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## Between Symbiosis and Schizophrenia: The Rights of Iraqi Refugees under Iraqi Law

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### I. Introduction

In the context of the considerable, well-deserved attention that has been given to the millions of Iraqi refugees currently either internally displaced or living abroad,<sup>1</sup> very little has centered on remedies that might be available under domestic Iraqi law. The focus, instead, has been on any number of other worthy issues, including the expansion of programs designed to admit Iraqi refugees into the United States,<sup>2</sup> the provision of much needed material relief to Iraqi refugees living abroad or internally displaced,<sup>3</sup> and, at times, calls on the Iraqi government to assume a larger share of the financial burden associated with housing refugees.<sup>4</sup> What Iraqi law might or might not be able to achieve has received considerably less attention.

There are some entirely valid reasons for this, concerning the limitations of the Iraqi legal system in particular and its ability to furnish necessary relief.<sup>5</sup> These limitations, and the means of remedying them, and thereby establishing a state more committed to the notion of the rule of law,

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<sup>1</sup> The actual number of Iraqi refugees and internally displaced persons is difficult to ascertain with any level of precision. Reports from early 2008, when the crisis was near its peak, place the figure at more than four million. REPORT OF THE IRC COMMISSION ON IRAQI REFUGEES, FIVE YEARS LATER: A HIDDEN CRISIS 1 (2008) [hereinafter "IRC REPORT"]. While that figure has almost certainly been reduced by substantial security gains in Iraq in the latter part of 2008, the scope of the Iraqi refugee crisis cannot be gainsaid.

<sup>2</sup> See, e.g., George Packer, *Betrayed*, NEW YORKER, Mar. 27, 2007, at 47.

<sup>3</sup> See Roberta Cohen, *Iraq's Displaced: Where to Turn*, 24 AM. U. INT. L. REV. 301, 304 (2008) (describing lower levels of international interest in Iraq refugee crisis).

<sup>4</sup> See, e.g., *id.* at 305; IRC REPORT, *supra* note 1, at 8.

<sup>5</sup> A more detailed description of these limitations and challenges appears in Part III of this Essay.

have been a subject to which I have devoted, and continue to devote, a considerable amount of time in the last few years.<sup>6</sup> But there is an irony in the dissociation of the refugee problem from the problem of the rule of law in Iraq more broadly. That is to say, how is an Iraqi to regard a cacophony of foreign-led development initiatives that, on the one hand, stress the importance of rebuilding state institutions related to the administration of law, and, on the other, virtually ignore those same institutions when a crisis like that of the Iraqi displaced erupts? The message, viewed from the perspective of the Iraqi listener rather than the various independent organizations themselves, each with its own worthy agenda, appears almost schizophrenic. The situation is exacerbated when the crisis relates, as it does in this case, to rights provided for in the new Iraqi Constitution. It is as if all of the time and effort expended by political actors on all sides to produce the Constitution was for the sole purpose of drafting it for its own sake, rather than making use of its provisions.

A more comprehensive paper, on the relationship of Iraqi law and its implementation to the realization of the rights of its most vulnerable citizens, remains unwritten. Nevertheless, this brief Essay attempts to hint at a manner in which two central challenges facing Iraq, the refugee crisis and the marginalization of legal process and remedy, may be approached in a way that is symbiotic rather than schizophrenic. The Essay approaches this through touching on potential Iraqi remedies that might exist within Iraqi law, and in particular the Iraqi Constitution, to ameliorate the condition of refugees and, even more particularly, the internally displaced. While acknowledging the obvious limitations of the Iraqi legal system, the Essay takes the position that pursuing remedies through Iraqi law (as a supplement to and not in place of other available relief) could result not only in much needed relief, but could also help to strengthen the very institutions that are necessary for civil society to flourish. The first section, in other words, addresses the refugee challenge, and the second, the challenge to the rule of law, with the hopeful conclusion that any improvement in the one will result in a similar improvement in the other.

## II. Legal Rights in Iraq

An Iraqi refugee, or internally displaced person, may be able to take advantage of any number of Iraqi legal provisions depending on his situation. Complaints could be raised pursuant to the Penal Code for theft, for example.<sup>7</sup> An Iraqi displaced from his home by another could potentially raise the tort of usurpation to have his home returned.<sup>8</sup> Finally, and unsurprisingly, intentionally harmful acts, such as wrongful death, are compensable under Iraqi law under standards that are similar to those of the United States.<sup>9</sup>

Yet in many cases, some of these remedies may be limited in value to the refugee. Quite often the refugee has not been directly threatened, but rather conditions generally make it apparent that her remaining at her home would be hazardous. There would not necessarily be anyone against

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<sup>6</sup> From 2003 until 2005, I worked as a program manager for a legal education initiative managed by the International Human Rights Law Institute of the DePaul University School of Law that focused its efforts on three of Iraq's largest law schools. I served as a legal adviser to the Iraqi government after that on various matters relating to tort and contract in particular. Since the beginning of 2009, I have been leading a program that provides expert advice on constitutional and legislative affairs that is part of a broader initiative managed by the University of Utah SJ Quinney School of Law.

<sup>7</sup> IRAQI PENAL CODE, §§ 439-50 (1969).

<sup>8</sup> See IRAQI CIVIL CODE, art. 192-201 (Nicola H. Karam trans., 1990).

<sup>9</sup> *Id.* art. 202-03.

whom a tort could be lodged in such instances, and in any event, proving the commission of the harm by an individual is likely to involve a lengthy and time consuming process. The initiation of criminal proceedings may be desirable to some refugees, but of less pressing concern than material remedy given their desperate circumstances.

Thus, rather than simply using penal law, which only punishes, or tort law, which requires a finding that someone caused an intentional or negligent injury, what the refugee seeks in the near term, from her own government if no other, is economic and social support. And the most logical place to find this, in Iraq, lies in the Iraqi Constitution, which contains a number of promising provisions.

Many different theories may be advanced as to why the Iraqi Constitution, even compared to most contemporary constitutions that grant broad economic rights, seems particularly generous in its economic and social rights. It certainly could not be, we may safely assume, the American influence in its drafting, given the traditional hostility of the United States to the very notion of an economic right. Some of this propensity toward the granting of broad economic rights could be traced to Iraq's Ba'ath Socialist past, where the public sector took on any number of obligations to its citizenry, including food rations, publicly funded retirement benefits and free education at all levels, including graduate school. Another part of the explanation could be related to the fact that, with all the divisions in the drafting process among Iraq's core ethnic and sectarian communities, the granting of rights was one area where all parties could agree. The broad provisions thus provided an opportunity for trust building among the badly divided political elements in Iraqi society.

In the end, however, irrespective of the reasons, the economic and social rights given to Iraqis under the Constitution are possibly the most extensive in the contemporary world. There are thirteen articles that deal specifically with economic rights in the Constitution.<sup>10</sup> Article 30(a) guarantees the individual and the family, especially the woman and the child, social security, health coverage and the minimum requirements necessary to live in freedom and dignity.<sup>11</sup> Appropriate income and housing are then specifically listed in the same Article as matters the government must safeguard.<sup>12</sup> The right to work is a guarantee in Article 22,<sup>13</sup> the right to health care in Article 31,<sup>14</sup> and in Article 34, the government undertakes the obligation of providing free education "at all levels."<sup>15</sup>

As important as the broad panoply of economic interests protected is the compulsory language of the provisions themselves. The state does not merely *aspire* to provide housing, the legislature is not charged with the *progressive elimination* of homelessness; rather, the government *ensures* appropriate housing, and *guarantees* work, health care, education and the like. These are all material benefits to which an Iraqi displaced from his home has no access.

Comparing South Africa's recent constitution to the Iraqi Constitution is potentially illustrative of the broad nature of Iraq's obligations. Section 26 of the South Africa Constitution reads as follows: "(1) Everyone has the right to have access to adequate housing. (2) The

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<sup>10</sup> See IRAQI CONST. art. 22-34.

<sup>11</sup> IRAQI CONST. art. 30(a).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* art. 22.

<sup>14</sup> *Id.* art. 31.

<sup>15</sup> *Id.* art. 34.

state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right . . . .”<sup>16</sup>

By contrast, Article 30 contains no such provisos, instead assuring its citizens appropriate income and housing.<sup>17</sup> The Iraqi constitutional delegations had traveled to South Africa when preparing the Constitution, and were certainly familiar with its terms. Nevertheless, they adopted a markedly different approach. The verbs used in the Iraq Constitution, relative to that of South Africa, are unquestionably strong ones, compulsory in their nature, and seem to leave little ground for ambiguity respecting the absolute nature of the government guarantees.

### III. Limitations in Iraqi Law

On a purely formal, legal level, therefore, the provisions of the Constitution seem remarkably helpful. At the very least, there appears to be ample grounds for a suit against the government for the failure to adhere to the constitutional guarantees of work, education, health care and housing. Two objections might be made, however, to limit the extent to which this approach is likely to be successful. Each is discussed in turn herein.

#### A. Logistics

The most obvious obstacle to relief under such a constitutional theory is reminiscent of the objection to economic rights generally, which is that they cannot reasonably be fulfilled. After all, the constitutional economic protections were not written solely with displaced persons in mind and should be available to all citizens of Iraq. Any reasonable judge would be aware of the fact that a nation of almost thirty million,<sup>18</sup> with 4 million displaced,<sup>19</sup> unemployment in the range of 18%,<sup>20</sup> and literacy rates of approximately 74%,<sup>21</sup> is not going to be able to fulfill its obligations as set forth in the Constitution, no matter how compulsory the language in the relevant provisions appears to be.

Yet, this would be a strange reason to abandon all hope in the Iraqi legal system to play any role in this matter. While no reasonable judge applying the language in good faith is going to insist on strict and absolute fulfillment of all designated rights, it seems incredible to suggest that a judge will not try to find *some* reading of the guarantees that might make them meaningful rather than simply ignoring their existence. South Africa might again prove a useful example of an emerging constitutional democracy grappling with similar problems.

South Africa’s Constitutional Court has sought to recognize the economic rights contained in its Constitution in a manner that balances both constitutional requirement and logistical imperative.<sup>22</sup> Should the circumstance of the deprived citizen be sufficiently dire, the Court invokes

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<sup>16</sup> S. AFR. CONST. 1996 § 26.

<sup>17</sup> IRAQI CONST. art. 30.

<sup>18</sup> Cohen, *supra* note 3, at 303.

<sup>19</sup> See IRC REPORT, *supra* note 1.

<sup>20</sup> See Global Security, Iraq: Growing Unemployment Threatens Stability (Feb. 19, 2009), <http://www.globalsecurity.org/wmd/library/news/iraq/2009/02/iraq-090218-irin01.htm>.

<sup>21</sup> UNICEF, Iraq Statistics, [http://www.unicef.org/infobycountry/iraq\\_statistics.html](http://www.unicef.org/infobycountry/iraq_statistics.html) (last visited Mar. 6, 2009).

<sup>22</sup> See *South Africa v Grootboom*, 2001 (1) SA 46 (CC) (S. Afr.).

the Constitution to require remedy.<sup>23</sup> For example, in the case of *Republic of South Africa v. Grootboom*, which involved the constitutional right to housing, the plaintiffs were living on a sports field in largely unprotected shelters, and requests for housing to the government had gone unheeded.<sup>24</sup> When the matter reached the Constitutional Court, the Court indicated that while the government did seem to have a program in place to increase levels of housing, it was not paying sufficient attention to those who were most in need.<sup>25</sup> Similar results in favor of individuals claiming violations of constitutional economic rights can be found in a highly contentious case involving patients who need HIV retroviral drugs to remain alive.<sup>26</sup>

At the same time, constitutional dictate does fall in deference to legislative policy when the need is not so dire, so long as the legislature is doing something to achieve the constitutionally protected economic interests. In *Soobramoney v. Minister of Health*, the Court denied a non-terminal patient the routine use of a dialysis machine where a hospital had shown that it was trying to prioritize the use of its machines to favor those whose conditions were fatal without dialysis treatment.<sup>27</sup>

It is fair to point out, and indeed I have pointed out, a stark distinction in the texts of the South African Constitution, which expressly grants the legislature some level of deference to achieve the economic rights set forth in the Constitution in a progressive fashion,<sup>28</sup> and the Iraqi Constitution, which is entirely and immediately compulsory.<sup>29</sup> Nevertheless, because it seems clear that Iraq's obligations on its terms are impossible to meet, the South African model seems a promising one for Iraqi courts. Certainly there is no justification in support of the notion that because the rights cannot be fulfilled on their terms they must be ignored, at least to anyone who takes Iraq's legal institutions even mildly seriously.

## B. State of the Iraqi Judiciary

A more serious objection to reliance on Iraqi law might well rely less on the state of the law, and more on the institution responsible for declaring what it is; namely, the judiciary. It is self-evident that Iraq's courts are not in the same position as South Africa's. Iraq's judiciary, and indeed its entire legal system had been through a great deal in the three decades of Ba'ath rule. It had been chronically underfunded, seen its brightest and best minds relocate beyond its borders, and was

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<sup>23</sup> *See id.*

<sup>24</sup> *Id.* at 56.

<sup>25</sup> *Id.* at 47.

<sup>26</sup> *See Treatment Action Campaign v Minister of Health*, 2002 (5) SA 571 (CC) (S. Afr.). It is important to note that I have reduced the substantial and nuanced opinions of *Treatment Action*, *Soobramoney* and *Grootboom* to those elements of the case that would be most relevant to potential Iraqi litigants. Given that the South African examples are being offered only by way of guidance, I thought it neither advisable nor prudent to do more than touch upon them in the most cursory manner possible.

<sup>27</sup> *See Soobramoney v Minister of Health*, 1998 (1) SA 765 (CC) at ¶ 37 (S. Afr.).

<sup>28</sup> *See generally* S. AFR. CONST.

<sup>29</sup> *See generally* IRAQI CONST.

ignored or disregarded where convenient.<sup>30</sup> A great deal of work needs to be done to restore the institution to the place of respect it once held.<sup>31</sup>

At the same time, the judiciary within Iraq emerged from totalitarian Ba'ath rule in a reasonably respectable position, given the circumstances. Iraq is not a society that has been so devastated by civil war and internal conflict that no cadre of legal professionals or qualified judges exists. Even totalitarian Ba'athism did not change this. To be sure, thoroughly corrupted kangaroo tribunals known as the "revolutionary courts" did exist, mainly for the purpose of sanctioning the killing of anyone the regime considered a threat or potential threat.<sup>32</sup> Those tribunals have disappeared, and the former chief judge of the supreme revolutionary tribunal, Awad Al-Bandar, was hanged for approving death sentences for nearly 150 men and boys, some as young as 13, for the attempted assassination of Saddam Hussein in Dujail in 1982.<sup>33</sup> In my experience, the remaining cadre of judges, even those who may have served during the Ba'ath era, are not necessarily politically tainted, and were more than capable of interpreting Iraq's Codes and applying them in a professional fashion, so long as the government's interests were not implicated.<sup>34</sup>

Where the government's interests were implicated, however, the matter was altogether different. The Ba'ath regime would never tolerate a judicial incursion into its own ability to administer the government in whatever manner it saw fit, and judicial passivity vis-à-vis the government became the norm from which none could deviate. As a result, the very notion of judicial review is extremely new and an altogether unfamiliar concept for Iraq's current judicial class, even as it is unfamiliar to Iraq's governing classes, including its employees within the government ministries, that a court decision could somehow constrain their activities.<sup>35</sup> This has nothing to do with the actual substance of the formal rules on the judiciary. The Constitution does have all the usual assurances of judicial independence,<sup>36</sup> but then so did the Ba'ath interim constitution under which Iraq operated from 1970 until the American intervention.<sup>37</sup> The problem lies more in legal culture than in substantive legal doctrine.

Early decisions are generally not encouraging. There is, as a general matter, an extreme reluctance on the part of the Supreme Federal Court to rule against the government on the grounds of constitutionality. Rare is the decision, among the dozens that have been made, where the ruling is in favor of the individual, and against the government. In siding with the government, the Court's reasoning is at times appealing, but it is also fair to say that at times it is shoddy and deeply flawed.

For example, Decision 13 of 2006 involved an individual who claimed that his agricultural land had been taken from him without compensation by the Agrarian Reform Act of 1970.<sup>38</sup> The petitioner challenged a 2006 law that directed the Property Claims Commission, formed in 2005 to

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<sup>30</sup> See, Haider Ala Hamoudi, *Toward a Rule of Law Society in Iraq: Introducing Clinical Legal Education into Iraqi Law Schools*, 23 BERKELEY J. INT'L L. 112, 112-14 (2005).

<sup>31</sup> See *id.*

<sup>32</sup> See Michael Scharf, *The Iraqi High Tribunal*, 5 J. INT'L CRIM. JUST. 258, 261 (2007).

<sup>33</sup> See *id.*

<sup>34</sup> See Eric Blinderman, *Judging Human Rights Watch: An Appraisal of Human Rights Watch's Appraisal of the Ad-Dujayl Trial*, 39 CASE W. RES. J. INT'L L. 99, 148 (2006-2007).

<sup>35</sup> See IRAQI CONST. art. 87, 88, 93, 94.

<sup>36</sup> *Id.* art. 19, 87, 88, 93.

<sup>37</sup> IRAQI (Interim) CONST. 1970, art. 79.

<sup>38</sup> Decision 13/2006, Federal Supreme Court of Iraq, available at [www.iraqijudicature.org](http://www.iraqijudicature.org) (in Arabic).

compensate property owners for Ba'ath era government takings, to exempt agricultural lands from its purview.<sup>39</sup> The Court denied the petition on the grounds that the Agrarian Reform Act of 1970 was enacted and implemented at a time when it was constitutional according to the Ba'ath interim constitution.<sup>40</sup>

The reasoning is baffling and subject to considerable criticism. There are very sound reasons that the Court would not want to engage in reversing land reform acts of thirty years earlier, under the guise of protecting against takings of confiscated property. Nevertheless, such reasons have almost nothing to do with what may or may not have been constitutional under Ba'ath era constitutions. In fact, if this reasoning is applied consistently, then it means that all Ba'ath era takings are legitimate if constitutional. When combined with the principle that property cannot, under the current Constitution, be taken without just compensation, any attempt by the Property Claims Commission to reverse any Ba'ath era takings are suddenly cast into doubt, and depend entirely on whether or not the taking was constitutional in its time. After all, if it was constitutional then the taker now legitimately owns the property and he cannot be deprived of it without compensation. The entire role of the Property Claims Commission, sanctioned in the Constitution as a means to redress precisely such confiscations, would be thrown into serious doubt. The Court has argued in at least one other case that some Ba'ath era takings were unconstitutional.<sup>41</sup> This provides little comfort or certainty; it still requires an analysis of 1970 Ba'ath era constitutional issues each time a confiscation is challenged.

In an apparent attempt to avoid this problem, the Court also made clear in Decision 13 of 2006 that "official agencies" may reverse Ba'ath era confiscations that were constitutional during Ba'ath rule. Leaving aside the logical incongruity of allowing the government to have standing to demand the return of land while denying standing to the individuals who had actually lost it, one may ask precisely what remains of the constitutional guarantees of property if the government may decide, free of seeming constitutional restraint, who is entitled to a particular piece of contested land. Solid reasoning from a less deferential court may have helped in the creation of a more principled constitutional jurisprudence than currently exists in this vital area.

Considerably less material is available concerning other economic rights. The one case that seems to discuss them is unhelpful.<sup>42</sup> In it, the petitioner sought both to receive a pension and to work in a different government office, thereby receiving two salaries from the Iraqi government.<sup>43</sup> The petitioner claimed that Article 11 of the Pensions Law, which prevented his doing this, violated Articles 22 and 23 of the Constitution, which guarantee work and private property, respectively.<sup>44</sup> The Court was generally unsympathetic, holding that the deprivation of the pension does not deny the petitioner the right to own private property or the right to work; it merely forces him to choose between two forms of income, the pension or the government salary.<sup>45</sup> The reasoning, while at least plausible on its face, tends to suggest that the Court will not be particularly receptive to economic rights claims made by litigants.

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See Decision 12/2006, Federal Supreme Court of Iraq, available at [www.iraqijudicature.org](http://www.iraqijudicature.org) (in Arabic).

<sup>42</sup> Decision 8/2006, Federal Supreme Court of Iraq, available at [www.iraqijudicature.org](http://www.iraqijudicature.org) (in Arabic).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Yet it would be wrong to describe the Court as incapable of any independence. Indicators suggest the judiciary is sincere in its attempts to strengthen its own institution, and it has ruled against the government, if rarely.<sup>46</sup> Given the broader recognition of the need to strengthen legal institutions in Iraq, the area of refugee rights under the Constitution might be an excellent place to bring the discussion from theoretical disquisitions into practical application. This could be done by initiating a suit for the deprivation of constitutional rights on behalf of Iraq's most deprived citizens, those forced from their homes. While there are clearly obstacles and difficulties, relief through the Iraqi judiciary might well be made available through a series of decisions that provide the parameters for the vindication of the economic rights in question. This would be a victory not only for the individual refugees themselves, but also for the many Iraqis dedicated to the establishment of the rule of law in their country.

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<sup>46</sup> See, e.g., Decision 4/2007, Federal Supreme Court of Iraq, available at [www.iraqijudicature.org](http://www.iraqijudicature.org) (in Arabic).