

# **Obstacles, Limitations and Challenges Hindering the Progress of the Judicial System in KRI**



**Conducted by:  
Kurdistan Center for International Law  
(KCIL)**

**2022**

**Obstacles, Limitations and Challenges Hindering  
the Progress of the Judicial System in the Kurdistan  
Region of Iraq**

به‌هیزکردنی سیستمی دادوهری له ههریمی کوردستاندا  
به‌رسته‌کان، ئاسته‌نگییه‌کان و کیشه‌کانی به‌رده‌م

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**Kurdistan Region of Iraq - 2022**



**This research has been conducted over  
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## **About the Kurdistan Center for International Law**

The Kurdistan Center for International Law (KCIL) is an independent academic center that specializes in the research and analysis of international law and its relevance to Kurdistan's communities. The KCIL is a Kurdish-German collaboration that is non-partisan, non-governmental and not for profit. The center combines advocacy with legal analysis to protect, promote and fulfill the fundamental principles of international human rights law, international humanitarian law and international criminal law in Kurdistan.

The KCIL believes that enforcing the treaties of international human rights laws has the potential to catalyze radical change within Kurdistan's communities. The KCIL tries to assist the Kurdistan Region of Iraq's authorities' attempts to ensure the principles of international human rights laws are adopted across the nation and that the rule of law is applied according to international standards.

## **About Konrad Adenauer Stiftung**

Konrad-Adenauer-Stiftung's Middle East and North Africa Rule of Law Programme is one of six worldwide regional rule of law programs managed by the KAS. Based in Lebanon, it is designed to be a program based around legal dialogue, which aims to promote the exchange of professional expertise and initiate or constructively accompany political decision-making processes in the region. The Rule of Law Programme Middle East and North Africa focuses on the following areas:

- The promotion of structures and key institutional elements of the rule of law, such as a functioning constitutional jurisdiction;
- The separation of powers, in particular that of a professional, effective and independent judiciary and a law-abiding administration that is effectively controlled by independent bodies or courts;
- The protection of fundamental (human) rights in their substantive and procedural dimensions;
- The support of regional cooperative instruments that promote the rule of law and democracy.

## **Abbreviations:**

CAT: Convention against Torture and Other Cruel or Degrading Treatment or Punishment

CEDAW: The Convention on the Elimination of All Forms of Discrimination against Women

ICCPR: International Covenant on Civil and Political Rights

ICERD: The International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR: The International Covenant on Economic, Social and Cultural Rights

ICRPD: The International Convention on the Rights of Persons with Disabilities

IPC: Iraqi Penal Code

ISIS: Islamic State of Iraq and Syria

KDP: Kurdistan Democratic Party

KRG: Kurdistan Regional Government

KRI: Kurdistan Region of Iraq

PUK: Patriotic Union of Kurdistan

UDHR: Universal Declaration of Human Rights

## Statement of the problem

Since the fall of Saddam Hussein's regime in 2003, many efforts have been made to strengthen and stabilize the Kurdistan Region of Iraq (KRI). Yet those attempts have had many undeniable shortcomings. The previous regime's legacy still exists within much of the region's cultural, legal and institutional environments. War, terrorism and internal violence have destroyed some of the KRI's legal infrastructure. Thus, it is necessary to conduct studies, in different fields, in order to determine how to establish the rule of law and good governance in the KRI.

A judicial system is a key pillar of state governance. Trying to strengthen the judicial system is critical to the future governance of the KRI. The Kurdistan Center for International Law (KCIL) has conducted this research as a constructive initiative which attempts to contribute towards the strengthening of the KRI's judicial system. This research first examines the obstacles, limitations and challenges which hinder the region's judicial system and then provides solutions to overcome these problems.

Understanding the challenges and problems facing the KRI's judicial system requires a thor-

ough evaluation of international legal standards, which are based on the principles of the rule of law and its indicators. In light of these indicators and principles, this research attempts to provide technical and legal recommendations.

There have been many political, legal and social upheavals in the KRI throughout its modern history, that affected the legal and administrative spectrum. The judiciary can play a very important role in resolving this issue. However, the judiciary itself faces various obstacles, which has reduced its efficiency. As a result, the KRI judiciary needs to carry out fundamental structural and legal reforms in various administrative, legal and human resource departments.

In order to arrive at practical solutions which can strengthen the KRI's judicial system, this study will first address the history and the evolution of the judicial system in the KRI. Then, it will outline the protection of fundamental human rights based on the principles and criteria of the rule of law. Following this, laws and regulations that are directly related to the fundamental rights and freedoms of citizens, as well as, grounds for the violation of these rights will be examined. While reviewing these laws, case studies where fundamental freedoms have been violated are identified

and in the following sections, practical solutions are presented.

The judiciary in any legal system exercises certain duties within the framework provided by the principle of the separation of powers and the rule of law. Certain tasks are considered the responsibility of the judiciary alone and are separate from governing powers' oversight. The same applies to the KRI's judiciary. This distinction is essential in order to maintain social solidarity, protect fundamental human rights and fundamental freedoms, fight corruption and crime, ensure legal relations between citizens, monitor government and citizens' actions, achieve justice and detect political deterrence in the KRI. Reforming the KRI's judicial system can be achieved by setting up a working group with the KRI Judicial Council to implement these proposals, as thoroughly as possible and in a timely manner. This has the potential to play a crucial role in promoting a capable, effective and efficient judiciary.

## Chapter One

### **A history of the judicial system in the KRI**

#### **1.1 A brief history of the judiciary in Iraq from ancient civilizations until 1991**

Mesopotamia is the cradle of civilization; its legal tradition goes back to one of the world's oldest codifications — the Code of Hammurabi, which was written around 3750 years ago. Older civilizations that comprised what is now modern-day Iraq (including Kurdistan) include the Sumerians, who date back to 5000 BCE and were centered around their capital, Ur-Abraham's place of birth; the Amorites, who founded the cities of Babylon and Akkad and whose empire lasted from 1900 to 1600 BCE; the Hittites, who ruled from 1600 to 1100 BCE; the Assyrians, who were in power from 1200 to 612 BCE; and finally the Chaldeans, who ruled from 612 to 539 BCE.<sup>1</sup> The

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1 M. Cherif Bassiouni, 2005, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, *Cornel international legal justice*, Vol. 38.

Code of Hammurabi covered all aspects of law, a reflection of the sophisticated society at the time. The code included laws on marriage and family relations, property, robbery and other crimes, the minimum daily wage, the purchase and trading of slaves, an owner's obligations to slaves and even fees charged by doctors, lawyers and accountants. The Code of Hammurabi recognized many ways of disposing property: by sale, lease, bartering, gifting, dedication, depositing, loans and pledging, all of which required a legal contract.<sup>2</sup> The Assyrians changed family law practices in Mesopotamia by implementing rules that were more restrictive to women than those in the Code of Hammurabi; husbands and fathers gained more authority over their families.<sup>3</sup>

In the 7<sup>th</sup> century, when the Persian army was defeated by Arab forces, Mesopotamia became 'al-Iraq'. Later, the region fell under the control

2 Claude Hermann Walter Johns, *Babylonian Law—The Code of Hammurabi*, *ENCYCLOPEDIA BRITANNICA* 11th ed. (1910-1911), available at <http://www.fordham.edu/halsall/ancient/ham-code.html>.

3 Constance A. Johnson, 2004, *Iraq: Legal History and Traditions*, The Law Library of Congress, Global Legal Research Center, available at <https://stuff.coffeecode.net/www.loc.gov/law/help/legal-history/iraq-legal-history.pdf>.

of the caliph in Damascus, in modern-day Syria. The Arab invasion brought with it language, religion, culture and a new set of laws. The Arabs were regulated by Islamic law (*Sharia*) that strictly prohibited rape and the killing of women, children, religious leaders or anyone who had not actually engaged in warfare. The Muslim warriors intended to conquer and govern Al-Iraq under Islamic rule. But it was not in their economic interest to destroy or pillage unnecessarily and indiscriminately.<sup>4</sup>

In the 8<sup>th</sup> century, the Abbasid caliphate took control. The study of law became an important part of theology and greatly developed during the Abbasid period. One of the four major schools of legal theory in the Sunni tradition, the Hanafi School, was founded in Baghdad in the early part of this era of Iraq's history. In the 14<sup>th</sup> century, when the Ottoman Empire was established, the Ottomans created a system of administration which encompassed the legislative and judicial functions of government. The system was codified in a book of laws and regulations. In addition to administrative rules and court rituals, the code, called the Ka-

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<sup>4</sup> The Arab Conquest and the Coming of Islam, IRAQ HISTORY, available at [https://arabic-media.com/arab\\_conquest.html](https://arabic-media.com/arab_conquest.html).

nun (Law), included criminal law. The Ottomans divided the regulations into two parts: one concerning the organization of the government and the military and the other concerning taxation and the treatment of citizens. By the 19<sup>th</sup> century, the Ottomans had transformed a number of laws and set up provisional representative assemblies. Together with the judicial system, these assemblies were no longer controlled by religious authorities and were intended to oversee civil rule. These local governments began to function as parts of a larger state structure. Abuses in the tax system that had allowed local governors to become rich were corrected, the regulation of the military conscription system was improved and new ministries were established, including a Ministry of Education and a Council of Justice, to oversee the developing legal system. The reforms enshrined the principle of fair public trials in law and ensured there was no punishment without an accompanying legal sentence. The Council of Justice was expanded and given quasi legislative powers.<sup>5</sup>

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5 Constance A. Johnson, 2004, Iraq: Legal History and Traditions, The Law Library of Congress, Global Legal Research Center, available at <https://stuff.coffeecode.net/www.loc.gov/law/help/legal-history/iraq-legal-history.pdf>.

World War I played a key role in the development of the entire Middle East. The Ottoman Empire had allied with Germany against the victorious British, French and Russian forces. The Middle East, along with other provinces of the Ottoman empire, became a battleground. After the fall of the Ottoman Empire and the signing of the Sykes-Picot Agreement in 1916, the British gained power over Iraq and abolished some of the institutions which were established during the Ottoman legal reforms.

After the British colonization of Iraq and the establishment of the Iraqi monarchy in 1921, the Ottoman judges were withdrawn and the British issued a statement outlining plans for the formation of the new kingdom's courts. The proposals were modest and included one Court of Appeal in Baghdad, which would also serve as the Court of Cassation. Worth noting that the Kurdish cities (Erbil, Sulaymaniyah and Duhok) were to become part of the Iraqi administration. In 1925, the Iraqi Kingdom established its first constitution. The fifth chapter of this constitution was devoted to the judiciary. The 1925 Constitution remained in force

as the basic law of Iraq until the end of the monarchical period in 1958.<sup>6</sup>

The July 14 Revolution, led by the Free Officers and General Abd al-Karim Qassim, ended the monarchical period in Iraq and resulted in the birth of the Iraqi Republic in 1958. The military officers who led the Revolution closed Parliament and issued announcement No. 1, which stated that a Republican regime had been established. Further proclamations announced the formation of a new government and a provisional constitution was published on July 26, 1958. On February 8, 1963, military units led by General Qassim's opponents took over key government sites, including the radio station and the Ministry of Defense building. General Qassim was executed without trial. It was the Ba'ath Party that had organized the coup. In May 1964, a new constitution was promulgated, which identified Iraq as a fully sovereign state and Islam as its official religion. In the same year, a great number of nationalization laws were passed, placing numerous sectors of Iraq's economy, including the banks, insurance companies and textile

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6 Stanford Law School, Introduction to the Laws of Kurdistan, Iraq Working Paper Series, p. 19.

industries under the control of the government.

The July coup in 1968 enabled the Ba'ath party to take power within a few weeks. Two years later, a new interim constitution was promulgated. Its first article stated that "Iraq is a Sovereign People's Democratic Republic". Islam was declared the state religion and Arabic the official language, with Kurdish an official language in the Kurdish region. The rights of Kurdish and other minority peoples were acknowledged. The constitution also established a judicial system described as independent and open to all. However, no detail was provided about the structure of the judiciary. The court system was based on laws promulgated by the French civil law model, as it had been since the days of Ottoman rule. Under the supervision of the Ministry of Justice, there were separate courts for civil, criminal, administrative, religious and other crimes. All judges were appointed by the president. The religious courts largely handled personal matters, such as marriage, divorce and inheritance. These religious courts followed different Islamic jurisprudence schools, namely the Hanafi for the Sunni Arabs, the Shafi'i for the Sunni Kurds and

the Ja'fari for Shi'a Arabs. Separate courts handled similar issues for the Christian and Jewish communities.<sup>7</sup>

Since the creation of Iraq, Kurdistan has been governed by and from Baghdad. During this 70-year period, Kurds in Iraq have regularly pushed for greater independence from Baghdad. Spurred on by the liberation of Kuwait in 1991 by the U.S.-Led coalition, a revolt against the Ba'ath regime took place in the south and north of Iraq. The revolution was put down savagely by the Ba'ath regime. Hundreds of thousands of people were reportedly killed by Saddam Hussein's Republican Guards and more than 50,000 refugees poured over the borders into Saudi Arabia, while thousands of others sought sanctuary in Iran. In the north, nearly two million people fled to the Iraqi borders with Iran and Turkey. This mass exodus led the U.N. Security Council on the 5<sup>th</sup> of April 1991 to pass "Resolution 688", which condemned the oppression of Iraqi civilians and called on Iraq to put an end to it. This paved the way to create a "safe haven," located north of what is known as the "36<sup>th</sup>

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7 Mark Lewis, 1990, Historical Setting, IRAQ: A Country Study, P. 181.

Parallel North” in Iraq, a cartographic line drawn just south of Erbil. Iraqi aircraft were forbidden to fly in this zone and the Ba’ath regime halted the advancements of its forces. As a result, an autonomous Kurdish territory was formed. In May 1992, Kurdistan held its first independent parliamentary election and in June of the same year, the Kurdish National Assembly began its sessions.

## **1.2 The judicial system in the KRI from 1991 to the present day**

After the withdrawal of the Iraqi Government from Kuwait in 1991, the KRI judicial system remained based on inherited Iraqi law, that was modified by legislative changes within Iraq's judiciary system. After that, the KRI judiciary became a vacuum which tolerated or facilitated torture and ill-treatment by the Kurdish administration authorities. Courts at that time in the KRI were influenced by the belligerent Kurdish political parties, namely Patriotic Union Kurdistan (PUK) and the Kurdistan Democratic Party (KDP). The system denied political prisoners the fundamental right to be tried by competent, independent and impartial courts. International standards, which impose safeguards against arbitrary detention and guarantee the right to fair trial were blatantly violated within the first year of the Kurdish uprising in 1991. Similarly, the UN's basic principles regarding the independence of the judiciary — which states that “tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or tri-

bunals” — were also violated.

The emergence of the KRI judicial system passed through several stages of development. From the beginning of the Kurdish uprising in March 1991 until the end of that year, judicial authority in areas which remained under Kurdish control was under the control of the Kurdish political party coalition (Iraqi Kurdistan Front). The courts were also governed by the Iraqi Kurdistan Front until the appointment of the Council of Ministers in 1992 and the creation of Ministry of Justice. After the formation of the Kurdistan Regional Government (KRG) in 1992, the courts were ruled by the Ministry of Justice, which was tasked with organizing and enforcing the laws. In 1993, the Kurdistan Court of Cassation was established.

In August 1992, the Kurdistan Parliament passed Law No. 11 of 31 August 1992, which rejected the application of any laws enacted by the Iraqi Central Government in the KRI. The law stated: “No laws, decrees, regulations and directives which were issued or which will be issued by the central government authorities after the withdrawal of the government administration from the

Kurdiŝtan Region on 23/10/1991 shall be enforced, except after the legitimacy of their enforceability has been confirmed by the Kurdiŝtan Parliament”.<sup>8</sup>

The new KRI judicial system, inherited from Iraq, remained in effect until the outbreak of the Kurdish Civil War in 1994. During this war, rival political parties established their own governments within their territorial zones (Sulaimaniyah and Erbil). Within those two zones, the courts operated in a separate and independent way. The Kurdiŝtan Parliament was paralyzed. However, the Kurdiŝtan Court of Cassation still acted as the court for both political zones until 1998, the year PUK established their own Kurdiŝtan Supreme Court in Sulaimaniyah. The remaining Kurdiŝtan Court of Cassation in Erbil ruled only over the zone ruled by the KDP.

After the fall of Saddam Hussein in 2003, the first united KRG was established in 2006 and the two Ministries of Justice were unified. The KRI judicial system was later unified in 2006. In the following year, the Kurdiŝtan Parliament enacted Law No. 23 of 2007 (the Judiciary Law) which es-

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8 Law No. 11 of 31 August 1992, Article 3.

established judicial authority as an independent authority, in parallel with executive and legislative authorities. This was a turning point in the history of the region's judicial system and a step towards its independence.

In 2009, the Kurdistan Parliament enacted the Law of KRI Judicial Institution, Law No. 7. The KRI Judicial Institution was established and was made responsible for the selection of judges and prosecutors in the KRI. Since its establishment in 2009, the KRI Judicial Institution has had three appeal levels. As of 2021, 148 judges and prosecutors have graduated from the KRI Judicial Institution. Today, 195 judges serve in the KRI's courts.



## Chapter Two

### **Scrutinizing potential violations and the guarantee of human rights in KRI laws**

The history of the KRI is full of struggles against tyranny, the oppression of dictatorial regimes and the emergence of Kurdish liberation movements. In their struggles, Kurds have emphasized that freedom, human dignity, justice and equality are undeniable and non-negotiable rights they should also be granted. The laws in the KRI provide a good base for the application of these principles and to some extent, these principles are evident in the current applicable laws.

For courts to be deemed impartial and judicially independent, they require the following: competent judges within courts and tribunals; a judicial system that is accessible and able to achieve justice; and domestic laws that are compatible with international conditions and standards. There must also be wider implementation of international law

and treaties on a national level. In practice, in the KRI, the potential for the widespread irrational interpretation of law is considerable and adherence to the principles of human rights has been much diminished. It has become commonplace for fundamental human rights and freedoms to be violated in the KRI — the treatment of prisoners, interference in judicial affairs and the government and political parties' application of legal and judicial procedures outside of the courts are just a few examples of widespread violations.

In this chapter, we will examine the Kurdistan draft constitution and other relevant laws' human rights guarantees, as well as their vulnerability to violations. We will also tackle the subject of women's rights and examine judicial independence in the KRI.

## 2.1 Protection of human rights within the KRI draft constitution

After the judicial authority became independent in 2007, the KRG formed a committee to draft a constitution in the same year. The Kurdistan Parliament issued Law No. 8 of 2008 as a mechanism to constitute a referendum.<sup>9</sup> Due to the political instability within the Kurdish political parties, the referendum was postponed to an unspecified date. In 2009, Parliament amended the referendum law and set a date for the referendum, but again, this was not followed through and the date was amended for the second time.<sup>10</sup> Afterwards, it was for the KRG to decide on a new date for the referendum.<sup>11</sup> Due to a disagreement between the different political parties concerning the division of power between the three authorities and the role of the president, the KRI draft constitution was not voted on by the people in a referendum. After the election in

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9 Law No. 8 of the year 2008, available; <http://perleman.org/files/articles/120109080123.pdf> (Kurdish).

10 Law No. 9 of the year 2009, available <http://perleman.org/files/articles/020809103112.pdf> (Kurdish).

11 Law No. 10 of the year 2009, available <http://perleman.org/files/articles/200513011224.pdf>(Kurdish).

2018, a new parliamentary committee was formed to review the draft constitution, but the committee has not yet embarked on this task.

The Iraqi constitution guarantees the Kurds some rights within the Republic of Iraq.<sup>12</sup> In Article 1, it defines the Republic of Iraq as a federal state, provides rights for every region or city to form a federal region inside Iraq and states that “the federal system in the Republic of Iraq is made up of a decentralized capital region and governorate, as well as local administrations” and that “upon coming into force, [it] shall recognize the region of Kurdistan, along with its existing authorities, as a federal region”.<sup>13</sup> The Iraqi Constitution specifically acknowledges the right for the regions to have a constitution. It clearly states that “each region shall adopt a constitution of its own that defines the structure of powers of the region, its authorities and the mechanisms for exercising such authorities, provided that it does not contradict this constitution”.<sup>14</sup> Since a constitution is a guarantee

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12 Iraqi constitution came into force in 2005 in a national referendum after the fall of Baath regime.

13 Iraqi constitution, Article 116 and 117.

14 Iraqi constitution, Article 121.

for protecting human rights within its framework, we will discuss some aspects of the KRI draft constitution.

### **2.1.1 Equality before the law**

The KRI draft constitution adopted some provisions as a guarantee to protect and maintain human rights. International human rights instruments explicitly address equality and non-discrimination among human beings. The most valuable instrument is The Universal Declaration of Human Rights (UDHR), which states that all humans are equal and should be treated without any kind of distinction based on race, color, sex, language, religion, political opinion, national or social origin.<sup>15</sup> The right to equality and freedom from discrimination are also enshrined by various provisions in the International Covenant on Civil and Political Rights (ICCPR), which explains that states are obliged to prohibit any kind of discrimination by enacting laws and that they should undertake all possible measures to ensure gender equality.<sup>16</sup>

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15 UDHR, Article 1, 2, 7.

16 Iraq signed in 1969, ratified in 1971, but Iraq is not a member

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also outlines the rights to equality and non-discrimination, including through gender equality, equal remuneration and equal opportunity for everyone.<sup>17,18</sup> The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) plainly defines the term of non-discrimination and outlines state's obligations to eliminate all forms of discrimination in order to guarantee the rights of everyone.<sup>19,20</sup> The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) emphasizes the rights to equality and non-discrimination, specifically in regard to gender-related violence. Based on principles of equality within political, economic, social, cultural, civil, or any other fields, it states that “discrimination against women” is defined as distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying

state of the First and Second Additional Protocols to the ICCPR.

17 Iraq signed in 1969, ratified in 1971, but Iraq is not a member state of the Additional Protocol to the ICESCR.

18 ICCPR, Article 2(2), article, 2(1), 26, article 20(2), 3, Article 7.

19 Iraq signed in 1969, Ratified in 1970.

20 ICERD, Article 1, Article 5.

the recognition, enjoyment or exercise of women, irrespective of their marital status.<sup>21, 22</sup>

The right to equality, gender equality and non-discrimination is an inalienable right. General Comment No. 18 in the ICCPR states that “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights”.

Including these rights within the constitution is one of the KRI’s challenges. The KRI draft constitution does not fully recognize the right to equality and non-discrimination, nor gender rights. In Article 20 (1.2.3), it is mentioned that “all are equal before the law... all forms of discrimination on the basis of race, color, sex, language, social background, nationality, origin, religion, belief, thought, age, social, political or economic status, or handicap are prohibited” and that “men and women shall be equal before the law”. In Article 6 (1) there is, however, a contradictory statement which reads: “The principles of Islamic Sharia as

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21 Iraq ratified in 1986.

22 CEDAW, Article 1.

one of the main sources of legislation, it is not allowed to enact a law inconsistent with the provisions of the fundamentals of Islam”. This means that these inalienable rights, especially the right to gender equality, should be regarded within the Islamic framework and not contradict fundamental Sharia provisions. Some rights, namely the right to divorce and the right to receive equal inheritance between men and women, are not fully guaranteed by this Article since according to the Quran a woman’s share of an inheritance is half of that of a man: “God instructs you concerning your children: for the male, what is equal to the share of two females”.<sup>23</sup> All Arab countries, except Tunisia, have this restriction in their constitution or general laws.<sup>24</sup> This does not allow women to enjoy the full group of internationally recognized rights. KRI needs to eliminate Article 6 (1) and instead name all the aspects of the right to equality, gender equality and non-discrimination.

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23 Qur’an 4:11.

24 <https://www.dhakatribune.com/world/africa/2018/11/25/controversial-gender-equality-in-inheritance-law-approved-by-tunisian-cabinet?fbclid=IwAR-31hfzmHIDs4P51oWgXztqVZw1HV34-8iTpod8kVRjisyuw73nbhh5i82E>.

## 2.1.2 The right to liberty and life

The right to liberty is one of the most essential human rights and concerns physical and psychological liberty. This right can be found in the UDHR, but it is only briefly addressed there.<sup>25</sup> The UDHR states that “no one shall be subjected to arbitrary arrest, detention or exile” without further clarifications and limitations. However, this can be seen as the foundation for other provisions in the ICCPR, which comprehensively reiterates the legitimate reasons and exceptions for limiting the right to liberty and whom may be deprived of their liberty.<sup>26</sup> The Convention on the Rights of Persons with Disabilities (ICRPD) explains that persons with a disability have the same right to liberty as anyone else.<sup>27,28</sup>

The KRI draft constitution briefly defines the right to liberty as the following: “Everyone has the right to life and liberty, they may not be deprived of these rights or restricted from them except by

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25 UDHR Article 9.

26 ICCPR Article 9.

27 Iraq ratified in 2013.

28 CRPD Article 14.

law”. However, the exception “by law” can be misused, for instance if a law is enacted that restricts some liberties which are protected by international human rights instruments, how can the phrase “by law” then be interpreted?

The right to life is essential to everyone; without life there are no other rights. That is why the right to life can be found in every international human rights instrument. The UDHR entitles everybody that has the right to life, while the ICCPR identifies the right to life as an inherent right for every individual, stating that it should not be: “interpreted narrowly, [as] it concerns the privilege of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity”.<sup>29, 30</sup>

Addressing this right clearly without any ambiguity in every constitution is therefore very important. The KRI draft constitution does address the right to life but not in an appropriate manner. It states in Article 19 (2) that “everyone has the right

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29 General comment No. 36, the right to life, human rights committee, 3 September 2019.

30 UDHR Article 3.

to life, they may not be deprived of the right or have it restricted, except by law”. As with the draft constitution’s definition of the right to liberty, the right to life is also restricted by the exception “by law”, leaving it vulnerable to violations. Another inadequacy of the constitution is that it does not prohibit capital punishment.

### **2.1.3 Social, economic and cultural rights**

Social, economic and cultural rights are a very broad and controversial issue. These rights can be found in all conventions, especially the ICCPR. Addressing these rights plays a vital role in guaranteeing human rights within any constitution. The KRI draft constitution addresses some of them in two separate chapters; Chapter Two (social and economic rights) and Chapter Three (ethnic and religious rights of the different groups of the Kurdistan region).

In these sections which cover social and economic rights, the draft constitution clearly addresses the right to a standard and adequate living. In Article 24 (2), when describing the need “for [a] dignified life” with sufficient food, clothing,

health services and housing, the draft constitution appropriately follows ICESCR Article 12 (1) and says that “everyone shall have the right to obtain healthcare and medical treatment, regardless of their ability to assume the expenses thereof”. The draft also guarantees that under certain social pressures, such as escaping from honor killing or other situations, in which women may particularly be vulnerable, these women should be protected in a special “home”. The right to social security is also broadly guaranteed for everyone during various periods such as “motherhood, sickness, unemployment, injury, disability, old age, displacement and loss of one’s means of livelihood in circumstances beyond one’s control.” As well as this, the draft constitution obliges the government to ensure the welfare of the handicapped and “persons with special needs” in order to integrate them into society.

The right to education is guaranteed in the draft constitution and obligates the government to provide “free education at the primary, secondary and university level”. It also states that primary level education is compulsory and is a way to “combat illiteracy”.

## 2.1.4 Freedom of religion, belief and expression

The right to freedom of religion, belief and expression is addressed in almost all human rights instruments. As a core of the human rights laws, the UDHR entitles people the freedom of thought, conscience and religion. This right includes freedom to change religion or belief as well.<sup>31</sup> The ICCPR also identifies the right to freedom of thought, conscience and religion. According to the ICCPR, this right should include freedom for people to have or adopt a religion or belief system of their choice.<sup>32</sup>

General Comment No. 22 to the ICCPR explains that the right to freedom of belief should not have any limitations whatsoever on the freedom of thought and conscience or the freedom to have or adopt a religion or belief of one's choice.<sup>33</sup> This also includes the right to have or adopt a religion or belief, the right to replace one's current religion or belief with another, or to adopt atheistic

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31 UDHR, Article 18.

32 ICCPR, Article 18.

33 General comment No. 22, Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, Para 3.

views, as well as the right to retain one's religion or belief. The comment also states that choosing a place to worship is also part of the right to freedom of religion. According to the ICCPR Article, limitations of the right to freedom of religion or beliefs may only be subject to such limitations that are prescribed by law and are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.<sup>34</sup>

The KRI draft constitution takes these rights seriously, because the KRI is a multicultural and multi-ethnic region and its populous hold diverse religious beliefs. Therefore, the draft constitution dedicates eight articles (29-36) to protecting these rights. It guarantees that people belonging to one of the ethnic or religious groups shall have the right to legal recognition of their personal names, which means they have the right to name their children as they want, in addition to the right to use the traditional local names of places in their own and respective languages. It also enacts Personal Status Law for the followers of one religion, who should not be impose their beliefs on the followers

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34 ICCPR Article 18(3).

of another religion.

The KRI draft constitution secures the rights of followers of non-Muslim religions and sects, such as Christians, Yazidis and others, in such a way that they may even establish their own religious councils and follow the provisions specific to the Personal Status Law of their faiths. Such “personal status provisions shall be determined by law and personal status cases shall be heard before a Personal Status Court,” the draft states.<sup>35</sup>

As an obligation, the KRI draft constitution obliges the KRG to guarantee the principle of effective equality among people belonging to ethnic and religious groups and also seeks to achieve this equality, stating that: “the authorities must create the conditions which will ensure that the identity of these ethnic and religious groups is preserved and must take the necessary measures to reinforce this identity”. However, this constitutional draft does not address the issue of religious involvement in political affairs, but this has been addressed in other States.

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35 KRI draft constitution Article 30(2).

## 2.2 The Anti-Terrorism Law

The Anti-Terrorism Law came into existence two years after a terrorist attack hit Erbil in February 2004. The Kurdistan Parliament enacted a temporary law for two years to criminalize terrorism. From 2006 to 2018, the law has been renewed six times. In 2018, it became a permanent law.

Since the emergence of the Islamic State of Iraq and Syria (ISIS) in 2014, the Anti-Terrorism Law has been used to prosecute ISIS-affiliated fighters. It has also allowed judges to bring charges against a wide range of individuals, including some who were not implicated in specific violent acts but are deemed to have assisted ISIS, including, for example, doctors who worked in ISIS-run hospitals or cooks who prepared food for the fighters. The Anti-Terrorism Law carries harsh sentences, even for mere membership of ISIS, such as life imprisonment or the death penalty.

The right to have a fair trial is a key element in ensuring the proper administration of justice and more generally in protecting human rights. Trials are mechanisms to ensure accountability and pro-

vide remedies for victims of crimes and injustice. Moreover, it is crucial for trials to be fair and be perceived as fair.

The overarching right to a fair trial consists of a series of important human rights that serve to safeguard the rule of law through procedural means. These rights are principally found in Article 14 and 26 of the ICCPR. However, the right to a fair trial is broader than the sum of these individual rights. The right to a fair trial also significantly depends on the conduct of the criminal justice proceedings. It is also often linked to the entitlement to other rights, such as the right to life, the right to be protected from arbitrary detention and the right to be free from torture as well as other forms of cruel, inhuman or degrading treatment or punishment (“ill-treatment”).

With respect to international humanitarian law, Iraq is party to the Geneva Conventions of 1949 and the Additional Protocol I of 1977. In the context of a non-international armed conflict, Article 3, which is common to the four Geneva Conventions, explicitly prohibits the “passing of sentences and the carrying out of executions without previous

judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples". Common Article 3 also prohibits violence against life and persons, in particular the murder of all kinds of civilians and *hors de combat*. Under international law, executions carried out in violation of this prohibition may amount to crimes of war. The principles of legality and individual criminal responsibility, as well as the prohibition of collective punishments, have been recognized as customary international humanitarian laws applicable to both international and non-international armed conflicts.

The KRI's Anti-Terrorism Law provides consecutive sentences for different acts of terrorism, ranging from the death penalty to life imprisonment and to imprisonment for less than 15 years for any person who commits any of the terrorist acts detailed in the law. Those who incite, plan, finance, or assist terrorists also face the same penalty as the main perpetrator of the act.

The broad definitions related to criminal offences under the existing Anti-Terrorism Law en-

large the scope of the prohibited conduct and make them liable to subjective and overly flexible interpretations. The Anti-Terrorism Law stipulates that accused persons should be treated fairly in accordance with the law during interrogation, including through the provision of a lawyer. Torture and inhuman treatment are also explicitly prohibited. However, contrary to international law, Article 13 of the Anti-Terrorism Law allows for confessions extracted under duress to be used in court if they are supported by other evidence.<sup>36</sup> This provision is unconstitutional; it is against Article 27 (c) of the Iraqi Constitution and against Iraq's obligations as a signatory of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>37</sup>

Recently, the application of the Anti-Terrorism Law in the KRI has been prolific. In 2020, there were 1190 cases in the Committee of Felony in the Kurdistan Court of Cassation. Five-hundred and twenty-one of those cases were related to the Anti-Terrorism Law, equivalent to 44 per cent of all criminal cases in 2020. Between January 1, 2021

36 KRI Anti-Terrorism law No. 3 of the year of 2006.

37 Iraq ratified in 2011.

and November 15, 2021, Anti-Terrorism related cases accounted for 410 out of 1,430 criminal cases. This represents 29 per cent of all criminal cases in the KRI.

It is a similar situation in the Juvenile Committee in the Kurdistan Court of Cassation, where the number of cases related to the Anti-Terrorism Law is considerable. In 2019, there were 192 terrorism-related cases, out of a total of 530. That means that 36 per cent of juvenile cases were related to the Anti-Terrorism Law. Similarly, in 2020, 72 cases out of 300 were related to the Anti-Terrorism Law, accounting for 24 per cent of all juvenile cases. There have been allegations that during the trial process, even the minimum human rights standards have been violated. All these data and information infer that the trials made under the Anti-Terrorism Law should not be taken into account during the process of the trials.

The Anti-Terrorism Law is vague; it can be applied to a wide range of activities and the law overlaps with other applicable laws in the KRI. For instance, case NO. 255/ Juvenile/ Cassation on July 28, 2021, described a 16-year-old girl who had

joined a WhatsApp group which was used by Islamic groups. The investigative judge and the trial chamber decided that the girl's activity counted as an act of terrorism and sentenced her to two years in prison, according to Article 3 of the Anti-Terrorism Law. The case was appealed in front of the Juvenile Committee in the Kurdistan Court of Cassation, which accepted the appeal and later decided that the case was not related to any terrorist activity; they changed the prosecuting law to the Misuse of Telecommunications Law and reduced the young girl's sentence to six months.

### **2.3 Women's rights in KRI laws**

Kurdish society is patriarchal; Kurdish women, therefore, face many obstacles including systematized legal discrimination. The Iraqi constitution potentially allows discrimination against women and is applicable on Iraqi territory including in the KRI. Article 2.1 states that no law that contradicts with Sharia should be enacted. It clearly states that “Islam is the official religion of the State and is a foundation source of legislation: a) no law may be enacted that contradicts with the established provisions of Islam; b) no law may be enacted that contradicts with the principles of democracy; c) no law may be enacted that contradicts with the rights and basic freedoms stipulated in this Constitution”. This provision is ambiguous; it is not clear which of these various sources is dominant — the provisions of Islam, the constitution, or the principles of democracy?

Under the Iraqi Personal Status Law, which dates back to 1959, various amendments since 1959 do not pay attention to the rights of women. There are many provisions that contradict with the UDHR and Constitutional rules, as well as with

the CEDAW and principles against gender discrimination. One of the most important texts mentioned in the law which violates women's rights is the subject of polygamy, which entitles men to have up to four wives. Sharia law states that "polygamy is not allowed without a judge's permission, to give permission, the following conditions must be fulfilled: a. the husband must have financial sufficiency to support more than one wife, b. there is a legitimate interest".<sup>38</sup> In 2008, an amendment to the 1959 Iraqi Personal Status Law was passed by the Kurdistan Parliament. According to the new amendment, men are limited to marrying a maximum of two women, not four and they can only marry a second wife if: "the first wife should agree to the second marriage, [and] his first wife is unable to have children or suffers from a disease". Men who violate these restrictions will either serve six months in prison or pay a fine of 10 million Iraqi dinars (approximately \$7,000). Yet still in the KRI a man has the right to have two wives and sometimes men visit courts outside the KRI's jurisdiction in order to obtain marriage contracts.

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38 Iraqi Personal Status Law, Article 3. Accessible; <https://kc-interlaw.org/Detail.aspx?jimare=252>.

Iraqi laws also create inheritance inequalities between men and women. Iraqi Personal Status Law and the Iraqi Civil Code both decree that the share of inheritance should follow Sharia, stating that “Males shall receive twice the share of females”.<sup>39</sup>

Iraqi laws do not fully address issues of inheritance, which is why the legislation of inheritance falls under the jurisdiction of the Quran. For instance, when a son dies, he might have a father, mother, wife, children, siblings and perhaps other immediate family. To identify inheritance’s share for each person, a mathematical calculation should be made. This process is not addressed by the Quran itself. Instead, Sharia law, in accordance with Islamic doctrines, handles this issue with some hypotheses, that are generally formulated by Islamic inheritance experts.

The legal age of marriage as outlined in the Iraqi Personal Status Law is eighteen years.<sup>40</sup> However, the law allows for an exception to this

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39 Iraqi Personal Status Law, Article 89 and 90. Accessible; <https://kc-interlaw.org/Detail.aspx?jimare=252>.

40 Iraqi Personal Status Law, Article 7. Accessible; <https://kc-interlaw.org/Detail.aspx?jimare=252>.

general provision and states that: “if an individual who has completed fifteen years of age submits a marriage request, the judge may approve it, if he finds that the requester has capacity and physical fitness subject to the legal guardian’s consent. If the legal guardian withholds consent, the judge shall request his approval within a specific period of time that he decides. If there is no objection or if the objection is unmerited, the judge may permit the marriage”.<sup>41</sup>

There are many provisions within the Iraqi Penal Code (IPC) that undermine women’s rights. Although the law is supposed to protect the rights and freedoms of individuals and the public, in a number of its provisions there are some violations of women’s rights and freedoms. The IPC gives a husband the right to discipline his wife and states that: “there is no crime if the act is committed while exercising a legal right... [whether] the punishment of a wife by her husband, the disciplining by parents and teachers of children under their authority within certain limits prescribed by law

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41 Iraqi Personal Status Law, Article 8. Accessible; <https://kc-interlaw.org/Detail.aspx?jimare=252>.

or by custom”.<sup>42</sup> According to the custom, “discipline” includes allowing the husband to prevent his wife from doing something which is not allowed according to cultural practices. The husband can also use violence to discipline his wife, which constitutes a crime. The wording of the law implies by definition that only the wife needs disciplining, as though she is always wrong and disobedient, but the husband does not. If the wife disciplines her husband, she will be brought before the court and will be sentenced under the crime of victimization, because the law does not allow her to discipline her husband, no matter his behavior.<sup>43</sup>

Concerning the punishment for adultery, the law discriminates between men and women and states that: “an adulteress and the man with whom she commits adultery are punishable by detention, the offender is assumed to be aware of the marriage unless he can prove that he was not capable of being aware of it, the same penalty applies if the husband commits adultery in the conjugal home”.<sup>44</sup>

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42 Iraqi Penal Code No. 111 of the year of 1969, Article 42. Accessible <https://kc-interlaw.org/Detail.aspx?jmare=233>.

43 Iraqi Penal Code, Articles (410-416).

44 Iraqi Penal Code, Article 377.1.

There is no punishment for the husband if he commits the same crime outside of his home, yet this exception does not apply to the wife; if the wife commits the crime outside her home, she will still be punished.<sup>45</sup>

A husband will not be punished for inciting his wife to commit adultery unless the act of adultery is committed. However, if he incites his wife to commit adultery and the wife refuses to do so, this act of incitement does not constitute a crime. Inciting the wife to commit adultery creates the potential for the women to commit a serious crime in her own right; the law is shaped around the duty to prevent the occurrence of the crime and if it occurs, no matter through what means of coercion, it is punishable.<sup>46</sup>

One of the most controversial articles in the IPC is Article 409, which states that: “any person who surprises his wife in the act of adultery in bed with her lover and kills them immediately or kills one of them or assaults one of them so that he or she dies or is left permanently disabled is punishable by a

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45 Iraqi Penal Code, Article 377.2.

46 Iraqi Penal Code, Article 380.

period of detention not exceeding three years”. In comparison, Articles 405 and 406 deal with normal murder which is punishable by anything from seven years of imprisonment to the death penalty. This exception to the punishment of murder only occurs in the mitigating circumstance of a husband killing a wife in an adultery charge. This article was abolished in the KRI according to Law No. 3 in 2015. This meant that the honor killing by the wife’s relatives is dealt with as a normal crime, as defined in Article 405. However, the self-defense exception in the IPC is available in the KRI, which means that if the wife’s relatives accidentally catch her in an extramarital affair with a man, they cannot claim they were acting in self-defense if they commit a crime to avoid being killed by the husband or her relatives.

Rape is another severe human rights violation that needs to be addressed appropriately in Iraqi laws. The IPC undermines women’s rights and states that: “if the offender mentioned in this section (rape, buggery, indecent assault) then lawfully marries the victim, any action becomes void and any investigation or other procedure is discontin-

ued and, if a sentence has already been passed in respect of such action, then the sentence will be quashed, legal proceedings will resume or the sentence will be reinstated, according to the circumstances if such marriage ends in divorce brought about by the husband without legal justification or in a divorce ordered by the court for wrongs committed by the husband or for his bad behavior within 3 years following the cessation of the proceedings”.<sup>47</sup> This article constitutes an incredibly serious violation of women’s rights — the man’s offer to marry the victim gives a right to end all legal proceedings and after three years of marriage, if he then divorces his wife, there is no punishment for him.

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47 Iraqi Penal Code, Article 398.

## 2.4 Judicial independence and impartiality

The ICCPR entitles individuals to the principle of impartiality, stating that: “all persons shall be equal before the courts and tribunal”. It continues: “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.<sup>48</sup> In civil and criminal proceedings, parties to a dispute or complaint must be treated equally and the court must treat them without discrimination. Enforcing the rules equally and without bias, the Iraqi constitution recognizes this issue not only for Iraqi citizens, but also for foreigners.<sup>49</sup>

Iraqi Civil Procedure Law guarantees the impartiality of judges; if both parties of a case have reasons to suspect that the judge is biased, they have an opportunity to challenge him or her. The result may be that the judge is taken off the case. Judges must also be entitled to recuse themselves in case they have a relationship with one of the

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48 ICCPR, Article 14.1.

49 Iraqi Constitution Article 14.

parties involved in a conflict if: 1) the judge is a fourth degree or closer relative of one of the litigants; 2) there has been a dispute between himself, his spouse, any of his children or of his parents with one of the litigants; 3) he is an attorney, agent, custodian, guardian, an apparent heir to one of the litigants; 4) either himself, his spouse, his ancestors or their spouses, his descendants or their spouses, hold an interest in the suit; and 5) he has previously given an opinion on the suit, represented one of the parties, or been involved in the suit as a judge, expert, or arbitrator, or has made or delivered a testimony.<sup>50</sup>

There are some laws in the KRI which prevent judges from being affiliated with a political party and give independent and impartial status to judges. Specifically, the law of the KRI Judicial Authority,<sup>51</sup> the law of KRI political parties,<sup>52</sup> and the law of the KRI Judicial institution.<sup>53</sup> Despite

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50 Iraqi Civil Procedure Law, No, 83 of the year 1969, Article 91. Accessible <https://kc-interlaw.org/Detail.aspx?jmare=253>.

51 Law of KRI judicial Authority, No. 23 of the year 2007, Article 2.

52 Law of KRI political Parties, No. 17 of the year 1993, Article 12.

53 Law of KRI Judicial Institution, Law No. 7 of the year 2009,

these guarantees, in reality, what sometimes happens is not in accordance with the laws; depending on personal, political and administrative influences, the impartiality of the KRI courts and judges is eroded. They are sometimes influenced by the intervention of tribal chiefs, which deprive the court of independence and impartiality. On other occasions, judges face problems and pressure from outside the courtroom, especially when they refuse to abide by certain instructions.

## **2.5 Requirements for the judicial application**

The requirements for applying to be a student in the KRI Judicial Institution are: 1) the applicant must have Iraqi citizenship; 2) they must be fluent in both Kurdish and Arabic; 3) they must not have been imprisoned for a non-political offense and not committed dishonorable offenses; 4) they must not have disabilities which prevent him/her from working appropriately; 5) they must hold a law degree from a recognized law school in Iraq or elsewhere; 6) they must not be older than 40 years; 7) they must have at least eight years of experience as a practicing lawyer, a court official, or an official of the legal department of a government office who has also appeared before the courts in at least five cases per year; 8) they must not be affiliated with a political party, or when affiliated, the candidate should withdraw their affiliation when they apply; and 9) they must have passed a written and oral exam as determined by the Council of the Judicial Institution. (The requirement for the applicant's existing years of legal practice can be reduced to six years if the candidate holds a master's degree in law and to three years if they hold a PhD

degree in law.<sup>54</sup>)

Since the establishment of the KRI Judicial Institution in 2009, the Institution has had three graduate classes: in 2012, 42 candidates were selected from 719 applicants; in 2013, 36 applicants were selected from 345; and in 2017, 60 applicants were selected from among 550 applicants. By 2021, 148 judges and prosecutors in total have graduated from the KRI Judicial Institution. After their graduation, the applicants choose whether to be a judge or a prosecutor. The duration of their study in the KRI Judicial Institution is two consecutive years.

In previous years, there has not been a clear process for employing judges within the KRI. As with many others political issues, political parties and factions have hired judges based on their own agendas and the strength of each party's influence in political agreements. Between 1991 and 2007, the Ministry of Justice was responsible for employing judges, but after the establishment of the Judicial Institution, a specific effort was made to lay out a set of principles and criteria for the selection and employment of judges. The process was

54 Law of KRI Judicial Institution, Law No. 7 of the year 2009, Article 8.

based on legal and professional principles, but it failed to fully put an end to political and partisan interventions. However, the initiative can still be considered as an important step towards an independent judiciary in the KRI. Compared to the past, the KRI's judiciary has changed significantly and there has been some positive progress. In particular, it is notable that now, whoever wants to be a judge must be scientifically and legally competent.

There is no regular legal training for judges, prosecutors and lawyers in the KRI; however, there is no open discussion for new set of laws including mandatory training by official authorities. Sometimes NGOs conduct trainings for judicial personnel. As is the case in the rest of Iraq, judges in the KRI are initially selected without having to select an area of specialization. However, as their careers proceed, judges tend to focus on a particular area and are later selected for more senior posts on the basis of this specialty. Judges in rural or outlying courts may be required to work across all fields of law.

## **2.6 Accessibility of the judicial system**

It is important that courts are accessible. People must not be discouraged from taking their case to court because it is excessively expensive, troublesome or complicated. Access to justice is an important element in a society under the rule of law. This means, first of all, that the criteria for admitting a case to be heard and decided in a court of law must not be too high. Some restrictions are inevitable, otherwise too many cases will overload and impair the judicial system. But the principle of access to justice requires that trials and tribunals be conducted free of charge or in such a way that the public can access them when necessary. Therefore, court costs should not be charged to the litigants and the litigants should not pay the judges. Rather, these costs should be covered by the government and no liability should be imposed on the litigants in this regard. On the other hand, this system should not enable anyone to make any claim against any other person and ask the court to investigate free of charge. The plaintiff must pay part of the costs of the proceedings during the filing of the lawsuit. This may effectively reduce

the number of false claims that do not have a legal basis. If either party fails to pay the costs of the proceedings, the court must establish a mechanism which protects him or her from being deprived of justice due to their economic circumstances and in any case, they should be allowed to file a request for justice in the courts.

Iraqi Civil Procedure Law provides litigants with judicial aid and obliges the state to offer judicial aid to poor people who are unable to pay the judicial fees due when filing lawsuits or legal appeals. If the applicant for judicial aid is successful in his case, the execution department shall collect the adjudged fees from the judgment debtor and shall on order by the court, record this payment as revenue for the treasury.<sup>55</sup> Due to the economic crisis that has gripped the KRI since the emergence of the ISIS, the number and quality of court buildings has been insufficient and the KRI judicial and executive authorities have no plan to construct new buildings.

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<sup>55</sup> Iraqi Civil Procedure Law, No, 83 of the year 1969, Article 293 and 296.



## Chapter Three

### **The main duties of the KRI's judicial system and its challenges, causes and solutions**

The judiciary in any country has certain duties that are assigned to it by law. It also has other duties, which are not explicitly stated in the law. In the KRI, as set out in previous sections of this research, the region's legal system has gone through many changes and has made significant progress in protecting fundamental human rights. But it has also faced various obstacles and challenges in carrying out its legally specified and implicit duties.

This chapter outlines the main challenges and problems in the KRI judiciary system and their solutions. To address this issue, the tasks that a judiciary must carry out are categorized into several groups; the challenges facing these tasks are also identified. Obstacles and problems, which are related to performing each of these tasks, have been recognized and then reasonable and practical solutions are provided to overcome each of these obstacles.

## **Duty 1**

### **The investigation of complaints and the resolution of claims and disputes**

The main task of the judiciary is to hear complaints and lawsuits. This must be done consistently and in accordance with the law. The existence of any inconsistencies or differences in the understanding or interpretation of different laws leads to the issuance of different sentences in similar cases. The same rulings must be reached in the same situations. Sometimes, in addition to these cases, the KRI's judiciary encounters other obstacles. This in turn prolongs the trial process and sometimes creates obstacles with the execution of the cases. Some of the obstacles in the KRI's judicial system are as follows:

## **Challenge 1**

### **The unreliability and uncertainty of some judicial rulings and decisions**

The rule of law requires that the same decisions be made in similar situations. This is known as equal-

ity before the law and is one of the components of the rule of law. If it is not possible for the law to be applied in an equal manner, it will lead to inequality between citizens and parties involved in the claims. This will result in an inefficient judiciary and the erosion of public trust in the judicial system. Such a situation is caused in the KRI by the following factors:

***Cause 1: Conflict, ambiguity and deficiency in laws and regulations***

Some laws in the KRI are ambiguous and overlapping. Sometimes due to the large number of laws, a conflict arises between individual laws. This causes unreasonable and unfounded judicial decisions, which confuse the judge especially when different judgments in different courts and cases reach different conclusions. This occurs most often in criminal matters. To solve this problem and deal with this cause, we propose the following solutions:

1. Identifying and registering instances of conflicting opinions and collecting information relating to these situations in a database

within the judiciary. Once this database of “conflicting laws and decisions” has been created, action must be taken to settle them in order to create a unified procedure in judicial proceedings, verdicts and decisions.

2. Identifying conflicting, vague and incomplete laws and regulations and compiling them within the above database in order to assess their role in the issuance of conflicting sentences.

### ***Cause 2: Structural deficiencies and weaknesses***

One of the factors that leads to conflicting verdicts being issued is the weakness of the KRI’s judicial structure. Part of this is due to the fact that judicial processes and judgements are not specialized within the KRI; the same processes are applied across different facets of law. To solve this problem and deal with this cause, the following solutions are proposed:

1. The approval of specialized judicial procedures, prioritizing the establishment of specialist procedures for commercial cases, fam-

ily cases, juvenile cases, labor cases, serious crimes with international dimensions such as terrorist crimes, crimes against humanity, genocide, war crimes and transnational organized crime. (One of the suggestions of this study is that the drafting of these procedures be completed by the Judiciary Development Studies Center of the Judiciary, which consists of legal experts and specialists.)

2. The establishment of specialized litigation branches with appropriate structures related to various lawsuits in the fields of business, family, criminal and civil matters, prioritizing family and commercial lawsuits.
3. Given the geopolitical and demographic conditions within the region, we also recommend that the KRI urgently design a mechanism to prosecute the perpetrators of serious international crimes, in accordance with the International Criminal Code.
4. The creation of alternative mechanisms for resolving disputes and lawsuits, such as arbitration and mediation methods. Arbitration can be used in civil and commercial cases

and mediation can be used in some criminal cases. This would require that laws be passed in accordance with these mechanisms and their procedures and that competent persons be brought in to work on these mechanisms from outside the judiciary, working under the supervision of the judiciary. Utilizing these mechanisms would reduce the number of lawsuits presented in court and would ultimately increase the speed of court proceedings. Through arbitration and mediation, trials can be conducted more quickly, with greater quality and in a specialist manner.

5. That the time of public court hearings be announced publicly and that it becomes necessary to announce the reasons for not holding an open court in any lawsuit.
6. That previous judicial judgements be publicly disseminated — while respecting the confidentiality of the persons involved in the case — by creating a database of “judicial decisions” that allows for the possibility of public analysis and evaluation. This would

encourage individuals, including elites and specialized institutions, to participate in the evaluation and design of the KRI's judicial system. In order to carry out this proposal effectively, there must be a sincere and proper motivation to see it enacted.

### ***Cause 3: The error of some expert and forensic opinions***

Independent experts play an important role in judicial rulings and judges' decisions. Some of the mistakes and erroneous decisions of courts and judges are due to the weakness of independent expert opinions in civil and criminal fields. Sometimes social relations between individuals involved in the court case and experts influence the appointment of experts and forensic medical examiners, leading to corruption or conflicts of interest. This ultimately leads to an unfair trial and a departure from a fair and just procedure, which affects the presentation of evidence in court. As a result, the judge can be misled and ultimately their verdict can be effected. The KRI is still using the Iraqi

Forensic Law, which dates back to 1987 and the Law of Experts before the Judiciary, which dates back to 1964.<sup>56, 57</sup> Both laws are applied in an old and outdated manner. In order to reduce the rate of these errors, the following solutions are proposed:

1. That experts be referred to the courts in a professional and intelligent manner without the intervention of biased parties.
2. That new technologies and artificial intelligence be used as much as possible in order to provide some expert opinions instead of relying on individual experts.
3. The establishment of an online system and standard procedures for exchanging information and providing forensic opinions.
4. That the KRI take initial steps towards establishment specialized institutions of formal expertise, where individuals obtain licenses and work under the supervision of the judiciary.

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56 Forensic Law No. 57 of the year 1987.

57 Law of Experts before the Judiciary No. 163 of the year 1964.

#### ***Cause 4: False statements of some witnesses and informants***

One form of proof that influences the decision to issue a court order, as well as the decision of the judge or investigator, are witness testimonies and reports from informants. These can divert the court from a path to justice and confuse the judge if the necessary moral and legal standards are not applied to these testimonies and informants. Sometimes people are willing to falsely testify and provide false information in exchange for money or benefits. The Iraqi Criminal Procedure Law mentions how to deal with secret informants and this is also applicable in the KRI.<sup>58</sup> To apply the Anti-Terrorism Law in KRI courts, they are severely dependent on secret informants. To prevent false testimonies and deal with their cause, the following solutions are suggested:

1. That the KRI provide judges with access to databases where they can validate the testimony of witnesses and secret informants — for example, through police information

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58 The Iraqi Criminal Procedure Law, No. 23 of 1971, Article 47 (2), available; <https://kc-interlaw.org/Detail.aspx?jimare=234>.

centers and criminal records of individuals or other statistical centers in which the identity and occupational information of citizens are recorded.

2. That procedures for obtaining the testimonies of witnesses and informants be standardized, to ensure that testimonies and information is provided within a specific framework.
3. That a database of “witnesses and informants” be created in order to record the identities of witnesses, informants and the subjects of their testimony.
4. That steps be taken to increasingly deter individuals to resort to perjury by increasing the severity of punishments for providing incorrect information in court proceedings.

### ***Cause 5: Lack of up-to-date rules and procedures in line with social change and international standards***

The existence of laws that accord with the lived conditions of social life and are in accordance with international standards can play a very important role in the success and efficiency of the judiciary. Some of the problems raising difficulties for the judiciary in KRI are related to old laws and procedures that have not yet been updated to reflect the real needs of society or international legal developments. To solve this problem, the following solutions are proposed:

1. That there be a review of the judicial system, analyzing its relation to international standards and its compliance with the social conditions of the KRI.
2. That there be a review of criminal policy and criminal laws in order to harmonize them with the provisions of international human rights instruments and indicators of the rule of law, if it was for the judiciary, prison sector, detention center management and fight

against corruption.

3. KRI needs to unify the penal laws, under one law, following in the footsteps of Iraq, who recently started to unify all of their penal laws under one penal code.<sup>59</sup>

## Challenge 2

### Delays in the litigation process

One of the biggest problems in the judiciary is the long delay between a trial and sentencing. This sometimes discourages litigants from taking cases to court, frustrates the judiciary and reduces public confidence in it. Sometimes this delay is such that instead of going to court, citizens prefer to settle disputes outside of court, in traditional ways or to make a compromise, which most of the times, is against their will. Citizens are forced to accept the results of such methods, which have many negative consequences; in an even worse scenario, instead of going to court and filing a lawsuit, sometimes they seek personal revenge, which exacerbates the

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<sup>59</sup> <https://presidency.iq/EN/Details.aspx?id=#3385:~:text=The20%most20%significant20%points20%of,return20%the20%funds2%C20%and20%illicit.>

problem. Such a situation is caused by the following factors:

***Cause 6: The increasingly large number of incoming cases sent to the judiciary***

The judiciary must have the necessary infrastructure to cope with the legal requirements of the society. The capacity of the judiciary must be in balance with the load of work; it cannot be expected to take on work it does not have the capacity for. An unsustainable load of lawsuits, complaints and cases filed in the courts can reduce the effectiveness of the judiciary. In the KRI judicial system, the large number of disputes and complaints is part of the problem facing the judiciary and has weakened the functioning of the judiciary and prolonged proceedings within it. To solve this problem and deal with this cause, the following solutions are proposed:

1. Using alternative methods of resolving disputes such as arbitration, mediation, peace and reconciliation. In order to use these methods, it will be necessary to pass the relevant laws and procedures. It will also be

necessary to train people to perform these tasks — obtaining licenses, providing an operational framework, services, performance evaluations — and create the necessary infrastructure, such as organizations and institutions of arbitration, mediation and reconciliation. Monitoring these people and the institutions will also be highly important.

2. Recognizing grassroots activities to build social peace institutions. Offices like this do currently operate in the KRI, but often with negative consequences, due to the influence and support of political parties and individuals with social and tribal status. Organizing and educating these offices and holding legal courses related to the procedures of peace and reconciliation is essential too.
3. Clarifying the competencies of quasi-judicial authorities and social peace organizations by offering public education courses for citizens.
4. Educating citizens about laws and regulations and promoting citizens' legal awareness regarding business, family, civil and

criminal responsibilities arising from activities in social communication networks.

5. Approving specialized procedures for various issues of civil, business, family and work lawsuits.
6. Establishing units or centers of legal advice and judicial assistance in the courts to provide services to citizens.

### ***Cause 7: Room for error in litigation***

Another obstacle to the efficiency of the judiciary are the errors and confusion throughout all stages and procedures of a trial, which is more common in the old court system. The reason for this is that the procedures are outdated and the mechanisms have not yet been adapted to new procedures and mechanisms. To deal with this problem, the following solutions are proposed:

1. Preparation of an “electronic judicial file” which includes standard forms for actions and processes related to the review and scanning of paper documents in the files.
2. Elimination of unnecessary formalities and

the adoption of technological practices. For example, by creating an electronic judicial account for citizens and using digital technologies such as smartphones and SMS, court hours, citizens can access and be notified of court hours and legal and judicial deadlines without the need to visit in person or send paper correspondence. To do this, the necessary regulations and appropriate instructions must be present.

3. Providing online access to the judges' databases in order to conduct inquiries and execute judicial orders without the need for unnecessary and complicated correspondence and administrative procedures.

### ***Cause 8: A laborious and inefficient notification process***

One of the reasons for the delay between trial and sentencing is the large number of hearings that are held for each lawsuit. Sometimes these meetings have to be held multiple times due to non-compliance with the notification procedures or the impossibility of notifying the litigants within the legal

period. Repeating these hearings has a big impact on the length of the overall hearing. Sometimes, one of the litigants even deliberately uses these legal solutions to waste time, prolong the trial time and somehow abuse loopholes in the law. To solve this problem and deal with this cause, the following solutions are proposed:

1. Completing the information of the litigants in an “electronic registration system and creating an electronic account” for litigants and in the future, for all citizens.
2. Requiring litigants to verify their identity and confirm receipt of notifications in the “electronic registration system”.
3. Ensuring that judicial documents are efficiently communicated to specific groups such as prisoners, the elderly, the illiterate, the sick, the disabled, etc.

### ***Cause 9: Delay in the process of consulting experts and receiving expert comments***

One of the reasons for the delay of the trial is the need in some cases for expert opinions. Sometimes it takes a long time to obtain these opin-

ions and sometimes it is possible for defendants to object these opinions multiple times and refer them to other experts. This again prolongs the proceedings. To solve this problem and deal with this cause, the following solutions are suggested:

1. Creating standard procedures for the “expert process” by creating forms which need to be filled in with the following information: the reasons for the need to refer to the expert; and the necessary issues the expert is expected to comment on as part of the referral. It will also be necessary to make this infrastructure electronic, so experts can communicate with judges easily and so that the judge’s behavior can be supervised during the referral process.
2. Limiting the number of times an expert can be referred to.

### **Challenge 3**

#### **Incomplete and late execution of some sentences**

Incomplete execution of court rulings or unjustified and unnecessary delays in the execution of

their rulings leads to the inefficiency of the court and reduces public trust in the judiciary. This often occurs in KRI courts and the reasons for it are:

***Cause 10: The lengthy process of identifying the property of the convicts***

In order to enforce some court rulings, the property of the convicts must be identified so that they can be seized and confiscated. This task is currently carried out by human resources departments and it is not possible to systematically access information on the property and assets of the convicts. To solve this problem and deal with this cause, the following solution is suggested:

1. Providing online access to government authorities' databases to identify convicts' movable and immovable properties, in order to pave the way for the data to be aggregated under one single database in the future. For this to occur, it will be necessary for different parts of the government to cooperate with the KRI judiciary.

### ***Cause 11: Some fugitive convicts***

Sometimes, as soon as they are informed of the verdicts issued against them or even before the verdict is issued, convicts run away and hide, escaping the law. In this case, accessing them in order to execute the court verdict is difficult and sometimes impossible. To solve this problem and deal with this cause, the following solution is proposed:

1. The imposition of economic and social restrictions on fugitive convicts such as: blocking bank accounts, banning transactions, banning activities on the stock exchange and banning driving and flying. In order to do this, it is necessary to create a database of “fugitive convicts’ information system” and require all government agencies and public and private banks to run identity checks within it before providing services to individuals.

## ***Cause 12: Difficulty in determining the insolvency of the convict***

The inability of convicts to carry out their sentence due to their financial inability and hardship is one of the reasons that hinders the execution of the court sentence. In this case, imprisoning the convicted person cannot be considered as a useful solution. On the other hand, the lack of centralized access to accurate information about the individual financial situation of the convict opens up potential grounds for abuse as the execution of the court order will be suspended - it means that some criminals or convicts rely on their financial incapacity to not compensate the victims, this problem occurs due to the lack of sufficient information about the financial status of individuals. To solve this problem and deal with this cause, the following solutions are proposed:

1. Establishment of an “Individual Transaction Credit System” in order to validate the financial and credit capacity of individuals to conduct transactions and prepare legal documents. There should also be a relevant institutional obligation to run checks through this

system before performing any transaction or arranging property transfer documents in their name or the transfer of ownership and property to others. This requires the adoption of related laws and regulations and the creation of an electronic information infrastructure.

2. Investigating the movable and immovable property of the convicts by accessing the databases of government authorities, restricting certain special economic activities that indicate financial ability such as company registration, buying real estate and cars and receiving facilities and activities in the stock exchange. These restrictions should be in place from the time of registration of the insolvency claim until the payment of the sentence and the status of the person claiming the insolvency should be updated in the “Individual Transaction Credit System”.

## **Duty 2**

### **To protect public rights, promote justice, human rights and fundamental freedoms**

One of the most important tasks of the judiciary is to protect the public rights and fundamental freedoms of all citizens without any discrimination. This includes: drafting laws for approval in parliament to enact laws related to human rights and fundamental human freedoms, as well as the denial of any forms of repression and domination by individuals, groups or institutions. This duty also includes the interpretation of general and ambiguous laws, in addition to an analysis of judiciary's actions in the courts and finally the unconditional execution of court rulings and the observance of human rights in all stages of the trial, as well as before and after it. In the KRI, there are obstacles and challenges, arising from various factors, which hamper this goal to protect fundamental human rights and freedoms and restrict interference with these freedoms. Sometimes these issues lead to the widespread violations of these rights. The challenges facing the judiciary in performing this task in the KRI are as follows:

## **Challenge 4**

### **The abundance of instances which violate human rights and public rights**

The abundance of political groups and factions in the KRI, the dominance of Islamic rules and regulations in various stages of legislation and sometimes the influence of political parties and individuals with political and religious bases who impose their views at different stages, have created a widespread violation of public rights in the region. The interests of political groups and the dominance of partisan and political views in all stages of legislation, administration and oversight have caused the concept of public good too often be forgotten. Sometimes, even by declaring something an emergency, they can extend laws that have expired and only been approved for a certain period of and eventually make them permanent laws. This can be seen in the Anti-Terrorism Law (as explained before), which addresses the violation of human rights, political dissidents and activists in various fields. A similar situation can be seen in the law on the use of social networks and communication

tools, which has unlimited ground for a broad interpretation in favor of the ruling apparatus. Cases like this have created a wide range of public rights violations. The main factors causing this challenge are as follows:

***Cause 13: The divergence of views and practices regarding the concept of public good, public and constitutional rights***

The ruling system in the KRI has not yet been able to take the form of a government or at least a proper, modern and professional government and to this day it is governed by a model of party governance and consensual democracy between the parties at different levels. This has led the dominant parties to respond to the demands of some other political, tribal and religious actors in order to maintain their base. In other words, they have not been able to abandon older forms of governance. This has led to the acceptance and application of different views, which are sometimes incompatible with fundamental human rights and freedoms. To solve this problem and deal with this cause, the following solutions are proposed:

1. Defining the concept of reviving public rights, determining its subject areas and prioritizing them. As well as this, examples of public rights should be accurately identified and publicized by amending laws and regulations related to public rights, particularly the Anti-Terrorism Law and the Law of Misusing Telecommunications.
2. Holding a national debate to discuss the KRI draft constitution.
3. Codifying and approving citizenship rights regulations and providing a commensurate guarantee that each of these rights will be upheld.
4. Launching a system to monitor the application and implementation of citizenship regulations, especially under the supervision of the KRI judicial authority.

***Cause 14: Inadequate and ineffective sanctions for the protection of public and human rights***

Without a guarantee of effective enforcement, laws lose their binding aspect and become a moral rule that, if violated by individuals, will not be held li-

able. As a result, there will be no desire to implement them. This is especially important when the rights are addressed to the governing institutions. Inherently, powers tend to be unbridled and unlimited. If there is no obstacle to this tendency, violations will occur more widely. In the KRI, there are many cases of human rights violations for which there is an inadequate guarantee of implementation. This is especially the case when one side of the issue is political and involves powerful individuals and/or institutions. To solve this problem and deal with this cause, the following solutions are proposed:

1. Abandoning the legal duties of managers and abolishing negligence in the protection of public rights, through the enactment of laws and related regulations or through a public announcement of the Charter of Rights and Duties of all government and public institutions.
2. Criminalizing and determining the appropriate punishment and the guarantee of appropriate executions for the abuse of public rights; and establishing specialized branches

to investigate the protection of public rights by amending the relevant laws and regulations.

3. In case of drafting and approving the Charter of Citizenship Rights, defining the supervisory body for its implementation and enforcement.
4. The public announcement of examples of citizenship rights, educating citizens and announcing examples of violations of public rights.
5. Paying attention to the role of the media and non-governmental actors in monitoring the implementation of public rights.
6. Providing a mechanism for prosecuting core international crimes.
7. Providing a mechanism for the reparation of the victims of core international crimes through cooperation with other governmental bodies.
8. Providing a mechanism for the prevention of core international crimes through the promotion of social conciliation and peace education for all.

9. The criminalization of hate speech.
10. Enacting the law of obligation and the responsibility of security companies and security agencies. (Recently the Security Company law has been enacted by the Kurdistan Parliament, but there is no clear mechanism for holding them responsible for committing crimes).<sup>60</sup>
11. Enacting the law governing how the police and military forces use firearms.
12. Enacting the law to protect persons under enforced disappearance.
13. Establish a law prohibiting all forms of torture and inhuman treatment.<sup>61</sup>

***Cause 15: Paying attention to minor and individual issues and forgetting major issues of public law***

In order to realize the public good and protect public rights, while respecting the fundamental rights

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<sup>60</sup> On 1st Dec. 2021, the Kurdistan Parliament enacted the law, but still needs to be approved the Kurdistan President.

<sup>61</sup> A draft law for prohibition of all forms of torture and inhumane treatment has been submitted to Kurdistan Parliament but still it's under revision by the committee of Human Rights.

of individuals, special attention should be paid to public rights and it should be ensured that addressing minor issues does happen at the expense of major issues. Instead, protecting the rights of all citizens must be on the agenda. Examples of the protection of public rights include the civil, political, economic, social and cultural rights of all individuals, groups and entities. Sometimes the ruling media, in order to dominate public opinion, highlights minor examples and ignores public issues to divert public opinion from them. To solve this problem and deal with this cause, the following solutions are proposed.

1. The protection of public rights by guaranteeing the use of resources, opportunities and public privileges in accordance with the public interest. This can be implemented by publicly announcing access criteria and details of persons benefiting from the resources and privileges of public sectors.
2. The criminalization of crimes committed against the environment according to the international legal instruments. While the KRI has an independent commission for protect-

ing the environment, it is a part of the KRI executive authority and there is no regulation by the Commission for criminalizing acts against the environment.<sup>62</sup>

3. The online publication and public access to documents and reports about executive bodies such as regarding budgets, contracts, tenders and auctions.
4. The announcement of a list of officially and legally registered companies and institutions to prevent the abuse of illegal companies and institutions by citizens. Begin exploring the possibility of citizen's access to the necessary information in this field by launching electronic platforms and databases related to these companies and institutions.

### ***Cause 16: Limitations in the prosecutor's office's capacity to declare a crime***

In the KRI, the prosecutor's office operates under the auspices of the Council of Ministers and is part of the Ministry of Justice.<sup>63</sup> There are two

<sup>62</sup> Law of protecting the environment in KRI, No. 20 of the year 2008.

<sup>63</sup> Law of the KRI Public Prosecution, No. 18 of the year 2007.

approaches to the administrative structure of the prosecutor's office; first, under the supervision of the Council of Ministers and second, under the supervision of the judiciary. In Iraq, the prosecutor's office is affiliated with the Judicial Authority, but in the KRI, it is dependent on the executive authority in terms of administration and budget.<sup>64</sup> These can create obstacles and restrictions for the prosecutor. However, despite accepting the fact that the prosecutor's office has a limited capacity to detect crime, to solve this problem and improve the ability of the prosecutor, the following solutions are suggested:

1. Linking the prosecutor's office to the KRI Judicial Counsel.
2. Establishing a unified procedure for the process of receiving and investigating the declaration of a crime by public institutions.
3. Preparing the ground for the registration and activity monitoring of civil institutions and non-governmental organizations in the fields of civil rights, children and women's rights, as well as the rights of vulnerable

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64 Law of the Iraqi Public Prosecution, No. 49 of the year 2017.

groups such as workers and the disabled. In addition, the possibility of reporting and filing complaints by the latter groups in court against violators of public rights should be defined.

4. Providing legal grounds for civil society and non-governmental organizations and citizens to declare the financial and administrative corruption of government officials and institutions and introducing the possibility of civil institutions taking part in these proceedings.
5. Enabling the possibility of announcing individuals' reports on illegal decisions and actions or the refusal to perform the duties of government agencies.
6. The establishment of an office for judicial assistance and the provision of consultation for all clients of the courts.

## **Challenge 5**

### **Restricting fundamental human rights and freedoms based on individual political and partisan behavior**

In the KRI, the political parties in power govern all governmental affairs on the basis of a partisan system. Because of this, laws are sometimes enacted, interpreted and implemented based on individual party and political issues. This leads to the restriction of the fundamental rights and freedoms of citizens. There are several reasons for such behaviors; the main factors are as follows:

#### ***Cause 17: Insufficient guarantee of the protection of fundamental freedoms***

The fundamental freedoms of citizens cannot be restricted by temporary laws, except in cases of urgency. Therefore, in any case, these fundamental rights must be protected by law and a guarantee of proper implementation must be provided. In the KRI, these guarantees are insufficient and there is no constructive reaction to violations. To solve this problem and deal with this cause, the following

solution is proposed:

1. Determining exact examples of cases in which there is a need to restrict the freedom of citizens, regarding activities on social networks, the use of mass media, as well as participation in peaceful rallies, strikes and protests. The KRG can easily make accusations of terror and acting against public order and national security by interpreting its laws and procedures broadly. Examples of such restrictions must be made public and specified by law.

***Cause 18: Broad interpretation of the rules governing the profession of journalism, the fight against terrorism, the use of mass media and social media and holding rallies***

In general, KRI citizens are fully aware of recent issues in the region; they can easily access news from journalists and activists via social media, as well as the verdicts issued against them by the Criminal Court of Erbil. This governmental body has used this kind of broad interpretation to prepare the ground for the abuse of these laws by the

security agencies and the police. Therefore, in order to solve this problem and deal with this cause, the following solutions are proposed:

1. Follow-up by the responsible legislative and executive authorities in order to clarify the laws which concern the issues, including providing an uninterpretable definition of related concepts in the laws.
2. Amending the laws and regulations which are related to the fight against terrorism and espionage and also determining the examples of criminal acts in mass media, such as the Misuse of Telecommunications Law.

### ***Cause 19: Insufficient support for press freedom***

Although there is a law in the KRI that regulates the profession of journalism and the freedoms related to it, it has been variously interpreted in different courts or by different judges.<sup>65</sup> It is possible to apply the law in different forms and it can be ruled in different rulings in similar cases. To solve this problem, the following solutions are proposed:

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65 Law of Journalism, No. 35 of the year of 2007.

1. Providing an uninterpretable definition of related concepts in laws according to the framework of international human rights law, especially the right to access information.
2. Holding public trials for the violations and allowing for the possibility of public access to information about these cases.
3. Translating into the Kurdish language the international legal instrument and guidelines related to the judiciary, the police, law enforcement officials, prison management and other fields related to the protection and promotion of human rights and rule of law.

### ***Cause 20: Violation of the rights of some defendants***

Usually in cases where one party is the governmental body or its affiliates, it is possible for the trial process to be influenced by them. In the KRI, due to the political and administrative structure of the party, this can happen. Most of the rights of the accused, which are necessary to a fair trial, are recognized in Iraqi and KRI laws. For instance: the

principle of legality of crime and punishment<sup>66</sup>; the right of the accused to defend himself at all stages of the trial<sup>67</sup>; the principle of innocence of the accused until proven guilty in a competent and impartial court<sup>68</sup>; the use of non-retrospective laws unless in favor of the accused<sup>69</sup>; the principle of personal punishment<sup>70</sup>; the principle of not detaining persons unless ordered by a court<sup>71</sup>; the need to provide a lawyer for the accused<sup>72</sup>; the right to non-prosecution and non-inspection of homes, residences and privacies,<sup>73</sup>; the prohibition of all forms of physical and psychological torture and inhuman treatment<sup>74</sup>; and the right of the accused to appeal.<sup>75</sup>

Despite the recognition of these rights of the

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66 Iraqi Constitution, Article 19(2).

67 Iraqi Constitution, Article 19(3).

68 The Iraqi Criminal Procedure Law, No. 23 of 1971, Article 300.

69 Iraqi Penal Code, No. 111 of the year 1969, Article 2.

70 Iraqi Constitution, Article 19(8).

71 Iraqi Constitution, Article 19(12).

72 Iraqi Constitution, Article 19(11) and The Iraqi Criminal Procedure Law, No. 23 of 1971, Article 144.

73 Iraqi Constitution, Article 17(2) and The Iraqi Criminal Procedure Law, No. 23 of 1971, Article 72.

74 Iraqi Constitution, Article 27(c) and The Iraqi Criminal Procedure Law, No. 23 of 1971, Article 156.

75 The Iraqi Criminal Procedure Law, No. 23 of 1971, Article 254.

accused in the laws, there remains a possibility for violations of the rights of the accused in the stages of investigation, prosecution and appeals. In order to solve this problem, the following solutions are proposed:

1. Follow-up to record the data of the place of inspection by the police.
2. Enforcing the rule of law for judicial independence, the principles of law enforcement officers and ensuring prosecutorial oversight of these matters and the allowing for the possibility of the victim to file a complaint against the offender in the courts. It is necessary to review the laws in this regard and provide such an opportunity for the victims.
3. Monitoring the conduct of the police and law enforcement in detention places in order to protect the rights of detainees, fundamental human rights and the protection of civil rights, through methods such as audio and video recording of detention centers and observatories. This should be achieved while still maintaining data confidentiality and the authorities should be provided with access to this.

## **Challenge 6**

### **Insufficient measures taken to support children, adolescents and women**

Although there are special laws in the KRI judicial system to protect children and adolescents' rights, especially in criminal matters, these measures are insufficient. More attention should be paid to these groups, especially since these groups are more vulnerable than other members of society. As for women, they are also vulnerable due to the patriarchal, traditional and religious views that exist in the KRI. In the case of children, it has often happened that the child has been abused or left unattended at home, or that women have been subjected to domestic violence at home, or even honor killing. There are many factors that underlie these events. Some of these factors are as follows:

#### ***Cause 21: Violation of the rights of some children, adolescents and women in a dangerous situation***

In some societies, women, children and adolescents are in a dangerous situation and due to these

groups' social and familial status in society, they are more at risk of having their rights violated. Some of these risks are caused by the families and some by the community. These people are sexually abused and subjected to domestic violence, or they are used as unpaid or underpaid laborer's. In order to solve this problem in the KRI and to reduce the effects of the patriarchal system and limit the violation of these individuals' rights by their families and society, the following solutions are proposed:

1. The adoption of the Law on the Protection of Children and Adolescents, as well as the Charter of Rights and Duties of Parents and the provision of appropriate training courses for families, especially in the regions where they are most likely to be subjected to such crimes.
2. Strengthening judicial oversight of the process of identifying, accepting, maintaining, supporting and empowering women, children and adolescents at risk.
3. Setting up social work centers and providing counseling, legal and psychological services to people at risk. Additionally, they should

be supported in cases where they wish to file a lawsuit in the judiciary against those who violated their rights and appropriate guarantees should be applied to protect the life and health of these people.

4. Facilitating the transfer of custody of abused and neglected children and adolescents to appropriate alternative families by taking measures such as adjusting financial guarantees and strengthening the role of caregivers to determine the transfer of custody.
5. Making an appropriate decision regarding the custody or transfer of children and adolescents at risk before the arrest or imprisonment of the head of their families.

### **Duty 3**

#### **Supervising the correct implementation of laws and the smooth flow of affairs**

One of the basic duties of the judiciary is to monitor the enforcement of law properly, so if laws are not implemented accordingly, the judiciary can demand a full implementation and the perpetrators will be prosecuted. There are many reasons to deprive the judiciary from this authority in many societies - there are some grounds and factors in the KRI that have challenged the performance of the judiciary, which are as follows:

#### **Challenge 7**

##### **Incomplete implementation of some laws related to governing bodies**

There are several reasons why the judiciary sometimes enforces laws incompletely. Pressure from and the influence of politicians and those in power, as well as the lack of transparency and legal infrastructure have challenged the KRI's judiciary. The main reasons for this are as follows:

## ***Cause 22: Insufficient guarantee of the correct implementation of laws***

In cases where laws have been violated, there is no sufficient, immediate and effective guarantees. In practice, the KRI judiciary has faced much inefficiency. In order to properly implement the laws, to secure adequate and effective guarantees for the implementation of the laws, the following solutions are proposed:

1. Producing integrated publications of legal duties and the Charter of Rights and duties of governing bodies and making these clear to the public and within institutions.
2. Submitting reports on the status of the implementation of relevant laws for each body on a regular basis and also publishing them publicly.
3. Launching a system of criticism, suggestions and complaints for all clients of the governing institutions and establishing an evaluation mechanism regarding the adherence of officials and institutions to the applicable laws.

### ***Cause 23: Lack of assessment and evaluation of the consequences of the non-implementation of laws and their effects***

One of the reasons why the lack of proper implementation of laws becomes commonplace is that the consequences of this flawed and inadequate implementation are never evaluated. The public are not informed about the consequences; they are not published or even evaluated by the governing institutions themselves. Therefore, no one will be prosecuted for improper performance resulting from the act and omission made during their legally assumed responsibility. To solve this problem and deal with this cause, the following solutions are proposed:

1. Pursue authorities when they abandon their legal duties or act in offensive or criminal manners and pursue those who are negligent in enforcing the laws.
2. Preparing practical training and education for officers who undermine the implementation of the law by their actions or omissions.
3. Have clear definitions of administrative,

disciplinary and criminal punishments for both passive and active criminal acts and review the rules and regulations governing this ground.

## **Challenge 8**

### **The weakness of monitoring who holds power over government agencies**

The KRI's political parties dominate the government and public institutions in all areas. So far, it is not possible to have real oversight of this, because monitoring the performance of government agencies has not become one of the tasks of the judiciary. Sometimes, by setting up various commissions, the judiciary investigates the issue in which serious violations have occurred. But most of the time such a mechanism is used to divert the correct process and cover up the truth, or the results of such fact-finding committees are never published or announced. Such issues can only be announced when they are used by one political party to overcome a political rival. There are several reasons for the challenges, some of which are as follows:

## ***Cause 24: Lack of attention to the benefits of other routes for public oversight***

Civil society organizations and individual activists are among the main pillars of democratic governance and they can play an important role in this, alongside public institutions. Ignoring their capacity for this can weaken the rule of law. The civil society organizations in the KRI do not play this crucial role and are mostly affiliated with the ruling parties. To solve this problem and deal with this cause, the following solutions are proposed:

1. Encourage individuals and independent civil society organizations to report violations, crimes and administrative and financial misconduct by government agencies and public institutions and provide legal protection to individuals who cooperate with the judiciary in overseeing government action. For this to happen, it will be necessary to prepare appropriate instructions. For example, defining the reporting body and considering rewards or privileges for those who report cases of corruption and violations of the law, in ad-

dition to defining the process of reviewing public reports and announcing the results of the investigation to the reporting person and, if necessary, to the public.

## **Challenge 9**

### **Weak oversight of the prosecutor's office and the courts**

Although the prosecutor's office and the courts oversee the implementation of law and are responsible for the administration of justice themselves, they are also subject to the law and their actions must be based on it. Therefore, they should be monitored and evaluated; their actions should be measured in accordance with the principles of independence, neutrality and other components of the rule of law. In the KRI, although the judiciary is less affected by political parties than other governing institutions, political groups in the judiciary try to exert influence in various ways and serve their own interests. This creates obstacles for the judiciary and its ability to self-monitor, which occur for various reasons as follows:

## ***Cause 25: Inefficiency of traditional methods of monitoring***

Traditional supervisory methods are not suitable due to the large number of tasks and cases in the current judiciary system. Violations and weaknesses cannot therefore be evaluated effectively. To solve this problem and deal with this cause, by modernizing the monitoring process with digital technologies, the following solutions are proposed:

1. Creating information technology systems that make electronic records of cases and court rulings, as part of the long-term plans of the judiciary. Once this system has been created, it is necessary to provide academics with access to these electronic files and databases of cases and court rulings and allowing them to evaluate and score the decisions issued by the judges of the courts and determine their strengths and weaknesses.
2. Evaluating the performance of judges based on indicators such as the proportion of appropriate verdicts, conciliation rates, length of proceedings and the holding of public and

regular court hearings.

3. Strengthening the monitoring of the supervisory authorities of the judiciary.

## **Duty 4**

### **Discovering crimes and prosecuting and punishing the criminals**

One of the main duties of the judiciary is to detect crimes and take action to prosecute and punish criminals in accordance with the law. In the KRI, according to the status of the administrative structure of the prosecutor's office and its capacity in terms of manpower and judges, there are various challenges as follows:

#### **Challenge 10**

##### **The difficulty of detecting crime**

Crime detection is a very complex issue in all societies. It requires the use of scientific, technical and legal power. In the KRI, although there is some access to the necessary facilities, knowledge and infrastructure that can detect crime, there are still factors that make this issue difficult. The following factors are significant in this regard:

## ***Cause 26: Not utilizing all possible routes for crime detection***

The KRI has not utilized all its power to detect crimes and sometimes in the process of trying to detect a crime, inappropriate interventions occur. This hampers the performance of the judiciary. To solve this problem and deal with this cause, the following solutions are proposed:

1. Establishing a professional police department to facilitate and implement the duties of the judiciary in detecting, arresting and preserving the effects and scene of the crimes and to conduct investigations, communications and the prompt execution of judicial rulings and decisions.
2. Governing the professional police department through the KRI judicial authority.
3. Discovering patterns of crime and misconduct by using information from the “Judicial Case Database”, information about victims and offenders and information from other systems of government authorities and the power and experience of judges, inspectors

and prosecutors.

4. Preparing crime maps of the KRI based on the frequency of repetition and the severity of crimes in different areas.

## **Challenge 11**

### **Weakness and inefficiency in the criminal law punishments and the quality of their implementation**

What justifies punishment is its ability to act as a deterrent. If the punishments contained in the criminal law do not have such a feature and effect, they will cause problems for the judicial system. Some of these problems are related to the laws and some of them are related to how the punishments are executed. There are several reasons for these challenges, the main of which are as follows:

#### ***Cause 27: The insufficient implementation of laws and regulations governing the execution of criminal sentences***

In the KRI, due to the social, political and legal structures present in the region, for various rea-

sons, enforcement guarantees cannot be effective. Sometimes a convicted criminal escapes legal punishment by leaving one party and joining another, or escaping from one city to another, or by being granted impunity by members of the political parties. To overcome this problem, the following solutions are proposed:

1. Prohibiting political parties and institutions from interfering in the execution of criminal sentences and publishing the names of fugitive convicts and individuals or groups that have played a role in the escape of convicts.
2. Providing legal grounds for the trial and punishment of individuals who play a role in the impunity of convicts, regardless of their political, administrative and social status.
3. Observing prisoners' rights based on rules and standards such as accommodation, health, security and access to judicial services.

## **Duty 5**

### **Preventing the commitment and occurrence of crimes**

One of the duties of the judiciary is to prepare programs and actions that reduce the likelihood of crimes being committed and in some way prevent the commission of crimes. There are many cases that increase the rate of crime or even the likelihood of legal disputes and, ultimately, a large number of lawsuits in the courts. The judiciary has a responsibility to reduce this figure, thereby both improving the legal security of citizens and social order, as well as increasing the quality of its work and increasing its performance and efficiency. Carrying out this task involves the following challenges for the KRI judiciary:

### **Challenge 12**

#### **Volatility in the legal relations of individuals**

The lack of specific mechanisms and processes for establishing legal relations between individuals leads to the formation of various disputes between them and through this, it is possible for them to

file a lawsuit against each other or commit a crime. There are several reasons for this challenge, such as:

***Cause 28: A lack of mechanisms to prevent disputes***

Citizens' lack of knowledge about their laws and rights, their lack of access to legal advisors and lack of familiarity with various types of transactions and contracts can be one of the main reasons for disputes and lawsuits occurring. To solve this problem and deal with this cause, the following solutions are proposed:

1. Providing citizens with the possibility of inquiring about the financial convictions of individuals by creating a database related to this that is under the supervision of the judiciary.
2. Pursuing the provision of the possibility of concluding formal contracts on the basis of standard contract texts.
3. Holding workshops and public courses for citizens and business organizations to get acquainted with contracts and transactions and the rights and duties of parties.

## ***Cause 29: Difficulty of public access to legal services***

Access to legal services and advice can reduce the number of disputes and litigations in the judiciary. In the KRI, there is no mechanism for providing this service in the courts or in the form of legal and specialized associations. To solve this problem and deal with this cause, the following solutions are suggested:

1. The development of legal software in order to facilitate public access to legal services such as contract preparation, judicial registration and the preparing of judicial documents.
2. Holding legal courses for the public by professional institutions and law professors in a language that is understood by all citizens. Due to the highly specialized language of law, it can be difficult for ordinary citizens to understand terms and regulations. Therefore, holding such courses can be very useful and effective.
3. Preparing the ground for the establishment of legal clinics and consultants in various judicial and legal fields.

## **Challenge 13**

### **Weaknesses in eliminating the main factors in committing crimes**

The lack of appropriate action to eliminate the grounds for crimes and legal disputes are major challenges and they raise difficulties for the KRI judiciary. There are several reasons for this:

#### ***Cause 30: A lack of complete identification of the main factors in committing crimes***

A lack of coherent and practical studies — in various fields of sociology, psychology, law, justice and economics — on the reasons why crimes are committed or disputes that lead to legislation occur is among a problem the KRI judiciary faces. To solve this problem and overcome this issue, the following solutions are proposed:

1. Recording data related to crime and litigation for the judiciary, regulatory bodies and the police and the creation of a database covering this that is able to be utilized in decision-making and further studies.
2. Identifying the main causes of at least ten

most commonly occurring and severe crimes and then studying the crimes appropriately every quarter.

3. Establishing the Office for the Prevention of Crime in the KRI's Courts and conducting studies by this office in order to identify the causes and areas of crime and disputes. This office should also provide practical solutions for the issues uncovered.

### ***Cause 31: The judiciary not utilizing external capacities***

The judiciary alone cannot succeed in preventing the commission of crimes and legal disputes. Other governing bodies, civil society organizations, professional and specialized institutions, universities and educational institutions must also work with the judiciary in this regard. The KRI's lack of utilization of these capacities has weakened the judiciary's ability to prevent crimes. To solve this problem and deal with this cause, the following solutions are proposed:

1. Inviting university professors and experts to coordinate with the judiciary by holding spe-

cialized meetings and asking for their guidance in the crime prevention offices, which will be established in the courts based on the proposal of this study.

2. Holding meetings between the judicial authority, the government, university departments and institutions in the KRI on a regular basis to identify the causes of crimes and to determine an application plan to present to the judiciary for the elimination of the causes of these crimes.
3. Preparing the ground public institutions' participation in the judiciary's crime prevention programs.

## **Duty 6**

### **Protecting the property rights of individuals**

A large number of lawsuits and disputes between citizens occurs due to property disputes. Failure to establish individuals' property rights can lead to great challenges in society and this will ultimately have an effect on the judiciary. In the KRI, a large number of property contracts are usually prepared by ordinary citizens without legal knowledge. This causes many problems for citizens and instability in their property rights. Sometimes the extent of their ownership of real estate is unclear and leads to disputes. Some of the properties are public and do not have any ownership documents. These issues have created many challenges for the KRI judiciary. Some of the most important challenges are as follows:

### **Challenge 14**

#### **Volatility of Real Estate Ownership**

The boundaries of ownership of immovable property and its location, if not clear, may interfere with the ownership of neighboring property and lead to

conflict and litigation. Due to the fact that a large part of real estate in the Kurdistan region doesn't follow any kind of cadastral plan of locations and areas, we are witnessing a lack of geographical coordinates that created many problems. There are several factors involved, including:

### ***Cause 32: The issue of validity and invalidity of ordinary transactions***

In the case of real estate transactions, usually in most countries, these transactions are formal and the process of their transfer is done in notaries and with the permission of the relevant authorities. A large part of real estate transactions in the Kurdistan region are based on ordinary and informal contracts between citizens, which are not registered with the competent authority and provide grounds for violations. To solve this problem and deal with this cause, the following solutions are proposed:

1. Facilitating the process of official registration of real estate transactions by standardizing contracts and requiring the regulation of real estate transactions in the form of of-

fiial transfers and based on official documents.

2. Setting up engineering and legal offices to prepare new and cadastral maps for properties and determine the limits of ownership of owners and register it in an electronic database.

### ***Cause 33: Weakness in the accuracy of delimitation in ownership documents***

In traditional ownership documents, the boundaries of ownership are approximate, and due to the fact that the geographical location of the property is not precisely determined, there is a possibility of conflict and conflict of ownership. This is the case with agricultural and residential lands in the Kurdistan region. To solve this problem and deal with this cause, the following solutions are proposed:

1. Mapping lands and properties by determining the boundaries of geographical coordinates and property plots.
2. Issuance of ownership document based on cadastral information.

3. Conversion of ownership documents without detailed specifications and geographical coordinates based on cadastral mapping standards.
4. Creating a database related to real estate ownership and personal ownership.

## Chapter Four

### **Conclusions and final recommendation**

The results of this study show that there are many obstacles and challenges to empowering the KRI judiciary. To overcome these challenges, various solutions have been presented in different sections. These solutions have been proposed for different parts of the judiciary, including in administration, technology and IT infrastructure, human resources and training, as well as the review of some laws and the enactment of laws in many different areas to avoid legal loopholes. Generally, the solutions concern managerial, structural, legal and educational proposals. In connection with each duty of the judiciary, this study has identified the existing obstacles and has examined their source. A number of practical and sensible solutions have been proposed to overcome each of the obstacles. Solutions have been proposed based on the capabilities of the KRI judiciary, as well as the capabilities of the government. Most of the solutions are feasible in the short-term and refer to necessary

changes and reforms in some of the KRI's legal procedures. Some of them need to be conducted in cooperation and coordination with the Parliament. Part of the solutions depend on the initiative of the judiciary to use the available capacity of civil society organizations and non-governmental organizations. Some of the solutions have educational dimensions that can be fulfilled by holding practical courses for judges, prosecutors, administrative and judicial personnel, police forces, prison staff and managers. Some of the suggests include the need for the translation and compilation of legal instructions and principles of behavior in Kurdish, for court and prison staff. By doing this, the relevant individuals and law enforcement officers will be acquainted with the rules and principles of behavior related to their field of work.

In general, solutions are proposed in a way so that they can be achieved in different stages through a planned schedule. In fact, if these proposals are realized, the KRI judiciary will be completely transformed and will become a strong, independent and efficient system. In the event of such changes, both the fundamental rights of citi-

zens and their freedoms will be protected, the actions of the government will be effectively monitored and the number of criminal cases and civil lawsuits in the courts will be reduced.

In order to follow up on and implement the proposed solutions in this study, it will be necessary to establish a working group in the KRI judiciary under the supervision of the KRI Judicial Council. This working group should follow a schedule and suggested timeframe for the implementation of these proposals.



“The information and views set out in this publication are those of the authors and do not necessarily reflect the views of the Konrad-Adenauer-Stiftung or its Regional Rule of Law Programme Middle East & North Africa”.