# State-Building in Iraq

## Addressing the Structural and Functional Gaps in the Governing System, With Reference to the Constitution

Dlawer Ala'Aldeen

MERI
Middle East
Research Institute

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The Middle East Research Institute engages in policy issues contributing to the process of state building and democratisation in the Middle East. Through independent analysis and policy debates, our research aims to promote and develop good governance, human rights, rule of law and social and economic prosperity in the region. It was established in 2014 as an independent, not-for-profit organisation based in Erbil, Kurdistan Region of Iraq.

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**MERI Policy Report**

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President of MERI

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# Contents

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| | |
|---|---|
| Adil Abdul-Mahdi | Former Prime Minister of Iraq and member of ICDC. |
| Ahmed Rushdi Abdulla | Advisor, Council of Representatives of Iraq. |
| Ameer Tahir Al-Kinani | Advisor to the President of Iraq. |
| Basheer Hadad | Deputy Speaker, Council of Representatives of Iraq. |
| Farhad Alaaldin | Chairman of Iraq Advisory Council. |
| Falah Matroud Aluboudi | Director General, Council of Representatives of Iraq. |
| Fuad Masum | Former President of Iraq and former Member of ICDC. |
| Ghazi Ibrahim Al-Janabi | Advisor to the President of Iraq. |
| Haider Al-Abadi | Former Prime Minister of Iraq. |
| Haider Muthanna | Director General, Council of Representatives of Iraq. |
| Lukman Faily | Ambassador, Iraqi Foreign Ministry |
| Majid Khidir Ahmed | Director General, Council of Representatives of Iraq. |
| Mayada Al-Hijabi | Director General, Council of Representatives of Iraq. |
| Mohammed Abubakir | Director General, Council of Representatives of Iraq. |
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| Torhan Mufti | Former Cabinet Minister, Iraq. |
| Serwan Serini | Secretary General, Council of Representatives of Iraq. |
| Sharwan Al-Waili | Former National Security Advisor. |

Others A list of 9 senior executives, experts, members of the Council of Representatives who preferred not to be named.

# Author Biography

Dlawer Ala'Aldeen is the Founding President of the Middle East Research Institute. Formerly, he served as Minister of Higher Education and Scientific Research in the Kurdistan Regional Government and as Professor of Medicine in Nottingham University in the UK. He has long been engaged in capacity-building and nation-building projects in Iraq, and has published extensively on political & security dynamics, governance systems and democratisation in the Middle East. His recent books include: 'Nation-Building and the System of Governance in Kurdistan Region' (2013); and 'State-Building: A Roadmap for the Rule-of-Law and Institutionalisation in Kurdistan Region' (2018).

# List of Acronyms

| | |
|---|---|
| CPA | Coalition Provisional Authority |
| CoR | Council of Representatives |
| FAC | Federal Appeal Court |
| FCoI | Federal Council of Iraq |
| FGD | Focus Group Discussions |
| FGoI | Federal Government of Iraq |
| FSC | Federal Supreme Court |
| GnOR | Governorates that are not organized in a region |
| ICDC | Iraqi Constitution Drafting Committee |
| KII | Key Informant Interview |
| KRG | Kurdistan Regional Government |
| KRI | Kurdistan Region of Iraq |
| PM | Prime Minister |
| PMU | Popular Mobilisation Units |
| PoRI | President of the Republic of Iraq |
| SJC | Supreme Judicial Council |
| TAL | Transitional Administrative Law |

# Executive Summary

Following decades of authoritarian rule and highly centralised governing system, the people of Iraq adopted a democratic Constitution in 2005, designed to put Iraq on an evolutionary roadmap for democracy, rule-of-law and economic prosperity. The Constitution consists of 144 Articles which, together, define the main pillars of a democratic governance and provide frameworks and boundaries for their enactment, with or without mandating new legislations. However, translating the Constitution into reality proved extremely challenging.

Over the past 16 years, the political and institutional leaders have engaged in an overt sectarian political dynamics that proved detrimental to the state-building process. They were highly selective in enacting, key constitutional Articles. Many essential institutions and/or legislations that are mandated by the Constitution are awaiting establishment, some of which are critical for enhancing the rule-of-law, safeguarding the Constitution, streamlining the legislative cycle, institutionalising the centre-periphery relations, empowering the local government and optimising the management of national resources and assets. As a consequence, there are currently numerous structural and functional gaps or weaknesses in Iraq's governing system, which have added to the country's fragility and acted as independent drivers of conflict.

In this report, attempts are made to: (a) Identify the key structural and functional gaps or weaknesses in the governing system that have arisen from inadequate implementation of the Constitution; (b) highlighting the relevant historical context and political barriers for progress; and (c) offer appropriate policy recommendations to stakeholders.

Methodological Note: The data for this report were collected from September 2020 to March 2021. To maximise the breadth and depth of the information collected, a mixed qualitative methods approach was adopted, which included: a preliminary desk review of the existing literature, 21 semi-structured interviews and three focus group discussions with policy- and decision-makers at the federal level, including Council of Representative officials, government advisors, and subject matter experts in Baghdad. The conclusions and recommendations proposed here in this report, have been presented, shared and discussed with participants of the focus group discussions for further verification and contextuality.

# 1. Introduction

The 2005 Constitution was, by all accounts, a transformative social contract adopted by the people of Iraq through a landmark referendum on 15 October, 2005. Following decades of authoritarian rule and highly centralised governing system, the Constitution was designed to put Iraq on an evolutionary roadmap for democracy, rule-of-law and economic prosperity. However, translating the Constitution into reality proved extremely challenging for all stakeholders.

The Constitution consists of 144 Articles, divided into six main sections which, together, define the main pillars of a democratic governance, including the separated legislative, executive and judicial branches as well as the independent commissions[1].

Section one (Articles 1-13) deals with fundamental principles.

Section Two (Articles 14-46) provides for civil and political rights, and economic, social and cultural liberties.

Section Three (Articles 47-108) defines the structural components and their competencies.

Section Four (Articles 109-115) defines the powers of the Federal Government.

Section Five (Articles 116-125) sets out the powers of the Regions.

Section Six (Articles 126-144) outlines the final and transitional provisions.

Each of these sections provide frameworks and boundaries for their enactment. Some of the Articles could be fulfilled by existing legislations, with or without amending, while others mandate new legislations and the establishment of new institutional structures or functions that current laws would not accommodate. Hence, it was expected that once the new legislative and executive institutions are put in place, they will then begin, in collaboration with other stakeholders, to formulate these laws expeditiously.

In December 2005, a general election was held in earnest, based on the Constitution's provisions, and a 275-member Council of Representatives (CoR), was elected. This was followed by a protracted, yet successful, process of Government formation which marked the beginning of an evolving electoral democracy. Thereafter, the responsibility of building the country's key institutions and essential checks and balances fell upon the CoR and Government leaders.

Unfortunately, the institutional and political leaders thereafter engaged in an intensely detrimental power politics at the expense of the state-building process. They were highly selective in their implementation of the numerous constitutional Articles that required legislations for enactment. While the process was expedited for some of the Constitution's provisions, many others were put on hold. As a consequence, there are currently numerous structural and functional gaps or weaknesses in Iraq's governing system, which have added to the country's fragility and acted as independent drivers of conflict. Many essential institutions and/or legislations that are mandated by the Constitution are awaiting establishment, some of which are critical for enhancing the rule-of-law, safeguarding the Constitution, streamlining the legislative cycle, institutionalising the centre-periphery relations, empowering the local government and optimising the management of national resources and assets.

In this report, attempts are made to: (a) Identify the key structural and functional gaps or weaknesses in the governing system that have arisen from inadequate implementation of the Constitution; (b) highlighting the relevant historical context and political barriers for progress, and (c) offer appropriate policy recommendations to stakeholders where appropriate.

# 2. Project Methodology

To develop an insight and attain a deep understanding of the structural and functional weaknesses of the system of governance and the challenges institutional leaders face during the state-building process, the Middle East Research Institute (MERI) devised a rigorous qualitative data collection methodology. A data collection process was initiated that lasted for six months, spanning from September 2020 to March 2021. The methodology utilized for this study comprised of the following:

1. A desk review that synthesised and analysed available literature pertaining to the topics of the Constitution's stipulations, interpretation, and implementation in Iraq. A special attention is given to identification of constitutional articles that have not been enacted or legislated for, as mandated. Sources of data included academic and policy reports, as well as legal and public domain documents. Collectively, these sources shed light on the structural and functional gaps or weaknesses that require urgent prioritisation by the political and institutional leaders.

2. Key Informant Interviews (KIIs) with key stakeholders. For this study, 21 semi-structured key informant interviews were held, where the researchers either met stakeholders in person or through virtual means (such as Skype calls, phone calls, or emails). Interviewees included policy- and decision-makers at the federal level, including Council of Representative officials, government advisors, and subject matter experts. On average, each interview lasted for an hour.

3. Focus Group Discussions (FGDs) with key stakeholders. MERI conducted three focus group discussions in Baghdad. Participants included legislative and executive branch leaders as well as subject experts.

Throughout the course of the data collection process, MERI researchers solicited the participation of legislators, executives, judicial experts, and academics to ensure robust representation across the categories. For all participants, the researchers obtained verbal consent that acknowledged the ownership, purpose and use of the research; the voluntary and confidential nature of participation in the study; and the freedom to opt out at any time during the data collection process.

Data and transcripts were collected in Arabic and Kurdish. Unless stated otherwise, all interviews and FGDs were conducted under Chatham House Rules; therefore, only the names of KIIs and FGD participants who consented are listed in this report. The content of this report was presented, shared and discussed with the FGD participants for further verification and contextuality.

# 3. The Constitution: Context, Process and Politics

## 3.1. Key Events leading up to the Constitution

The 2005 Iraqi Constitution is a product of an exceptionally complex political process that was shaped by a series of transformative events and milestones. The most relevant ones, that impacted the content and context of this ultimate social contract, were as follows:

- 19 March 2003: Iraq was invaded by a US-led Multinational Coalition Force.
- 21 April 2003: The Ba'th Party regime was removed, marking a new era and new system of governance.
- 16 May 2003: The Coalition Provisional Authority (CPA), a transitional government, was established as per the United Nations Security Council Resolution 1483 (2003), and vested itself with executive, legislative, and judicial authority over the Iraqi government, effective until its dissolution on 28 June 2004.
- 22 July 2003: The CPA formed the Iraqi Governing Council, 25 member political leaders consisting of 12 Shiites, five Sunni Arabs, five Kurds, a Turkman and an Assyrian Christian.
- 8 March 2004: The Iraqi Governing Council adopted a provisional constitution for Iraq, the "*Law of Administration for the State of Iraq for the Transitional Period*", commonly known as the Transitional Administrative Law (TAL).
- 28 June 2004: TAL came into effect and remained in place until the 2005 Constitution was adopted.
- 30 January 2005: The Transitional Iraqi National Assembly was elected and operated under TAL.
- 28 April 2005: The Iraqi Transitional Government was formed and endorsed by the Iraqi National Assembly.
- 12 May 2005: The Iraqi Constitution Drafting Committee (ICDC) was appointed by the newly formed Iraqi Transitional Government.
- 13 June 2005: The ICDC began its work to consult, debate, and prepare a draft Constitution.
- 23 August 2005: A completed draft of the Constitution was submitted to the Iraqi National Assembly.
- 15 October 2005: The final version of the Constitution was approved by a majority of 78.5% in a nation-wide referendum.

## 3.2. The Legitimacy of an Imperfect Process

The final ratification of the Constitution was hailed a historic success by the majority of the Iraqis, despite widespread criticisms of the process and product. However, it is widely admitted that the 2005 Constitution suffers a number of structural, legal and political imperfections. Some critics go as far as questioning its legitimacy, citing several issues relating to the security circumstances, hasty process, representations of the country's diverse communities and the overwhelming external interventions[2].

*"The element of fear was behind the rush. The Shiites and the Kurds were afraid of the past and the future and believed that the sooner the constitution is written and ratified the better" [KII].*

The time the ICDC took to formulate the Constitution (11 weeks) was considered exceptionally short for a thorough consideration and broad consultation[3,4]. This was reflected in the numerous shortcomings of the text and context. These were known at the time to the ICDC, however, the pressure in those exceptional political and security circumstances on the ICDC was too great to allow for long and wide consultations [KII, former ICDC member]. Moreover, the ICDC's membership consisted of elected politicians, and some politically affiliated or politically motivated legal and religious scholars. None were considered constitutional experts with academic or practical track record in subject matter [KII]. The majority of the members were former exiled opposition parties whose culture and mentality were shaped by decades of anti-state warfare with little evidence of commitment to state-building. Their debates inside the ICDC were driven largely by sectarian and sub-nationalistic politics while influenced by diverse interest groups. In fact, much of the debates were of personal nature where parties often tried to tailor-make articles and distributed powers with particular individual leaders in mind for each position [KII].

The ICDC had full access to international advisors who were largely experts from the US and European democracies, with little background on Iraqi culture, history or socio-political fabric. They often used Lebanon as the closest model, which is by no means closely comparable to Iraq.[5] Some argued that the process of constitution drafting in Iraq was an "insufficiently organic one", virtually dictated by exogenous powers, while the new political elites did not trust each other and had not arrived at a "sufficiently common vision for what the new constitutional order should be".[9]

Interestingly, the approved version of the draft Constitution which was put to the Referendum was the Arabic one. Critics argue that it was written in a religious language which is not necessarily ideal for legal documents, let alone for such an existential social contract [KII]. The end result of all these procedural and editorial imperfections was a product that is relatively ambiguous, making interpretation problematic.

Taken together, the Constitution was considered a highly divisive text. In the words of one commentator, the Constitution "enshrined ethnic differences into law, its drafters hoped to achieve national unity by having all sects participate in government and public life. To do so, they created a system that allocates public sector roles based on sect and ethnicity. This principle appears to permeate all Iraq's institutions from the central government downwards"[3].

It is important to stress that Sunni Arabs (constituting around 20% of Iraq's population) were clearly under-represented at the ICDC, while the powerful political parties that oversaw the process of drafting the Constitution were mainly Shiite Arabs and Kurds. At the time, the Sunni's had recently lost power which they held for centuries and were highly critical of federalisation and decentralisation of Iraq. The majority of the Sunnis boycotted the election of the Transitional Iraqi National Assembly, therefore were grossly under-represented both in the National Assembly (with only 15 members) and the ICDC. To compensate, the ICDC invited 15 willing Sunni politicians outside the National Assembly to join the Committee as non-voting members [KII].

The Arab Sunni political leaders expressed grave concerns that the constitution fails to ensure national unity, diminishs their rights and further weakens Iraq by handing over additional power to regions and provinces dominated by Kurds in the north and Shiites in the south[6] where Iraq's largest oil reserves lie. Furthermore, the Sunnis believed the Constitution undermines the country's Arab identity and insisted that Iraq, one of the original founders of the Arab League in 1945, should be explicitly labelled an Arab state. Therefore, it was not surprising when the majority of Sunni Arabs rejected the Constitution

before, during and after it was ratified. Three Sunni-majority governorates and most Sunnis in Baghdad either refused to vote on the day or casted a 'No' vote at the ballot[7].

Under pressure of criticism, and threat of boycott, the ICDC tried to reassure the public by including Article 142 in the constitution which lays out a mechanism for amending the Constitution. This Article mandated the creation of a committee by the CoR to present within four months "a report that contains recommendations of the necessary amendments that could be made to the Constitution". The CoR must approve the "*proposed amendments*" by an absolute majority of the members before putting to a nation-wide referendum. The amendment is considered ratified "*if approved by the majority of the voters, and if not rejected by two-thirds of the voters in three or more governorates"*. Given Iraq's sectarian political dynamics and the lack of confidence between the major ethno-religious components, these requirements make it extremely difficult, if not impossible, to amend the Constitution[8].

## 3.3. Poor Constitutionalism

Despite the above reservations, the 2005 Constitution was considered fit for purpose in the short term, subject to further amendment and evolution in the long run. It was widely accepted that, if implemented properly despite its flaws, the social contract can transform Iraq to a democracy. However, the Iraqi political elite have so far failed, collectively, to make the most of what is available. None saw the Constitution as a sacred social contract or an ultimate arbitrator. Without exception, they all began from the outset to interpret and/or implement the constitution's diverse articles selectively to their best interests. To date, constitutionalism remains an elusive theme or culture[9], and remains impalpable in Iraqi institutions across the centre and periphery. Of course, there are numerous other political, security and institutional impediments to progress, but the end result was the lack of adequate implementation of the constitution.

## 3.4. Safeguarding the Constitution

Adherence to the Constitution is a collective responsibility of all citizens and institutions. Nonetheless the act of safeguarding "*the commitment to the Constitution"*, is bestowed upon the President of the Republic of Iraq (PoRI, Article 67). Clearly, tackling violation of the Constitution is a complex and delicate legal matter that requires clear interpretation of the law and well-defined tools and mechanisms, none of which are readily available to PoRI.

Where, in PoRIs opinion, violations of the Constitution occur, the only action available to him is to seek interpretation and judgement from the Federal Supreme Court (FSC), a process that has proven extremely problematic. The past 16 years' experience has shown that the FSC, at its functional best, is seen as a highly politicised tribunal, frequently influenced by dominant political or security actors. They have been indecisive or perceived as biased on too many occasions, particularly when faced with implicit or subtle violations [KII].

Another tool available to the PoRI to safeguard the Constitution is via Article 73 (Third), which relates to "*ratifying and issuing the laws enacted by the CoR".* Even here, the PoRI's room for manoeuvre is extremely limited, because such powers are exercised within the legislative chain and become relevant only when new legislations are issued by the CoR (details below).

> Recommendations: In the absence of a Constitutional amendment, a new law can/should be produced that would clarify the tools and mechanism by which the PoRI can safeguard the Constitution. The PoRI must be empowered to fulfil this vital role

# 4. The Constitution and the State of the Judiciary

The judicial branch plays a pivotal role in the system of governance. It is the only body that interprets the laws, determine their constitutionality, and decide on how to apply them in practice. The judicial authority in Iraq has been evolving since the adoption of the Constitution in 2005, underpinned by several key legislations. However, some fundamental structural and functional weaknesses continue to exist, with no indication that they will be addressed anytime soon.

## 4.1. Interpretation of the Constitution

Interpretation of the Constitution is the remit of the FSC which also determines the constitutionality of laws and regulations and ratifies the final results of the general elections for the CoR. Importantly, the FSC acts as a final court of appeals that settles disputes amongst, or between, the various executive bodies and its decisions are final and binding.

The need for a FSC was recognised as early as 2004 when a transient Constitution was drafted, and its establishment was mandated by Article 44 of the TAL[10]. As per Section A of this Article, a new legislation was required to create the FSC. In early 2005, and in the absence of an elected legislative chamber, the Cabinet of Ayad Allawi had assumed both legislative and executive powers. They issued the Order (Law) No. 30 of 2005, which established a nine-member FSC[11]. The incumbent President of the Federal Appeal Court (FAC), Judge Madhat Al-Mahmoud, was then invited to add the FSC to his portfolio as the founding Chairman. Eight more judges were selected as permanent (life-long) members.

The 2005 Constitution mandates the issuance of a new legislation that should replace Law 30 of 2005. Article 92-Second states that: '*the FSC shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the CoR*'. To date, no such law has been adopted, thus, Law No. 30 remains in place, despite its flaws.

Critically, Article 3 of Law 30 (before the recent 2021 amendment) stipulated that if any one of the nine judges vacate their position, a reserve judge can be put in place by the PoRI. However, Judge Al-Mahmoud had consistently objected to the enactment of this Article, calling it unconstitutional. His objection was based on the fact that he (as President of FSC) should be the one appointing members of the Court. To prevent the PoRI from filling any possible FSC vacancies, Al-Mahmoud issued Order 28/2019 on 21 May 2019 which abolishes Article 3, pending the replacement of Law No. 30 itself[12]. His decision, in effect, made sure that the minimum quorum for major decisions at FSC (unanimous vote of nine judges) would become permanently disrupted, thereby making the interpretation of the Constitution or settling constitutional disputes virtually impossible.

Indeed, upon the retirement of one of the nine judges (Judge Farouq Sami) for old age and ill health in late 2019, the FSC became virtually defunct[13]. This time, Judge Al-Mahmoud wanted Article 3 of Law No. 30 enacted to help to appoint Judge Mohammed Rajab Al-Kubaisi (reserve member) in Judge Sami's position. Al-Kubaisi had recently retired from the SJC for old age[14]. Judge Al-Mahmoud persuaded the PoRI to issue a decree (No. 4 of 21 January 2020) for the new appointment.

Not surprisingly, Judge Faiq Zidan, President of the Supreme Judicial Council (SJC), vehemently objected to the presidential decree. He is believed to have threatened to take drastic actions against the PoRI and FSC's

President, should they choose to pursue this path [KII]. Zidan insisted that the responsibility to nominate judges for the FSC rests entirely with the SJC which he presides over. Ignoring the notion of conflict of interest, Judge Zidan referred the dispute to a Primary Court, which comes under his own jurisdiction, instead of a more independent body, such as the Administrative Court. Expectedly, the Primary Court ruled in Judge Zidan's favour, nullifying the presidential decree. The PoRI appealed to the Court of Appeal, which is also headed by Faiq Zidan himself. As predicted, the Court of Appeal endorsed the Primary Court's ruling and nullified the PoRI's decision. The PoRI withdrew the decree. Soon after in October 2020, Judge Sami died, followed by a second FSC member, the 94-year-old Judge Aboud Al-Tamimi[15]. These deaths rendered the FSC permanently dysfunctional and renewed the constitutional impasse at a sensitive time when the FSC's services were needed most. This was the time when Adil Abul-Mahid, then Prime Minister (PM), had resigned and the PoRI faced constitutional dilemmas during the designation of new candidates for premiership.

The urgency of replacing Law No. 30 increased dramatically after repeated calls form protesters and politicians for a snap general election, which could not be conducted without a functional FSC. The CoR was forced to resurrect a previously debated draft legislation and entered a protracted process of voting on its various Articles. By March 2021, most of the draft legislation's Articles were approved before an impasse was reached over key Articles relating to the membership of the FSC, namely, the mechanisms of selecting members and determining their voting powers. The stalemate at the CoR made the leaders resort to a quick amendment of Article 3rd of the existing Law No. 30 of 2005[16]. In it, the SJC is made to be the lead institution in charge of appointing the FSC members and identifying its Chair and Deputy Chair. The amended Article also determined the retirement age of the FSC members, which automatically removed Judge Al-Mahmoud and all the other members from office.

As such, the controversy over the constitutionality of Law No. 30, and the need for its replacement by a new legislation as mandated by the Constitution, remain.

## 4.2. The Courts and the Judicial Checks and Balances

The judiciary institutions have evolved significantly in the last 16 years, but collectively failed to achieve independence, control internal corruption, and win back public confidence. The judicial authority has failed to modernise the internal checks and balances to ensure professional accountability and financial transparency [KII]& [17,18].

The independence of the judiciary is guaranteed by Article 87 of the Constitution and judges to date have enjoyed a high degree of immunity. Yet, the courts and many judges have been accused of being poorly lead, poorly trained, highly politicised, easily influenced by external pressure, biased in their judgment and tolerant of deep corruption within their ranks. The judicial leaders have done very little to address any of these generic or specific accusations [KII].

> *"We have sent hundreds of corruption cases to the Court, but the Court is not processing them because they are becoming tools of the powerful political parties or their own leadership. The judges do not have adequate understanding of democracy or independence of the judiciary. Their concept of institutional independence is very different from democracy". (Member of the Parliamentary Committee for Integrity at the CoR).*

As per the Constitution (Articles 87-101), the federal judicial authority is comprised of the SJC, the Supreme Court, the Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts that are regulated by law. Based on the principles upon which the Constitution was

drafted, these institutions are meant to be managed separately and independently [KII]. However, they have now lost their independence to the President of the SJC who has assumed a lead role in appointing the head of each of these institutions as well as members of the FSC. The SJC Law No. 45 of 2017 stipulates that the Chief of the Court of Cassation shall serve as the President of the Supreme Judicial Council of Iraq, rendering this person (Judge Faiq Zidan) the unrivalled "Supreme" leader of the judiciary system. Experts believe that this power, when used politically, has rendered the SJC President supremely powerful and beyond accountability (KII).

Article 96 stipulates that "The law shall regulate the establishment of courts, their types, levels, and jurisdiction, and the method of appointing and the terms of service of judges and public prosecutors, their discipline, and their retirement." However, such law was never issued. Instead, the judicial leaders continue to rely on an existing Law of 1986 and do not believe there is a legislative gap here. Similarly, Article 99 mandates the creation of a new military court, but the leaders have allowed the existing military courts to fill the niche and there is no intention of changing them.

The Constitution mandates a new law for the establishment of Federal Courts in Governorates and Regions (Article 89). Such Courts would look into all disputes and judgements that are of federal nature. To date, no such law has been debated, therefore, no such Courts have been established in the periphery. The pretext is that, with the exception of the KRI courts, all other courts in the rest of Iraq are considered Federal, because they look into all violations of the law, be it local or federal. The KRI's judicial system, however, has evolved independently from Baghdad and there has been little progress in integrating it to the federal system in Iraq. Currently, there are no federally managed specialised court in the KRI to look at federal issues, such as drug trafficking, terrorism, oil and gas and border crossing. Importantly, there are no well-defined mechanisms of formal referral of cases to federal courts in Baghdad.

> **Recommendations:** The leaders of the judicial authority and its institutions must take its independence and control of its internal corruption seriously and regain public confidence by enhancing internal checks and balances, and ensure transparency, accountability, and quality performance. Taking these measures may not require new laws, but new regulations, guidelines, and/or improved audit systems. Therefore, it is within the power of the SJC and other institutional leaders to initiate such a process, and if required, push for new legislations.

# 5. An Incomplete legislative Cycle

The federal legislative system in Iraq consists, as per Article 48 of the 2005 Constitution, of a lower chamber (CoR), an upper chamber (the Federal Council of Iraq, FCoI) and the Presidency of the Republic. These independent, yet complementary, institutions provide appropriate checks and balances that are designed to ensure the full functionality of the legislative system at the highest possible quality.

## 5.1. The Federal Council: The Missing Link

During the term of the first CoR, immediately after the ratification of the Constitution, a one-time Presidency Council was elected, consisting of a President and two Vice-Presidents. This Council was given the power to object to, reject and/or return legislations to the CoR by a unanimous vote (Article 138-5th). After subsequent elections, the Presidency Council was replaced by the President (PoRI) with no mention of Vice Presidents. However, much of the critical legislative powers of the Presidency Council were transferred to the FCoI, an upper chamber that should have been legislated for and established soon after the first election.

Article 65 stipulates that the FCoI will *"include representatives from the regions and the governorates that are not organised in a region",* and this should be regulated by a Law. No draft legislation has been put to debate since the first election, largely for political reasons and this topic has not been given priority.

> Recommendations: The absence of FCoI combined with reduced powers of PoRI, has created major structural and functional gaps in the legislative cycle, leaving the CoR to its own accord with no external checks and balances above it. These have negatively impacted the state-building process. Therefore, a new legislation must be formulated, and the FCoI established as soon as possible.

## 5.2. The Role of the President in the Legislative Cycle

The last 16 years' experience demonstrated that the PoRI's role in the legislative cycle has become a mere formality, with hardly any power at his disposal to prevent poor legislations from enactment [KII]. Where successive PoRIs tried to exercise whatever limited power they retain by law, they were repeatedly undermined by the CoR leaders or other political rivals. Interestingly, the CoR persistently, wittingly or unwittingly, offends the presidency of Iraq by routinely including a statement ("*the law is valid once issued by the CoR*") in all new legislations even before they are submitted to the PoRI for endorsement. This is neither legal nor constitutional.

As per the Constitution, laws are *"considered ratified after fifteen days from the date of receipt by the President*" (Article 73-Third). The PoRI is thought to have the right to return a new legislation to the CoR without ratification, but only once. This remains a controversial issue and many disputes this right, believing that the PoRI can refuse to endorse a new legislation but not return it. That said, there were occasions where the PoRI returned newly issued legislations to the CoR. However, the CoR did not have a well-defined mechanism to handle this process. Ideally, the Speaker should refer the issues to the CoR's relevant Committees who should consider the PoRI's objections point-by-point before putting them to new votes. Once finalised, the Speaker of the CoR should formally resubmit the amended legislation to the PoRI for ratification. There were occasions where the Speaker played minimal role in the process and left it to more junior members of the CoR (e.g. Chariman or parliamentary Committees) to formally and directly reply to the PoRI, rejecting

his objections altogether [KII].

Where the CoR was to persist, the PoRI has no constitutional power to stop the new legislation except to prevent its publication in *Al-Waqai Al-Iraqiya*, a pre-requisite before the laws are enacted. *Al-Waqai Al-Iraqiya* is the official Gazette of Iraq where published legislations are given reference numbers, but only when they carry the President's signature[19]. However, this exclusive power of PoRI has been undermined previously when legislations were published and enacted without the PoRI's endorsement. More recently, CoR members wanted to push for a new controversial legislation on equalisation of Higher Education degrees, to which the PoRI and the Cabinet had fundamental objections [KII]. This law was considered a backward step, undermining standards and quality of Iraqi degrees[20]. However, CoR members insisted on its enactment and forced the PoRI's hand by threatening to change the *Al-Waqai Al-Iraqiya* Law (No. 78 of 1977), should he object to its publication. They submitted a draft legislation to the CoR in which they propose overriding the PoRI altogether, for all future publications. The PoRI therefore backed down and the new Higher Education legislation was enacted [KII]. The draft amendment of the *Al-Waqai Al-Iraqiya* Law is now temporarily shelved but not withdrawn. This issue demonstrated the disjointed system of legislation and the level of internal competition or rivalry between the legislative institutions which are supposed to be integral and complementary.

In short, the powers of the PoRI are neither sufficient to safeguard the various institution's commitment to the Constitution, nor to stop poor legislations from being enacted. Meanwhile, numerous legislations have been passed over the years by the CoR that could have been filtered out and returned for further amendment, or even rejected outright for being half-backed, unconstitutional and/or detrimental to the state. Therefore, the establishment of the constitutionally mandated FCoI has become an urgent priority. Such Council will have the power, the stature, and the legitimacy to safeguard the legislative system in a way that no other entity could practically fulfil. Regrettably, none of the successive PoRIs, CoR Speakers or CoR members gave this matter any priority, and there is no apparent will at this stage to put this issue on the agenda during the current term of the CoR. Left alone, it may take a generation or two before FCoI is seriously debated.

**Recommendations:**

a. Initiating and expediting the process of creating the FCoI is the collective responsibility of the executive and legislative branch leaders, particularly the PoRI and the Speaker of the CoR.

b. Meanwhile (or failing that), a law must be issued to empower the PoRI to fulfil some of the functions of the upper chamber.

c. Where the PoRI is enabled to return a legislation to the CoR, there should be clear mechanisms of managing or handling this process. Currently, this is not well defined.

d. The PoRI must be engaged in all new legislation from conception to ratification, irrespective of whether they are proposed by the Cabinet or the CoR. Importantly, the Cabinet should never submit a new draft legislation to the CoR without close involvement and endorsement of the PoRI.

e. The statement "the law is valid once issued by the CoR" should be removed from future draft legislations or replaced by another that states: "the law is valid once it is formally published".

## 5.3. The Legislative and Executive imbalance

At the turn of every political crisis, there have been repeated calls from the public as well as political actors for the dissolution of the CoR and holding early elections. The latest was during the 2019 political crisis when the Government of Adil Abdil-Mahdi resigned under the pressure of protesters. There were, also, demands for the dissolution of the Parliament. As a result, a new Government was formed and the CoR endorsed it.

In what was largely considered a highly populistic move, the Council of Ministers proposed 6 June 2021 for a snap general election, which was later changed to 10 October. However, this debate revealed a significant functional weakness in the electoral system and prompted intense debates about the appropriateness and constitutionality of such declaration. Article 64 of the constitution stipulates that the CoR "*may be dissolved by an absolute majority of the number of its members, or upon the request of one-third of its members* **or [by]** *the Prime Minister with the consent of the President of the Republic*".

Interpretation of the last part of this Article is subject to extensive debate. Some constitutional experts, including advisors to the President (KIIs), believe that the PM and the President can together dissolve the Parliament without the need for approval by CoR itself. The sectarian principle that drove this line, at time of writing the Constitution, was to make sure that the Sunni leadership of the CoR would remain under check and that the CoR's dominance is not without its limits. However, some parliamentarians doubt this understanding and stress that only the CoR can dissolve itself and the executive branch leaders (the PoRI and/or the Cabinet) can only request such action. Clearly, the CoR leaders did not indulge in this issue for some time as it was not in their best interest to do so; and made sure that time goes by with the final date of election being set as close to the natural four-year term as possible.

**Recommendations:**

a. The FSC must provide an interpretation for Article 64 and determine the right of the executive branch to dissolve the CoR.

b. A new legislation must be issued to provide detailed mechanism for the dissolution of the CoR and ensure a democratic balance between the legislative and executive branches is achieved.

# 6. The Executive Gaps

## 6.1. The President and The Prime Minister: Complementarity vs Competition

The executive branch of government, as defined in Article 66 of the Constitution, consists of the PoRI, Council of Ministers (Cabinet) and the associated institutions. Their powers are designed to be complementary for a unitary, integral, and fully functional executive body. However, over the past 16 years' these main executive institutions diverged, followed separate evolutionary paths, and ultimately became fragmented. As a consequence, successive PoRIs and Cabinets became loosely connected with minimal collaborative engagement between them.

During the drafting of the Constitution, the distribution of powers between the PoRI and the Cabinet (as a single body) were extensively debated. The Shiites insisted, for obvious reasons, on concentrating the greatest number of executive powers in the Cabinet and the post of PM. In the process, the PoRI's role was reduced to a virtually ceremonial one [KII]. Indeed, Article 78 defines the Prime Minister as the direct executive authority responsible for the general policy of the State and the commander-in-chief of the armed forces. This article underpins Iraq's long tradition of power concentration and centralisation, thus rendering the PM too powerful to be accountable or restrained, particularly where he/she belongs to a dominant political party with a credible parliamentary support.

Nevertheless, it was understood that PoRI, being the sovereign, would play a lead role in the process of designing government policies (listed under Article 110) and take an active part in top-level decision making. In practice, however, the PoRI was seen, and treated, as separate from 'Government' [KII]. The only direct access the PoRI has to the Cabinet's meetings is via a relatively junior, non-voting representative, whose role is limited to updating the President, without taking an active part in policy- or decision-making.

Furthermore, Article 73-Ninth of the Constitution stipulates that the PoRI shall "*perform the duty of the High Command of the armed forces for ceremonial and honorary purpose*". However, successive PMs have regularly competed against the PoRIs, carrying out these ceremonial duties, instead or in addition to the PoRI. For instance, it is becoming a tradition now for PMs to attend the annual military parades, conducted on the anniversaries of the foundation of the Iraqi Army (6 January)[21]. Also, they invariably duplicate ceremonial state reception (inspection of guard of honour) for visiting sovereigns, which clearly frowned upon by the visitors for the amount of time wasted on such ceremonies[22]. Interestingly, tensions between the PoRI and the PM surfaced on a number of occasions culminating to the cancellation of the military parades or the President's attendance at the United Nations (in 2016). These were not only embarrassing but very costly to the nation too.

**Recommendations:** To further institutionalise the PoRI-PM relations, delineate their remits and enhance their complementary roles:

a. A new draft legislation should be formulated in collaboration between the two Government components and submitted to the CoR as soon as feasible.

b. The PoRI and the PM should negotiate a best-practice arrangement or mechanism that can be mutually rewarding while eliminating internal competition.

c. The PoRI should be partner in policy- and decision-making in all strategic issues, including military operations, budgetary matters, and foreign policy designs.

## 6.2. The Prime Minister: First Among Equals

According to the Constitution and the Cabinet's by-laws, the Council of Ministers (not the PM) is responsible for overseeing the respective ministries, proposing laws, preparing the budget, negotiating and signing international treaties, and appointing deputy-Ministers, undersecretaries, ambassadors, the Chief of Staff of the Armed Forces and his assistants, Division Commanders or higher, the Director of the National Intelligence Service, and heads of security institutions. As such, the PM, is an equal member of the Cabinet, therefore not empowered to take any of these responsibilities on his/her own without the Cabinet's collective endorsement. However, successive PMs have knowingly and habitually violated the Cabinet's bylaws, particularly Article 2 of Section 7. Prime Minister Nouri Al-Maliki was the first to do so and appointed many officials in such high positions by deputation. However, his actions were justified on the basis that he had empowered himself by securing a generic authorisation endorsement from his Cabinet members which allowed him to act on their behalf.

The subsequent PMs continued the trend, with or without securing authorisation from their Ministers. The incumbent PM, Mustafa Al-Kadhimi, recently replaced the Governor of the Central Bank, the National Investment Commission, and the state-owned Trade Bank of Iraq (all by deputisation), without following due process, and neither the PoRI nor the CoR objected to this action or questioned its constitutionality [KII][23]. Appointments by deputisation are considered temporary occupations for a maximum three months, whereas many posts have been filled by deputisation for years on end.

Finally, the Constitution is silent about the processes of PM resignation or holding the PM and Cabinet to account, while no existing legislation addresses this issue. Similarly, there is no clarity on how, under what circumstances and by what mechanism, the CoR can question, impeach, or withdraw confidence from the PM. The existing practice is merely based on improvisation and precedence, as per sectarian dynamics.

**Recommendations:**

a. A new legislation must be issued to further define the boundaries and mechanisms of executing the powers of the PM as defined by the Constitution.

b. A new legislation must be produced to provide clearer and more practical mechanisms of government change and holding executive leaders, including the PoRI and PM, to account. These should include outlining circumstances for, and management of, these executive's questioning, resignation, impeachment, or replacement.

c. A law must further define the limits of appointing senior executives by deputisation and outline more practical mechanisms for swift appointment.

## 6.3. The State Security Forces: Proliferation & Fragmentation

It is not a secret that one of the major drivers of Iraq's fragility and instability is the uncontrolled proliferation of state- and non-state armed forces, many of which operate outside the government's command-and-control structure. The traditional state security forces in Iraq include:

- the Regular Army branches, under the Ministries of Defence;
- the various Police Forces, under the Ministry of Interior; and
- the Iraqi Special Operations Forces (directed by the Counter Terrorism Service) under the direct command of the PM as the Commander-in-Chief of the Armed Forces.

In parallel, several non-state armed groups were operational in Iraq before 2005 and continued to grow in influence to date, in stark violation of Article 9-First-B of the Constitution, which states: "*The formation of military militias outside the framework of the armed forces is prohibited.*"

More recently in 2014, upon the Iraqi Army's collapse in the face of the Islamic State (ISIS) invasion, over 60 new non-state armed groups were established, collectively named the 'Popular Mobilisation Units' (PMUs). These fast-growing and battle-hardened forces have acquired greater fighting capacity than the slowly recovering Iraqi Army. The PMUs remained outside the state's command-and-control structure for two years before they were given a legal status via an expedited legislation, Law No. 40 of 2016. This Law brought them under the Commander-in-Chief and secured their funding from the national budget. However, several hard-line PMUs continue to act independently pursuing agendas that are in direct conflict with that of the state or the government. Importantly, Article 5 of Law No. 40, in line with the Constitution, prohibits the involvement of PMU from engaging in politics. However, this did not stop the veteran PMU leaders from engaging in politics or standing for election while affiliated to one of the various organisations [KII].

There is a clear lack of cohesion and coordination between these diverse armed groups, and a high degree of internal competition between them, which is not sustainable. Article 84-First of the Constitution stipulates that *"A law shall regulate the work and define the duties and authorities of the security institutions and the National Intelligence Service, which shall operate in accordance with the principles of human rights and shall be subject to the oversight of the Council of Representatives."* To date, no such law has been issued, hence, the administration and operation of these diverse forces have not been regulated.

> **Recommendations:** New laws must be adopted to institutionalise the management, funding and operations of all armed state and non-state forces and fully integrate them within the state structure.

# 7. The Centre-Periphery Relations: Institutionalisation & Empowerment

Devolution of power and decentralisation were among the core values and principles that all political parties signed up to at the time of writing the Constitution. However, with time, the centralisation tendencies have dominated the culture of governance in Baghdad and created too many political barriers for the devolution of power, decentralisation, and federalisation.

Currently, there are several unimplemented constitutional Articles that mandate new legislations to further define the powers and responsibilities of both the Federal and local governments (regions and Governorates that are not organised in a region- GnORs). They relate to power devolution (Article 123), representation of local governments at the federal level (Article 105), deeper institutionalisation of assets and resource management (Articles 106, 110-114), the creation of peripheral Federal Courts (Article 89), the formalisation of the powers and presence of Federal Police Force in the KRI, and integrating Peshmarga forces within the Iraqi Army or the Guards of The Region (Article 84).

## 7.1. Empowering the Periphery: The Battle of Wills

The lack of will to institutionalise the centre-periphery relations and empowerment of the local governments is best demonstrated by the lack of progress in implementing Articles 105, 106 and 123.

Article 123 stipulates that *"Powers exercised by the federal government can be delegated to the governorates or vice versa, with the consent of both governments, and this shall be regulated by law."* To date no new legislation has been put to active debate by the CoR.

Article 105 of the Constitution mandates a new legislation to establish *"a public commission to guarantee the rights of the regions and governorates that are not organised in a region [GnOR] to ensure their fair participation in managing the various state federal institutions, missions, fellowships, delegations, and regional and international conferences*". Such a commission is considered a key institution that can allow each Region and GnOR to be represented at the federal policy- and decision-making level, and their constituencies' legal rights and entitlements defended. In retrospect, one could argue that such a Commission would have prevented, many of the recurrent political crises that have plagued Iraq, including disputes over power sharing and equitable resources allocations. In June 2012, the then PM Nouri Al-Maliki created a steering committee, headed by Torhan Mufti, a Cabinet Minister, with the membership of Ministries of Finance, Planning and Higher Education as well as other stakeholders[24]. A draft legislation was submitted to the CoR and four years later Law No. 26 of 2016 was issued. This Law describes the Commissions' objectives, tools, and mechanisms in detail[25]. It insists on fair distribution of federal revenues, including natural resources and international aid, and fair allocations of centrally manged delegations, scholarship programmes, and conference attendance. The Law also empowers the Commission to participate in the design of strategies and policies and observe, seek information, and follow up progress in each ministry. Unfortunately, this law was never implemented [KII].

Article 106 stipulates that a "*public commission shall be established by a law to audit and appropriate federal revenues*". The purpose is to "*verify the fair distribution of grants, aid, and international loans' across the regions and governorates*"…., and to "*guarantee transparency and justice in appropriating funds*". Indeed, Law No. 55 was passed in 2017, but the PM sought the SFC's judgment on the validity of the key components of the law, and accused Salim

Al-Jubouri, Speaker of the CoR, of illegally tampering with the text of the original draft law. The Court ruled in the PM's favour and affirmed that the Commission shall be independent, and administratively not responsible to any of the three (executive, legislative or judiciary) authorities. As a consequence, Law 55 and Article 106 were never implemented [KII].

In short, the implementation of Article 105 (Law 26 of 2016) and Article 106 (Law 55 of 2017) is instrumental in providing mechanisms for building confidence between the centre and periphery and further institutionalisation of the system of governance, as per the Constitution. It also eliminates yet another driver of conflict or crises. Interestingly, the KRG policy makers (with KRI being the only region in Iraq), are believed to be keen on the enactment of Article 105 but not Article 106, whereas the reverse is true for Baghdad's policy makers. The GnOR's, however, wish to see both Articles implemented because they believe they are getting the worst deal as things stand. In the words of a KII: "c*urrently, Samawa Governorate gets a much greater share of the budget allocation than Nineveh, even though the latter's population is much larger. Had there been a Commission for Regions and GnOR's, they would have objected to the budget plan and taken the Government to the Supreme Court".*

> **Recommendations:** It is paramount for new legislations to be formulated in support of Articles 105, 106, and 123 as mandated. These will add to the institutionalisation of the centre-periphery relations, defuse tensions and help prevent further conflicts.

## 7.2. The stickiest of all: The Oil & Gas Revenue Sharing

There are several vital national assets and revenues that are yet to be characterised and legislated by the CoR, as mandated by the Constitution. In particular, Articles 110-112 have caused the greatest amount of tensions and controversies to date, as they relate to oil and gas revenues which account for over 95% of Iraq's exports. These Articles outline the mechanisms by which the management of the sector and revenue shares can be achieved. However, their interpretation and implementation remain by far the most contentious centre-periphery issues. Constitutional ambiguity, conflicting interests, and fierce power struggle between Baghdad and the periphery have all prevented legislative efforts to reconcile between opposing views and contributed to further fuelling conflicts.

In particular, several disputes have emerged over time between the FGoI and the KRG (and GnORs) around the ownership and management of natural resources[26,27]. Both sides appear to accept Article 111, which bestows the ownership of oil and gas on "*all the people of Iraq in all the regions and provinces*." But they hotly dispute the intent of Article 112, which refers to hydrocarbons explicitly, and the identification of the relevant competent authority. The two sides also disagree on revenue sharing, stipulated in Article 112-First, due to the lack of definition on what constitutes "fair" redistribution or "damaged regions". This Article stipulates that the pre-2005 oil and gas fields shall be managed by the central government.

The FGoI cites Article 110, which states that "the federal government has "*exclusive authorities*" in formulating "sovereign economic and trade policy", and by extension is interpreted to include the trade in Oil and Gas. Thus, the FGoI claims full ownership of all exports and attempts to impose central authority. The KRG, in contrast, cites Article 112 and asserts that "*the federal government, with the producing regional and governorate governments, shall <u>together</u> formulate the necessary strategic policies to develop the oil and gas wealth*". They stress that the phrase "*together*" overrides the "*exclusive authority*" granted to the federal government in Article 110. The KRG further cites Article 115 which stipulates that "*priority shall be given to the law of the regions and GnORs in case of dispute*." This further limits the FGoI's exclusive authority. Moreover, Article 121 stipulates that if

regional and national laws in respect to matters outside the exclusive preview of the federal government are in contradiction, the regional government has the right to amend the "*application of the national legislation within that region*."

Since the ratification of the Constitution, the KRG passed its own natural resources Law (No. 28) in 2007 and started exploring, drilling, and exporting oil independently from Baghdad. Furthermore, the KRG pursued its own contracts with international oil and gas companies and in 2013, extended its own pipeline across the border into Turkey[28,29]. Baghdad, however, has consistently questioned the legality of the KRG's international contracts and independent exports. In 2012, they took the KRG to the Supreme Court which has failed to rule or resolve the issue to date. In the recent years, the FGoI and the CoR have also taken the Budget law as an opportunity to demand the KRG to hand over the oil export or its revenue to FGoI [KII][& 25, 26]. Meanwhile, a draft legislation for a pan-Iraq hydrocarbon law has been sitting idle since 2009 at the CoR in Baghdad with no sign of a collective will to push it through.

Obviously, the longer these constitutional ambiguities and fundamental disputes are left unaddressed, the more intractable the centre-periphery positions are likely to become. Conversely, with the right political will, the opposing positions can be reconciled via a new legislation and an overall policy, as mandated by Article 112. Baghdad now realises that the KRG energy industry is irreversible and the last two successive PMs of the FGoI have turned a blind eye to the KRG's independent oil policy, while working on managing mutual expectations.

**Recommendations:** To achieve an enduring reconciliation, both the FGoI and KRG will eventually need to reach a political agreement and expedite the passage of a new legislation designed to guide the development of the sector.

# 8. Unfinished Business

As stated throughout this policy report, there are many outstanding legislations that are mandated by the Constitution with no indication that they will be given priority anytime soon. Below is a non-exhaustive list of constitutional articles (Table 1) that have not been legislated for, against the functions that should fulfil.

**Table 1: Constitutional Articles which have not been legislated for.**

| Article | Required Legislation | Comment |
|---|---|---|
| 4 (2nd) | To regulate Military service. | Pending |
| 12 (1st) | To regulate the flag & national anthem. | Law issued in 2017 to amend Law 85 of 1965 relating to Iraqi emblem only. |
| 12 (2nd) | To regulate official holidays, religious and national occasions and the Hijri and Gregorian calendar. | Law 15 of 2012 regulates honours only. |
| 18 (4th) | To regulate the issue of multiple citizenships of senior, security or sovereign position holders. | Pending |
| 21 (2nd) | To regulate the right of political asylum in Iraq. | Law 51 of 1971 remains in place, and should be replaced. |
| 22 (2nd) | To regulate the relationship between employees and employers. | Law 52 of 1987 regulates the work of trade unions but not the establishment such Union or other professional organisations. |
| 24 | To regulate freedom of movement of Iraqi manpower, goods, and capital between regions and governorates. | Pending |
| 28 (2nd) | To regulate exemption of low income earners from taxes. | Pending |
| 30 (2nd) | To regulate the social and health security to Iraqis in cases of old age, sickness, employment disability, homelessness, orphanhood, or unemployment. | Pending |
| 38 (3rd) | To regulate freedom of assembly and peaceful demonstration. | Pending |
| 39 (1st) | To regulate the freedom to form and join associations and political parties. | Law 13 of 2000 needs replacing. Law 30 of 2015 relates to establishing political parties and societies. |
| 41 | To regulate the citizen's commitment to personal status according to their religions, sects, beliefs, or choices. | Law 188 of 1959 needs replacement |
| 61 (9th-C) | The PM 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. | Law No. 1 of 2004 relates to defending the national safety. |
| 63 (1st) | To regulate the rights and privileges of the CoR members. | Law 13 of 2018 issued. The SFC cancelled Law 28 of 2011 relating to salaries and allowances of CoR members. |

| | | |
|---|---|---|
| 65 | To establish the FCoI | Pending |
| 74 | To fix the salary and the allowances of the President of the Republic. | Laws 26 & 27 of 2011 were cancelled by the SFC. The political environment over the past years, combined with negative social media campaigns have made it difficult for new legislations to be debated. |
| 82 | To regulate the salaries and allowances of the PM and Ministers, and anyone of their grade. | |
| 84 (1st) | To regulate the work and define the duties and authorities of the security institutions and the National Intelligence Service. | Laws 20 & 31 of 2016 were issued for Ministry of Interior and Counter Terrorism Services, respectively. |
| 86 | To regulate the formation of ministries, their functions, and their specialisations, and the authorities of the minister. | Law 20 of 1991 and Law of the Executive Authority of 1950 remain active. A draft law has been submitted to the CoR but lay dormant for some time. |
| 92 (2nd) | To establish and regulate the Supreme Federal Court | Law 30 of 2005 remains active, amended recently. Unconstitutional. |
| 93 (6th) | To regulate settling accusations directed against the President, the PM and the Ministers. | Pending |
| 102 | To establish and regulate the High Commission for Human Rights. | Pending |
| 103 (1st) | To regulate the Communication and Media Commission | Law 56 of 2004 (Central Bank) was based on TAL. Law 31 of 2011 relates to Financial Audit Agency. Law 26 of 2015 relates to the Iraqi Media Network. |
| 104 | To establish the Martyrs' Foundation | A legislation was issued but never enacted. |
| 106 | To establish a public commission | Pending |
| 107 | To establish a Federal Public Service Council | Pending |
| 112 (1st) | To regulate the management of oil and gas extracted from present fields. | Pending |
| 113 | To regulate national treasures, including antiquities, archaeological sites, cultural buildings, manuscripts and coins. | Law 55 of 2002 remains active. |
| 114 (1st) | To manage customs, in coordination with the governments of the regions and GnORs. | Law 23 of 1984 remains active. |
| 114 (7th) | To formulate and regulate the internal water resources policy in a<br><br>way that guarantees their just distribution. | Pending |
| 123 | To regulate the delegation of powers exercised by the federal government to the governorates or vice versa. | Pending |
| 124 | To define the boundaries and regulate Baghdad's administrative borders, as Capital of Iraq. | Law 16 of 1995 remains active. |
| 125 | *To protect the* administrative, political, cultural, and educational rights of the various nationalities. educational rights of the various nationalities | Pending |

# 9. Conclusion

Technically, three main categories of implementation failures can be identified. These include: (a) Articles waiting new legislations for full implementation; (b) Articles legislated for and ready to be enacted but not yet implemented; and (c) Articles enacted but only partially implemented. They are scattered across the Constitution's six sections. However, much of these failures relate to better defining key government institutions and/or further enhancing the checks and balances. Reasons of the failure to act on these legislations vary, but they are largely because the CoR and government leadership failed to prioritise them or they believe existing bodies play the required roles.

It is evident that many of the structural and functional gaps or weaknesses that are highlighted in this report stem from oversights or flaws in the current Constitution. These cannot be changed without amending the Constitution, which has been made virtually impossible by design. Amending the Constitution requires an overarching political agreement between the major components of Iraq's society and the endorsement of all governorates. At this stage, a majority vote in any three governorates together can defeat any referendum on an amended Constitution. In the current political climate, such an overarching agreement and securing the majority population's endorsement in all of Iraq's governorates is a mammoth task that has not been tested before. Importantly, rushed amendments and referenda, in the near future, will run the risk of creating yet another imperfect constitution.

Therefore, it is best to focus the efforts in the short and intermediate term on (a) expediting legislations to underpin the current Constitution and enhancing the democratic checks and balances; (b) ensuring the enactment and implementation of these legislations; (c) introducing new mechanisms to monitor the implementation of the Constitution and constant identification of areas of structural and functional weaknesses, and the best way of addressing them.

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