

The Iraqi Constitution: Analysis of the Controversial Articles Solutions and Recommendations

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Al-Bayan Center pursues its vision by conducting independent analysis, as well as proposing workable solutions for complex issues that concern policymakers and academics.

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Foreword by Tim O. Petschulat, Resident Director of FES Jordan & Iraq:

When the former German Minister of Justice Dr. Herta Däubler-Gmelin visited Basra in February 2019 as part of a FES program, she had a special request. As a university professor in constitutional law she had always wanted to visit the ancient site of Ur, which is known as Abraham's birthplace and - among jurists - as the origin of human kind's oldest legal text: the Sumerian code of Ur-Nammu, dating back to 2100 BC. So we went to Nasariyah and visited the most impressive ancient site of Ur. Later we also paid a visit to Iraq's National Museum in Baghdad and were once more overwhelmed - not only by the richness and diversity of Iraq's cultural heritage but also by its ancient history of law.

Considering the prestigious legal tradition of Ur-Nammu and Hammurabi, the state of present day's rule of law in the land between Euphrates and Tigris is rather depressing. While many developing countries struggle with implementing their otherwise good laws, in Iraq there is clearly a problem within the law itself. There is little doubt that some of Iraq's current challenges are deeply rooted in Iraq's dysfunctional constitution.

The current Iraqi constitution is a result of the failed American attempt to transform Iraq into a US-friendly democracy after toppling the Baathist regime in 2003. While the basic law appears to be rather progressive on a first glance with regards to civil rights, it badly fails in providing a stable basis for state building. Many of its provisions rather divide than unite the nation by implicitly safeguarding the interests of demographic groups (Shii, Kurds, Sunni) rather than protecting the rights of all Iraqi citizens equally. Today many experts agree that the constitution the people voted on in 2005 was a hastily written and incomplete draft, that reflected different shades of foreign influence, a vast underrepresentation of Iraqi legal expertise, the absence of Sunni representation in the process and the strengths of the two major Kurdish parties at the time of its composition.

Today the Iraqi people suffer throughout the country from poor governance, poor security, corruption, social insecurities on all levels and above all a constant political deadlock. Especially the last challenge is directly connected to flaws within Iraq's

constitution. To steer Iraq into a more prosperous future will require constitutional amendments. That is however easier written than done: Powerful vested interests as well as a very high legal threshold have so far blocked any attempt at reforming the constitution, in spite of the mounting pressure from street protests since October 2019.

This new book was written and reviewed by four excellent scholars. It outlines a way on how to move forward in reforming the constitution - not from an outside perspective but from a genuinely Iraqi one. Their study carefully analyses some of the most contested articles and proposes not only changes, but also a mechanism on how to achieve those changes in an inclusive way. It is my hope that the ideas outlined in this book by Iraq experts may reach and inspire the newly formed parliamentary committee in charge of proposing amendments to the constitution. Amending Iraq's basic law in a way that enables constructive state building will not solve all the problems, but it may be a promising starting point.

It may also send a strong signal to the street.

A signal, that change is possible.

A signal of hope in a better future.

Foreword by Al-Bayan Center:

The protests on October 1st, 2019, brought the issue of constitutional amendments back to the light as a fundamental part of reforming the Iraqi political system, which reached a challenging stage for the unity of the country and the harmony of its people.

The constitution was written in extremely complicated circumstances under the pressure of terrorist attacks, the presence of the American occupation, an electoral boycott of some components, and politicians' fear of the ghost of the previous dictatorial regime. However, the constitution came out to carry important tasks forming the minimum level of consensus among the Iraqi people, starting the process of building the state and building the Iraqi nation. However, the experience of the past years of accumulated legislative and legal work proved that part of the corruption and sterility of the political system in facing internal challenges and foreign affairs, and its reluctance to provide services to Iraqis are due to the constitution, its interpretations, and the laws derived from it. Therefore, it has become necessary to think more seriously about opening a comprehensive national dialogue to amend the basic law or even rewrite it again away from those pressures that affected the Iraqi constitution in 2005.

The permanent constitution of 2005 preceded the Transitional Administrative Law that emphasized the representative nature of the Iraqi state with its known terms and regulations, such as a federal system, decentralization, harmony, and a free-market economy with a system of services and social security. However, it was only supported by the leaders who wrote it, the members of the Transitional Governing Council at the time.

After the approval of the Transitional Administrative Law, elections were organized to form the interim government and the national constitution-writing committee comprising 28 Shiites, 15 Kurds, 15 seculars, 5 people representing minorities, and 15 Sunni Arabs, 2 of whom were elected only.

Despite how fast the constitution was written, it was the first experience for Iraqis since the establishment of the state to have a permanent constitution written by Iraqis. It had unprecedented attention from specialists, academics, civil society organizations, and political forces.

It was clear from the start that the Shiite demands, which were represented mostly by Islamic parties, focused on the concepts of the majority and the role of Islam and personal status, but they were divided on the issue of supporting federalism. As for the Kurdish demands, they focused on ethnic federalism, the distribution of oil and gas resources, harmony, a moderate form of civilization and a system that guarantees public freedoms and women's rights. As for the Arab Sunnis, their demands were focused mainly on the identity of the Arab state, rejecting the pluralism of the system, de-Baathification, decentralization, and the distribution of resources, but they did not oppose Kurdish federalism.

The experience of the constitution of 2005 indicated abandoning the conditions of a pluralistic system such as the supremacy of agreements, and international treaties since it tended to be the constitution of a majority afraid of past experiences. For example, the practical experience of implementing the constitution demonstrated the impracticality of forming a government without consensus, despite the lack of regulations, such as the right of veto which was abolished in the permanent constitution after it was presented in the Transitional Administrative Law.

The contexts in which the Iraqi constitution was written and its use of strange terms for legal jurisprudence such as (the components), as well as the applied experience, proved that the new political system takes into account the interests of major groups (Shiites, Sunnis, and Kurds) and not the interests of citizens far from their affiliations and subsidiary identities, laying the rules of quotas, sectarianism and ethnicity, even if not adopting them explicitly.

In addition to that, the applied experience of the constitution has proven that those who wrote it did not consider: the number of vice-presidents of the republic, the resignation of the prime minister, or even the bloc that form the government if the premiership is vacant, among other cases, strengthened by ambiguous interpretations of the Federal Court sometimes, and strange constitutional jurisprudence at other times, which seemed affected by the complex psychological and political circumstances that surrounded the Iraqi political experience since 2003 until now.

The inability of the political system to currently promote and protect Iraqi sovereignty, and provide services to its citizens, and the disturbing levels of corruption and extortion in the various state institutions, have been accompanied by increased

public awareness and the emergence of a new generation that rejects the contexts in which the permanent constitution was written. The accumulation of elite, popular, and parties

protests starting February 25, 2011 until today, have revealed the need for serious thinking to bring about a fundamental change that affects the foundations of the current political system, secures a higher percentage of representation in the political system, assures an equitable distribution of wealth and applies a more comprehensive law equal to all citizens.

After the recent protests, a committee was formed to review the provisions of the permanent Iraqi constitution, reinforced by calls for religious authority in Najaf to form constitutional amendments with the consent of all components, without the logic of dictation or imposition due to immediate political pressure.

The paper in your hands is the product of research done by experts specialized in constitutional law and political science. They clearly indicate in their work the need to amend the framework of the current system of government in order to achieve greater harmony between different powers, encourage the rule of law, improve accountability opportunities, and give everyone the right to participate in the formulation of a constitution which guarantees a fundamental reform of the judiciary system, the electoral system, the federal governance and the relationship between an individual citizen and the state. This change is extremely difficult due to the complex mechanisms of implementing amendments established by the writers of the permanent constitution. Also Al-Bayan Center for Planning and Studies extends its deep thanks and sincere gratitude to Mr. Sajad Jiad - former Executive Director of Al-Bayan Center, for all his efforts to prepare the book.

Al-Bayan Center for Planning and Studies is pleased to present this effort to those interested, decision-makers, and those concerned with forming constitutional amendments, in the hope that it will help in providing them with discreet studies and in-depth readings for a sound, flawless constitution, away from wrong interpretations or deviations through the path of proper representation of citizens and strict supervision over state institutions.

Introduction

Iraq's constitutional framework is in desperate need of reform. Its substantive content and the manner in which it was drafted have contributed to weaknesses in the rule of law and of government accountability. The result for the Iraqi state and society has been devastating in some cases: despite repeated policy, security and economic failures, and despite astronomical corruption, there has been little government accountability. Neither the courts nor national elections have been effective at holding state officials accountable for their actions. If Iraq is to have a chance of recovering from its current state of affairs, much effort will have to be made to amend its current governance framework, and to do so in a way that encourages the rule of law. Concretely, a new reform process should be designed that will allow a greater opportunity for all of Iraq's constituencies to be involved in shaping the new constitution, which should proceed on the basis of a firm agreement on process, and which should have achieved consensus amongst Iraq's political and social groups as its target. Substantively, any reform effort should have as its fundamental focus the need to establish governmental accountability. This will require significant reform to Iraq's judicial sector, to its electoral system, to the federal system of government and to the relationship between the individual and the state.

Iraq's constitution emerged from an imperfect process. From 2003 to 2009, there were four separate processes to draft, redraft and reform Iraq's constitutional framework. During each of those processes, the procedural rules that had been established by them were not fully respected. For example, each of the final drafts that were prepared was agreed upon without the approval of some of the country's most important and legitimate actors. Drafts and redrafts were prepared far beyond the agreed upon deadline. Each of the processes also neglected to reach out to the public in any meaningful way. The body that was formally and legally constituted to draft the constitution was not allowed sufficient time to complete its work, causing a major breakdown in the process. The effect has been to undermine the value and meaning of agreements on procedure, which has had a negative impact on Iraq's political culture since 2005.

The result is also that Iraq's post-2003 constitutional process has produced a constitution that is far outside the popular mainstream and that does not respond to essential needs in a large number of respects. On fundamental rights, the constitution

satisfies itself with listing a large number of rights without including a single provision beyond the absolute minimum that would increase the likelihood that those rights would ever be applied in practice. The provisions relating to the judiciary purport to establish an independent court system, but does not set out any of the detail that would have been necessary in order to translate that general principle into a reality. The constitution leaves all of these implementing issues to subsequent legislation, which was a major strategic mistake considering that the country's political system has been singularly incapable of enacting any of the major legislation that the country so desperately needs.

The constitution establishes Iraq as a parliamentary democracy, which is far more suitable for the country than a presidential system, particularly considering its history and makeup. However, the constitution makes a number of miscalculations and omissions on how that system of government is to function, all of which have contributed to the current state of affairs. Amongst other things, the electoral process and the government formation process both leave open a number of opportunities for political vacuums. Indeed, the constitution currently provides that the president, speaker of parliament and prime minister should all be appointed in the weeks following parliamentary elections, which in practice has led to extraordinary lengthy periods of political stagnation in which all institutions exist in a state of limbo (including for example the government formation processes in 2010 and 2014). In another example, the provisions relating to the law making process have prevented the Council of Representatives from playing an important political role, and have also prevented the emergence of a unified political opposition. Meanwhile, provisions relating to the remuneration of parliamentarians have essentially created a clear financial incentive to become a member of parliament as well as an opportunity to engage in self-dealing. Finally, the constitution's provisions on the security sector miss an enormous opportunity to provide more clarity on each security institution's mandate and the methods of operating. Worst of all, the constitution places the security sector firmly under the prime minister's sole control without providing any of the requisite checks and limitations to that authority.

The constitution also caused significant controversy in 2005 by establishing the country as a federation. Despite the vigorous debate that this caused, Iraq is probably well suited to being governed under a federal system of government. However, the constitution's rules on Iraq's federation are full of gaps, contradictions and are

skewed in favor of an outcome that much of the country has not and still does not appear to accept. For example, the constitution does not clearly establish whether or not provinces enjoy the same rights as regions, which has contributed to confusion and tension between the authorities in Baghdad and provincial authorities. The constitution is also extremely permissive and flexible in that it allows any combination of provinces (even if they do not share common boundaries) to merge and transform into regions, without any say from the central authorities in Baghdad. That unprecedented system was designed to allow for the entire country to federalize along the lines of what the Kurdistan Region has achieved, but it has failed to materialize into any concrete changes other than escalating a bitter political debate. Furthermore, the constitution grants so few powers to the central government that it has essentially ignored the relevant provisions and has behaved as if there are no limits imposed on it. This has contributed to the sense that the constitution is not entirely binding, which has weakened the rule of law even further.

Finally, the provisions relating to independent agencies were very poorly conceived. The wording that is used is both inconsistent and confusing, and precious little detail is given on how the country's independent agencies (including the Board of Supreme Audit and the Independent Electoral Commission) are supposed to function in practice. The result has been that these vital institutions have been unable to even come close to fulfilling their missions to anything close to a satisfactory level.

Recommendations

(i) Any attempt to amend the 2005 constitution should be organized around a number of fundamental principles, including that negotiations should involve as many constituencies as possible (not just limited to elected representatives), the process should involve several stages, the public should be given a genuine opportunity to be involved, all decisions should be adopted through consensus and finally whatever procedural rules are adopted should be captured in a written agreement that should be applied to the fullest extent possible.

(ii) In practice, the revision process should first be led by a constitutional commission, which should be led by a non-partisan group of Iraqis, who should have as their

mission to recommend a list of possible amendments to the constitution. The commission should organize public hearings to allow for interested parties to express their views on how the constitution should be amended. In a second, later stage, a committee of parliamentarians should work alongside an expert committee to prepare a final draft. The parliamentary committee should be required to consider the commission's recommendations and prepare a draft of its own; immediately thereafter, the expert committee should be required to review the parliamentary committee's draft and prepare a final version for consideration by the parliament and by the public. The final draft should be adopted through a public referendum.

(iii) Islam and Sharia have been mentioned in the Iraqi constitution multiple times. The constitution emphasizes that Islam is the state's religion. It also affirms the Islamic identity of the Iraqi people (Article 2, Section II). In fact, this section should be removed since it is a repetition of what has been already stated in (Article 2 section I), that Islam is the state's religion. This section expresses the desired emphasis on a general idea, the Islamic character of Iraq and its people. These sections have no legal effect in practical terms. Therefore the repetition of the same idea may not be good for the constitutional standpoint. The Iraqi constitution also confirms in two places that Islam is a source of legislation, and the established provisions of Islam may not be violated by other legislations. This is a representation of an obvious contradiction between the two sections. The constitution overall introduces Islam as a source of legislation, while the second sections highlight Islam more than the other sources of legislation. This leads us to the need to amend these sections: First, by the unification of the term used to be either "Islam", "established provisions of Islam", "Islamic law", or others to unify the constitutional meaning when Islamic Sharia is stated. Second, the constitution must determine the status of the Islamic law clearly, and whether it is superior to other sources of legislation, or it is just a source among many.

(iv) The constitution's section on fundamental rights should be amended mainly by introducing a number of enforcement mechanisms. Firstly, the supremacy clause (article 13) should be strengthened to clarify that all branches of government are bound to respect the law. Secondly, a provision that clearly establishes the process that must be followed to limit fundamental rights, and the basis on which fundamental rights may be limited should be included in the constitution (something that has

already been achieved in Article 49 of Tunisia's 2014 constitution). The provision relating to states of emergency (article 61(9)) should be strengthened by specifically indicating the procedures that need to be followed to renew a state of emergency, and by clearly indicating which fundamental rights cannot be limited even under an emergency and what procedure needs to be followed in the event that an emergency is declared. Finally, the constitution should clearly indicate that all of the rights and obligations that are afforded to citizens are justiciable before the courts.

(v) The Iraqi constitution chose to build the foundation for a multi jurisdiction. It established the Federal Supreme Court, in addition to the ordinary courts specialized in civil and commercial disputes. The constitution, also, has opened the door to establish specialized administrative courts (Article 100). However, the Iraqi constitution unifies all presidencies of the judicial bodies under the Supreme Judicial Council and gives the Federal Supreme Court a special status. It is required to modify the judiciary system to determine the federal judiciary status, and whether it is a multi-judiciary having its own presidency and budget, or it is a unified judiciary, including the Federal Supreme Court, that is subjected to the Supreme Judicial Council, which has the final say on all matters relating to the federal judiciary. Iraq, also, needs to create a specialized administrative juridical system having the same status other judiciaries have. Therefore, it will become a council to the state specialized only in resolving administrative disputes. Finally, the Iraqi constitution has decided that the Federal Supreme Court is composed of judges and experts in law and Islamic jurisprudence. This should be reversed towards the appointment of judges who have had judicial work for a certain period (not less than fifteen years). The constitution does not mention the number of judges of the Court, and does not include how they are appointed in their positions, and the terms of their office. This must be determined by the constitution, not by ordinary law. Also, the constitution must define a mechanism for accountability of judges to ensure a balance between power and responsibility. It is proposed to add a constitutional control of the Federal High Court in the matters of the election laws to ensure the issuance of these laws are free from any constitutional flaws, which could put the elected councils to the risk of dismantlement in the future.

(vi) The election of the president, the speaker of parliament and the prime minister should be decoupled so as to prevent a power vacuum. In particular, presidents

should serve for a single 7 year term. The constitution's references to vice-presidents should be eliminated, whereas the provisions on replacement (article 75(4)) should be maintained. With respect to how the prime minister should be appointed, the Iraqi constitution requires the President and the House of Representatives to elect the prime minister and form the new government. This paper calls to change that and appoint only the president to ask the parliamentary candidate of the majority bloc to form a cabinet without the need to present the new cabinet or the government's program to the parliament to get their approval. To make the general elections more effective, the existing electoral system in Iraq should be reversed to adopt a more balanced system that combines the elections of individuals and the elections of different open blocs.

(vii) The parliament's legislative function should be strengthened by explicitly allowing for parliament to adopt legislation without government approval (albeit with certain limits relating to budgetary issues). The parliamentary opposition should also be given a specific role, including the right to lead specific committees and the right to place certain items on the parliament's agenda on regular intervals (which has already been adopted in the 2011 Moroccan and the 2014 Tunisian constitutions). Finally, the parliament's power to determine the remuneration of its own members should be transferred to an independent public service commission.

(viii) The security sector's mandate should be clarified. The military's mandate is currently confused and can only be ascertained by reading different provisions together. Meanwhile, the police are never mentioned in the constitution whatsoever. Each of these bodies should be given a clear mandate to govern their behavior. Finally, the power that is currently granted to the prime minister by virtue of his position as commander in chief of the armed forces should be dissipated by reverting the TAL's wording on this issue, which provided clear limitations on the prime minister's power.

(ix) Iraq's federal system of government should be both clarified and broadened. The relationship between the Kurdistan Region and Baghdad should generally remain unchanged and should be established as an exceptional situation that does not necessarily impact the manner in which the rest of the country is to be governed. Provinces outside the Kurdistan Region should be given significant additional pow-

ers, mainly by clearly and explicitly providing them with the right to enact legislation. Meanwhile, the list of exclusive federal and shared powers should both be extended to include a small number of additional areas, and the wording of both provisions should be improved by removing much of the existing ambiguity. In conjunction, the provision relating to the right of provinces to transform into regions (article 119) should be eliminated.

(x) The constitution should dedicate a specific article to each of Iraq's independent agencies specifically in order to specify what each agency's mandate is, and what its operating procedures should be (Egypt's 2012 and 2014 constitutions both adopted this approach). Meanwhile, the constitution should include a number of general provisions that provide independent agencies with the means to satisfy their mandates, namely by requiring them to publish their reports. The constitution should also introduce clear mechanisms that will protect the agencies' independence, namely by protecting appointment and dismissal processes from political influence.

Section 1:

Procedural questions

It is by now beyond dispute that the process through which a constitution is drafted is just as important as its actual content. Modern, democratic nations will no longer accept that constitution be the product of a closed drafting session organized solely by technocrats or by members of a single political party. Democratic countries are composed of various levels and types of constituency, many of which will insist on being involved in some capacity or another. In addition, constitutional negotiation processes are an opportunity to set transition countries on a new course, particularly with a view to encouraging adherence to a new set of principles such as the rule of law and a culture of democratic dialogue. On the other hand, constitutional negotiations are also fraught with danger: a flawed approach during such a delicate process can easily set a country on a downward spiral.

Our advantage today in comparison with when Iraq set out to draft its first post-Baath constitution can, is that we can now reflect on the efforts that were made from 2003 onwards and derive from them a number of lessons that any future constitutional process should learn from. In particular, since 2003, Iraq has lived through four separate constitutional drafting processes, each of which was based on its own rules, and each of which was designed to achieve a specific set of objectives. The four processes are:

(i) The drafting of Iraq's interim constitution (also known as the TAL) which took place from 2003 to 2004.

(ii) The first attempt to draft a permanent constitution, which was led by the constitutional drafting committee's tenure, which lasted from May to August 2005 and which purported to represent Iraq's various electoral constituencies.

(iii) The second attempt to draft the permanent constitution, which was led by what was commonly referred to as the Leadership Council, which worked from August to October 2005. The Council represented Iraq's power elites, while privileging those parties which were most closely aligned with the US.

(iv) The first and thus far only attempt to amend the constitution, which was led by a constitutional revision committee, which worked from 2007 to 2009 and which represented Iraq's electoral constituencies.

Each of these processes produced different results and are worth discussing in some detail here before we provide some form of prescription for how the current constitution should be amended.

a. The TAL Process

Following their invasion of the country in March 2003, the United States and the United Kingdom created the Coalition Provisional Authority (CPA), which was Iraq's highest civilian authority from 2003 to 2004. The CPA played a major role in determining how Iraq's transition process would be organised. The CPA itself created a separate body known as the Governing Council, whose membership was entirely Iraqi (although some of its members had not lived in Iraq for many years). Together these bodies spent the end of 2003 and the start of 2004 drafting a document known as the Law of Administration for the State of Iraq (also known as the "Transitional Administrative Law" or the "TAL"), which was designed as an interim constitution.

The process took place on two parallel tracks, involving two different types of constituency. Firstly, a small group of non-political drafters worked to prepare a preliminary draft, with a focus on the system of government that would be established at the center. These individuals played the role of dispassionate experts and technicians. They consisted almost entirely of US officials and Iraqis who had lived the largest part of their lives in exile.³ Secondly, high level negotiations on key issues (such as the federal system of government) were ongoing. Sadly however, those discussions were equally restrictive; the negotiations were led by the US civilian administrator (Paul Bremer) who spent the bulk of his efforts negotiating with a single political alliance, leaving the remainder of Iraq's political groups to decide whether to sign

3. See Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq*, Holt Paperbacks (2006); and Feisal Amin al-Istrabadi, 'Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law', *New York Law School Law Review*, Volume 50, 2005-2006.

on to, what was for them, a largely predetermined agreement.⁴ Naturally, those parties and individuals which disapproved of the occupation and who considered its influence over the country's political future to be illegitimate played no role over the process and subsequent discussions.⁵ Although the text of the TAL was finalized in [March 2004], it was adopted without the approval of several negotiating parties, who objected to the provisions that detailed the road map (see below).⁶

Notably, the Iraqi public was never consulted in any shape or form during the drafting of the TAL. Virtually none of the parties that participated in its drafting were elected (many were not even Iraqi), there was no consultation process, the drafts were never published, there were never any public discussions, and a referendum was not held to grant the text some form of popular legitimacy.

Substantively, the TAL was similar in form to many other interim constitutions that were enacted during periods of transition in other countries.⁷ It purported to reestablish Iraq as a democracy for the first time since 1958. It also established a new federal system of government for the country, which was supposed to be applied throughout the interim period, and included a road map for how Iraq would transition to a new and permanent constitutional arrangement. The federal system of government was practically without equivalent in comparative perspective, as it granted enormous power to subnational units while Baghdad's power was very limited.

The TAL provided that a Transitional National Assembly would be elected in January 2005, that the entire drafting process should take place in 6 months and that it should be completed by 15 August 2005 (article 61). A three month public consultation process would follow, in which Iraqis would be given the opportunity to debate and discuss the draft, followed by a referendum that should take place on 15 October 2005. The TAL also provided that in the event an extension of time became necessary, a one-time only six-month extension could be granted. Article 61(c) also provided that "the general referendum will be successful and the draft constitution

4. See L. Paul Bremer III and Malcolm McConell, *My Year in Iraq: The Struggle to Build a Future of Hope*, Simon & Schuster (2006).

5. The Sadrist Movement was perhaps the most important party that did not take part.

6. Hamza Hendawi, 'Shiites Won't Sign Interim Constitution', *The Associated Press*, 4 March 2004.

7. The full text of the Transitional Administrative Law is available here:
<http://www.iraqcoalition.org/government/TAL.html>.

ratified if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it". Given that the population of Iraq's three northern provinces were almost entirely Kurdish, any draft constitution that was put to a referendum and that was not approved by the Kurdistan Alliance would almost certainly fail to meet the threshold imposed by Article 61(c). Although this was interpreted as providing the Kurdistan Alliance with a virtual veto on the draft constitution, it could also have been read as an attempt to prevent the new constitution from being adopted on a majoritarian basis. As noted earlier however, a number of parties refused to sign this particular provision.

b. The Constitutional Drafting Committee

Following the completion of the TAL, sovereignty was formally transferred to an Iraqi administration in June 2004, which had as its main responsibility to organize the elections that were eventually held in January 2005. The elections were held in January 2005 and were generally considered to be free and fair despite significant violence. The United Iraqi Alliance obtained close to a majority of seats in the new assembly, while the Kurdistan Alliance was close to a quarter. Representatives of Iraq's Sunni Arabs, one of the country's main ethno-sectarian groups, boycotted the elections and as such were seriously underrepresented in the Assembly.⁸ Following the elections, a 55-member constitution-drafting committee (CDC) was appointed from amongst the TNA's members.⁹ Although the CDC commenced work in May, 15, additional members, who supposedly represented Iraq's Sunni Arabs, were allowed to join the committee in June. The CDC was solely responsible for preparing a draft constitution that could be put to the people in a referendum.

The CDC suffered from a number of critical failings. The TAL required that a significant amount of public outreach be carried out by the relevant authorities to "encour-

8. That level of underrepresentation was not reflected in the Constitutional Committee due to an ad hoc decision to include 15 Sunni members of the Committee (see below).

9. For a detailed account of Iraq's constitutional drafting process, see Zaid Al-Ali, *The Struggle for Iraq's Future: How corruption, incompetence and sectarianism have undermined democracy*, Yale University Press (2014). Also see Haider Hamoudi, *Negotiating in Civil Conflict: Constitutional construction and imperfect bargaining in Iraq*, University of Chicago Press, November 2013.

age debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq as it writes the constitution” (article 60). Although the CDC’s public outreach body did carry out a national opinion survey, the results were skewed in favor of the political party that happened to control that body. In any event the survey results were only published after the CDC was dissolved and so therefore did not have any impact on the substantive discussions that took place. The second source of difficulty was the CDC’s internal rules, which it drafted in May 2005, and which allowed for substantive issues to be decided on a majoritarian basis. That rule and the inclusion of the additional 15 members created an unforeseen dynamic within the committee. The expanded CDC included a large majority of members who were determined to establish a federal system of government in which the federal government in Baghdad would play a key role in maintaining national unity and in which regional autonomy (even in the Kurdistan Region) would be greatly reduced. Most Arab members of the CDC (Sunni and Shia alike) were also socially conservative and sought to reflect that perspective in their work. Kurdish members, who were generally in favor of maintaining the same federal system that was established by the TAL and who were also broadly more socially liberal than their Arab counterparts, found that they were systematically in a minority in the discussions.

Over time, the list of exclusive federal powers expanded from 7 powers in the first iteration to more than 21 at the end of the CDC’s tenure. The drafters had also included provisions that predetermined how any federal regions (including the Kurdistan Region) would have to be organized internally. During the CDC’s tenure, the draft constitution was evolving in a way that would have brought Iraq closer to some of the world’s most well established federations, but which was nevertheless surprising and alarming to many actors and observers. Kurdish members of the CDC resisted this trend but were consistently outvoted, and found that they were unable to steer the discussions in a direction that was more to their liking.

c. The Leadership Council

By early August 2005, the CDC had made significant progress on a number of issues, but clearly required additional time to complete its work. The TAL included a provision that allowed for a single six month extension and some members were calling for more time to be granted in order to allow for the negotiations to proceed. Instead, the CDC's work was discontinued and a new, informal body known as the "Leadership Council" was formed to continue drafting the text. US and Iraqi officials defended the Leadership Council on the basis that it was the only way in which the original referendum date could be met. Throughout the summer of 2005, violence increased steadily in the capital and elsewhere, and some US and Iraqi officials considered that a new election would bring into existence a new political settlement that would allow for a gradual return to normalcy. Because a new election could only be organized after the drafting of the constitution was completed, the implication was that the drafting process should be rushed, even if this meant doing so informally and without the formal mechanisms that had been agreed upon. This justification turned out to be a terrible miscalculation, given that violence quadrupled following the December 2005 elections.

The Council was not provided for by the TAL, which was supposed to be the agreed upon road map for Iraq's transition to democracy. The Council's very existence and the changes that it introduced to the TAL were not in conformity with the TAL. By way of example, although the TAL provided that the constitution should have been completed by August 15, 2005 to allow for public debate of the draft before the referendum, the Council continued making changes until October 13, 2005, which is to say, two days before the referendum date. In addition, the Transitional National Assembly, which was elected to draft the constitution, was not allowed to oversee, debate or vote on the draft constitution and found that the drafting body that it appointed to carry out its work was dissolved. All of this confirmed that the Leadership Council was not intended as a continuation of the CDC's work but as a replacement for it. That much is obvious by studying the manner in which the draft constitution's substantive content radically shifted as soon as the Leadership Council took over from the CDC.¹⁰

10. See Zaid Al-Ali, *The Struggle for Iraq's Future: How corruption, incompetence and sectarianism have undermined democracy*, Yale University Press (2014), pages 84-102.

Secondly, the Council's deliberations were informal, which allowed for a large number of foreign officials to play key roles in the process. Amongst other things, the Council's first meetings took place at the United States embassy in Baghdad,¹¹ which opened the door to the involvement of many American and British diplomats.¹² In fact, the Council's opaque manner of proceeding created an unprecedented opportunity for external advisers acting on behalf of private interests to be directly involved in the process, in ways that were completely unregulated and to this day remains generally undocumented.¹³

The impact of all of the above is that, although the constitution was ultimately approved by close to 80% of the population in the 15 October referendum, its provisions were far outside the popular mainstream.¹⁴ Much of the CDC's work on the federal system of government was undone and replaced with the TAL's provisions, with some modifications around the edges. That proved to be highly problematic over the long term, creating a dynamic in which senior state officials refused to apply some of the constitution's most important provisions (see below).

11. See State Department Cable, Classified by DCM David Satterfield, Subject: 'Constitution update, August 19 – More Progress', Date 19 August 2005, available at https://wikileaks.org/plusd/cables/05BAGHDAD3424_a.html ("Leaders of the top Iraqi political factions, including representatives of the major Sunni Arab political groups, met at the Ambassador's residence on the morning of August 19. While a line-by-line review slowly progressed, a variety of side-meetings focused on critical issues produced closure on all but the question of resources. Further Shia-Kurd discussions resulted in significant movement toward agreement on this issue, key to closing on an overall constitution text").

12. See this discussion at Chatham House, in which the former UK ambassador to Iraq clearly states that he played a role in the negotiations; 'Iraq's political systems', published on 20 March 2013, at <https://www.youtube.com/watch?v=7AkL-GqmPJU8>. The same former UK ambassador makes the same admission in the following discussion, also at Chatham House; 'Ranj Alaaldin and Zaid Al-Ali discuss Iraq at Chatham House', published on 18 March 2014, at https://www.youtube.com/watch?v=_mXX10rbDEE.

13. Some of the foreign advisers that advised the drafting process have in fact been remarkably forthcoming about the influence that they had. Some encouraged their Iraqi clients to adopt radical views that were very likely to increase tensions with other Iraqi actors over the long term, with little regard for the consequences. This applies to many issues including federalism, territorial rights and natural resources. Some of those same advisers also reportedly acquired interests in oil fields, and so therefore stood to benefit personally from the advice that they were giving. See for example, The End of Iraq: How American Incompetence Created a War Without End, Peter Galbraith, Simon and Schuster (2007); and James Glanz and Walter Gibbs, 'U.S. Adviser to Kurds Stands to Reap Oil Profits', The New York Times, 11 November 2009.

14. Although the constitution was approved by a large majority of the population in a referendum that took place in October 2005, the referendum results are not a good measure to assess the population's level of agreement with the actual text for a number of reasons, including but not limited to the following: (a) the final text of the constitution was only shared with the general public two days before the referendum date; (b) the final text of the constitution actually included a provision that specifically provided that the constitution should be amended within 4 months, hardly reassuring for anyone that may have cast their vote on referendum day; (c) security deteriorated considerably during the constitutional drafting process, leading the general population to vote not on the basis of the draft's actual content (which, for the most part, no one had seen anyway) but on the basis of their own survival instincts.

d. The Constitutional Revision Committee

The 2005 constitution provides that the Council of Representatives “shall form at the beginning of its work a committee from its members with the mission of presenting to the Council of Representatives, within a period not to exceed four months, a report that contains recommendations of the necessary amendments to the Constitution” (article 142). Twenty-nine members of parliament, who together supposedly mirrored the parliament’s composition, were selected to join the constitutional revision committee (CRC). Thirteen of the twenty-nine members were also members of the original Constitutional Drafting Committee (CDC), and the CRC’s chairman had been the chairman of the CDC. Despite constitutional provisions to the contrary, the process lasted for several years. In May 2007, the CRC issued an initial draft report in which it suggested a number of changes to the constitution.¹⁵ In July 2008, the CRC issued a preliminary draft final report. The CRC’s final report on suggested changes was finally submitted to the Iraqi parliament at the end of 2009.¹⁶

Although it managed to agree on a large number of possible amendments, the CRC’s proposals were never debated in parliament, were never put to a referendum, and were therefore never adopted for a combination of reasons:

(i) The process was led by members of parliament, many of whom were heads of political blocs and committee heads as well. The result was that the individuals who were supposed to lead the process found that they were overburdened, which caused for the process to drag on for far longer than was originally intended causing many parties and observers to lose interest.

(ii) Many of the individuals who were deeply involved in the revision process had also been heavily involved in the actual drafting of the constitution in 2005. This created an unnatural dynamic in which some members were vested in the text that they were asked to revise, leading to a series of missed opportunities for improvement and also a lack of enthusiasm in the process.

(iii) The CRC (and the CDC before it) functioned on the basis that the only actors who were relevant to a constitutional drafting process were elected representatives.

15. UNAMI report GJPI + USIP article

16. REFERENCE to full text

As a result, both the CRC and the CDC missed a significant opportunity to reach out to other actors throughout the country, many of whom could have made important substantive contributions to the process and could have generated significant public interest. This was even more so given that developments on the ground during 2008 and 2009 were already starting to reveal how inadequate Iraq's governance structure was.

(iv) The process did not involve the public or civil society organisations to any significant extent. Ideally, a constitutional process should integrate ideas and reactions from all interested parties who are not formally part of the process, and should also rely on pressure from the public to give momentum to the reform process. In the CRC's case, the public was largely unaware of the process or of the types of benefits that might accrue in the event the constitutional amendments were adopted.

e. Legacies and Lessons

Iraq's constitutional negotiation process, which started in 2003 with the drafting of the TAL and which ended in 2009 with the failure of the revision process, has left a number of key legacies on Iraqi state and society.

The first is the constitutional process' impact on the rule of law. Although constitutional drafting processes are supposed to be key moments in a country's historical evolution and an opportunity to establish or reinforce the rule of law, the Iraqi process fell short of that aspiration. The TAL was never formally adopted by the full spectrum of Iraq's political class, given that some negotiators refused to sign the text and even denounced it just as it was entering into force. The CDC did not consult with the Iraqi people in any meaningful way, despite a legal requirement to do so. In addition, the CDC did not finish its work by the agreed upon deadline and was not allowed to extend its mandate. The Leadership Council's entire basis for existence was illegal, and its proceedings took place within a total legal vacuum. Finally, the CRC was supposed to complete its work within four months, but instead continued operating

for three years; in any event, its recommendations were never put to a vote, rendering the entire process both obsolete and pointless. The fact that procedural rules were generally not respected has had a negative impact on the rule of law in Iraq. A precedent was established that written agreements were always flexible and could be amended by whoever happens to control the reins of government.

Secondly, the drafting process was so elite driven that it delivered a model for governance that was far outside of the popular mainstream. The TAL was essentially drafted by US officials and a number of Iraqis, most of whom had just returned from decades-long exile and none of the principle actors had been elected at that point. Although it could be argued that the CDC had more legitimacy, its work was essentially set aside by the Leadership Council, which was once again unelected and unrepresentative of the general population. The Council replaced much of what the CDC had done with the TAL's provisions, which were the product of an undemocratic process. To make matters worse, none of these bodies, including the CRC, ever took the issue of public outreach seriously. The only individuals who could influence the constitution's substantive content were foreign officials and Iraqi former exiles.

Thirdly and finally, the constitutional process applied a fake and shallow commitment to consensus. While parties claimed to understand that issues of high importance, such as a constitutional settlement, should be adopted by a consensus of opinion, that understanding was never applied in practice. The drafters of the TAL were happy to move ahead with its application despite the fact that it did not enjoy the support of some of the most important forces in the country. The CRC is the only body to have pursued genuine consensus between the country's political forces, which is no doubt the reason why its deliberations lasted for so long. That tradition of foregoing agreement amongst political elites at critical junctures continued after the 2005 constitution was adopted.

This entire discussion can be summarized through the following table, which perfectly illustrates how badly Iraq's post-2003 process was conceived and applied:

	Consensus based approach	multi-constituency approach	Multi-stage approach	Adherence to rules	Genuine public involvement
TAL	X	✓	✓	X	X
CDC	X	X	X	X	X
LC	X	X	X	X	X
CRC	✓	X	✓	X	X

While the legacies of these developments and practices have been very painful, they also create a unique opportunity in Iraqi history. The four different processes that took place from 2003 to 2009 each adopted their own individual approaches to the same issues, and in that respect offer the opportunity to develop a number of principles on which any future constitutional process could be based. In particular, based on all of the above, we can establish the following principles:

- **A Multi-Constituency Approach:** Apart from the process through which the TAL was drafted, each of the other processes that Iraq lived through from 2003 to 2009 were essentially single constituency approaches. In particular, what this meant is that each of the constitutional negotiations that took place only involved individuals from a single constituency, which in this case were elements from the country's political elite. As a general rule, political elites can never be fully representative of society as a whole, simply because there are a large number of constituencies that often make up large segments of the population but which often have no scope to win an election. By way of example, this applies to women, who are often incapable of generating any interest in national elections despite the size of their constituency. It also applies to the working class, which in many countries does not have any political representatives in state institutions such as government and parliament. This is especially true in Iraq, where women and laborers are not represented in any meaningful way in the state and therefore did not participate in the post-2003 constitutional pro-

cess. The result is that the interests and ideas of these constituencies, including women, workers, legal experts, and many others are not properly reflected. The principle that can be derived from this is that whatever process takes place in the future should involve elected officials, and should also give significant scope for members of other constituencies to influence the drafting process.

- **A Multi-Stage Approach:** Another important feature in the post-2003 constitutional process was the fact that the CDC and the Leadership Council were required specifically to prepare a full constitutional text from start to finish without any interruption. The result of that approach was that there was never any opportunity for the drafters, or for anyone else, to reflect on the draft, to identify important omissions and mistakes, and then to propose the types of amendments that could remedy those problems. The TAL process and the CRC both involved several stages. With respect to the TAL, non-political drafters started the drafting process and were succeeded by a heavily political negotiation. The CRC did not change its membership, but did publish several drafts, allowing significant time to flow after each publication, which created significant opportunity for the main actors to reflect on what progress was being made and what remained to be done. The fact that the CRC was the only body to reach a consensus on a large number of issues shows the value in repeating that approach in any future process.

- **A Rules-Based Approach:** As noted above, all of the post-2003 bodies violated the rules that they had set for themselves or that had been set for them, which has had a devastating effect on the rule of law in Iraq. A rules-based approach in constitutional drafting increases transparency and predictability about the constitutional process, improves the rule of law, and increases the reliability of written agreements between political parties in the future. A future constitutional process could represent an important opportunity to remedy this wrong. The parties to any future process should commit to written agreements on the procedure, which should serve as a model for future political negotiations. Because constitutional negotiations are by nature unpredictable, whatever procedural agreements are signed should allow for a certain amount of flexibility (possibly including a mechanism that would allow for the procedure itself to be amended), so as to improve the likelihood that the agreements will not be violated even in the face of changed circumstances.

- **Public Involvement:** Aside from the TAL process, which did not include any public involvement at all, the remainder of the post-2003 bodies all worked on the basis that the public could be consulted on the drafts that were being prepared at the end of the process, which is to say, through a referendum. That mechanism has proven to be highly inadequate, as illustrated by the referendum that followed the Leadership Council's tenure, in which 80% of the population voted in favor despite not having had any meaningful opportunity to review it. A genuinely democratic process should involve a far greater opportunity to influence the drafting process. In order for that to happen, drafts should be published during the process, and sufficient opportunity should be provided for members of the public to study them and provide comments.

- **A Consensus-Based Approach:** The failure to reach consensus on key constitutional issues seriously damaged the 2005 constitution's ability to establish a functioning system of government. Political decisions on a particular country's political system, or the relationship between the individual and the state should not be decided by a simple majority of constitutional negotiators. This is particularly important in deeply divided societies such as Iraq. A future constitutional drafting process should avoid that outcome by incorporating deadlock breaking mechanisms where necessary, including relying on third-party mediation.

f. A New Revision Process

a. Much of the rest of this report has as its focus a number of substantive amendments that could be made to the Iraqi constitution to strengthen the rule of law and government accountability. In order for these or any other suggested reforms to have a chance of success, they must be adopted through a rigorous process that builds on Iraq's past experiences and on the experiences of other countries. We introduce some ideas of how a future constitutional process can be organized here.

In particular, it is important to integrate lessons learned from the 2005 drafting process and the 2006-2009 revision process, as well as from the recent constitutional drafting process from other countries. As a result, we believe that any new attempt to amend the 2005 constitution should involve a multi-stage and multi-institutional

approach, in order to involve a broader range of actors and incorporate as many ideas as possible. In particular, we recommend that any future constitutional reform process be constructed as follows:

(i) A Constitutional Commission: We recommend that the President of the Republic and the Council of Ministers initiate a reform process by composing a Constitutional Commission (the “Commission”). The Commission should have as its mandate to prepare a report on what reforms should be made to the constitution. The Commission’s report should consist of both a narrative report to explain the basis for its recommendations, and a detailed list of all the changes that it believes should be made.

As part of its work, the Commission should involve the public to the fullest extent possible. This should be for the purpose of enriching the Commission’s work, and to create some momentum in favor of constitutional reform. This can be achieved through a number of steps, including but not limited to the following:

- a. Inviting members of the public, including civil society organisations, to prepare submissions for the Commission’s consideration;
- b. Organising public hearings during the Commission’s tenure to allow for specific public submissions to be debated, and to allow the Commission the opportunity to discuss some of its preliminary ideas for reform with members of the public;
- c. Publishing the Commission’s final report online and in hard copy to all interested parties. As already stated, the final report should include a narrative report that should be drafted in non-technical language to allow for as many members of the public as possible to review and evaluate its recommendations;
- d. Organise a final press conference to publicise and to launch the Commission’s findings.

The Commission should be required to submit its report within 9 months. As soon as the Commission completes its work, it should be disbanded. Its members should have no further formal role in the constitutional process. The members should also be employed for this task on a full-time basis, to ensure that they will have a sufficient amount of time to carry out their task.

The Commission should consist of a small number of members, preferably no more than 9, gender representation (women or men) is not less than %30. Its members should be individuals who are known for their integrity, independence, and their professionalism. The Commission's members should be sufficiently diverse so as to benefit from various forms of expertise. By way of example, its members should include:

- a. Legal experts, including sitting judges, academics, lawyers, or legal advisers;
- b. Sociologists, to bring a greater understanding of how the constitution has impacted society and what impact any suggested reforms are likely to cause;

A select number of independent bodies should be required to prepare lists of candidates for membership in the Commission. These bodies could include state universities, judicial councils, etc. The President of the Republic should be required to select the Commission's members from the prepared list of candidates. A dedicated judicial panel should oversee the appointment process to ensure that the nominations and appointments are made on the basis of objective criteria.

(ii) The Drafting Process: Before the Commission completes its work, three separate bodies should be composed and should be ready to commence the drafting process as soon as the Commission's report is finalized and is made public. These three bodies should work on the basis of the Commission's report, but should not necessarily be bound by it. They should interact throughout the drafting process to ensure firstly that all possible opinions are considered and to ensure that a sufficient level of consensus is reached between them. The committees in question are:

a. A Parliamentary Committee: This committee should be composed exclusively of parliamentarians. It should be representative of parliament, but should not be larger than 15 members in size, in order to ensure that it will be able to conclude its work relatively easily. All of the parliamentary committee's members should have no other function, so as to ensure that they dedicate a sufficient amount of time to their work. Thus, if any individual member is also a member of another substantive committee or is the head of a political group, then those functions should be suspended until the parliamentary committee completes its work.

b. An Expert Committee: The expert committee should consist of a small number of independent legal experts, including experts in legal drafting. They should also not be affiliated with any political group. None of the members of the Constitutional Commission should be allowed to become members of this expert committee. The expert committee's members should be retained on a full-time basis and should be prohibited from assuming elected public office or senior government positions for a specific period of time following the completion of their work. The expert committee should have a small secretariat at its disposal, in order to assist with research and communication issues.

A Judicial Panel: A small panel of judges should be composed to resolve differences of opinion between the parliamentary committee and the expert committee, and only as necessary. If no disagreements arise, then the judicial panel will not have any specific role in the process.

After these bodies are composed, a specific manner of proceeding should be established, which should determine how these bodies will interact and how they should complete their work. We recommend that the following process be established:

a. After the Constitutional Commission completes its work, the parliamentary committee should be required to produce its own specific recommendations. This should be done based on the Commission's report, but should not necessarily be bound by it. The parliamentary committee may, but is not obliged to organize public hearings to consider other views. The parliamentary committee should have 3 months to complete its work. During this period, the parliamentary committee may but is not obliged to request assistance from the expert committee.

b. After the parliamentary committee completes its work, the expert committee should be required to produce a final set of specific recommendations, which should include a final consolidated draft of the proposed revised constitution. The expert committee will work based on the parliamentary committee's recommendations, and should also be free to consider some of the views that were expressed by the Constitutional Commission. The expert committee should be required to send regular reports to the parliamentary committee, detailing its work. In the event the parlia-

mentary and expert committees cannot agree on a specific matter, then the issue should be referred to the judicial panel, which should be required to issue an opinion within one week. The expert committee should be required to complete its work within 4 months altogether.

c. The final draft as agreed between the parliamentary and expert committees should be published online and hard copies should be distributed to all interested parties. A press conference should also be organized to publicize the draft's completion and members of the public should be encouraged to debate the draft through all available means (on national and private television, through other media outlets, in organized discussion forums, etc.).

(iii) As soon as this process is completed, the final draft as agreed by the parliamentary and expert committees should be submitted to parliament for approval, and subsequently to a referendum, in accordance with article 126 of the constitution.

Section 2: Islamic Sharia

Like all Arab and Islamic countries, the Iraqi constitution includes a reference to Islam in several sections, but the mention of Islam is spread to multiple aspects; Islam as “the religion” of the state in (Article 2, section I), Islam as “an identity” in (Article 2, section II), Islam as “a source of legislation” in (Article 2, section I (a)), and finally it emphasizes the role of “Islamic jurisprudence experts” in the formation of one of the most important institutions in the Iraqi state, the Federal Supreme Court, in (Article 92, section II).

a. Islam as “The Religion” of State

(Article 2, section I) of the Iraqi constitution states: “Islam is the official religion of the state.” This is a landmark text you can find in all the constitutions of the General Islamic countries, Arab especially, like the Tunisian Constitution (2014) in the first article, the Kuwaiti Constitution in (Article 2), the Moroccan Constitution in (Article 3). Perhaps the explanation of the emphasis on Islam as the “official” religion of the state is what has happened in most Arab and Islamic countries under the Western occupation which continued until the mid-twentieth century and contributed directly to the change of cultural, social, legal, and linguistic structure in some countries. As a result, the periods of national independence and then the forms of constitutions, are considered a favorable opportunity to emphasize the “religion of” the state as part of the general effort to preserve the identity and break away from the colonial era and its effects. Therefore, Iraq is no exception at all.

In this context, it is worth noting some of the questions posed by those who oppose these articles, such as: Does the state have a religion? Should the state have a religion? Doesn’t “declaring the religion of the state,” mean there is positive discrimination in favor of citizens belonging to the same religion of the state. On the other side, doesn’t that imply there is negative discrimination against citizens who believe in other religions or do not believe in any religion at all?

From a legal and constitutional standpoint, this provision has no legal effect, since describing the state as a Muslim country does not create clear obligations or rights. In this framework, the Egyptian Constitution of 1923 is the first Arab Constitution citing this formula, in which (Article 149) states: "Islam is the religion of the state, and Arabic is the official language," but without any effects of this article in public life. It did not result in the prevention of any acts or activities "inconsistent with the provisions of the law." Also, this article was not used to revoke or cancel any law or a government decision some see as a law or decision that is "against the official religion of the state."

The constitutional opinion may refer to the futility of this kind of constitutional provisions, or even refusing to state them in a constitution, but if we look at the constitution as a "report or description of the reality of society" or accept the constitutional provision as "the desire to revive this description to the community or create them," then the first paragraph of (Article 2, section I) describes or decides that the official religion of the state is Islam.

b. Islam as "Identity"

Article 2, section II) states: "This constitution guarantees the preservation of the Islamic identity of the majority of the Iraqi people, ...". This text is not different from the essence of the previous section (Article 2, section I) which states "the official religion of the state." Here, it is stated again as a "proof" of the general characteristics of the Iraqi society with a constitutional document confirming and safeguarding them, as it is believed by those who framed the constitution, which makes it , once again, a text without legal effect. What is noticeable in this constitution is the use of the term "this constitution guarantees..." This language refers to this question directly: How does the constitution guarantee the preservation of an identity? The Constitution is a written document expressing the will of the authors. If the makers want the constitution to "guarantee" the preservation of the identity of the community, then that will be pursued by requiring certain player like the state, through implying a specific commitment, to achieve this goal, not through this structural report, which is devoid of all content and does not achieve any real guarantee.

It was more appropriate to use the term “the state guarantees” instead of “this constitution guarantees” as the first expression is a step toward identifying the real entity responsible for “preserving the Islamic identity,” which is the state. This will reduce, not cancel, the construction of the text, and its mystery.

c. Islam as “The Source of Legislation”

Herein lies the critical importance of the second article of the Iraqi Constitution; (section I) states: “Islam is the official religion of the state, and it is the source of legislation.” Under the second part of (Article 2 / section I (a)): “No law may be enacted that contradicts the established provisions of Islam.” It is clear by the juxtaposition of this text, in it is the first part, that the constitution made “Islam” a source of legislation. In fact, the use of the term “Islamic law” or “law” was more satisfactory and more accurate. It is known that Islam as a religion is an umbrella of all that is within the religion, which the Islamic jurisprudence scholars divide into two aspects; the first is the worship (including the provisions of belief and worship), and the second is the transaction (including all related transactions of an individual and a state). The latter is meant for the process of legislation, which is organized in accordance with the provisions of Islamic law using the provisions to regulate people’s lives through laws and legislations. On the other hand, the text clearly decides that Islam is a source of legislation using saying indefinite wording, not defining. This means that Islam is a source among other sources of legislation (such as the law, the customs, and the court rulings). This, also, means that Islam does not override other legislation sources, but sits with them in the same position. The legislator (the parliament) has the right to take from any sources, without order, and there will be no violation of the provisions of the constitution.

This brings us to the second part of (Article 2), which highlights the clear contradiction between the first and second sections. The latter indicates that no law may be enacted that is contrary to the “established provisions of Islam.” This represents a higher position for Islamic law among other legislation sources because the constitution refuses the violation of the provisions of the fundamentals of Islam. This means the legislator must be fully committed to the provisions of Islam when crafting legislations. Otherwise, the constitution will be violated. Here the contradiction appears since the first section equated Islam with other sources of legislation, while the sec-

ond section states that the provision of Islam must not be violated when legislating (which implies the high ranking of provisions of Islam).

The accuracy and the consistency of drafting the constitutional texts require identifying the position of Islam as the source of legislation that must not be violated and make Islam on the same ground with other sources and not differentiate between them. In addition, in order to achieve consistency between the constitutional provisions, the term used to express Islamic law should be unified. The term "Islam .. as a source of legislation" is used in the first section of the second article, and in the second section the term "established provisions of Islam" is used. Beside the contrast between the two terms, the provisions of the Iraqi constitution do not clarify the meaning of any of those terms. For example, does "the established provisions of Islam," which may not be violating, mean something else other than "Islam," which is the basis for legislation. It is not clear and hard to guess, especially with the extreme uncertainty about the terminology used.

This mysterious drafting of the constitution can lead to an open invitation to the judiciary to exercise a broad authority to interpret the constitutional provisions applicable to them. In this context, the Iraqi Supreme Federal Court is the one who interprets the provisions of the constitution (Article 93 / section II) and as well as control over the constitutionality of laws (Article 93 / section I). After the review of the provisions of the Federal Court over the past ten years since the release of the constitution, the court has issued a few sentences about the lawsuits, which were intended to challenge the constitutionality of some of the legislations, on the basis that these laws are violations of the established provisions of Islam. Notably, these judgments have rejected the appeal of unconstitutionality based on the violation of the provisions of Islam. As a result, this means that there was no violation of the provisions of Islam.

For example, the Iraqi Supreme Federal Court dealt with a lawsuit¹⁷ addressing the unconstitutionality of Article 77 of the Evidence Law that prohibits the testifying act (proof must be written only) if the legal disposition is more than 5,000 dinars, or of an undefined value because this article, according to prosecutor's opinion, is in contradiction with the provisions of Islam, which must not be violated according to

17. Check The Iraqi Supreme Federal Court no 60/ Federal/ 2010.

(Article 2, section I) of the Iraqi constitution. The Federal Court rejected the lawsuit on the basis that (Article 77) of the Evidence Act does not violate the established provisions of Islam. The Court has decided that the provision of Islam in this context is the Quranic verse No. 282 of Surah Al-Baqarah: "O you who believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you....".

The extrapolation of the Federal Court ruling other provisions show they are short¹⁸, where the government writes a complete provision in just a few lines, and it does not clarify the violation of Article 77 of the Evidence Act when it comes to the established provisions of Islam. It only includes a Quranic verse that concludes that writing is obligatory as evidence for proof¹⁹. Also, the provisions of the Evidence Act do not intend to clarify the provisions of the fundamentals of Islam which should not be violated by a legislation.

Finally, the Federal Court judgment settled this dispute. Although the Iraqi Law of Evidence was issued in 1979 (and amended in 2000) before the releasing of the Iraqi Constitution in 2005, Article 2 /section (a) of the constitution used the wording: "No law may be enacted that contradicts the established provisions of Islam" that constitutional constrain is only applied on laws that are presented after releasing the constitution and not before that, so the legislative laws enacted before the release of the Constitution were valid due to the absence of this constitutional constrain at the time. This interpretation conforms to the wording of Article 2/ section "A" that the restriction of enacting a new law contradicts the provisions of Islam is primarily directed to the legislative authority (the parliament) and not to a judge or any other entities or individuals, and therefore this constitutional constrain is applied on the parliament which was formed after the issuance of the Constitution, and evidently this constrain does not apply to the parliament (or the Legislative Authority) existed before the issu-

18. See also, the Federal Court Decision No. 69/2012 on federal 04.12.2012, Resolution No. 3 / federal / Media / 2014 02.06.2014, Resolution No. 82 / Federal / 2012 on 18.12.2012.

19. The Federal Supreme Court referred to the verse 282 of Surah Al-Baqarah to mean that writing is obligatory as evidence of proof as set out in the Quranic command: "write it ...". Jurisprudence scholars say that it is a recommendation not obligatory. See: great interpretation of Imam Fakhr al-Din al-Razi, Dar scientific books in Beirut, year of publication: 2004 - 1425.

ance of the Constitution, because of the lack of constitutional text by that time. In this context, we note that the Constitution of the Islamic Republic of Pakistan, issued in 1973, stated in Article 227 (Part IX): "All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions." Under this constitutional provision, which clearly indicates the will of the constitutional legislator regarding the application of Islamic provisions, the Pakistani legislator is committed to reviewing all legislative laws issued before and after the issuing of the constitution, and that they be compatible with Islam.

Given the comparative international experiences concerning the Islamic law (or the Islam Provisions) in the constitution and how the judicial authority should deal with the interpretation and application of these laws, the Egyptian Supreme Constitutional Court stands out in this context, given the multiplicity of judicial and legal applications on the matter. Article II of the Egyptian constitution (1971) states that Islamic Sharia is a source of legislation, and then in (1980) the Islamic law stipulates that Islamic Sharia is the principal source of legislation. The Egyptian Supreme Constitutional Court interpreted this provision when it reviewed a dispute took place between Al-Azhar University and a Business enterprise on a financial transaction, the dispute reached to the Judicial Authorities, when the business enterprise appealed to the Competent Court to oblige Al-Azhar University to pay their financial dues and legal benefits of these entitlements in accordance with the provisions of Article 226 of the Egyptian Civil Code. Al-Azhar University has refused this request on the basis that the legal benefits are not permissible according to the Shariah, and thus, Al-Azhar University appealed to the Supreme Constitutional Court requesting a judgment for the unconstitutionality of Article 226 of the Civil Code on the fact that this article is violating Islamic law, resulting in that Article II of the Egyptian constitution regarding the Islamic law had become directly applicable by the judge and that if there is any violation of the laws of Sharia, they will be automatically repealed.

The Supreme Constitutional Court issued a judgment on May 4th, 1985; the Court made a number of principles concerning the application of Article II of the Egyptian constitution. On the one hand, the Court decided that Article II of the Constitution is a directive to the parliament (legislature), that is the parliament is com-

mitted to the principles of Islamic law while proposing a new law, and then if the law is contradicted to the Islamic law it will be unconstitutional. This also means that “the legislation does not have to be derived from the Sharia”, it is sufficient that the legislation “is consistent with the Sharia.” This principle also suggests that the text of Article II does not make the Islamic laws above the Constitution or they are applied on its own by the judge, it is just a matter of constitutional constraints to the parliament. On the other hand, the Court also decided that Article II of the Constitution is only applicable to laws that are issued after its issuance, and therefore does not apply to laws passed prior to 1980. This interpretation stated by the Court resulted in excluding the application of Article II of the Egyptian constitution on most Egyptian laws, even if they contradict the Sharia because they had been issued over more than a century before 1980.

On the other hand, the Supreme Constitutional Court has interpreted the word “principles of Islamic Sharia” as principles (or sentences) with conclusive certainty of the Islamic Sharia provisions. This means that the source and interpretation of a provision derived from Sharia must be definitive, beyond any reasonable doubt, and has no divergence division of opinions.²¹ This interpretation by the Egyptian Supreme Constitutional Court is considered as a standard legal discipline of the term “Islamic Sharia”; because one of the biggest challenges facing the issue of the application of Islamic law, is that the principles are not specific on all issues, but the Sharia is made up of a large number of opinions and jurisprudence accumulated over a thousand and four hundred years in which there were many visions and the circumstances differ significantly, which led to the existence of tens of views on a single issue.

21. العلاقة بين الدستور، والشريعة، والفقه: قضاء المحكمة الدستورية العليا المصرية. بيير جوهانسون. (2004) ص: 881-896
يراجع دراسة زيد الاصلية

Section 3: Fundamental Rights

a. Reforming Iraq's Enforcement Mechanism

The Iraqi constitution contains a generous list of rights. The constitution provides for all the traditional civil and political rights (including expression, movement, association, and assembly), socio-economic rights (including the rights to housing, education, and health care), as well as what are sometimes referred to as third-generation rights (such as the right to a clean environment). However, although the list of rights is comprehensive, there is clearly a problem with the protection of basic rights in Iraq. Many rights do not receive adequate attention by the state (including the right to a clean environment), others are restricted and limited (including association, movement and assembly), while others suffer from poor management and service delivery (including the right to healthcare).

This situation is not only tragic but it is avoidable. Indeed, some constitutional systems, including in African and Latin American countries, have been successful in protecting fundamental rights and in improving standards of living. Although the differences between successful constitutional systems and those that are less successful can relate to complex political, economic and social factors, the manner in which constitutional frameworks are drafted can have an important impact as well. It is important though to ensure that any reforms that are entered into are properly designed to tackle the problem at its root. Clearly, the inclusion of a specific right in the Iraqi constitution is not sufficient to ensure that ordinary citizens will benefit in any way. Also, if those rights that are already included are not being protected, then the inclusion of even more rights will not be a solution. There are a number of reforms that can be entered into and that would increase the likelihood that ordinary citizens can benefit from the rights that are included in the constitution. These mainly include reforming the enforcement mechanisms that are already embedded in the constitution.

A successful enforcement mechanism will depend on a number of institutions and mechanisms, including an independent judiciary (see below). A successful constitutional framework will also measure the strength of those institutions against the relevant country's constitutional traditions (weighing its successes and failures) and decide whether additional provisions and mechanisms may be necessary to protect fundamental rights. These can include mechanisms incorporating supremacy clauses, as well as limitation clauses.

b. Supremacy Clauses

Supremacy clauses are constitutional provisions that clearly state that fundamental rights bind the exercise of power by public authorities. All branches of government (legislative, executive, and judicial) on all levels of the state (national, regional, and municipal), as well as any other organs of the state (such as the independent commissions), should be included within the ambit of fundamental rights protection. The Iraqi constitution already includes a supremacy clause, but as can be determined from a quick comparison with other constitutions, it could easily be improved.

Constitution of Iraq, Article 13

This Constitution is the preeminent and supreme law in Iraq and shall be binding on all parts of Iraq without exception.

No law that contradicts this Constitution may be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.

Constitution of Germany, Article 1(3)

The legislative, executive, and judicial authorities are bound by the following basic rights as the directly applicable law.

Constitution of South Africa, Section 8 (1)

The Bill of Rights applies to all laws, and the legislative, executive, and judicial authorities and all state agencies are bound by them.

Constitution of Namibia, Article 5

The fundamental rights and freedoms stipulated in this chapter should be respected and defended by the executive, legislative and judicial bodies, all government agencies and bodies and all natural and legal persons in Namibia, when the matter applies to them, and they will be applied by the courts in the manner described below.

A comparison of these provisions reveals an important difference. The Iraqi constitution provides that all laws and regional constitutions must conform with the constitution, which means that the Iraqi parliament and the Kurdistan Regional parliament are bound by Article 13. It does not explicitly state however whether the executive and judicial branches of government are bound by the constitution. Importantly, the German, South African and Namibian provisions resolve this problem by explicitly binding all three branches of government. In countries such as Iraq, Germany and South Africa, this is an important distinction. Each of these countries suffered for many years under totalitarian and oppressive regimes in which the executive branch of government acted with impunity. One of the results in each country was the establishment of a constitutional culture that strongly favors executive action and impunity. It is therefore vital that, in such circumstances, constitutions are as explicit as possible in establishing a new constitutional culture that places the constitution itself and the law above governmental action. As a result, any amended version of Article 13 of the Iraqi constitution should clearly and explicitly indicate that all branches of government are bound to respect the law.

c. Limitations Clauses

The second way in which the constitution could improve the protection of all rights would be to include what is commonly referred to as a limitation clause. Most societies limit fundamental rights in some form; every piece of legislation that regulates human activity carries with it at least the potential for the limitation of some right. For example:

- Freedom of expression is limited by the prohibition against defamation. In other words, one cannot use freedom of expression to ruin the reputation of another. Individuals are also not permitted to use their freedom of expression to call for immediate violence against a specific individual or groups of individuals.
- Freedom of movement is limited by traffic rules, by rules relating to detention and imprisonment, and finally by immigration rules. In other words, freedom of movement is routinely limited to make public transport more efficient, to protect law and order through the detention of criminals, and for economic reasons including the desire to protect local labour markets by preventing large-scale immigration.

In the past, many constitutions recognized this by specifically requiring parliament to determine how each right should be limited. For example:

1971 Constitution of Egypt, Article 47

Freedom of opinion is guaranteed. Every individual has the right to express his opinion and to disseminate it verbally or in writing or by photo, tape, or by other means within the limits of the law.

Although the drafters' intention here is obvious, in practice, this constitutional provision does not grant or protect a right. It merely announces that the right exists and that it can be limited, without providing any indication as to how far that limitation can extend. In practice, as is well known, although all Arab constitutions provided for the

existence of specific rights, hundreds if not thousands of laws were passed that so restricted those rights that they rendered the rights themselves completely meaningless. For example, in Egypt under the 1971 Constitution, a law was passed that prohibited any public discussion of the president's health on public security grounds. Rules were passed that prohibited any public criticism of the police, the army, or the courts. It became almost impossible to criticize the state, which meant that freedom of expression was essentially non-existent, despite article 47's very broad and generous wording.

Today, this type of provision is commonly referred to as a 'clawback clause' because it appears to announce a fundamental right held by the people but then states that the government can take that freedom back from the people through legislation. Clawback clauses are highly problematic and undermine any protections of rights given by the constitution because they allow for legislation to take away all meaning from fundamental rights. In the absence of a strong judiciary (which is mostly absent in the Arab region), a government that seeks to completely limit fundamental rights faces almost no obstacles when the right is only protected by a provision like this one. Iraq's constitution contains several clawback clauses, including the following:

Constitution of Iraq, Article 24

The State shall guarantee freedom of movement of Iraqi manpower, goods, and capital between regions and provinces, and this shall be regulated by law.

Constitution of Iraq, Article 39 (1)

The freedom to form and join associations and political parties shall be guaranteed, and this shall be regulated by law.

As already indicated, these provisions correctly recognize that all rights must be subject to regulation, but provide no indication whatsoever what type of legislation

can be passed to limit the right to movement and association. What this means is that if a highly restrictive law is passed by the Iraqi parliament, and an Iraqi plaintiff brings a claim to the Federal Supreme Court to challenge the law's constitutionality, the Court will have no measure against which the law should be measured. The consequence will therefore be that the Court will apply its own criteria, which means that the protection of basic rights is left entirely to the discretion of judges. Once again, this is highly problematic in countries such as Iraq where judges are often imbued with a strong bias in favor of executive power.

Many countries in the world have been struggling with these issues for more than half a century, and have together developed several solutions, some more effective than others. These countries (including Canada, Germany, South Africa, Kenya, and many others) have been learning from each other's experiences to strengthen their own national experience. Most recently, Tunisia builds on that comparative experience by incorporating some innovative provisions in its new constitution. The two main approaches that exist today to limit the state's ability to arbitrarily and unfairly curb fundamental rights include:

- specific limitation clauses; and
- general limitation clauses.

A specific limitation clause is a clause connected to a specific right, which explains the purposes or means by which that right may be limited. A general limitation clause is one set of instructions given for how all rights in a constitution, or a particular section of a constitution, may be limited. These clauses each have their benefits and drawbacks, and their impact depends very much on how they are written. Iraq must seriously consider including a limitation clause of its own in its new national constitution if it wishes to increase the chances of building a state in which fundamental rights are respected by the state and not be routinely violated as they were in the past.

Specific Limitation Clauses: Specific limitation clauses are clauses that are contained in the same provision as a particular freedom and explain how that freedom may be restricted. Specific limitation clauses vary significantly, but all are aimed at preventing arbitrary restrictions of rights. Specific limitations can take the form of a single phrase within an article.

Constitution of Iraq, Article 38

The State shall guarantee in a way that does not violate public order and morality:

- a. Freedom of expression using all means.
- b. Freedom of press, printing, advertisement, media, and publication.
- c. Freedom of assembly and peaceful demonstration, and this shall be regulated by law.

The words ‘that does not violate public order and morality’ are limitations. These words mean that the right to free exercise of speech may only be limited if the exercise interferes with one of these two enumerated values. The particular phrasing that is adopted by article 38 is problematic because it invites the government, parliament, and courts to limit freedom of expression based on two highly subjective values that are not defined anywhere in the constitution. Provisions such as article 38 have been used in many parts of the world to selectively restrict rights based on particular officials’ interests, even if they are in conflict with large segments of the population.

Specific limitations clauses can be far more detailed. For example:

Constitution of South Africa, Article 16

- (1) Everyone has the right to freedom of expression, which includes—
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to—
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm.

This model is significantly clearer than Article 39 under the Iraqi constitution because it extensively discusses the contents of freedom of expression, and then separately discusses potential limitations in detail. Article 16 of the South African constitution ensures that freedom of expression cannot be totally emasculated by the government by limiting the reasons for which expression may be restricted. The South African Constitution has disposed of vague and subjective phrases such as public welfare, order, and morals, in exchange for more precise text like that seen here. The Iraqi constitution can and should learn from this expression by limiting the reasons for which free expression may be restricted in Iraq. Given Iraq's current situation, an amended version of Article 39 would read: 2

Constitution of Iraq, Article 38 (proposal)

1. The State shall guarantee:
 - a. Freedom of expression using all means.
 - b. Freedom of press, printing, advertisement, media, and publication.
 - c. Freedom of assembly and peaceful demonstration.
2. These rights will not extend to: Sectarian and racial incitement;
Incitement of imminent violence;

General Limitation Clauses. General limitation clauses set out the means and purpose necessary for the limitation of all rights in the constitution. These clauses are included to ensure that the constitution is uniformly supreme to legislative attempts to restrict rights. These clauses can ensure that no constitutional right can be completely limited. The language must be broad, because these clauses apply to all rights, and drafters must avoid vague or ambiguous language that will allow for arbitrary limitations. The Iraqi constitution already includes a general limitation clause. It provides as follows:

Constitution of Iraq, Article 46

Restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or on the basis of a law, and insofar as that limitation or restriction does not violate the essence of the right or freedom.

As will be demonstrated below, Article 46 is seriously deficient and should be amended. All this provision does is indicate that rights and liberties must be limited through a law and that a limitation on a right cannot be so extreme as to completely negate a right's existence. Otherwise, it says nothing about what constitutes (and what does not constitute) a legitimate reason for limiting a right, and it also says nothing about what means laws can use in order to limit rights. Article 46 is so deficient that it has barely even been mentioned by the Federal Supreme Court in its decisions and has almost no practical effect in protecting fundamental rights in Iraq. If the Iraqi constitution is to be amended, then this provision in particular is in need of serious revision.

In order to be effective, limitation clauses usually stipulate that basic rights cannot be limited other than:

- through the enactment of a law (legality);
- for a specific number of reasons (purpose);
- in a manner that is proportional to the purpose that the law is seeking to achieve (proportionality).

A comparison between two different limitation clauses will demonstrate how modern and democratic constitutions deal with this important issue:

Constitution of Kenya, Article 24

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including –

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

Constitution of Tunisia, Article 49

The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and to protect the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought.

Judicial authorities ensure that rights and freedoms are protected from all violations.

There can be no amendment to the Constitution that undermines the human rights and freedoms guaranteed in this Constitution.

Legality. One of the goals of limitation clauses is to ensure that restrictions are not arbitrary. To achieve this goal, many limitation clauses require that any restriction on rights is made by law rather than an individual action. Laws, particularly those passed by the legislature, are believed to require increased consideration compared to an executive action and provide citizens a clear body to hold politically accountable for the restriction. Both Article 46 of the Iraqi constitution and Article 49 of the Tunisian constitution clearly provide that rights can only be limited through the enactment of a law. However, simply requiring that restrictions be made by law may provide little protection as executive actions can sometimes also have the status of a law.

Partly in order to resolve this problem, some constitutional provisions require that a law meet a certain standard before it can be allowed to restrict rights. For example, the first part of South Africa's article 36 says: 'The rights in the Bill of Rights may be limited only in terms of a law of general application'. 'General application' means that any law limiting rights must apply to all individuals and not only one particular case. This is a response to the concern that laws could be passed or government actions are taken that are arbitrarily directed at particular groups or individuals.

Kenya has an even more robust legality requirement. It provides that any legislation that limits basic rights must “express the intention to limit that right or fundamental freedom, and the nature and extent of the limitation” (Article 24(2)(a)). This provision requires that legislators consider the impact the legislation will have on rights and then specifically indicate in the law itself what the expected impact of the legislation will be in practice. Requiring legislators to acknowledge the infringement of rights will also make it easier for citizens to hold these officials accountable.

Purpose. Limitation clauses are distinct from clawback clauses because limitation clauses place limits on the government’s ability to restrict rights. Often they do this by stating that parliaments and governments may only restrict rights to achieve certain purposes, such as national security, public order, and others. As already mentioned, Iraq’s article 46 does not clearly indicate for what reason a law could limit a basic right. Article 49 of Tunisia’s constitution states that a limitation of rights can be made for ‘public order, national defense, public health or public morals’, it also imposes as a condition that any restriction must be ‘necessary to a civil and democratic state’. Although this provision has yet to be applied by the Tunisian courts, they will be required to define what can be qualified as being ‘necessary’ and what a ‘democratic state’ consists of.

Kenya’s article 24 does not include any of these terms because many of these same terms had been used to excessively limit rights in their country’s past. Instead, it provides that a law that limits a right must be “reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom”. This wording is very similar to the reference in Article 49 of Tunisia’s constitution to a “civil and democratic state”. The use of this wording prioritizes the need to maintain an open and democratic society over the need to impose security, based on the recognition that security cannot exist without democracy, which itself cannot exist without the legitimate exercise of basic freedoms. The use of this wording in the Kenyan and Tunisian constitutions is therefore reflective of a vision of how a democratic state should be constructed and will be binding on the countries’ respective courts as they determine whether specific legislation is sufficiently respectful of these essential constitutional norms.

Proportionality. Proportionality is, by international standards, arguably the single most important factor when it comes to the limitation of fundamental rights. German courts have been at the forefront in developing the idea of proportionate state action despite the fact that the German Basic Law, itself, contains no direct reference to the concept. When deciding cases, German courts now routinely check to ensure that acts of public authorities (whether legislative, executive, or judicial):

- are pursuing a legitimate purpose;
- are deploying the mildest possible means to achieve the aim; and
- that the means that are being deployed are proportionate to the purpose that is being pursued.

Germany's tradition of applying the principle of proportionality has been extremely effective at establishing a higher protection of basic rights. Article 49 of Tunisia's constitution clearly incorporates this legal principle when it states that limitations on rights are only valid if "there is proportionality between these restrictions and the objective sought". Kenya's new Constitution builds on this tradition and incorporates many of these elements into its limitation clause. Article 24 of the Kenyan constitution provides that limitations are only valid if they take into account:

Constitution of Kenya, Article 24 (1)

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Provisions like this guide entities seeking to restrict rights as well as courts determining the constitutionality of restrictions. By way of example, the inquiry into whether there are less restrictive means available to the state to achieve a specific objective (set out in Article 24(1)(e) of the Kenyan constitution is particularly effective in requiring courts, legislatures, and executives to consider whether the restriction is necessary. These standards can and should be incorporated into an amended version of the Iraqi constitution.

d. States of Emergency

Constitutions often grant governments the authority to declare states of emergency during times of great danger so that they can take actions that would otherwise be unconstitutional. States of emergency are sometimes a necessity but are also incredibly dangerous, as poorly drafted provisions on states of emergency have been abused throughout the region to allow for undemocratic forces to consolidate their power. Iraq's constitution already contains a detailed provision on emergencies.

Constitution of Iraq, Article 61(9)

- (a) To consent to the declaration of war and the state of emergency by a two-thirds majority based on a joint request from the President of the Republic and the Prime Minister.
- (b) The state of emergency shall be declared for a period of thirty days, which can be extended after approval each time.
- (c) The Prime Minister shall be delegated the necessary powers which enable him to manage the affairs of the country during the period of the declaration of war and the state of emergency. These powers shall be regulated by a law in a way that does not contradict the Constitution.
- (d) The Prime Minister shall present to the Council of Representatives the measures taken and the results during the period of the declaration of war and the state of emergency within 15 days from the date of its end.

Procedural requirements to declare an emergency. Article 61(9) contains a number of important safeguards that have already served Iraq well. Paragraph (a) imposes a high threshold for declaring a state of emergency, including that both the Prime Minister and the President present a joint request to parliament, and that a two thirds majority of parliament. This type of threshold is very unlikely to be met except in truly exceptional circumstances, and would best be preserved in any new version of this provision.

Time limits. Article 61(9) provides for a 30 day time limit, which is in line with best practice on this issue. The difficulty with this provision however is that it allows for a 30 day emergency to be extended forever. It also does not specifically indicate what process needs to be followed in order for an extension to be legally valid, opening the door to the possibility that the prime minister could unilaterally extend a state of emergency without referring to the president of the republic or the parliament. If this were ever to happen, Iraq could easily lapse into a permanent state of emergency lasting for decades, as occurred in Egypt and Tunisia prior to 2011. Egypt's 2012 Constitution provided a novel approach to restricting states of emergency.

Constitution of Egypt (2012), Article 148

...The declaration shall be for a specified period not exceeding six months, which can only be extended by another similar period upon the people's approval in a public referendum.

This provision puts the power to extend a state of emergency in the hands of the public through a referendum. This prevents an executive and legislature of the same party from continuing a state of emergency indefinitely. Kenya's constitution grants the authority to extend a state of emergency to the legislature.

Constitution of Kenya, Article 58

(3) The National Assembly may extend a declaration of a state of emergency—

(a) by resolution adopted—

(i) following a public debate in the National Assembly; and

(ii) by the majorities specified in clause (4); and

(b) for not longer than two months at a time

(4) The first extension of the declaration of a state of emergency requires a supporting vote of at least two-thirds of all the members of the National Assembly, and any subsequent extension requires a supporting vote of at least three-quarters of all the members of the National Assembly.

Thus Kenya's constitution clearly provides first that the legislature is solely responsible for extending any state of emergency, and second imposes increasingly difficult majority requirements in order to ensure that any renewal of a state of emergency would have to be supported by a near-consensus of opinion in the country's political class. Unlike Egypt's 2012 constitution, however, Kenya's constitution does not clearly establish a maximum number of times that the state of emergency can be extended. Given the very high threshold that must be met in Iraq to declare a state of emergency, it does not appear necessary to amend the provision to include a maximum number of times that the declaration can be renewed. However, the provision should specifically indicate what procedure needs to be followed in order to renew the state of emergency.

Non-derogability. Article 61(9)(3) of the Iraqi constitution provides that the prime minister shall be delegated "necessary powers which enable him to manage the affairs of the country". This formulation is understandably vague given that it is impossible to predict what powers the executive power should have before knowing the nature of the emergency. While a certain amount of flexibility is probably necessary on this point, there is much that the constitution can and should do to ensure that whatever powers will be delegated to the prime minister will not be abused. Most

importantly perhaps, many constitutions clearly indicate that a number of rights are non-derogable, even in instances of states of emergency, which can ultimately protect those rights from any infringement. South Africa's constitution contains a table of non-derogable rights, which refers back to earlier sections of the Bill of Rights and makes whole or parts of provisions non-derogable during states of emergency:

Table of Non-Derogable Rights

1 Section number	2 Section title	3 Extent to which the right is protected
9	Equality	With respect to discrimination solely on the ground of race, colour, or social origin, sex, religion or language.
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom And Security of the person	With respect to subsections (1) and (e) and (2) (c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to : - subsection (1) (d) and (e), - the rights in subparagraphs (i) and (ii) of subsection (1) (g), and - subsection 1 (i) in respect of children of 15 years and younger.
35	Arrested, detained and accused persons	With respect to : - subsection (1) (a), (b) and (c) and (2)(d), - the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d) - subsection (4), and - subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair,

Listing some rights as non-derogable may, however, make other fundamental rights appear more limited and make them more vulnerable to complete derogation during times of emergency. Therefore the inclusion of a list of non-derogable rights may lead to increased restrictions on fundamental rights. Kenya's Constitution responds to this problem by placing additional limitations on emergency derogation. Article 58 requires that any derogations be necessary and consistent with international law.

Constitution of Kenya, Article 58

(6) Any legislation enacted in consequence of a declaration of a state of emergency—

(a) may limit a right or fundamental freedom in the Bill of Rights only to the extent that—

(i) the limitation is strictly required by the emergency; and

(ii) the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency [...]

How constitutions are structured may also guide courts during times of emergency. Many constitutions include the right to call a state of emergency in the section relating to the powers of the executive. Others, including South Africa, include their state of emergency provisions (and lists of non-derogable rights) within the Bill of Rights. By tying non-derogability to states of emergency, a constitution may better protect those rights than a constitution that leaves open the possibility that the restrictions on non-derogability were not to be applied during times of exception.

e. Justiciability

Under Iraqi law, not all rights that are included in the constitution are justiciable. What this means is that an individual may bring a claim before the courts to argue that the state has violated his or her basic rights concerning certain rights but not

others. Theoretically, the civil and political rights that are set out in the Iraqi constitution are justiciable (meaning that individuals may petition a court based on these rights), whereas the social and economic rights that are set out in the constitution are not. Thus, although article 31 of the Iraqi constitution provides that “every citizen has the right to health care”, if an Iraqi does not have access to a hospital, he or she will not be able to bring a claim before the Iraqi courts to argue that his or her constitutional rights have been violated, simply because these rights are not justiciable under Iraqi law.

Provisions such as Article 31 are merely designed to provide guidance to the State as it needs to organize its priorities but are in no way enforceable by the courts.

The result in practice is that there is no way for ordinary Iraqis to hold the government or the parliament accountable for their performance through the ordinary courts. Clearly, given the situation of ordinary Iraqis and given the crisis in accountability that Iraq is currently living through, there is a desperate need to increase mechanisms through which the state can be held to account for its performance and the issue of justiciability of ordinary rights is a good opportunity to achieve that aim.

Other constitutions adopt a completely different approach to the enforcement of social and economic rights and provide useful lessons for Iraq. The South African constitution does not distinguish between civil and political rights on the one hand and social and economic rights on the other. Both are contained in the Constitution’s ‘Bill of Rights’ and are covered by that chapter’s justiciability guidelines.

Constitution of South Africa, Article 8

The Bill of Rights applies to all laws, and the legislative, executive, and judicial authorities and all state agencies are bound by them.

South Africa’s constitution recognizes that the enforcement of social and economic rights might pose challenges that do not exist for civil and political rights. For example:

Constitution of South Africa, Article 26

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

This provision recognizes that some socioeconomic rights may implicate state budgets in ways that some first-generation rights do not. For this reason, article 26 only requires the state to act “within available resources”. This provision also recognizes that it may take time to build institutions to administer these rights, and so article 26 allows for their “progressive realization”. The enforceability of these provisions is not questioned in South Africa, but each case does raise complex questions regarding how these rights should be enforced, and when it would be reasonable for a court to force the government to ensure the protection of a particular right.

The Constitution of Columbia goes one step further by creating a special mechanism to ensure that individuals always have a course of action, particularly in situations when the courts are unable to satisfy their function:

Constitution of Columbia, Article 86

Every person has the right to file a writ of protection before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whoever acts in his/her name for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may be violated by the action or omission of any public authority.

The protection will consist of all orders issued by a judge enjoining others to act or refrain from acting. The order, which must be complied immediately, may be challenged before a superior court judge, and in any case the latter may send it to the Constitutional Court for possible revision.

This action will be available only when the affected party does not dispose of another means of judicial defense, except when it is used as a temporary device to avoid irreversible harm. In no case can more than 10 days elapse between filing the writ of protection and its resolution.

Article 86 recognizes that the ordinary judicial process is in some cases insufficient or unsatisfactory for many individuals. Therefore, it states that where an individual considers that his or her constitutional rights have been violated, he or she may appeal before a court at any time and in any form. In practice, this right has allowed for Columbians who do not have access to legal representation to make their submissions to the Columbian courts in the form of short letters, and sometimes even in the form of oral messages. Article 86 also provides that courts must respond to the request in less than 10 days. This mechanism, referred to in Columbia as a 'tutela', is today studied around the world for its innovative approach to the enforcement of constitutional rights.

Considering Iraq's difficulty in improving basic services such as health care and education for ordinary citizens, we strongly recommend that the constitution be amended to clearly indicate that social and economic rights be justiciable and that the courts be granted significant power to hold the state accountable for any failures to provide adequate services to ordinary people.

Section 4:

The Judicial Sector

The Iraqi constitution in force, issued in 2005, recognizes the Iraqi judiciary authority in Section III of Chapter III entitled “the federal authorities”; the constitution tackled this authority in detail in Articles 87-101. The constitutional provisions point out that the constitutional judicial authority is independent, and it works side by side with the other two authorities; the legislative and executive, where they form the pillars of the new Iraqi state institution after 2003, Article 87 of the Iraqi Constitution describes that: “The Judicial authority is independent. The courts, in their various types and classes, shall assume this authority and issue decisions in accordance with the law”. Article 88 also states: “Judges are independent and there is no authority over them except that of the law. No authority shall have the right to interfere in the Judiciary and the affairs of Justice.” To show the improvements of these constitutional provisions of the judicial authority, it could be compared with the provisions of the Iraqi constitution before 2003 during the rule of the Baath Party, where there was no independent judicial authority of any kind, Article 55 section (A) of the Judicial Authority Act No. 160 states that: “the Minister of Justice is authorized to supervise all courts, judges, staff, and committees, as well as monitoring their duties, job obligations, and personal and official behavior.” the Minister of Justice in accordance with Article 57 of the same law: “is authorized to alert the judge to the legal and administrative errors that point out during the minister’s review” this is as well as the additional powers granted to the minister by the “Ministry of Justice Law No. 101 of 1977. These provisions show the large extent of power granted to the Minister of Justice -representative of the executive Authority- during the rule of the Baath Party, a power that had been widening to include the duties and work of the Judicial Authority.

The text of the Iraqi Constitution refers to the independent nature of the Judicial Power which is consistent with other constitutions, the statistics indicate that approximately 65% of the national constitutions²² applied in the various countries of the world explicitly state the principle of independence of the judicial Authority, including

22. International Institute for Democracy and Electoral Assistance, a practical guide for building constitutions, Judicial Authority design 2011

Spain Constitution (Article 117), and the Constitution of the Federal Republic of Germany (Article 97). It is also consistent with the basic principles announced by the United Nations Conference in 1985 on the independence of the judicial power; the first principle was that the State shall guarantee the independence of the judiciary system and include it in the state's constitution. However, the challenge does not lay in the practical side of the ruling regimes and their respect of the judiciary system Independence, but the challenge also lies in adopting a comprehensive legal regulation -both in terms of the Constitution or ordinary legislation- that firmly establishes the principle of judicial independence by making amendments to many details that represent a route to the violation of the judicial independence²³. Thus, the point is not to explicitly state the independence of the judicial system in the constitution, which is also confirmed by the fact that some countries have independent and professional judicial systems without stating that in their constitutions, including the United States and the United Kingdom.

a. The Nature of the Federal Judiciary

Article 89 of the Iraqi Constitution states that: "The Federal Judicial Authority is composed of the Higher Juridical Council, Supreme Federal Court, Federal Court of Cassation, Public Prosecution Department, Judiciary Oversight Commission and other federal courts that are regulated in accordance with the law." And article 90 provides that: "The Higher Juridical Council shall oversee the affairs of the Judicial Committees. The law shall specify the method of its establishment, its authorities, and the rules of its operation." These provisions clearly indicate that the Iraqi Constitution chose to establish a specialized multi judicial system and not a standard judicial system. The specialized multi judicial system establishes a number of specialized courts each of which is concerned with specific issues and the courts never infringing with each other. For example, the Federal High Court of Iraq does not interfere in civil matters which fall in the jurisdiction of the ordinary courts such as; the Federal Court of Cassation. However, on the other hand, according to the Article 90 of the Constitution stated above, it establishes an upper authority that dominates all the issues of the judiciary and judges in Iraq which is the Supreme Judicial Council.

23. It is noteworthy that the Iraqi Penal Law (No. 111 of 1969) in articles 233-236 criminalizing intervention in the affairs of the judiciary for the purpose of influencing the judgments and decisions issued by courts.

This is not the case in the majority of states where a multi judicial system is implemented, where each judicial body is financially and administratively independent from other jurisdictions and has their own council. But that does not prevent the adoption of the model of the Supreme Judicial Council that dominant all the affairs of the judiciary, as the case in Iraq, for it has a major advantage in the unification of the judicial proceedings (on all judicial bodies), especially regarding the appointment of judges, their technical rehabilitation, their rights, methods of holding them accountable for legal and administrative errors.

In this context, Article 92 of the Constitution stipulates: "The Federal Supreme Court is an independent judicial body, financially and administratively." According to this, the Iraqi constitution did not mention the independence of any other judicial body besides the Federal Supreme Court. This is a shortcoming in the constitutional legislation which was resulted from the vision of putting the Federal Supreme Court in the position of the higher judicial body within the Iraqi judicial system neglecting the whole philosophy of the constitutional provisions that have adopted this multi-judicial system. Therefore, the legislation should have stated to grant the financial and administrative independence, in a single inclusive text, of the Supreme Judicial Council as dominant for all judicial authorities, or to stipulate that the financial and administrative independence is granted for every Federal Judicial Authority; the general judiciary headed by the Federal Court of Cassation, the Prosecutor's Office, and the State Council as an administrative body as stated in Article 101 of the Constitution.

b. The High Judicial Council

One of the main shortcomings of the judicial authority texts in the Iraqi constitution is related to the formation of the Supreme Judicial Council and its functions; Article 90 of the Constitution states that: "The Higher Juridical Council shall oversee the affairs of the Judicial Committees. The law shall specify the method of its establishment, its authorities, and the rules of its operation." Accordingly, while the constitution grants the Supreme Judicial Council "To manage the affairs of the Judiciary and supervise the Federal Judiciary," (Article 91) it is a broad authority represents the

supreme authority for all Iraqi federal judiciary, the Iraqi Constitution should have also determined the method of forming the Council (in terms of number of members, the method of selecting them, and their specializations) at the constitution, and not to leave these issues for the ordinary lawmakers because of its significant importance and influence. It should be noted that a Law related to the Supreme Judicial Council had already been issued in 2012 (Law No. 112) which has raised a broad wave of political, legal, and constitutional controversy in Iraq²⁴. One of the most controversial points was that of the chairmanship of the Supreme Judicial Council, will the head of the Federal Court be the chairman of the Council or will be the Head of Court of Cassation. The Federal Supreme Court has regarded the Law as unconstitutional. September 16, 2013 until now, mid 2016, there is no act for the Iraqi Supreme Judicial Council as an implementation of the article (90). There is no doubt that this perplexity –and its ongoing effects- could have been easily avoided if detailed provisions relating to the Supreme Judicial Council were stated in the Constitution. Thus, a constitutional overview must be united with regards to the various judicial authorities in Iraq, is it a single entity or separate entities? The Iraqi Constitution chose to establish a multi-judicial system then it should have set for a separation between the Federal Supreme Court and the ordinary judiciary (the Court of Cassation headed by the Supreme Judicial Council). Finally, in terms of Supreme Judicial Council specialties, it is likely when making any constitutional amendments; the Constitution would include some of the council's authentic specialties, such as: supporting the independence of the judiciary; the development of judicial work and activating the professional management of the courts; to achieve a prompt justice.

c. The High Judicial Council's Budget

Article 91 in the Constitution Grants the Supreme Judicial Council the right to “propose the draft of the annual budget of the Federal Judiciary Authority and present it to the Council of Representatives for approval.” While this text guarantees the financial independence of the judicial authority, however, there was confusion and over-

24. There is a large controversy over several years ago about the presidency of the Iraqi Supreme Judicial Council and its specialties, a controversy that extended since the formation of the Council according to the Coalition Provisional Authority writ No. 35 in 2003, then by virtue of Article 143 of the Law of Administration for the State of Iraq for the Transitional Period, and then Law No. 112 for the year 2012 issued by the Iraqi parliament, which was announced unconstitutional in September 2013.

lapping with the text of article 92 regarding the private Federal Supreme Court which states that: "The Federal Supreme Court is an independent judicial body, financially and administratively." The first text -along with other texts regarding the Supreme Judicial Council, indicates that the judiciary's budget is a single budget shared with each federal judicial body, and it is proposed by the Supreme Judicial Council, and thus, what is the need for providing a text that stipulate the administrative and financial independence of the Federal Supreme Court? Readjusting Constitutional texts required a clear identification of each body of the judicial system, and that are all subject -or not subject to and independent of each other- to the Supreme Judicial Council, which oversees the work of each body including their fiscal budget.

In the framework of the constitutional right granted to the Supreme Judicial Council to propose a project on the judiciary's budget, the constitution should have also stated that all proposals regarding the jurisdiction of the Supreme Judicial Council to solicit its opinion over the projects. On the one hand, the Judicial Council, by virtue of its job, is aware of the judicial issues and its details, hence it must be informed on all matters relating to the judicial system, and especially the draft laws, such as the Federal High Court Act, and the Supreme Judicial Council Act, and so on. On the other hand, such a measure would raise the quality of laws in general and meet the needs that have been stipulated for. Needless to say, that seeking the Opinion of the Supreme Judicial Council on draft laws relating to the judicial authority does not mean, in any case, that the Parliament or the legislative authority are obliged to the opinion of the Supreme Judicial Council, for the last word goes to the representative of legislative of the people; the parliament.

d. The Federal Supreme Court

Texts relating to the Supreme Federal Court did not specify the method of selecting or appointing judges of the Federal Court but left it to the law, Article 92 states that: "The Federal Supreme Court shall be made up of a number of judges, and experts in Islamic jurisprudence and law experts whose number, the method of their selection and the work of the court shall be determined by a law enacted by a two-third majority of the members of the Council of Representatives." Again, it was advisable to in-

clude constitutional provisions specifying the number of judges of the Federal Court and the method of their selection, in order to block any possible way of manipulating these very important provisions. To this day, no law regarding the Federal Supreme Court has been issued since the issuing of the Iraqi Constitution in 2005²⁵, thus the Federal Court is operating in accordance with article No. 30 of the Constitution.

What draws attention in the constitutional text mentioned earlier, is the reference to the formation of the Federal Court of “judges” and “experts in Islamic jurisprudence” and “law experts”. In other words, the text suggests that Islamic jurisprudence experts and law experts are non-judges, and thus they have never exercised judicial work, let alone the practice of the legal work.

The text on the formation of the Federal Court by appointing non-law practitioners -Islamic jurisprudence experts or professors- is a departure from judicial work, which makes it imperative that the court must be made up of judges. As long as the court is dealing with legal disputes, there should be no room for the non-practicing law members, those members are not familiar with the nature of judicial work, which through practicing, accumulate experiences and legal capabilities that enable the judge to pass a judgment on opposing, that cannot be achieved in Islamic jurisprudence expert or even law professors in universities. The role of Islamic jurisprudence experts is confined in the research process which is far from the essence of the judicial work. The same thing applies to university professors of non-law practicing and who focus mainly on the academic field. Therefore, the compared systems adopt the method of appointing judges or attorneys with legal law practice of a period not less than 15 years, to work in the Federal Supreme Court.

A view regarding the text of the formation of the Federal court members may point to the explicit wording of the article, that is the Federal Court is formed by judges, Islamic jurisprudence, and law experts, but the text must be interpreted as: “the appointing of Islamic jurisprudence and professors of law refers to their job as experts

25. There is a draft law regarding the Federal Supreme Court debated in parliament several years ago, and has been delayed issuance due to deep differences over certain provisions of the law, the most prominent of these disagreements centered on a quorum to vote once the court issues judicial decisions, some political blocs adhere to the need that judges have “consensus” about what decisions to be issued on all issues, while another party call for only two-thirds of the “voices of the judges’ majority is enough ?? It is true that all of these views cannot be taken into consideration; it is not imaginable, to issue a decision by the courts, according to the judges absolute majority (half plus one).

assistants, who must be resorted to when the court finds the need for the use of them. Article 92 Supports that interpretation, the Iraqi laws refer to the term “court” or “judicial body” to express the court in the traditional sense of the word, which is the judicial body formed with judges only.

e. Constitutional Oversight

Constitutional oversights are of two types; an oversight of laws before issuing and applying laws, and an oversight after the issuing of a law, if enacted. Article 93 of the Iraqi constitution adopted the second type of constitutional oversight in the use of the word “in effect”. However, some of the compared constitutional experiences show importance in relying on the first type of constitutional oversight (prior to the issuance of laws) to avoid frequent crisis affecting the political arena with regards to the authenticity of the electoral process (presidential, parliamentary, local, or other elections), because some constitutional courts may regard some electoral provisions as unconstitutional, and hence, the invalidity of the elections held based on these texts, and then dissolving the elected Parliament or local council and thus the outbreak of the complex legal and political crises. Based on this experience, the constitutional model which stipulates the possibility that the Constitutional Court is to exercise a pre-constitutional oversight, especially on electoral laws, so if the laws were already issued -after undergoing constitutional examination by the Court- they would not be considered unconstitutional and therefore the Parliament or any elected council will not dissolve. In the Iraqi context, this antecedent happened before through the judgment delivered by the Federal Supreme Court in the case numbered (67 / Federal / 2012) on Oct. 23, 2012 of the unconstitutionality of the fifth paragraph of Article 13 of the governorates, municipalities, and local administrations elections law No. 26 / 2008 which was required, giving effect to the judgment of the Federal Court, to dissolve all the elected councils based on this law, but that did not happen!! The issuance of this provision in itself represents an appeal of the legitimacy of the elected assemblies until the end of their term.

f. Accountability

A clear loophole in the provisions of the Federal Supreme Court resides in the absence of a clear accountability system or holding judges and members of the Court accountable for their errors, or at least, the importance of stating in Article 92 the accountability system for judges of the Supreme Court. The compared Constitutional experiences indicate that the two important pillars for the establishment of a supreme court (constitutional, federal, or otherwise) are; first, the method of judges appointment, to ensure a greater political investment in the court, and second, a clear method accountability and holding judges accountable for their errors or removal if necessary. In spite of the extreme rarity of cases of isolating judges of the Supreme Court, the text regarding the accountability method is necessary and inevitable in order to ensure a balance between power and responsibility. In this context, some are saying that if the Supreme and Constitutional Courts are protective of rights and freedoms, the question would be: Who will protect us from our protectors? The Iraqi Federal Supreme Court has many powers and authorities that directly affect the work of the Legislative and Executive Authorities, and therefore these two authorities must have the power over the judges of the Federal Court to hold them accountable for their errors in order to ensure a balance between these authorities.

g. Public Prosecution

Prosecutors are mentioned in the Iraqi constitution in a very general way. Article 89 regarded the prosecutors as part of the federal judiciary; the Constitution had no other detail relating to this critical judicial authority. It is well known that the work of the public prosecutor is to investigate and prosecute criminal offenses; because of the important rule the prosecutor has, the compared constitutions were keen to include a detailed method for the Prosecutor's appointment and the extent of immunity and financial independence that he has as well as his relationship with the Judicial System as a whole. However, the Iraqi constitution did not address all of these issues and referred them to the normal regulation of laws. Hence, this issue must be addressed whilst the amendment of the Iraqi Constitution to establish an independent and specified Iraqi public prosecution which is adherent to the Executive Authority -represented by the Minister of Justice- or a part of the Federal Judiciary.

h. The Conseil D'état (Majlas al-Dawla)

Article 102 of the Constitution states: "It is permitted to regulate in a law the establishment of a State Council specialized in the functions of administrative judiciary, interpretation, drafting, and the State and various public institutions representation before the judicial bodies except those exempted by law". This article is considered an important leap towards the re-establishment of the Iraqi judicial system after 2003, because it included the idea of administrative justice in Iraq, and yet, this judiciary was placed in the framework of the "State Council" established under the amended Law No. 65 in 1979 that linked it to the Ministry of Justice, and the Council did not, and still does not, represent an independent administrative judiciary. In this context, the wording of Article 101 of the Constitution paves the way towards the establishment of the State Council as a separate administrative judiciary, that supports the general philosophy of the entire constitutional provisions relating to the judiciary, which has adopted a multi-specialized judicial system.

However, the obvious shortcomings that appeared in the text are; first, the text makes the establishment of the State Council as a permissibility, and the fact that it had to be mandatory, because the philosophy of the multi-specialized judicial system, adopted by the Iraqi constitution in force, required the establishment of an independent judicial body specialized in the judiciary's administrative work, most importantly, the disposition of a case in appeals on the administrative and governmental decisions in order to cancel these decisions, or, at least, the compensation for the damage resulting from them. Article 100 of the Constitution ensured that by stating that: "It is prohibited to stipulate in law the immunization from the appeal of any administrative work or decision." Although this article preceded Article (102) in consolidating the rule of law by subjecting all governmental administrative decisions to judicial review, it will remain, even partially, an idle Article if no independent administrative judiciary is created.

On the other hand, the establishment of the State Council was necessary to cope with the establishment of the new Iraqi regime after 2003, and the most prominent feature of this new regime is the foundation of a new federal parliamentary republic, a regime where authorities are intertwined between the federal government and the regional governments, as well as local governments with what will entail from a variety of administrative disputes, so it will be a good policy to allocate a professional and independent judiciary to settle disputes regarding the administrative judiciary to

alleviate the burdens of the Federal Supreme Court since its establishment in settling disputes to be assigned to the administrative judiciary, and allocate the Federal Supreme Court for constitutional issues. But then again, Article 101 has another flaw when it stated the establishment of an administrative judiciary but did not stipulate its independence or that it is an integral part of the federal judiciary. Therefore, it had to be included in either Article 101 or Article 89 where the parts of the Federal Judiciary were tackled.

It should be noted in this context that the Fifth Amendment to the law of the State Council No. 65 of 1979, has been issued under Law No. 17 of 2013, the amendment has added important additions²⁶ to the Administrative Judiciary in the State Council, but the State Council is still affiliated to the Ministry of Justice²⁷. This raises the question; why Article 101 of the Constitution is not being in effect when issuing the Fifth Amendment, where it was more appropriate to pass a new law for the establishment of the State Council, regarding it as an independent judicial body, and annulment of the State Shura Council.

The second point of the shortcomings of this text is the function of the State Council mentioned in the article, that is “the State and various public institutions represented before the judicial bodies, ...” This text raises a question about the reason for assigning this work to the State Council; usually the State Council, in international comparison, is an independent judicial authority, and exercises the most important function of the administrative judiciary in the settlement of appeals on the administrative decisions. The members assigned in this Council are judges with full independence and immunities, if so, what is the relation between the State Council “in representing the state”?? This text shows that the representation of the State –as an Administrative Judiciary- to be “in front of judicial bodies”, is not the State Council one of the judiciary bodies? Does it make sense, then, to imagine that one of the judges of the State Council, who settles disputes where the state or the government is the most prominent party, to represent the state, which is a party in the dispute he is settling?! The representation of the State before the judicial bodies have to be by lawyers appointed in the various government departments, or to be represented by creating a public or a quasi-judicial body specialized in playing the role of “government attorney.”

26. One of these additions is the establishment of the Supreme Administrative Court, as well as geographically expanding the administrative courts.

27. Article I of Act 17 of 2003.

Section 5:

Separation of Powers

a. The Political System

From 1925 to 1958, Iraq was ruled as a constitutional monarchy. From 1958 to 2003, the country was mainly ruled under a non-democratic presidential system of government. The 2005 constitution establishes Iraq as a parliamentary democracy. In parliamentary systems, the legislature is generally the only body that is directly elected by the people. The legislature selects a prime minister, who then selects a cabinet that comprises the government. The prime minister and the government carry out the executive functions of the state. One of the most distinctive aspects of the parliamentary system, as it is provided for in the constitution, is that the prime minister and the government serve at the pleasure of the legislature. In other words, some mechanism exists by which the legislature holds the executive accountable by exercising the power to remove the executive, often through a vote of no confidence.

Iraq is well suited to be governed under a parliamentary system, for a number of reasons. Firstly, presidential systems increase the risk of sliding back into authoritarian rule, particularly in countries with a weak rule of law. Although several calls have been made to reintroduce presidentialism in Iraq, we are very concerned that such an initiative would allow for a single individual to capture all major state institutions and reestablish some form of perpetual rule (as has happened in many other countries in the region and beyond). Secondly, parliamentary systems are noted for allowing flexibility in the political process. Since the executive does not serve a fixed term and may be voted out of office if it loses the confidence of the legislature, changing political preferences may be reflected in the composition of the government. This may be especially important in countries with fractured societies and a multitude of political parties. The executive is compelled to comply with the political preferences of the majority of the legislature; otherwise, it faces not only a challenge in promoting its policy agenda but also a threat to its survival.

The difficulty in Iraq's case however is that the country's political parties have established the tradition of forming "governments of national unity", which means that virtually all the parties that are represented in parliament also have some form of representation in government. This has had a number of negative consequences, including the following: (i) because all governments have been composed of ministers from different parties, cooperation between these individuals has been particularly difficult; and (ii) there has not been any meaningful parliamentary opposition to the government to speak of, which has reduced opportunities to hold the government accountable for its actions or inactions, as the case may be.

The challenge for any reform effort will therefore be to maintain the current parliamentary system, while at the same time introducing changes that will increase government accountability and improve the performance of key institutions, including but not limited to the parliament and the government. We explain some possibilities in the sections that follow.

b. The Electoral System

Iraq's electoral system is fraught with difficulties. The current constitution is essentially silent on how elections are to be organized, which in practice has meant that the Iraqi parliament has determined the electoral framework virtually on its own. Unsurprisingly, the rules that it establishes are extremely permissive and provide for minimal oversight, which has contributed to the country's difficulties. This should be remedied through a number of common-sense amendments, including but not limited to the following:

- A rule should be instituted according to which a political party or coalition must obtain at least 5% in order to be represented in parliament. This rule encourages coalition-building and greater cohesion within the parliament.
- Specific prohibitions against foreign and illicit funding should be included in the constitution. In particular, all electoral candidates and parties should be obliged to declare their sources of income, where their monies are held, and also their exact expenditure.

- Electoral campaigns should be publicly funded, to provide less well-funded parties and coalitions with greater opportunity to challenge parties that have enjoyed significant financial support from illicit sources (Morocco's 2011 constitution institutes such a rule).
- The Electoral Commission should be given broad authority to disqualify candidates who violate these rules, and who violate other basic rules. It is insufficient for candidates to simply be fined, which is current practice, given that the potential gains from membership in parliament far outweigh the risks of a financial penalty.

c. The President of the Republic

(i) Term Lengths and Number of Terms

The constitution couples the presidential election with the parliamentary election. Article 72 explicitly provides that the president's term "shall end with the end of the term of the Council of Representatives". Also, article 72 states that the president's term is 4 years, which is the same as the parliament's term (article 55). As a result, since 2005, the president and the parliament's terms have coincided with each other. This was highly problematic following both the 2010 and the 2014 elections. Indeed, although article 67 provides that the president's role is to guarantee the commitment to the constitution, he has instead participated as an interested party in the negotiations in the government formation process, which contributed to delay and dysfunction on both occasions.

We, therefore, recommend a number of changes to the current system that have as their objective to streamline the government formation process:

- Amending the length of the president's term to 7 years, such that presidential elections do not coincide with the government formation process.
- Explicitly providing that the president can only serve one seven-year term, to reduce the likelihood that the president will participate in the government formation process on a partisan basis.

- Along those same lines, explicitly require that the president should resign from any political position, and should remain at arms' length from all political parties during his or her tenure.

(ii) Vice Presidents

The constitution also provides for the existence of a vice president, which is unusual in parliamentary systems of government. Presidential systems usually require the nomination of a vice president, given that they usually require presidents to be directly elected by the people, which can be difficult to organize at short notice and in case of sudden incapacity. On the other hand, in parliamentary systems, in case of the president's incapacity or death, the parliament is usually required to elect a new president, mainly because the process is far easier to organize than under a presidential system. Italy's constitution is fairly typical in that regard:

Constitution of Italy, Article 86

The functions of the President of the Republic, in all cases in which the President cannot perform them, shall be performed by the President of the Senate.

In case of permanent incapacity or death or resignation of the President of the Republic, the President of the Chamber of Deputies shall call an election of a new President of the Republic within fifteen days, notwithstanding the longer term envisaged during the dissolution of Parliament or in the three months preceding dissolution.

In Iraq's case, not only is the existence of a vice president essentially unnecessary, but it has been transformed since 2005 into a mechanism to distribute portfolios to political parties merely during government formation processes. We recommend bringing Iraq in line with traditional parliamentary systems through the following amendments:

- Removing any mention of the vice-president in the constitution, and simply indicating that in the event a sitting president is incapable of continuing to exercise his or her functions, that the parliament should elect a replacement within a specific period of time (this is currently provided for under article 75(4) of the constitution).
- In the event the constitution was to maintain the position of vice president, the constitution should specifically indicate that there should only be one vice president, whose sole function should be to replace the president in case of incapacity.

d. The Prime Minister and the Council of Ministers

(i). Government Formation

The Prime Minister, according to Article 78 of the Constitution is “the direct executive authority responsible for the general policy of the State...” This is consistent with what the Iraqi Constitution adopted in establishing a republican, representative Parliamentary state as stated in Article1, which means that the Executive Authority lies in the hand of the Council of Ministers, based on the results of parliamentary elections, while the authorities granted to the President of the Republic are only a matter of protocols and formality.

In this context, forming a government in the Iraqi constitutional system²⁸ is of high importance, which depends entirely on the election results of the Iraqi Council of Representatives²⁹ as stipulated in Article 76 of the Constitution which states that:

28. The term “government” has not been used in the Iraqi Constitution, but instead used the term Cabinet to indicate the government or the actual executive authority in the country (away from the President of the Republic)

29. The “Federation Council” –which is supposed to be the second Parliamentary Chamber for the Iraqi Parliament- does not have any role in the process of forming the government, as the constitution did not include any details regarding the formation of this Council and its specialties, and referred it to the law, which has not been issued yet.

Constitution of Iraq, Article 76

(1). The President of the Republic shall charge the nominee of the largest bloc in the Council of Representatives with the formation of the Council of Ministers within fifteen days from the date of the election of the President of the Republic.

(2). The Prime Minister-designate shall undertake the naming of the members of his Council of Ministers within a period not to exceed thirty days from the date of his designation.

(3). If the Prime Minister-designate fails to form the Council of Ministers during the period specified in clause "Second," the President of the Republic shall charge a new nominee for the post of Prime Minister within fifteen days.

(4). The Prime Minister-designate shall present the names of his members of the Council of Ministers and the ministerial program to the Council of Representatives. He is deemed to have gained its confidence upon the approval, by an absolute majority of the Council of Representatives, of the individual Ministers and the ministerial program.

The President of the Republic shall charge another nominee to form the Council of Ministers within fifteen days in case the Council of Ministers did not win the vote of confidence.

(A) The Partnership Between the President and the Council of Representatives in the Selection of the Cabinet

Article 76 of the Constitution stated a joint authority between the President and the Council of Representative in selecting the Prime Minister; the president selects a Prime Minister and the Council of Representatives is to give a vote of confidence to the Council of Ministers Cabinet. It should be noted here that the President's authority in selecting and assigning the Prime Minister is a protocol rather than an effective authority, for the fact that the President is obliged to choose the candidate from a

party that won the elections. In this context, it is known that there are three basic methods³⁰ for the selection and formation of the government in the parliamentary systems; the selection of the Cabinet is decided by the Presidents alone, as is the case in The United Kingdom, or the Parliament solo acquires the power to appoint the Cabinet, as is the case in Japan (Emperor's authority is limited to issuing the appointment decisions only) and, finally, the President and the Parliament have shared power in appointing the Cabinet, as chosen by the Iraqi constitution, and stated in the fourth paragraph of Article 76 of the Constitution.

Multiple considerations in the Iraqi context concerning the selection of the first prototype of the appointment methods of the Council of Ministers shall be made by the president only, without the intervention of Parliament, it is the model that practically means assigning a candidate of the winning parliamentary majority party to form a government, then the selected ministerial Cabinet is presented to the President to issue the appointment decision, without any interference of the Parliament. The Iraqi ruling system experience after 2003, was based on a parliamentary system, which is a completely new experience for the Iraqi society, who lived for long periods under the ruling of a central government, it was a good policy to move from a highly centralized system to a parliamentary system. The Iraqi experience in governance during the past 12 years was very difficult especially during the years 2006, 2010, and 2014. And interspersed with many political negotiations and agreements which had always run over the public interest where it required to quickly form a government and take over its tasks immediately after the elections. Suffice it to recall that the formation of the Iraqi government in 2010 delayed for more than 8 months after the announcement of the election's results. This happened also in 2014. The severe political crisis³¹ that Iraq is going through in this period is due to an effort by the Iraqi prime minister to form a government of technocrats, a step comes in response to popular demands to improve the government's performance and to confront the policy of quotas partisanship and sectarianism that Iraq suffers from. The Prime Minister chose a new ministerial cabinet, as a result of following the constitutional obligation -the need to gain the confidence of the Council of Representatives (which in this research we advocate to waiver- the Prime Minister went to the Council of Repre-

30. Mohammed Qadri Hassan, the Prime Minister in Modern Parliamentary Systems, p. 38

31. The first half of 2016, particularly during the months of April and May.

sentatives to gain confidence for the new Cabinet, but as a result, due to a variety of reasons most notably quotas partisanship, the crisis has also moved to the Council of Representatives itself, who no longer able to discuss the issue of voting for confidence to the new ministerial Cabinet, but the Council of Representatives itself split, and a new bloc created of several members demanding the dismissal of the Prime Minister and his two deputies.

So, the waiver of the Iraqi Council of Representatives from the process of giving confidence to the new cabinet, the designated Prime Minister to form his ministry and their appointment by the President is the optimal way for Iraq to avoid a very complex closed-circuit in the formation of the successive governments. This does not collide with the parliamentary system or the rules of democracy; that the oldest systems of parliamentary democracy in the world –United Kingdom- adopts this policy with the formation of the British government, where the king/ Queen is obliged to commission the leader of the winning party, and then the designated Prime Minister is responsible for choosing his ministers without the interference of the House of Commons³². In this context, it should be noted that the Iraqi electoral system should be amended, and perhaps the adoption of a mixed election system is a positive step that allows changing the composition of the Iraqi Council of Representatives since 2005.

Some might say in this context that granting the designated prime minister to choose his government without having to be presented to the Council of Representatives shows a broad authority, and the prime minister might choose of ministers from his own party or his parliamentary bloc, while this criticism seems valid, but that, on one hand, the designate prime minister is the representative of the will of the majority of Iraqi voters, who gave him confidence by the success of his parliamentary party in general elections, and thus he is responsible to those voters in achieving their ambitions in the rational management of the state as a Prime Minister of Iraq,

32. The British government guide, a guide to the laws, customs and rules of the work of the government, first edition, 2011, p. 14. should be noted here that if the parliamentary election did not result in winning a one bloc with majority (so-called suspended parliament), thus the government formation will resides to one of the three solutions; the first is; the winning bloc leader with relative majority shall form a minority government that will form the cabinet; or by forming a coalition government headed by the leader of the winning bloc with relative majority, and finally call for an early parliamentary election, which may reshape the balance in the House of Commons avoid falling in the crises of minority governments and coalition governments.

and therefore he has the right to choose ministers of whom he trust their abilities and efficiency, without the need to obtain confidence from the the Council of Representatives, regarding his Cabinet or his Ministerial curriculum as well. Accordingly, the prime minister, and his government collectively are responsible of in front of the Council of Representatives, and the citizens, for the performance of the government, if the Government showed a serious remiss, the Council of Representatives still have several parliamentary tools³³ that allow them to keep an eye on the government's performance, and the highest of these tools is the withdrawal of confidence from all of the government, and then forcing it to resign if the Council of Representative loses the confidence completely.

(B) Standard of Commissioning the Prime Minister

Article 76 stated that the President is "shall name the nominee of the Council of Representatives bloc with the largest number to form the Cabinet" so the Iraqi constitution has acknowledged that the formation of the government is not dependent on obtaining an absolute majority³⁴, but enough relative majority, which means that a political party or parliamentary bloc has the largest number of parliamentary seats, regardless of whether these seats exceed half of the total number of seats of the Council of Representatives or not, since the condition of obtaining an absolute majority would have led to many difficulties, knowing that no parliamentary party since 2006 had ever won an absolute majority of seats in the Council of Representatives.

Some political parties went to the Federal Supreme Court as a request for interpretation of the first paragraph of article 76 of the Iraqi Constitution, the Court has issued an interpretative decision of what is meant by "largest number parliamentary bloc" stating that : "it is either a cluster that formed after the elections through one electoral list, which entered the elections with a designated name and number, or a cluster formed by two or more of the electoral lists, which entered the elections with different names and numbers and then joined together in a single entity (bloc) in the Council. The president must then name a candidate from the winning parliamentary bloc to form the Council of Ministers."³⁵

33. Paragraph 7 and 8 of Article 61 in the Iraqi Constitution.

34. The number of Iraqi Council of Representatives seats in the current term (2014-2018) is 328 seats, an absolute majority of seats equal 165 seats.

35. The Federal Supreme Court Decision No. 25 / Federal / 2010 in Mar. 25,2010

The decision had raised a lot of political controversy since its release, the fact that it does not take into consideration the will of the Iraqi citizens who voted in the general elections, who chose a certain political bloc and granted their confidence in its political program and candidates. Article 76 should have been interpreted as the parliamentary bloc that won the majority number in the elections, without considering what alliances and coalitions took place between two or more of the parliamentary blocs after the announcement of the results. Moreover, this interpretation emphasizes the respect for the winning parliamentary bloc (who won the elections) and its candidate for the presidency of the Council of Ministers. As well as granting the winning bloc the opportunity for negotiation and consultation to attract other parliamentary blocs in coalition with them, and then allow them to form a majority that will establish the Ministerial Cabinet. On the other hand, if the winning parliamentary bloc failed to form the Cabinet or gaining the confidence of the parliament, then paragraph V of Article 76 is applied, where the President of the Republic shall name another nominee to form the cabinet within 15 days in case the Cabinet did not gain the confidence, the other nominee would be the candidate of the bloc with the highest number in the Council of Representatives by virtue of the alliance between two or more of parliamentary blocs after the announcement of the election results. This view is supported by the absence of any interpretation that determines the method of choosing the other candidate in paragraph V of Article 76 in the case of the failure of the first parliamentary nominee won by election results in forming the Cabinet. This interpretation presupposes the existence of two blocks previously described, but if the elections and the alliances in the Parliament resulted in one bloc with the highest number, then the bloc's nominee will be commissioned to form a Cabinet.

Finally, it should be noted that Paragraph V of Article 76 did not determine what should be done when the two nominees –the first nominee by virtue of election results or the nominee of the alliance of two or more blocs- fail to form the Cabinet. In this case, and likewise the compared constitutions, it is crucial to state in the constitution a solution for this by calling for early parliamentary elections, as a way to overcome the obstacle in failing to form the Cabinet and gaining confidence. Article 116 of the Turkish Constitution adopted this solution.

e. The Parliament

As already noted, Iraq is well suited to be governed under a parliamentary system. We therefore do not propose amending most of the provisions relating to the parliament under the 2005 constitution, given that they, for the most part, match comparative and best practice. However, there are some issues that do need to be resolved, including the parliament's law making powers and the parliament's ability to determine its own level of remuneration. Provisions relating to both of these issues should be amended to bring Iraq's system of government closer to best practice, and also to remove the incentive and ability of parliamentarians to engage in self-dealing.

Law making power. One of the more surprising developments since 2005 is how the Federal Supreme Court has interpreted Article 60 of the constitution. The Court has held that article 60 is designed to mean that the parliament cannot vote on any draft legislation if it has not first been approved by the government, and even that the parliament cannot introduce any major changes to draft legislation after it has been approved by the government. That interpretation has essentially emasculated the parliament as a lawmaking and a debating chamber, and has granted the government full control over the legislative process.

Constitution of Iraq, Article 60

- (1). Draft laws shall be presented by the President of the Republic and the Council of Ministers.
- (2). Proposed laws shall be presented by ten members of the Council of Representatives or by one of its specialized committees.

In parliamentary systems, there is an assumption that government and parliamentary majorities will see eye to eye on virtually all major issues of policy, considering that parliament provides confidence to government and may withdraw confidence and form a new government at any moment. As always however, Iraq is an exception, given its tendency to form governments of national unity, and given the fact that

governments have always been composed of a large number of parties which have for the most part been unable to formulate a single policy position on any major issue. Instead, what has happened is that parliamentary majorities have been formed in relation to specific issues, and have sought to pass legislation despite the absence of governmental policy. This took place in 2013 for example, when the 2008 decentralisation law was amended by the parliament without government's consent.

Other parliamentary systems do not recognize the same distinction. They either provide that both the government and the parliament can submit bills for consideration, or provide that government approval of bills is necessary only where that bill has a financial impact.

Constitution of Germany, Article 76 (1)

Bills may be introduced in the Bundestag by the Federal Government, by the Bundesrat, or from the floor of the Bundestag.

Constitution of Kenya, Article 114 (2)

If, in the opinion of the Speaker of the National Assembly, a motion makes provision for a matter mentioned in the definition of "a money Bill", the Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance.

Remuneration. One of the more unpopular aspects of Iraq's constitution is the fact that it allows parliament to determine its members' own level of remuneration. In practice, parliament has awarded its members some of the highest salaries and benefits packages in the world. This is explicitly permissible by virtue of article 63(1) of the constitution.

Constitution of Iraq, Article 63 (1)

A law shall regulate the rights and privileges of the speaker of the Council of Representatives, his two deputies, and the members of the Council of Representatives.

Other constitutions adopt a different approach to this issue. One approach is for any decision on remuneration that is taken to only apply in the following parliamentary term, to reduce the incentive and the opportunity to engage in self-dealing.

Constitution of Egypt, Article 105

Members shall receive a remuneration defined by law. If the remuneration is modified, the modification does not come into effect until the legislative term following the one when it was adopted begins.

Yet another approach is to delegate this issue to an independent commission. In Kenya's case, parliamentary remuneration was so high in comparison to average salaries in the country that a new and independent Salaries and Remuneration Commission was established specifically for this purpose.

Constitution of Kenya, Article 230 (4)

The powers and functions of the Salaries and Remuneration Commission shall be to-

- a. set and regularly review the remuneration and benefits of all State officers

The role of the opposition. One of the causes of Iraq's tendency to form governments of national unity is the feeling amongst virtually all political parties that nothing can be achieved outside of government. Clearly, if nearly all political parties that are represented in parliament reach an agreement to form a coalition government, then they will also dominate all the principal positions within parliament itself, including the speaker's position, and within all standing committees. In such instances, the general population is deprived of traditional and institutional avenues to express displeasure with the government's performance.

There is much that the constitution can do to remedy this problem, namely by providing that specific roles will be provided to the parliamentary opposition. This will create an incentive for parties not to join the government, and will allow for them to voice opposition to the government's policies through formal, institutional means. Any effort to reform Iraq's constitution in favor of this type of arrangement could draw from significant international experience in this area.

In the UK's House of Commons, the powerful Public Accounts Committee (the equivalent of Iraq's finance committee) is always headed by a member of the opposition. The rationale is simple: one of parliament's essential functions is to exercise oversight over the executive branch of government and that cannot be done if the parliamentary majority, which will almost always be sympathetic to the government, is also in control of all important legislative committees, including the finance committee. Tunisia's constitution provides for the same type of rule.

Constitution of Tunisia, Article 60

The opposition is an essential component of the Assembly of the Representatives of the People. It shall enjoy the rights that enable it to undertake its parliamentary duties and is guaranteed an adequate and effective representation in all bodies of the Assembly, as well as in its internal and external activities. The opposition is assigned the chair of the Finance Committee, and rapporteur of the External Relations Committee.

It has the right to establish and head a committee of enquiry annually. The opposition's duties include active and constructive participation in parliamentary work.

It is worth noting that the 2011 Moroccan constitution also provides the parliamentary opposition significant rights and arguably goes further than article 60 in certain respects. Article 10 of the Moroccan constitution (which is part of the text's general provisions) provides the parliament with several inalienable rights, including "the freedom of opinion, expression and assembly", "air time in state media, in proportion to its representation", "the benefit of public finance", the right to have its draft bills in parliament's agenda, etc. All of these common sense measures will go some way to supporting the work of Morocco's opposition in a way that is beyond what exists in the rest of the region, including Tunisia, at least for now. Also, article 82 provides that the parliament must reserve at least one day a month to review the opposition draft bills. Where Morocco's constitution is perhaps not as strong is article 69, which provides that "one or two" parliamentary committees "at least" should be presided by the opposition. That provision could result in the presidency of a single, lesser committee (such as the environmental committee) to the opposition, whereas article 60 of the Tunisian constitution relates specifically to the presidency of the finance committee.

f. The Security Sector

The Iraqi security sector consists of the army, the police and intelligence agencies. The Iraqi constitution includes several provisions relating to security sector issues. The relevant provisions provide some information on specific institutions' mandates, and on the principles that underpin their work. While these provisions do underline several important democratic principles, they are also lacking in detail, and have therefore contributed to confusion about the functioning of Iraq's security institutions.

Mandates. The Iraqi constitution does not provide sufficient information on each security institution's mandate. In particular:

- The military's mandate is defined solely as being to "defend Iraq", without specifically defining what "Iraq" consists of in this context (article 9(1)(a)). In the chapter on the state's federal system of government, article 110 sets out the exclusive powers of the federal government, which includes to "establish and manage armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq" (article 110(2)). While that wording provides some clarity as to what the armed forces' mandate consists of, it does not exclude the possibility that they could be used for other purposes as well.
- The National Intelligence Service is provided with a far more detailed mandate. The constitution provides that it is responsible for "collecting information, assessing threats to national security, and advising the Iraqi government" (article 9(1)(d)). That wording suggests (without specifically saying so) that the Service does not have any authority to take direct action on its own, and that it will have to work in cooperation with law enforcement agencies (namely the police) to make arrests or prevent criminal activity including threats to national security. What the constitution does not do is specifically state that the National Intelligence Service should be the only institution that is responsible over intelligence matters, nor does it require that intelligence services or operations can only be based on a law.
- The police or internal security forces are simply never mentioned in the constitution.

The South African constitution provides a good illustration of how a constitution can specify a security institution's role, and what procedures should be followed to ensure that the security institutions are respecting limitations on their mandates.

Constitution of South Africa, Article 200

1. The defence force must be structured and managed as a disciplined military force.
2. The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

Article 201

1. A member of the Cabinet must be responsible for defence.
2. Only the President, as head of the national executive, may authorise the employment of the defence force-
 - a. in cooperation with the police service;
 - b. in defence of the Republic; or
 - c. in fulfillment of an international obligation.
3. When the defence force is employed for any purpose mentioned in subsection (2), the President must inform Parliament, promptly and in appropriate detail, of-
 - a. the reasons for the employment of the defence force;
 - b. any place where the force is being employed;
 - c. the number of people involved; and
 - d. the period for which the force is expected to be employed.
4. If Parliament does not sit during the first seven days after the defence force is employed as envisaged in subsection (2), the President must provide the information required in subsection (3) to the appropriate oversight committee.

Hence, article 200 provides that South Africa's defence force (the equivalent of an army) has a mandate to "protect the Republic, its territorial integrity and its people",

while article 201 sets out the specific procedures that must be followed to ensure that the defence force will keep to that mandate. This includes requiring that the president must in all cases report to parliament on the specifics of any military deployment according to article 200.

Civilian oversight. The constitution confirms the principle of civilian control. It provides that the armed forces are “subject to the control of civilian authority [...], shall not be used as an instrument to oppress the Iraqi people, shall not interfere in political affairs, and shall have no role in the transfer of power” (article 9(1)(a)). The National Intelligence Service is also “subject to legislative oversight, and shall operate in accordance with the law and according to the recognized principles of human rights” (article 9(1)(d)). The principle of civilian control is repeated in the constitution’s section relating to the council of ministers, which states that the state’s “security institutions” (left undefined) and the National Intelligence Service are “subject to oversight by the Council of Representatives”, and that the National Intelligence Service is “attached” to the Council of Ministers” (article 84). Although the concept of civilian control appears fairly well supported by these provisions, the fact that the constitution never defines what the consequences of being subject to “oversight” or being “attached” are has created significant uncertainty, which has contributed to the security services’ general lack of capacity.

Commander in chief. Perhaps most importantly, the 2005 constitution establishes the position of Commander in Chief, the difference being that the position is now granted to the prime minister (article 78). The relevant provision does not provide any detail as to whether that position is ceremonial or whether it entitles the prime minister to exercise real functions, and also does not mention the minister of defense or the chain of command. This lack of detail has clearly contributed to Iraq’s security crisis, given that it has led to a tendency on the part of the prime minister to concentrate power in his own hands.

Iraq theoretically allows for significant accountability over the commander in chief (the prime minister), given that the parliament can theoretically withdraw confidence from him at any point. In practice however, because the prime minister has so much authority in his hands, withdrawing confidence can be very difficult. Any future reform of the constitution should therefore focus on how to split apart political authority

over the armed forces in a way that does not lead to their paralysis. Comparative experience provides significant lessons on how this can be achieved.

Constitution of Germany, Article 65 (a)

Command of the Armed Forces shall be vested in the Federal Minister of Defence.

Constitution of Greece, Article 45

The President of the Republic is the commander in chief of the Nation's Armed Forces, the command of which shall be exercised by the Government, as specified by law. The President shall also confer ranks on those serving therein, as specified by law.

The principle of dissipation is therefore well established in both Germany and Greece. Both countries are parliamentary democracies, but in both cases, the prime minister is not accorded with the title of commander in chief. An even better illustration of how this principle can be implemented in practice however can be found in the TAL (Iraq's interim constitution, which was drafted in 2004).

Iraq's 2004 Interim Constitution, Article 39 (b)

The Presidency Council shall carry out the function of commander-in-chief of the Iraqi Armed Forces only for ceremonial and protocol purposes. It shall have no command authority. It shall have the right to be briefed, to inquire, and to advise. Operationally, national command authority on military matters shall flow from the Prime Minister to the Minister of Defense to the military chain of command of the Iraqi Armed Forces.

Here the principle of dissipation is not only clearly applied but also could not have been better organized in practice. Article 39(b) of the TAL provides that three separate officials have some form of authority over the armed forces, namely the president, the prime and the minister of defense. It also states that while the prime minister has "command authority", he cannot exercise that authority directly and must do so through the minister of defense. This provides an important check on the prime minister's own authority. Any reform of Iraq's 2005 constitution would do well to learn from article 39(b) of the TAL, which appears to have been particularly well crafted.

Section 6:

The Federal System of Government

Iraq's federal system of government is unique in comparative perspective. It establishes an asymmetric system, with different federal subnational units (i.e. the regions and the provinces) enjoying different levels of autonomy from the center. It also allows for enormous flexibility on how the subnational units are to be organized with the provinces themselves deciding whether to transform into regions, and whether to merge, without any involvement from the federal government. This system was designed as a means to rectify some of the excesses of the pre-2003 era, by devolving power away from the center and in favor of Iraq's local communities.

Federalism is well suited for diverse countries such as Iraq, particularly intending to allow for communities to play an important role in deciding how local issues should be managed within the context of a broader national strategy on key areas. However, the federal system of government as provided for by the constitution has also been the source of discord. Its provisions include many contradictions, and leaves a number of issues unresolved.

The result has been that, since 2005, the state has been operating without a single unifying vision for how the system of government should function. Instead, different state institutions operate under their own individual sets of rules: (1) the federal government in Baghdad has sought to maintain a high degree of centralization by exercising control over most levels of government; (2) the Kurdistan Region has been implementing its own understanding of the constitution, which it perceives as providing it close to full autonomy with a large number of issues, including airspace and natural resources; (3) some provinces have pushed back against the federal government's control and have sought greater autonomy in the exercise of their functions; and (4) other provinces have been internally divided as to the precise amount of autonomy they should be exercising.

That in turn has caused major damage to the rule of law. In many areas, governance has been paralyzed, contributing to a breakdown in services and declining standards of living. More importantly perhaps, the rule of law has been severely undermined by the fact that state institutions have refused to adhere to a single set of constitutional rules that govern their behavior. This has contributed to an environ-

ment in which virtually all rules are considered to lie somewhere between optional and negotiable.

If the constitution is to be reformed, then a number of important changes should be made to the federal system of government to remedy all these problems. In particular, a more traditional form of federalism should be adopted throughout the entire country with the exception of the Kurdistan Region, which should maintain its special status. In particular, what this means is that the flexibility mentioned above should be abandoned in favor of a much clearer set of rules on how provinces should be structured and how Iraq's internal borders should be organized. It will also mean offering far greater autonomy to Iraq's provinces than under the current dispensation, while at the same time ensuring that all provincial authorities are placed under scrutiny by the state's oversight institutions. Finally, it will also mean establishing a formal body that will allow Iraq's provinces to coordinate policy in ways that have thus far not been possible.

a. Formation of Regions

Iraq currently consists of a federal state, the Kurdistan Region, 15 provinces that are not organized into regions, as well as local administrations. The constitution anticipates that some of the provinces may desire to organize themselves into federal regions, ostensibly in order to enjoy greater autonomy from Baghdad and so establishes an extremely liberal mechanism for that purpose.

Constitution of Iraq, Article 119

One or more provinces shall have the right to organize into a region based on a request to be voted on in a referendum submitted in one of the following two methods:

1. A request by one-third of the council members of each governorate intending to form a region.
2. A request by one-tenth of the voters in each of the provinces intending to form a region.

The principles that underlie this mechanism include the fact that: (1) federal authorities do not appear to have any authority to intervene during the region-formation process, which means that the matter is left entirely to local forces to determine; (2) article 119 leaves it entirely to those same local forces to decide how many provinces will form into a single region, without any apparent restrictions. What this means is that while a single province can decide to transform into a region, a group of several provinces may also decide to do so, without any restrictions. In fact, the system as established by article 119 is so liberal that provinces do not even need to share a common border in order to join together to form a region.

Since it entered into force in 2005, article 119 has been a major source of tension within Iraq's political class. Many observers have noted that article 119 opens the door to transforming Iraq into a confederation of ethno-sectarian identities, which does not have a successful precedent for peaceful coexistence anywhere in the world (other than Bosnia, which suffers from a set of other difficulties, including governmental dysfunction). Meanwhile, local forces in several provinces (including in Basra province) have expressed a desire to transform into regions.

As noted below, our recommendation is to grant Iraq's provinces with legislative authority in all areas that are not exclusively attributed to the federal authorities, which greatly reduces the need for the mechanism that is set out in article 119. On the other hand, a mechanism is still needed in order to determine how Iraq's internal boundaries should be changed, if necessary. Some of the world's most well established federations include mechanisms that allow for internal boundaries to be changed, and there is much that can be learned from that experience. In particular, comparative experience shows that other constitutions include detailed mechanisms for changing internal boundaries, and also establish substantive criteria that new boundaries would have to follow in order to be constitutionally valid. For example, in Germany internal boundaries can be changed based on "regional, historical, and cultural ties, economic expediency, and the requirements of regional policy and planning" (article 29(1)). Meanwhile, Kenya's 2010 constitution provides similar criteria.

Constitution of Kenya, Article 188 (2)

The boundaries of a county may be altered to take into account:

- a. population density and demographic trends;
- b. physical and human infrastructure;
- c. historical and cultural ties;
- d. the cost of administration;
- e. the views of the communities affected;
- f. the objects of devolution of government; and
- g. geographical features.

In terms of procedural mechanisms that need to be followed in order to change internal boundaries, each country has its own system, but for the most part, they typically involve a number of steps: (1) the involvement of an independent commission composed specifically to study a boundary change that has been suggested; (2) some form of local consultation in the affected areas, usually in the form of a local referendum; and (3) acceptance by national authorities.

b. Division of Powers

(i). The Current System

The constitution divides state authority between different levels of government. Article 110 sets out a list of powers that are to be exercised “exclusively” by the federal government; article 114 adds a list of powers that are to be “shared” by the federal and regional authorities; while article 115 provides that all the powers that

are not explicitly listed under articles 110 and 114 belong to both the regions and the provinces. A number of other provisions purport to clarify other issues relating to the federal system of government, including how natural resources should be managed (article 112), the internal organization of regions (article 121), and the administration and powers of provinces (article 122), amongst others.

While these provisions deal with all the essential features of a federal system of government, they contain a number of contradictions and confusions which have made it more difficult to govern Iraq since 2005.

Obvious mistakes. For example, the constitution contains a number of obvious mistakes, including the fact that the same powers are allocated to different levels of government. This applies to customs policy, which is listed as an “exclusive federal power” as well as a “shared power”:

Constitution of Iraq, Article 110

The federal government shall have exclusive authorities in the following matters: [...]

(3) Formulating fiscal and customs policy; issuing currency; regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy; and establishing and administering a central bank.

Constitution of Iraq, Article 114

The following competencies shall be shared between the federal authorities and regional authorities:

(1) To manage customs, in coordination with the governments of the regions and provinces that are not organized in a region, and this shall be regulated by law.

Clearly, exclusive federal powers are by their very nature exclusive to the federal government and cannot be shared with another level of government, regional or otherwise. Authority over customs can belong to one or the other branch of government but clearly cannot belong to both.

Another important area of confusion comes from the wording of Article 115, and how it appears to put both regions and provinces on the same level as each other. It provides in full that:

Constitution of Iraq, Article 115

All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and provinces that are not organized in a region. Concerning other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and provinces not organized in a region in case of a dispute.

The use of the expression “the law of the regions and provinces” clearly indicates that provinces can pass laws according to article 115, and that provincial law takes precedence over federal law in relation to the “shared powers”. The difficulty is that many of the remaining provisions relating to the federal system of government strongly suggest that provinces do not have the right to legislate. For example, as already indicated, article 114 indicates that shared powers belong to “federal authorities and regional authorities”, and does not mention provinces. Also, article 121 explicitly notes that regions have “executive, legislative, and judicial powers” in all areas except exclusive federal powers, whereas article 122(2) describes provinces as being totally subordinate to the federal government:

Constitution of Iraq, Article 122 (2)

Provinces that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law.

Thus, whereas the constitution allows for regions to organize themselves internally in the way that they deem most appropriate, article 112(2) states that provinces should only have “administrative and financial authorities”, without making any mention of the right to enact legislation. Reading articles 115, 114, and 122 together, one cannot avoid the conclusion that the wording from article 115 referred to above is a drafting mistake. It has contributed to significant confusion and tension since 2005 as to the precise level of authority that provinces should have, with some arguing that they have the power to pass legislation and others arguing that they do not. Thus, rather than investing effort in developing and implementing coherent strategies to improve standards of living in the country, the political class has been investing much of its effort in arguing over poorly drafted constitutional provisions.

Examples of poor drafting. Another example of Iraq’s confused federal system of government is how specific powers are formulated. A brief reading of article 110 provides a good illustration of that point:

Constitution of Iraq, Article 110

The federal government shall have exclusive authorities in the following matters:

1. Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing, and ratifying debt policies and formulating foreign sovereign economic and trade policy.
2. Formulating and executing national security policy, including establishing and managing armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq.
3. Formulating fiscal and customs policy; issuing currency; regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy; and establishing and administering a central bank.
4. Regulating standards, weights, and measures.
5. Regulating issues of citizenship, naturalization, residency, and the right to apply for political asylum.
6. Regulating the policies of broadcast frequencies and mail.
7. Drawing up the general and investment budget bill.
8. Planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions.
9. General population statistics and census.

What is striking about article 110 is that each of the powers that are allocated to the federal government is formulated differently, which raises a large number of issues, including but not limited to the following:

(i). While the federal government is exclusively competent to “formulate and execute” national security policy (subsection 2), it is only given authority to “formulate” foreign policy (subsection 1). This difference in wording (combined with article 115) can be interpreted to mean that the federal government does not have the authority

to actually implement foreign policy and that that power would therefore belong to the powers and the regions, but that would be an absurdity that would be totally impractical.

(ii). The federal government is given authority to “regulate” issues of citizenship (subsection 5), but is not explicitly given the authority to formulate policy on that same issue. Once again, this wording suggests that the authority to formulate policy on citizenship belongs to the regions and the provinces, which cannot work in practice.

(iii). The federal government is given authority to “formulate” foreign policy (subsection 1) and customs policy (subsection 3), but it is also given authority to “plan policies” relating to water sources from outside Iraq (subsection 8). The wording indicates that there must be a difference between “formulating” policies and “planning” policies, but of course no indication is given anywhere in the text.

(iv). Most confusingly perhaps, the federal government is given authority over “general population statistics and census” (subsection 9) although no indication is given as to the nature of that authority. Does the federal government have the authority to “formulate policy”, or can it also “execute policy”? Or is the federal government’s authority limited to “planning”? No indication is given.

In yet another example, while article 115 states that the federal government has no authority outside its exclusive powers (article 110) and its shared powers (article 114), the constitution elsewhere appears to suggest that the federal government has the power to enact legislation in all areas without limitation:

Constitution of Iraq, Article 115

All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. Concerning other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of a dispute.

Article 115 clearly establishes three categories of authority: (1) exclusive federal powers; (2) powers that are to be shared by the federal and regional authorities; and (3) powers that are neither exclusive to the federal government nor shared, which “belong to the regions and provinces”. The only way to interpret article 115 is that the federal government has the authority to legislate in exclusive federal powers and shared powers, but in relation to the rest. That interpretation is certainly in line with the spirit of the section relating to the federal system of government. Article 121(2) points in another direction, however.

Constitution of Iraq, Article 121(2)

In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.

Article 121(2) establishes the same type of rule as article 115, except that it is a different rule. Article 121(2) establishes only two categories of authority: (1) exclusive federal powers; and (2) everything else. Also, article 121(2) clearly indicates that the federal government has the authority to legislate in all areas that are not within

its exclusive authority. This is in clear contradiction to article 115. Clearly, this is the result of uncoordinated changes being introduced by different individuals to the constitution during the drafting process.

(ii). Recommendations

The Kurdistan Region. Given historical circumstances on the status of the Kurdistan Region, it is virtually inconceivable that the Kurdistan Region will accept any lesser form of autonomy in comparison to what is enjoyed today. Any discussion in favor of reversing its autonomy at this stage would likely only fuel efforts in favor of Kurdish independence. At the same time, there is little question that the relationship between Baghdad and Erbil has deteriorated and could benefit from some form of constitutional reform to regulate some of the aspects of that relationship. It is therefore recommended to maintain the broad principles that currently underline the Kurdistan Region's autonomy while also clarifying a number of principles, including that:

(1) the Kurdistan Region is entitled to a reasonable proportion of the state's annual state budget, which should be in accordance with human needs and in a manner that is transparent;

(2) Budgetary transfers to the Kurdistan should also cover security needs, in exchange for which Kurdistan security forces should expand cooperation with national security forces;

(3) Whatever funds are transferred to the Kurdistan Region must be subject to constitutional oversight mechanisms, including financial auditing by state authorities, which must make their findings available to the public.

Improving and lengthening the list of exclusive federal powers. For the rest of the country, meaning the remaining 15 provinces outside the Kurdistan Region, we recommend amending the relevant provisions to bring Iraq more in line with traditional federal systems of government. This would require implementing a number

of key changes. The first would be to clarify the federal government by uniformising the language with each area. We also suggest including a number of additional substantive areas to the list, in order to bring Iraq more fully in line with traditional federations. By way of illustration, we recommend amending article 110 as follows

Constitution of Iraq, Article 110

The federal government shall have exclusive authorities in the following matters:

- (1) Foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing, and ratifying debt policies and formulating foreign sovereign economic and trade policy.
- (2) National security policy, including establishing and managing armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq.
- (3) Fiscal and customs policy; issuing currency; regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy; and establishing and administering a central bank.
- (4) Standards, weights, and measures.
- (5) Citizenship, naturalization, residency, and the right to apply for political asylum.
- (6) Broadcast frequencies and mail.
- (7) The general and investment budget bill.
- (8) Water sources from outside Iraq, the rate of water flow to Iraq, and its just distribution inside Iraq in accordance with international laws and conventions.
- (9) General population statistics and census.
- (9) Air transport.
- (10) Federal railroads.

Legislative authority for the provinces. Secondly, we recommend explicitly granting the provinces with legislative authority in all areas that do not fall under the exclusive jurisdiction of the federal authorities, and in accordance with a number of

principles. This should include: (1) the principle of residuality (according to which the provinces automatically have the right to legislate in all areas not explicitly allocated elsewhere); (2) the right for the federal authorities to intervene in particular circumstances. Germany's basic law (one of the world's most successful federations) provides a good illustration of how these principles can be set out in Iraq's constitution.

Constitution of Germany, Article 70

(1) The States [Länder] have the right to legislate insofar as this Constitution does not confer legislative power on the Federation.

(2) The division of competence between the Federation and the States [Länder] are determined by the provisions of this Constitution concerning exclusive and shared legislative powers.

Article 71

In matters within the exclusive legislative power of the Federation, the States [Länder] have power to legislate only where and to the extent that they are given such explicit authorization by a federal statute.

Article 72

(1) In the field of shared legislative power, the States [Länder] have power to legislate as long as and to the extent that the Federation does not exercise its right to legislate by statute.

(2) In this field of shared legislative power, the Federation has the right to legislate if and insofar as the establishment of equal living conditions in the federal territory or the preservation of legal and economic unity necessitates, in the interest of the state at large, a federal regulation.

Improving and lengthening the list of shared powers. Thirdly, we recommend amending article 114, both to clarify its wording, and to make a number of substantive changes to the list. Some powers, including the authority over customs, should be removed from article 114, given that it falls under exclusive federal authorities

(see above). Also, a number of other authorities should be added to bring Iraq more fully in line with traditional federations. As such, we amending article 114 as follows:

Constitution of Iraq, Article 114

The following competencies shall be shared between the federal authorities and provincial authorities:

- (1) Main sources of electric energy and its distribution.
- (2) The environment.
- (3) Development and general planning policies.
- (4) Public health.
- (5) Education.
- (6) Scientific research.
- (7) Internal water resources.
- (8) Civil law, criminal law, civil procedural law, and criminal procedural law.
- (9) Labor law.
- (10) Property law.
- (11) Public welfare.
- (12) Economic matters.
- (13) Agricultural production.
- (14) Consumer protection.

Dispute resolution mechanism. Fourthly, we recommend specifically indicating in this same section of the constitution (which is to say, the section relating to the distribution of powers to different levels of government) what dispute resolution mechanism should be followed in the event of a dispute between different levels of government relating to jurisdictional issues. In particular, we recommend that a provision should clearly indicate that in the event of a jurisdictional dispute between different levels of government, that the matter should be referred to the Federal Supreme Court.

The Federation Council. Finally, a mechanism must be established to allow for Iraq's various provinces to meet, discuss shared interests and initiatives and make specific reform proposals. Article 65 of the Constitution currently provides that a "Federation Council" should be established by law. Not only has that law not been issued, but it is also unclear whether Iraq is well suited to a two-chamber parliament. The legislative process is already far too cumbersome, which has caused parliament's output to be very low. The establishment of a second chamber could conceivably lead to permanent legislative paralysis. As an alternative, it is recommended that the constitution be amended to provide for the establishment of a consultative chamber that will allow for provincial authorities to exchange views about common interests. Tunisia's constitution provides a useful example of the type of institution that could be established.

Constitution of Tunisia, Article 141

The High Council of Local Authorities is a representative structure for all local authorities' councils. The High Council headquarters will be located outside of the capital.

The High Council of Local Authorities has jurisdiction to consider issues related to development and regional balance, and give its advice with respect to any draft law related to local planning, budget, and financial issues. The President of the High Council of Local Authorities may be invited to attend discussions of the Assembly of the Representatives of the People.

The composition and tasks of the High Council of Local Authorities shall be established by law.

Oversight. Finally, it must be made totally clear in the constitution that independent commissions such as the BSA, the Integrity Commission, and the regular courts must actively monitor the spending of public monies in all provinces. This will require significantly increasing these institutions' resources to ensure that they are capable of satisfying this mission.

Section 7: Independent Agencies

a. Principles Derived from Comparative Experience

General principles. Independent agencies are a vital aspect of all modern constitutional systems. They satisfy a number of key functions that states depend on to function effectively. Although each country has its own institutional design that is based on its own particular circumstances, almost all states have established the same core group of Independent agencies. These include, but are not limited to: (i) supreme audit institutions, which are the only body in the state that are capable and mandated to ensure that all government monies are spent as originally intended and as effectively as possible (Iraq's own supreme audit institution, the Board of Supreme Audit, was established in 1927); (ii) central banks, which are responsible for a number of key tasks including maintaining sound fiscal policy; and (iii) electoral commissions, which are usually responsible for organizing all aspects of electoral ballots.

What all these and other institutions have in common is that, in order to satisfy their mandates effectively, they must be able to work independently from governmental influence. To take supreme audit institutions as one example, independence is the most basic principle underlying auditing in all parts of the world, in both the private and public sectors. In order to determine if monies are being spent by the government according to the law, auditors must be free to make their own determinations free from influence by government officials. The failure to adequately protect a supreme audit institution's independence can be devastating for its work: if circumstances permit, governments will exploit constitutional and legal loopholes to prevent auditors from investigating certain government departments, pack the audit institutions with party loyalists, dismiss auditors who are too independent, place the entire agency under the control of a head who will protect the government from criticism, influence the content of audit reports, or even prevent the reports from ever being published or acted upon, rendering the institution's existence utterly useless.

The best way to protect an independent agency from government influence is through clear and detailed constitutional provisions on the main aspects of each independent institution's mandate and the main aspects of its governance. Constitutional protections for the main elements of an independent institution's work are a far superior form of protection than leaving all aspects of an independent institution's work to legislation. Because constitutional amendment procedures are almost always more difficult to satisfy than the ordinary law-making process, constitutional provisions relating to these specific issues undoubtedly offer a higher form of protection against government influence. Laws can be changed at any moment by temporary political majorities that are tempted to exploit loopholes to capture specific institutions. As such, most modern democratic constitutions dedicate a number of provisions to the main aspects of independent agencies and their work to protect their independence, while leaving the detail to subsequent legislation.

Chapter four of the 2005 Iraqi constitution deals with Independent agencies. It establishes a number of different agencies in 7 separate provisions and provides some detail on how there are supposed to operate. We will discuss each of these provisions and the agencies in question below.

Providing constitutional status to independent agencies. Constitutional provisions relating to independent agencies must satisfy a number of requirements in order to offer the highest form of protection possible, and this can be achieved in a number of different ways. Firstly, a constitution should mention each of a country's major independent agencies by name. By simply mentioning that a specific independent agency exists, it will be very difficult if not impossible for governments that are seeking to control the state to dissolve or eliminate an independent agency altogether. Conversely, if a specific agency is not mentioned in the constitution, and if the only basis for that institution's existence is the existence of a law, then all a government or a parliamentary majority would have to do to dissolve the agency would be to repeal that specific law, which can be a very easy threshold to meet in many circumstances.

The 2005 Iraqi constitution provides a number of key independent agencies with this minimum amount of protection. For example, it provides that:

Constitution of Iraq, Article 102

The High Commission for Human Rights, the Independent Electoral Commission, and the Commission on Public Integrity are considered independent commissions subject to monitoring by the Council of Representatives, and their functions shall be regulated by law.

By simply mentioning these specific agencies' existence, the Iraqi constitution ensures that at the very least they will exist and that it will be very difficult for any government to dissolve them without amending the constitution altogether.

Defining independent agencies' mandates. Secondly, each of the independent agencies should have its specific mandate clearly articulated in its own separate constitutional provision. By way of example, Egypt's 2014 constitution includes a provision that is entirely dedicated to establishing the mandate of the Central Auditing Organisation (Egypt's supreme audit institution, and its equivalent of the Board of Supreme Audit). Egypt's constitution provides that:

Constitution of Egypt, Article 219

The Central Auditing Organization is responsible for monitoring the funds of the state, public legal personalities, and other bodies to be identified by law; for the implementation of the state budget and independent budgets; and for reviewing its final accounts.

Similarly, the 2015 Yemeni constitution draft provides as follows:³⁶

36. The 2015 draft Yemeni constitution was never enacted in large part as a result of the conflict that erupted later on that year.

Yemen draft 2015 Constitution, Article 294

1. The Audits and Control Authority is an independent national institution, and is responsible for the following:

Auditing the accounts, financial statements, and financial management of all institutions, organizations, and organs of the State at the various levels of government and presenting reports on such audits.

2. Carrying out an effective control over public funds and ensuring good management in terms of efficiency and effectiveness.

3. Contributing to developing the performance of organs and institutions subject to its control, particularly in financial and administrative matters.

4. Any other function prescribed by law.

A comparison of these two provisions reveals a number of important differences. The first is that the Yemeni supreme audit institution is mandated to carry out a far larger number of tasks than its Egyptian counterpart institution. Indeed, Article 219 of the Egyptian constitution provides that the Central Auditing Organisation has one essential task, which is to audit the expenditure of state funds. On the other hand, Article 294 of the draft Yemeni draft constitution provides that the Audits and Control Authority must not only ensure that funds are spent as originally intended and in accordance with the law, but must also ensure that state funds are used as efficiently and effectively as possible, thereby working to ensure that Yemenis are obtaining value for their money. Article 294 also provides that the audit institution must play an active effort in capacity development efforts for state institutions, rather than merely publishing reports on their performance. The second main difference between the Egyptian and Yemeni provisions is that even within the confines of financial audits, the Egyptian provision defines the audit institution's mandate more narrowly than the Yemeni provision. The differences between the two provisions are subtle but important:

(i) Article 219 of the Egyptian constitution states that the Central Auditing Organisation is responsible for auditing "the funds of the state" without clearly indicating that it has the authority to audit all state funds.

(ii) In addition, Article 219 of the Egyptian constitution provides that the Auditing Organisation is responsible for auditing “public legal personalities and other bodies to be identified by law” Because it does not clearly indicate that all state bodies must be audited, and by leaving the matter to subsequent legislation, Article 219 clearly leaves open the possibility that certain bodies could avoid monitoring by the Auditing Organisation. On the other hand, the Yemeni draft constitution is far clearer on this point, leaving no doubt that the Audits and Control Authority has a mandate to audit all state bodies. Article 294 provides that the Authority is responsible for auditing “all institutions, organizations, and organs of the State at the various levels of government” This wording has had an important practical impact. Since the Egyptian constitution entered into force, some state institutions have refused to allow the Central Auditing Organisation to audit their financial records, arguing that they were outside of the Auditing Organisation’s mandate.

The Iraqi constitution is very weak on mandates. It provides some agencies with very clear mandates but is entirely silent for the majority of agencies. For example, in a single provision, the constitution mentions the existence of four separate agencies without saying anything whatsoever on what these different agencies are mandated to achieve, other than what the name of each agency indicates:

Constitution of Iraq, Article 103

- (1) The Central Bank of Iraq, the Board of Supreme Audit, the Communication and Media Commission, and the Endowment Commissions are financially and administratively independent institutions and the work of each of these institutions shall be regulated by law.
- (2) The Central Bank of Iraq is responsible before the Council of Representatives. The Board of Supreme Audit and the Communication and Media Commission shall be attached to the Council of Representatives.
- (3) The Endowment Commissions shall be attached to the Council of Ministers.

By remaining silent on these issues, the Iraqi constitution has essentially abandoned this issue entirely to law, which means that each agency’s mandate could

be either improperly defined by parliament, or could have its mandate changed at any moment by a majority in parliament. That is precisely what constitutions are designed to avoid and any amendment to the Iraqi constitution should pay considerable attention to this issue.

Creating the capacity to satisfy mandates. Thirdly, constitutions should also provide each independent agency with the means to satisfy its mandate. To keep with the audit institutions as a point of illustration, if their mandate is to ensure that state funds are expended in accordance with the law, then their reports must all be published. If audit reports are kept from public scrutiny, then it automatically means that parliament, the media, prosecutors and the general public will not be able to review their contents. In turn, this means that there will be a far lesser incentive for underperforming state institutions to improve their performance in accordance with the findings of state institutions. The Egyptian constitution dedicates an entire provision to how independent agencies should publish their reports:

Constitution of Egypt, Article 217

Independent bodies and regulatory agencies present annual reports to the President of the Republic, the House of Representatives and the Prime Minister at their time of issuance.

The House of Representatives considers such reports and takes appropriate action within a period not exceeding four months from the date of receipt. The reports are presented for public opinion.

Independent bodies and regulatory agencies notify the appropriate investigative authorities of any evidence of violations or crimes they may discover. They must take the necessary measures with regard to these reports within a specified period of time. The foregoing is regulated by law.

Meanwhile, the Yemeni constitution draft provides:

Yemen draft Constitution, Article 285

Independent agencies and specialized councils shall present periodic reports to the President of the Republic, the House of Representatives, the Federal Council, the legislative assemblies in the regions, and the regional governments, where appropriate.

Both of these provisions present a number of advantages and disadvantages. They were both clearly drafted with the public interest in mind, and represent a strong attempt to introduce transparency to the functioning of state institutions. They are a clear improvement on the past, where there was no obligation on most independent agencies to share their reports to anyone outside the president of the republic, and where there was never any obligation to act upon a specific report's findings. However, neither of the two provisions is entirely satisfactory, as a result of a number of problems in their choice of words. By way of example:

(i) Neither of the two provisions clearly specifies that independent agencies must make their reports publicly available in all cases. Article 285 of the draft Yemeni constitution requires all independent agencies to present their reports to such a broad range of institutions (including both houses of parliament, and all regional assemblies) that it will be effectively impossible for specific reports to remain confidential. Meanwhile, Article 217 of the Egyptian constitution applies the same spirit but is far more modest in its scope. It requires audit institutions to be presented to the "President of the Republic, the House of Representatives and the Prime Minister". This is a far more restrained number of individuals and institutions, and if all three are occupied or under the control of the same political coalition, then a report that contains damaging information on the government's performance could easily be kept from public scrutiny.

(ii) The third paragraph of Egypt's Article 217 requires for independent agencies to notify investigative authorities in case there is evidence of "violations or crimes". While that requirement has the same practical impact as the publication of a report,

the provision is problematic because it only relates to “violations or crimes” leaving open the possibility that instances of mismanagement and incompetence which do not qualify as crimes but which result in the poor management of state funds will not be disclosed, and therefore could never be acted upon. In addition, Article 217’s wording leaves it to the independent agency itself to decide whether to refer matters to prosecuting authorities. In many functioning democracies, however, all citizens have the standing to commence proceedings against state institutions that are guilty of corruption and other criminal behavior. Article 217’s wording leaves open the possibility that independent agencies may actively decide not to refer specific matters to prosecution without the public ever learning of the matters in question.

(iii) Both provisions only require that specific reports be shared with various branches of government. Egypt’s Article 217 only requires independent agencies to share their annual reports and makes no mention of the huge number of issue-specific reports that are published throughout the year. Yemen’s Article 285 provides that independent agencies must “present periodic reports” to the various branches of government, which appears to suggest that reports should be prepared specifically for the purpose of informing different branches of government of the independent agencies’ activities. Once again, Article 285 makes no mention of the remainder of the independent agencies’ reports and whether or not they should be published. This clearly leaves open the possibility that the independent agencies could choose not to publish their own material, possibly with a view to protecting specific government actions from scrutiny.

The Iraqi constitution is entirely silent on this issue. Apart from merely stating that specific agencies should exist, and remaining silent on their mandates, it says nothing about how these agencies are supposed to operate and how they should achieve their respective missions.

Clear governance mechanisms that protect independence. The final issue is that all constitutions should provide sufficient detail on how independent agencies are to remain independent. In the past, some constitutions have merely limited themselves to indicating that the agencies should be independent, without explaining what that meant. In practice, the consequence in many cases was that the institutions were solely administratively independent (meaning that the government

did not interfere with the institutions' day to day operations) but that they were not politically independent from government influence. In order to ensure that independent agencies are fully independent of the executive branch of government, a constitution must clearly establish the following:

(i) A clear appointment process for the head of independent agencies that prevent any single branch of government from dominating or manipulating the process. In practice, this can mean that several branches of government must be involved in the appointment process, and also that candidates must have satisfied a number of criteria (including for example not having been a member of a political party in the recent past).

(ii) A clear prohibition against unilateral and arbitrary dismissal of independent agencies' heads by the executive branch of government. Many constitutions require that high substantive and procedural requirements be met in order for a dismissal to be valid. For example, the head of an institution should have been guilty of gross incompetence, and a motion for dismissal will have to have been approved by two-thirds of the parliament in order to be valid.

(iii) Clarity on how each independent institution's budget is to be established. Governments that are unhappy with oversight by independent agencies can limit their impact merely by reducing their budgets. Modern and democratic constitutions can and should include clear rules on how budgets can be protected from government manipulation. Amongst other things, a constitution typically provides that independent agencies' budget must be established by law, and also requires each independent institution to be consulted before its budget is finally established.

(iv) Clarity on each agency's reporting lines. Many constitutions often specify which branch of government will be responsible for overseeing independent agencies' work. Many modern democratic institutions are silent on this issue, but if they do say anything at all they will typically indicate that independent agencies are answerable before the legislative branch of government.

Egypt's 2014 constitution provides a good illustration of how these vital issues are dealt with in practice:

The Constitution of Egypt, Article 215

Independent bodies and regulatory agencies are identified by law. These bodies and agencies have legal personality, technical, financial, and administrative independence, and are consulted about draft laws and regulations that relate to their fields of operation. These bodies and agencies include the Central Bank, the Egyptian Financial Supervisory Authority, the Central Auditing Organization, and the Administrative Control Authority.

Article 216

For the creation of each independent body or regulatory agency, a law is issued defining its competencies, regulating its work, and stipulating guarantees for its independence and the necessary protection for its employees and the rest of their conditions, to ensure their neutrality and independence. The President of the Republic appoints the heads of independent bodies and regulatory agencies upon the approval of the House of Representatives with a majority of its members, for a period of four years, renewable once. They cannot be relieved from their posts except in cases specified by law. The same prohibitions apply to them that apply to ministers.

These two provisions cover a large number of issues. Amongst other things, they require for each independent institution to be consulted before any legislation on their functioning is issued. Article 216 also provides that the head of an independent institution must be approved by the house of representatives, preventing the president from completely dominating the process. Where Article 216 falls short however is that it is essentially silent on how the head of an institution can be dismissed. Because it merely states that the law will establish how the heads of institutions should be dismissed, Article 216 opens the possibility that the law could simply provide that the president or the prime minister will make these decisions on their own. In practice, this is exactly what happened in Egypt since the 2014 constitution was adopted: the president is now solely empowered to dismiss heads of independent agencies, which has recently used to dismiss the head of the Central Auditing Organization.

Iraq's 2015 constitution does not provide sufficient detail on how independent agencies are to be governed. It says nothing about how their respective heads should be appointed, or how they should be dismissed. This key omission has been a major contributing factor to how independent agencies such as the Integrity Commission have operated in practice. Rather than seeking parliamentary approval when appointing the head of each agency, successive prime ministers have appointed the heads of independent agencies themselves. In terms of reporting lines, the Iraqi constitution actually does provide some detail but does so in such a confusing manner that it actually contributed to reducing the agencies' independence. The constitution uses a large number of different terms to describe specific agencies' relationship with the Council of Representatives, without providing any explanation whatsoever as to what each of these terms means or what effect they have, thereby creating a huge source of confusion that has been exploited by the government to its advantage. By way of example:

- (i) The Independent Electoral Commission is "subject to monitoring by" the Council of Representatives (Article 102);
- (ii) The Central Bank is "responsible before" the Council of Representatives (Article 103 (2));
- (iii) The Board of Supreme Audit is "attached to" the Council of Representatives (Article 103(2)).

This confusing terminology was interpreted by Iraq's Federal Supreme Court in a manner that favored the government and which stirred significant opposition in the parliament.³⁷ Any amendment to the Iraqi constitution will have to remedy this problem, first by reconsidering the relationship between the independent agencies and the Council of Representatives, and also by clearly indicating what that relationship entails exactly.

37. Federal Supreme Court Decision No. 25 / Federal / 2010 on 3/25/2010.

b. Proposed Changes

Based on all of the above, it is beyond question that Chapter Four of the Iraqi constitution relating to independent agencies is highly deficient. Its current wording is incomplete and what detail is included is very confusing, which has contributed to the country's crisis in governance. Any amendment to the Iraqi constitution can and should remedy this situation through a number of common-sense changes, including but not limited to the following:

(i) Chapter Four should commence with one article that clearly indicates that all independent agencies are politically, administratively and financially independent. The provision should also clearly establish how the heads of each agency should be appointed and dismissed, while ensuring that no single branch of government should monopolise or control either process, and also ensuring that the heads of specific agencies may only be dismissed for a limited number of grounds (including, for example, gross incompetence). The provision should also prohibit the practice of appointing acting heads to govern agencies *ad infinitum*, as has been the practice since 2005. The provision should also clearly indicate that all agencies should make all of their reports publicly available in all cases. Finally, a clear mechanism should be established to determine how each independent agency's budget should be determined.

(ii) Chapter Four should also include a series of provisions, each of which should be dedicated to discussing an individual agency's particularities. Each of these provisions should clearly establish what each agency's mandate should be, how other state institutions should support its work. The effort to determine each agency's mandate should be carried out as deliberately as possible, as this task represents an important opportunity to remedy some of the worst aspects of the Iraqi state's current functioning. The designing of each agency's mandate should be carried out with a view to closing loopholes, reducing redundancies and streamlining particular administrative functions. By way of example, the relationship between the Integrity Commission, the Board of Supreme Audit and the Inspectors General was confused for a long time as a result of legal reforms that were entered into by the Coalition Provisional Authority, and remained confused after the 2005 constitution entered into force because of the lack of detail on this fundamental issue. While some of these confusions have since been clarified, the relationship could be greatly improved with a view to improving the anti-corruption framework.

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