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Cory Kopitzke

Indiana University Maurer School of Law, cjkopitz@indiana.edu

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Cover Page Footnote

Cory Kopitzke, Executive Editor, *Indiana Journal of Global Legal Studies*, Volume 24; J.D. Candidate, May 2017, Indiana University Maurer School of Law; B.A. German, 2014, Wabash College. I would like to thank Colonel (Retired) Richard D. Welch, Ph.D. Fellow, Center for Constitutional Democracy, for his time and guidance throughout the writing process.

**Realizing an Opportunity:
Limiting the Power of the Executive in the Iraqi Constitution**
by Cory Kopitzke*

INTRODUCTION

In the summer of 2015, Iraqi citizens took to the streets in protest.¹ After going without essential services, such as electricity, in the sweltering heat and after enduring corruption that undermined Iraqi forces battling the Islamic State, these citizens called for meaningful changes in the management of the Iraqi government and for the fulfillment of “democratic aspirations” enshrined in the Iraqi Constitution.² In response to these protests, Iraqi Prime Minister, Haider al-Abadi, proposed sweeping reform measures to combat the decisive divides in the current administration.³ These reforms called for drastic change—including the elimination of the vice-president and deputy prime minister positions, the removal of a large percentage of cabinet members, and the cessation of sectarian and party quotas for state positions.⁴

After his reform package received unanimous approval from the Iraqi Parliament and from the Grand Ayatollah, Ali Al-Sistani,⁵ Abadi took immediate action to remove the vice presidents and deputy prime ministers from office.⁶ However, after the current vice-presidents brought challenges to the reforms, the Supreme Court of Iraq ruled that the removal of these positions was unconstitutional.⁷ The Parliament, therefore, withdrew its support for the package and accused Abadi of overstepping his authority.⁸

Outside the government, the Islamic State still controls large swaths of land, including, for the time being, twenty-five percent of the city of Ramadi—the provincial capital of Anbar,⁹ and Iraqi forces have only been able to claim back roughly six percent of government territory in the past

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¹ Stephen Kalin, *Iraqi PM Orders Easier Access to Baghdad's Green Zone as Protests Surge*, REUTERS (Aug. 28, 2015), <http://www.reuters.com/article/us-mideast-crisis-iraq-reforms-idUSKCN0QX0HF20150828>.

² See Haider al-Abadi, Op-Ed., *We Have Heard the Iraqi People: Recent Protests Provide an Opportunity to Prove that Peaceful Reforms Can Prevail Over Violent Extremism*, WALL ST. J. (Sept. 8, 2015), <http://www.wsj.com/articles/we-have-heard-the-iraqi-people-1441754816>.

³ Stephen Kalin, *Iraqi Deputy PM Resigns, Faces Corruption Investigation*, REUTERS (Aug. 10, 2015), <http://www.reuters.com/article/2015/08/10/us-mideast-crisis-iraq-reform-idUSKCN0QF26C20150810>.

⁴ Full Text of Prime Minister Abadi's Proposed Reform Agenda, 1001 IRAQI THOUGHTS (Aug. 10, 2015), <http://1001iraqithoughts.com/2015/08/10/full-text-of-prime-minister-abadis-proposed-reform-agenda/>.

⁵ *Iraq's Prime Minister Fires Senior Cabinet Officials*, DEUTSCHE WELLE (Aug. 12, 2015), <http://www.dw.com/en/iraqs-prime-minister-fires-senior-cabinet-officials/a-18646379>.

⁶ Noah Feldman, Op-Ed., *Reform Plan Could Tear Iraq Apart*, BLOOMBERG VIEW, (Aug. 12, 2015), <http://www.bloombergvew.com/articles/2015-08-12/reform-plan-could-tear-iraq-apart>.

⁷ Loveday Morris, *In the Fight Against the Islamic State, Iraq's Leader Begins to Look Shaky*, WASH. POST (Nov. 27, 2015), https://www.washingtonpost.com/world/iraqi-leader-appears-shaky-as-fight-against-islamic-state-takes-on-new-urgency/2015/11/25/26b625d8-870c-11e5-bd91-d385b244482f_story.html.

⁸ See *id.*

⁹ Pat St. Claire, *ISIS Suicide Bombers Attack Iraqi Forces at Base Near Ramadi*, CNN (Jan. 2, 2016), <http://www.cnn.com/2016/01/02/middleeast/iraq-ramadi-isis-suicide-attack-on-army-base/>.

year.¹⁰ Moreover, there is evidence that the Kurdish Government may be taking advantage of the war with the Islamic State to grab land and disputed oil resources, refueling the “long-running land dispute that has pitted Iraqi Kurdistan against the central government in Baghdad.”¹¹ Additionally, Iraq is still facing an outbreak of cholera that has infected over 2,000 people.¹²

These internal and external factors paint an unattractive picture of the situation in Iraq, but combined, they might indicate a window of opportunity. After examining the current state of affairs in Iraq, this paper argues that there is a potential opening for constitutional reform. I contend that this potential opportunity should be taken advantage of with specific and narrowly tailored amendments to the Iraqi Constitution that limit the power of the executive branch. In Part One, I will provide a broad overview of the situation in Iraq, including the attitudes of government officials, the desires and needs of Iraqi citizens, and the significant internal and external factors pressing on top decision makers, culminating in a potential opportunity for constitutional reform. I argue that the internal and external factors—such as the severe security threat from the Islamic State, the economic crises, and recent actions taken by the Prime Minister—can be figuratively plotted out as exogenous shocks rising to a peak today whereby the opportunity for constitutional reform is potentially ripe. In Part Two, I will discuss the possible adjustments to the Constitution that could be introduced. I incorporate commentary from leading academics in this arena on why changes to the executive should be pushed. In short, this paper should be seen as a snapshot on the present situation in Iraq and as a brief source that can be used for further, more extensive, research on the current prospect of constitutional reform.

I. An Opportunity for Reform?

As noted above, the crises facing the administration in Baghdad may be acting as catalysts whereby political actors will be more receptive to constitutional reform proposals. Building off of the scholarship of political scientists in the study of ideational change,¹³ I argue that the external and internal factors pressing on decision makers in Iraq are potentially great enough to highlight that traditional behavioral and decision-making patterns are inadequate to deal with the problems facing the nation.¹⁴ Sheri Berman, a political scientist at Barnard College maintains that ideational change can stem from dissatisfaction with existing belief structures.¹⁵ This dissatisfaction can come from either exogenous shocks “that forc[e] a rapid reconsideration of ideational frameworks” or from a more gradual de-legitimization of existing beliefs.¹⁶ Both can open up political space for new ideas.¹⁷

¹⁰ *Id.*

¹¹ Sam Dagher & Ben Kesling, *Arabs Accuse Kurds of Exploiting War With Islamic State to Grab Land*, WALL ST. J. (Nov. 25, 2015), <http://www.wsj.com/articles/ethnic-tensions-flare-in-iraqi-city-of-sinjar-after-kurdish-led-offensive-pushes-islamic-state-out-1448361003>.

¹² Isabel Coles, *Cholera Spreads From Iraq to Syria, Kuwait, Bahrain: UNICEF*, REUTERS, (Nov. 6, 2015), <http://www.reuters.com/article/us-mideast-crisis-iraq-cholera-idUSKCN0SV18420151106>.

¹³ Sheri Berman, *Ideas, Norms and Culture in Political Analysis*, 33 COMP. POL. 231 (2001).

¹⁴ *See id.* at 234.

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.*

For example, the argument has been made that the fall of Communism acted as an external shock that created an identity crisis for Russian speakers in former Soviet republics.¹⁸ This shock allowed for the introduction of new ideas and new forms of government. However, a large shock or crisis such as this is not necessary for change.¹⁹ Political spaces can come about because of changing material conditions, such as an economic crisis or the rise of new social groups.²⁰ I contend that a political space is developing in Iraq due to the many internal and external factors mentioned above.

Perhaps the best indicator that a political space has opened for constitutional change is the dialogue created by the introduction of the large reform package by Prime Minister Abadi. Some of his measures have prompted constitutional challenges and rulings by the high court,²¹ and others have sparked debates about their overall negative effect on the nation. For example, in response to Abadi's plan to abolish the vice-president positions, Iraqi President, Fuad Masum, said that the Constitution should be amended in order to accomplish this goal.²² He highlighted the need for the constitution to be amended but emphasized the "importance of respecting the principles of the constitution as the basis for any reforms and for any measures."²³ Also, indicative of the opportunity for reform were statements by Abadi himself. After introducing his reforms, Abadi claimed that "[a]ny change in the political process should be in need of a change in the constitution. . . . I hope that I'll get a mandate from people to alter the constitution."²⁴ Abadi argued that the current Constitution was written in a hasty manner, and while he respects its authority, claimed it is incomplete.²⁵

Another indicator that the opportunity for reform might be present is the large civil protests by Iraqi citizens. While citizens first took to the streets of Baghdad to protest the lack of services such as electricity, many have now demanded more significant changes.²⁶ For example, protestors moved the discussion to issues such as improving the judiciary, removing corruption, and getting religion out of politics—many of the actions Abadi promised in his reform proposals.²⁷ Indeed, it will be the actions and opinions of Iraqi citizens that will be key to any constitutional reform measures, as the Iraqi Constitution requires, *inter alia*, the approval of the people of the nation in a general referendum for any amendment to be implemented.²⁸

It is also important to discuss what role the rise of the Islamic State has played in the probability of constitutional reform. The Islamic State has controlled large patches of land in Iraq since early

¹⁸ *See id.*

¹⁹ *Id.*

²⁰ *See id.*

²¹ *See Morris, supra note 7.*

²² *Iraq President Says Constitution Should not be Bypassed*, YAHOO NEWS (Aug. 26, 2015), <http://news.yahoo.com/iraq-president-says-constitution-not-bypassed-181454359.html>.

²³ *Id.*

²⁴ Vivian Salama & Sinan Salaheddin, *Iraqi Prime Minister Says He Will Seek a Popular Mandate to Change Constitution*, STAR TRIB., (Aug. 12, 2015), <http://www.startribune.com/iraqi-premier-says-will-seek-mandate-to-change-constitution/321544891/>.

²⁵ *Id.*

²⁶ Tim Arango, *Protests in Iraq Bring Fast Promises, but Slower Changes*, N.Y. TIMES (Aug. 31, 2015), http://www.nytimes.com/2015/09/01/world/middleeast/protests-in-iraq-bring-fast-promises-but-slower-changes.html?_r=0.

²⁷ *See id.*

²⁸ IRAQ CONST. art. 126.

2014, which, again, prompted intervention from the United States.²⁹ Now, however, the Iraqi forces have driven the Islamic State from the city center of Ramadi, and the situation is looking optimistic.³⁰ Abadi has declared that 2016 “will be the year we drive ISIS out of Iraq.”³¹ This success has brought about a new sense of nationalism,³² which might bolster a movement for reform, to implement many of the successes into the Constitution. People are taking pride in being Iraqis again,³³ and if the government continues to support the military and root out corruption inside it, efforts to establish constitutional safeguards may be more likely.

Revelations of Iraqi politicians are also telling with regard to the opportunity for reform. Former Iraqi Prime Minister, Ayad Allawi, recently told media sources that he fears the eventual breakup of the country if disputes among political and sectarian groups inside the government do not come to an end soon.³⁴ Allawi noted that every party has its own militia or armed forces and because each of those groups believes it is the only correct party, violence by those groups is inevitable.³⁵ He continued, arguing “there is no Iraqi state, but only a (central) power. And if we do not pass this crisis, Iraq will in the future face catastrophe and partition.”³⁶

Finally, the Kurdish government has put independence back on its agenda for 2016, with Kurdish President, Masoud Barzani, echoing the opinions of many of his citizens that the Kurdish region would be better off if it cut ties with Baghdad.³⁷ In late 2014, when the Islamic State took over large portions of Iraq, Barzani asked his Parliament to set a date for an independence referendum, claiming the Kurds no longer want to be a part of the Iraqi troubles.³⁸

All of the struggles, disasters, and political upheavals I mention above should not be taken as entirely negative. They should be seen as painting a picture of opportunity. I claim, in short, that these misfortunes have shocked the Iraqi Government and its people to reconsider their existing beliefs and the ways in which the country is currently conducted. Perhaps the people have had enough? Perhaps reform would solve many of these problems? I do not know for sure, but I believe the opportunity is there to find out.

II. With an Opportunity, Why Reform the Executive?

If the opportunity for constitutional change is present, I argue that efforts should be made to reform the powers of the executive. While changes to any part of the Iraqi Constitution would, in theory, be possible, I contend that changes to the executive branch would be the most beneficial to the management of the government and most likely to be accepted by the people.

²⁹ Chelsea J. Carter, Hamdi Alkhshali, & Susanna Capelouto, *Kerry Assures Iraqis of U.S. Support if They Unite Against Militants*, CNN (June 23, 2014), <http://www.cnn.com/2014/06/23/world/meast/iraq-crisis/>.

³⁰ See St. Claire, *supra* note 9.

³¹ *Id.*

³² See *id.*

³³ *Id.*

³⁴ *Iraq's Former PM Warns Further Tensions Could Break up the Country*, RUDAW (Jan. 11, 2016), <http://rudaw.net/english/middleeast/iraq/11012016>.

³⁵ See *id.*

³⁶ See *id.*

³⁷ Hannah Lynch, *Is 2016 the Kurdish Goodbye to Iraq?*, RUDAW (Jan. 8, 2016), <http://rudaw.net/english/kurdistan/080120161>.

³⁸ See *id.*

The recent reform attempts by Abadi are evidence that reforms of the executive branch are needed and wanted; however, the change that is needed is, perhaps, not the change Abadi envisioned. One of Abadi's proposals includes removing from all senior executive positions political and sectarian quotas.³⁹ The Prime Minister would also be permitted to dismiss governors or heads of local councils in cases of faulty performance and to consolidate and dismiss certain ministries.⁴⁰ While these reforms were initially approved by Parliament, they threaten to centralize power in the Prime Minister. The exclusion of all senior executive officials from sectarian and political quotas has the potential to alienate certain factions, as that structure was arguably "built into the DNA of the Iraqi Constitution"—though not explicitly stated—to suppress Sunni fears that Kurds and Shiites would unite to repress Sunnis.⁴¹ Moreover, one must take account of the political context of these reforms to understand some of their significance.⁴² Since Vice-President al-Maliki was ousted as Prime Minister last year, he, along with some other political groups closely aligned with Iran, has been trying to undermine Abadi's authority. Thus, many of Abadi's reforms look less like a trimming of government bureaucracy and more like an attempt to thwart a power struggle.⁴³

Another reason the executive branch should be reformed is the ambiguity of power with regard to the prime minister and the military. Given the fact that Iraq is attempting to recover from one of the country's largest corruption scandals in which 50,000 or more "ghost soldiers" received paychecks from the government without showing up for work,⁴⁴ while that same military is fighting to keep the Islamic State from taking over more land, it seems appropriate to consider how reforming the Constitution might prevent this type of problem in the future. As Zaid Al-Ali—an attorney who served as a legal advisor to the United Nations Office of Constitutional Support and who provided advice to the Iraqi constitutional drafting committee—has said, the constitutional drafters did not provide any specific rules governing the military's chain of command.⁴⁵ All the Constitution says is that the Prime Minister is to be the "commander-in-chief of the armed forces," which Al-Ali notes is unusual or "even unique" in a parliamentary system.⁴⁶ The Constitution does not even mention how the Prime Minister should coordinate with the Minister of Defense and what each person should be responsible for.⁴⁷ It is this ambiguity that has made government

³⁹ *Full Text of Prime Minister Abadi's Proposed Reform Agenda*, 1001 IRAQI THOUGHTS (Aug. 10, 2015), <http://1001iraqithoughts.com/2015/08/10/full-text-of-prime-minister-abadis-proposed-reform-agenda/> [hereinafter "*Full Text*"].

⁴⁰ *See id.*

⁴¹ *See* Noah Feldman, *Reform Plan Could Tear Iraq Apart*, BLOOMBERG VIEW (Aug. 12, 2015), <http://www.bloombergvew.com/articles/2015-08-12/reform-plan-could-tear-iraq-apart>.

⁴² *See* Zaid Al-Ali, *Premature Excitement About Iraq's New Government Reforms*, WASHINGTON POST (Aug. 14, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/08/14/premature-excitement-about-iraqs-new-government-reforms/>.

⁴³ *See Id.*

⁴⁴ Suadad al-Salhy, *How Iraq's "Ghost Soldiers" Helped ISIL*, ALJAZEERA (Dec. 11, 2014), <http://www.aljazeera.com/news/middleeast/2014/12/how-iraq-ghost-soldiers-helped-isil-2014121072749979252.html>.

⁴⁵ *How Faults With Iraq's Constitution Undermines The Country, Interview with Constitutional Scholar Zaid Al-Ali*, MUSINGS ON IRAQ (Feb. 24, 2014), <http://musingsoniraq.blogspot.com/2014/02/how-faults-with-iraqs-constitution.html>.

⁴⁶ *See id.*

⁴⁷ *Id.*

accountability with regard to the military almost impossible, and it has allowed the executive too much leeway in implementing policy, leading to the corruption mentioned above.⁴⁸

Amending the executive powers might also help to thwart some of the corruption flowing from the judiciary. As Al-Ali notes, reports have shown that Iraqi judges have ignored exploitations and abuses by the executive since at least 2003.⁴⁹ Reworking the executive powers section of the Iraqi Constitution to do away with many of the ambiguities of the Prime Minister's powers, as mentioned above, might place more direct restrictions on judges, giving them less flexibility to interpret or ignore the actions of the executive. Moreover, this action may be most relevant now given one of Abadi's recent reform proposals—the ability for the Prime Minister to dismiss elected governors or heads of local councils in cases of faulty performance.⁵⁰ This provision has, perhaps, the most potential for abuse. Given his allegiance to his political party, Abadi would be unlikely to dismiss a political ally but much more likely to dismiss a political opponent.⁵¹ Moreover, this provision places even more power in the hands of the executive even though the Constitution was designed to decentralize power and provide provinces with greater autonomy.⁵² Abadi's plan would move the Iraqi executive closer toward its disastrous record of centralism, and, as noted by Al-Ali, “illustrates his incapacity to seek modern solutions to Iraq's long-standing problems.”⁵³

CONCLUSION

While the situation in Iraq is not necessarily positive, the condition of the state may be such that reform efforts would be more likely than not to pass—or at least be considered by the public. The Iraqi people want a functional government that provides them with services and protection. The previous administrations have not done this. Former Secretary of Defense Chuck Hagel recently noted that the five years between the pullout of American troops and the rise of the Islamic State “were wasted, and that's what's led to so much of the turmoil, the trouble, the chaos, the slaughter and the killing in Iraq today.”⁵⁴ Hagel claimed that the Sunni/Shia and Sunni/Kurd relationship along with the Prime Minister's inability to “fulfill any of the constitutional requirements and the promises he had made to bring Iraq together” led to the instability seen today.⁵⁵ While he may or may not be correct, his claim that constitutional requirements have not been fulfilled seems to be a statement with which many other policy makers and scholars can agree.

At the end of the day, I acknowledge that the likelihood of any type of constitutional reform inside Iraq at the current moment is unlikely. Ideological beliefs aside, the practical concerns of passing any type of reform that would require a referendum, as noted above, would be overwhelming. The

⁴⁸ Michael Youhana, *The Weak State: The Dissolution of Constitutional Iraq*, FULL STOP (June 17, 2014), <http://www.full-stop.net/2014/06/17/features/essays/michaelyouhana/the-weak-state-the-dissolution-of-constitutional-iraq/>.

⁴⁹ See Al-Ali, *supra* note 32.

⁵⁰ *Full Text*, *supra* note 29.

⁵¹ See Al-Ali, *supra* note 32.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ Aaron Mehta, *Hagel: Iraq 'Squandered' 5 Years, Paving Way for ISIS*, DEFENSE NEWS (Jan. 11, 2016), <http://www.defensenews.com/story/war-in-syria/2016/01/11/hagel-iraq-squandered-5-years-paving-way-isis/78659842/>.

⁵⁵ See *id.*

Islamic State still controls land and people inside the country. Thus, any referendum would take a long time to organize and still might not get reach all of the people required.

Nevertheless, I hope that a dialogue can be started alongside all of the turmoil whereby reformers and government officials can begin to consider the possibility of improving their constitution. Nothing can be done behind a wall of cynicism. The nation of Iraq has an opening, and I believe some scholars are recognizing that opening. I, therefore, hope that people of Iraq will put aside many of their differences and come together to solve the countless problems facing the nation.