

## **Establishing Governmental Legitimacy in Iraq: The Path to Protecting Human Rights**

By Matt Mines

### **Creating Legitimacy in a Post-Conflict Society**

Rule of law is essential for ensuring the protection of human rights in post-conflict societies. Contention and disagreements, however, often arise regarding the best ways to establish rule of law in a reconstructive state. It is a vital prerequisite to rule of law that a government be viewed as legitimate. Following an armed conflict, the restoration of basic services and infrastructure is essential for instilling confidence that the government is legitimate and is capable of providing for the needs of the local populace. The essential services include water, electricity, and security on a consistent basis. In order to ensure ongoing respect for the rule of law, the state must possess a monopoly on the use of force. Once a government has established itself as legitimate and capable of enforcing the law, human rights violations can be prevented. It remains unclear, however, as to what processes should be pursued in establishing legitimacy. Does one hold elections as soon as possible, or is it more sensible to build and reestablish local infrastructure? One component remains certain: in order for rule of law to exist in a post-conflict state, there must be a legitimate functioning government that is capable of enforcing the law. Furthermore, under the Universal Declaration of Human Rights, basic services and freely held elections are constituted rights in and of themselves and therefore deserve attention. In this paper, I aim to address issues concerning establishing legitimate governments that respect the rule of law and human rights in the context of post-conflict societies like Iraq.

The Iraqi state has lacked such a legitimate government, which has led to perpetual turmoil. It is widely acknowledged that a government must meet three prerequisites for creating legitimacy. First, a government must achieve a monopoly on the use of force. Second, the government must have the resources needed to keep the state's social and economic infrastructure functioning. And third, the state must sustain an administrative apparatus capable of overseeing and administering policy. These three factors will lead to the fourth prerequisite for a lawful government: its citizens will believe in its legitimacy (Schwartz 2008). Thus, the government will be able to demand compliance with its constituted governmental laws. Without these prerequisites, it is unlikely that the rule of law will persist over time or that the human rights of the nation's citizens will be protected. In Iraq, each of these factors remains absent and therefore, violations of both rule of law and human rights persist.

### **The Iraq Case**

In the case of Iraq, there was considerable debate regarding whether it would be better to hold elections immediately following the invasion and the overthrow of Saddam's regime, or to wait and work to construct quality, reliable essential services and develop functioning institutions prior to holding elections. Analysis has shown that the Iraqi and US governments should focus on improving basic services to develop legitimacy as much as on voting, policy, and institutional restructuring. Following the invasion and in the years leading up to the first elections in 2005, neither basic

services nor rapid elections were implemented. This resulted in discontent amongst the populace. These issues were compounded by the lack of a military force capable of securing the state.

Following the defeat of Saddam's regime in 2003, the Iraqi people were initially optimistic about their future. One public opinion survey conducted by Oxford Research International following the invasion in 2003 found that, when asked "What is your expectation for how things overall in your life will be a year from now," eighty-one percent of Iraqis responded "much better or somewhat better." However, this optimism for the future was squandered as the seeds of discontent were planted following the harsh, unreliable conditions in which people were forced to live. In fact, the horrendous level of service provision under Saddam Hussein's regime was considered far better than that under the Coalition Provisional Authority (CPA). Following several years of US occupation, Iraqi public opinion had largely shifted towards animosity and disparagement. A 2007 BBC poll found that eighty-two percent of Iraqis had little to no confidence in the US-led occupation—a complete shift from the feelings of 2003 following the invasion. The discontent has given rise to feelings of occupation rather than liberation, which has led to insurgency and the violation of human rights.

Drafting laws is not enough to suffice as creating rule of law. The bleak conditions in Iraq cultivated hostility due to the multitude of broken promises by the government. This was largely due to the essential services being provided primarily to government buildings and other privileged actors, while the general population suffered without sanitation, water, or consistent electric supply. With this inadequacy came skepticism of the government, which made it difficult for the government to be viewed as a legitimate body and for rule of law to be established.

### **Democracy and Rule of Law**

Another way to increase legitimacy would have been to hold elections immediately following the invasion. The primary means through which citizens can express their needs is democratic governance and the creation of a rule of law that reflects their beliefs. Research has found that in divided societies such as Iraq, democracy is difficult and unlikely to take hold. In the case of Iraq, elections were hindered and delayed as a direct result of the country's sectarian composition, with the Sunni, Shia, and Kurdish populations all vying for power. In particular, in 2005, the Sunnis boycotted the national elections, further preventing a transition of power. Additionally, the CPA was concerned that rushed elections would render undesirable political outcomes—specifically a Baathist party victory. This led to delayed national elections and suspicions among Iraqis regarding the CPA's presence and authority in the state. The delayed elections led to discontent and feelings of occupation, furthered by the lack of resources provided to the populace. Following the elections, the insurgency experienced an upswing that undercut the legitimacy of the newly elected government.

The timing and implementation of national democratic elections are extremely difficult. If elections are ill-timed, they can lead to power struggles and civil conflict. In the most recent Iraqi elections in March 2010, there was insurgent violence against voters. This is the clear result of a failure to establish rule of law in Iraq at an earlier date. Unfortunately, there does not appear to be an end in sight to the insurgency in Iraq. Democratic voting, however, is a key consideration in

establishing legitimacy in a government, and these elections were a solid first step for instilling confidence in the government among Iraqi citizens. It is important to maintain awareness of the need to establish legitimacy in post-conflict governments at the soonest possible time. On-the-ground reports in Iraq indicated that if elections had been held soon after the invasion, desirable political outcomes could have been achieved.

## Conclusion

Determining which strategy to implement—basic services and infrastructure or democratic elections—and when, is a difficult and perilous process. In the years since the invasion of Iraq, there has been a serious lack of essential basic services and a difficult process towards democratization. For these reasons, the Iraqi government has been incapable of gaining legitimacy among citizens, leading to further violations of human rights and a persistent lack of rule of law compounded by an ongoing insurgency. Holding elections and improving basic services should be a central strategic tenet of establishing legitimacy en route to rule of law in any post-conflict state. These components should not be overlooked as preconditions to rule of law, because rule of law relies so heavily upon the legitimacy of a nation's government.

## Annotations

Al Hassani, Zouhair. 2008. "International Humanitarian Law and Its Implementation in Iraq." *International Review of the Red Cross* 90: 51-70.

Annotation: Al Hassani, a contributing professor from the University of Baghdad, provides an interesting perspective regarding international humanitarian law. He provides an extensive overview of how international humanitarian law functioned within the war zone of Iraq post-invasion. For instance, he discusses the roles and responsibilities of occupying forces and the issue of national sovereignty while being occupied.

Allawi, Ali. 2007. *The Occupation of Iraq*. New Haven: Yale University Press.

Annotation: Allawi provides an insider's account of the Iraqi government following the American invasion. He presents a useful exposition of the condition of Iraqi society and the sectarian alliances that ultimately led the nation into chaos. Allawi is an authoritative voice on the condition of the Iraqi government, as he was a senior minister in the government until recently. The book provides a useful and extensive description of the events leading up to the national Iraqi elections as well as the lack of legitimacy held by the government due to its lack of capability in providing basic services.

Amnesty International. 2010. "Iraq: Human Rights Briefing." London: Amnesty International Publications.

Annotation: This briefing is an up-to-date account of where human rights stand in Iraq. It provides useful information for the human rights scholar on the present situation. It includes a discussion on the election violence that occurred during the March 2010 parliamentary elections. It also discusses the purging of candidates from the election roll. These issues are relevant to discussions of developing democracy and the protection of human rights.

Arato, Andrew. 2007. "Post-Sovereign Constitution-Making and Its Pathology in Iraq." *New York Law School Law Review*, 51: 536-555.

Annotation: Arato provides an interesting examination of the post-conflict constitution making process, a component he deems to be largely neglected from analyses of the Iraq war. He contends that the failure to develop a legitimate constitution is in large part to blame for the current conditions in Iraq. Arato states that, even if the constitution making process had been successful, the Iraq war was likely to fail because of other deep-seated flaws in the transition process. However, he outlines a transitional process for constitution making and delineates its critical pathology. For instance, Arato believes in a two-stage model for provisional constitution making. This includes an interim government that recognizes the constitutional limitations, allows for constitutional learning, and has a constitution that is insulated against easy alteration. Furthermore, he discusses options for constitution making outside of democratic processes. This is a helpful article in understanding the constitution-making process in post-conflict countries.

Bali, Ash. 2005. "Justice Under Occupation: Rule of Law and Ethics of Nation-Building in Iraq." *The Yale Journal of International Law*, 30: 1-38.

Annotation: Bali presents a useful framework describing the transformation of Iraqi thought from viewing America as a liberator to an occupier. It is helpful in understanding the methods used for instituting justice in other post-conflict states such as Kosovo. Bali explains how America went wrong and recommends measures to be taken by America to improve its legitimacy in Iraq. These measures include improving Iraqi infrastructure, delivering basic services, and internationalizing support for Iraqi state-building while concurrently transitioning away from occupation.

Barkan, Joel D., Paul J. Densham, and Gerard Rushton. 2006. "Space Matters: Designing Better Electoral Systems for Emerging Democracies." *American Journal of Political Science* 50 (4): 926-929.

Annotation: This article is helpful in developing an understanding of how to foster and implement an election in a newly democratized country. The authors discuss the interactive effects between an electoral system and the spatial distribution of voting. This is a critical factor in the shaping of electoral outcomes and emerging democracies. This is especially helpful in understanding the electoral system and design of the Iraqi elections. Also, the article explains why the first Iraqi elections created many challenges for the democratic process, as the elections

relied on one national district rather than dividing the country into provinces or districts that had already existed.

Barnes, Rudolph. 2009. "The Rule of Law and Civil Affairs in the Battle for Legitimacy." *Military Legitimacy and Leadership Journal* 90 (871): 2-53.

Annotation: This is a very helpful article on creating legitimacy in post-conflict states and how the wars in Iraq and Afghanistan have consisted of largely political operations rather than simply operations of "might." In counterinsurgency (COIN) operations, "might" must be viewed as legitimate in order to develop rule of law. It is not enough to simply possess overwhelming force. In COIN, promoting legitimacy must be the primary objective of operations. Barnes, a military strategist, identifies civil affairs and the creation of legitimacy in the post-conflict context of Iraq and Afghanistan as the primary means to achieving a strategic end. The article provides useful information regarding the role of civil affairs in counterinsurgency operations.

Campanelli, Danio. 2008. "The Law of Military Occupation Put to the Test of Human Rights Law." *International Review of the Red Cross* 1: 653-668.

Annotation: Campanelli describes the difference between the law of war and law of peace and the different values that are at stake. Further, he states that the law of armed conflict and human rights law both sprang forth from the need to protect people from the power of the state, whether it is in war or in peace. He goes on to assert that human rights are applicable during armed conflicts and to describe the relevant legal norms. And finally, Campanelli provides a useful and extensive description of human rights law during military occupation. This is an interesting piece describing the intersection between two very different applications of law.

Cogen, Marc, and Eric De Brabandere. 2007. "Democratic Governance and Post-Conflict Reconstruction." *Leiden Journal of International Law* 20 (3): 669-693.

Annotation: This article attempts to explicate the necessary conditions for creating democratic governance in a post-conflict, reconstructive state. The necessary conditions include: free and fair elections, freedom of association, and freedom of expression. The authors apply these constitutive elements to contemporary post-conflict states such as Kosovo, East Timor, Afghanistan, and Iraq in an analysis of the resulting success of these nations' reconstruction. In reference to the Iraqi reconstructive state, the article explicates issues and problems created by the Coalition Provisional Authority in its attempt to institute elections in Iraq. According to the authors, the major problem hindering democratization in Iraq is its tenuous security situation.

Cushman, Thomas. 2005. "Introduction: The Liberal-Humanitarian Case for War in Iraq," in Thomas Cushman (ed.), *A Matter of Principle: Humanitarian Arguments for War in Iraq*. London: University of California Press.

Annotation: This book provides an interesting counterpoint to the majority of press and media regarding the Iraq war. The aim of this book is to provide ideological justifications, on moral grounds, for the Iraq war. It challenges the positions of both the left and right, and claims that the war in Iraq has been morally justifiable on the grounds that Saddam Hussein was a brutal dictator who perpetrated crimes against humanity and violated the human rights of the citizenry of Iraq. However, Cushman does not excuse the justification provided by the Bush administration for entering the war. This book is useful in developing a holistic view regarding justifications of the war.

Diamond, Larry. 2005. "Building Democracy After Conflict: Lessons From Iraq." *Journal of Democracy* 16 (1): 9-23.

Annotation: "Building Democracy After Conflict" explores the unique state building circumstances found in Iraq in the post-war period. It is useful in its recommendations and advice regarding building legitimacy in a reconstruction context. It discusses building legitimacy through democratic elections and questions whether or not this is enough. Finally, it makes several recommendations based on the lessons learned from Iraq and explains how these lessons can further and improve democracy in other contexts. Some of the lessons include holding the elections first within a reasonable period of time and dispersing reconstruction funds effectively.

Diamond, Larry. 2006. "Iraq and Democracy: The Lessons Learned." *Current History* 105 (687): 34-39.

Annotation: This is a short, concise article on the situation in Iraq, the manner in which democracy was deployed, and lessons on how to deploy democracy better in the future. Diamond discusses issues related to the single national district in the first Iraqi elections and the problems that this created. Furthermore, Diamond discusses the issues of developing legitimacy in a nation-building context. Diamond is a useful source on the situation in Iraq as he was Senior Adviser to Coalition Provisional Authority in Baghdad.

Diamond, Larry. 2004. "What Went Wrong in Iraq." *Foreign Affairs* (September/October): 34-56.

Annotation: Larry Diamond outlines the pitfalls that occurred Iraq. He describes elements necessary for rebuilding a state, past experiences in post-war transitions, and the reasoning behind the elections. There is an extensive overview of the Iraqi circumstances post-invasion and what went wrong there. This is a useful document for understanding post-war transitions and state-building.

Pace, John P. 2008. "Human Rights in Iraq's Transition: The Search for Inclusiveness." *International Review of the Red Cross* 90 (869): 91-117.

Annotation: This article explains the challenges presented to the United Nations following the invasion of Iraq. Political and human rights challenges beset the UN in its attempt to reconstruct Iraq. Pace describes the provisional government and transitional process for democratizing Iraq. In this process, there was a certain need for inclusiveness of the various Iraqi sects. The challenges have persisted; however, measures have been taken towards developing an inclusive human rights policy in Iraq. A Ministry of Human Rights was formed to protect the citizens of the nation, a Council of the Judiciary was formed to separate powers of the justice system, and mandates were instituted to ensure human rights. This article should be read with awareness of Pace's considerable bias against the invasion of Iraq.

Papagianni, Katia. 2007. "State Building and Transitional Politics in Iraq: The Perils of a Top-down Transition." *International Studies Perspectives* 8 (3): 253-271.

Annotation: Katia Papagianni argues for a different sort of post-conflict transition—one organized and led from the bottom-up. She advocates for a transition led by indigenous local communities rather than by policy-makers in large bureaucratic institutions. She holds the belief that top-down transitions cannot lead to democratic institutions. Also, she argues that democratic institutions need to emerge from existing social factors. By transitioning through such methods, post-conflict states like Iraq can build legitimacy and credibility in their local institutions.

Papagianni, Katia. 2005. "Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation." *Development in Practice* 15 (6): 747-759.

Annotation: This is another useful article by Papagianni regarding transitional politics in conflict states. Once again, she argues for the inclusion of the public in the planning process and in state-building, claiming that this creates feelings of legitimacy amongst the public. She analyzes Afghanistan and Iraq based on the differences of their transitional processes. The comparison develops into three themes: transitional frameworks and the need to separate them from constitutional discussions; the representation of the public in institutions and politics; and the participation of civil society in the transitional process.

Peerenboom, Randall P. 2005. "Human Rights and Rule of Law: What's the Relationship?" *Georgetown Journal of International Law* 36: 1-154.

Annotation: Peerenboom investigates the relationship between human rights and rule of law and examines the human rights community's recent interest in their association. Rule of law is seen as being central to the protection of human rights and to maintaining social order. He contends that wealth is a better predictor of respect for human rights than rule of law. He also argues that the relationship between democracy and rule of law is weak, stating that authoritarian regimes are capable of maintaining rule of law. Although this article is not specifically about the rule of law in Iraq, it is a good overview of the issues concerning rule of law and human rights.

Rotberg, Robert. 2003. "Failed States, Collapsed States, Weak States: Causes and Indicators," in Robert Rotberg (ed.), *State Failure and State Weakness in a Time of Terror*. Washington, DC: Brookings Institute Press.

Annotation: This chapter is very helpful in explaining the political, economic, and social factors that lead states to fail. Although Rotberg does not specifically reference the Iraqi case, it is easy to apply his ideas and understand why the chaos in Iraq has persisted for an extended period of time. He explains the need for a state government to be able to provide positive political goods in order to ensure its continuing legitimacy in the eyes of its constituents. In the case of Iraq, basic services were lacking, the state lacked a monopoly on the use of violence, and thus the state failed.

Rothstein, Bo. 2009. "Creating Political Legitimacy: Electoral Democracy Versus Quality of Government." *American Behavioral Scientist* 53: 311-330.

Annotation: This article examines the process of creating political legitimacy. Rothstein argues that the Iraqi people have cast their vote in an electoral democracy but have failed to create a legitimate government through this process. He claims that legitimacy is created on the output side rather than the input side. This means that legitimacy is created through the services provided like infrastructure, water, electricity, etc. rather than through merely casting a vote. Rothstein states that the electoral process does not impart legitimacy on governments, even in the case of countries like Sweden. This indicates that for countries such as Iraq, nation-builders must focus on the output side.

Rubini, Daniel. 2009. "Justice in Waiting: Developing Rule of Law in Iraq." *Military Legitimacy and Leadership Journal* 1: 53-93.

Annotation: Rubini discusses military civil affairs operations in developing rule of law in Iraq. He stresses that it is crucial in post-war peace operations to establish government services and stabilize functions. Rubini also points to the leaders of Iraq's justice system as being crucial for creating a legitimate, independent judiciary. Furthermore, Rubini discusses the need for legitimacy and public support in establishing rule of law and as a central tenet of counter-insurgency operations. This is a helpful article from a practitioner's point of view regarding legitimacy, rule of law, and human rights within numerous contexts.

Samuels, Kirsti. 2006. "Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt." *World Bank Social Development Papers* 37: 1-64.

Annotation: This paper provides a useful overview of what constitutes "rule of law" based on the World Bank's extensive experience in post-conflict reconstructive states. Samuels describes the five basic premises for rule of law: a government bound by law, equality before the law, law



and order, predictable and efficient rulings, and human rights. The difficulty of implementing rule of law in a post-conflict state is heightened by the lack of capacity in the state as it begins anew. The article then goes on to explain four constitutive elements of the rule of law, which include: economic development, democratization, poverty reduction, and peacebuilding. The article concludes that there is little consensus on the process of reconstructing the rule of law in post-conflict states despite two decades worth of experience.

Schwartz, Michael. 2008. War Without End: The Iraq War in Context. Chicago: Haymarket Books.

Annotation: Schwartz centers this analysis of the Iraq war on how he sees a US occupation fueling civil war in Iraq. He discusses the dismantling of the Iraqi state following the invasion, which leads into a useful analysis of the need for infrastructure as a prerequisite for rule of law. Rule of law is central throughout as he describes the chaos that ensued following the invasion and the occupation. However, there is a clear bias to this book, as Schwartz views the Iraq war as an invasion vested in oil. Regardless of the political leanings, it is an interesting and helpful analysis for understanding how basic services, infrastructure, and elections can lead to rule of law.

Stover, Eric, Miranda Sissons, Phuong Pham, and Patrick Vinck. 2008. "Justice on hold: accountability and social reconstruction in Iraq." *International Review of the Red Cross* 869: 5-28.

Annotation: This article explains the social reconstruction circumstances that existed in post-conflict Iraq following the invasion. Ultimately the "security quagmire" created a very unstable situation that led to failing rule of law and hindered reconstruction in Iraq. The article provides a useful definition of transitional justice in reconstruction. Additionally, the authors incorporate the notion of building legitimacy within the government that follows the conflict in order to ensure that rule of law persists. Iraq is a very complex reconstructive case, as it has a difficult and complicated history dating back to the violence and human rights violations wrought by Saddam Hussein's regime.

United States Government Accountability Office. 2007. "Securing, Stabilizing, and Rebuilding Iraq: Iraqi Government Has Not Met Most Legislative, Security, and Economic Benchmarks." Report to Congressional Committees. Washington DC: GAO.

Annotation: This government report provides an extensive overview of how the United States and Iraqi governments have failed at securing Iraq from insurgents and providing a stable country in which to rebuild. The aspects most useful regarding human rights, electoral law, and the rule of law are the issues found in implementing an election in Iraq. The GAO found that only one of eight legislative benchmarks was met and that the rest were failing. However, the Iraqi government has been successful in protecting minority party rights in Iraq's legislature.

United Nations. 2009. "Human Rights Report, 1 January-30 December 2009." New York: United Nations Assistance Mission for Iraq.

Annotation: This is a useful assessment of the current human rights conditions in Iraq. The report operates as a tool for the government to improve upon the human rights of the nation. The report specifically points to shortcomings in the Iraqi rule of law as a threat to security and to upholding human rights. It also notes instances of torture and ill-treatment in pretrial detention facilities. In Section II of the report, recommendations are provided to improve human rights in Iraq. The report discusses indiscriminate killings, targeted attacks, extrajudicial killings, mass graves, and civilian casualties among other human rights issues in. Finally, it discusses issues around the rule of law in Iraq—specifically the death penalty, detention, and internment under various governmental bodies.

Voorhoeve, Joris. 2007. From War to Rule of Law: Peacebuilding After Violent Conflicts. Amsterdam: Amsterdam University Press.

Annotation: This book takes a comprehensive look at the processes of state-building and peacebuilding in post-war nations. It focuses on progressing from violent conflict to countries with legitimate justice systems that are governed by the rule of law. Voorhoeve argues that nations need to be stabilized before holding elections. He states that the main elements of a complete rule of law system are free and fair elections. Through the development of a system of rule of law, human rights can be protected. The Iraqi case involves warring parties involved in an insurgency, which has consistently undermined the creation of a rule of law system. Thus far, the system is failing in Iraq.

Weingast, Barry R. 1997. "The Political Foundations of Democracy and the Rule of Law." *The American Political Science Review* 91 (2): 245-263.

Annotation: This article argues that democratic stability is reliant upon a self-enforcing equilibrium defined by having government officials who respect democracy's limits on their power. This notion is applied to a variety of issues including democratic stability, plural societies, and elite pacts. The article is applicable to the Iraqi case because it aids in understanding the foundations of democracy in plural and sectarian societies. For instance, Weingast provides research regarding why divided societies have so many difficulties in implementing rule of law and why democracy has such a small chance at succeeding in these societies. He does, however, provide evidence to the contrary through examples of states like Belgium and Switzerland.

West, Bing. 2008. *The Strongest Tribe: War, Politics, and the Endgame in Iraq*. New York: Random House.

Annotation: This book is a gripping account of the war in Iraq from combat journalist Bing West. It provides an overview of five years of war in Iraq with first-hand accounts from the people who fought there. It is useful for establishing a context regarding the circumstances in Iraq around the time of the first elections and for understanding why and how the elections failed to create legitimacy for the Iraqi government. West also discusses the US government's decision not to hand over control to the Iraqis early on.

Williamson, John. 2004. "Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System." *The Georgia Journal of International and Comparative Law* 33 (1): 229-244.

Annotation: Williamson describes his role in reinstating rule of law in post-war Iraq. He has a background in developing justice systems in a post-conflict context, having helped in Kosovo as well. Williamson describes how the US, as an occupying power, had a legal obligation to reestablish the justice system in Iraq. According to Williamson, one of the most daunting tasks to be dealt with was the destroyed infrastructure. Up to seventy-five percent of the courts had been destroyed, computers were gone, files and court records had disappeared, and so on. Thus, the justice system had a very difficult transition. Williamson concludes that a simultaneous response to the shortcomings in the justice system is necessary in order to create rule of law.