

STRENGTHENING THE RULE OF LAW IN IRAQ

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ABSTRACT--- *Since the liberation of Iraq, the country has undergone with radical transformations in terms of governance and administration. From 2003 with the change of regime in Iraq, the country has encountered daunting legal and institutional challenges that have pushed Iraq backward, and made the people suffer dramatically. Iraq has historical footprint regarding the rule of law since the Babylonian Dynasty that has the famous ever known Code of Law that dates back to 1772 BC. Which is considered as world's almost first known codified constitutions. This study lays out a constructive framework for overviewing the rule of law in Iraq, a country which has suffered from the unrest and turmoil in the last 30 years, including interstate and intrastate wars. This study is divided into three main parts, the first session deals with the literature review on rule of law in Iraq. Moreover, the second session deals with the institutions that are linked to the rule of law, and how strengthening the rule of law influences them such as Parliament and Courts. The third part addresses the findings and the policy recommendations for better law enforcement and policy planning in Iraq. The expected results of this study focus on two main priorities as: The Iraqi rule of law is the only tool that affects the Iraqi institutions and this is the only pathway for improved institutional capacity in legal terms. The second is the existing legal system needs to be fully implemented and reviewed over the coming years by taking experience from successful stories around the world. The main thesis questions for this study are; why does the rule of law in Iraq do not work? And what is the state of the rule of law in Iraq after 25 years of Liberation? The methodology is content analysis as the study is descriptive and primary data is not collected, while data from accredited organizations is collected and analyzed accordingly, conclusions and recommendations are drawn from it.*

Keywords-- *Iraq, rule of law, constitution, institutions*

I. INTRODUCTION

No doubt that rule of law provides a legal basis for governance in a sovereign country, the debate about rule of law in Iraq has been a real concern for the Iraqi public. Since 2003 with the liberation of Iraq, strengthening the rule of law was a top priority for the new government in the transition phase. Besides, it has been a vocal focus for the United States of America, since the liberation, the U.S. started structural reforms in Iraq in all sectors, and the top priorities were justice system, rule of law and governance. In this regard, especially in conflict affected countries, strong rule of law is a panacea for eradicating all challenges and difficulties. During the insurgency years in post-2003, Iraq's justice system was in a catastrophic state as the government institutions especially the judicial institutions were disrepair, and almost were withered to near non-existence as courts and justice institutions were inoperable and dysfunction as they were understaffed and lacked governance system. Besides, the Iraqi people as they suffered severely under the Ba'ath regime so called justice, the public lost trust and confidence in the formal justice sector.

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Dealing with rule of law means dealing with a main principle of governance, rule of law is a fundamental principle of a state, and it has been considered as a serious pillar of state efficiency and effectiveness in public administration. At this point, we define the rule of law, it means different things to different scholars yet like a single way street all comes back to the same direction, according to Brookings () “Iraq wants to keep practicing ‘rule by law’ rather than a ‘rule of law’ system.”

When it comes to the rule of law, constitution to be the legal foundation, thus the Interim Government and the U.S. has worked on enforcing new constitution in 2005, and reforming the previous laws, court system, and judiciary which was highly centralized and abused in favor of the Ba’ath regime. Thus, building rule of law in Iraq is paralyzed by low institutional capacity, lack of human resource, insurgency, and poor economic condition of the country as well as terrorism and resistance to change. Indeed, insurgency and terrorist attacks have affected judicial and legal reforms in the case of Iraq.

Moving the focus away from

II. LITERATURE REVIEW

Drawing on an extensive literature it shows that the rule of law is a complicated issue, it has various dimensions to be analyzed and discussed. Rule of law is a contested concept, and it has been debated over year, without any consensus yet. According to McLean and McMillan (2003), law means the body of rules enforced by any sovereign state. According to “any attempt in explain the emergence of constitutional constraints raises the question of why most governments in the past and present remains largely unbounded by law. Among the many definitions of the concept, Rule of Law Dicey’s definition is among the few which mentions three main issues as:

"the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power"; - "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts"; - "the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts"

In understanding the importance of rule of law, one needs to look at the origins of the concept of rule of law and ancient scholar analyses of this concept. As Plato coded, “Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.” Similar to Plato, Aristotle adds that ““law should govern and those in power should be servants of the laws.” 1

Coming to where the “rule of law” phrase is derived, it is ‘la principe de legalite’ which means the principle of legality in French language, here it means a government based on the main principles of law not of men. Besides, Dworkin (1986) “rule of law shapes political, economic and social activity.” Two key ideas flow from this. First, control over power, and abuse of power by individuals. According to Fukuyama accountability refers to “the legal ability to hold power-holders to account for their actions.” (2011, pp. 582–4)

If in the literature rule of law was addressed as been originated and rooted in the ancient greeks and Europe, rule of law has referred and roots in the so called code of Hamorabi, in the ancient.... Which was one of the essential elements of rule of law in the methipotamia, as scholars refer to aristotale and Plato also other

Defining rule of law in the essence of governance of a country, the term has got different connotations, like “rule of law as an aspect of law which envisaged a political system where life is promoting according to laws that guarantee a good degree of objectivity in dispensing justice, defending freedom, promoting peace and prosperity. (Onwanibe, 1989). Regarding the rule of law, it serves the needs of the people at different degrees, if rule of law is practiced. In other words, the concept of the rule of law in the literature connotes that rule by law, which conveys the outstanding role of law over the government officials and community members equally. Referring to what Aristotle stated “the rule of law is better than that of any individual.” From this statement rule by law

In countries where rule of law rules the country, all members of the community are law abide citizens whom follow set of rules and laws that are set in the constitution and practiced by the government. In the past and now, the issue of justice has been linked to rule of law, since in countries where rule of law is not effective obviously justice is not served, and principle of justice is at question. No doubt that rule of law sets principles of governance and adjusts the challenges and weakness in a system, as well as it eradicates any attempts to arbitrary governance, since state officials in the developing countries where rule of law and courts are controlled by them, they overcome the system of governance.

In the doctrine of rule of law, focus is on the separation of the three main powers...

Recently, the UN Secretary General in his report addressed rule of law as follows:

"[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

The rule of law has an important bearing upon state system in which it defines how strong is a state, and how weak it is, in certain cases weaknesses in the rule of law has been the main issue in state failure, and this has been the case in Iraq, and most developing countries in the Middle East and Africa, where the individual rulers have more influence on state system than the government has.

In the same vein, rule of law is addressed as “the rule by law not by men.” (p.15). adding, Stein (2009) mentions that “the rule of law should be viewed as a lodestar to which countries can turn for guidance now and in the future.” (p.303).

According to the World Justice Project Rule of Law Index, the concept of rule of law is addressed as “Effective rule of law reduces corruption, combats poverty and disease, and protects people from injustices large and small. It is the foundation for communities of peace, opportunity, and equity – underpinning development, accountable government, and respect for fundamental rights. The rule of law is not just the rule of lawyers and judges: all members of society are stakeholders.” (2018).

III. RULE OF LAW IN IRAQ SINCE 2003 AN ENABLING ENVIRONMENT

Ensuring that justice is served, it needs strong independent justice system, rule of law as well as security in Iraq. Iraq has a history in state abuses of rule of law, as the Iraqi Ba’ath regime has limited freedom in Iraq, and justice was

abused in favor of the government in power, thus in Iraq the regime was the main reason for lawlessness in post-invasion of 2003, thus the current government since 2005 needed to do radical changes for reforming justice and implementing rule of law. Doubtless that the rule of law is explicitly enshrined in the Iraqi constitution. Based on the Iraqi constitution, the federal government is addressed as democratic government

Rule of law is not only associated with the basic human rights, and principles of governance, but it is linked to limiting and assessing the exercise of public power, utilizing revenues, securing and protecting human rights, and civil well-being of citizens as well as other rights.

Unfortunately, the rule of law in Iraq has a dark history in which during the Ba'ath regime rule of law was replaced by rule of force and violence. From this understanding the legal aspects of rule of law were source or chaos in Iraq, thus the responsibility of the new government in Iraq since 2005 in the new era of governance was hard to provide rights and respect the main components of rule of law.

The new Iraqi constitution was entered into force in 2005, after the collapse of the previous Ba'ath regime in Iraq, the new constitution established a federal system of government. Adding, under the federal system the Iraqi government power is united and also distributed relatively to the regions and governorates. The supreme court held that the Iraqi council of representative/ Parliament has the power to amend the constitution under article Means any legal changes need to be done according to the consensus in the parliament.

Iraq similar to many other failed states yet suffers from lack of a coherent legal system, as legal system is paralyzed and weakened by war, instability, religious influence and tribalism to a great extent, thus resistance to the rule of law has been great. As Barry (2009) highlights “developing countries remarkably resist the rule of law and good governance.” Yet that does not mean all countries in the developing world resist rule of law, but the environment might not be in favor of rule of law, or factors including internal and external affect rule of law practices. Considering the case of Iraq, government was unable to adopt rule of law during the transition period which took even to now, one factor which is very essential is institutional capacity in strengthening rule of law.

According to the World Justice Project rule of law have the following universal principles:
The government and its officials and agents as well as individuals and private entities are accountable under the law.

The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.

The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.

Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.”

Based on the mentioned principles justice in the last point has to be practiced by independent representative with efficient numbers and sufficient resources, in Iraq justice has those challenges as in post Saddam's regime there was lack of personals knowledge in law, since with the occupation people who were involved with the Ba'ath regime, from the fear of retaliation they escaped Iraq, and institutions suffered from lack of civil servants.

According to many studies in the field of social sciences and administration, institutional capacity has great impact on the rule of law, unfortunately, failed states such as Iraq lacks right institutions in pace, and that shows that institutional strengths depends on the three branches of power, including the Executive, Legislative, Judiciary powers

in any country. In the case of Iraq, it seems that “the principle of separation of powers, each of the three branches of government overlap to some extent.” (Marks & Cooper, 1988, p. 57). In line with the separation of power, Johnson refers to Aristotle’s concept of a true division between “true constitutions and non-constitutions, states in which men rule and not laws are sometimes considered non-constitutions.” (1990, p. 74). To the present distribution of power and power control is not well-balanced in Iraq. Focusing on legal foundation of rule of law, we need to refer to constitution as a legal framework of strong rule of law, thus “constitution performs two main functions: positively, it establishes and maintains a system of public power, and negatively it regulates and control public power, including administrative power, by imposing on it boundaries and limits.” (Cane, 2016, p. 4). No doubt that architecture of a state is structured based on its legal foundation and the main pillar for it is constitutional and practicing rule of law. The landscape for practicing rule of law is yet not suitable in Iraq due to internal and external challenges the country encounter. Maintaining the rule of law is a responsibility of Iraqi government especially by considering the nine factors, in which World Justice Program collects data from as follows: first factor is constraints on government powers, absence of corruption, open government, fundamental rights, regulatory enforcement, order and security, civil justice, criminal justice. Based on the information and data, Iraq is not in the 2018 WJP rule of law index, as there lack of data and commitment which is a big problem for a country which seeks strengthening rule of law. (Rule of Law Index, 2017-2018).

As Iraq in post-Saddam era to now is still full of difficulties, tensions and damages, where the question of rule of law is yet not resolved, for knowing the truth about the situation of rule of law in Iraq, it can be only known by comparing Iraq to the other countries in the world at large who suffer from conflict and wars. A prominent measure could be the the Rule of Law index Read more at: <https://www.vanguardngr.com/2018/09/at-58-rule-of-law-in-nigeria-is-a-dwarf/>

I.I. Challenges Centered around the Implementation of Rule of Law in Iraq

The recent challenges that rule of law face in Iraq, are countless and few could be highlighted in this study, yet there are many unanswerable questions regarding the rule of law in Iraq, as the system seems broken, and not effective, there are cases in which power is abused and misused in the history of Iraq and even in recent years.

Iraq had experience with Saddam Hussein who was an individual who has exercised power without being back to rule of law or constitution in most cases while decisions were taken alone, or with his close circle.

While, the regime change has created a fertile environment for restating rule of law, and enforcing rule of law in a better form in Iraq, in the light of the structural deficiency, it can be argued that the ratification of the new constitution in 2005 has aimed in enforcing and strengthening rule of law in Iraq.

In the recent year’s rule of law has been paralyzed by certain key factors including politics and religious factors, this checks and balances have not been in place, and government officials were not subjected to the law, as yet rule of law does not govern the country and that is due to the following shortcomings in the case of Iraq:

The wars and conflicts that Iraq has been in since 1979, the Iraq-Iranian War, the gulf wars, American Invasion 2003, year of political upheaval, the Arab Spring, and lastly the rise of the Islamic State of Iraq and Syria. In line with this notion, the last security and instability in which Iraq has faced, it can be concluded that “Iraq as having

complexities in governance needs a highly centralized authority based on the premise of rule by law compare it to rule of law system.” (Al-Khatteb & Al-Saadoon, 2015).

<https://www.brookings.edu/opinions/iraqs-rule-of-law/>

Supremacy of Law

Quoting from what said “no one is above law”, for effective and strong rule of law, it has to be powerful, this also means individuals and institutions practicing power.

I.II. Power Separation and Limitations of the Rule of Law

There have been many cases in which government officials and individuals in the three branches of power typically in the executive branch has been abused and misused,

As Iraq has experienced harsh and difficult years in terms of security and conflict, thus institutional democratization is at the early phase of development, safety and security of people is yet not provided fully by the government. Since power was abused by the Ba’ath regime,

Considering the environment and situation in Iraq, rule of law suffered from certain constraints and challenges as follows:

IV. LIBERATION OF IRAQ

As Montequieu’t Hart stated that law in a democratic community has its own function, while it should fulfil the conditions to make a democracy function not only procedurally, but also substantively. Where democracy should assure an equal input for everyone in the public system, law provides chances to realize one’s potential and to emancipate. From this view, there is a need for a system of checks and balances, which can be a watchdog for the freedom of the individuals and restriction of the same freedom, for constraining and publishing while law is violated. This legal approach can create a guide for the rule of law in which the right of everyone is protected and

Focusing on the collapse of Saddam Hussein’s regime in 2003, the United States worked on certain key issues, first important phase was issuing few orders, as Order No.1. Coalition Provisional Authority (CPA) which has focused on de-baathification of the Iraqi community, following CPA Order No.2 dissolving the Iraqi intelligence and security agencies, and army, and dismissed the Baathist employees and members from the institutions. In line with these orders, CPA Order No.15 was issued which aimed at reforming the Iraqi justice system which was paralyzed by the Iraqi Ba’ath regime. For further strengthening rule of law, by September 13, 2003 the CPA has issued Order No. 35, which re-established the council of judges that had existed prior to the Ba’ath regime, the council of judges was in charge of supervision of the Iraqi judicial and prosecutorial systems. According to Order No. 35. The council was independent from the Ministry of Justice concerning its authority, power and budget. For promoting judiciary system and rule of law, by the end of 2003, the CPA issued Order no. 48 that gave the Governing Council the right to establish an Iraqi Special Tribunal, it is crucial to take the orders into account as fundamental steps in reforming and formulating new justice system in Iraq in Post-Saddam era in Iraq.

People in Iraq had bad experiences as most people have been forced to accept and ensure the rough justice of Saddam Hussein in Iraq that lie beyond international human rights control. Thus, it was in fact unclear and difficult for the coalition partners to understand the necessities and need for restructuring rule of law and justice in Iraq. Besides, Iraqi history has been full of trajectories and miseries, yet the hope must not be lost, as since 2003 there is improvements and constitutional reforms that can be adopted in the long-run and can be effective in the due time. Therefore, existence of judicial institutions is very essential for the current and future of Iraq, as the judicial system of Iraq since 1960s has been at question by scholars who wrote about justice system in Iraq.

V. THE POLITICAL TENSION AND INSURGENCY CHALLENGES

Building the rule of law in Iraq vested in the interest of the people of Iraq and the Americans, however, building rule of law is a political exercise in Iraq rather than a government affair. Unfortunately, most Iraqi leaders since 2003, have benefited from a centralized system of governance and patronage based system in which clientelism, religion and tribalism is very manipulative.

From this perspective corruption is a top alarming phenomenon that Iraq suffers from, in post 2003 forward corruption has been an integral part of the Iraqi system, for this reason implementing and strengthening rule of law and reforms were threat to such phenomena in Iraq. The reforms during the interim-government have failed because there was insurgency and political instability and there was strong resistance from the remnant of the Ba'ath regime towards changes in Iraq.

Justice system and rule of law were passive in Iraq for years as people could not digest the fact that the objective of building rule of law effects are to treat all people equally, as yet people are not in Iraq. In 10 years' time in post liberation of Iraq, most people think the reality is not much different than before, as yet there are discriminations, lack of equality, poor governance and service delivery still exist. Therefore, as strong rule of law and justice system increases government accountability and rule of law increases legitimacy of government in the eyes of the people.

Most reforms in Iraq since the new constitutional reform of 2005, has given the national assembly the role for pushing for reforms, however the elections, and instability have left little room for successful and fruitful reforms.

VI. FINDINGS AND RECOMMENDATIONS

- Considering the role of civil society and non-governmental agencies in strengthening rule of law is significant in many ways. NGOs in most situations have fundamental role to play because they are like watchdogs and their tasks can be carried out successfully.

- There is a serious need for media, as media can serve in promoting rule of law, and informing more people about the importance and value of rule of law

- Government commitment is required for strengthening rule of law in the context of Iraq as government's absolute power can enforce checks and balances for assuring the exercise of a healthy rule of law in Iraq.

- There is an important sense regarding rule of law, in which in the case of Iraq the Rule of law only flourishes when all Iraqis feel responsible for implementing it effectively as a public good for all.

VII. CONCLUSIONS

Drawing a set of delighting conclusions might not be impossible, while there is a need to strengthening the rule of law in Iraq, tackling the main factors that affect the rule of law on internal and external level is required for strengthening rule of law, and catching up with other countries in the region. In doing so, it is necessary to take required measures into account in today's reality of Iraq. As the rule of law is rightly considered as the main principle for an efficient state system. In this vein

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