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ELEMENTS OF THE ILD PROGRAM RELEVANT TO IRAQ

The Property Challenge in Iraq

After 20 years of experience analyzing the world's property systems, the ILD has found that the property recording organizations in most developing and former communist nations tend to be in decent working order. Like their counterparts in the West, they have departments specializing in surveying, mapping, and digitalization of real estate and business registries. The odds are that up until Operation Desert Storm in 1991 Iraq's property records were also in good condition (at least for Baghdad). Since then, however, these records have probably degraded. And many or most of them, it is now feared, may have been looted and torched after the fall of the Iraqi regime. If so, they will have to be reconstructed—and fast—to help settle real property claims and provide space for displaced persons and returning refugees.

The real problem, however, is that even if that Humpty-Dumpty can be put together again, Iraq's records are still unlikely to reflect the reality of Iraqi property, much less provide authorities with the legal tools to build an inclusive market economy. History has shown us, again and again over the past two centuries, that once an existing authoritarian legal and administrative system breaks down, it is impossible to reconstitute the previous order. What automatically followed the collapse of the age-old patrimonial system, of feudalism, and, more recently, of communism was not a market economy but anarchy and widespread black markets, or another form of authoritarianism to rein in unruly behavior.

In the Ukraine today, for instance, 14 years after the end of communism, 60% of the people operate in the underground economy. Unable to adapt to burgeoning markets and emerging new practices, the Ukrainian system cannot provide affordable and thus enforceable rules, leaving people no alternative but to make their living in the extralegal sector. And while the Egyptians may have invented surveying and mapping 3,000 years ago to calculate and virtually represent boundaries after the Nile overflow, today 90% of Egyptians operate their businesses and hold their assets outside the law. The same kind of underground economic activity is bound to thrive in Iraq, including the transactions taking place in a vast extralegal micro and small enterprise sector that is probably now one of the largest absorbers of unemployed Iraqis, particularly young people.

The consequences for a genuine property system and the future of capital formation in Iraq are profound. A spanking new computerized property database, neat maps, and property claims commissions do no good if the records they contain do not reflect real possessory

rights on the ground. And even if Iraq's legal system could be jump-started tomorrow, it is doomed to failure because its laws will not connect to the reality of how most people do business when freed from authoritarianism and will thus be unenforceable.

Throughout the developing and post-communist world, from Russia to Brazil —and now in Iraq— the real challenge of creating a property system is to design it in such a way that the poor and middle class citizens holding extralegal assets will voluntarily register those assets and transactions and bring them under the rule of law of a market economy —not because they are forced to but because they recognize that it is easier and more profitable to comply with the law than to work outside it. Law will have to be redesigned and adapted to the changing needs and expectations of common people no longer controlled by a dictatorship. That is the only way a property system can work in a non-authoritarian country.

Why Property is so Important for Creating the Rule of Law in Iraq

Creating a property system is more than just building a system to record ownership; it is the cornerstone of the rule of law and the market economy. We believe that a property system has to be designed so that it can integrate *all* of a nation's assets and provides the framework of rules that organize the market, the titles and records that identify economic agents, and the contractual mechanisms that allow people to exchange goods and services in the expanded market. It is property law that provides the means to enforce rules and contracts along with the procedures that allow citizens to transform their assets into leverageable capital. Therefore, if the property system is not designed to enable owners to enter into the market economy, property will be reduced to its ownership protection function and the poor, even with titles in hand, will be excluded from the market economy.

That is also why the ILD program to create an inclusive property system is more than just about land. We want everything that people use and possess to come under the rule of law so that everyone is not partly “legal” and partly in the shadows but fully governed by the rule of law. A property system should be able to represent all kinds of assets —not only land, but also businesses, chattel, and whatever other things people own— in standardized and universally accepted records that allow owners to use their belongings and track records to guarantee credit and contracts. We make sure that beneficiaries of property programs are also in a position to access the instruments that store and transfer the value of their assets, such as shares of corporate stock, patent rights, promissory notes, bills of exchange, and bonds. We design the property system so that addresses can be systematically verified, so that assets can be described according to standard business practices, so that people can be made to pay their debts, and so that authors of fraud and losses can be easily identified in an expanded market.

That is how the rule of law begins —with property law that protects what poor people cherish the most and leads them quickly to understand the value of a system of rules that applies to everyone.

What needs to be done before implementing an Inclusive Property System for Iraq

The ILD program rests on a strategy whose objective is not just to consolidate the legal rights of those who had property under the Baath regime or its predecessor but to give all Iraqis the

right to have property rights. Bestowing such “meta rights,” emancipating people from bad law, and creating an inclusive property system is not about drafting elegant statutes, interconnecting shiny computers, or printing multicolored maps. Iraqis know all about that. What Iraqis need is a property program supported by a well-thought-out political strategy that motivates Iraqi leaders to be deeply committed to putting property and capital in the hands of the whole nation, thus giving citizens the incentives to create the institutions of a democratic and free society which they can use to safeguard and advance their objective interests.

That is exactly what the Western nations did – create legal property systems supported by well-thought-out political strategies. That is, for example, what Thomas Jefferson did in Virginia at the end of the eighteenth century, when he increased the fungibility of property by abolishing, among other things, the practice of entail. Similarly, when Stein and Hardenberg set the stage for universal property rights in Germany at the beginning of the nineteenth century, when Eugen Huber in Switzerland at the beginning of the twentieth century and the Japanese reformers after World War II began to integrating the dispersed property systems of their countries, they too employed carefully planned strategies to storm the barricades of the status quo. They also made sure they were armed with astutely aimed legislation that permitted government to create popularly supported, bloodless revolutions that could not be halted.

That is why the program we propose for Iraq takes the form of a transformation strategy that is based not only on our experience in the field but on the lessons that the ILD has learned from the successful transitions to market systems in the USA, Europe, and Japan during the 19th and 20th centuries.

Before creating a new property system for Iraqi authorities, it is important to get the facts: all extralegal and legal assets must be identified, located, quantified and classified according to the different rules —formal and informal—that govern the right to possession and exchange.

The rule of law can be established only if the new property law:

1. reflects the extralegal customs and practices of the poor and middle classes; and
2. gives them more easily enforceable rights than they can obtain through bribes and protection provided by extralegal organizations.

The program will begin by identifying, locating and classifying extralegal rights over assets, whether they are created by feudal, tribal, refugee, or black market organizations. Such information is an essential prerequisite for writing modern law and shaping recording procedures that will be enforceable and respected in practice.

Simultaneously, we will investigate the current laws and regulations that thwart Iraqis who try to gain legal title to assets they are holding, forcing even honest people to operate in the extralegal sector and continue to conduct business in a corrupt environment. The ILD has found that in most developing countries such obstacles to playing by the rules can be truly Sisyphean. Today, in Egypt, for example, which helped set up the Iraqi civil code of 1953, titling a bakery can take up to 540 days of moving from one bureaucracy to another at a cost

of 84 times the average wage. In Mexico, even after 15 years of structural adjustment, foreclosing a mortgage takes no less than 43 months.

With the information obtained above, we will acquire the material and criteria needed to create an official property law that is more efficient at protecting rights and creating capital than the fragmented extralegal rules and bribes that characterize the shadow economy. In this manner, records and maps can be transformed from quickly outdated snapshots into “living” cadastres. Instead of slipping back into the corrupt practices of the extralegal economy, owners will have the incentive to keep registering their subsequent transactions, thus maintaining current official property records (and the legitimacy of the market economy law).

We would be very surprised if the information obtained would not confirm that a substantial amount of the poor and middle classes of Iraq are already working within a market economy, albeit an extralegal one and constitute a wide-based constituency for market reforms. This diagnosis would debunk any myth about a market system being incompatible with the local culture.

In our experience, presenting proof to a government that the extralegal sector of its nation is enormous and composed of private firms run by ordinary people loaded with potential capital motivates the leadership to move quickly towards reform. For instance, the ILD diagnosis in Egypt found that 90% of the population holds their assets and does business outside the law. We also estimated that these assets were worth about \$245 billion —55 times larger than all foreign direct investment in Egypt and 30 times the value of the nation’s existing legal business. Egyptian leaders were astounded. They were no less amazed by another ILD discovery: that the cost of legalizing those assets was prohibitive for most Egyptians: typically, it took 2 years to license a business and 17 years to title a home that could work as collateral, thus depriving the poor of access to their capital. The ILD diagnosis demonstrated that the reason most Egyptians worked outside the law and refused to enter a legal market economy was not due to an Islamic or Arabic cultural trait but to bad law. We are now helping the Egyptians reform their legal property system.

Faced with evidence of such vast potential wealth held by ordinary people, leaders in Iraq will have to recognize, sooner or later, that:

- The poor are not the problem, but the solution.
- That they are the most important constituency to create a market economy based on a rule of law compatible with their needs.
- The poor are vibrant, creative entrepreneurs.
- The poor already hold the assets required to create capital.
- The lack of liquidity for entrepreneurial purposes is the result of a bad legal structure that can be reformed to create an acceptable rule of law.
- Property reform will allow their macroeconomic policies to work because legal incentives become meaningful and assets and transactions can be taxed.
- Reform will defeat terrorism rather than incite it.
- If the new property law emphasizes the protection of the assets and transactions of the poor, given the fact that they are the majority, this will create a solid constituency for

the rule of law in a market economy. (This is in contrast with other countries where market reforms are driven by —and mostly beneficial to— small elites and therefore do not have widespread support.)

- The best way to win elections and stay in power is by creating an inclusive market economy.

The goal would be to produce a common bedrock law for all citizens. The current extralegal rules that govern most Iraqis should be deconstructed in order to identify the principles that underlie them and see how they can be integrated into a new property law that can be trusted by everyone. One can then proceed to design and help enact a legal property system that consolidates the meaningful aspects of the disparate and dispersed extralegal arrangements (including procedural regulations for refugees and displaced persons) into one modern, codified system that Iraqis will freely choose to abide by and that will meet with a minimum of resistance from official bureaucracies and the formal sector.

In this way, the new government can begin to catch the wave of rising expectations instead of being engulfed by it.

Lawlessness is terrible, but the whole notion of security is far more complex than what would be achieved by putting a cop on every corner. The rule of law is not the iron fist imposed from above, it is a consensus about people's respect for one another's person and property. It is a social contract that people agree to keep because it protects the sources of their livelihood, their assets, and the customs that they respect and obey.