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Working Paper Series**

# **Constitutional Law of Iraq**

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## **Preface to the Series: *Introduction to the Laws of Iraq and Iraqi Kurdistan***

Iraq and Iraq's Kurdistan Region is at a compelling juncture in their histories. In the wake of the transition to a democratic state, the country and region economy has prospered and its institutions have grown more complex. As institutional capacity has grown, so too has the need for a robust rule of law. An established rule of law can provide assurances to investors and businesses, while keeping checks on government and private powers and protecting citizens' fundamental rights. Institutions of higher learning, such as universities and professional training centers, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

This paper is part of the *Introduction to the Laws of Iraq and Iraqi Kurdistan*, a series of working papers produced by the Iraqi Legal Education Initiative (ILEI) of Stanford Law School. This series seeks to engage Iraqi students and practitioners in thinking critically about the laws and legal institutions of Iraq and Iraqi Kurdistan. Founded in 2012, ILEI is a partnership between the American University of Iraq in Sulaimani (AUIS) and Stanford Law School (SLS). The project' seeks to positively contribute to the development of legal education and training in Iraq.

The working paper series devotes significant attention to pedagogy. By writing in clear and concise prose and consulting with local experts at each step of the writing process, the authors strive to make the texts accessible to diverse and important constituencies: undergraduate law students, lawyers and judges, government officials, members of civil society, and the international community. By discussing the Iraqi and Kurdish legal regimes and applying specific laws to factual situations, the authors model how to “think like a lawyer” for the reader. They also use hypothetical legal situations, discussion questions, and current events to stimulate critical thinking and encourage active engagement with the material.

These working papers represent the dedicated efforts of many individuals. Stanford Law School students authored the texts and subjected each working paper to an extensive editing process. The primary authors for the initial series including papers on Commercial Law, Constitutional Law, and Oil and Gas Law, were John Butler, Mark Feldman, David Lazarus, Ryan Harper, and Neil Sawhney (J.D., 2014), under the guidance of Stanford Rule of Law Fellow Megan Karsh (J.D., 2009) and me. Jessica Dragonetti, Kara McBride, Cary McClelland, Neel Lalchandani, and Emily Zhang (J.D., 2015) are writing papers for the latter part of the series primarily concerned with Iraq's engagement with international law. I also thank the former and current deans of Stanford Law School, Deans Larry Kramer and Liz Magill, for their financial support, and the Stanford Law School alum, Eli Sugarman (J.D., 2009), who acts as an advisor to the project.

The faculty and administration of American University of Iraq in Sulaimani provided invaluable guidance and support throughout the writing process. Asos Askari and Paul Craft in particular

played a leadership role in getting the program off the ground and instituting an introductory law class at AUIS. Ms. Askari taught the first law class in the 2014 spring semester. Former and current presidents of AUIS, Dr. Athanasios Moulakis and Dr. Dawn Dekle, have provided unwavering support to the project. And finally, a special thanks to Dr. Barham Salih, founder and Chair of AUIS, without whose foresight and vision this project would not have been possible.

Finally, the authors of this series of papers owe an extraordinary debt of gratitude to many thoughtful Kurdish judges, educators, lawyers, and others who work within Iraqi institutions for their critical insights. In particular, the textbooks received vital input from Rebaz Khursheed Mohammed, Karwan Eskerie, and Amanj Amjad throughout the drafting and review process, though any mistakes are solely the authors' responsibility.

ILEI plans to continue publishing working papers through 2014. All texts will be published without copyright and available for free download on the internet.

To the students, educators, legal, and government professionals that use this set of working papers, we sincerely hope that it sparks study and debate about the future of Iraqi Kurdistan and the vital role magistrates, prosecutors, public defenders, private lawyers, and government officials will play in shaping the country's future.

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# THE CONSTITUTIONAL LAW OF IRAQ

*We, the people of Iraq, of all components and across the spectrum, have taken upon ourselves to decide freely and by choice to unite our future, to take lessons from yesterday for tomorrow, and to enact this permanent Constitution, through the values and ideals of the heavenly messages and the findings of science and man's civilization. The adherence to this Constitution preserves for Iraq its free union of people, of land, and of sovereignty.*

- Preamble, The Constitution of the Republic of Iraq of 2005

## I. INTRODUCTION

Sinan, a prominent farmer and local leader, has realized that agricultural growth and economic development in his community will not be possible without increased investment and reform of Iraq's water resource laws. Yet, he is not sure how such a major reform can be achieved. By looking at Iraq's Constitution, the subject of this paper, Sinan can learn about the basic **structures** and **institutions** of government that are responsible for enacting and implementing such reforms.

For example, Sinan and other farmers may ask their current representative to the Council of Representatives, Iraq's national **legislature**, to work with other representatives towards adopting a new law governing water resources. In response to the demands of their **constituents**, these representatives may consider passing a law that deals with water reform. However, the representatives must coordinate with the Prime Minister, the leader of the **executive** branch, who under the Constitution is responsible for **proposing legislation**. The Council of Representatives would then vote on the proposed law, and if a majority voted in favor, the law would be **enacted**.

Yet the enactment of the law is just the beginning of a process that has many steps. The **implementation** of the law is left up to the various **ministries**, also part of the executive branch. In this situation, the Ministry of Water Resources would be responsible for making sure that the various provisions of the enacted law are being implemented. Also, it is likely that disputes or ambiguities regarding the law may arise. For example, Sinan may disagree with other farmers over whether the law requires them to pay increased fees for use of water resources. These disputes would be resolved by the courts, the **judicial** branch of Iraq's government, that are responsible for interpreting the law and applying it to particular situations.

Of course, all of these steps are dependent on Sinan's representatives working to achieve the reforms that Sinan and the other farmers are hoping for. But Sinan is not powerless in this situation. As the Constitution makes clear, Iraq's government is a **representative democracy**, where the ultimate political power is with the people. Sinan can join with others in his community to **elect** new representatives in the scheduled parliamentary elections who will be

more responsive to their needs. The Constitution describes in detail the process for electing new representatives, which is central to the effective functioning of a democratic government.

As this example demonstrates, constitutional law is not simply an academic or theoretical field. Many questions about constitutions certainly are abstract: How should a government be best structured? What sorts of rights should citizens be entitled to? Which parts of government are responsible for which activities? What are the primary cultural and social values in a particular country? Yet a constitution is also the basic outline of the laws and government of a society. A concrete understanding of the constitution allows citizens to have a better idea of how their government operates in relation to the citizens.

### **A. Overview**

This working paper provides an introductory discussion of Iraq's constitutional system, focusing particularly on the primary institutions and actors in Iraq's government. Later papers in this series discuss in greater detail the related subjects of Iraq's federalist structure and the constitution's guarantees of rights and liberties.

After a brief history of Iraq's constitution (**Part II**), this paper focuses specifically on the Constitution's role in structuring the institutions of government and separation of powers (**Parts III & IV**). It then discusses Iraq's system of representation and elections (**Part V**) as an example for how the Constitution works in practice.

Articles of the current Constitution are cited throughout the paper as the foundational law for the actors, institutions and issues discussed. Make sure to familiarize yourself with the general layout of the Constitution, and particularly Section III of the Constitution (Federal Powers), that discusses the structure of the federal government of Iraq.

### **B. What is a Constitution?**

Prior to further exploring Iraq's constitution, a preliminary question must be asked: what is a constitution? Typically and at its basic level, a constitution is a **written document** created by the **people** of a country (usually through elected or appointed representatives) that establishes the country's "supreme" legal principles.<sup>1</sup> In other words, the constitution contains the central concepts of how a country's government will be structured, and how the citizens interact with the government.

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<sup>1</sup> HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 16 (Cambridge University Press, 2011).

You may hear the term “constitution” used on a more conceptual level, however, and not necessarily in relation to the actual document. This is the notion of **constitutionalism**, which is the broader idea that a constitution represents “the system of formal and informal rules that regulate the political order.” In this sense, a constitution is not just a legal document but also a set of ideas that describe and guide a country’s political system and values. These rules derive from various legal and non-legal sources, from judicial interpretation to local conventions and custom.<sup>2</sup>

Constitutions are created for a variety of purposes, and may serve several roles depending on the particular context of the country and society. An important purpose of constitutions, particularly in recent decades, has been the facilitation of peace after a conflict, whether external, as in the case of international armed conflicts, or internal, as in the case of civil wars. For example, South Africa passed a new constitution in the mid-1990s to facilitate the resolution of the internal conflicts related to the end of apartheid.

Another significant function of constitutions is that it is the basic law establishing the institutional structures of government. Democratic constitutions often do this in two primary ways. First, an effective constitution will set up a system of **separation of powers** to regulate the balance of power *between* different branches of the government. For example, it makes sure that no one branch of government, such as the Prime Minister or the Parliament, has too much power. On the other hand, a constitution may also explicitly protect the freedom and liberty of individual citizens *against* the government, often in the form of a **bill or charter of rights**, as in Section Two of Iraq’s Constitution. These sections of Constitutions usually describe certain rights of citizens, such as the freedom to express opinions or the right to vote, which cannot be violated by the government.

Finally, as referenced above, constitutions can play a political, non-legal, role by expressing the common aspirations and shared norms of a nation or people.<sup>3</sup> More than setting up a country’s basic legal framework, constitutions can represent a people’s political and cultural beliefs. This theory of constitutionalism argues that constitutions are most important for their **symbolic value** in uniting a people behind a certain set of political and social ideals.

### Discussion Questions

1. Do you think that any of the constitutional roles discussed above are more important than the others?
2. Is it possible for a constitution to fulfill all these roles, or must the creators of a constitution

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<sup>2</sup> *Id.* at 15 (quoting Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1961)).

<sup>3</sup> Lerner, *supra* note 1, at 18.

need to have one primary purpose?

3. Can you think of a situation where these different purposes would conflict?

Before discussing Iraq's current constitutional system in greater detail, the next section will outline the history of constitutionalism in Iraq. It is important to keep the following historical and political context in mind when considering the strengths, weaknesses and ambiguities of the current system.

## II. IRAQ'S CONSTITUTIONAL HISTORY IN BRIEF

This section will only briefly recount the history relevant to our study of the current constitutional structure in Iraq, although further historical study into the political and social context of these events is highly recommended. As discussed in the Introduction, Iraq's modern constitutional history can be broken up into three phases prior to the adoption of the 2005 Constitution: (1) the "monarchical" state, from 1925-1958, governed by the 1925 Constitution; (2) the nationalist or socialist "one-party" state, from the 14 July Revolution in 1958 through the American occupation in 2003, governed by a series of "provisional constitutions"; and (3) the transitional period, governed by the Law of Administration for the State of Iraq for the Transitional Period (TAL). As you read about the various constitutions of Iraq over the last century, think about whether you agree with some scholars who have observed that Iraq has had a "troubled constitutional history."<sup>4</sup>

### A. The 1925 Constitution and the Monarchical State

The first "modern" constitution of Iraq can be traced to the Cairo Conference in March 1921, convened by Winston Churchill, the newly appointed colonial secretary overseeing British relations with its Iraqi mandate.<sup>5</sup> The British government decided to import their contemporary form of constitutional monarchy and parliamentary democracy to Iraq, choosing Faisal ibn Hussein as the King of Iraq.<sup>6</sup> The resulting 1925 Constitution has been described as Iraq's "only legitimate, permanent constitution" prior to the current constitution,<sup>7</sup> but it also must be viewed as a compromise between the British desire to have strong power concentrated in the King and an understanding that Iraqi people wanted a democratic form of government.<sup>8</sup>

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<sup>4</sup> Feisal Amin al-Istrabadi, "Reviving Constitutionalism in Iraq," 50 *New York Law School Law Review* 269, 269 (2005-2006).

<sup>5</sup> Charles Tripp, *A History of Iraq* 45-46 (Cambridge University Press, 2007).

<sup>6</sup> Adeed Dawisha, *Iraq: A Political History from Independence to Occupation* 12-14 (Princeton University Press, 2009).

<sup>7</sup> Al-Istrabadi, *supra* note 4, at 269.

<sup>8</sup> Tripp, *supra* note 5, at 56.

The constitution essentially created two branches of government: an executive branch centered in the King, and a legislative branch composed of the two houses of Parliament. Yet the King was granted the power to unilaterally dissolve parliament, to select the prime minister, agree to all laws before passage, and issue ordinances on important matters when the parliament was not in session. Thus, while the constitution appeared to establish a parliamentary system, the King essentially controlled the policy-making power of the government.<sup>9</sup>

Yet the parliament still had the power to propose laws.<sup>10</sup> The parliament was able to score some “tangible successes,” forcing the government to adopt some of its ideas or remove a minister.<sup>11</sup> The nationalist members of the parliament in particular sought to strengthen the democratic nature of the constitutional system—for example, they initiated a long, heated debate over the approval of a treaty that the British had hoped would be passed quickly.<sup>12</sup> Over time, however, the government consolidated significantly within the executive power of the King, as he gained increasing control over parliament and the electoral process.<sup>13</sup>

### History in Context

As you later read about the current Constitution’s framework for separating power between the various branches of government, keep in mind this early division between the King and Parliament. Consider the differences between the approaches of the 1925 Constitution and the current Constitution.

## B. The One-Party State and an Absence of Constitutionalism

The July 1958 Revolution by the Free Officers, led by General ‘Abd Al-Karim Qasim, ended the monarchical period and announced the birth of the Iraqi Republic.<sup>14</sup> The 1958 Revolution also canceled the 1925 Constitution, and led to an era marked by the failure of constitutionalism. The series of interim and provisional “constitutions” utilized words of democracy, peoples’ fundamental rights, and equality before the law, but according to scholars, none of these democratic initiatives “would come to fruition.”<sup>15</sup> For example, consider the following excerpt:

Since 1958 five “interim” constitutions have been promulgated. All were issued in the wake of the military coups that brought army officers or narrow political parties to power.

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<sup>9</sup> Dawisha, *supra* note 6, at 16.

<sup>10</sup> Tripp, *supra* note 5, at 57.

<sup>11</sup> Dawisha, *supra* note 6, at 59.

<sup>12</sup> *Id.* at 52-53.

<sup>13</sup> *Id.* at 56.

<sup>14</sup> *Id.* at 171.

<sup>15</sup> Dawisha, *supra* note 6, at 194.

Short- term considerations of personal or party political self-interest were by and large the shaping force behind each "interim" constitutional initiative.<sup>16</sup>

Unlike the 1925 and current constitutions, these provisional constitutions were subjected to almost no discussion outside of the Cabinet, and were not a product of any debate or referendum.<sup>17</sup> Furthermore, "supreme executive power" was given to the Revolutionary Command Council, and especially the President: he had the power to appoint the Premier and Cabinet, all judges and civil servants, declare martial law and a state of emergency, and even cancel existing legislation by presidential decree. This expansion of power is made clear by the fact that in the 1964 interim constitution, 21 of the 105 articles addressed the powers of the President, while only three dealt with the role and responsibilities of the legislative branch.<sup>18</sup>

The provisional constitutions during the one-party state period also allowed the government to cancel or modify "fundamental" individual rights. For example, consider the following excerpt from the 1970 provisional constitution, which remained in effect, with certain amendments, until the Saddam Hussein regime was ousted in 2003.

#### **Interim Constitution of 1970**

##### **Article 26 [Expression, Association]**

The Constitution guarantees freedom of opinion, publication, meeting, demonstrations and formation of political parties, syndicates, and societies in accordance with the objectives of the Constitution and within the limits of the law. The State ensures the considerations necessary to exercise these liberties, which comply with the revolutionary, national, and progressive trend.

While Article 26 appears to be protecting individuals' freedom of expression, association and opinion, the second sentence indicates that any such freedom can be restricted by the State to ensure it complies with "revolutionary" and "progressive" ends. Similarly, consider the following excerpt from a 1977 law "interpreting" the constitutional concept of democracy.

#### **Ministry of Justice Committee Report regarding Law No. 35 of 1977<sup>19</sup>**

The people as interpreted by the Revolution and the Leading Party, the Arab Ba'ath Socialist Party, is all the members of the society who enjoy equal rights and equal duties. But in exercising democracy . . . [I]t is inevitable to exclude all persons who take a political, economical or intellectual attitude hostile to the Revolution and its programme. The status of

<sup>16</sup>Final Report on the Transition to Democracy in Iraq, Democratic Principles Work Group 6 (2002), available at <http://www.iraqfoundation.org/studies/2002/dec/study.pdf>.

<sup>17</sup>*Id.* at 195.

<sup>18</sup>Dawisha, *supra* note 6, at 195.

<sup>19</sup> Final Report on the Transition to Democracy in Iraq, *supra* note 16, at 6.

such people shall be defined [and] revolutionary political consciousness shall play a decisive role in immunizing public opinion towards them. This being an exceptional case created by the necessity of transforming society.

While a National Assembly existed and was in theory supposed to propose and draft laws, confirm budgets and debate all aspects of domestic and foreign policy, its jurisdiction was “restricted to endorsing polices and enacting laws submitted to it by the [Revolutionary Command Council].”<sup>20</sup> For further historical analysis of the Ba’athist period, see the Introduction.

### C. The Transitional Period and the Adoption of TAL

After the removal of the Saddam Hussein regime in 2003, “[c]onstitutionalism had so receded . . . that the concept of constitutionalism itself had entirely disappeared.”<sup>21</sup> On March 8, 2004, all twenty-five members of the Iraqi Governing Council signed the **Transitional Administrative Law (TAL)**, which had been approved by consensus.<sup>22</sup>

The TAL divided the transitional period into two phases. The first was the interim government phase, which began June 30, 2004, when the **Coalition Provisional Authority (CPA)** transferred sovereignty to the Iraqi government. The second was the transitional government phase, which was to begin after elections for the Transitional National Assembly were held and the transitional government was formed.<sup>23</sup> The TAL intended that the Transitional National Assembly would draft a permanent constitution that would be offered to the Iraqi people in a referendum.

#### **Transitional Administrative Law**

##### **Article 3.**

(A) This Law is the Supreme Law of the land and shall be binding in all parts of Iraq without exception. No amendment to this Law may be made except by a three-fourths majority of the members of the National Assembly and the unanimous approval of the Presidency Council. Likewise, no amendment may be made that could abridge in any way the rights of the Iraqi people cited in Chapter Two; extend the transitional period beyond the timeframe cited in this Law; delay the holding of elections to a new assembly; reduce the powers of the regions or governorates; or affect Islam, or any other religions or sects and their rites.

(B) Any legal provision that conflicts with this Law is null and void.

<sup>20</sup>Dawisha, *supra* note 6, at 230.

<sup>21</sup> Al-Istrabadi, *supra* note 4, at 270.

<sup>22</sup>*Id.* at 271.

<sup>23</sup>Article 2 of TAL, available at <http://www.au.af.mil/au/awc/awcgate/iraq/tal.htm>. See also, *Iraq’s Transitional Law*, UNITED STATES GENERAL ACCOUNTING OFFICE 2 (May 25, 2004), available at [www.gao.gov/new.items/d04746r.pdf](http://www.gao.gov/new.items/d04746r.pdf).

(C) This Law shall cease to have effect upon the formation of an elected government pursuant to a permanent constitution.

### Discussion Question

Note that Article 3 of the TAL *prohibits* amendments to the law regarding certain rights and institutions. Why do you think the drafters of the TAL decided to make these specific areas immune from amendment? Do you think that they omitted other areas that also should have been protected?

In January 2005, the Transitional National Assembly was elected, and it appointed a Constitutional Committee that immediately began to draft a permanent constitution. On October 15, 2005, the Constitution was approved in a national referendum.<sup>24</sup> While the TAL no longer had effect after the adoption of the permanent constitution in 2005 under Article 61 of the TAL, the TAL's government structure and fundamental rights were imitated in many ways by the current constitution. Furthermore, certain articles of the TAL, such as Articles 53(A) and 58, remain in force. Therefore, you will learn much about the current constitutional structure of Iraq by reading through the entirety of the TAL, which in some sense served as a blueprint for the 2005 Constitution.

### D. Summary

As you can see, Iraq has experienced several distinct phases of constitutionalism over the last century. While these constitutions are no longer in force due to the enactment of the 2005 Constitution, it is important to continue to keep them in mind. In particular, consider how the provisions of the current Constitution differ from or are similar to provisions in past Iraqi constitutions. The past constitutions provide valuable lessons on how to – and how *not* to – structure state institutions, separate power among branches of government, and protect the fundamental rights of citizens.

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<sup>24</sup> “Iraqi Constitution Passes, Officials Say,” *CNN* (Oct. 25, 2005), <http://www.cnn.com/2005/WORLD/meast/10/25/iraq.constitution/index.html>.

### III. THE STRUCTURE OF IRAQI GOVERNMENT

#### A. Overview

Keeping the previous background in mind, we will now explore Iraq’s current Constitution in greater detail. As stated in **Part I** above, a primary function of constitutions is to set forth the structure of a nation’s government and to describe the responsibilities of each governmental body. In the various sub-Parts that follow, we will learn about these different bodies and how they interact with each other.

Section One of the Constitution presents a list of “fundamental principles.” The majority of these principles relate to social, cultural or religious issues, as well as security concerns that are specific to the context within which the constitution was drafted. The first Article, however, is highly relevant to the more detailed discussion of government institutions and structure in Section Three of the Constitution, as it lays out the fundamental character of the Iraqi state.

#### Constitution of Iraq

##### Article 1:

The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.

Several fundamental concepts central to Iraq’s constitutional system are presented in the short text of Article 1. While these concepts are too complex to be fully defined in a short explanation, the definition box below provides a basic grasp of the concepts in order to better understand the more detailed discussion of Iraqi government that follows.

Several other Articles in the first section also describe important concepts specifically related to Iraq’s legal and political framework. In particular, the Constitution makes clear that the government is accountable to the people and the law, and that transfers of governments must happen democratically.<sup>25</sup> It also contains a **supremacy clause** in Article 13, which means that the Constitution is the “supreme law” and that no other law can be passed which violates it. Keep these fundamental principles in mind when thinking about the structure of power and institutional arrangements discussed below.

#### Important Definitions

<sup>25</sup> Articles 5-6.

**Democracy:** A government in which the supreme power is held by the people, usually through voting for representatives in periodic free elections. Democracies may differ in how they structure their governments and elections.

**Federal state:** In a federal state, there is division of powers between the national (“central” or “federal”) government and the governments of the individual subdivisions of the state (in Iraq, the regions and/or governorates). The theoretical and practical implications of federalism are lengthy and complicated, and thus are discussed separately in a following working paper.

**Parliamentary:** A parliamentary system is a system of democratic government where the ministers of the executive branch are accountable, and often appointed, by the Parliament (i.e., the legislative branch). The parliamentary system can be contrasted to a presidential system, where the executive officers are neither part of nor appointed by the legislative branch.

**Republican:** While the term “republic” may refer to a diverse set of political philosophies and governmental arrangements, its basic meaning is simply a system of government where the head of state is not a monarch.

**Representative democracy:** A representative democracy can be contrasted against a *direct* democracy. Under the direct system, the people themselves are responsible for passing laws and regulations. Very few countries have any system of direct democracy. In a representative democracy, however, the people directly or indirectly elect representatives and other officials who are tasked with the responsibility of governing the State. In a representative system, the people do not have day-to-day control over public affairs, but have the “last word” through elections.

**Sovereign:** Sovereign refers to an entity having supreme political power. In older forms of government, the sovereign could be a king or queen. In modern democracies, the *people* are considered sovereign, as they have the ultimate power to elect and remove governments. Sovereignty is also an important concept in international relations, as sovereign nations refer to those independent states that compose the international community of nations.

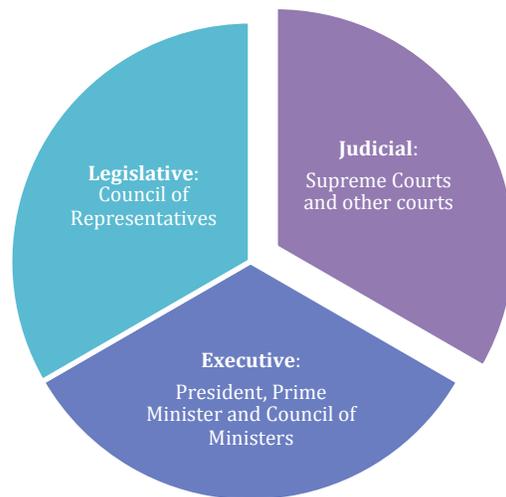
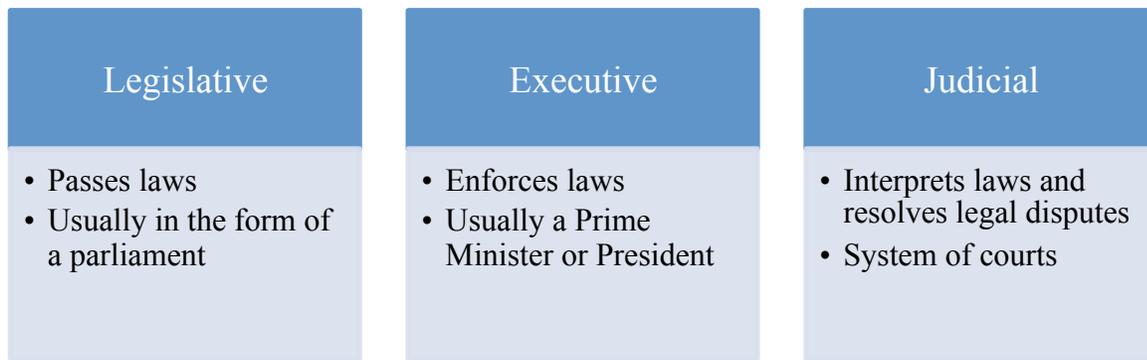
## **B. Separation of Powers**

Many constitutional scholars consider the **separation of powers** to be one of the fundamental building blocks, along with judicial protection of individual rights, of an effective constitutional

system.<sup>26</sup> This concept may be traced back to the writings of Montesquieu, an 18<sup>th</sup> Century French political philosopher. Montesquieu believed that in order to prevent a government from becoming despotic and wielding absolute power, a system needed to be created where different bodies exercised different powers.<sup>27</sup> Article 47 of Iraq’s Constitution makes clear that all the federal powers should be exercised “on the basis of the principle of separation of powers.”

The primary powers in a government are the **legislative, executive and judicial** powers. These basic powers are very important to any system of democratic government, and thus each federal power has its own section in the Constitution. The figure below sets out the basic concepts of these powers, and how they are institutionally structured in Iraq’s Constitution.

**Figure 1: Legislative, Executive and Judicial Powers in Iraq**



<sup>26</sup>See e.g., Ebrahim Afsah, “Constitution-Making in Islamic Countries—A Theoretical Framework,” in *Constitutionalism in Islamic Countries* (Oxford University Press, 2000).

<sup>27</sup> Hilary Bok, "Baron de Montesquieu, Charles-Louis de Secondat", *The Stanford Encyclopedia of Philosophy* (Spring 2010 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2010/entries/montesquieu/>.

The point of creating a Constitution centered on separation of powers is to create a system where each part of the government **checks and balances** each other part of government. What this means is that no branch of government has too much power because they need the cooperation of other branches in order to pass and implement laws. For example, as we will see, the legislative power (Council of Representatives) cannot pass laws without the approval of the executive power (Prime Minister and the Presidential Council). But the Prime Minister is himself appointed by the Council of Representatives. Similarly, the judicial power interprets the laws when they hear cases, but the judges in the judicial power are to be appointed under law approved by both the Council of Representatives and the Prime Minister. Moreover, that laws that the courts apply are imposed and can be amended by the Council of Representations – so when the courts make a decision that the legislature does not approve of, it can change the underlying law for future cases.

As you can see, each branch of government is dependent to some extent on the other branches. In this sense, each government body “checks” the power of other governmental bodies. The idea is that requiring the different parts of government to contend with each other and work together would lead to more thoughtful lawmaking and government administration, ensuring that no single person or group would be able to control the entire process. While reading this paper, however, it is important to remember that there is no one “correct” way to separate power in a government, and that governmental structures vary considerably throughout the world.

### **Horizontal vs. Vertical Separation of Powers**

This paper will focus on the **horizontal** separation of powers, or the separation of powers between actors at the federal level of government. There is another type of the separation of powers—the **vertical** separation of powers—that refers to how power is divided between national and local governments. In Iraq, for example, horizontal separation of powers refers to the division of power within the federal government: between the executive branch, the legislative branch, and the judicial branch. Vertical separation of powers in Iraq refers to the division of power between the federal government, the regional governments, and the governments of the governorates.

This paper will focus solely on the horizontal separation of powers. You can learn more about the vertical separation of powers in Iraq in the federalism working paper.

## IV. IRAQ'S FEDERAL POWERS

### A. The Legislative Power

The legislative branch is the part of the government that makes and approves laws, also known as **legislation**. In democracies, the legislative branch is almost always composed of representatives, organized into one or two “houses,” who are elected by the people in free elections. These representatives meet to introduce and discuss bills, and vote on bills to enact laws.

Article 48 of the constitution assigns the federal legislative power to two governmental institutions: the Council of Representatives and the Federation Council. As of early 2013, the law regulating the formation and competencies of the Federation Council had not yet been enacted. Therefore, the focus of this sub-Part shall be the Council of Representatives.

The fundamental and primary responsibility of the Council of Representatives is the enactment of federal laws.<sup>28</sup> According to Article 59 of the constitution, laws are passed by the approval of a simple majority<sup>29</sup> of the Council, provided that at least half of the members of the Council are present for the vote. Fifteen days after approving the law and sending it to the President, the law will be considered ratified and it will be enforced after publication in the official gazette.

While the Council's primary responsibility is the enactment of federal laws, Article 61 lists numerous other powers assigned to the legislative branch, including:

- Monitoring the performance of the executive branch;
- Electing the President of the Republic;
- Ratifying international treaties and agreements;
- Approving the appointment of certain executive, judicial, diplomatic and military officers;
- Questioning the President, Prime Minister or any other Minister about policies and performance;
- Initiating withdrawal of confidence procedures against the Prime Minister or any other Minister;
- Consenting to the declaration of war and state of emergency; and
- Approving the draft general budget bill submitted by the Council of Ministers (Article 62).

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<sup>28</sup> As discussed in working paper on federalism, the legislative powers of the Council of Representatives are limited to enacting laws within the federal government's exclusive authorities (Article 110) or shared authorities (Article 114). Other areas of legislation and regulation are devolved to the governments of the regions and governorates (Article 115).

<sup>29</sup> A simple majority means “a majority in which the highest number of votes cast for any one candidate, issue, or item exceeds the second-highest number, while not constituting an absolute majority.” Oxford Dictionaries (2013).

### Reading Focus

Read Articles 61 and 62, and think about why these additional powers were delegated to the legislative power. In your opinion, does the constitution provide the Council of Representatives sufficient authority to “check and balance” the other branches of government, and in particular, the executive branch?

The Council of Representatives is given the discretion to establish its own bylaws, internal procedures, and leadership institutions (Articles 51, 52, 53 and 63). The constitution also establishes procedures for dissolving the Council prior to the expiration of its electoral term, either upon a majority vote of the Council itself, or upon the request of the Prime Minister and President (Article 64). The provisions of the constitution relating to the election of members of the Council of Representatives are discussed below in further detail in **Part V**.

#### **B. The Executive Power**

The executive branch of a government is generally assigned the power to enforce the law enacted by the legislative branch, and to ensure the laws are carried out as intended. The executive branch of the national Iraq government is composed of the President and the Council of Ministers, which is headed by the Prime Minister.

##### 1. The President of the Republic

The President of Iraq is “the Head of the State and a symbol of the unity of the country and represents the sovereignty of the country” (Article 67). The President is to be elected from nominees who satisfy the eligibility conditions of Article 68 by a two-thirds vote of the Council of Representatives. The President is elected to a term of four years, and is limited to serving only two terms.

The President is granted a great deal of powers in Article 73, although many of these powers are largely symbolic or ceremonial. The most important powers the President holds are to call the Council of Representatives to convene, and to designate the Prime Minister and charge him to form a government (Article 76).

##### 2. The Council of Ministers and the Prime Minister

The Prime Minister is “the direct executive authority responsible for the general policy of the State and the commander-in-chief of the armed forces” (Article 78). The Prime Minister directs

the Council of Ministers, presides over its meetings, and may dismiss any Minister with the consent of the Council of Representatives.

The Council of Ministers is responsible for planning and executing the general policies and plans of the State and overseeing the work of the national ministries and departments. The Council is made up of the heads of the various national ministries, and must be appointed by the Prime Minister and approved by the Council of Representatives. Ministries are the primary administrative units of the national government, which are responsible for executing the laws and implementing policies through regulations and instructions. Some particularly prominent ministries include the Ministry of Defense, the Ministry of Foreign Affairs, and the Ministry of Oil. The ministries are particularly important because they structure much of the day-to-day policy in a variety of areas.

In addition to its general planning and execution of State policy, the Council of Ministers has the following additional powers under Article 80:

- Proposing bills;
- Issuing rules, instructions, and decisions in order to implement the law;
- Preparing the draft of the general budget, the closing account, and the development plans;
- Recommending to the Council of Representatives the appointment of various executive, diplomatic, and security officials; and
- Negotiating and signing international treaties and agreements.

Article 76 of the Constitution describes how the Prime Minister and the Council of Ministers are to be appointed and selected. This appointment process is a good example of the principle of separation of powers. The Prime Minister must be nominated by members of the Council of Representatives. Similarly, the Prime Minister's choice of Ministers must be approved by a majority vote of the legislature. At the same time, the Council of Ministers will often be the source of proposed legislation that the Council of Representatives will act upon, and is responsible in the end for implementing the enacted laws. This dependent relationship between the two branches is a good example of how both the executive and legislative branches are empowered to check and balance each other.

#### **Constitution of Iraq**

**Article 76:**

First: The President of the Republic shall charge the nominee of the largest Council of Representatives bloc with the formation of the Council of Ministers within fifteen days from the date of the election of the President of the Republic.

Second: 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.

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

Fourth: 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.

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

### Law in Context

According to John McGarry and Brendan O’Leary in their 2005 article on the nature of Iraq’s constitution, *Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription*, the federal executive power in Iraq is exercised through a “hybrid presidential-parliamentary executive.”<sup>30</sup> What they mean is that Iraq does not have a simple parliamentary executive system, where the Prime Minister is the head of the majority of the parliamentary. Instead, in Iraq, the President is responsible for charging the nominee of the largest bloc to become Prime Minister, and the President must be elected by a two-thirds majority (Art. 76). By **vesting** some appointment power over the Prime Minister in the President, the authors argue that Iraq’s executive represents a broader representation than a simple majority.

However, many critics have argued that the executive branch has become dominated by the Prime Minister, and that the increased strengthening of this office at the expense of other government actors may do harm to Iraqi’s constitutional system. Do you agree or disagree with these commentators regarding the power of the Prime Minister’s office? Based upon your reading of the constitution, do you think its drafters intended for power to be shared between the President and Prime Minister, as claimed by McGarry and O’Leary, or do you think they had a preference for a strong Prime Minister and a weaker President?

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<sup>30</sup> John McGarry & Brendan O’Leary, “Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription,”*5 International Journal of Constitutional Law* 670

### C. The Judicial Power

The primary function of the judiciary in any legal system is to *adjudicate and resolve legal disputes*. For example, if Kamil wants to bring a claim against Asos for violating a contract, he must bring the dispute in front of a judge to be resolved. Similarly, if the government wants to punish Kamil for a crime, it must prosecute him in a court of law.

Another important function of the judiciary, related to the concept separation of powers, is that the judiciary must *interpret* the laws, including even the Constitution. This means that when the law is unclear as to how it applies in certain situations, judges are responsible for deciding. For instance, imagine that the legislative branch passes a law stating: “No vehicle may be brought into the public parks.” After this law is passed, Hawre is fined for violating the law when he brings his bicycle into a public park. If the law does not itself define what a “vehicle” is, a judge must determine whether a bicycle qualifies as a vehicle, or if the law is referring only to other vehicles like cars. This judicial role is central to democratic government and the rule of law.

#### 1. Judicial Independence

Judicial independence is widely considered to be the foundation of the rule of law in any country. While there is no exact definition of judicial independence, it has three main components. First, judges must be **impartial** – this means that judges must make their decisions based on the law, rather than their personal interests or political beliefs. Second, judicial decisions must be **respected**. Once a final decision is made, other parties must accepted the decision as binding especially the other branches of government. Lastly, judges must be **free from interference**. To effectively carry out the judicial functions described above, judges must not be subject to political pressure or influence by the parties. The best way to establish judicial independence is to “insulate,” or separate the judicial power from the other branches of government. This separation of the judiciary is a fundamental aspect of the separation of powers in modern constitutions.

The concept of judicial independence is strongly recognized in the Iraqi constitution. In particular, Articles 87 and 88 make clear that the judicial power is “independent” and that there is no authority over judges “except that of the law.” This means that judges are to be free from interference by other branches of government or other political actors when adjudicating legal disputes or interpreting the law.

#### Discussion Questions

1. Note that Articles 87 and 88 do not specify how judicial independence should be maintained. In fact, Article 96 states that a law shall be passed to regulate the establishment of the courts and the “methods of appointing and terms of service” of

judicial officials. Do you think that the constitution could or should have provided more details regarding the protection of judicial independence? Does Article 96 give the Council of Representatives too much power to interfere in the judiciary, or does it appropriately endorse separation of powers?

2. Article 98 prohibits judicial officers from joining a political party or maintaining any other employment. In some countries, judges are appointed for life, and removable only for serious misconduct. In others, judges are chosen by independent commissions, outside of the normal political process. What do you think are the best policies and procedures for striking the correct balance between judicial independence and democratic accountability?

Despite the Constitution's emphasis on judicial independence, commentators have disagreed over the degree of independence enjoyed by Iraqi judges.<sup>31</sup> As the laws regulating the judicial power develop and are enacted, it will be important to evaluate whether judges are being protected sufficiently from the other branches of the government.

## 2. Judicial Review

Another increasingly important role of the judicial power, particularly in the context of separation of powers, is **judicial review**. Judicial review refers to the power of the judiciary to overturn laws and regulations approved by the legislative and executive branches when they conflict with the provisions of the constitution.<sup>32</sup>

The Iraqi constitutional system has adopted the principle of judicial review by establishing the Federal Supreme Court. Under the Constitution, the Federal Supreme Court has the primary power to interpret the constitution and determine the constitutionality of approved laws and regulations. Importantly, decisions of the Federal Supreme Court are "final and binding on all authorities" (Article 94). In addition, the Federal Supreme Court has authority over other types of disputes, notably those arising between the federal government and the regional and/or governorate governments.

### Constitution of Iraq

#### Article 93:

<sup>31</sup> For a positive analysis of the independence of Iraq's courts, see Charles P. Trumbull IV & Julie B. Martin, *Elections and Government Formation in Iraq: An Analysis of the Judiciary's Role*, 44 *Vanderbilt Journal of Transnational Law* 331 (2011) (finding that "Iraq's judiciary is emerging as a reliable, independent, and neutral arbiter of disputes"). For a more negative view, see Norah al-Molhim, "War Against Activists: Coopting "Justice" and the Lack of Judicial Independence," *Jadaliyya* (18 Jul. 2012).

<sup>32</sup> Note that in some countries, judicial review refers to the broader concept of courts reviewing the legality of secondary legislation and administrative law. Here, we describe the more limited concept of judicial review of the constitutionality of enacted laws and regulations.

The Federal Supreme Court shall have jurisdiction over the following:

First: Overseeing the constitutionality of laws and regulations in effect.

Second: Interpreting the provisions of the Constitution.

Third: Settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal to the Court to the Council of Ministers, those concerned individuals, and others.

Fourth: Settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations.

Fifth: Settling disputes that arise between the governments of the regions and governments of the governorates.

Sixth: Settling accusations directed against the President, the Prime Minister and the Ministers, and this shall be regulated by law.

Seventh: Ratifying the final results of the general elections for membership in the Council of Representatives.

Eighth:

A. Settling competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region.

B. Settling competency disputes between judicial institutions of the regions or governorates that are not organized in a region.

Judicial review is particularly robust in common law<sup>33</sup> countries like the United States, where even a lower court may overturn a federal law passed by the Congress. In other countries, like the United Kingdom however, judicial review of the constitutionality of statutes is essentially non-existent (although it has become more of an issue since the UK joined the European Union).

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<sup>33</sup> Common law is a type of law “based upon judicial decisions and embodied in reports of decided cases.” ENCYCLOPEDIA BRITANICA (2013). It is different from a civil law system, which is generally written down in a legal code. For more on the distinction between the two systems, *see* The Common Law and Civil Law Traditions, UC-Berkeley, <http://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf>.

There are two primary institutional models of judicial review: the *decentralized* model and the *constitutional court* model.<sup>34</sup> Under the first model, any court in the country may decide the constitutionality of a statute or regulation, often in the context of normal legal proceedings and lawsuits. This institutional arrangement is most often found in common law countries like the United States, India, etc.

The second model, however, assigns the power of judicial review to a specialized institution often called the constitutional court. This court has the sole authority to determine whether a law or regulation complies with the constitution. Within these two models, of course, countries have instituted a range of variations as to the actual procedures of judicial review. The Constitution's provisions regarding the Federal Supreme Court mean Iraq is closer to the constitutional court model than the decentralized model.

### Resolving Constitutional Ambiguities

Article 76 does not provide clear guidance on how the President should determine the “largest Council of Representatives bloc” for the purposes of appointing the Prime Minister. This lack of constitutional guidance is an important example of how the Supreme Court, and the judicial power in general, is called upon to interpret the Constitution to provide greater detail about how the government should be structured.

Following the March 2010 parliamentary elections, various political groups argued for different interpretations of the Article. Some parties claimed that the largest bloc is simply the electoral list that received the most seats in the election. Others argued that it referred to the largest coalition, potentially formed from multiple lists, in the Council of Representatives.

The Federal Supreme Court addressed this uncertainty in its Opinion No. 25 of 2010:

*The Federal Supreme Court construes the term “the largest Council of Representatives bloc” as follows: either the bloc that, after the elections, is composed of one electoral list, which ran for the elections under a specific name and number, and won the largest number of seats; or a bloc that is formed of two or more electoral lists that had contested the elections under different names and numbers, but then grouped together to form a single bloc, which will form a*

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<sup>34</sup> Definitions of the two models of judicial review are drawn from Lech Garlicki, *Constitutional Court Versus Supreme Courts*, 5 International Journal of Constitutional Law 44 (2007); see also Rainer Grote, “Models of Institutional Control,” in *Constitutionalism in Islamic Countries* (Oxford University Press, 2012) (describing the different models of constitutional review in Islamic countries).

*single entity within the Council of Representatives; whichever of the two is highest in number.*<sup>35</sup>

As you may know, the Supreme Court's interpretation of this provision was important for the ultimate formation of the National Alliance government in November 2010, after seven months of negotiation and political conflict following the elections.

Do you think that the Supreme Court correctly interpreted the relevant provisions of Article 76? Why did the drafters of the constitution leave this provision unclear, and do you think it could have been drafted more precisely? More fundamentally, do you think that political questions like these are best decided by the Federal Supreme Court, or would be better left to other actors in the political system?

Aside from the Federal Supreme Court, the constitution specifically lists several institutions of federal legal power in Article 89: the Higher Juridical Council, the Federal Court of Cassation, the Public Prosecution Department, and the Judiciary Oversight Commission. The constitution also provides for other federal courts to be established as specified by law. In addition, Article 121 allows regional governments to create their own courts and systems of judicial power, a topic that will be discussed later in this volume.

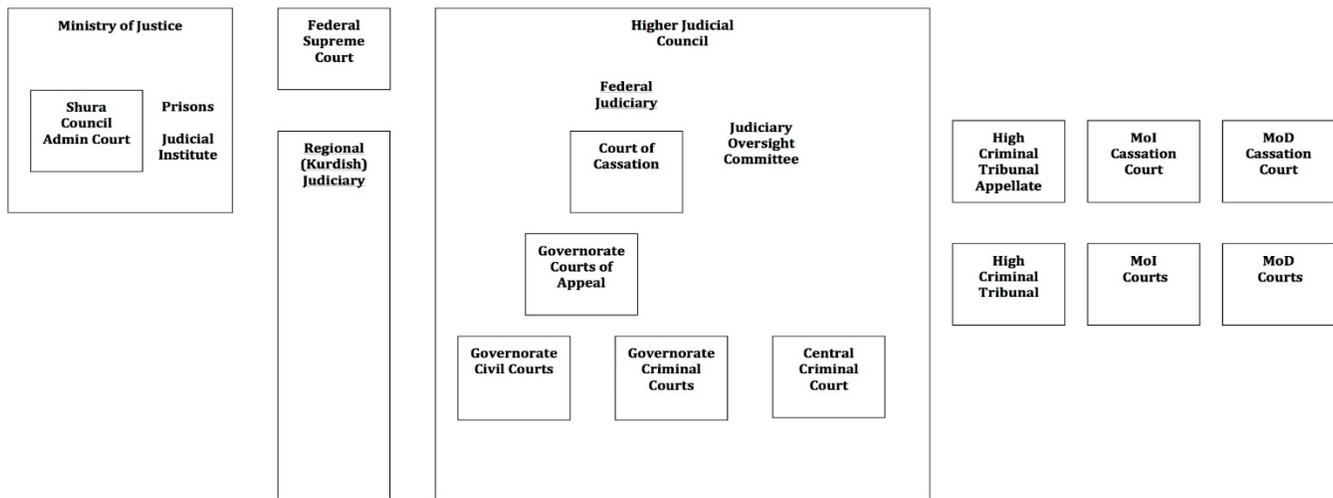
The approximate structure of the current Iraqi judicial system is depicted in Figure 3 below. As of early 2013, the judiciary lacks a single comprehensive law regulating its organization and administration, thus making it difficult to clearly ascertain the exact institutional hierarchy of the courts.<sup>36</sup> Rather, the court system has been established from a variety of legal sources, most important of which are the Judicial Organisation Law No. 160 of 1979 and the Law of Public Prosecution No. 159 of 1979. The current Federal Supreme Court and Higher Judicial Council were established by Coalition Provisional Authority Orders during 2003 and 2004.<sup>37</sup>

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<sup>35</sup>“Federal Supreme Court Opinion on Article 76 of the Constitution Concerning the Nomination of the Prime Minister,” *Global Justice Project: Iraq* (March 28, 2010), <http://gjpi.org/2010/03/28/federal-supreme-court-opinion-on-article-76-of-the-constitution-concerning-the-nomination-of-the-prime-minister/>.

<sup>36</sup>Chibli Mallat, *Iraq: Guide to Law and Policy* 158 (2009) (“The uncertainty . . . reflects an unsettled situation and a fuzzy institutional hierarchy [in the courts].”).

<sup>37</sup>“Judicial Independence,” *Global Justice Project: Iraq*, available at <http://gjpi.org/central-activities/judicial-independence/>.



**Figure 3: Structure of Iraq’s Courts<sup>38</sup>**

Optional Reading: For an informative account of the history of the Iraqi judiciary since Ottoman times and its current organizational structure, read an article by Medhat Mahmoud, the Chairman of the Court of Cassation and President of the Council of Judges at the time of writing: “Judicial System in Iraq,” *Iraqi Judicial Forum* (2004).<sup>39</sup>

#### **D. Independent Commissions**

The constitution provides for the establishment of unique government institutions known as independent commissions. These independent commissions serve as an additional check and balance on government actors outside the traditional tripartite, or three-part, division of powers between the legislative, executive and judicial branches. While these commissions are subject to oversight, either by the legislative or executive branch, they are intended to be administratively independent given the nature of their work.

Some of the independent commissions expressly provided for by the constitution include the High Commission for Human Rights, the Independent Electoral Commission, and the Central Bank of Iraq, which are subject to oversight by the Council of Representatives. Several other commissions provided for by the Constitution are instead subject to oversight by the Council of Ministers. The constitution also allows for the creation of other independent commissions as needed in Article 108.

<sup>38</sup> Adapted from a chart in Mallat, *supra* note 40, at 157.

<sup>39</sup> Available at [http://gjpi.org/wp-content/uploads/2009/01/mahmood\\_2004.pdf](http://gjpi.org/wp-content/uploads/2009/01/mahmood_2004.pdf).

### Discussion Questions

The independent commissions envisioned by the constitution deal with a wide range of issue areas, from human rights to electoral administration to central monetary policy. Why do you think the drafters of the constitution thought that these specific areas required government bodies that were more independent from the rest of the political process? And can you think of other issue areas that might require the creation of independent commissions under Article 108?

Recall from our earlier discussion of separation of powers that the traditional system of checks and balances is divided between the three branches of government: legislative, executive, and judicial. The creation of independent commissions is a unique aspect of the Constitution as these commissions provide further limits on the exercise of government power.

## V. CONSTITUTION IN PRACTICE: ELECTIONS AND REPRESENTATION

*“That elections and political parties are necessary ingredients of democratic governance is accepted as an incontrovertible fact among most political scientists. Modern democracy is almost by definition representative democracy. Elections are a necessary condition of representative democracy. In representative democracy citizens participate in politics primarily by choosing political authorities in competitive elections. Elections, hence, are a necessary and crucial instrument to make democracy work.”*<sup>40</sup>

### A. Elections in Iraq

As discussed earlier, Article 1 of the Constitution strongly emphasizes that Iraq employs a “representative, parliamentary, and democratic” government. To this end, elections are central to Iraq’s constitutional system. Elections are the selection of representatives among various political candidates by a vote of the people. In Iraq, the people are responsible for electing representatives to the Council of Representatives. They are thus also indirectly responsible for electing the Prime Minister and the Council of Ministers, who are chosen from the majority bloc of the Council of Representatives. Furthermore, Iraqis may vote in various regional and governorate elections to elect local political leaders.

The framework for organizing and holding elections is a useful example of the Constitution, and law more generally, in practice. As you will see, the Constitution contains several Articles that provide general guidance about elections. To fill in the details not covered by the Constitution, the Council of Representatives passed electoral laws. And the Independent High Electoral

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<sup>40</sup> G. Bingham Powell Jr., *Elections as Instrument of Democracy* (Yale University Press, 2000).

Commission has been given the power to actually implement the electoral laws and organize elections. Clearly, various institutions throughout the government must work together to achieve successful elections, relying on the fundamental concepts of the Constitution as they do so.

We began our discussion of the structure of Iraqi government in Part III with an exploration of **separation of powers**, in order to understand how authority is shared throughout the various branches of government. In this section, keep separation of powers in mind as you examine the Constitution's provisions related to elections and representation, and subsequent developments of the electoral system through statutory law. Just like the system of checks and balances, the electoral provisions of the Constitution are intended to ensure that the government is provided enough authority to effectively govern without infringing upon the freedom of its citizens

### **B. Constitutional Provisions Relating to Elections**

Article 20 of the Constitution establishes the fundamental nature of elections and voting in the Iraqi political system: "Iraqi citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office." Yet aside from one article dealing with the election of the Council of Representatives, excerpted below, the Constitution is generally silent on the structure and implementation of elections. Like many constitutions, the Iraqi Constitution leaves it to the executive and legislative branches to pass electoral laws, and to the judiciary to ensure that such laws are followed.<sup>41</sup>

#### **Constitution of Iraq**

##### **Article 49:**

First: The Council of Representatives shall consist of a number of members, at a ratio of one seat per 100,000 Iraqi persons representing the entire Iraqi people. They shall be elected through a direct secret general ballot. The representation of all components of the people shall be upheld in it.

Second: A candidate to the Council of Representatives must be a fully qualified Iraqi.

Third: A law shall regulate the requirements for the candidate, the voter, and all that is related to the elections.

Fourth: The elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives.

Fifth: The Council of Representatives shall promulgate a law dealing with the replacement of its members on resignation, dismissal, or death.

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<sup>41</sup>Mallat, *supra* note 40, at 110-11.

Sixth: It is not permissible to combine membership in the Council of Representatives with any work or other official position.

Note that Article 49, the main constitutional provision governing the electoral process of Iraq, leaves essentially all details regarding future elections, including candidate and voter requirements, to later legislation. We will discuss some of these details below in **Part D**. However, Article 49 does include two very important provisions. Most significantly, it establishes the ratio of one representative per 100,000 citizens, and that these representatives will be directly elected by secret ballot. Secondly, the Constitution creates a quota for women representation in the Council of Representatives, though the details of implementation are also left to later electoral laws.

### Discussion Questions

1. Article 93 of the Constitution envisions a role for the Federal Supreme Court in ratifying the results of the general election. Should the Supreme Court approach this responsibility actively, or merely as a formality? Do you think that the courts are the right institution for this responsibility, or that it should be left to independent agencies like the Independent High Electoral Commission?
2. Consider the following quote from the European Commission for Democracy:

“[I]t is not desirable that constitutional provisions go beyond describing the very foundation of the election system and guaranteeing fundamental rights. In order to allow for necessary flexibility, provisions on the administration of the elections and other procedural matters should be left to legislation enacted by the parliament and administrative rules issued by authorised election administration bodies.”<sup>42</sup>

Do you agree that it is better a constitution to only refer to elections vaguely, leaving the actual details to later laws? Is it better to preserve flexibility, as recommended by the quote, or does that lead to the possibility of later abuse and unfairness?

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<sup>42</sup> European Commission for Democracy Through Law (Venice Commission), “The Choice of an Electoral System and the Issue of Stability of Electoral Law in the Light of the Albanian Experience” (Dec. 13, 2012), <http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL%282012%29009-e>.

### C. Free and Fair Elections

As former United Nations Secretary-General Kofi Annan has written, “elections are the indispensable root of democracy.”<sup>43</sup> By choosing their representatives through a regular electoral process, citizens ensure that the government is accountable to the people, and that their interests and aspirations are recognized by those responsible for creating, implementing, and enforcing the laws. Yet simply holding elections is not enough to guarantee democracy—these elections must be inclusive, free and fair.<sup>44</sup> Some of the features recognized as being central to free and fair elections include:

- Opposition organizations and political associations of all types should feel free to organize and campaign without fear;
- The election structure and rules should not specifically favor one candidate;
- Voters should not be intimidated, by physical or other means;
- The voting process should be secret, and voters should trust the ballot results;
- The result of the election should be accepted without violence or disruption.<sup>45</sup>

Remember that these are only some of the significant aspects of a working electoral system, and many democratic countries may not have yet successfully implemented all such features without any problems.

#### Discussion Question

“At its root, electoral integrity is a political problem. Power, and the competition for power, must be regulated. It is not enough for governments to create institutions; politicians must respect and safeguard the independence and professionalism of election officials, judges and courts.”<sup>46</sup>

What is the main point that this quote from the Global Commission on Elections, Democracy, and Security is trying to make? What are some commonsense ideas to protect elections from undue political interference?

### D. The Election Law Framework

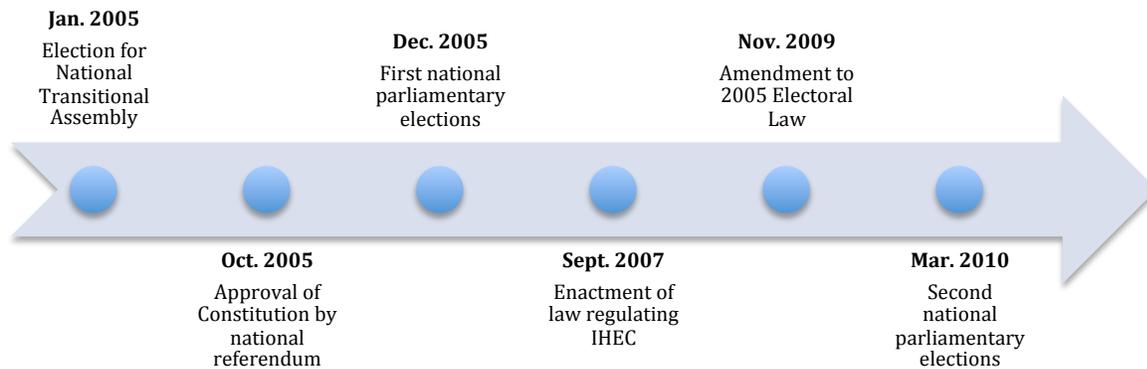
<sup>43</sup> Kofi Annan, “Foreword,” *Deepening Democracy*, Global Commission on Elections, Democracy, and Security 3 (Sept. 2012), available at <http://www.idea.int/publications/deepening-democracy/index.cfm>.

<sup>44</sup> See Ebrahim Afsah, *supra* note 32, 475-76, 497-98.

<sup>45</sup> *Deepening Democracy*, *supra* note 46, at 3-9.

<sup>46</sup> *Deepening Democracy*, *supra* note 46, at 10.

Iraq's electoral system in the last decade has undergone significant legal and political changes, resulting in a complex legal framework. This section will merely provide an overview over the national electoral process in Iraq, leaving much of the highly technical details for those students interested in further, in-depth study.<sup>47</sup> A timeline of the key electoral events is provided below.<sup>48</sup>



In January 2005, Iraqis participated in the first election after the fall of the Saddam Hussein regime, voting for representatives to the Transitional National Assembly, which would draft the permanent Iraqi constitution. This election was held pursuant to **CPA Order No. 96 of 2004**, and contained unique mechanisms and procedures in light of its transitional nature.<sup>49</sup> Later in 2005, however, around the time that the Constitution was approved by national referendum, the Transitional National Assembly enacted the Electoral Law of 2005, which would govern and regulate the upcoming election to the Council of Representatives.

The 2005 Election Law established the basic requirements for voters and candidates, and thus “filled in the gaps” of Article 49 of the Constitution. According to Article 3 of the Election Law, voters must be legally competent Iraqi citizens, over the age of 18 years old, and registered to vote. Candidate requirements are similarly established under Article 6 of the Election Law. Furthermore, Chapter Five (Articles 20 to 26) regulates the manner in which media campaigns are conducted, while Chapter Six (Article 27) establishes criminal offenses for interfering with the electoral process.

<sup>47</sup> Note that this paper only discusses the system relating to national elections for the Council of Representatives. The law governing provincial and district elections in Iraq is the Governorates, Districts and Sub-Districts Election Law No. 36 of 2008, subsequently amended by Law No. 44 of 2008. This law was further revised in August 2012, although its constitutionality has been called into question, *see* Mustafa Habib, “New Law Says No Place for Smaller Political Parties in Iraq,” *Niqash* (Aug. 9, 2012), <http://www.niqash.org/articles/?id=3104>. Elections to the Kurdish National Assembly are governed by a series of amendments to an original regional electoral law. A consolidated version of this law can be found at Global Justice Project: Iraq’s website at <http://gjpi.org/central-activities/elections/>.

<sup>48</sup> For an excellent account of the electoral process in Iraq from 2005 to 2010, see Charles P. Trumbull IV and Julie B. Martin, *Elections and Government Formation in Iraq: An Analysis of the Judiciary’s Role*, 44 *Vanderbilt Journal of Transnational Law* 331 (2011).

<sup>49</sup>*Id.* at 336.

### Law in Context

A provision of the 2005 Election Law that should be highlighted is Article 15, providing for the composition of the electoral districts. It stated that each government “shall be allotted a number of seats proportional to the number of registered voters in the governorate.” After the December 2005 elections, this provision of the Election Law was challenged as unconstitutional for violating Article 49 of the Constitution (excerpted above). The Federal Supreme Court agreed with this challenge, holding in an important decision in 2007 that the Constitution required “the criteria of 1 seat for each 100,000 of the Iraqi population,” rather than the criteria established in Article 15 of the Election Law. The Supreme Court noted that Article 13 of the Constitution requires that “any law that is in contradiction with the constitution...[is] invalid,” and struck down this provision of the Election Law as unconstitutional.<sup>50</sup> This decision by the Federal Supreme Court is a classic example of judicial review, discussed above in **Part IV.C.2**.

The 2005 Election Law thus had to be amended to be in compliance with the Constitution, and in 2009, the Council of Representatives sought to do just that. The 2009 amendments also made significant changes to the electoral list process. In the 2005 elections, candidates were elected via closed lists, where voters only voted for political parties, who determined candidates independently. The 2009 amendments introduced an open list system, which gave voters, rather than political parties, significantly more influence in selecting their representatives, because they could vote for either individual candidates or the party’s electoral list.<sup>51</sup>

These amendments thus established the legal framework for the 2010 parliamentary elections. While the 2010 elections were marked by significant controversy and uncertainty, the legal provisions of the 2009 amendments remain the governing electoral law of Iraq.

#### **E. Delegation: The Independent High Electoral Commission**

Note that the Election Law provides authority to the Independent High Electoral Commission to enact further regulations and implement the law. For example, Article 7 of the Election Law states that nominees shall be “subjected to the approval of the Independent Election Commission,” while Article 3 states that voters should register in accordance with “procedures established by the Independent Election Commission.” This provision of authority by the legislative branch to an administrative agency or commission is called **delegation**.<sup>52</sup>

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<sup>50</sup> Federal Supreme Court Decision 15/2006 regarding the Size and Composition of the Council of Representatives (issued Apr. 26, 2007), available at *Global Justice Project: Iraq*, [http://gjpi.org/wp-content/uploads/tawafuq\\_vs\\_speaker-size-of-cor-eng.doc](http://gjpi.org/wp-content/uploads/tawafuq_vs_speaker-size-of-cor-eng.doc).

<sup>51</sup> Trumbull & Martin, *supra* note 54, at 344.

<sup>52</sup> Note that in the United Kingdom and several other common law countries, delegation may refer not only to the delegation of legislative power to administrative agencies, but also to delegation from a government department or minister to another executive branch official.

Delegation is an important concept in all aspects of government, not just in the electoral context. In most countries, the main legislative body (i.e., the Council of Representatives) does not have the time or the expertise to carry out the details of their laws. Thus, the legislature must provide authority to other actors in the government, whether Ministries or independent commissions, to implement and enforce the law through regulations, guidance, and instructions. The field of law concerning delegation is known as **administrative law**, and is a complex topic not covered here.

The Independent High Electoral Commission implements elections in Iraq, a type of independent commission discussed in **Part IV.D** above. The Council of Representatives established the permanent version of the Commission by law in 2007. The law provides the Commission with the authority to: (1) “promulgate rules” for federal, regional, and local elections and referenda; (2) “oversee,” “organize,” and “conduct” most elections; and (3) coordinate and collaborate with regional bodies to administer their elections (Article 2). The law also provides further detail about the Commission’s functions, administration of elections, complaint mechanisms and reporting requirements in Articles 4, 5, 8, and 9.

The sections most relevant to *constitutional* law, however, are those relating to the appointment and termination of Members to the Commission, contained in Articles 3 and 6 of the law. In particular, consider the discussion question regarding Article 6’s termination provisions below.

### Discussion Question

#### Article 6 (Law No. 11 of 2007)

Membership in the Board of Commissioners shall be terminated for one of the following reasons:

1. If the member's resignation is accepted by the Board of Commissioners in accordance with internal regulations.
2. If the member dies or becomes incapacitated.
3. If a member of the Board of Commissioners is convicted of a dishonoring crime.
4. If the recommendation by a majority of five members of the Board of Commissioners for the removal of one of its members for violating the code of conduct is ratified by a simple majority of the Council of Representatives.
5. The Council of Representatives may relieve the Board of Commissioners of its post in its entirety or in part by an absolute majority vote after violation of a law is proven against them.
6. If it is proven that the information supplied by the member while assuming his post is incorrect.
7. If the seat of any of the members of the Board of Commissioners is vacant for any of the reasons mentioned in Article 6 of this section, he shall be replaced by another member selected with the same mechanism stipulated in Article 3 item 2.

Do you think the restrictions on termination provided for in Article 6 of Law No. 11 of 2007 sufficiently provides for the independence of the High Electoral Commission? In particular, examine items 4 and 5. What do you think should be considered a “violation of law” or of the

code of conduct that justifies removal? Conversely, do you think that the restrictions in Article 6 are too generous to the Commission, and that the Council of Representatives should have more control over the Commissioners?

As provided for in Article 102 of the Constitution, the Independent High Electoral Commission is made subject to the oversight of the legislative branch, i.e., the Council of Representatives. Commissioners are to be appointed by majority vote of the Council, after a review process to be conducted by a specialized committee. Moreover, the Council of Representatives can remove Commissioners, although subject to certain significant restrictions. The law establishing the Independent High Electoral Commission is thus a good example, at least theoretically, of how the Constitution intends independent agencies to remain *independent* of political control while still *accountable* to the people of Iraq through their elected representatives.

#### Law in Context

The answer to the previous question will have important consequences for a current event. In 2012, the head of the Independent High Electoral Commission was arrested and convicted with corruption, which would bar him from life from public service. In late 2012, however, he was acquitted by the Court of Cassation.<sup>53</sup> Similarly, the Governor of the Central Bank of Iraq, another independent commission under the Constitution, was suspended for corruption charges, and the Council of Ministers appointed an acting Governor. Commentators have claimed that the Council of Ministers acted unconstitutionally in both of these instances. For example, a Member of Parliament (MP) and member of the Parliamentary Integrity Committee, claimed: “All the heads of independent bodies who refused to abide by the orders of the executive branch have faced smear campaigns.”<sup>54</sup>

Remember that the Constitution provides for these government bodies to have independent authority and be subject to the *supervision* of the Council of Representatives. How can the laws and implementation be structured to prevent the executive branch, particularly the Prime Minister, from exercising control over these institutions?

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<sup>53</sup> “Iraq ex-electoral chief says cleared of graft,” *Ahram Online* (Oct. 16, 2012), <http://english.ahram.org.eg/NewsContent/2/8/55736/World/Region/Iraq-exelectoral-chief-says-cleared-of-graft-.aspx>.

<sup>54</sup> Oudai Hatem, “Iraq Lawmakers See a Power Grab In Maliki Ouster of Central Banker,” *Al-Monitor* (Oct. 18, 2012), <http://www.al-monitor.com/pulse/politics/2012/10/central-bank-head-arrest-warrant-stirs-up-old-divisions-in-iraqs-parliament.html#ixzz2KXNLGVbB>.

## **F. Summary**

This Part is not intended to fully cover the highly technical and detailed field of election law. Rather, the electoral system of Iraq is presented in order to provide a useful example of how the Constitution works in practice. As you have read, the Constitution sets down the basic concepts and guidelines by which elections must be held. The various branches of government discussed earlier in this paper must then be responsible for their constitutional roles in order for the elections to be successful. The legislative branch must enact laws that detail how elections must be held. The executive branch and independent commissions are tasked with implementing and organizing the elections. And the judicial branch may be called upon to clarify legal confusion, as the Federal Supreme Court did in its 2007 decision. Elections are perhaps the clearest example of the day-to-day value and power of democratic constitutions.