottoman rule in the area.\textsuperscript{146} As such, the Kurds have long been clamoring for some degree of political independence and in some cases, complete autonomy. In fact, this drive for Kurdish autonomy is one of major points of debate over the drafting

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\begin{itemize}
  \item \textsuperscript{141} See \textsc{Lalonde}, \textit{supra} note 8, at 8.
  \item \textsuperscript{143} \textit{Id}.
  \item \textsuperscript{144} \textit{Id}.
  \item \textsuperscript{145} Edmund L. Andrews & Patrick E. Tyler, \textit{As Iraqis 'Disaffection Grows, U.S. Offers Them a Greater Political Role}, \textsc{N.Y. Times}, June 7, 2003, at A8.
  \item \textsuperscript{146} See, e.g., Pamela Constable, \textit{Kurds Adapt to a New Order in Iraq}, \textsc{Wash. Post.}, Aug. 12, 2003, at A8 (discussing the nature of the relationship between the predominantly Arab peoples of Iraq and the ethnic Kurdish minority).
\end{itemize}
of a new constitution.\textsuperscript{147} At the least, it seems as if the Northern judicial districts that are home to this Kurdish minority will allow for some degree of equal representation on the bench.\textsuperscript{148}

One of the greatest obstacles to reestablishing a functioning judiciary will be the anger of Iraq's Sunni minority who is now faced with a government in which even a semblance of equal representation will strip them of the privileges they enjoyed under the \textit{mamluk} warrior class, the Ottomans, the British, and eventually Hussein's Baath party as well.\textsuperscript{149} Given that the country is predominantly Shi'ite, it stands to reason that the newly established judiciary should also be predominantly Shi'ite. Yet this raises both the question of the Shi'ite population's ignorance of legal practice, and that of the Sunni population questioning the legitimacy of a judiciary that might be seen as religiously biased, retaliatory, and possibly a tool of the imperialist United States. A Shi'ite member of the Governing Council, Abdul Aziz al-Hakim, amidst the talks of transferring power to a representative government in December 2003, said that "[t]he Shia felt persecuted under the former regime."\textsuperscript{150} He went on to say that, simply put, "[t]he Kurds and the Sunni are afraid of a Shiite government."\textsuperscript{151} As might be expected, "Senior members of the Saddam regime are likely to be particularly in danger of retribution. Prominent families and tribes who have lost relatives will exact revenge on officials of the former regime . . . when they can be found."\textsuperscript{152} This unavoidable consequence of decades of violence will make consideration of former Baath party members as a possible solution to the dearth of judges in the country particularly troublesome. Former Baathists will be presumed corrupt and any Shi'ite who earns a position

\textsuperscript{147} See Eric Schmitt & David E. Sanger, \textit{Guerrillas Posing More Danger, Says U.S. Commander for Iraq}, \textit{N.Y. Times}, Nov. 14, 2003, at A1. The two major points of debate are the question of Kurdish autonomy and that of whether "Iraq will be a secular state, an Islamic one or something in between." \textit{Id.} at A15.

\textsuperscript{148} The specific problems faced by Iraq's Kurdish population are beyond the scope of this Note and will not be addressed in detail. Suffice it to say for our purposes that they too have been deprived of the opportunity to participate in the operation of the nation's judiciary, and their ranks will suffer from many of the same difficulties that will beset the nation's Shiite population.

\textsuperscript{149} See Andrews & Tyler, \textit{supra} note 145 ("[T]he greatest threat to Americans in Iraq will come not from the Shiites, despite their close ties to Iran, but from disaffected Sunnis who have lost the relatively privileged position they enjoyed under Saddam Hussein.").


\textsuperscript{151} \textit{Id.}

\textsuperscript{152} DOBBINS, \textit{supra} note 8, at 173.
on the bench will be presumed vindictive and vengeful, or at the very least, inexperienced.

2. The Effect of De-Baathification on Iraq’s Judiciary

The first Order issued by the Coalition Provisional Authority was on the topic of “De-Baathification of Iraqi Society.” The stated purpose of the De-Baathification Order is as follows: “By this means, the Coalition Provisional Authority will ensure that representative government in Iraq is not threatened by Baathist elements returning to power and that those in positions of authority in the future are acceptable to the people of Iraq.” In addition to making it illegal to publicly display Mr. Hussein’s visage and providing rewards for information that leads to the capture of more senior party members, the Order defines a multi-tiered classification of former party members, that mirrors the party’s own organization structure. Generally speaking, “Senior Party Members” are “removed from their positions and banned from future employment in the public sector.” The CPA conducted interviews of any suspected former low-ranking Baathists in an effort to determine whether they may be fit for public service in the future. Iraq’s Governing Council released their own set of guidelines on the de-Baathification procedure in January of 2004. The primary difference between the guidelines put in place by the CPA and those released by the Governing Council is that the latter has allowed for “an elaborate appeals process that will allow some of those in the fourth-highest leadership echelon to contest their dismissals if they did not commit any crimes and if their advancement in the party was mainly on the basis of professional achievement.”

The discovery of 2.5 million pages of party records found in Iraq has also shed a great deal of light on the nature of the organization as well as the actions and political propensities of various party

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154. Id.
155. See id.
156. Id.
157. See id.
159. Id.
members. Amidst these documents was a massive list of all of the high school seniors in Iraq with a chart detailing their stance towards ten issues of political and social importance. This cache of information, and any others like it, might prove helpful in determining what Iraqis that were not party members might be the most suitable for civil service. There is a great deal of debate within Iraq over whether all former party members should be excluded from public service or just the most high-ranking members. The custodian of these documents has stated his hope that "the membership records among his documents will help the new government decide who among them were the most pernicious."

The major concern over this procedure with regard to the judiciary is that all of the judges in Iraq were required to be Baath Party members. While this de-Baathification procedure is certainly necessary, it is likely that it will also weed out many of the "[t]housands of educated Iraqis [who] joined the party because they had little choice if they wanted to advance in their professions . . . many of [whom] possess the technical and administrative skills needed to rebuild the country." The de-Nazification process in post-WWII Germany created many of the same difficulties. It bears noting that many Germans wanted to allow ex-Nazis to participate in the civil administration of the country because they recognized that those Nazi-party members who were members by convenience might nevertheless be crucial to the reconstruction process. While it may be too soon to assess to what extent, if any, these de-Baathification policies might be loosened to allow the nation's judiciary to be rebuilt, it is crucial to be attentive to the effect that these policies will have on the existing pool of potential Iraqi jurists.

B. The Role of the United Nations

An agreement concluded in May of 2003 between the CPA and the U.N. about the role the U.N. would play moving forward, it seemed as if

161. See id.
162. See id.
163. Id.
164. See, e.g., Hundley & Franklin, supra note 158.
165. Id. The article goes on to make the somewhat ominous observation that "some of the regime's worst thugs were low-ranking members who may evade the purge." Id.
167. See id.
some of the concern over specifically anti-American sentiment might be eluded. In fact, upon hearing that the U.N. might be sending personnel to assess whether or not direct elections are feasible, Grand Ayatollah Ali al-Sistani put the word out to his followers that they should refrain from protesting against the U.S. occupation. At least in this one case, the promise of the U.N. return has proven helpful to the occupying forces.

United Nations Security Council Resolution 1483 created the office of U.N. Special Representative of the Secretary General. One of the primary responsibilities of this Special Representative is to promote "legal and judicial reform." The man originally chosen to fill this position, Sergio Vieira de Mello, pledged full support for judicial reforms in Iraq, but stated that the process must be led by Iraqi nationals. "What we have learned in the United Nations is that such processes must be led by nationals. We must never come with our own models. We can share them with you," he said during his first meeting with a group of Iraqi judges and lawyers. Mr. de Mello brought with him tremendous experience, and his death has undoubtedly left a gap in the U.N.'s capacity to successfully contribute to judicial reconstruction. Similarly, his death at the hands of a bombing attack on the of the U.N.'s Baghdad compound on August 19th and the subsequent bombing of the compound on September 22nd prompted a complete exodus from Iraq of all International U.N. personnel. The man who was serving as de Mello's replacement in the position of acting Special Representative for U.N. Secretary General Kofi Annan in Iraq resigned in early November of 2003 over security concerns. The U.N.'s departure, and that of numerous other aid agencies, such as the Red Cross, is indicative of the immediate need to reestablish basic security in Iraq. There is no question that the U.N. can offer tremendous resources, both in terms of financial

174. See id.
and intellectual capital, to the process of reconstructing the judiciary. However, it seems as if the Coalition Provisional Authority and the Iraqi Governing Council must first establish fundamental law and order before any discussion of what the U.N. might do in the future is appropriate.

Suffice it to say at this point that the U.N.'s absence in the early phase of the reconstruction was lamentable, especially given the fact that the void they left in terms of supporting the Iraqi people has been filled by organizations such as Hezbollah, and individuals such as Muqtada al-Sadr, both of whom are active in stirring the socio-political waters in post-Saddam Iraq.

III. SURMOUNTABLE OBSTACLES

A. Structure of the Judiciary

Given the inherent complexity in such situations, it is important to recognize that, while there may be no clear blueprint for judicial reform in the post-conflict setting, successful efforts in this area may be looked to for guidance. An examination of current judicial structures among Middle Eastern countries reveals that the Kuwaiti model may be the best-suited to handle the needs of the nascent Iraqi government as well as the people, in that the latter will undoubtedly have widely varying opinions on how certain matters are to be adjudicated given the religious diversity in the country. If the new Iraqi judiciary can quell the Iraqi peoples' fears that they will be forced to abide by the laws of other

175. The Shiite Islamic group Hezbollah is well-known for having "some of the most dangerous [terrorist] operatives in the world." James Risen, Hezbollah, in Iraq, Refrains From Attacks on Americans, N.Y. TIMES, Nov. 24, 2003, at A10. Needless to say, Hezbollah is not a suitable replacement for the United Nations. However, a former American official, who was familiar with the intelligence reports on Hezbollah's presence in Iraq, cited the group's close ties to Tehran, and suggested "sending Hezbollah to Iraq is about Iran's desire for us to take them seriously, both in terms of their interests in Iraq and their broader concerns in the Middle East." He concluded by suggesting that Iran wants "a dialogue with us, and they are signaling they can help us or hurt us." Id.

176. Muqtada al-Sadr is a radical Shiite cleric, whose militia has been actively fighting both Coalition forces and Iraqi Security forces in certain portions of Baghdad as well as Najaf. See, e.g., Raid Fails to Seize al-Sadr, SEATTLE TIMES, Aug. 8, 2004, at A7.

177. Michael G. Karnavas, Creating the Legal Framework of the Brcko District of Bosnia and Herzegovina: A Model for the Region and Other Postconflict Countries, 97 AM. J. INT'L L. 111, 111-12 (2003) ("While circumstances vary and analogies rarely serve as clear guides to action in postconflict nation building, architects crafting the framework for peace are well served by being cognizant of models that have worked reasonably well elsewhere.").
religious sects, then it will have taken an enormous step toward legitimacy. The shari‘a is predominantly applied to personal status issues. That in mind, numerous Islamic States have established separate shari‘a courts to hear such issues. On the other hand, Kuwait has a civil court system that has specific sections designed to hear personal status cases. “For Muslims, the courts rule on the basis of codified Sunni law or Shi‘i (ja‘fari) law depending on the litigants. Non-Muslims are governed by their own laws.” This allows such cases, religiously-charged as they may be, to remain under the broader umbrella (and appellate control) of the nation’s judiciary as a whole. The inherent complexity of such a system will be a deterrent to those considering how to handle personal status issues in Iraq, but it could be the only possible way to appease the various religious and ethnic sub-groups within Iraq.

A similar system was in place in Iraq prior to the Coalition invasion but it was largely dysfunctional, along with the rest of the judiciary, given the overwhelming influence of Saddam Hussein’s Revolutionary Court and Special Courts. Iraq had a sub-system of Religious Courts that would apply shari‘a law to personal status issues for Muslims, while allowing such matters to be dealt with in the Civil Court of First Instance for non-Muslims. Given that there ought to be at least a memory of such a system, one in which both the Sunnis and Shiites can have their own courts, it seems possible that it might be reestablished.

Iraq currently has twelve judicial districts. One concern is that these judicial districts may have been established according to Saddam Hussein’s policy of minimizing the popular strength of the Kurds in the north of the country. There is little to no information available on how these judicial districts were established, nor does there appear to be any movement to reconsider their boundaries.

178. See COULSON, supra note 14, at 155.
179. See generally BROWN, supra note 97 (providing a detailed analysis of the judicial structures among thirteen Arab nations other than Iraq).
180. See id. at 23.
181. Id.
182. SPECIAL REPORT 104, supra note 83, at 6 (“While the civilian courts hear cases and render verdicts, they are powerless to resist political direction from the government and interference from the security services. They also have suffered from the corruption that has infected the rest of Iraq’s institutions following the first Gulf War.”).
183. Id.
184. Douglas Birch, N.J. Judge Tackles a Tough Docket in Iraq; Army Reservist to Reform a Battered Justice System, BALT. SUN, July 20, 2003, at 1A.
B. Filling the Bench

Given the relatively small number of judges from which a new judiciary can be selected,\(^{185}\) it will be a challenge to fill the bench. One possible solution may be to contract judges in from other Arab countries, a technique that has been successfully employed by Kuwait. In Kuwait, the contracts are orchestrated through the Ministry of Justice and there is a distribution of power as to the contracts’ validity in that the Ministry of Justice can not terminate these agreements without the approval of the Supreme Judicial Council.\(^{186}\)

One consideration that will need to be addressed before the process of reestablishing the judiciary is completely underway is that of compensation for judges. While addressing a group of Arab jurists at the Arab Judicial Forum, Supreme Court Justice Sandra Day O’Connor stated that “a necessary component for a good judicial system is to be sure that the judges are adequately paid so that they have a decent standard of living as a judge and we hope would be less tempted to engage in unlawful behavior.”\(^{187}\) This is likely to be especially true in post-war Iraq given the tradition of corruption within the civil service and the government as a whole. A strong compensation structure will likely be required in order to counteract the potentially disruptive effects of various militant Islamic and insurgent factions within the country’s population. The CPA took a step in the right direction in January of 2004 when it issued an order providing for a pension to be paid to the families of judges and prosecutors who are killed while in office.\(^{188}\) The CPA is also implementing a nation-wide pay schedule for those who work as civil servants, including judges, attorneys and courthouse employees.\(^{189}\) By the fall of 2003, most of these civil servants were receiving payment under this schedule, a welcome change considering that nearly all had gone without pay from the day of the Coalition

\(^{185}\) Estimates as to the number of judges in Iraq at the point when Saddam’s regime collapsed range from 700 to 860. Compare Brian MacQuarrie, Rebuilding Iraq/The Court System; Rule of Law Begins to Take Hold in the Judiciary, BOSTON GLOBE, Aug. 29, 2003, at A26 (700 judges), with US-Led Coalition Launches Sweeping Judicial Reforms in Iraq, AGENCE FRANCE PRESSE, June 18, 2003 (860 judges).

\(^{186}\) BROWN, supra note 97, at 24.


\(^{188}\) Coalition Provisional Authority (Iraq), Ord. 52 (Jan. 6, 2004).

\(^{189}\) McGovern, supra note 95, at 36.
Military observers have reported that judges are complaining that their salary under this plan is too low. However, they also reported that “[t]hey work from 9 a.m. to 1 p.m. six days per week, [during which time] most judges and courthouse employees were milling about and not too busy working.”

1. Training New Judges

Following the Arab Judicial Forum held in Bahrain in September of 2003, Justice O’Connor stated that, in the context of Arab judicial reform, “judicial training is key . . . to making the system work.” This statement was made with the caveat that this is especially true in civil law systems where judges are trained separately from lawyers. Many of the judicial structures within the Arab world are based upon the Egyptian system, which was based upon the French civil law system. Even the United States’ own common law system supports a robust continuing legal education system for members of the bar. Therefore, the importance of a structured judicial training mechanism in post-war Iraq will be of paramount importance regardless of whether the new Constitutional framework establishes a civil law or common law system.

There is little information on what is being done in this arena at this point. However, some news items indicate that the United States Military is using some of their Judge Advocate General Corps to train new Iraqi judges and attorneys. During the judicial reform efforts in Bosnia and Herzegovina in 1999, an intensive three-week training program was established for the newly appointed members of the judiciary. Iraq should establish a similar program at a minimum. A longer term program for judicial training must also be established.

Several countries and NGOs have offered assistance in terms of training security forces. To date, however, few nations or organizations have made formal offers to assist in the training of judges.

190. See id.
191. See id.
192. id.
194. See id.
195. See id. See generally BROWN, supra note 97.
197. Kamavas, supra note 177, at 122.
Egypt’s National Center for Judicial Studies in Cairo is recognized as one of the foremost judicial training facilities in the Middle East.\textsuperscript{199} Other Arab countries have sent judges to the Center for training in the past.\textsuperscript{200} Perhaps its resources might be brought to bear on the process. While there seems to be little news of nation’s offering their assistance on this admittedly focused issue, some other groups have recently stepped up and offered to lend some assistance. For example, the American Bar Association sent a letter to President Bush in January 2004 offering its services to help rebuild the judiciary.\textsuperscript{201} The offer was forwarded from the White House to the Coalition Provisional Authority in Baghdad. A spokesperson for the CPA was “unsure” whether the offer would be accepted.\textsuperscript{202}

2. Judicial Selection

During the process of judicial reform in Bosnia and Herzegovina in 1999, the Brcko Law Revision Commission (BLRC), whose responsibility it was to rebuild a unified judiciary, looked to the process of judicial selection that took place during the reunification of Germany after the fall of the Berlin Wall.\textsuperscript{203} While the overall success of the BLRC’s efforts has yet to be determined, several of the strategies upon which they relied will likely be helpful in post-war Iraq. First, the BLRC “determined that all judicial member and court staff would need to reapply and compete for positions in the new judiciary.”\textsuperscript{204} During this re-interviewing process, the BLRC had clearly established guidelines as to who would constitute a qualified candidate: “The overall emphasis was on competence, irrespective of one’s ethnic background, gender, or place of origin.”\textsuperscript{205}

This sort of approach would be well applied in Iraq. Realistically, the complete de-Baathification of the judiciary will be nearly impossible. That in mind, the new Iraqi judiciary must at least be composed of members with proven competence as legal practitioners and judicial decision-makers. By establishing a probationary period during which a judicial review committee of sorts could oversee the implementation of

\begin{itemize}
  \item \textsuperscript{199} BROWN, supra note 97, at 18.
  \item \textsuperscript{200} See id.
  \item \textsuperscript{201} See Brian Lazenby, American Bar Association Offers to Rebuild Iraq, CHATTANOOGA TIMES FREE PRESS (Tenn.), Jan. 16, 2004, at B2.
  \item \textsuperscript{202} Id.
  \item \textsuperscript{203} Karnavas, supra note 177, at 122.
  \item \textsuperscript{204} Id.
  \item \textsuperscript{205} Id.
\end{itemize}
the new legal system, any potentially biased or otherwise unqualified judges who make it through this first screening process could be weeded out.\textsuperscript{206} The judiciary must first function before it can function perfectly.

The process began shortly after the Coalition Invasion. Major General Donald F. Campbell, the senior U.S. advisor to the Iraqi judiciary, supervised an "aggressive evaluation process" for members of the new judiciary.\textsuperscript{207} Pursuant to the CPA's order on de-Baathification, high-ranking members of Saddam's Baath party were eliminated from the judiciary. This de-Baathification of the judiciary is especially troublesome because Baath party membership was a prerequisite to legal education and judicial appointment under Saddam Hussein.\textsuperscript{208} This process will probably reduce the already dauntingly small number of judges currently within Iraq to fill these positions. In August of 2003, only 700 judges were being put through this evaluation process in hopes of determining their "fitness for the bench in a democratic society."\textsuperscript{209} This number indicates that, before a country-wide judiciary can be firmly established, new judges must be added from either within the country's broader legal community, from the population of Iraqi exiles, or possibly from the judiciaries of neighboring Arab states.

A specially formed Judicial Review Committee is in charge of the vetting process, whose end has been described as the elimination of "the bad elements who played an adverse role during the era of the ousted regime."\textsuperscript{210} This committee has been eliminating judges based on their participation in the special courts used by Saddam's regime.\textsuperscript{211} One potential concern here is that many of the judges who participated in these special courts did so under strict orders from Saddam himself or one of the branches of his security services. Therefore, it would seem that mere participation in such a court ought not to preclude a judge from further service. It bears noting that former Baath Party member-Judges have not been categorically excluded from the bench. In some areas of Iraq, the only judges remaining on the bench are former Baath

\textsuperscript{206} See, e.g., id. at 122 (discussing the one-year probationary period for which new judges were appointed by the BLRC).

\textsuperscript{207} MacQuarrie, supra note 185.

\textsuperscript{208} Ann Scott Tyson, Iraqi Justice System Starts to Mend, CHRISTIAN SCI. MONITOR, Aug. 1, 2003, at 06.

\textsuperscript{209} MacQuarrie, supra note 185.

\textsuperscript{210} Iraq: Judicial Review Committee Dismisses 66 Judges, GLOBAL NEWS WIRE, Nov. 5, 2003.

\textsuperscript{211} Id.
Party members. While this raises the specter of a stymied
democratization process, it is likely the only means through which a
fully-staffed, and adequately trained, judiciary may be established.
Concern over the exclusion of former Baathists from various
components of the government's infrastructure has arisen from sources
as diverse as senior American military personnel and Iraq's Prime
Minister Ayad Allawi. So long as a process through which corrupt
Baathists might be removed from power is in place, the notion of
permitting former Baathists to serve their country should not be
completely cast aside. Admittedly, this is no small task. There is already
concern that Prime Minister Allawi's ties to the Baath party, and his
efforts to disband the commission in charge of the de-Baathification
process, have created "the foundation for an effective reconstitution of
the Baath party."

C. THE PLACE OF ISLAM IN IRAQ'S SUBSTANTIATIVE LAW

In order to appease the Iraqi people, those international jurists and
scholars who are involved with this process must do so with an as-yet-
unheard-of sensitivity to the inescapable need to establish a system of
law that satisfies the unique needs of Iraq's overwhelming Muslim
majority. That said, it is important for scholars of Western,
predominantly secular, law to learn that a democracy built upon an,
least-partially, Islamic judiciary is not only feasible but absolutely
necessary given the current socio-political conditions in Iraq and the
Middle East. In order for the newly reformed judiciary to have the
requisite amount of legitimacy, it will have to be at least partially
Islamic in nature. To what degree this turns out to be the case will be a
function of the nature of the Constitutional framework that is established
(assuming it has not been established by the time of publication).

An Iraqi scientist living in Canada has published an article
suggesting a referendum on several issues that must be clarified before

212. See Tyson, supra note 208 ("Perhaps more important, with many prewar Baath Party
judges ... firmly in place, it remains unclear how effectively such [legal] reforms will be
implemented. In Salahaddin Province, for example, all 52 prewar judges—all of whom were
members of the now banned Baath Party—remain in their jobs.")

213. See, e.g., Eric Schmitt, U.S. Generals Fault Ban on Hussein's Party, N.Y. TIMES, Apr. 21,
TIMES, Oct. 13, 2004, at A12. It should be noted that Dr. Allawi is a former Baathist himself,
although one "who fell out of favor with Saddam Hussein" prior to the Coalition invasion. Id.

214. See Wong & Eckholm, supra note 208.

http://scholarlycommons.law.hofstra.edu/hlr/vol33/iss1/8
the drafting of a constitution.\textsuperscript{215} The first, and apparently most important, that he suggests is a referendum on the theme of Islam and constitution. The three options he proposes are as follows: "[1] Islam is the only source of constitution, legislature, judicial and executive, . . . [2] Islam is the main, but not only, source of constitution, legislature, judicial and executive, [and 3] . . . Islam is one of the sources of constitution, legislature, judicial and executive."\textsuperscript{216} The relevance of this is that, at least in the eyes of one Iraqi, it is simply not an option for a completely secular, non-Islamic government to take the place of Saddam Hussein’s Baath party. The sooner that those in charge of overseeing this judicial reformation process accept this as at least a possibility, the sooner they can get started on building a legitimate judiciary.

Unfortunately, it seems as if the United States is convinced that an Islamic judiciary as a component of an Islamic state is out of the question. When asked whether he foresaw Iraq developing as an Islamic State, Secretary of Defense Donald Rumsfeld stated simply, "That won’t happen."\textsuperscript{217} It is important for Mr. Rumsfeld and everyone else who will have a hand in this redevelopment process to know that an "Islamic State" need not turn out to be a hotbed for terrorism and human rights violations. Professor Khaled Abou El Fadl has stated that, "[a] dual commitment of Islamic Law and democracy is possible, but only if Muslims understand Islamic law to reinforce the same commitments made by democracy to individual human rights and dignities."\textsuperscript{218} The decision as to what role Islam will play in the new Iraqi state and its judiciary must ultimately be made by the Iraqi people.

\section*{Conclusion}

Clement Attlee’s observation on the democratization process in post-WWII Germany may serve as a helpful guideline for those involved in this project: "It was an illusion to imagine that there was a normal Germany to which one could revert. There has been no normal Germany for fifty years or more, except one governed by a centralized and

\begin{footnotesize}
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\item[215.] Munthir Al-Lami, Editorial, \textit{Commentary: Required Immediately in Iraq: Referendum Before Constitution!}, Iraq Occupation Watch Center, at \url{http://www.occupationwatch.org/article.php?id=407} (Aug. 11, 2003). As of December 2003, such a referendum was scheduled to occur some time after the direct election of participants to a constitutional convention, targeted to occur prior to March 15, 2005. \textit{See Tse, supra} note 6, at A11.
\item[216.] Id.
\end{itemize}
\end{footnotesize}
militaristic machine." 219 Something very similar might be said about Iraq. Instead of a mere fifty years, however, one must look past the days of the Ottoman empire for any sort of normalcy, and even then will find a legal order that is totally unsuited to the nation’s contemporary needs. Iraq in its present state provides the world with an opportunity to create a functioning Islamic Democracy, one in which terrorism is not the most attractive option for the young and discontented, one that the peoples of neighboring states such as Iran and Saudi Arabia 220 can look to for guidance.

With that in mind, it is of absolutely paramount importance that each piece of the puzzle fit together snugly. It will do little good to establish a robust police force and security apparatus unless these obstacles to judicial reform are overcome. Economic and industrial reconstruction cannot proceed without a strong, independent, and professional judiciary to interpret and enforce the nation’s legal canon. While this Note has discussed the substantial impediments to the process, there are also great advantages provided by Iraq itself. There is a strong judicial infrastructure, tainted though it may be. Despite its defunct status in recent decades, Iraq also possesses a sophisticated body of law that may transfer nicely into the able hands of a new judiciary. Come what may, this task is equally unparalleled in both its scope and the level of sensitivity to the past that it will require.

The Coalition of the Willing set out to create a unified democracy in Iraq. The ultimate result of this nation-building effort will likely not be apparent for years to come. The violence that is shredding the country at this moment is the result of a sinister coincidence of efforts by radical elements of the Shi’ite majority and Saddam-loyalist Sunnis who have kept the former under such strict control for centuries. The last time Shi’a and Sunni fought against a common foe was in 1920, when a

220. There is some evidence that the Saudi Shi’a population is already becoming invigorated by developments in Iraq. For example, the royal family has announced that they will be holding the first local council elections in the country’s history due to increased “pressure to institute democratic reforms.” Saudi Arabia Announces First Local Council Elections, but No Date, N.Y. TIMES, Oct. 14, 2003, at A3. This is precisely the sort of effect that analysts hope the democratization of Iraq will have on its neighbors. See, e.g., GRAHAM E. FULLER, UNITED STATES INSTITUTE OF PEACE, ISLAMIST POLITICS IN IRAQ AFTER SADDAM HUSSEIN 7 (Aug. 2003) (“Since the fall of Saddam Hussein and the emergence of Shiite political forces in Iraq, the Saudi Shia have themselves become emboldened to call for greater cultural rights within the Saudi system.”). See also Kenneth M. Pollack, Editorial, Saudi Arabia’s Big Leap, N.Y. TIMES, Oct. 16, 2003, at A29 (“[M]oreso than even the pluralist maelstrom in Iraq, moves toward democratization in Saudi Arabia could have ripples throughout the Middle East.”).
massive armed revolt broke out against the British who occupied the country under Mandate.221 The British failed to take a proper accounting of the socio-religious divide in Iraq and, as a result, established a government that created the environment in which a man like Saddam Hussein could take power. Those persons in charge of rebuilding Iraq’s judiciary must be mindful of the errors made while Iraq was under British control. A functioning, independent judiciary, that enjoys the confidence of the nation’s population, is the bedrock upon which democracy may be established. Failure to purge the corrupt Baathists from the bench will place a massive impediment in the way of democratic reform. At the same time, blind adherence to a de-Baathification policy that removes those Baathists who were party members by convenience will strip Iraq’s nascent judiciary of a great deal of its intellectual and experiential capital. This is an exceptionally complicated task, and is made moreso given the potential ramifications of a failed democratization effort in this age of economic globalization and terrorism. While the stakes are high and the end result remains to be seen, one thing is certain: “Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised.”222 Perhaps the victors of the Iraqi election, and the insurgents who are working so hard to disrupt it, will take the time to read this Note so that they might be reminded that justice is not above the law.

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221. See notes 48-50 and accompanying text.

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