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Iraqi Civil Law: Land, Refugees, and the Legal Framework

Legal Disclaimer

Any opinion expressed is purely my own. I represent neither the U.S. Army nor the Department of Defense.

The Displacement Situation

- More than 4.5 million Iraqis have fled their homes since the 2003 U.S.-led invasion, making it the largest refugee crisis in the Middle East;
- About 1.2 million Iraqis are in Syria, at least 500,000 are in Jordan and 350,000 are in Egypt, Lebanon and Persian Gulf nations;
- Close to 2 million are displaced within Iraq.

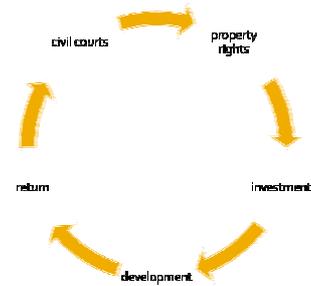
Guiding Principles on Internal Displacement

Principle 28: National authorities have the “primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.”

Civil Courts Are Important

- Prosperity and property rights are inextricably linked. The importance of having **well-defined** and **strongly protected** property rights is now widely recognized among economists and policymakers. A private property system gives individuals the exclusive right to use their resources as they see fit. That dominion over what is theirs leads property users to take full account of all the benefits and costs of employing those resources in a particular manner. The process of weighing costs and benefits produces what economists call efficient outcomes. That translates into higher standards of living for all.
- Gerald P. O'Driscoll Jr. and Lee Hoskins
Property Rights : The Key to Economic Development (2003)

Civil Courts Are Important



Civil Courts Are Important

- Not only for the displaced – for everyone.
- An essential part of a functioning state – a must.
- In contemporary Iraq, aside from Order 101 and Decree 262 – they're the only game in town.

BLUF #1

- International actors seeking to create mechanisms for property restitution should look to the organic legal system early on to avoid needless repetition, tinkering, and to maximize domestic involvement.

BLUF #2

- Domestic institutions such as civil courts must be incorporated into restitution schemes as (a) they are naturally vested with jurisdiction; (b) their existing legal infrastructure may assuage operational difficulties; and (c) their enforcement mechanisms will ultimately be needed to enforce judgments.

BLUF #3

- Maximizing the involvement of the domestic legal system and institutions serves to increase the rapidity, efficacy, and legitimacy of the restitution mechanism.

A typical scenario

- Bilal al-Mashhadani, a 45-year-old Sunni teacher, is still afraid to return to the Baghdad home he fled after five black-clad Shiite gunmen, whom he recognized as members of the Mahdi Army militia, came to his house and told him he was no longer welcome in the neighborhood.
- The next day he found an envelope on his doorstep. It contained a bullet and a letter saying "leave or die."
- Al-Mashhadani, his wife and three daughters packed what they could, locked the door and on Dec. 20, 2006, fled to the Amariyah district of Baghdad.
- There, Sunnis were welcomed and it was Shiites being made to feel unwelcome. But with so many Sunni influx pouring in, rents went up. Al-Mashhadani is paying \$210 a month, 83 percent of his monthly salary as an Arabic teacher.
- Meanwhile, the militiamen have moved a Shiite family into his original home in the Hurriyah district of Baghdad. He says he asked them through intermediaries for rent but they refused.

The Legal Foundation

The Iraqi Civil Law System

from 10,000 feet high and at 500 miles per hour.

Key Dates in Iraqi Legal History

- 1760 B.C. – Codex Hammurabi (ancient Babylon)
- 7th Century – rise and development of Islamic law
- 13th – 15th Century – Ottomans expanded power in the Middle East
- 1804 – French *Code Civil* (Portalis)
- 1869 – Ottomans enact code of laws known as the Mejlle (Cavdet Pasha)
- 1876 – Egypt signs treaty with European powers allowing for “Codes Mixtes”
- 1914 – 1932 – Modern state of Iraq carved out by British
- 1949 – Egyptian Civil Code enacted (Sanhuri)
- 1953 – Iraqi Civil Code enacted (Sanhuri)

Iraqi Civil Law: Its Purpose

Governments have sought to concentrate power and assimilate modern Iraq’s diverse ethnic and cultural groups into a single nation through the enactment of the **Iraqi Civil Code** and the **Iraqi Code of Personal Status**.

Those legal documents have, for decades, comprised the bulk of modern Iraqi civil law.

Abdel-Razeq Al-Sanhuri

The author of the Iraqi Civil Code



Abdel-Razeq Al-Sanhuri

- A widely-respected comparativist in the Middle East;
- Part of an intellectual movement in the Middle East that identified with European countries and traditions while simultaneously maintaining a nationalistic ideology that valued Middle Eastern culture and identity;
- His work is characterized by a blend of European and Islamic legal principles and a preoccupation with incorporating the Islamic legal tradition into modern civil codes.

Abdel-Razeq Al-Sanhuri

- Initially asked to create an Iraqi Civil Code in 1933 (scuttled);
- Invited back in 1943 to complete the work;
- The Iraqi Civil Code was enacted on September 8, 1951 and became effective two years later on September 8, 1953.

Iraqi Civil Code

- Based on the Egyptian Civil Code which is based on the French Code;
- Incorporates elements of the *Mejelle*;
- Even incorporates a few elements that predate the *Mejelle*.

Iraqi Civil Law

- The Iraqi Civil Code represents a synthesis of Western civil law (mostly inherited from the French via the Egyptian Civil Code) with Islamic legal principles.
- An analysis of the substantive law reveals a sophisticated blending of the two systems in a way that allowed Iraq to possess a modern civil code that was compatible with Western countries while maintaining ties to traditional Islamic law.

Iraqi Civil Code

- **Article 1:** The **written provisions** of the Civil Code are dominant. When the written law is silent on a certain topic, Iraqi courts will decide matters in accordance with normal **custom and usage**. Should there be no applicable custom or usage to which the court can turn, then an Iraqi court may look to **Islamic Shari'a** to decide the merits of an issue. Otherwise, courts may look to the principles of **equity** in making decisions. In all instances, Iraqi courts may be guided by **Iraqi jurisprudence** and the **jurisprudence of other countries with legal systems which are similar to the Iraqi legal system**.

Iraqi Civil Code

"The main difference [in the Iraqi Code] from the Egyptian code is the provision that the principles could come from any school, which is an explicit recognition and inclusion of Sunni and Shi'ite jurisprudence. In Egypt Al-Sanhuri had objected to such a clause on the grounds that it was redundant in a country of Sunnis, since a principle by definition rose to the level of uniform acceptance across the Sunni schools. In the case of Iraq, however, the failure of a Sunni-dominated government to include such a provision would be understood as an intentional and unacceptable exclusion of Shi'ites"

-- Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 *GEO. WASH. L. REV.* 176, 176-77 (1953).

Iraqi Civil Law (Property Law)

"Iraqi property law is based on continental civil law but is heavily influenced by Ottoman law and, to some extent, traditional Islamic legal principles. One even sees glimpses of ancient Mesopotamian law and faintly hears the echoes of Hammurabi."

Iraqi Civil Code

- The Iraqi Civil Code recognizes the right to complete private ownership of property;
- Ownership vests the owner with the absolute right to dispose of his or her property through use, enjoyment, and exploitation of the thing owned, its fruits, crops, and anything the property produces.

Iraqi Civil Code

- The owner of the property is considered to be the owner of everything commonly considered to be an essential element of it.
- Property in Iraq may be owned by a single owner or jointly.
- The "dismemberments" of property.

Possession

- The Iraqi Civil Code defines possession as the physical domination, directly or through an intermediary, of a thing which may be the subject of a pecuniary right.
- This is the typical “right of possession/possessory action” that exists in civil law systems.

Possession

- If dispossessed of property, the possessor of an immovable may apply to the court within a year of the date of dispossession to have the immovable restored to him or her. If the dispossession was clandestine in nature, the time limit for bringing the action begins when the dispossession was revealed.

Possession

- If the person who was dispossessed has not been in possession for a year, he may not recover possession except from someone with inferior possession.
- The best possession is by a person with title. When two people have title, the person with the oldest title has better possession.

Possession

- If possession is coupled with *coercion*, obtained *secretly*, or *ambiguous*, it has *no effect* against the person coerced, the person from whom it was concealed, or the person who was confused as to its nature.
- Likewise, if a person has been dispossessed but reinstates his or her possession through coercion, the original dispossessor may go to court and get a judgment reinstating his possession.

Tolling of Prescription

- The Iraqi Civil Code tolls the running of prescription where there is an impediment rendering it impossible for the plaintiff to claim his or her right.
- This rule reflects the civilian concept of *contra non valentem agere nulla currit praescriptio*, a Latin maxim meaning that prescription does not run against a party unable to act.

The IPCC

The initial regulation authorizing the creation of the IPCC was promulgated on 14 January 2004. This statute, and its annex, authorized the establishment of a claims commission to resolve claims arising **between July 17, 1968 and April 9, 2003** involving **immoveable property**, assets affixed to immoveable property, easements, or servitudes that were: (i) confiscated or seized for reasons other than land reform; or (ii) expropriated for reasons other than lawfully used eminent domain, or as a result of opposition to **the Ba'athist Government of Iraq**, or as a result of ethnicity, religion, sect of the owners, or for purposes of ethnic cleansing; or (iii) acquired for less than appropriate value by the Ba'athist Government of Iraq; or (iv) property otherwise affected.



The IPCC

- Article 10 of that annex provided the following:
- Newly introduced inhabitants of residential property in areas that were subject to ethnic cleansing by the former governments of Iraq . . . may be (i) resettled, (ii) may receive compensation from the state, (iii) may receive new property from the state near their residence . . . or (iv) may receive compensation for the cost of moving to such area.

The IPCC

- Article 8 of the initial promulgating regulation contained a list of thirteen general principles to guide the IPCC in the adjudication of claims.
- "The IPCC shall comply with the following principles when resolving property claims. The Governing Council shall issue more detailed provisions regarding the process in the Guidelines and Instructions."
- These general principles were not taken from the *Iraqi Civil Code*.

The IPCC

- The initial regulation contained a filing deadline of 31 December 2004.
- On 24 June 2004, the week the CPA dissolved, the CPA promulgated *Coalition Provisional Regulation Number 12*, noting that the initial regulation did not provide adequate mechanisms for the operation of the IPCC.

The IPCC

- The new regulation included two annexes containing more detailed procedural and structural information.
- The juris. of the IPCC was expanded to include claims arising between 18 March 2003 and 30 June 2005.
- Its jurisdiction was expressly made exclusive
- The filing deadline was also extended to 30 June 2005.

The IPCC

- The general principles only address property that was confiscated or seized by the Ba'athist regime. It would be impossible to hold the regime responsible for property confiscated or seized after the end of the regime--9 April 2003. Accordingly, the general principles in the IPCC statute contain absolutely no language providing a means of redress for persons with claims arising between 9 April 2003 and 30 June 2005, as envisioned by the revised IPCC Statute.

The IPCC

It allows no compensation for moveable property or immoveable property that was damaged, but not confiscated. Its means of compensation is narrowly focused on the purchase price of property, neglecting other damages such as emotional damages and lost rent. Likewise, the statute also neglects the subject of fruits and products of usurped property and makes no distinction between good faith and bad faith purchasers.

The IPCC

"As of the end of June 2004, twenty-two offices were reported to be operating and receiving claims. But other key steps had not been taken to implement the provisions of the IPCC statute. Judge Dara Noureddin, a member of the former IGC and head of its Legal Committee, expressed his frustration to Human Rights Watch about the slow pace of developments in this regard, saying that by March 2004 the CPA had not approved the implementing regulations. This belied the optimism expressed by CPA officials at the start of 2004 that mechanisms for the receipt and assessment of property claims could begin as early as mid to late February in some areas."

-- Human Rights Watch

The Diagnosis

"The Property Claims Commission is not working."

-- Major General John R.S. Batiste, Commander of the 1st Infantry Division

New York Times, Dec 29, 2006

Crisis in Housing Adds to Miseries of Iraq Mayhem

"Iraqi officials say that after security, housing is a priority, but plans to address the problem are minimal. The Housing Ministry is building 17 complexes with 500 apartments each across the country for government employees and families of those killed by militants, Mr. Shouk said. That would be 8,500 homes."

Washington Post, March 1, 2006

Shiites Told: Leave Home Or Be Killed: Sunnis Force Evictions As Iraq Tensions Grow

"Salim Rashid, 34, a Shiite laborer in an overwhelmingly Sunni Arab village 20 miles north of Baghdad, received his eviction notice Friday from a man at the door with a rocket launcher."

BBC News, October 2007

Iraq's Displaced People Nightmare

"The huge displacement of people inside Iraq appears to be contributing to the further fragmentation of the country."

Washington Post, April 15, 2008

Iraqi Militias Offering Aid To Displaced

"Militias of all denominations are improving their local base of support by providing social services in neighborhoods and towns they control," the report says. It also finds that the Iraqi government, "although it has access to large sums of money," lacks the capacity and political will "to address humanitarian needs."

The CRRPD

- In 2004, the Iraqi government established a mechanism which came to be known as the Commission for the Resolution of Real Property Disputes (CRRPD) to redress violations of property rights during the Saddam Hussein regime.
- As of April 2006, 132,000 property claims had been filed and 22,000 resolved. Many more claims could be filed.

The CRRPD

- According to IOM's Peter van der Auweraert, it will take 30 years just to address the appeals that have already been ruled on by the CRRPD's Judicial Committee.

Two-Track Approach

- Domestic institutions (civil courts) are critical as they protect property rights, enforce judgments, and are central to Iraqi society and the initiatives of civil society.
- Courts often, however, merely enforce one right against the claims of another and, thus, do not necessarily solve the displacement problem.

Two-Track Approach

- International institutions (or special domestic institutions) can serve to augment civil courts/domestic institutions to pick up where the legal system left off.
- Make property restitution less of a "zero sum game."

Legislative Modifications

- Duress Against Third Parties
- *Lésion*
- *negotiorum gestio* or *gestion d'affaires*

Remembering:

ICC Art 1

"In all instances, Iraqi courts may be guided by Iraqi jurisprudence and the jurisprudence of other countries with legal systems which are similar to the Iraqi legal system."

Duress Against Third Parties

- Duress is currently only actionable where the threat is to cause injury to one's parents, spouse, or an unmarried relative on the maternal side.
- Article 112 of the Iraqi Civil Code should be amended to allow that duress can serve to vitiate a contract when threats are directed against third parties.

Lésion

- *Lésion* refers to the substantive unfairness of a transaction due to the disproportionate nature of the contract. The classic example of *lésion* operating to invalidate a contract is in the sale of an immovable for less than seven-twelfths of its value. See BELL, BOYRON & WHITTAKER, *supra* note 8, at 329.

negotiorum gestio or *gestion d'affaires*

- *negotiorum gestio* or *gestion d'affaires*: Pursuant to this doctrine, a quasi-contract is formed where a person voluntarily and intentionally performs a useful act for the benefit of another or on another's behalf. The classic example of such an act is boarding up a vacationing neighbor's windows as a hurricane approaches or mending his roof prior to an inundation.

Conclusion

"[W]hat is most urgent for the majority of developing countries is to increase the basic strength of their state institutions to supply those core functions that only government can provide."

-- FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY 42 (2004)

Reading Material

- Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford 2007)
- Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 GEO. WASH. L. REV. 176 (1953)
- Haider Ala Hamoudi, *Baghdad Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience*, *Berkeley Journal of Middle Eastern and Islamic Law* (Inaugural Issue), Vol. 1, No. 1, 2008
- Dan E. Stigall, *A Closer Look at Iraqi Property and Tort Law*, 68 La. L. Rev. 765 (2008)
- Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, 16 J. Transnat'l L. & Pol'y 1 (2006)

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