



INSTITUTIONALIZED
VIOLENCE
AGAINST WOMEN *and* GIRLS
Laws and Practices in Iraq

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For additional information contact:

Sherizaan Minwalla
sminwalla@ha-iraq.org

Graphic Designer:

Claudia Renzi

Photography:

Radio Nederland Wereldomroep

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Authors

Sherizaan Minwalla, a lawyer and Heartland Alliance's Country Director is the author of this report.

Legal Officers and Advisors

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Translators

Kurdish Translation: Hadi Mohammed Ahmed

Arabic Translation: Shler Gharib Karim and Ahmad Abdul Ameer

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Introduction

Throughout the world violence against women and girls occurs overwhelmingly behind closed doors in the home, but also permeates public spaces in schools, on the street, and at work. Gender-based violence is also embedded in social, political, legal and economic institutions through which women and girls lack power and autonomy, and are continually subordinated in status to their men and boys. In Iraq violence is institutionalized in the legal system through laws that are discriminatory against women and girls or that encourage violence, by the absence of laws aimed at protecting women and girls, and through harmful procedures and practices directed towards women and girls in both formal and informal justice systems.

For victims of gender-based violence who interact with the legal system, these matters are of heightened concern for several reasons. Gender-based violence largely stems from the family, the primary protective unit in Iraqi society. Women and girls who suffer gender-based violence by their relatives, or who lack strong family protection, are extremely vulnerable to abuse given the dearth of protective services and shelters available to victims in Iraq. Durable solutions outside the context of the family are hard to find since the society restricts the ability of women to live independently, making them continually dependant on male relatives for socioeconomic support. Culture and tradition play a central role in influencing how gender-based violence manifests in Iraqi society, as well as how advocates respond given the changing context. Matters involving gender-based violence in Iraq are inextricably linked with issues of honor, making it shameful to seek outside help or to report violence occurring in the home.

Violence and discrimination inflicted against women and girls are institutionalized through laws and legal practices in the criminal justice system where both criminal defendants and victims filing criminal claims against perpetrators encounter bias, harsh laws and practices that treat victims as criminals and perpetuate abusive practices. First, certain crimes involving gender-based violence, such as domestic violence, human trafficking and female genital mutilation (FGM), are not adequately criminalized, leaving victims without sufficient legal recourse. For example it is illegal to cut off a person's body part, but this provision of the Iraqi Penal Code does not address the practice of FGM that is complicated by traditional sexual restrictions, by the fact that the victims are too young to bring claims in court, and that those facilitating the procedure are their caretakers.¹ Similarly, the IPC's assault and battery provisions under which domestic violence claims are brought fail to account for the nature of spousal violence and the context in which domestic violence occurs. In human trafficking cases if a victim is forced to commit a crime, such as prostitution, she might claim coercion as a criminal defense,² yet not only is this difficult, but it does nothing to provide support to victims or even to adequately acknowledge their status as victims of human trafficking. In all cases legislation is needed to more fully recognize the nature and scope of these crimes in order to protect rather than punish victims, and to fully prosecute perpetrators of gender-based violence.

Protective laws that do exist are often underutilized, sometimes due to the lack of protection and practical options available to women and girls who assert their rights under the law. Judges continue to treat crimes of violence against women and girls leniently by allowing perpetrators to act either with impunity or by handing out light sentences for crimes such as rape, sex trafficking and murder.

¹There are no known cases challenging the practice of FGM that have been brought before an Iraqi court.

²IPC Chapter Four, Section 1(2), Paragraph 62.

Introduction

continued

Iraqi law permits legal defenses to criminal activity and allows mitigated sentences when warranted by compelling facts and circumstances. The legal system, including laws and practices, are influenced by societal norms and values that significantly condone gender-based violence when the law and legal actors disregard abusive facts, blame victims for their abuse, or fail to adequately punish perpetrators adequately. For example, investigators, judges, police and prosecutors do not routinely consider or inquire whether a woman accused of adultery was forced into her marriage or whether she suffered severe domestic violence during her marriage, and instead narrowly focus on whether she engaged in an extramarital relationship. Yet these same legal actors generally sympathize with men accused of killing female relatives based on the pretext of preserving or reclaiming family honor. The law in Iraq continues to permit mitigated sentences in honor killing cases, and although the law was amended in the Kurdistan Region, men continue to receive light sentences, or in some cases avoid prosecution altogether, for committing acts of violence against women and girls. Indeed the victims continue to be assessed, even post-mortem, to determine their actions and whether such violence was legitimated if not at least understandable.³

Many women and girls who are suspected of engaging in criminal activity have suffered a history of gender-based violence, or face an imminent threat of harm if released from detention or jail. In these cases gender-based violence is often relevant to their legal cases, yet is continually treated as irrelevant by lawyers, prosecutors, investigators and judges. For example many women and girls charged with prostitution are in fact forced into criminal activity. In other cases victims of severe domestic violence or sexual abuse have assaulted or killed perpetrators in self-defense. Understanding the background and histories that underlie criminal charges may show that a person is not criminally liable, or may provide evidence that could lead to a mitigated sentence. The facts of gender-based violence are important to raise during criminal investigations and trial to gain a clear understanding of the context. In cases unrelated to violence against women and girls courts look to whether there are defenses to criminal activity that might lead a judge to find a person not guilty of a crime, and to compelling facts that might lead to a reduced sentence when societal norms and values permit. These same approaches should be applied in cases involving violence against women and girls and through this program the capacity of courts to respond favorably has been demonstrated.

The Personal Status Court is another area where victims of gender-based violence encounter frequent discrimination and abuse when they encounter laws and practices that favor men to the detriment of women. This is especially apparent in matters involving divorce, custody and financial support to victims of domestic violence. Early and forced marriage leads to many problems for girls who frequently encounter a lifetime of abuse within these marriages. When families force girls to marry outside of the courts, they look to religious leaders who conduct religious marriages that are recognized by the family and community, but not by the legal system. The children born to these marriages cannot obtain legal identity documents until the marriage is legitimated. In some areas of Iraq this appears to be changing and religious leaders increasingly check to ensure that both parties consent to the marriage and are of legal age. In Duhok a positive sign of progress is that the Islamic Religious Committee has an informal agreement with the Personal Status Court to require proof of legal

³Medical providers routinely conduct "virginity tests" on women and girls including on corpses post mortem in honor related cases.

Introduction *continued*

marriage prior to conducting a religious marriage.⁴ Many of the cases coming before the Personal Status Courts through this program were for registering marriages, followed by divorce due to domestic violence. Similar to cases brought before criminal courts, lawmakers and adjudicators in the Personal Status Courts require a solid understanding of the dynamics of domestic violence and other forms of gender-based violence in order to better respond to the needs of victims. Legally mandated court ordered mediation in divorce cases for example may perpetuate an abusive relationship and lawmakers should consider whether the law should be amended to allow both parties to decide whether they want mediation assistance, since in cases of severe domestic violence victims can be further harmed through this process.⁵

Access to justice is a significant challenge for victims of gender-based violence who are marginalized from their families and are usually unable to retain private attorneys. Although the law guarantees criminal defendants the right to a lawyer, in practice court appointed lawyers do little to advocate for their clients and often go to trial knowing little about their clients' cases including how gender-based violence may be relevant at trial.

Through this legal aid program, attorneys were trained to provide legal representation based on an advocacy model that is client-centered, meaning that the victim is empowered through the process and that the needs and interests of the client, as determined by the client, are the central driving focus. Many of the successful legal outcomes in clients' cases may be attributed to the lawyers who applied themselves to gathering evidence, identifying and preparing witnesses, gathering information on clients' histories of abuse, and linking this information to the development of novel legal theories posited in court.

The model of the program is one of joint representation in which lawyers partner with social workers to provide comprehensive services to clients. Victims of gender-based violence have myriad and complex needs beyond the strictly legal ones. Social workers provide integral services that include mediating with family members, supplementing basic needs to women in shelters and detention, and advocating with government agencies for public benefits and services. Heartland Alliance trained social workers to conduct mediation from a gender-focused approach that involves placing the needs and interests of victims at the forefront of the process.

Throughout this paper are also examples of how cases have been handled in a positive manner by judges who have considered evidence of abuse when deciding cases, and have subsequently dropped charges against victims forced into criminal activity or acting in self-defense. There are also examples of judges who have used evidence of abuse to mitigate sentences against criminal defendants convicted of crimes related to gender-based violence. It is hoped that with increased advocacy, training and reform these approaches will set the standard for legal practice in the future.

⁴Interview with Mullah Zahid As'aad Muhammed, Duhok, January 5, 2011.

⁵Many domestic violence victims still choose mediation, which may in part be explained by their extremely limited options if divorced. Though many domestic violence advocates do not condone mediation in cases of domestic violence due to the unequal power dynamics of both parties, and the likelihood that the abuse will eventually resume, in places such as Iraq victims and advocates sometimes view mediation as the only viable option where women cannot be self sufficient, where they risk losing their children in divorce, where they lack family support, and the risk of stigma for the woman in a case of divorce is high. In some cases mediation appears to have led to a successful outcome in the short term, however these cases need long-term follow up to assess whether the abuse has resumed, and under what circumstances.

Introduction *continued*

This paper seeks to explore these issues by looking to how actual cases have been handled through this legal aid program:

1. In the criminal justice system.
2. By non-detained and detained victim claimants
3. Through the Personal Status Courts.

Each section includes a set of recommendations and it is hoped these will be seriously considered and adopted by the relevant authorities of the Kurdish Regional Government and the Government of Iraq.

Methodology

This project developed out of a legal aid program in which lawyers and social workers jointly screened cases and provided services to individuals eligible for assistance. Heartland Alliance partnered with local nongovernmental organizations to carry out the activities of this program that included direct services as well as monitoring and documentation of how the legal system impacted their clients.

Information contained in this report derives from real cases. Since November 2009, Heartland Alliance in partnership with local nongovernmental organizations operates a service-based program designed to address the needs of victims of gender-based violence caught up in the criminal justice system—either as criminal defendants or as victim claimants—and in Personal Status Courts. This report includes information on cases accepted by the program as of the time of the writing of this report.

Lawyers screened cases based on specific criteria that required a link between either a history and/or future threat of gender-based violence and the legal issues at stake. Thus if a woman sought a divorce due to domestic violence, she would qualify for legal representation. If she was charged with stealing food that she could not pay for due to domestic violence, then she would qualify for legal representation. Victims of gender-based violence who required legal assistance with filing complaints against perpetrators also qualified for the program. However if a woman was charged with killing her husband and there was not any connection between the alleged crime and gender-based violence, then she would not qualify for services, yet she would be appointed a lawyer by the court in accordance with Iraqi law.

Through providing direct legal and social services, the LNGO staff have a unique perspective to identify and document how the formal (legal) system and informal (mediation) practices impact women and, in particular, victims of gender-based violence. Heartland Alliance developed forms that identified a range of issues to be tracked and documented. The forms were used to gather demographic data about clients, information about their histories or imminent threats of gender-based violence, and bias among law enforcement and court personnel towards clients and lawyers. In criminal defense cases, lawyers compiled information about the handling of criminal investigations, trials and procedures, evidentiary matters and sentencing. In the Personal Status Courts, lawyers and social workers examined the impact on clients of court-ordered mediation in cases of divorce, the role and impact of mediation by third parties, and the influence of changing social and cultural traditions, norms and taboos. The information is stored in a web-based database⁶ and analyzed by Heartland Alliance.

⁶The database was created by the Chicago-Kent College of Law with the support of the U.S. Regional Reconstruction Team, Erbil, Iraq.

Gender-based violence in Iraq

Violence against women is not unique to Iraq and is recognized as a global problem. Yet how violence is experienced, and how victims and advocates respond, is unique and is influenced by Iraq's legal, cultural, traditional, political, historical and other factors. Commonly recurring forms of gender-based violence identified in the six Governorates where this project was implemented include forced marriage, domestic violence, rape and sexual assault, forced prostitution/sex trafficking, child marriage, selling women through marriage or for debt resolution, and, at least in the north, female genital mutilation.⁷ It is important to note that gender-based violence is not limited to just these forms; there are several instances where women have committed suicide due to the psychological abuse suffered that should be classified as gender-based offenses as well.⁸

Throughout Iraq there is a dearth of reliable data and information on the incidence and types of violence perpetrated against women and girls. Although there have been some efforts at documenting prevalence rates of violence against women, the information is often anecdotal or based on discrete research undertaken by NGOs. The KRG started documenting gender-based violence in 2007, and while this development shows progress, problems remain with regard to consistency and accuracy in reporting. Different agencies are working under different definitions and standards that have led to inaccuracy in documenting and identifying gender-based violence. In order to provide a clear and integrated approach to data collection, which includes recurring training and education, it is necessary to strengthen the methodology used for data collection and assessment.⁹

In Iraq, like the rest of the world, a significant number of the perpetrators are individuals known by the victims and primarily include immediate and extended family relatives. This places women in extremely vulnerable situations since the family is the primary source of support and protection in Iraqi society. Therefore when there is abuse and dysfunction within the family, women and girls have extremely limited options for protection and some escape to shelters, jails or the home of another relative or powerful community leader.

Documenting gender-based violence is necessary to better grasp the problems facing women and to better tailor the response by government and civil society organizations. Social programs and institutions that help victims heal, both physically and physiologically, are essential. There are some services currently available, but the current shelters and social support systems are under-sourced and do not adequately respond to the victim's needs.

To achieve meaningful progress, the number and quality of shelters, legal representation programs, social support programs, and medical care facilities must be expanded and improved. Civil society organizations play a crucial role in providing services including shelter services, and these can and should be financially supported by the government. Also necessary is training for law makers, judges, investigators, prosecutors and police on improving how gender-based violence cases are handled, on gender sensitivity and on the legal and procedural barriers facing victims. Victims of gender-based violence are often blamed for the abuse and are marginalized by their families and communities, which further alienates victims and deepens their psychological trauma. Further, appropriate training and education is needed for the staff of these programs in order to ensure quality of care and best practices continued to be applied under difficult circumstances.

⁷For more information on FGM in Kurdistan, visit the website of WADI, a German NGO that has been working on this issue for several years at: www.stopfgmkurdistan.org. See also "Iraqi Kurdistan: Girls and Women Suffer the Consequences of Female Genital Mutilation, Human Rights Watch Report (June 16, 2010), <http://www.hrw.org/en/news/2010/06/16/iraqi-kurdistan-girls-and-women-suffer-consequences-female-genital-mutilation>.

⁸Kurdish Human Rights Project (KHRP) 'The Increase in Kurdish Women Committing Suicide' (European Parliament), 2007, 36.

⁹"Documenting Violence Against Women in Iraqi Kurdistan, Heartland Alliance (2009), see www.heartlandalliance.org.

Iraq's international legal obligations

Iraq, whose Federal Constitution guarantees gender equality, has ratified or acceded to several applicable international treaties, including the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the International Covenant on Civil, Cultural and Political Rights (ICCPR), and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, plus Supplement (Palermo, 2000, acceded 2009). Both international and domestic laws, treaties, and protocols provide a useful framework and set of standards for responding to legally institutionalized violence against women and girls.

Abusive practices, such as early or forced marriage or failing to apply international standards towards detention of minors, violate Iraqi law as well as the CRC and the ICCPR. These practices render young women and girls extremely vulnerable to ongoing abuse not only while in the custody of the State but also by their families once they are released from incarceration. Depending on the area of the country, girls and adult women are detained together, and those accused of committing minor offences are often incarcerated in the same living quarters as violent offenders.

The ICCPR, ratified by Iraq on January 25, 1971, sets forth a number of provisions relevant to the rights of both male and female adults and juveniles suspected of criminal activity, including the right to be free from arbitrary arrest and detention and the right to effective legal counsel. The ICCPR also outlines standards to be adhered to in order to ensure due process during trial, including the right to a presumption of innocence, adequate time to prepare for trial, the right to self defense, and the right to call and examine witnesses. These important provisions have particular relevance in cases brought before Iraqi courts but how they manifest has unique application in the context of gender-based violence given the threats often stemming from family members.

Similarly, CEDAW provides a framework that defines the legal obligations of States to eliminate discrimination against girls and young women in the areas of political, economic, social, cultural and civil rights in the public and private spheres. States that have ratified CEDAW are required to repeal laws that discriminate against girls and young women, and should promote gender equality in all future domestic legislation. Signatories are also required to protect girls and young women from discrimination through public institutions and other bodies established for this purpose, and to eliminate all forms of discrimination practiced against girls and young women by public and private institutions and individuals. Iraq acceded to CEDAW in 1986, but had several reservations¹⁰ including a reservation to Article 16 with regard to provisions of Islamic Sharia law.

Iraq's Juvenile Care Law No. 76 of 1983 provides various protections for minors, although many provisions are not fully implemented in practice. The Juvenile Care Law is in many ways a progressive law that incorporates international standards for the treatment of juveniles in the criminal justice system. For example, Article 2 of the Juvenile Care Law encourages practices that encourage early detection of juveniles at risk of delinquency with strategies to counter trends of delinquent behavior. Unfortunately, there are significant gaps in the implementation of the Juvenile Care Law. The investigation courts, juvenile courts, detention centers, the Juvenile Care Council, and the Personality Study

¹⁰Iraq ratified CEDAW with reservations to article 2, subparagraphs (f) and (g), and articles 9 and 16 based on its desire to apply the provisions of the Convention in a manner consistent with Islamic Sharia. [news/2010/06/16/iraqi-kurdistan-girls-and-women-suffer-consequences-female-genital-mutilation](https://www.unhcr.org/refugees/journal/2010/06/16/iraqi-kurdistan-girls-and-women-suffer-consequences-female-genital-mutilation).

Iraq's international legal obligations

continued

Office are all responsible in varying capacities for influencing how juveniles are impacted by the criminal justice system. Yet there are often problems with applying supervised release due to an overutilization of prolonged detention for juveniles, sometimes even for minor infractions. Additionally, few resources are allocated to ensure safe reintegration of minors following release from detention.

The CRC, acceded to in 1994, requires that the best interests of the child be a primary consideration in all actions concerning children,¹¹ and includes a number of important provisions that address the rights of children with regard to education, administrative or legal proceedings, rights within the family and society, and the duties of the State to protect the rights and interests of children. One area of concern for example is the right of the State to terminate parental control over a child in cases of abuse or neglect. This is provided for in the CRC, Article 9, as well as in Iraq's Juvenile Care Law, but is generally not utilized to protect juveniles from honor killings. Currently, courts will only release juveniles into the care of their relatives, which is a problem in a case where a girl is detained for protection and can only be released into the custody of persons intent on killing her.

The CRC also stipulates that signatory States should ensure that children have access to education, that States establish—and enforce—a minimum age for employment as well as hours and conditions of employment, and that States should take measures to prevent sexual exploitation and trafficking of children. In 2009, the Iraqi Government took an important step towards addressing trafficking in persons and acceded to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. This move was necessary to ensure coherence at the international level in terms of the usage of the definition of trafficking in persons and to guide transnational cooperation and provide victim assistance. A draft anti-trafficking law has been proposed in Baghdad, and discussions around drafting a similar law have taken place in the Kurdistan Region.

Iraqi and Kurdish governmental response

The challenges facing the Iraqi and Kurdish Governments are numerous as both entities strive to provide basic needs, to ensure security and to confront political deadlock. Addressing issues of violence against women is not surprisingly an issue that has more readily been addressed in northern Iraq where there is considerably greater security and prosperity. And yet the Iraqi government, in moving forward an agenda of peace, stability and stronger rule of law must engage women at the outset if the country is to succeed.

The KRG has taken significant steps to acknowledge the importance of confronting gender-based violence at the highest levels of the government. In 2007 the KRG created the Commission on Violence Against Women, an inter-ministerial level body chaired by then Prime Minister Nechirvan Barzani.¹² The Commission has a mandate to protect women and girls from violence, to promote the rule of law, and to streamline gender programming throughout the different Ministries. The KRG supports women's shelters throughout the three northern governorates and has established four Directorates for Following up Violence Against Women to document gender-based violence and respond to cases of abuse. Much work remains to be done, however these steps should be commended and acknowledged since they have created a space where women's rights activists can advocate for reform with the backing of the government.

¹¹CRC art. 1.

¹²See <http://www.krg.org/articles/detail.asp?lngnr=12&smap=02010100&rnr=223&nr=24188>. When first launched the Commission was headed by the Minister for Human Rights and included members from the Ministries of Interior, Women's Affairs and the Religious Ministry. Nazand Begikhani was also included as an independent expert/advisor and Kurdish women's rights activist.

Iraqi and Kurdish governmental response

continued

Victims of gender-based violence in the criminal justice system

CRIMINAL DEFENDANTS

In the rest of the country there has been progress at the local and provincial levels through trainings, capacity building and networking among civil society organizations, law enforcement, the judiciary and other legal actors to improve awareness and response on gender-based violence matters and cases. An important step was the proposal of anti-trafficking legislation, which remains pending. However at the top levels of government much more remains to be done to document gender-based violence, to provide safe space and services for victims, to support civil society organizations and service providers, and to support training for law enforcement, the judiciary, prosecutors, health care providers and other relevant staff.

Many female detainees charged with crimes have suffered a history or imminent threat of gender-based violence. The link between having suffered forced marriage, rape, sex trafficking and other forms of gender-based violence and criminal allegations is frequently ignored and disregarded by police, investigators, prosecutors and judges in the criminal justice system. Yet evidence of a history of gender-based violence is often relevant in criminal cases for two primary reasons:

1. To absolve the defendant of guilt.
2. To mitigate criminal culpability by demonstrating compelling facts to explain the criminal act.

Even without a past history of gender-based violence, women and girls encounter threats of harm simply for being arrested, detained and suspected of criminal activity. Even if the court finds that a person is innocent of the charges, the detainee/victim's family and/or tribe frequently consider her guilty regardless of the court's decision.

Gender-based violence victims confront many of the same issues facing detainees in general, as well as specific problems linked to the abuse. A number of issues of concern were identified in the course of representing female detainees, and monitoring how their cases proceeded through investigations and trials. Issues highlighted in this report are highlighted because they are salient issues impacting the victims of gender-based violence, but it is important to note that these matters do not represent the full scope of problems needing attention in the criminal justice system.

This section of the paper focuses on the rights of individuals in detention and during investigation, trial, sentencing and appeal. It additionally examines how violence against women is institutionalized in legal codes and practice with a particular focus on crimes of prostitution, adultery and killing that are frequently leveled against women and girls.

Criminal Procedures and Rights of Persons in Criminal Justice System

Article 9 of the International Covenant on Civil and Political rights includes several important standards designed to ensure the rights of persons suspected of criminal activity. According to the Covenant:

- No one shall be subjected to arbitrary arrest or detention.
- A person should be informed of the reason for arrest at the time of arrest.
- A person should be promptly informed of the charges against him or her.
- A person should be brought to trial within a reasonable time or released

CRIMINAL DEFENDANTS

(continued)

Arrest and Detention

According to Iraqi law, criminal proceedings may be set in motion against an individual if that individual is suspected of criminal activity in violation of a public or personal right. In cases where a personal right has allegedly been violated, only the aggrieved party may file a claim with a judge, investigator or police officer according to Article 1 of the Iraqi Criminal Procedure Code (hereinafter ICPC). A number of crimes are listed in the law, including some that have particular relevance to victims of gender-based violence such as adultery, polygamy, rape and verbal abuse (Article 3 ICPC).

According to the law, a person can be arrested only when a judge issues a warrant unless otherwise stipulated by law (ICPC Art. 92), and once apprehended the arresting office must inform the suspect of the reason for the arrest contained in the warrant (ICPC Art. 94). For example a police or court officer may arrest an individual without a warrant if the person is carrying a weapon in violation of the law or the officer has reasonable grounds on which to believe the person has committed a misdemeanor or felony (ICPC Art. 103).

In certain cases individuals who are detained may be eligible for release upon posting bail, or without bail if someone guarantees they will not flee and will return to court as required. Eligibility to be released from jail pending the outcome of a criminal investigation or trial depends on the charges and possible sentence as well as a determination by the judge that the defendant is not a flight risk or that release will prejudice the investigation (ICPC Arts. 109-111). Under the ICPC an individual should not be detained for more than one quarter of the maximum possible sentence, or in any case exceed six months. However if the judge deems it necessary to extend the period of detention to more than six months, the judge should submit a request for the extension to the criminal court.

For individuals represented through this program, the average length of time detainees spent in detention prior to trial was six months, however there were cases in which the detention period was extended by the order of a judge.

A In Kirkuk a woman detained and charged with prostitution was held for one year without being brought to trial, and the judge continually extended her detention every twelve days for various reasons such as not having an identity card, or requesting a medical test. She did not have a lawyer during the year she was detained, but once she retained legal counsel she was scheduled for trial within two weeks. She was convicted and sentenced to five years in jail.

In the Kurdistan Region two women without a lawyer were detained and charged with prostitution and were not scheduled for trial until after one year had passed.

In Baghdad a woman was arrested, detained and charged with forging official papers. She alleges that her husband forced her to sign these documents. The husband fled and instead of setting the trial date or releasing her, the court continues to extend her detention. She has been detained for about one year.

In the Kurdistan Region a woman charged with prostitution was detained for one year before being brought to trial. She was sentenced to two years.

CRIMINAL DEFENDANTS

*(continued)**Victims Detained for Protection*

Several provisions under Iraqi law mandate that a person should not be arrested or detained without identifying the relevant law that forms the basis for such action. An arrest warrant issued by a judge must include the relevant type of offense and applicable legal provision (Criminal Procedure Code Art. 93), and an order from a judge to detain someone should state the law under which the person is held (Criminal Procedure Code Art. 113).

Iraqi women and girls have been detained for protection when they are not facing criminal charges. In many of these cases individuals are detained for protection against family members intending to harm or kill them. In Northern Iraq there are shelter alternatives, however in some cases the threat is serious enough that the shelters do not believe they can provide adequate protection. There have also been cases where judges displayed bias against shelters and ordered women and girls at risk to be placed in detention even when a shelter alternative existed. This can be problematic for several reasons: victims are held with suspected criminals that may include individuals with a violent past; family problems may be exacerbated when a victim/detainee is accused of further causing family dishonor and shame; and victims of gender-based violence are caught up in the criminal justice system, possibly charged with a crime for which they never committed.

A commonly used legal provision used to detain women and girls who are not charged with crimes but who are at risk is Article 240 of the IPC. Article 240 is a legal provision that applies to persons who fail to comply with officially issued orders and is unrelated to cases involving gender-based violence, “Any person who contravenes an order issued by a public official or agent, municipal council or official or semiofficial body in accordance with their legal authority or who disobeys an order issued by those entities in accordance with their legal authorities is punishable by a period of detention not exceeding 6 months or by a fine not exceeding 100 dinars.” The following are examples of the types of cases where individuals have been detained under Article 240 for protection:

In Kurdistan Region a twenty-one-year old woman was raped and became pregnant. The perpetrator was sentenced to one year and the woman was detained indefinitely under Article 240 to protect her from being murdered by her family. She gave birth to her child in the detention center and she was moved to a women’s shelter.

In Kurdistan Region a couple ran away and married. The 20-year old woman’s father killed her husband and tried to kill her, but she managed to escape and sought help from a women’s shelter. She remained in the shelter for three months, however when her family surrounded the shelter and threatened to kill her, the police moved her to the detention center where she was held under Article 240.

In Kurdistan Region a 15-year old orphaned girl’s step-mother tried to sell her to human traffickers who wanted to force her into prostitution. She ran away and was arrested without any legal documents. After a virginity test was conducted and it was clear that she did not have any legal issues, she was detained because she could not return home. She was held under a charge for vagrancy while the authorities tried to move her to an orphanage.

CRIMINAL DEFENDANTS
(continued)

In Duhok a 16-year old girl was raped by her neighbor and became pregnant. She was arrested and detained under Article 395. Pursuant to Article 395, "Any person who seduces a woman over the age of 18 with a promise of marriage, has sexual intercourse with her and subsequently refuses to marry her is punishable by detention." The lawyer convinced the judge to change the legal charge from Article 395 to Article 240 since the victim was charged with the offense of the perpetrator. Article 240, though irrelevant, was used to keep the woman in the detention center to protect her from being killed by her family, despite the fact that there is a protective shelter in Duhok for this purpose

Recommendations:

- Utilize women's shelters instead of criminal detention centers wherever possible.
- Establish space at detention center specifically for women at risk to avoid placing them with suspected criminals.
- Consult with victim as to her preference; judges should not place women in detention when there are viable shelter alternatives unless this is based on the request by and agreement of the person at risk.
- Reinforce legislation that effectively targets perpetrators instead of targeting victims.
- Improve and support the ability of shelters to provide protection and address long term needs of individuals at risk.

Freedom from Torture

Both international¹³ and Iraqi law prohibits torture during arrest, detention and incarceration. The Iraqi Constitution prohibits torture under Chapter 2, Article 37, "All forms of psychological and physical torture and inhumane treatment are prohibited. Any confession made under force, threat, or torture shall not be relied on, and the victim shall have the right to seek compensation for material and moral damages incurred in accordance with the law."

Torture is also banned under the IPC Article 333 which prohibits public officials from torture, or ordering another person to engage in torture, of an accused person or witness in order to force him to confess to a crime or to provide information about a crime. The Criminal Procedure Code Article 127 prohibits, "The use of any illegal method to influence the accused and extract a confession." Illegal methods include mistreatment, threats, injury, enticement, promises, psychological influence or the use of drugs or intoxicants.

Individuals represented through this program did not report widespread incidents of torture at the time of arrest or while detained. However there were some cases in which women reported having been tortured at the time of arrest and detention. Individuals reported being beaten, subjected to electric shock, placed in solitary confinement, and forced to provide information about a crime. The abuse was heightened at the time of arrest and was inflicted by police officers investigating crimes.

¹³ICCPR, Art. 7, Convention Against Torture.

INVESTIGATION
AND TRIAL

Right to Legal Counsel

The Iraqi Constitution guarantees criminal defendants the right to legal counsel during a criminal investigation and trial at the cost to the government if the defendant cannot afford a lawyer. (Section 2, Article 19(4) and (11)). The Criminal Procedure Code Article 144 also requires that the Head of the Court of Felony appoint a lawyer if the defendant does not have one. The Ministry of Justice does pay lawyers fees to represent criminal defendants who cannot afford a lawyer, however the lawyer often does not meet his or her client until considerable time has passed following arrest, the defendant has been questioned and other evidence has been collected. During this project lawyers routinely encountered detained women and girls who were not advised of their right to counsel and had never met with a lawyer to discuss their legal cases during investigation. Legal representation is required at all stages to ensure that defendants are advised of their rights, and are able to prepare an adequate defense.

To achieve the intent of these Constitutional safeguards, it is necessary to ensure persons charged with crimes have access to quality legal representation. Currently the right to counsel primarily exists largely in form but not substance for a large number of Iraqi criminal defendants.

The ICCPR standards to ensure due process at trial are found in Article 14(2) and include:

- Right to a presumption of innocence (burden of proof lies with the prosecution).
- Adequate time and facilities to prepare for defense.
- Equal access to, and equality before, the Courts .
- Right to a public hearing.
- Right to trial without undue delay.
- Right to self defense including the right to choose one's lawyer.
- Right to examine witnesses called against the individual and to call and examine one's own witnesses.

Presumption of Innocence

An individual charged with a crime has the right to be presumed innocent until proven guilty according to the law. (ICCPR Art. 14(2)). The Iraqi Constitution also guarantees this right under Section 2, Article 19(5).

There is little to direct judges on how they may or should question defendants and witnesses, however under the Criminal Procedure Code Article 179, "The court may ask the defendant any questions considered appropriate to establish the truth before or after issuing a charge against him. A refusal to answer will be considered as evidence against the defendant." There were cases in which judges questioned criminal defendants in an abusive manner, including the use of derogatory language directed at the suspect. In other cases they may pursue a line of questioning that is irrelevant, but that seeks to undermine the reputation of the defendant, that may imply guilt, and that deprives the defendant of the right to a fair hearing. Still in other cases judges refused to pursue a line of questioning that could be relevant to the case at hand; in the context of gender-based violence judges may find a history of gender-based violence unimportant when in fact such information could prove useful.

INVESTIGATION
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(continued)

How a judge handles an investigation or trial can indicate whether he or she has presumed the defendant to be guilty before considering all of the evidence. While many judges handle cases in a professional, seemingly objective manner, there are some who clearly display bias towards defendants, making improper statements indicating that the defendant is guilty of criminal activity as well as of immoral behavior.

During investigation and trial there were cases where judges also verbally attacked the character and reputation of lawyers, criticizing them for representing women and girls engaged in what the judges viewed as immoral behavior. These comments when made during trial indicate the bias of the decision-makers and their failure to presume defendants innocent until proven guilty. The issue of bias among legal actors is explored more fully below but the following includes examples of occasions where a judge's line of questioning indicates bias in the outcome of the case prior to the presentation of all the evidence.

In a case in Northern Iraq involving a minor charged with prostitution was, the judge began the trial by asking, "Why did you do that?" Throughout the trial the judge and prosecutor directed accusatory comments and questions to the juvenile defendant. The prosecutor stated, "I know you look young, but you know more than 70 [men] people." When the defendant and her mother testified about abuse and violence, the judge refrained from taking notes and these statements did not make it into the record. The judge convicted the 14-year-old girl and sentenced her to six months in jail.

In another sex trafficking case involving a 14-year-old girl in the Kurdistan Region, a different judge indicated even before trial that he believed the defendant was guilty. Although the judge's manner of questioning was not inappropriate or abusive, he appeared to find justifications for a finding of guilt, disregarding consistent testimony by the defendant that she was forced into prostitution. At the end of the trial the judge acknowledged that the defendant did not receive money in exchange for sex, but he convicted her, stating, "She received indirect benefits such as food and clothing." During the investigation the judge suggested that if the girl was forced, she would have reported it to a guard at the checkpoint, and even went so far as to suggest that she should bring in the traffickers as "direct evidence" that she was forced.

Importantly, there were also examples in which judges handled cases in a sensitive and professional manner that should set the standard for court practice in the future.

In a criminal trial in the Kurdistan Region in which a woman was accused of being an accomplice to her husband's rape of a neighbor's daughter, the court sent the husband out of the courtroom to allow his wife to testify in a closed courtroom. The female defendant testified about her husband's long history of abusive treatment towards her, as well as how he forced her to commit a crime by beating her and threatening to send her to her family where she faced the risk of being killed. In this case the three Judge panel decided that the woman's defense to committing criminal activity based on coercion was valid and released her from detention; her husband was sentenced to fifteen years in jail for raping a minor.

INVESTIGATION
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(continued)

Preparing for Trial

International law requires that criminal defendants be allowed “adequate time and facilities” to prepare a defense. (ICCPR Art. 14(3)(b)). Overall this did not present a problem in the cases handled through this program since detainees were screened regularly and early, allowing on average six months to prepare. Lawyers identified cases in which detainees were held for lengthy periods without having their cases brought to trial and without an attorney to ensure their cases moved forward and when an attorney with the program accepted the case and requested that the trial be scheduled, they were not given adequate time to prepare for trial and the clients consequently suffered.¹⁴

A woman from the Kurdistan Region who was charged with adultery under Article 377 was in a women’s shelter and then detained for more than six months before having her trial date set. She did not have a lawyer until one week before the trial. The lawyer requested an extension for time to prepare for trial but the request was denied. The lawyer wanted to present evidence of forced marriage and severe domestic violence, but was prevented from presenting witnesses and in one trial hearing the defendant was convicted and sentenced to four years in jail.

A critical component of a fair trial is having the right to examine and present witnesses. (ICCPR Art. 14(3)(e)). Under Article 58 of the Iraqi Criminal Procedure Code a defendant can present witnesses to testify before the court. In most cases, victims of gender-based violence in criminal court were permitted to present witnesses. In some cases, however, they were prevented from presenting witnesses and this harmed their cases.

In a case in the Kurdistan Region involving domestic violence and attempted murder by the husband, the judge asked the husband to present witnesses during the investigation, but refused to allow the victim to present witnesses despite her efforts to present her sister to testify about the domestic violence.

Criminal Charges Frequently Filed Against Victims of Gender-Based Violence

Certain crimes are often linked to victims of gender-based violence in the Iraqi criminal justice system.

1. Prostitution and Sex Trafficking

Prostitution is a crime which involves a significant amount of gender-based violence including rape and sexual assault, sex trafficking, and other abuse and exploitation. Many Iraqi women and girls charged with prostitution have been forced into prostitution and are victims of sex trafficking or sexual under the UN Trafficking Protocol. Others have been forced by relatives, acquaintances or criminal gangs. Although little is documented about the prevalence of sex trafficking, once the lawyers began screening female detainees charged with prostitution, they identified a significant number of women and girls who were forced. They additionally encountered many groups of women and girls who were arrested for prostitution who refused to talk about their cases, and then who were shortly released without being fully investigated or prosecuted which indicates that there may be individuals with control over these individuals who manage to secure their release in order to continue to profit from them through forced prostitution.

¹⁴Iraqi court appointed defense lawyers have complained that they rarely receive advance notice of hearings. They are unable to prepare adequately for trial since their first meeting with a detainee is often in the holding cell immediately prior to their investigative hearing. One court appointed defense lawyer stated that his first readings of case files are usually during the hearing itself. See <http://www.hrw.org/sites/default/files/reports/iraq1208web.pdf>

INVESTIGATION
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(continued)

Response by the courts have been mixed; in some cases judges recognize that women and girls have been forced into prostitution or wrongly accused, and they drop the charges or find them not guilty. However in other cases victims of sex trafficking have been convicted of prostitution and sentenced to jail. The following are examples of the types of cases encountered, and the individuals assisted through this program:

A university student in Baghdad was forced by her family to quit school and marry. Soon after the marriage her husband sold all of their furniture and personal belongings and moved with her to the United Arab Emirates (UAE). Once there, her husband locked her up in an apartment, started beating her when she questioned him or asked for money, and did not allow her to leave the apartment or contact her family. One day the woman overheard her husband on the telephone making arrangements to force her work in prostitution. The woman escaped and sought help from a neighbor who took her to the Iraqi embassy. The embassy helped her to return to Iraq, but when she returned her husband called her and threatened to kill her if she told anyone about what happened. The husband returned to Iraq and filed a claim against his wife for disobedience under the PSL Article 25 to force her to return to him. The woman was terrified of her husband and was afraid pursue a legal separation, however with the help of her lawyer and social worker who convinced her husband that he would suffer legal consequences, the woman managed to get a divorce and avoided being trafficked into prostitution.

A 14-year old girl in the Kurdistan Region was lured into a relationship by an adult male police officer who lived in her neighborhood and who promised to marry her. Once their sexual relationship started the man became distant and eventually stopped seeing the girl. However the girl's teacher informed her father that he had seen her in the company of a man, and when her father confronted her she fled with the help of the man. Soon the man abandoned her and she did not return home, fearing she would be killed. A taxi driver took her to a prostitution house where she was forced to have sex with men. In one instance she was sold to a man for \$1,600 for one month and was raped repeatedly in his house. Eventually she was arrested and charged with prostitution, however the judge agreed with the evidence showing that she was forced, and he dropped the charges and released her to a protective shelter. She continues to face the risk of an honor killing.

A 14-year old girl in the Kurdistan Region was lured into a relationship by an adult male who lived in her neighborhood and who promised to marry her. The relationship did not last long, but when the girl's father tried to force her to marry an old man, she called the neighbor to help her escape. The neighbor dropped her off at a prostitution house where she was forced to have sex with multiple men. She was arrested while at this house and was tried and convicted. During the trial the judge made numerous derogatory statements towards the girl and her mother, blaming the girl for her predicament and accusing her of working in prostitution because she enjoyed sex with multiple men. The girl was sentenced to a six-month jail term.

A 28-year old woman in Baghdad who was married with two children suffered severe domestic violence from her husband who beat her often. The woman's husband was an alcoholic and brought prostitutes to his house for sex with him and his friends. One day the police arrested the woman and her husband and both were charged with facilitating prostitution under the IPC Article 339. The woman's lawyer presented evidence including the wife's testimony that she was not guilty and was instead a victim of severe abuse. The judge agreed and dropped the charges and released the woman from jail.

INVESTIGATION
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(continued)

2. Adultery

Adultery is a crime in Iraq as it is in most Islamic countries.¹⁵ In some Muslim countries there is a growing perception of adultery as a moral crime that is a matter better dealt with privately between spouses rather than within the criminal justice system.¹⁶ In Iraq it continues to be a criminal act and a grave social offense against family/community/tribal honor, leading women to face serious threats of honor killing by their husband's and natal families. The mere suspicion or allegation of adultery places all parties at risk, but especially women and girls who carry the heavy burden of maintaining honor.

Men are also criminally liable under the IPC Article 377, however Iraqi law discriminates against women by holding them responsible for adultery committed anywhere, whereas men are only liable for acts of adultery committed in the marital home. In 2001 the Kurdistan Regional Government amended Article 377 in Law No. 9 to hold men liable to the same extent as women; thus a married man may be charged and convicted of committing adultery whether the act is committed inside or outside the home.¹⁷ Also liable under Article 377 are unmarried persons who engage in relationships with married persons. The crime of adultery is a misdemeanor offense which is punishable with a jail sentence from three months to five years under the IPC Article 26.

Most of the women represented through this program who were charged and/or convicted of committing adultery suffered an extensive history of abuse and violence. Many were forced into marriages, often with older men. Once married they usually suffered severe domestic violence including rape and ongoing sexual abuse. While these issues may not absolve them of criminal responsibility under Iraqi law, these are clearly factors that should be considered by courts in sentencing and should be considered mitigating factors leading to reduced sentences.

Abusive men have misused the adultery law to threaten, intimidate and divorce their wives, as part of a continued pattern of abusive behavior but also as a means to more easily divorce their wives and avoid responsibility for supporting them. This latter scenario has arisen when the husband wanted to take another wife but faced difficulty either from his family or from the courts in obtaining a divorce.

The accusation of adultery alone may be a basis for some families to commit honor killing. It is considered to be one of several justifiable reasons for killing women who are viewed as dishonoring their families. Women charged and/or convicted usually lose their rights to their children, and may never be able to safely reintegrate back into their natal families or communities.

A woman from Baghdad was married to an abusive man with whom she had three children. Her husband abused her severely, often beating her, depriving her of money needed for basic items such as food and clothing, preventing her from showering and always accusing her of not being trustworthy. They lived with her husband's family, but after several years her father-in-law kicked them out of his house. Later the husband also kicked his wife and their children out of their house, and she took the children to

¹⁵Criminalization of adultery derives from Islamic law which applies to both married and unmarried men and women. Under Islamic law the punishment for married persons is stoning to death, and for unmarried persons the punishment is 100 lashes. Another evidentiary requirement according to Islamic law is that the person must confess, or there must be four witnesses who saw the act of adultery committed. See <http://www.freedomhouse.org/template.cfm?page=176>.

¹⁶In Lebanon for example adultery is criminalized and women are penalized to a greater extent than men, however there is little support among much of the population and the legal system to prosecute adultery cases.

¹⁷Law No. 9 of 2001: Article 1: Paragraph 2 of Article 377 of the Amended Penal Code Law No. 111 of 1969 shall be suspended in the Kurdistan Region. Article 2: The husband who commits adultery and the women whom he committed adultery with shall be punished with the penalty provided for under Paragraph 1 of Article 377 of the Amended Penal Code Law No. 111 of 1969.

INVESTIGATION
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(continued)

stay at the house of her husband's employer since she did not have anywhere to go. The husband accused both of them of adultery and both were arrested and detained. The lawyer and social worker mediated with the husband to drop the false adultery charges to allow the woman to get a divorce and he finally agreed. Once the husband dropped the charges the woman was released from detention and reconciled with her family. Her children had to return to their father since the woman and her family could not afford to support them.

In the Kurdistan Region a woman's husband took a second wife and forced his first wife and their four children to live in the basement. He wanted to divorce her but he had no basis for getting the divorce, so he paid someone to try to have a relationship with his first wife so that he could accuse her of adultery and obtain a divorce. The man called the first wife many times trying to convince her to meet with him, but she refused and told her children that she did not know who the man was or why he was calling. Finally one day at the request of the husband the man appeared at the house, followed by the husband who started making a lot of noise for the neighbors to hear that his wife was having an affair. The husband called the police and his first wife fled to her relative's house. She was later arrested and detained. Eventually all of the evidence was raised before the investigation judge, and the man who was paid was found and confessed. The charges were thrown out and mediation with the first wife's family was successful to allow safe reintegration upon release.

For the most part courts fully reviewed all available evidence in adultery cases as demonstrated below:

In an adultery case in the Kurdistan Region which the husband filed an adultery claim against his wife and accused her of being pregnant by another man. The court permitted the woman's lawyer to present nine witnesses who all testified that to their knowledge she did not commit adultery. A medical committee also issued a report that she was not pregnant. After consideration of all the evidence presented, the judges found her not guilty. Once she was eligible for release, her lawyer and social worker mediated with her family and convinced them that she was innocent. Once released from detention the woman was able to reconcile with her family and return home.

A 37-year old Shia widow in Basra left Baghdad after her husband was killed in an explosion. She had to support herself and tried to live in Najaf, then Missan and finally returned to Basra. While looking for a job and a place to live, she was approved by a man who offered a temporary (muta'a) marriage in exchange for 150,000 dinars for the dowry and another 150,000 dinars to be paid at the end of the contract. The man's neighbors suspected there was prostitution going on since they knew he lived alone, and they called the police. Both were arrested and charged under Article 377 for committing adultery. The judge released the man to arrange legal marriage papers, and once that was concluded he released the woman as well.

INVESTIGATION
AND TRIAL
(continued)

Recommendations:

Ideally discussion should ensue around eliminating adultery from the criminal codes, and treating it as a moral offense to be dealt with privately and through the Personal Status Courts in divorce cases. Two primary reasons for this include the fact that men often use these codes to perpetuate abuse against women, and because the law and its implementation unfairly discriminate against women and girls. In the absence of such measures which at this time would be difficult in Iraq, the following recommendations apply:

- Clarify and strengthen evidentiary requirements needed to prove adultery cases
- Impose stiff penalties on individuals who file false adultery claims that include jail sentences and/or high fines
- Reduce penalties for adultery including the imposition of fines rather than jail sentences
- Amend the IPC Articles 128(a),¹⁸ and 130-132¹⁹ which permit legal excuses or mitigated sentences in honor related crimes of violence (applies in Iraq outside the KRG); ensure uniform application of KRG amendments to these articles to fully prosecute and impose maximum sentences in honor killing cases
- Expand protective shelters throughout Iraq to protect women threatened with honor killing
- Improve existing shelters to provide adequate protection and to meet long term needs for women who cannot safely reintegrate into their families or society

3. Assault, Battery and Killing

Some of the women detained were charged with inflicting violence, including killing, towards their spouses. To be eligible for services through this program the individual was required to establish that she acted in self-defense or in response to gender-based violence such as domestic violence. Depending on the facts and circumstances of a particular case a woman may claim under Iraqi law that she acted in self-defense. Such a claim is more likely to succeed if the woman acted in response to an imminent threat of harm, and if the threat she faced was deadly or would cause serious bodily harm. These cases are challenging and it is important to present as much evidence as possible about the history of domestic violence or proof that the defendant defended herself against a serious threat.

In the Kurdistan Region a case was brought before the criminal court in which a woman was accused of killing her husband. The judges reviewed the facts and circumstances surrounding the killing as well as evidence of severe domestic violence, and determined that the woman killed her husband in self-defense.

When the 34-year-old woman was arrested and detained for killing her husband, the court charged her with premeditated murder under the IPC Article 406, which carries a possible life sentence or execution. The woman has suffered years of severe domestic violence throughout her marriage. They had four children but the first child died within a year of being born. The woman's husband wanted to take a second wife, but his family did not agree, and he took it out on his wife by beating her severely, bruising her entire body and causing her broken bones. A year later she decided to leave her husband and went to her parent's house with her sons, however her husband found her and insisted that she return home with him. One home the husband threatened to kill her. She was in the car where the husband left his gun. He returned to the car in a rage and the wife, fearing for her life, grabbed the gun and shot her husband. During the criminal trial the judges heard testimony about the abuse and also considered medical records as evidence of an extensive history of abuse. The judge asked her why she did not run

¹⁸Under Article 128(a), a court may reduce or exempt a person from penalty if the judges determine that the defendant had a legal excuse for committing the alleged crime.

¹⁹Article 130 provides the degree to which a court might issue a lenient sentence; Article 131 regulates reduced sentences in misdemeanor cases; and Article 132 permits a court further discretion to reduce a sentence based on the facts and circumstances.

INVESTIGATION
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(continued)

away instead of shooting her husband, and she replied that it was night and dark and if she had run away there would be questions about her honor; she also stated that she had nowhere to go and believed that her husband would find her and kill her. The court reduced the charge to Article 405, and sentenced the woman to a reduced sentence of five years in jail.

Rather than imposing the maximum penalty, the judges reduced her sentence from a possible life sentence to five years. This case provide a good example of how lawyers can advocate by creating novel case theories and presenting evidence of gender-based violence to the courts. Similarly the court's handling of the case was positive, and the woman was given due process and better outcome than she would have expected had her history of domestic violence not been presented.

In another case an indigent woman originally from Basra was arrested in Kirkuk, detained and charged with assault and battery under the IPC Article 413. The woman lives with her husband and young child in an unfinished house in a poor neighborhood in Kirkuk where her husband collects and sells empty bottles to support the family. On the day of the incident, the woman traveled to the market to sell her mobile phone and along the way she was continually harassed by men who made derogatory comments towards her. Finally she spoke up against the men who were harassing her, and one of the men responded by beating her and causing her to bleed from her face. In self-defense she hit the man's head with a plastic knife causing him injury as well. Both filed complaints against one another, but while the woman was detained, the man was released and was able to continue selling soft drinks in the market. The woman who was illiterate signed a statement that she could not read by using her thumbprint. Once the lawyer and social worker became involved they located the woman's family who supported her, and convinced the man to drop the charges which both he and the woman agreed to do.

4. Sentencing and Appeal

Lawyers reported that many of their clients did not want to appeal their cases due to fears that their sentences would be increased on appeal. For example sex trafficking victims convicted of prostitution refrained from filing appeals, because they did not believe it would lead to a positive outcome and instead might hurt their cases. In one trafficking case a juvenile sex trafficking victim convicted of prostitution filed an appeal on the basis that she was forced into prostitution and therefore had a valid defense. She also raised several other issues in her case but the appellate court affirmed the lower court's decision.

VICTIMS FILING
CRIMINAL CLAIMS
AGAINST
PERPETRATORS

Through this program detained and non-detained victims who chose to file criminal complaints against perpetrators of gender-based violence were are provided with legal representation, mediation assistance and social support. There are many challenges that victims face when deciding whether to file a claim, and they must weigh a number of factors to determine whether it is in their best interest to pursue legal action in the criminal justice system.

Victims of gender-based violence encounter a number of societal and institutional barriers to reporting crimes and to achieving justice through the criminal justice system. One of the primary reasons gender-based violence victims fail to report crimes of sexual abuse, rape, forced marriage, domestic violence and FGM is due to their fear of retaliation by perpetrators as well as relatives and tribal/community members. Because honor is inextricably tied up with female sexuality and stringent behavioral norms, actions that violate these traditional and patriarchal

VICTIMS FILING
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(continued)

codes of conduct are deemed to offend the family/tribal honor regardless of whether the female was abused or consented. Thus in cases of rape, victims may still be viewed as bringing dishonor to their family or tribe even though they were assaulted. Girls and women understand this, and their fear of being blamed or further abused often deters them from reporting such criminal activity. Retaliation by the family or tribe may include killing, forced marriage, coerced suicide or severe restrictions on mobility and other aspects of daily life.

Other deterrents to reporting gender-based violence crimes include:

- Fear of further abuse
- Fear of losing children
- Fear of loss of shelter and basic needs
- Weak response by law enforcement and courts
- Feelings of shame
- Fear of not being believed
- Fear of being blamed for being responsible for the rape or assault
- Lack of protection and services for rape victims

Another concern is that many provisions of the Iraqi Penal Code (hereinafter IPC) treat gender-based violence leniently. Although there are some laws punishing violence against women, various severe forms of violence are not criminalized, including domestic violence, human trafficking, and female genital mutilation. As discussed below, existing laws are inadequate to address the nature and scope of such violence and perpetrators continue to act with impunity. Another problem is that even when perpetrators of violence against women and girls are convicted, judges often gave them low sentences considering the seriousness of crimes such as rape and sexual assault, honor killings and domestic violence (claims brought under assault and battery laws). These crimes have maximum sentences, but no minimum sentences, allowing wide discretion for judges to impose light penalties.

Victims of Rape and Sexual Assault

Many individuals assisted through this program reported a history of rape and sexual assault, yet few filed criminal claims against the perpetrators. Rape is a private offense and only the victim, or her family if she is a minor, may file a claim; the government cannot pursue criminal proceedings without the cooperation of the victim. Victims are more likely to file claims in cases where the rape led to a loss of virginity and/or pregnancy due to the fact that it is harder to hide the rape from the family. Furthermore, married women face the risk of being charged with adultery if they report a rape and are doubted.

Rape and sexual assault are criminalized under various provisions of the IPC. Section 5 of the IPC criminalizes carnal knowledge of a minor with a maximum penalty of 10 years in prison. Rape is criminalized under article 393, which recommends increased penalties under certain circumstances including rape of a minor, of a relative, by a person in an official capacity or a position of trust, if it leads to a disease, loss of virginity or pregnancy; the maximum penalty is 15 years. Forced sodomy can lead to a sentence of up to seven years in prison if the victim is an adult, and a maximum of 10 years if the victim is a minor pursuant to Article 394.

VICTIMS FILING
CRIMINAL CLAIMS
AGAINST
PERPETRATORS
(continued)

It is also illegal pursuant to Article 395 to seduce a woman by promising marriage and then refusing to marry her. Sexual assault with the use of force, threat, deception or other means is illegal under the IPC Article 396 and has a maximum jail term of seven years if the victim is an adult, and 10 years for minor victims. Sexual assault without the use of force, threat or deception is punishable under Article 397, with the same penalties as those in Article 396. The maximum sentences tend to be low given the seriousness of the offenses, and in some cases judges refrain from imposing the maximum sentence in cases involving severe violence against children.

A seven-year-old girl in the Kurdistan Region was brutally raped by a 20-year old man. A DNA test along with her testimony was used to convict the rapist under Article 393 of the IPC. Although the maximum allowable sentence was 15 years in jail, the judge sentenced him to 10 years, stating that the man did not have a prior conviction. This was despite the fact that in two separate incidents girls reported rape and sexual abuse allegations against the same individual.

Legally Institutionalized Rape and Sexual Assault

Many of the individuals represented through this program reported being raped by their husbands. The idea that a woman or girl loses the right to control over her body and her sexuality by entering into a marriage contract violates international laws and norms that do not distinguish violations based upon a person's marital status. Rape is institutionalized, or effectively condoned by the IPC and PSL through several provisions that fail to deter rape, or ignore the seriousness of the offense, particularly within the context of marriage. Marital rape is not illegal, and women and girls forced into marriages face a lifetime of repeated ongoing rape and sexual assault.

A significant problem can be found through the application of Article 398 of the IPC which allows a rapist to avoid criminal liability if he marries the victim. Ostensibly to protect the honor of the victim and her family, the law ensures that rape victims will face a minimum of three years to possibly a lifetime of rape and abuse once married to their rapists. Once the marriage passes the three-year mark, the rapist can divorce the victim without facing the risk of renewed criminal penalties.

States are required to treat men and women equally in regard to marriage in accordance with the ICCPR Article 23. Men and women have the right to enter into marriage only with their free and full consent, and States have an obligation to protect the enjoyment of this right on an equal basis. Victims of rape who are pressured to marry to avoid social stigma, marginalization and honor killing cannot be said to fully consent to these marriages, and the State should not support such marriages by permitting rapists to avoid criminal liability.²⁰

Looking at the cases it is clear that this law is applied routinely as a way for rapists to stop criminal proceedings, but also to prevent family members from killing or otherwise harming the victims. Indeed the unfortunate aspect of the law and tradition is that rape victims "consent" to or advocate for such marriages as the only way to avoid the more serious result of murder.

²⁰General Comment No. 28 to the ICCPR Article 23.

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In the Kurdistan Region an 18-year-old unmarried woman was raped by a perpetrator who later persuaded her to marry him. They ran away together and when they were arrested, the victim was placed in a shelter and the perpetrator was detained. The victim's family filed a claim against him under the IPC Articles 395 and 3296. At trial the defendant. He denied knowing the victim, and the case is ongoing. However; one option for the perpetrator to evade criminal liability is to marry the victim to stop criminal proceedings.

In Baghdad a girl was raped at the age of 12 and her family forced her to marry her rapist. As a husband, he was very abusive and beat and raped her repeatedly during their marriage. She filed for divorce and during the proceedings her husband, who did not agree to the divorce, stated to the judge, "She was a bad woman but I saved her honor by marrying her." The judge denied the woman a divorce and she tried to commit suicide by self-immolation. Her husband later traveled outside the country and divorced her by phone. Although the rape case was never brought before the court, the case illustrates commonly held perceptions that victims are shameful, and that marrying them is an honorable practice.

In Baghdad a man raped a 28-year-old relative and she became pregnant as a result. She informed him and said she was sure her family would kill both of them when they discovered what happened. He convinced her to run away and she moved in with a distant relative. The woman believed that the only way for her to survive would be to marry the man who raped her, and he eventually agreed to the marriage. After mediation her family agreed that their daughter was a victim and that they would not kill her, but that she should marry the relative according to Sharia law.

Gender-based violence inflicted onto young girls has ongoing negative physical and psychological consequences. Trauma from child rape and sexual abuse is retriggered when girls are faced with the prospect of marriage, particularly in a place such as Iraq where females are expected to demonstrate virginity by bleeding during intercourse. Girls who are suspected of losing their virginity are routinely subjected to hymen tests despite their unreliability as a method to determine virginity. Rape victims are often blamed for the rape, which is a primary motive for not reporting the incident in the first place. Even when it is clear that the victim was forced and did not consent to sex, particularly with very young girls, the occurrence of the incident is socially viewed as bringing shame on the family, and in extreme cases the family will kill the girl to reclaim its honor.

In the Kurdistan Region a woman was raped by her cousin when she was a minor. The rapist agreed to marry her but they ran away from their families who wanted to kill them. The husband, used the fact that his wife was not a virgin when she married him as a pretext to abuse basis throughout their marriage, beating and sexually abusing her and threatening to return her to her family where she would be killed. She was too afraid to leave due to this threats and ongoing physical, sexual and psychological violence.

Even if the family supports the victim, it is very difficult for the family to remain in their community as the victim and her family are stigmatized.

In one case involving a seven-year-old rape victim, the perpetrator was arrested and convicted. However the girl's family was so concerned about how she would be viewed by her extended family and her community, that they did not even tell their relatives with whom they lived about the incident. The victim's parents were concerned that if other relatives found out, the father would be expected to seek a revenge killing against the perpetrator or his family. The victim and her immediate family fled the country following the trial to avoid all of these consequences.

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Recommendations:

- Define terms such as “rape” and “sexual assault.” Applicable criminal provisions tend to be confusing and should clarify that rape is defined by force or coercion as well as the lack of consent.
- Amend the IPC to delete Article 398 which allows a rapist to avoid criminal prosecution by marrying a rape victim.
- Amend the IPC to permit a married women or girl the right to file a criminal claim against her husband who rapes her.
- Amend Articles 385 and 394 to clearly criminalize sex with minors regardless of their consent.
 - The actions of the minor should not be criminalized
 - Exceptions can be made in cases where there is a legal marriage (between ages 15–18 with parental consent and approval of a judge in full accordance with PSC Article 8)²¹
- Amend the IPC to provide minimum sentences for those convicted of crimes of rape and sexual assault.
- Amend the IPC to increase the maximum allowable sentences for those convicted of rape and sexual assault.
- Provide adequate protection for rape victims threatened with harm by their families.
- Provide training to police, investigators, prosecutors and judges on how to work with rape victims including appropriate interviewing techniques, particularly with child victims.

Victims of Domestic Violence

Domestic violence is a serious and pervasive form of gender-based violence for the individuals assisted through this program, and was the primary motivation for seeking divorce by clients. In Iraq, spousal abuse is frequently accompanied by extended family abuse by both the family of the husband, but also the family of the victim. Importantly, there are also instances in which family members from either side support the victim and attempt mediation with the abusive spouse to prevent ongoing violence. These are some of the most difficult cases to resolve since abusers usually resume abusive behavior after family members or others intervene.

Currently there is no domestic violence law to address the problem of spousal abuse, and criminal complaints are filed under assault and battery provisions. The fact that courts see a number of these cases is a good sign that police response is improving, and that victims are allowed to file and pursue criminal claims. However the existing laws are inadequate to address the nature of domestic violence, which involves intimate partners living in the same house where the violence is recurring and the victim suffers multiple forms of abuse.

Domestic violence is not simply a problem of physical assault and battery, but involves a complex pattern of abusive actions, including physical, sexual, verbal and psychological abuse, restrictions on mobility, prevention from contact with family, threats, intimidation, threats to take one’s children, deprivation of basic needs such as food and shelter. Physical abuse may take many forms including punching, hitting with hands or objects, kicking, pulling hair, and dragging the victim by her hair or clothes. Verbal abuse and degradation are commonly used to make victims feel worthless and depressed. Sexual abuse may include anal rape as well as forced sex with other men (*see Section on Human Trafficking for more information*).

²¹The law requires that there be a basis for permitting the marriage of a minor between the ages of 15-18 years.

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In several cases husbands threatened their wives with filing false adultery claims against them if the women tried to leave. In other cases abusive men did file false adultery claims in order to further abuse their wives and in some cases to try to get rid of them. Thus Article 377 of the IPC is sometimes used as a tool of control by abusive men against women who fear retaliation by their families and communities regardless of the veracity of the claims.

In order to effectively respond to domestic violence the law must acknowledge the unique relationship existing between the victim and abusers, which often includes extended family in addition to the spouse. This relationship makes the impact and response to domestic violence much more complicated than assault and battery cases between strangers, acquaintances or those who are unrelated. Usually there are children involved and divorce is difficult if not impossible for some women. In some cases families prohibit women from seeking divorce because they consider it shameful, and families even threaten to kill women who seek divorce even in cases of severe domestic violence. The law needs to recognize the power imbalance inherent in a domestic violence relationship, and provide victims with the ability to file claims with protection from retaliation.

Furthermore the victims are primarily dependent on their abusers for economic support which often prevents them from filing charges. Thus adequate services for victims are an essential component required in any domestic violence law including shelter and longer-term housing, financial support, counseling, employment assistance and vocational training. The KRG is currently considering anti-domestic violence legislation which is a critical step towards addressing this problem more comprehensively. The bill continues to be debated and revised by Parliament Members. There is no comparable law being proposed or considered by the Government of Iraq at the time this report is issued.

Without a law criminalizing domestic violence, Iraqi victims of severe gender-based violence have looked to various provisions in the Penal Code to bring criminal claims against perpetrators, including Articles 413 (assault and battery), 432 (threats) and 433 (defamation). As demonstrated by the cases below, judges continue to undermine the seriousness of domestic violence as a crime, and appear to be fairly lenient with sentencing perpetrators of domestic violence.

In the Kurdistan Region a woman suffered severe domestic violence by her spouse. The woman visited a hospital after an especially severe incident of abuse, and the medical report stated that she showed indications of bruising on her neck and back and blood in one of her ears. During the trial the judge asked the victim's sister who testified as a witness which ear she bled from. When the sister made an error and mentioned the left instead of the right ear, the judge used that as a basis for disregarding her witness testimony. The judge further undermined the severity of the particular abuse, and domestic violence in general, by stating, "It was just a simple problem, just hitting his wife...maybe they will solve it later." The husband was convicted under Article 413 for assault and battery. He was sentenced to a one-year suspended sentence, not serving a day in detention or prison. The maximum penalty under Article 413 is three years incarceration and a fine.

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A 24-year-old woman from Basra was severely abused by her husband as well as his mother. She visited the hospital on three separate occasions due to severe beatings in a two-month period. She filed a claim in the criminal court under Article 413 of the IPC. The judge issued a warrant to the husband and his mother to testify during the investigation. The husband insisted to the judge that his wife suffered from a bad mental condition, and told the judge that a criminal case would ruin his reputation and that of his father and the rest of his family. The judge dropped the case for lack of evidence despite the existence of the medical records.

In Baghdad a married woman with four daughters was severely abused by her husband. He regularly beat her and frequently kicked her out of their home. One day she took her daughters and rented another apartment for them to live away from her husband. Her husband found her, broke into the apartment and threatened her with a gun to her head. He forced her to sign a document putting his name on the apartment lease, and she withdrew her name and replaced it with that of her husband. The next day her husband kicked her out of the apartment half dressed and without her daughters. She went to her sister's house and later filed a criminal claim against her husband for threatening to kill her. The husband threatened to kill the lawyer if the client did not withdraw the case, and she did despite receiving payment for handling the case. Another lawyer took the case and filed a claim under the IPC Article 432 for threatening the client. During the investigation, the judge refused to listen to the victim's witnesses including her sister, but he asked the husband whether he had any witnesses to testify. The judge stated, "Not every single woman who is disciplined by her husband has the right to throw him in jail." He dismissed the case. The husband filed an adultery claim against his wife and the case is pending.

A teacher in the Kurdistan Region was severely abused by her husband, and she had a medical report as evidence of physical assault. She had inherited money which she used to buy a car, and gave the rest of the money towards the purchase of a home that was in her husband's name. She frequently returned to her father's house due to the ongoing abuse. She filed a criminal claim against her husband under Article 413 of the IPC for assault and battery, and under Article 432 for threatening her. One day her husband locked her inside the house, beat her and threatened her with a gun. He forced her to sign a document stating, "I am not a good woman, I am not a good mother, and I agree to live with my husband under any condition and I agree to give my car and my share of the house to my husband." Her husband threatened to accuse her of adultery if she did not sign the paper and withdraw the pending legal claims. She signed the paper but then later retained a lawyer to help her to file for divorce.

In the Kurdistan Region a case involving severe domestic violence, a 52-year-old man shot his wife three times and she survived. She filed a criminal claim against him under Article 406 which applies to intentional killing, and which must be read with Article 31 if the allegation is attempted killing. The maximum allowable sentence is seven years in jail for attempted murder. The judge sentenced the perpetrator to 1 year in jail with a suspended sentence, and he was released after the trial. The victim appealed the light sentence but the Court of Cassation affirmed the lower court's decision. The judge stated at the close of the trial that he gave a lenient sentence because the man was old, they were still married (they were in divorce proceedings), and the judge expected the husband and wife would reconcile. They did not reconcile and the victim obtained a divorce.

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A 25-year-old woman in Basra was severely abused by her husband who beat her almost every day. She visited a police station to file a claim against him under Article 413. During the investigation the judge said, "What is the matter with women nowadays? They all watch a lot of episodes on TV and complain if their husbands are impolite. The society has become very bad and ruined because of this kind of thing." The husband was arrested and then released on bail. The woman withdrew the claim under pressure from her family.

A twenty-two year old woman in Basra filed a claim in the Personal Status Court for divorce and other legal rights including her dowry and alimony. Her husband retaliated by filing a claim against her, alleging that she committed adultery. The judge issued an arrest warrant the same day the claim was filed and the woman was arrested in her home. She was detained for two days before being questioned. The officer yelled at her and made accusations and when the woman started crying he yelled at her to "stop crying those fake tears." There were no witnesses or other evidence against the woman and when she told the judge that she was innocent of the charges he said, "No woman will say that she is guilty. All women will say that they are innocent while they are all devils." Despite the lack of evidence, the woman was detained until she agreed to give up her legal rights in the divorce case. Once she agreed her husband withdrew the claim.

Recommendations:

- Develop and push for passage of comprehensive domestic violence legislation that incorporates protective measures for victims and harsher penalties for perpetrators
 - Punitive measures should be sought at the request of the victim
 - Services must be provided to victims and must be allocated for in the KRG and GOI budgets
- Train judges, prosecutors and police to better understand and respond to domestic violence claims
- Eliminate Article 41 of the Iraqi Penal Code that empowers husbands to discipline their wives thereby encouraging domestic violence
- Remove Article 377 that criminalizes adultery as it is often used by abusive men to threaten, intimidate and otherwise abuse their wives
- Expand protective shelters throughout Iraq to protect women from severe domestic violence including murder
- Improve existing shelters to provide adequate protection and to meet a range of needs of survivors who may require prolonged shelter protection

Victims of Female Genital Mutilation (FGM)

Female genital mutilation is a deeply entrenched practice in parts of Iraqi Kurdistan. Whether the problem exists in other regions of the country is unknown and additional research is required. Due to the nature of the problem, where the violent procedure is inflicted on girls too young to defend themselves, and is committed at the request of their mothers, the program did not encounter any cases involving FGM. A law proposed to the Kurdish Parliament to criminalize FGM was discussed but did not pass. The need to pass legislation criminalizing this act which leads to significant physical and psychological harm to the victims is a necessary step along with efforts to change how communities where this is practiced think about the procedure. Until those who condone FGM understand the negative consequences to girls and women, and accept that the procedure is no longer necessary for religious and cultural reasons, the law alone will be insufficient to eradicate this harmful practice.²²

²²For additional information on efforts to combat FGM in the Iraqi Kurdistan Region, go to www.stopfgmkurdistan.org. Also see "Iraqi Kurdistan: Girls and Women Suffer the Consequences of Female Genital Mutilation," Human Rights Watch (June 2010), available at <http://www.hrw.org/en/news/2010/06/16/iraqi-kurdistan-girls-and-women-suffer-consequences-female-genital-mutilation>.

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The Personal Status Courts governing matters of marriage, divorce, paternity, custody, alimony, inheritance and other family-related matters often see cases involving gender-based violence. According to Iraqi law a marriage must be registered through the court to be legal. Both parties must consent to the marriage (PSL No. 188, Art. 4), minimum age requirements are met (PSL No. 188, Arts. 7 and 8), no legal impediments exist such as certain relatives (PSL No. 188, Ch. 2, Arts. 13-17), and a medical report showing that both persons are free from communicable diseases or other health impediments (PSL No. 188, Art. 2).

According to customary practice and religious obligations, Iraqis go through the religious marriage first, followed by registering the legal engagement and marriage through the court. It is illegal to conclude a marriage contract outside of court, and any man who does this can be punished with imprisonment from six months to one year or charged with a fine of between 300 to 1000 dinars. There are many cases in which families and individuals pursue marriages outside the court, meaning they go through the religious marriage, but they do not register the contract in court. This is often done when the marriage involves girls who do not meet the minimum requisite age for marriage, and the marriage is forced.

While it is not the legal obligation for religious leaders to ensure that couples they marry later register their marriages in court, these religious leaders should be required to confirm that the individuals whom they marry meet basic legal requirements such as the minimum age of marriage. Courts see many cases where someone later tries to register a marriage several years after the religious marriage was conducted and the couple bore children. The courts usually opt for imposing the fines on the couples rather than a jail sentence, which is a positive outcome. However there has been no discernable effort by anyone to pursue legal action against religious leaders who facilitate illegal marriages (underage/forced).

Through this program the types of cases that are commonly filed by victims include cases for marriage registration, for divorce, for custody and for dowry and alimony. Cases filed to secure divorce due to domestic violence were the most common type of case handled by the program.

Early Marriage

Numerous treaties recognize the right to free and full consent in a marriage, and require States to take steps to prevent abuse and exploitation of individuals in marriage. Article 16 of CEDAW requires that States take measures to, “eliminate discrimination against women in all matters relating to marriage and family relations.” The provision further provides that there should be no discrimination between the right of men and women to choose to enter into a marriage and to choose their marriage partners. If a child is married it should have no legal effect, meaning the marriage should be rendered void. Because one of Iraq’s reservations when it acceded to CEDAW was Article 16, it is not currently bound by this provision.

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Several provisions of the CRC address the rights of children that pertain to early and forced marriage. Articles 2 and 18 require that the best interests of the child be a primary consideration in all matters relating to children. The CRC also requires that States take measures to prevent all forms of physical, sexual and psychological abuse and neglect (Art. 19), all of which are inherently found in early marriage. States must assure that children's views and rights to express those views are considered in accordance with their age and maturity (Art. 12). Children must be protected from exploitation (Art. 36), efforts must be taken to appropriately document and respond to child maltreatment (Art. 34), and to prevent the sale or traffic in children for any purpose and in any form (Art. 36).

Under the ICCPR Article 8 ensures that no one is "held in slavery...or servitude," and that "slave-trade in all their forms shall be prohibited." The ICCPR further requires that marriage be entered into freely and with full consent from both parties (Art. 23).

Iraqi law protects against child and early marriage by setting the minimum age for marriage at 18 years, however with permission from parents and courts children can legally marry as young as 15 years of age, or 16 years in the KRG. If a person is below 18-years of age, he or she must obtain permission from his or her guardian and from a judge in order to legally marry. In some cases where the judge determines that the guardian unreasonably objects to the marriage, the judge can overrule the guardian and permit a juvenile to marry (PSL No. 188, Art. 8). The Amendment to the PSL by the Kurdish National Assembly (KNA) in 2008 raised the minimum age of marriage to 16-years. (Act. No. 15 to Amend Law 188 of the year 1959, Art. 5). Many individuals assisted through this program were married underage and usually outside of court.

The following cases illustrate problems facing women who suffered serious abuse stemming from forced and early marriages.

A 19-year-old woman originally from Mosul but living in the Kurdistan Region was threatened with honor killing by her. Her paternal uncle forced her at the age of thirteen to marry his 15-year-old son. Her husband abused her throughout their marriage. They were very poor and lived in an area with other displaced persons. One day when her uncle and husband saw her talking to a man from the market outside her tent, her husband shot his gun, but he missed her and both she and the man ran away. They were not suspected of a crime and were not arrested, and the woman was placed in a protective shelter. The husband requested a divorce through a mullah, however he did not legally register the divorce since the marriage was illegal and had only been conducted religiously. The woman's lawyer assisted her with registering the marriage and then the divorce. Although the woman's natal family supports her, her uncles have threatened to kill her and she cannot safely return home.

In a case in Kirkuk, a 14-year-old girl's father forced to marry her cousin who was much older than she. The marriage was conducted by a mullah and was not legally registered in court. During the marriage her husband was very abusive and repeatedly raped and beat her and deprived her of medical care when he beat her and injured her eye. Before filing for a divorce, the woman first had to legally register the marriage. During legal proceedings the husband employed various strategies to delay court hearings and he frequently did not appear in court. The first judge did not follow proper procedures and canceled the case, however when the lawyer filed the case a second time, a different judge took the case seriously, and he ordered the husband arrested and detained for ignoring the court summons.

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Aside from the psychological and social harms that frequently transpire due to early and forced marriages, there are several legal problems that emerge. Children born to these marriages remain undocumented and unable to acquire nationality or civil identification cards if their parents cannot produce a legal marriage certificate, and they essentially do not exist so to speak in any official records. This later leads to problems for children who need documentation to attend school or to access any government benefits or programs.

When the court does not legally recognize a marriage, it must first be registered prior to obtaining a divorce by bringing in two witnesses who can reliably attest to the facts of the marriage.

Under Iraqi law the penalty is as follows:

Any man who concludes his marriage contract outside the court is punished with a period of imprisonment that is no less than six months and no more than a year, or charged with a fine that is no less than three hundred dinars and no more than a thousand Dinars (PSL No. 188, Art. 10(5)).

Under the 2008 Amendment by the KNA, the penalty is the following:

“...anyone who conducts a marriage contract...outside the court is punished with a fine varying between 1 million dinars to 3 million dinars.”

The Iraqi law clearly applies to husbands who conclude illegal marriages, however the amendment in the Kurdistan Region applies to anyone who facilitates marriages outside the court, and could be extended to religious marriages religious leaders as well. In no cases in this program were husbands arrested or jailed for concluding a marriage outside of court, although small fines were imposed in a number of cases. Furthermore lawyers did not encounter any cases in which religious leaders were held to account for sanctioning child marriages in northern Iraq.

Fortunately by registering the marriage the courts do not penalize the victims, and the clients assisted in this program did not encounter serious legal obstacles to registering their marriages in the courts in order to file for divorce. However there were cases in which the abusive husbands' were resistant to registering their marriages, and only after considerable mediation would they finally agree to cooperate.

*Forced Marriage*²³

Forced marriage is not permitted under Shariah law which requires the consent of both parties to the marriage; it is also illegal under international and Iraqi law. In Iraq, anyone who forces an individual to marry may be penalized (PSL No. 188, Art. 9(1)). If the relative who forces the marriage is related in the first degree to the individual who is forced, the punishment can be up to three years imprisonment and a fine. If the person forcing the marriage is not a first degree relative, the judge can impose a prison term from three to ten years (PSL No. 188, Art. 9(2)). According to the PSL Article 9:

No relative or non-relative has the right to force marriage on any person, whether male or female, without his or her consent. The contract of a forced marriage is considered void if the marriage is not yet consummated.

The KRG 2008 amendment provides:

Even if the marriage is consummated, the contract shall be suspended.

²³See "Forced Marriage: Life and a Critical Destiny," People's Development Association (2010). This report looked at patterns and practices of forced marriage in Pishdar and Raniya, Sulaimaniya. Report can be found at www.niniliraq.org.

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The legal and practical effect of this amendment is unclear. A victim of forced marriage would still need to pursue legal proceedings to invalidate her marriage that is “suspended”; it would not automatically render a forced, consummated marriage legally void. If a girl was forced into a marriage, it is easier for her to get a divorce until she is 19 years of age. After that time has passed, she must proceed through the regular channels for securing a divorce, which is more complicated. The existence of this law is necessary for the State to show support for consensual marriages, however the language and implementation of the law are weak and do little to prevent what appears to be a pervasive practice.

Consummating a forced marriage is usually, if not always, through rape and, because there is not a marital rape provision, these women are left with little recourse. Instead sexual violence in marriage is normalized as part of a wife’s marital duties. The PSC allows a maximum sentence of 3 years for relatives and 10 years for non-relatives who violate Article 9 of the PSC. There are serious non-legal impediments to pursuing legal action in forced marriage cases. Girls cannot easily leave their homes to file claims in court, assuming they even know it is illegal and that they have this right. Girls being forced into marriage do sometimes run away and seek protection in women’s shelters where mediation is often successfully employed to convince families not to force a marriage, however during these mediations the law may be referred to, but social workers do not generally recruit lawyers to file claims in court, most likely in the interest of maintaining the family’s privacy to avoid a scandal.

No individuals pursued legal action against their parents, relatives or non-relatives for forced marriage through this program, however forced marriage was identified in many of the marriage cases as an underlying abusive factor that later led to many problems.

Recommendations:

- Improve the application of penalties for individuals responsible for facilitating forced marriages; ensure that religious leaders responsible for violating the law are also held legally accountable.
- Iraq should fully ratify CEDAW and remove the reservation of Article 16 to prevent abusive practices that are perpetuated by tradition, culture and religion.
- Raise awareness in urban and rural areas about the minimum age of marriage, and the rights of Iraqis to choose their spouses and consent to marriage.
- Establish mechanisms for victims of early and forced marriages to report and seek assistance to prevent these marriages.
- Provide appropriate shelter protection and services including mediation support for girls who run away to avoid forced marriage.

Divorce and Domestic Violence

Most of the cases handled through the Personal Status Courts involved victims of domestic violence seeking divorce. Divorce continues to be highly stigmatized in Iraqi society and many women remain in abusive marriages to avoid family and societal criticism. One of the greatest challenges domestic violence victims face is trying to ensure that they and their children’s rights are protected in the process and outcome. The fact that there is such a high stigma attached to divorce leads many victims of gender-based violence to give up rights to custody and dowry in return for a legal separation. Much of this is due to pressure by the abusive husband, his family, and the woman’s family.

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Personal Status Laws require that judges order mediation prior to granting a divorce in an effort to encourage reconciliation. Mediation is viewed as inappropriate by many domestic violence advocates who recognize that in the context of domestic violence the victim is in an unequal power dynamic and mediation encourages her to remain with her abuser. Many victims reconcile in order to avoid the risk of losing their children and to avoid other harsh consequences of divorce.

Another issue centers on polygamy and related abusive practices. Women assisted through this program faced accusations of adultery by husbands who pressured them into divorce in order to take another wife. In other cases women are pressured or forced to consent to a polygamous marriage.

A woman's natal family is often her main source of support, and many victims of gender-based violence find that their families support divorce and are willing to take them back. However others are threatened by their families for bringing shame, and these women risk being killed if they proceed with divorce.

Although women have the right under the law to file for divorce in certain enumerated circumstances, they find it difficult in terms of cost and time to prove legal grounds such as abuse. In addition, abusive spouses often manipulate the legal process in order to make it more difficult for the divorce to move forward. Yet this is necessary for many women who seek custody of children as well as financial support. Unfortunately many women give up key legal rights including their dowries, alimony and custody of children in order to obtain a divorce.

A woman with four children was forced by her father to marry her husband when she was 18-years old. Her husband abused her by verbally and physically assaulting her regularly, and by depriving her of financial support to meet basic needs. Once she contacted the police to report an incident in which her husband hit her hard on her head and injured her. The woman filed the suit due to domestic violence. Her husband through his lawyer continually sought to postpone court hearings, causing his wife extreme mental distress. The woman finally decided that getting the divorce was a priority above her other rights, and she changed the nature of the suit to give up her dowry in exchange for divorce. Once the divorce was final she said she felt that she was "born anew" by no longer having to live with her abusive husband.

Recommendations:

- Pass comprehensive domestic violence legislation pending in the KRG; draft and propose similar legislation to the Iraqi Parliament.
- Mediation assistance through the Personal Status Courts in divorce and separation cases should be optional, and should not be imposed on parties who file for divorce based domestic violence.
- Ensure that courts provide adequate opportunities for domestic violence victims to testify about domestic violence and present witness testimony.
- Train court personnel on the dynamics of domestic violence to improve awareness and response.
- Consider amending the Personal Status Laws to permit women to retain their dowries and to benefit from alimony and child support in cases where divorce is granted without proving grounds. This is necessary since abusers often pressure victims to give up legal rights in exchange for divorce, and in order to maintain these rights victims must currently prove legal grounds.

Bias among police, judicial investigators and judges

There are many judges, prosecutors, police and others working in courts and law enforcement who act in a professional manner, and with objectivity. Yet there are also individuals who act unprofessionally, and even abusively towards victims who are arrested for suspected criminal activity, and who go before courts in criminal and Personal Status Court cases. Biased attitudes towards women and girls generally, and towards victims in particular, were found among the police, prosecutors, judicial investigators and judges in the criminal and Personal Status Courts towards victims of gender-based violence and their legal counsel. Victims of rape and domestic violence, for example, were often blamed for the crimes perpetrated against them. In addition, lawyers were often criticized for representing victims of gender-based violence. Victims of gender-based violence often suffer social and community condemnation for being shameful persons who dishonor their families; this adverse reputation is often imputed to those who seek to represent and assist them. There is a failure to distinguish between the role of the lawyer and the legal case at issue. For example, if a lawyer represents a woman charged with adultery, the lawyer may be viewed as supporting the crime or immorality in general, rather than supporting the criminal defendant's right to legal counsel throughout the investigation and at trial.

The comments below indicate a presumption of guilt by police, investigators and judges of criminal defendants who are victims of gender-based violence. The comments also demonstrate a strong tendency to blame the victims without understanding the dynamics or nature of violence against women. Perhaps most alarming about these comments is the disturbing lack of compassion for the physical and psychological suffering of women and girls who encounter gender-based violence.

A victim of sex trafficking was arrested for prostitution in Kirkuk, and was insulted by the investigating judge and the chief of police. She was prevented from speaking and was then kicked out of the investigation room in the detention center.

Officers at a Kirkuk police station and detention center in Kirkuk insulted an elderly woman arrested for theft, stating "You are an old woman with grey hair, how can you steal things, how can you be a thief in this old age?"

A judge in Personal Status Court in Kirkuk stated to a victim of domestic violence, "You have a mental disorder; you are mad, you are a crazy woman. How can a husband get along with you?"

In a sex trafficking case in Kirkuk in which the victim was charged with prostitution, the Investigation Judge stated to the lawyer, "It is a shame that you defend such people."

In Kirkuk a victim of forced marriage explained to the Judge in the Personal Status Court that her father forced her to marry her cousin. The judge responded by stating "The girls of this era cannot be forced to marry. This is something of the past."

Police officers in a sub-district police station in the Kurdistan Region insulted a sex trafficking victim who was arrested for prostitution, stating "What about you, you seem as if you are shy—you have catered to ten men everyday, why are you feeling shy now?"

An investigating judge assigned specifically to gender-based violence cases in the Kurdistan Region insulted a victim of rape, forced abortion and forced marriage, stating, "If you were ethical and had good morals or manners you wouldn't have done such a thing as a child." The judge then said to the woman's lawyer, "Leave this case or she will make you like herself."

Bias among police, judicial investigators and judges

continued

A judge in the Kurdistan Region assigned specifically to gender-based violence cases said to a woman during the investigation that she was “a woman who does not observe moral norms.”

During an investigation, when discussing the paternity of a child born to a rape victim, the judge told a rape victim who was detained with her one-year-old child. “If you were a good person he would have admitted that it was his child.”

In Baghdad a victim of severe domestic violence was accused of killing her husband. The police officer harassed her saying, “You killed your husband because he didn’t satisfy you in bed.” During the criminal investigation the investigation judge said, “You killed your husband because you want to be a whore and do as you wish. What your husband did to you he did because he knew you were a bad woman.”

In Baghdad an adult female victim of sex trafficking who was charged with killing her husband said that she killed him, because he forced her to work as a prostitute. During the criminal investigation the investigation judge denied her the right to defend herself and said, “How can I be convinced that you are an honest woman and not engaged in prostitution while you are able to kill your husband. A bitch like you can do anything and you deserve to burn in hell.”

In Baghdad a woman’s husband forced her to work in prostitution and threatened to kill their daughters if she refused. She was arrested for prostitution and during the criminal investigation, the investigation judge said to her female lawyer, “Look, you are a beginner and an amateur so don’t let the whore’s tricks fool you, and for your professional reputation don’t get involved in such cases.”

In Baghdad, a victim of severe domestic violence filed for divorce against her husband for seeking a divorce, stating, “Shame on you. How can you divorce your man after all these years? What do you want to do—to marry again with a young man after you have become an old woman?” When the lawyer raised the history of domestic violence, the judge continued, “What is this nonsense that you are talking about? What is the history of violence? This nonsense you imported from the west will destroy our Muslim society.”

Recommendations:

- Provide gender-sensitivity training to police, judicial investigators and judges, particularly those working in the Personal Status Courts and Criminal Courts.
- Provide specific training to police and judicial investigators that identify the types of gender-based violence and the physical and mental problems that accompany them.
- Reinforce the presumption of innocence as applied to those suspected of criminal activity among law enforcement and judges.
- Ensure fair and adequate review of cases appealed by individuals on the basis that bias negatively affected the outcome of the case.

Evidentiary barriers to proving gender-based violence related facts

Facts involving a person's history of gender-based violence are often relevant in the criminal context as well as in matters of personal status. In cases of criminal defense, establishing a history of gender-based violence may serve to prove a defense to criminal activity under IPC Chapter Four, Section 1(2), Paragraph 62. A victim filing a criminal complaint must prove the gender-based violence in order to effectively achieve justice through prosecution and conviction. Under the Personal Status laws, gender-based violence is often a requirement in order to benefit from various forms of relief such as divorce.

Yet proving gender-based violence such as physical and sexual assaults is an intrinsically difficult task. Victims who delay reporting of violent acts due to fear of retribution, retaliation or further violence, may no longer show physical signs of bruising, cuts, burns or tearing. Victims are often disbelieved for not reporting gender-based violence immediately despite the risks to their personal safety if they do. Furthermore, violence does not always leave physical marks of evidence, and victims who are sexually assaulted, raped, beaten, kicked and subjected to other attacks may not have the scars to prove it.

Gender-based violence frequently happens behind closed doors and out of the view of family, friends, neighbors and community members. Oftentimes the testimony of the victim is the only evidence available unless the perpetrator confesses to the crime.

If the victim is charged with a criminal offence, her testimony alone is insufficient as proof of her innocence.

One testimony is not sufficient for a ruling if it is not corroborated by other convincing evidence or a confession from the accused. The exception to this rule is if the law specifies a particular way of proving a case, which must be followed.

ARTICLE 213 OF THE LAW ON CRIMINAL PROCEEDINGS

Such limitations make it difficult for victims to prove the violence or to claim a legal defence. This leaves victims vulnerable to being treated as perpetrators.

In the Kurdistan Region a juvenile victim of human trafficking provided testimony during her trial that she was forced into prostitution, and that she did not receive any money in exchange for sex, but that her traffickers were paid. The judge stated "You should provide direct evidence...such as the testimony of the men."

In the above case the girl had escaped from her traffickers and sought protection from the police. She told the police that she had been forced into prostitution. The police detained her, and failed to conduct additional investigation that could have led to evidence that would have corroborated the defendant's testimony. The judge accepted the victim's statement at the time of arrest that she worked in prostitution, but failed to seriously consider the rest of her statement in which she said that she was forced.

Rape cases are also quite difficult to prove, particularly if the victim was married and therefore presumed to have lost her virginity. Married women reporting rape risk being charged with adultery which is a deterrent to reporting criminal activity. If the woman is unmarried, she will likely be subjected to a hymen test to determine virginity, despite the fact that such tests are controversial and of questionable reliability. Thus these cases may come down to the testimony of the rape victim and the alleged rapist, and without corroborating evidence the victim's testimony alone may be insufficient to prove the crime.

Informal and non-legal justice mechanisms

The informal justice system in Iraq exists where disputes or conflicts between individuals, families and tribes continue to be resolved outside of courts. The primary adjudicators in Iraq in the informal justice system include tribal leaders, shaykhs, mullahs and other influential community leaders. These individuals often handle cases, including criminal matters, privately without reporting incidents to the police. In the traditional informal justice system, problems are sometimes resolved by committing crimes against women and girls by deciding to give a woman or girl in marriage to settle a dispute, or by agreeing to kill a woman who is deemed to have dishonored her family, tribe, village and community.⁷

The courts do not appear to have the requisite authority over powerful tribal, religious or party officials in certain cases where powerful and well-connected individuals and families are involved. Sometimes tensions arise between the legal and informal justice sector actors over who has control over individuals and cases and in what manner. A detailed review of how the informal justice system operates and intersects with the formal legal system is beyond the scope of this paper, and further analysis is warranted. Many Iraqis continue to prefer to solve personal matters outside of the court either because they prefer to keep these matters private, they do not trust the courts, or they do not want to be held legally accountable. In order to improve the rule of law in Iraq, courts must be recognized as having requisite authority to handle matters addressed by Iraqi law, and the law must be viewed as having supremacy over tribal and religious methods of resolving problems.

Conclusion

This is a critical time in Iraq's history as its people struggle toward a more democratic system premised on the rule of law. Integral to the effort of strengthening public and private institutions and building a stable society is the improvement of the status of women and girls and the elimination of barriers to equality, autonomy, and human rights.

Addressing violence and discrimination embedded in Iraqi laws and practices is necessary to comply with the Iraqi Constitution that guarantees women and girls, equality, and with Iraq's various international treaty obligations. As illustrated throughout this paper, there are a number of ways in which existing laws are harmful to women and girls and encourage violence and discrimination. Crimes involving gender-based violence should include sentences commensurate with the seriousness of the offenses. Other serious crimes that are not adequately criminalized such as domestic violence or human trafficking lead courts to apply alternate provisions such as assault, kidnapping, and rape charges that do not fully address the nature and scope of such criminal activity.

Existing laws that could be protective are often underutilized either because the victims find it difficult to access the courts, or because such laws are not drafted in a manner to deter criminal activity. For example, although forced marriage is illegal, the practice is pervasive and the legal system has been ill-equipped to adequately tackle this problem. Various rape-related laws do little to prevent or deter rape, and instead place women and girls in the vulnerable situation of marrying their rapists to avoid societal shame and dishonor.

Many women and girls detained for suspected criminal activity have suffered a history of gender-based violence. Many of them have never reported the abuse for various reasons, but these abusive incidents are often related to their legal issues. Law enforcement, investigators, and judges unwittingly disregard such information, or deny the relevance of such information when presented at trial.

Conclusion

continued

Yet a history of gender-based violence can provide compelling information in a criminal trial that could lead to reduced charges, a legal defense to criminal activity, or a mitigated sentence if considered and weighed by the courts.

It is not only the letter of the law that negatively impacts victims of gender-based violence, but the practice of law when it is biased and misogynist. Police, investigators and judges who make derogatory statements during investigation and trial about gender-based violence victims deprive them of due process. Furthermore, decisions about how a trial is conducted, whether witnesses can be presented, how defendants and witnesses are questioned, whether evidence is accepted and how it is weighed, are all relevant to ensuring a fair hearing.

Gender-based violence is difficult to address in large part because it occurs outside of public view. Many victims who try to seek legal rights or to defend themselves against criminal allegations also face many unseen pressures by family members, tribal leaders as well as perpetrators of crime to give up legal rights to avoid drawing attention to perceived shameful matters involving the family. Mediation when done from a client-centered gender sensitive approach has proven to be a useful tool to prevent violence against women. Yet traditional mediation has in many cases sacrificed the well-being of women and girls in the interest of protecting the family or tribal unit. For example “consent” by a rape victim to marry her rapist must be understood in the context of her extremely limited choices of marriage or being victim to an honor killing. Consent in such cases cannot be said to be meaningful.

Addressing legally institutionalized violence against women requires a real commitment by the government to tackle these issues on multiple fronts. One of the most salient options is to start by reviewing and recommending revisions to the Personal Status Codes, the Iraqi Penal Code and the Criminal Procedure Code in order to bring these laws in line with international norms as well as Constitutional guarantees. Also critical to these efforts is the provision of mandatory gender-sensitivity training and practical skills training to improve professionalism of all aspects of criminal and family court cases. It is important to establish policies and protocols for handling sensitive cases involving gender-based violence in order to better identify and respond to the needs of victims, to avoid treating victims as criminals, and to prevent impunity of perpetrators.

These changes can be made. What is required is the commitment from the relevant authorities, and an improved awareness and understanding of these issues throughout the legal profession, civil society, the media, and Iraqi society as a whole. This is an opportune time, and failure to address these issues will ensure that another generation of Iraqi women and girls will face severe forms of violence and hardship.

