

Iraq's Burgeoning Judiciary: Current Issues and the Best Way Forward

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Following the United States takeover of Iraq in 2003, the Department of Justice released an assessment of Iraq's fractured judiciary. Corruption, public distrust of the courts, and other roadblocks provided a bleak outlook for the rebuilding of the Iraqi judiciary. Nevertheless, recent large-scale judicial reforms have been moderately successful, including the separation of executive and judicial power, guarantee of due process, and efforts to protect the system from corruption, bribery, and political pressure. Now, during a period of relative stability, the Iraqi government must focus the improvement of the judiciary on four major areas: judicial independence, the debate between transparency and national security, the ability to prosecute high-ranking officials, issues with Kurdish autonomy, and international assistance and training. While each of these issues is complex, this research asserts that there are six crucial improvements that will best enhance the Iraqi judiciary going forward. These improvements include increased courthouse rehabilitation to provide security for judges, a policy of erring on the side of transparency instead of worry over national security, a focus on promoting judges by merit instead of removing them through review, the rolling back of the ministerial protection law, a movement toward the election of judges instead of appointment, and an initiative to educate the Iraqi people and judiciary on the rich history of Iraqi law, as Iraq was the birthplace of codified law. If these improvements begin to be implemented now, they will ensure solid and sustainable growth of the Iraqi society and economy in the long-term.

Following the United States' takeover of Iraq in 2003, the Justice Department released a report detailing the fractured state of Iraq's judiciary system (United States General Accounting Office 2004, 82). Corruption, public distrust of the courts, and a host of other problems plagued the country's non-independent judicial branch. However, attempts by the Coalition Provisional Authority and the new Iraqi government to restructure and improve the legal system have been moderately successful. These developments can offer Iraqi citizens and businesses the insurance to safely operate in a free society. Now, with decreased levels of violence due to the United States' troop surge and insurgent ceasefires, Iraq is poised to enter a new phase of its political development. The government can and must use this opportunity to establish the judiciary's independence and sturdiness by increasing transparency, building national pride around Iraq's legal history, rethinking the term limits and elections of judges, and funding large-scale judicial security projects.

Historical Background

Shortly before the United States invaded Iraq in 2003 the Iraqi judiciary lacked any legiti-

macy due to its dependence on a powerful executive branch; however, this was not always the case. The trouble began when Saddam Hussein, following his succession to the presidency after Ahmad Hasan al Bakr, abolished the Council of Judges in 1979. This council had been established in 1963 to provide oversight for corruption in the judiciary, as well as to appoint judges to fill vacancies (Coalition Provisional Authority 2003). After the council's abolishment, Hussein began to exercise his own executive authority over judicial appointments. In 1988, the judiciary was given a complete overhaul by Hussein during a governmental "transitional" phase, which meant that rule by decree would be the standard indefinitely, or at least until Hussein felt the Baathist vision of Iraq had been achieved. Hussein structured the courts so that he had appointment power for all judges and could override any judicial decision. He additionally placed his own Ministry of Justice over the court system as an overseer. The Ministry of Justice then created general and secular courts for civil, criminal, administrative, and other matters. Religious sharia law courts were also added to specifically settle cases regarding the religious affiliation of Sunni and Shia Muslims, and to resolve disputes over administration of religious "waqfs" (trusts or endowments). Various minority

religious groups were given their own courts to settle personal status disputes as well. Hussein also created a second, separate court system under the Revolutionary Command Council to handle espionage, treason, and “antistate” cases (Metz 1998). Essentially, this was the court of Hussein’s secret police and it severely undermined the public’s trust in the fairness and protection of the court systems.

In addition to undermining the independence of the judiciary, Saddam also paved the way for the separation of the Kurds from the national court system, the effects of which still exist today. A 1974 amendment to the Constitution provided autonomy to the Kurds in the region where they were the majority of the population. Both the Kurdish PUK and KDP parties vouched for and received judicial systems independent of each other. The parties agreed to use the Iraq legal code and the central government in Baghdad still maintained tight control over police forces and the administration of justice (Metz 1998). Hussein’s grant of autonomy to the Kurds has made it difficult for modern judicial development in Iraq to form around a central government, as the Kurds are now used to their own self-rule.

Judicial Reforms

The Iraqi court system has undergone a massive structural overhaul since the fall of Saddam’s regime. The federal judiciary is now comprised of the Higher Judicial Council, Federal Supreme Court, Court of Cassation, Public Prosecution Department, Judiciary Oversight Commission, and other smaller federal courts. The Higher Judicial Council plays a supervisor role over the court system. The Federal Supreme Court is the highest court in the country and has the final authority on legal decisions. Supreme Court members are appointed by the Prime Minister and confirmed by the Council of Representatives (the 275-member elected legislative body). The Court of Cassation is the highest court for criminal matters (United States Department of State). The Revolutionary Court, in addition to other secret police tribunals, has been abolished under the newer system, restoring the faith of some Iraqis in free and fair trials.

Along with the new structure, the Iraqi federal court system has developed advanced legal rights and procedures to ensure protection of participants and detainees. For instance, a flurry of new civil

rights have been adopted including the inadmissibility of evidence extracted by torture, an inviolable right against self-incrimination, a right to assistance of counsel throughout all stages of criminal proceedings and at government expense if necessary, and the right to be informed of the foregoing of rights (Foreign & Commonwealth Office). In order to eliminate unfounded charges, investigative judges in criminal proceedings will review evidence and decide whether or not to proceed with a criminal prosecution (Sung 2007). Additionally, the Ministry of Interior and Iraqi Corrections Service both bear responsibility to ensure that criminal suspects receive an initial hearing over their charges, which they are entitled to within 24 hours of their arrest. In order to prevent police corruption and prisoner abuse (as was the case in the former regime), suspects that are detained following the initial hearing are not returned to police custody, but are instead turned over to pre-trial detention centers administered by the Ministry of Justice (Foreign & Commonwealth Office). This system of checks and procedures has helped eliminate problems that might have carried over from years under Hussein’s regime.

Because of the developments in structure and procedure, the current Iraqi court system has developed accessibility and momentum. Hundreds of judges have been trained since the fall of Saddam Hussein. According to the White House, only 4,000 felony cases were resolved in Iraqi courts in 2003. However, those numbers doubled by 2004, and in 2005, the courts resolved more than 10,000 felony cases. The court that has seen the most progress, however, has been the Central Criminal Court of Iraq, which at first only had the capacity to prosecute fewer than 10 trials and investigative hearings per month. The Court was then able to handle more than 50 multi-defendant trials and 100 investigative hearings in the first two weeks of September 2005 alone (Bush 2005). In 2007, just one of the Central Criminal Courts in Baghdad handled nearly 24,000 cases alone. This incredible growth has led to problems of unmanageable caseload, leading to questionable outcomes of quickly reviewed cases. Judge Faiq Zaidan of the Central Criminal Court believes, however, that the issue is, “something that will require more time.” (Temple-Raston 2008) In the mean time, separate court branches are slowly developing in local provinces, providing a more accessible system to handle cases that may not be able to gain traction at the crammed federal level (Bush 2005).

Areas of Focus and Development

With a new judicial structure in place, there are five major areas of focus and development in Iraq's legal system: judicial independence, transparency in the judiciary, the ability to prosecute high-ranking officials, Kurdish autonomy, and international aid and development.

Judicial Independence

Quickly after the United States' invasion of Iraq in 2003, the Coalition Provisional Authority reinstated the Council of Judges (now called the "Higher Judicial Council") that Saddam abolished in 1979. This council took the place of Saddam's Council of Ministers and established the judiciary as a separate branch of government with its own budget, payroll, and property (Foreign & Commonwealth Office). It is charged with supervising the judicial system by investigating for corruption and incompetence, and also oversees the maintenance of the court system. The Council of Judges has also been charged with appointing people, most of which have been lawyers, to fill judicial and prosecutorial vacancies (Coalition Provisional Authority 2003). The primary use of lawyers to fill vacancies is a drastic change from Saddam's Baathist patronage system and fortunately, "there are a great number of skilled lawyers," in Iraq (Pollack 2006, 85). In time, the appointment process will likely change as the Council of Representatives drafts legislation to decide the permanent process. This will likely leave the Higher Judicial Council in charge of administrative tasks only.

While the structural independence of the judiciary has developed, the system still struggles with issues of corrupt judicial loyalties, especially with Baathism. A large part of the CPA's initial efforts in the judiciary were focused on establishing the Judicial Review Committee in order to review all of Iraq's prosecutors and judges so that unsuitable ones could be removed. The committee used merit, Baathist affiliation, and possible corruption as their filters. It reviewed about 870 judges and prosecutors and removed about 20 percent of them. Additionally, the United States General Accounting Office reports that the committee appointed 110 new judges and prosecutors and reinstated 80 who had been removed under the former regime (82). Kenneth Pollack, a former CIA intelligence analyst, former National Security Council staff member, and

expert on Middle East politics notes that, "Considerable progress has already been made," but goes on to add that the judiciary "still includes far too many judges appointed under Saddam's reign whose loyalties, values, and capacities are suspect." Pollack also worries that the process of searching for corrupt judges may be missing the point. He notes, "The process has not been transparent and, at least so far, it has focused on removing those most loyal to the Baathist regime as well as the most corrupt, rather than retaining the most competent."

Judicial independence is also faced with the difficult issue of political and social pressures in Iraq. Dr. Ahmed Jabre Attwan, a legal expert at the College of Law at Baghdad University believes that, "The government has to protect the judicial system from any pressure from influential political parties or any social influences to achieve this independence for this important sector." (Global Policy Forum 2006) Attwan would like to see tougher measures imposed on those that try to exploit the legal system for their own gain. To make matters worse, local militias control areas in Iraq, thereby forcing judges to cater to the militia's agenda or else risk death. In 2006, at least 11 judges were killed by suspected militia violence. A 65-year old Iraqi lawyer who spoke on the condition of anonymity notes that, "We can't do our job properly with all these pressures. They [militias] are controlling everything everywhere, and they do whatever they want. They don't even hesitate to put pressure on us openly." (Global Policy Forum 2006)

Efforts are being made, however, to help judges feel independent of external forces. Two measures in particular have been successful in this cause. The first has been an increase in the salary of judges in order to dampen the appeal of bribes. Second, security for judges and courthouses has been increased dramatically in order to lessen the chance of a successful violent attack on a judge. Judges and their families are given around the clock protection by state-subsidized security details (Pollack 2006, 86). Courthouses, most of which have been destroyed or severely damaged, have undergone large-scale reconstruction. In order to maintain security for courthouses and other government buildings, the CPA created the Iraqi Facilities Protection Service and endowed it with basic equipment. Despite all of the efforts, however, courthouse reconstruction projects have slowed due to budgeting problems. One former CPA official noted in 2004 that, at the time, the fortification of courthouses was not adequate enough to ensure

the security of court personnel (United States General Accounting Office 2004, 82). Nevertheless, construction projects have continued in order to help aid judicial independence.

Experts believe that there are additional measures that can be taken in order to fight corruption and to relieve political pressures on the judiciary. In *A Switch in Time: A New Strategy for America in Iraq*, Kenneth Pollack proposes two solutions. He believes a better way to weed out the corrupt judges from the bench is to create a judicial promotion committee that emphasizes scouring each judge's background. He adds that, "it might be ideal to include well-regarded judges from foreign countries on these panels to ensure an outside and, hopefully, unbiased perspective in the process." Pollack also believes that strong political pressures can be blunted if the Iraqi government adapts the United States' view on judicial term limits. Pollack states that, "The tenure of senior judges (including the Court of Cassation, Iraq's "Supreme Court") should be lengthened to insure judges to political vicissitudes." Pollack believes that improvements to the judiciary's independence like these are crucial to developing Iraqi trust in the court system, and in return, sturdier economic development as Iraqis believe the court system will protect their businesses (85).

Transparency

In the effort to engender trust in the judiciary among Iraqis, transparency of the judicial process has been a roadblock. The difficulty facing transparency right now is a tendency on the part of Iraqi government, with the backing of U.S. advisers, to err on the side of secrecy when releasing documents from court proceedings. The reasoning for this trend is because of the great demands required by national security. While this reasoning is understandable, Kenneth Pollack suggests that the threat of a, "judicial process that is seen by the public as arbitrary and corrupted," is being "vastly outweighed" by the threat of long-term damage to national security. Pollack adds that the only way to defeat the insurgency is to, "create a strong state through a process of good government." Additionally, Pollack asserts that the only true way to fight judicial corruption is allow the release and public archiving of all documents detailing court proceedings. This way, any committee that monitors judicial corruption will have a record of data to prove their case (86).

Prosecution of High-Ranking Officials

Iraqi judges are finding it extremely difficult to investigate high-ranking Iraqi officials due to a law added to the criminal code in 1971. The law, known as 136B, was originally created to protect lower-level officials such as police officers (Temple-Raston 2008). Under the law, a governmental corruption case cannot be filed against a former or current minister without that minister's permission. Additionally, that minister can immunize any of his subordinates, protecting them from corruption cases as well. When U.S. administrator Paul Bremer first took power over the Coalition Provisional Authority, he suspended 136B. Iraqi Prime Minister Nouri al-Maliki, however, reinstated the law, supposedly to protect his ministers from political targeting (Pincus 2007).

United States officials have become increasingly concerned that this reinstated law is allowing corruption to run rampant in the current Iraqi government. The special inspector general for Iraq, Stuart W. Bowen Jr., said that the reinstating 136B, "effectively creates an undemocratic bulwark against enforcement efforts to fight corruption in Iraq." Bowen suggests that the use of the law in several corruption cases was politically motivated. These cases included an Oil Ministry employee who manipulated bids for contracts totaling \$2.5 million, and a \$5 million illegal advertising contract created by the Supreme Electoral Commission, among others (Pincus 2007). Even worse, the law allows ministers to engage in blatant sectarian violence, such as in the case of the basement of the Interior Ministry where hundreds of Sunni detainees were tortured. Overall, the law "gives ministers a judicial role," says Judge Faiq Zaidan. Efforts are being made by the U.S. Embassy to pressure the Iraqis to roll the law back. U.S. and Iraqi officials note, however, that the law is likely to remain, as rolling it back would leave the current Iraqi government vulnerable to investigation as well (Temple-Raston 2008).

Kurdish Autonomy

A central problem facing the future of Iraq's legal system is whether or not the northern Kurdish region of Iraq should be able to continue to develop its own independent legal institutions. During the creation of the Transitional Administrative Law in Iraq, debates over Kurdistan's autonomy were especially polarized between the Kurds and the U.S.-backed Arabs. Having been through a difficult relationship with a central Baghdad government in

the past (including the Anfal genocide), Kurdistan was unwilling to allow for a strong federal government. It desired almost complete legal autonomy to conduct its own foreign policy, control its own resources, and to control its own fiscal policy. The Arab desires, which were backed by the United States, were to create a strong central, not federal, government in Baghdad that ruled over the entirety of Iraq, treating Kurdistan as it would any other region. This view was consolidated in the "Pachachi draft," named after a Sunni Arab member of the Governing Council. The draft declared the Kurdistan Regional Government to be, "a subordinate level of the government of Iraq," and called for the elimination of Kurdistan's already separate judiciary (O' Leary 2005, 59).

The Transitional Administrative Law (TAL) was created with a compromise between Iraq's Arab and Kurdish populations. The TAL places the pressure on both a national federal government in Baghdad as well as the federal entities to decentralize power "where practical." It recognizes that the government will be bi-national in application and that Kurdistan has the power and right to maintain its own internal security and judiciary, but must negotiate resource management, fiscal policy, and foreign policy with the federal government (O' Leary 2005, 60). Thus, Kurdistan still operates under its own court system for now and probably will continue to in the foreseeable future.

As Kurdistan's situation settles out more over the next few years, it is likely that the Kurds will be granted their own court system. The reasoning behind this is that efforts like the TAL set Kurdish independence in motion, an effort that a majority of Kurds favor. Additionally, many of the young Kurdish people have been educated as "Kurds" and speak almost no Arabic. This is likely to lead to a desire for separate services and institutions for the Kurds instead of, for example, a court system largely tailored toward Arab-speaking groups. One possible roadblock to this independent court system, however, is that there are significant minority groups including a large number of Turcomans on the border between the Kurdish and Arab parts of Iraq. These groups face pressure from both sides on a variety of conflicting issues between Kurds and Arabs (Cordesman 2007, 5). Their status within the legal systems will have to be determined in the future, and their case may lend more credence to a simpler, unified central court system.

International Aid and Development

A large portion of the international aid given to Iraq has been focused on the judiciary. Legal experts, lawyers, and judges from around the world have visited Iraq to help train judges and prosecutors, develop legal education, and assist with court proceedings. One such benefactor has been the Foreign & Commonwealth Office (FCO) of the United Kingdom's government. In addition to contributing over £2.1 million toward the rehabilitation of the judicial system, the FCO has trained 300 members of the Iraqi judiciary, with 60 of those being trained in the United Kingdom (Foreign & Commonwealth Office). Other international experts have taken on the task of trying to instill a sense of pride in members of the Iraqi legal system. Melissa Waters, a visiting professor at Case Western Reserve University's School of Law and acting director of Case Western's Frederick K. Cox International Law Center's War Crimes Research Office, makes a point of telling the Iraqi attorneys that she works with that they come from an incredibly rich legal tradition. She asserts that, "What most people do not know about Iraq is that it is the birthplace of codified law, a legal system used by much of Europe and most of the world." She also notes that Iraq was a founding member of the United Nations and is a signer of the Universal Declaration of Human Rights (Griffith 2004).

Melissa Waters' personal involvement in the international development of Iraq's legal system represents a broader trend of incredible focus on human rights law within Iraq. Waters joined legal experts from Canada, Ireland, Scotland, Egypt, and the United States in order to give lawyers that practiced law under Saddam's regime a crash-course on international human rights law. The course has been administered in a series of sessions sponsored by the International Legal Assistance Consortium. In order to reach one particular session, forty-eight Iraqi defense attorneys risked their lives as they traveled by twos in unmarked cars along the war-torn route to Baghdad's airport to reach their flight to the United Arab Emirate of Dubai for their training (Griffith 2004).

In some cases, international legal experts will go to Iraq to assist with development. In one instance, Professor Michael Newton from the Vanderbilt University Law School served as an adviser to the judges of the Iraqi High Tribunal. In a lecture entitled "The Iraq Genocide: Personal Perspectives and Legal Residue," Professor Newton described his particular assistance in war crimes trials for the Kurdish Anfal genocide. He discussed

and displayed the rigorous work and technology needed to prove a human rights violation. He also lauded the professionalism, patience, and attention to detail that the Iraqi lawyers have displayed in their training and subsequent prosecution of Anfal participants. In fact, Professor Newton noted that the Iraqi prosecutors were among, "some of the best lawyers I have ever worked with." The take-away from his lecture was that international legal experts, much like the ones he has worked with, have generously donated large amounts of time and energy to developing Iraq's judiciary. He noted that, given Iraq's history with the Anfal genocide, international human rights law has received the bulk of the attention and has matured into a legal code that rivals western nations (Newton 2007).

A Path to Improvement

Despite the obstructions Iraq faces in the continued development of its legal system, there are six improvements that can be made to develop a stronger, more respected judiciary. The first of these is to fund a large-scale courthouse rehabilitation project, much like Pollack suggests. The current project for courthouse rebuilding and fortification has stalled due to budgeting problems. This has presented one of the most significant delays in the development of the judiciary in Iraq. Courthouse rebuilding and fortification will increase the number of cases that can be tried and help ensure that judges are free from violent external actors. If a new source of funding can be located, then the Iraqi Facilities Protection Service could buy new equipment, hire more personnel, and pick up the pace of its project. The funding itself could come from a variety of sources, but would likely have to be budgeted from oil revenues once a sharing agreement is signed.

Second, the Iraqi judiciary must develop a policy of increased transparency. Given the country's history with the Revolutionary Court and secret police, the judiciary has a poor public image. Transparency of proceedings will help develop trust in the system. Additionally, as Kenneth Pollack states, transparency is the best tool for outing corrupt judges, and will go a long way toward legitimizing the courts (85).

Third, the Judicial Review Committee must begin to transition from reviewing the records of current judges for corruption to becoming the committee that instigates judicial promotion.

Kenneth Pollack laid out this idea as well (85). Such a committee could offer an incentive for judges to act fairly by offering promotions based on merit. Additionally, as a part of the promotion process, this committee could incorporate a review of the judge's past record to scan for the possibility of corruption. The use of the Judicial Review Committee's resources and time would be better spent as a promotional committee, especially now that a majority of the current judges have been reviewed. A system of promotions will ensure that the most qualified judges fill the higher-level positions in the judiciary, which will additionally strengthen the perceived legitimacy of the system.

Fourth, the Iraqi Parliament must roll back law 136B. The law undermines the judiciary's fundamental duty to pursue government corruption cases. Since the law has been reinstated, billions of dollars have been misused and ministers have had the power to engage in sectarian violence without prosecution (Pincus 2007). If the judiciary is to be able to protect its citizens and businesses, it must have the ability to battle government corruption. Hopefully, a compromise can be struck that will allow 136B to be eliminated.

Fifth, while the system of federal judicial appointments is developing as a power of the Prime Minister and Council of Representatives, provincial judges should be selected in a different way to ensure maximum democratic participation. The eventual goal should be for provincial judges to be elected by a direct vote of the area population. This would ensure that the Iraqi constituency would feel a sense of investment and power in the judiciary. Additionally, these local judges could protect the rights of their local population, whereas appointed judges may not necessarily reflect the ideals of the local community. On issues of contention between separate local judiciaries, the Supreme Court could function much as it does in the United States by resolving matters of differing legal outcomes for issues that relate to federal law. This system should not be developed immediately, however. For a transitional period, provincial judicial appointments should be based around a process like the "merit plan" (or "Missouri plan") in the United States (Murphy 2006, 153-154), where a screening committee like the Higher Judicial Council screens judicial candidates based on merit, then allows the Prime Minister to select his or her appointment only from that list. Following one full term of that appointed judge, the judge would become subject to elections every cycle. Such a system will ensure

that the development of the judiciary remains in the hands of actors that have experience in the legal system, and will also ensure that possible corrupt candidates do not find their way past screening and onto the bench. Additionally, such a process will build a sense of political compromise between Iraqis and their government, as the Prime Minister and local constituencies must work to approve the appointments of judges.

The sixth and final needed improvement to Iraq's judicial system is an educational initiative to create a sense of investment and pride in Iraq's judicial system. As Melissa Waters stated to the Iraqi defense attorneys she worked with, Iraq is the birthplace of codified law (Griffith 2004). A large-scale educational campaign could develop a strong sense of national pride for Iraqis learning to trust the new court system. It could also strengthen the commitment of Iraqi prosecutors and judges who are risking their lives to develop the legal system.

Conclusion

The development of the Iraqi legal system since the fall of Saddam Hussein has been a relative success. Problems still persist with security, transparency, and judicial independence; however, the court system has seen significant improvement in its ability to handle increased caseloads and to earn trust from the population. The most significant achievement of the new system is the avoidance of past problems. Civil rights including due process have replaced the midnight trials of Saddam's Revolutionary Court, providing a sense of legal legitimacy among Iraqis. The selection of judicial and prosecutorial appointees based on merit, as opposed to the loyalist appointments of Saddam, has also developed the legitimacy of the court. This newfound legitimacy will not only attract Iraqi citizens and entrepreneurs, but will also attract foreign investment, which will rapidly increase the speed with which Iraq's economy develops. With room for improvement, the court system has developed and stabilized relatively well given its violent environment. With continued international support, as well as improvements to security, transparency, historical education, judicial appointment and candidate review, the Iraqi system will return once again to the pride of being a revolutionary system of law.

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