



The Judicialisation of Constitutional Disputes in Iraq: Exploring the Rule of Law in Transitional Democracies

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Majida Sanaan Ismael

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Abstract

It is generally agreed that the transition from authoritarian rule to a constitutional democracy often coincides with the adoption of a new, incomplete and often vague constitution that empowers, and more importantly constrains newly appointed and elected state officials and institutions. In such a transitional setting, it is to be expected that power will not only be exercised on the basis of democratic principles and practices, but that it will also be based on the rule of law, that serves to limit the arbitrary and abusive exercise of public power. Therefore, this thesis examines the role of newly empowered courts in emerging and transitional states and the far-reaching implications of transferring political conflicts into constitutional cases concerning the rule of law. It argues that resolving and judicialising contested constitutional questions can put the rule of law, the constitutional judiciary and the process of transition itself to the ultimate test in the period immediately following a transition to democracy.

This thesis presents an in-depth case study analysing the recent constitutional and political developments in the fragile state of Iraq following the US-led invasion in 2003. It uses original and detailed analyses of the key case law of the Federal Supreme Court of Iraq; the legal doctrinal method and insights from comparative literature on courts, law and the political system. This thesis assesses the Court in the context of broader constitutional principles, such as the rule of law, and modern phenomena, such as the trend towards the judicialisation of politics, in the specific circumstances of transitional democratic states.

Findings from this research are complex and multiple; they illustrate how establishing and upholding the rule of law in states that are newly emerged from authoritarian rule can be a formidable undertaking, one that is shaped by a legacy of authoritarianism and at best 'rule by law'. The research concludes that, judicialisation affects and is affected by the rule of law. Thus, state officials and institutions may well bypass the constitution as well as transfer political disputes into constitutional cases; often using the judiciary to legitimise and institutionalise excessive political powers. When the government is not bound by the rule of law and the law is not sovereign over all, judicialisation might expose the court to external interference, as well as affecting the functioning of a new parliament which is attempting to establish its powers and legitimacy.

Dedication

This thesis is dedicated to:

Every life that has been lost to keep our lives safe and, above all, to martyrs and Peshmerga. It is their sacrifices and belief in their cause in defending humanity and Kurdistan that has given me the courage to believe that even the seemingly impossible can be possible.

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Last but not least, I would like to thank my family: my parents and my brothers and sisters, especially my brother Serkat, for supporting me in every way they could not only whilst I completed this thesis but throughout my life, making it possible for me to overcome my personal difficulties during my PhD journey.

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Table of Abbreviations

AJC	Accountability and Justice Commission	112
CPA	Coalition Provisional Authority	13
FC	Federation Council	106
FCC	Federal Court of Cassation	137
FSC	Federal Supreme Court	4
HJC	Higher Judicial Council	131
IBA	International Bar Association	52
IGC	Iraqi Governing Council	13
ILD	Iraqi Legal Database	18
IRQFSC	Iraqi Federal Supreme Court, Decision	106
KRG	Kurdistan Regional Government	129
MPs	Members of Parliament	126
RCC	Revolutionary Command Council	9
TAL	Law of Administration for the State of Iraq for the Transitional Period (2004)	7
CSOs	Civil Society Organizations	160

Table of Cases

Iraqi Cases: Main Cases Which Are Given Names:

1. IRQFSC 15/2006 [26 /8/2006], *Parliamentary Seats' Distribution* (15/2005)
2. IRQFSC 228/2006 [9/10/2006], *First Independent Commission* (228/2006)
3. IRQFSC 9/2007 [16/7/2007], *First Governorates' Legislative Power* (9/2007)
4. IRQFSC 16/2008 [21/4/2008], *Second Governorates' Legislative Power* (16/2008)
5. IRQFSC 45/2009 [20/7/2009], *Kirkuk's Power-Sharing* (45/2009)
6. IRQFSC 58/2009 [13/10/2009], *Removal of the Governor of Salah al-Din* (58/2009)
7. IRQFSC 72/2009 [19/11/2009], *Hashmi's Veto of the Election Law Amendment* (72/2009)
8. IRQFSC 7/2010 [3/3/2010], *Mandean Sabeans* (7/2010)
9. IRQFSC 11/2010 [14/6/2010], *Yezidis Quota* (11/2010)
10. IRQFSC 12/2010 [14/6/2010], *Surplus Seats* (12/2010)
11. IRQFSC 20/2010 [23/3/2010], *Specialist Doctors* (20/2010)
12. IRQFSC 21/2010 [18/10/2010], *Third Governorates' Legislative Power* (21/2010)
13. IRQFSC 25/2010 [25/3/2010], *Largest Parliamentary Bloc* (25/2010)
14. IRQFSC 43-44/2010 [12/7/2010], *Draft and Proposal Law* (43/2010)
15. IRQFSC 55/2010 [24/10/2010], *Open Session of the Parliament* (55/2010)
16. IRQFSC 60/2010 [21/12/2010], *Contract Law* (60/2010)
17. IRQFSC 88/ 2010 [18/1/2010], *Independent Commissions* (88/2010)
18. IRQFSC 36/2011 [10/5/2011], *Governorates' International Representation* (36/2011)
19. IRQFSC 59/2011 [21/11/2011], *Divorce through Agent* (59/2011)
20. IRQFSC 61/2011 [31/1/2012], *al-Waqf* (61/2011)
21. IRQFSC 73 /2011 [26/12/2011], *al-Batikh* (73/2011)
22. IRQFSC 7/2012 [26/2/2012], *Administrative Decentralization* (7/2012)
23. IRQFSC 8/2012 [2/5/2012], *Governorates' Oil Exportation* (8/2012)
24. IRQFSC 9/2012 [2/5/2012], *First MPs' Pension* (9/2012)
25. IRQFSC 35/2012 [2/5/2012], *First Formal Questioning of Minister* (35/2012)
26. IRQFSC 42/2012 [19/9/ 2012], *Female Quota* (42/2012)
27. IRQFSC 74 /2012 [9/10/2012], *KRG Oil Contracts* (74/2012)
28. IRQFSC 95/2012 [27/1/2013], *Parliamentary Formal Questioning of the Minister for Youth and Sport* (95/2012)
29. IRQFSC 96/2012 [12/3/2012], *Investigative Committees of Parliament* (96/2012)
30. IRQFSC 24/2013 [26/8/2013], *Second Kirkuk's Power-Sharing* (24/2013)
31. IRQFSC 29/2013 [6/5/2013], *KRG's Higher Education Ministry* (29/2013)
32. IRQFSC 31/2013 [6/5/2013], *Second MPs' Pension* (31/2013)

33. IRQFSC 64/2013 [26/8/2013], *Term Limit Law* (64/2013)
34. IRQFSC 79/2013 [23/10/2013], *MPs' Allowance* (79/2013)
35. IRQFSC 90/2013 [7/11/2013], *Fiscal Independence of Governorates* (90/2013)
36. IRQFSC 38/2014 [24/6/2014], *Third MPs' Pension* (38/2014)
37. IRQFSC 45/2014 [11/8/2014], *Second Largest Parliamentary Bloc* (45/2014)
38. IRQFSC 59/2014 [24/6/2014], *KRG Oil Export* (59/2014)
39. IRQFSC 133/ 2014 [17/2/2014], *MPs' Replacement* (133/2014)
40. IRQFSC 10/ 2015 [18/2/2015], *Abusive Divorce* (10/2015)
41. IRQFSC 21, 29/2015 [14/4/2015], *Second Proposal and Draft Law* (21/2015)
42. IRQFSC 51/ 2015 [22/6/2015], *Time Limit for MPs' Replacement* (51/2015)
43. IRQFSC 106/2015, [26/1/2016], *Dismissal of Governor of Ninawa* (106/2015)

Iraqi Cases: Cases Which Are Not Given Names:

44. IRQFSC 1/2006 [9/2/2006]
45. IRQFSC 8 /2006 [29/5/2006]
46. IRQFSC 9/2006 [29/5/2006]
47. IRQFSC 10/2006 [29/5/2006]
48. IRQFSC 4/2007 [2/7/2007]
49. IRQFSC 12/2009 [2/1/ 2009]
50. IRQFSC 57 /2010 [16/8/2010]
51. IRQFSC 87/2010 [2/12 / 2010]
52. IRQFSC 89 /2010 [8/12/2010]
53. IRQFSC 2/2011 [02/22/2011]
54. IRQFSC 34/2011 [5/5/2011]
55. IRQFSC 39/2011 [30/1/2012]
56. IRQFSC 99/2011 [18/10/2011]
57. IRQFSC 34/49 /2012 [12/6/2012]
58. IRQFSC 41/2012 [8/7/2012]
59. IRQFSC 6/2013 [12/3/2013]
60. IRQFSC 19/2013 [6/5/2013]
61. IRQFSC 87/2013 [16/9/2013]
62. IRQFSC 51, 52, 53, 54, 55, 56, and 57/2015 [22/6/2015]

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Adams v The Scottish Ministers, 2004 SC 665
AXA v The Lord Advocate and others [2011] UKSC 46
Nicklinson v Ministry of Justice [2014] UKSC 38

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Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR) (4 November 1950)
American Convention On Human Rights, 'Pact of San Jose, Costa Rica' (adopted at San José, Costa Rica, 22 November 1969 at the Inter-American Specialized Conference on Human Rights
African Charter on Human and Peoples' Rights (adopted 27 June 1981) (African Charter)

National Constitutions and Statutes

Basic Law of the Federal Republic of Germany (1949)
Constitution of the Republic of France (1958)
Constitution of the Islamic Republic of Afghanistan (2004)
Constitution of the Republic of Kosovo (2008)
Constitution of Kenya (2010)
Constitution of the Arab Republic of Egypt (2014)
Human Rights Act [UK Parliament] (1998)

Iraq Constitutions

Basic Law of the State of Iraq (1925)
Interim Constitution of the Republic of Iraq (1958)
Interim Constitution of the Republic of Iraq (1963)
Interim Constitution of the Republic of Iraq (1964)
Interim Constitution of the Republic of Iraq (1968)
Interim Constitution of the Republic of Iraq (1970)
Law of Administration for the State of Iraq for the Transitional Period (2004)
Constitution of the Republic of Iraq (2005)

Iraqi Legislations (Acts of Parliament)

Civil Actions Law (83) 1969
Criminal Procedural Law (23)1971
Law of the Oil Ministry (101) 1976
Ministry of Justice Law (101) 1977
Law of the State Shura Council (65) 1979
Civil Evidence Law (107) 1979
Judicial Supervision Law (124) 1979
Judicial Organisation Law (160) 1979
Iraqi Enforcement Law (45) 1980
Public Customs Law (23) 1984

Administrative Judicial Court Law (106) 1989
 Revolutionary Council, Legislative Decree (27) 1992
 Revolutionary Council, Legislative Decree (55) 1992
 Electoral Law for the Council of Representatives (16) 2005 (Parliament Electoral Law 2005)
 Law of the Federal Supreme Court (30) 2005
 Bylaws of the Federal Supreme Court (1) 2005
 Replacement of Members of Council of Representatives Law (6) 2006
 Bylaws of the Iraqi Council of Representatives (15) 2006
 Unified Retirement Law (27) 2006 (repealed)
 Oil and Gas Law of the Kurdistan Region – Iraq (28) 2007
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 Law of the National High Commission for Accountability and Justice (10) 2008
 Elections Law (36) 2008- Governorate, Districts, and Sub-District Councils
 High Commission of Human Rights Law (53) 2008
 Federal Public Service Law (4) 2009
 Electoral Law for the Council of Representatives (26) 2009 - Amendment to Electoral Law (16) 2005
 Disengagement of Departments of the Ministry of Municipalities and Public Affair Law (20) 2010
 Law of the Council of Representatives (23) 2010 –Amendment to Law of the Council of Representatives (50) 2007
 Law of the Salaries and Monthly Allowance of the Members for the Council of Representatives (MPs) (28) 2011
 Law of the Salaries and Monthly Allowance for the Ministers (27) 2011
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De-Ba`athification of Iraqi Society (1) 2003
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 Re-Establishment of the Council of Judges (35) 2003
 Regulation of Oil Distribution (36) 2003
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 Suspension of Exclusive Agency Status of Iraqi State Company for Water Transportation (51) 2004
 Board of Supreme Audit (77) 2004
 Independent Electoral Commission of Iraq (92) 2004
 Electoral Law (96) 2004

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(100) 200

Chapter One: Introduction

Introduction

It is generally agreed in constitutional literature that in recent decades, constitutional courts have expanded their power and influence within legal systems. Increasingly, constitutional judiciaries are called on to resolve a variety of constitutional and legal questions and controversies. Various legal and political systems across the globe have continued to experience this expansion of judicial powers. Scholarly opinion contends that by reviewing the constitutionality of laws and decrees, constitutional judiciaries began to engage in addressing and resolving issues that are central to public policy and political controversies.¹ Scholars are divided between those who support a robust and activist court and others who adopt a more cautious stance towards this judicial role.

In general, in developed democracies, the impact of judicialisation is often addressed in so far as it infringes the ‘constitutional balance’ and separation of power. The implications for democracy of allowing an unelected institution to invalidate or check the policy and actions of an elected body are also discussed. However, in transitional states where the demands for the rule of law and a constitutional judiciary tend to match those for democracy, questioning this impact might not be the primary concern. Instead, in a fragile and unstable transitional democracy, the primary concern might become the basic tenets of the rule of law. Often the central focus of governments and legal reform is on the rule of law. Therefore, one could also make the relations between the rule of law and judicialisation, and related implications, central to the existing scholarly debates. Arguably, judicialisation and the expansion of judicial powers could be seen as enhancing the rule of law; courts might have to judicialise certain issues to ensure the basic rule of law is respected. However, in such transitional states where corruption in state institutions is widespread, there is an ever growing concern that when guarantees and practices of judicial independence are weak or absent altogether, authority and mechanisms of

¹ Hirschl R, ‘The New Constitutionalism and the Judicialisation of Pure Politics Worldwide’ (2006) 75(2) *Fordham Law Review* 721.

accountability together might serve to create political pressure or interference in the judiciary. Therefore, this thesis argues that judicialisation both affects and is affected by the rule of law.

Most transitional democracies emerging from long-standing authoritarian regimes struggle to establish a rule of law system that will strengthen and safeguard the democratic transition and serve to prevent a return to similar or other kinds of authoritarian regimes. Almost all transitional states provide for some form of constitutional judiciary, be it a supreme or constitutional court. Formally, these courts have an expanded list of jurisdictions, are relatively accessible and independent. Therefore, they are expected to hold government officials and institutions legally accountable for infringing any newly established constitutional boundaries and rules of redistribution of power. In practice, the authority and influence of these courts often expands to cover political controversies.

This thesis will argue that particular factors might contribute significantly to the greater potential for judicialisation of the constitution, during the periods leading up to the transitional moments, during the constitution writing process and in the immediate years following transition. Democratisation often coincides with ‘constitution making’ and a newly enacted or amended constitutional text, often incomplete and lacking clarity, is likely to create considerable conflict in interpretation of constitutional norms when applied in the context of transitional democracies. Despite constitutional adherence to the rule of law and preservation of democratic principles and values, together with noticeable progress regarding electoral democracy and the peaceful alteration of power, the rule of law often continues to present a major challenge in emerging democracies. Inevitably these conflicts would put to a crucial test the basic tenets of the rule of law, the principles of separation of powers and the role of constitutional judiciary.

In the initial periods following the transition, questions with the potential to impact significantly on the entire constitutional order and society are increasingly taken to the courts, and there are high expectations that courts will serve to preserve and enforce the newly established democratic constitutional order and enhance the rule of law. Conflicts regarding interpretations of constitutional norms might concern both the structure and the substance of state

policies and laws. The courts often refrain from deciding on the substantive issues and content of the policies involved, instead proving more willing to rule on the structural aspects, by verifying how rules and institutions work. It could be argued that involvement in addressing or resolving substantial questions may prompt political interference, threatening judicial independence. Furthermore, it might be meaningless to impose significant substantive limitations on the government before a basic rule of law has been secured, the supremacy of the law and equality before the law has been guaranteed, and stability, predictability and certainty in the rules have been ensured.

Examining judicialisation through the lens of the rule of law may raise substantial concerns that it might threaten or cause violations of the rule of law. It can be argued that in states in transition the '[mis]use' of the rule of law might enable a government to claim it is conforming to the rule of law thus minimising contestation of its excessive powers. This raises real concerns over the independence of the judiciary and effectiveness of other mechanisms of horizontal accountability. The expansion of judicial involvement in constitutional issues merits serious attention since the judiciary might be used to legitimise the government exercising its powers rather than checking and controlling arbitrary powers.² Such concerns have generated an ongoing debate questioning the independence of the constitutional courts, especially from the executive authority, and their capability and willingness to check governments exercising power.

With growing concern over powers being consolidated in one or two branches of the government, conflicts involving the constitutional balance of powers, in particular between the executive and the legislature, are constantly brought before the courts. Court decisions can alter this constitutional balance, strengthening one branch and weakening the other. Thus, there are continuing demands for constitutional adjudication despite the increasing potential that further interferences by court in contested political issues will bring about a counter-reaction and potential external interference that may infringe their institutional autonomy. Many would argue that constitutional judiciaries, and to

² Salma Yusuf, Dominique Mystris, 'The Rule of Law Revival in Transition States' [2012] *Consortium of Humanitarian Agencies* 12.

a different extent, legislatures, tend to gradually reconsider their position and role within an emerging democracy.³

Given the above conceptual arguments, it is imperative to consider these and other related questions and concerns in the context of Iraq's democratic transition. The expectation is that this case study should provide a theoretical framework for understanding the constitutional judiciary in Iraq, by engaging its experiences with those examined in the broader literature, in particular that on emerging democracies. In the aftermath of the 2003 regime change, the country began its transition from a longstanding authoritarian regime to a constitutional democratic system. Since its creation in 1921, the organisation of Iraqi governments has been ordered by written constitutions. In the last decade, the implementation of the new Constitution and the transition to democracy have been hindered by factors including the legacy of decades of legal and political practices under an authoritarian regime, a difficult democratic transition characterised by widespread post-transition violence, ethnosectarian conflict, corruption, and political instability. Although the 2005 Iraqi Constitution has been approved in a national referendum it remains a work-in-progress. Furthermore, state institutions remain for the most part fragile and failing; and despite the dire need for consensus, politicians find it difficult to compromise and reach agreements on virtually all policies.⁴ This may not be caused by politicians' ignorance of the values and practices of separation of powers and the rule of law, and of a broader sense of the constitution. Equally relevant is the fact that new political actors often ignore these values and relentlessly pursue a course of weakening newly established governmental institutions. However, even when they take these rules seriously, it may be difficult to agree on the exact meaning of the rules and to determine where the boundaries of power lie.

The new Iraqi Constitution seems to have strengthened the judiciary as an essential component of the rule of law and empowers it to check government abuses and the arbitrary use of power. The newly established constitutional judiciary, the Federal Supreme Court (FSC), is a pre-constitutional, and

³ Yoav Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel* (Cambridge University Press 2013) 50.

⁴ See Chapter Four (4.1.2).

transitional Court, which was established in the course of the transition, before the approval of the 2005 constitution. It has a general mandate to enforce and preserve the then newly created 2005 Constitution under the rubric of constitutional review. Furthermore, it plays a decisive role in policing the boundaries of powers between federal authorities and between federal government and sub-federal governments. The Court is new and novel to the context, and the other two political branches are relatively weak or unwilling to settle their conflicts in interpretations of the Constitution, which has often brought such conflicts to the Court. Increasingly, the FSC can be an indispensable guarantor of this new constitutional order; its position and role have put to the ultimate test its constitutional mandate of upholding the principles and values of the rule of law.

Before discussing the structural framework and working plan for this thesis, it seems relevant to give a brief introduction to the constitutional and political developments in Iraq focusing mainly on the pre-2003 developments. In line with the general arguments of the thesis, this background discussion focuses on separation of powers and the constitutional judiciary.

1.1 Constitutional and Political Developments in Iraq pre-2003

1.1.1 Creation of the Modern State of Iraq

The territory known today as the modern state of Iraq, once ruled by one of the oldest known legal codes, namely, the Code of Hammurabi (1790 BC), was part of the Ottoman Empire for almost four centuries prior to the First World War.⁵ In the aftermath of the defeat of the Ottoman Empire in the War, imperial powers divided up the Empire's territories and created new states. In 1914, the British army entered the territories of Iraq. In 1920, the League of Nations granted the British Government a Mandate over the territory of Iraq, and the state of Iraq was formally created from three former provinces (*vilayet*) of the Ottoman Empire: Basra, Baghdad and Mosul. The Mandate officially ended in 1932 when Iraq was granted official independence, becoming a member of the League of Nations. The state of Iraq had a Shia Muslim majority

⁵ Gareth Stansfield, *Iraq: People, History, Politics* (Polity Press 2007) 75.

together with Sunni Muslims and other ethno-sectarian communities such as Kurds, Christians, Yazidis, Turkmen, and Jews.⁶

During the first decade of the British Mandate, the British High Commissioners played a crucial role in creating and building the institutional foundation for the state and governing system of Iraq. Since its creation, Iraq has had various political and constitutional systems, ruled by a series of constitutions, with the exception of the Basic Law of the state of Iraq in 1925 (the 1925 Basic Law) and the Constitution of the Republic of Iraq of 2005 (the 2005 Constitution), other constitutions were set for a provisional period until a permanent constitution could be written and even they were titled as ‘interim constitution’. It is possible to identify three different eras in the political and constitutional developments in Iraq.

The first constitution of Iraq, approved in 1925, established a constitutional monarchy. The British administration appointed Faisal, son of the Sharif of Mecca, as the first King of Iraq.⁷ The monarchy lasted until 1958 when it was overthrown by a military coup (also known as the 14 July Revolution) which declared the Republic of Iraq.⁸ This was followed by four decades of the Republican era (1958-2003), during which the country was governed by series of provisional constitutions: 1958, 1963, 1964, 1968, 1970 and the draft constitution of 1991. In 1963, the first Republican regime was overthrown by a military coup led by Baath Party members; another Baathist-led coup followed in 1968. Each new regime introduced a provisional constitution that contained almost identical ideas and principles for the governance of Iraq. In 1979, Saddam Hussein became president of the Republic, further strengthening Baath rule over Iraq.⁹

⁶ The mandate of Britain over Iraq was established by the Sèvres Accord between the Allied Powers and representatives of the Ottoman Empire in 1920. See Charles Tripp, *A History of Iraq* (Cambridge University Press 2007).

⁷ During the years of the First World War, the Sharif of Mecca led the Arab Revolt in support of the British. After France gained a Mandate over Syria, his son Faisal was expelled from the country. He was then chosen by the British to become the first King of Iraq. Toby Dodge, ‘The British Mandate in Iraq, 1920-1932’ (2009) 2 *Cengage Learning EMEA*, The Middle East Online Series 1-5 <<http://eprints.lse.ac.uk/38880/>> accessed 1 June 2013.

⁸ Stansfield, *Iraq: People, History, Politics* 75- 98.

⁹ The Arab Socialist Baath Party is considered to be ‘the first Arab political party with pan-Arabist Goals’, which were socialism, freedom from foreign control, and the unity of all Arabs in a single state. It was officially founded as a political party at its first congress in April 1947 in Damascus. During the period 1948- 1951, the Baath party had branches in Lebanon, Iraq, Jordan and Syria. See John F Devlin, ‘The Baath Party: Rise and Metamorphosis’ (1991) 96 (5)

The third era started following the breakdown of the Baath regime and the US-led invasion of the country in 2003. Between 2003 and 2004, Iraq was under the rule of the US-led Coalition Provisional Administration (CPA).¹⁰ During this period, the first post-2003 constitutional document was approved, that is, the Transitional Administration Law for the State of Iraq 2004 (TAL). This provided for the foundation of a constitutional political system based on a federal parliamentary constitutional democracy. In late 2005, the (permanent) Constitution for the Republic of Iraq was approved in a general referendum.

1.1.2 Iraq's (Pre-2003) Constitutional Experience

1.1.2.1 The Monarchy Constitution (1925-1958)

The first Iraqi constitution, the 1925 Basic Law, established a constitutional monarchy and created the foundations of governmental institutions as well as the relations between them and the citizens. It provided for fundamental rights and freedoms, recognising Islam as 'the official religion of the State'¹¹ and established three branches of government. The executive authority consisted of the King as the head of state, and the Council of Ministers. The King was vested with significant powers without any responsibilities. Indeed, this Constitution stated that the sovereignty belongs to the nation, which is 'entrusted by the people to the King'.¹² He was the Commander-in-Chief of all armed forces, had almost absolute powers over the formation and dissolution of parliament, the holding of elections, and the appointment of Senators. The Constitution expressly stated that 'the legislative power is vested in parliament and the King', who had powers confirming laws, ordering their promulgation and supervising their execution. His executive powers were also crucial, since the King could appoint and dismiss ministers and their decisions were subject to his approval. The parliament consisted of the Chamber of Deputies whose

American Historian Review 1396-1370. See also Kanan Makiya, *Republic of Fear: The Politics of Modern Iraq* (updated, University of California Press 1998).

¹⁰ The Office of Reconstruction and Humanitarian Assistance (ORHA) led by General Jay M. Garner, U.S. Army was initially in charge of post-2003 Iraq. In July 2003, following the overthrow of the Baath regime on April 9, 2003, the United States led the Coalition which established the CPA, headed by Ambassador L Paul Bremer III. See L Elaine Halchin, 'The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities' (2004) CRS Report for Congress (Order Code RL32370).

¹¹ Basic Law of Iraq (1925), art 13.

¹² *Ibid*, Part II: The prerogatives of the Crown, arts 19-27.

members were elected by the people; and the Chamber of Senate whose members were appointed by the King. Elections for the Chamber of Deputies were held frequently, some 16 elections taking place during the monarchy era.¹³

The constitution contained detailed provisions relating to the judiciary which consisted of civil and ordinary courts and the Supreme Court. It provided for the independence of the judiciary, stating that the courts were to ‘be free from all interference in the conduct of their affairs’.¹⁴ The 1925 Basic Law established a limited form of constitutional judicial review in the form of the Supreme Court which had powers to issue final and binding decisions on impeachment of ministers, members of the parliament, and judges of the Court of Cassations for accusations related to their duties; to interpret the Constitution and to review the constitutionality of laws. The Court consisted of eight members selected by the Chamber of Senate: four senators and four senior judges. The president of the Chamber of Senate chaired the Court, which was convoked by Royal will and with the consensus of the Council of Ministers.¹⁵

1.1.2.3 The Republican and the Baath Constitutions (1958-2003)

Following the 1958 military coup which overthrew the monarchy, army officers controlled government and civil affairs,¹⁶ introducing the first Republican constitution. In addition to proclaiming Iraq to be a republic, the 1958 Constitution established the Sovereignty Council to exercise the powers of the president until elections could be held.¹⁷ Baathist-led coups in 1963 and 1968 introduced three other provisional constitutions (1963, 1964 and 1968) which established the Revolutionary Command Council (RCC). The RCC became the ultimate decision-making body during the rise to power of the Baath Party from 1968 to 2003. Importantly, all of these constitutions provided for virtually identical patterns of governance and fundamental principles. Formally, these constitutions included basic rights and freedoms, recognised Islam as the official religion of the state and guaranteed religious freedom.

¹³ See Republic of Iraq, Council of Representatives, ‘A Summary of the Iraqi Parliaments: Numbers of Parliaments and Their History’ <<http://ar.parliament.iq/LiveWebsites/Arabic/history.aspx>.> accessed 12 October 2015.

¹⁴ Basic Law of Iraq (1925), Part V: The Judicature [or Judiciary], arts 68- 89.

¹⁵ *ibid*, arts 81- 83.

¹⁶ Tripp, *A History of Iraq* 147.

¹⁷ Thabit Abdullah, *A Short History of Iraq* (Taylor and Francis 2014) 102

The RCC was the most innovative and powerful governing body during the Republican era, having almost absolute legislative and executive powers. For example, the 1970 Constitution, in force until 2003, emphasised the significance of the RCC describing it is ‘the supreme institution in the state, which in July, 1968, assumed the responsibility to realise the public will of the people, by removing authority from the reactionary, and corrupt regime, and returning it to the people.’¹⁸ The RCC elected its president, who was also the president of the Republic, from amongst its own nine members. Most importantly, it had the power to issue laws and decrees, having the force of the law. It could also approve state budgets, international treaties and agreements.¹⁹

The president of the RCC had extensive powers over the appointment of judges, governors, and all civil and military employees. He was responsible for supervising all public and quasi-official organisations, directing and controlling the work of the ministers, and presiding over meetings with the prime minister and cabinet.²⁰ In 1979, Saddam Hussein, previously the Vice President of the RCC, who controlled the security forces, gained ultimate control over the RCC. He then became president of the Republic, Secretary General of the Baath Party regional council, president of the RCC and Commander-in-Chief of the armed forces.

The Republican constitutions theoretically provided for a National Council (parliament),²¹ in practice, the first election for the parliament during this era was not held until 1980. The Baath Party won the majority of seats in the parliament in all three elections held prior to 2003. Since the RCC had legislative powers, the then elected parliament had very limited powers which included considering draft laws prepared by the RCC.²² The President had ultimate powers over internal and international policy making, ‘Supervising the good enforcement of the Constitution, the laws, decisions, judicial judgments, and developmental plans in all parts of the Iraqi Republic.’²³

¹⁸ Provisional Constitution of Republic of Iraq [Iraq 1970 Constitution] (1970), art 37.

¹⁹ *ibid*, art 38-45.

²⁰ *ibid*, art 57.

²¹ *See e.g.* the 1970 Constitution devoted chapter three (arts 46-55) to the National Council (Parliament) which its key power was to ‘formulate its interior Regulation’; ‘consider the projects of Laws those proposed by’ RCC.

²² *ibid*, arts 50-53.

²³ *ibid*, art art 57.

Under the Republican constitutions, the judicial authority consisted of different types and degrees of courts including special courts (military and municipal). The Court of Cassation was the highest judicial body with jurisdiction over the whole country. Judicial independence was mentioned in all constitutions to different extents. For example, the 1970 Constitution, very briefly in one sentence, stated that ‘judicature is independent. It is subject to no other authority save the Law.’²⁴ As previously noted, the head of the RCC had power to appoint judges and to oversee the enforcement of judicial judgments.²⁵ None of these constitutions, save that of 1968, contained references to judicial review. The 1968 constitution provided that the Supreme Constitutional Court would be established to issue binding decisions regarding interpretation of the constitution, constitutionality of the laws, interpretation of the financial and administrative laws, and conformity of the regulations with the laws.²⁶ In the same year, the Law of the Supreme Constitutional Court was issued, according to which the court was to be staffed by a number of judges of the Court of Cassation and by high-ranking state officials. Only certain members of the executive authority and the Court of Cassation could access the Constitutional Court. In reality, however, the Law of the Constitutional Court was never implemented and the Court never functioned.²⁷

1.1.2.4 The Pre-2003 Constitutional Principles in Practice

Analysis of pre-2003 constitutional development in Iraq reveals that most of the universally recognised human rights were guaranteed in the constitutional texts and laws; the structure for some form of separation of powers was provided; minority rights were, to some extent, secured, and formally a degree of autonomy over the territory of Kurdistan was granted to the Kurdish population. In practice, however, these constitutional rights,

²⁴Iraq Constitution (1970), art 60 (a).

²⁵ *ibid*, art 57.

²⁶ Provisional Constitution of the Republic of Iraq (1968), art 87.

²⁷ Saad Abdul-Jabbar al-Aalush, ‘Nazarat fi Mozoha’ al-Raqaba al-Qazaiyye aala Dastoriyat al-Qawanin fi al-Iraq wa Mostaqbalaha fi Hemayat al-Hqoq wa al-Huriyat al-Amah’ [Perspectives on the Judicial Review on the Constitutionality of Laws in Iraq and its Future for Protection of Rights and Public Freedoms] (2005) 8 (14) *Journal of the College of Law, University of al-Nahreen* 18.

structures and the principle of the separation of powers did not exist.²⁸ Thus, as some observers would argue, these constitutions were ‘mere pieces of paper that ultimately had little power to bind their leaders’, since ‘[t]he government was free to cancel or amend the constitution while the people did not have any say in the process.’²⁹ The parliaments were weak and lacked sufficient powers for law making and supervising the government.

The Basic Law of 1925 established some form of separation of powers and judicial review as a means of preventing arbitrary exercise of powers. However, there were significant examples that showed the weakness of such arrangements. It could be argued that the powers that the King could exercise served to weaken the parliamentary system and contributed to the concentration of powers in one institution, namely, the Crown. For instance, although the Council of Ministers was constitutionally responsible to the Chamber of Deputies, it was arguably merely an advisory body to the King who could control ministers and their decisions.³⁰ This severely undermined parliament’s supervisory powers over government.³¹ It could be argued that the parliament and the political parties were able to influence the political process, but in general the ruling elite did not play the dominant role in making policies and governing the country.³² Indeed, the King’s broad legislative and executive powers, which included dissolving parliament and dismissing ministers, effectively made him the highest authority, and questioned the very principles of the constitutional monarchy.³³

Iraq was the first country in the region explicitly to establish constitutional review. The Supreme Court did very little during its operation, only striking down one contested law in 1939.³⁴ As a result, some have argued

²⁸ Sabah al Mukhtar, ‘The Rule of Law in Iraq Does it Exist?’ in Eugene Cotran and Mai Yamani (eds), *Rule of Law in Middle East and the Islamic World: Human Rights and the Judicial Process* (I.B.Tauris 2000).

²⁹ Saad Jawad, ‘The Iraqi Constitution: Structural Flaws and Political Implications’ (*The London School of Economics and Political Science, Middle East Centre Paper Series 01, LSE Middle East Centre, 1 November 2013*) <<http://www.lse.ac.uk/middleEastCentre/publications/Paper-Series/SaadJawad.pdf>> accessed 1 December 2015.

³⁰ Adeed Darwish, *Iraq: A Political History* (Princeton University Press 2013)16.

³¹ *ibid*-121.

³² *ibid*, 40.

³³ Abdullah, *A Short History of Iraq* 102.

³⁴ al-Aalush, ‘Perspectives on the Judicial Review on the Constitutionality of Laws in Iraq and its Future for Protection of Rights and Public Freedoms’ 1-20.

that the main rationale for the establishment of constitutional review was to contribute to the enhancing of the supervision of the executive branch over the legislative branch.³⁵ In particular, the court could only assemble as a result of Royal decree and consensus of the Council of Ministers. Thus, it was a temporary institution which operated only when there was a case to be considered. In addition, half of the members of the Supreme Court were senators appointed by the King.³⁶ Under the Republican constitutions even this very limited or formal separation of powers that had been established during the monarchy era disappeared. The executive was all-powerful: from 1958 to 1968 the President and the Council of Ministers exercised almost all legislative and executive powers. During Baath rule (1968-2003) the RCC was the ‘supreme institution of the state’, and indeed the President of the Republic who was also the president of the RCC had absolute power.

It can be concluded that before 1968, that is before the rise of the Baath regime in Iraq, the judiciary was reasonably independent. For example, the Council of Judges under the presidency of the Chief Justice of the Court of Cassation, the highest court in Iraq, governed the judiciary and oversaw all judicial appointments. It is also being reported that since the regime relied largely on special and revolutionary courts, the civil courts were relatively intact and independent.³⁷ In 1979, the Council of Judges was abolished and the judiciary became part of the Ministry of Justice.³⁸

1.1.3 The Post-2003 Constitutional Development

In the aftermath of the 9/11 terrorist attacks on the United States, an American led international coalition removed the Baath regime on 9 April 2003. Immediately following that, the US administration established the Coalition Provisional Authority (CPA), which could issue orders having the force of law for the administration of the country. The CPA issued some significant orders

³⁵ al-Aalush, ‘Perspectives on the Judicial Review on the Constitutionality of Laws in Iraq and its Future for Protection of Rights and Public Freedoms’ 1-20.

³⁶ *ibid* 18.

³⁷ Sujit Choudhry, and others, ‘Constitutional Courts after the Arab Spring: Appointment mechanisms and relative judicial independence’ (Centre for Constitutional Transitions at NYU Law International Institute for Democracy and Electoral Assistance 2014) 64-76, <<http://constitutionaltransitions.org/wp-content/uploads/2014/04/Constitutional-Courts-after-the-Arab-Spring-High-Resolution.pdf>> accessed 2 December 2014.

³⁸ Ministry of Justice Law (101) 1977.

which included the dissolution of the Iraqi army,³⁹ and disbanding the Baath Party.⁴⁰ In July 2003 it appointed a twenty-five person Iraqi Governing Council (IGC) that, in turn, created a Council of Ministers and a Constitutional Committee to prepare a draft constitution.⁴¹

In 2004, an interim constitution (TAL 2004) was drafted and entered into force. TAL (2004) set out the foundations for the governance of the country and a timetable for drafting a permanent constitution. In January 2005, an election for the Transitional National Assembly was held, and from its members a Constitutional Committee of 55 persons was formed, on the basis of an ethno-sectarian quota system, to prepare a draft constitution by August 15, 2005. The process of drafting a permanent constitution for Iraq proved to be difficult and many Iraqis challenged its legitimacy. For instance, it is stated that ‘the Committee was effectively dissolved when an ad hoc body referred to as the Leadership Council—a very small group that had the active participation of the US Embassy—took over drafting duties and produced a final draft Constitution without meaningful participation from the Constitutional Committee.’⁴² Nevertheless, in October 2005, the draft was approved in a general referendum.

The Constitution was drafted in a short period which left many issues unresolved and included many ambiguous institutional arrangements. Therefore, the Constitution itself states that a committee would be formed for the purposes of reporting to parliament within four months ‘recommendations of the necessary amendments’ of the Constitution which were then to be discussed by the Iraqi Parliament and approved in a general referendum.⁴³ This is yet to be implemented.

Article 1 of the 2005 Constitution establishes a federal, Republican, representative parliamentary and constitutional democracy. It recognises the ethno-sectarian diversity of the country, guarantees freedom of religion while providing for a greater role for Islam, stating that ‘Islam is the official religion

³⁹ CPA/Order 22: Creation of A New Iraqi Army (18 August 2003).

⁴⁰ CPA/Order 1: De-Ba`athification of Iraqi Society (16 May 2003); CPA/Order 5: Establishment of the Iraqi De-Baathification Council, Rescinded per Memo 7 Sec 3 (25 May 2003).

⁴¹ Feisal Amin Rasoul Al-Istrabadi, ‘Constitution without Constitutionalism: Reflections on Iraq’s Failed Constitution’ (2009) 87 (7) *Texas Law Review* 1634.

⁴² Choudhry, and others, ‘Constitutional Courts after the Arab Spring’ 67.

⁴³ Constitution of Iraq (2005), art 142.

of the State and is a foundation source of legislation'.⁴⁴ In Article 4, and for the first time, it establishes both Arabic and Kurdish as official languages, and protects other local languages. It provides for the sovereignty of the law, and establishes the people as the source of authority and legitimacy.⁴⁵ As will be discussed later in Chapter Four, it establishes a bill of rights,⁴⁶ separation of powers, and division of powers horizontally, over three federal branches of government, and vertically, between the federal government and sub-federal entities: federal regions and governorates. In Article 116, it recognises the Kurdistan Region, 'along with its existing authorities, as a federal region' and provides that other governorates may form similar federal regions. It establishes independent commissions or ombudsmen bodies to oversee government.⁴⁷ The Constitution provides for constitutional judicial review, the independence and impartiality of the judiciary, prohibits special courts and prohibits the immunity of laws from appeal or judicial review. An evaluation of these institutional arrangements and whether these theoretical principles have been translated into practice forms a significant part of this thesis.⁴⁸

It is important to notice that there is no single phrase that is used in Arabic literature on constitutional law or even in the constitutions of the Arabic countries to translate the term 'the rule of law'. Thus, they might refer to the phrase: '*dawla al-qanun* (state of law), *dawal al haq wa al-qanun* (the state of right and law), or *siyadat al-qanun* (the law is sovereign). Often the latter phrase is considered the translation for the English term 'the rule of law'.⁴⁹ It is interesting that the same Arabic phrase could be translated differently; in the Egyptian constitution *siyadat al-qanun* is translated into 'the rule of law'. In Iraqi constitutions, *siyadat al-qanun* is translated into 'the sovereignty of law'.⁵⁰ It seems that none of these terms were used in almost all pre-2003 constitutions;

⁴⁴ Constitution of Iraq (2005), art 2.

⁴⁵ *ibid*, art 5.

⁴⁶ *ibid*, arts 14-46.

⁴⁷ *ibid*, arts 102-108

⁴⁸ See Chapters Four (4.1) and Chapter Five (5.1 and 5.2).

⁴⁹ David M Mednicoff, 'The Rule of Law and Arab Political Liberalization: Three Models for Change' [2012] *Harvard Journal of Middle Eastern Politics and Policy* 55; Mark David Welton, 'Islam, the West, and the Rule of Law' (2007) 19(2) *Pace International Law Review* 165.

⁵⁰ Constitution of the Arab Republic of Egypt (2014) dedicates Part IV dedicated to '*Syadat al-Qanun*' which is here translated as the rule of law. Article 94 provides that 'the rule of law shall be the basis of governing in the State. The State shall be governed by Law. The independence, immunity and impartiality of the judiciary are essential guarantees for the protection of rights and freedoms'.

the Arabic version of the 2005 Constitution, however, in Article 5 uses *siyadat al-qanun*, which is translated into ‘[T]he law is sovereign’ in the English text. Therefore, it can be said that there is no explicit use of the term ‘the rule of law’ in Iraqi constitutions. On the other hand, this does not mean that there has not been any reference to the various principles which are considered essential to the rule of law, as will be discussed in detail in Chapter Two. Almost all of Iraq’s various constitutions have embedded elements of the rule of law to a greater or lesser degree, including an independent judiciary, equity and equality, supremacy of the constitution and the law, separation of powers, and fundamental rights.

In respect of constitutional developments in pre-2003 Iraq, most of these constitutions empowered one branch of government or institution with extensive and decisive powers that virtually blocked any degree of separation of powers; the King, the RCC and indeed the president of the Republic under Baath rule are the most obvious examples. Other problematic features included the establishment of specific courts, and the influence of the executive over judiciary. On the other hand, constitutional judicial review has been part of the modern constitutional structure of Iraq. In the pre-2003 era, as discussed earlier, Iraq had two rather unsuccessful experiences with constitutional judicial review. The post-2003 experience of constitutional judiciary is the primary focus of this thesis.

The above discussion gives an overview of the pre-2003 constitutional developments in Iraq; the rest of this chapter addresses the key research questions, methodology, contribution and thesis overview.

1.2 Research Questions and Objectives

The research questions on which this study is based are as follows:

- a) How can the rule of law and judicialisation be understood, and how might they affect each other?

The aim is to analyse the conceptual difficulties regarding different understandings of the rule of law and its basic tenets, its relation to democracy and the role of the courts in a democratic system. It also aims to understand the expansion of judicial powers and the judicialisation of constitutional issues and its implications; analysing the relationship

amongst multiple factors and their role in the rise and increase of judicialisation.

b) How might challenges and opportunities presented by transitional democracies test or serve these conceptual understandings of the rule of law and judicialisation?

The aim is to understand the relevance of the rule of law to transitional democracies; as well as understanding judicialisation and its implications for the rule of law focusing on challenges and opportunities of expansion of the power of the constitutional judiciary.

c) How might difficulties and opportunities presented by a transition from an authoritarian to a democratic regime in Iraq test or serve these conceptual understandings of the rule of law and judicialisation? To what extent has the Federal Supreme Court of Iraq been involved in the judicialisation of constitutional issues? What are the facilitating factors for and implications of the FSC's decisions for legal and political developments?

These questions are set to address the challenges and opportunities for the rule of law in Iraq in bringing judicialisation into the debates. Therefore, it assesses the position and performance of the Court in Iraq using original and detailed analyses of the key case law of the FSC, where judges are dealing with the constitutional and legal aftermath of the transition. It will analyse the implications of judicialisation on the 'constitutional balance' of powers and consider the potential for consolidation of powers at the expense of such balance. It will also explore implications for the independence and legitimacy of the FSC.

d) How can the judicialisation of constitutional issues in Iraq be understood within the broader field of understanding and instituting the rule of law in general, and in transitional democracies in particular? To what extent does judicialisation affect the rule of law and to what extent is it affected by it?

This question addresses the main conclusions from analysis of the case study used in this thesis and the Iraqi experience with constitutional judiciary during democratic transition. Using the legal doctrinal method and insights from comparative literature on courts, law and the political system, this thesis assesses the Iraqi Court in the context of universal constitutional principles, such as the rule of law, and modern phenomena, such as the

trend towards the judicialisation of politics, in the specific circumstances of transitional democratic states. These findings then will be discussed from a much broader perspective which challenges scholarly opinion on the rule of law and judicialisation. It considers the relation between the two and examines whether and to what extent judicialisation affects and is affected by the rule of law.

1.3 Research Methodology

This thesis analyses the interaction between the rule of law and judicialisation and its potential implications in transitional democracies. It takes into consideration that ‘constitutions neither originate nor operate in a vacuum. Their import cannot be meaningfully described or explained independent of the social, political, and economic forces’.⁵¹ Therefore, this thesis pays close attention to constitutional and political developments in post-2003 Iraq, in particular during the period 2006 to 2016, that is, the first decade of operation of Iraq’s FSC, which came into being as the current Constitution was approved.

This study used the legal doctrinal method, a case study, and insights from the comparative literature on courts and law as well as the political system. The case study method, which is frequently employed in social science studies, serves as a valuable means for researchers to explore a particular issue or problem in considerable depth. It provides a detailed examination of a specific experience or a series of related events that can, in turn, serve to expose the existence of broader conceptual principles.⁵²

The primary sources of this thesis are the case law of the Iraqi FSC, constitutions, statutes, and government acts. It also uses other secondary sources including books, journals, newspapers, research papers and reports both official and unofficial. This thesis only uses cases or decisions of the FSC which involve the Court engaging in constitutional review, abstract constitutional interpretation, and other non-review jurisdictions. Thus, it excludes the non-constitutional competence of the Court in which it functions as the court of last appeal. Most of the primary materials used for this research, including the FSC

⁵¹ Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 153.

⁵² Robert K Yin, *Applications of Case Study Research* (Sage Publications 1993) xi.

decisions and interpretations, are accessible in Arabic via the website of the Iraqi Federal Judicial Power.⁵³ The author herself has translated most of the decisions, and at times reference has been made to translations and comments by other scholars regarding some of the FSC's most contested decisions. It must be emphasised from the outset that the majority of the cases analysed here were brought before the Court during the period when this doctoral research was being conducted. The fact that these are new cases can be said to have, on the positive side, offered the opportunity to test further and more robustly the research questions. Conversely, there was a lack of academic sources specifically regarding constitutional jurisprudence and FSC case law, even though an extensive body of more general literature now exists on post-2003 Iraq's transition to constitutional democracy, regime change, and other related matters.⁵⁴

The research period was also affected by dramatic developments and events throughout the region and within Iraq, and the possibility remains that the whole constitutional order will break down and the country may dissolve into an endless cycle of conflict and destruction. Iraq has seen its highest levels of political instability, violence and disruption to both daily life and political life as a result of the virtual civil war and terrorist attacks that broke out while this research was being conducted.⁵⁵ This has inevitably affected the availability of

⁵³ Primary sources are mostly available on these official websites: The Iraqi Federal Judiciary: <<http://iraqja.iq/lgna.php>>; Coalition Provisional Authority (CPA): <<http://www.iraqcoalition.org/regulations/>>; Iraqi Legal Database (the ILD): <<http://www.iraqlid.iq/AboutEn.aspx>>; The Iraqi Local Governance Law Library: <<http://www.iraq-lg-law.org/en>>.

⁵⁴ Peter W Galbraith, *The End of Iraq: How American Incompetence Created a War Without End* (Simon & Schuster 2007); Peter W Galbraith, *Unintended Consequences: How War in Iraq Strengthened America's Enemies* (Simon & Schuster 2009); Ali A Allawi, *The Occupation of Iraq: Winning the War, Losing the Peace* (Yale University Press 2008); Zaid Al-ali, *The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism Have Undermined Democracy* (Yale University Press 2014); Toby Dodge, *Iraq - From War to a New Authoritarianism* (Routledge 2013); *Inventing Iraq: The Failure of Nation-building and a History Denied* (C Hurst & Co Publishers Ltd 2003); Peri Bearman, Wolfhart Heinrichs, Bernard G Weiss, *The Law Applied: Contextualizing the Islamic Shari'a* (I.B.Tauris 2007); Francis Fukuyama, *Nation-Building: Beyond Afghanistan and Iraq* (Forum on Constructive Capitalism (1st edn. Johns Hopkins University Press 2010); Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq* (Macmillan 2007).

⁵⁵ Toby C Jones, 'Toxic War and the Politics of Uncertainty in Iraq' (2014) 46 (4) *International Journal of Middle East Studies* 797-799; Kenneth Katzman, 'Post-U.S. Withdrawal Political Unravelling' (*US Congressional Research Service*, 1 June 2014); Ali Khedery, 'Iraq in Pieces' (2015) 94(6) *Foreign Affairs* 33-41; Aymenn Jawad Al-Tamimi, 'Violence in Iraq' (2012) 16 (3) *MERIA Journal* 1-14; Ahmed S Hashim, 'Iraq's Civil War' (2007) 106 (695) *Current History* 3-10; International Displacement Monitoring Centre, 'Iraq IDP Figures Analysis' (15 June

academic sources and also impacted to a degree on the author's motivation to continue with this research.

1.4 Contribution to Knowledge

It is generally agreed that the Supreme Court of the United States, and to a lesser extent other counterpart courts operating in the context of the more developed democracies, has been extensively studied.⁵⁶ They have been a central focus for a growing body of comparative scholarship. Such studies have focused on a variety of issues. Some of these key issues include the independence of the courts;⁵⁷ decision making and the methods of interpretation;⁵⁸ and the potential for and implications⁵⁹ of frequent use of the courts by individuals and interest groups. However, emerging courts operating in contexts of transitional and emerging democracies of post-authoritarian regimes have to date received less attention, possibly because it is only recently that interest has increased regarding the role of constitutional adjudication in these transitional states.⁶⁰ International development agencies have put great

2015)<<http://www.internal-displacement.org/middle-east-and-north-africa/iraq/figures-analysis>> accessed 2 January 2016.

⁵⁶ See e.g. CompLaw which 'introduce a new database on constitutional review conducted by high courts in the world's judicial systems (CompLaw), which is designed to promote research on issues of constitutionalism'. It 'contains information on courts, cases and political systems in 43 states. Data capture continues in an additional 30 states'. Cliond J Carrubba, and others, An Introduction to the CompLaw Database (5 April 2013) <:http://polisci.emory.edu/faculty/jkstato/resources/WorkingPapers/complaw2.pdf> accessed 12 December 2015.

⁵⁷ Jodi S Finkel, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s*. (South Bend, University of Notre Dame Press 2008); Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide'; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003).

⁵⁸ Diana Kapiszewski, *High Courts and Economic Governance in Argentina and Brazil* (Cambridge University Press 2012); Michael Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2010); Gretchen Helmke, *Courts under Constraints* (Cambridge University Press 2005); Rachel Sieder, Line Schjolden and Alan Angell 'The Judicialization of Politics in Latin America' in Rachel Sieder, Line Schjolden and Alan Angell (eds.) *The Judicialization of Politics in Latin America* (Palgrave Macmillan 2005).

⁵⁹ Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998); Sieder, Schjolden and Angell (eds) *The Judicialization of Politics in Latin America*.

⁶⁰ Wojciech Sadurski, 'Judicial Review in Central and Eastern Europe: Rationales Or Rationalizations?' (2009) 42(3) *Israel Law Review* 500; Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge University Press 2012); Tom Ginsburg, 'Courts and New Democracies: Recent Works' (2012) 37 *Law and Social Inquiry* 720; Vineeta Yadav, Bumba Mukherjee, *Democracy, Electoral Systems, and Judicial*

efforts into supporting rule of law reform in developing democracies which mainly support independent judiciaries to ensure courts are capable of enforcing the rule of law.⁶¹

Of course, this body of literature which has been developed through the use of in-depth case studies or comparative studies will contribute to current understandings of such courts and their role in transitional democracies. Research in this field, involving transitional countries, is both appealing and uniquely challenging given that the constitutions themselves are new and the political and legal contexts to which they apply are unpredictable and in a state of constant change, and most importantly the rule of law continues to be under threat. Studies that focus on transitional democracies can make use of insights from scholarship dealing with courts in developed democracies but at the same time, they can also contribute to the general understanding of the role of the judiciary.

Equally important, scholarship concerning the courts and democratisation focuses mostly on the relevance of courts and the rule of law in democratic consolidation and often regards the rule of law as one of the defining characteristics of a consolidated democracy.⁶² However, there has been less research concerning the period immediately following the transition to democracy and the relevance of the rule of law and constitutional judiciaries for democratization in general. This thesis argues that bringing together the rule of law and judicialisation is an important factor when discussing the independence, authority and accountability functions of courts. It is also relevant when analysing the institutional arrangements for checking the arbitrary exercise of powers and holding government officials and institutions to account for abuses of this kind. For the expansion of judicial powers both affects and is affected by

Empowerment in Developing Countries (University of Michigan Press 2014); Ginsburg, *Judicial Review in New Democracies*.

⁶¹ See, Thomas Carothers, *Promoting The Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace 2006); G Helmke, EV McLean, 'Inducing independence: A Strategic Model of World Bank Assistance and Legal Reform' (2014) 31 (4) *Conflict Management and Peace Science* 405.

⁶² Juan J Linz and Alfred Stepan (eds), *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press 1996); Larry Diamond, *Developing Democracy: Toward Consolidation* (Johns Hopkins University Press 1999); Guillermo O'Donnell, 'Horizontal Accountability in New Democracies' in Andreas Schedler, Larry Diamond and Marc F Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999).

the rule of law. It is in general agreed that in transitional democracies, significant effort and money are frequently placed into improving the institutional aspects of judicial independence and other aspects of the rule of law. These reforms aimed at enhancing the rule of law often have international support. Analysis of the case study used in this thesis addresses both the challenges and opportunities which result from applying conceptual understandings of the rule of law and the role of the constitutional judiciary in practice. The experience of transitional democracy in Iraq might highlight common challenges encountered in the particular contexts of emerging transitional democracies.

Although there is a growing body of literature on post-2003 regime change and political and constitutional developments in Iraq as previously noted, little attention has been paid to the Iraqi judiciary and even less to its constitutional judiciary. The experience of a functioning constitutional judiciary is new in Iraq and very recent in the regional context. Madhat al-Mahmood, the Chief Justice of the Iraqi Federal Supreme Court (FSC), has hardly referred to the Court in his book *The Judiciary in Iraq*.⁶³ In their article, Trumbull IV and Martin examined the role of the FSC in election-related disputes, covering the case law of the Court up to the 2010 election.⁶⁴ Furthermore, Reidar Visser, who has been observing the constitutional development in post-2003 Iraq, has analysed the role of the FSC in federalism-related disputes between 2005 to 2010.⁶⁵ As this thesis indicates, many of the Court's major decisions were issued following the 2010 general election, which was the first election to be held after the 2003 regime change in the country and the first under the 2005 Constitution. Others have briefly mentioned the Iraqi judiciary in research literature, often as an example in a generalised form.⁶⁶

⁶³ Madhat al-Mahmood, *The Judiciary in Iraq: The Path to an Independent Judiciary and Modern Court System* (iUniverse 2014).

⁶⁴ Charles P Trumbull IV and Julie B Martin, 'Elections and Government Formation in Iraq: An Analysis of the Judiciary's Role' (2011) 44(2) *Vanderbilt Journal of Transnational Law*.

⁶⁵ Reidar Visser, 'Policing a Messy Federation: The Role of the Iraqi Federal Supreme Court, 2005-2010', (2011) 2(52) *Orient*.

⁶⁶ Haider Ala Hamoudi has analysed the FSC's jurisprudential development in his work on broader subjects regarding the Iraqi constitution or Islamic law. *See e.g.*, Haider Ala Hamoudi 'Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution' (2010) 7(3) *University of St. Thomas Law Journal* 691; Haider Ala Hamoudi, 'The Will of the (Iraqi) People' (2011) 1 *Utah Law Review*; Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press 2013).

With these few exceptions, the author is unaware of any specific comprehensive examination, written in English, which focuses on Iraq's constitutional judiciary. In other words, the FSC of Iraq is an institution which so far not been the subject of a really thorough and detailed analyses of its case law from a constitutional perspective, let alone a study which locate those analyses in a broader perspective of theoretical debate. This is what I have set out to achieve in my thesis. As far as the author is aware, this research is the first comprehensive and updated study, at least in English, of the case law of the FSC and the implementations of the post-2003 constitutional democratic order in the country. It is distinctive in the sense that the discussed case law is broad in both subject matter and in the extent of cases that the FSC has dealt with over the last, indeed the first, decade of the Court's operation. Therefore, analysis of this case study also provides insights into recent constitutional and political developments in post-2003 Iraq, where judges are dealing with the constitutional and legal aftermath of the transition from an authoritarian system to one of constitutional democracy.

This thesis thus endeavours to address the gap in the literature on the constitutional judiciary in Iraq, introducing and integrating the experience of the Iraq constitutional judiciary and the FSC into the vast body of existing literature on courts. This thesis will also contribute to the broader debates surrounding judicialisation in developing democracies, and explore the difficulties of applying constitutional concepts in practice. It sheds light on the constant tensions and conflicts that occur in the processes of the exercise of power between the three branches of government and on the role which judiciaries should play in such power struggles, exposing the dangers posed by external political interference with the judiciary.

1.5 Outline of The Thesis

This chapter has provided an overview of this study and a brief introduction to the modern constitutional developments in Iraq. Chapters Two and Three develop the conceptual framework which is used as a basis for the analyses of the case study which follow in Chapters Four and Five. Chapter Six summarises the conclusions of the case study, highlights the research findings,

and presents a way forward for the FSC and future research directions in this area.

To be more precise: Chapter Two explores the theoretical and practical debates seeking to provide a conceptual understanding of and a framework for the rule of law, democratization and the relevance of the courts to transitional democracies. It begins by analysing an extensive body of literature discussing the theory of the rule of law in more developed democracies, focusing on the range of understandings and definitions of the rule of law which ultimately emerges as a contested concept. Then, it explores the formal rule of law, which focuses on the manner and the form the law takes; and the more substantive principles and values, which might inform the rule of law, for example, the protection of human rights. The focus then shifts to debates concerning the relationship between the rule of law and democracy, including the constitutional judiciary and its constitutional review powers. It considers a longstanding debate concerning constitutional judicial review and counter-majoritarian difficulties and goes beyond that, arguing that courts have different roles and positions within a democratic order, and as institutions they are integral to establishing the rule of law system.

The third section of the chapter considers the conceptual difficulties related to the application of the rule of law to the challenging context of transitional democracy. It argues that in transitional states, substantive attributes of the rule of law are constitutionally and principally accepted and preserved as equal to or more important than the formal ones. However, these often might or might not be the central focus or priority when they are applied. Therefore, it argues that legal reforms in transitional democracies should not cling to the ideals of the rule of law, but rather develop more practical and workable versions which take into consideration the changing circumstances of the transition. Indeed, the primary concern of the rule of law reforms then becomes the establishment of those institutions required for creating, interpreting, and enforcing laws, checking and holding to account the arbitrary and abusive exercise of power, and restoring the non-violent settlement of disputes. The chapter briefly reflects on the relevance of the constitutional judiciary, positing that transition from an authoritarian to a constitutional democratic system not only involves holding regular elections but also upholding the rule of law

system, both of which serve to control and constrain the arbitrary exercise and abuse of power. It argues that demands for the rule of law and the constitutional judiciary tend to improve with enhanced democracy.

Chapter Three builds on the arguments developed in the previous chapter regarding the position and role of the courts in a democracy. It begins by considering the proliferation of judicial power and influence, also known as judicialisation, and analysing how this has been conceptualised. The next two sections examine various factors that are thought to account for the rise of judicialisation and to explain its persistence as a phenomenon, respectively. It is argued that judicialisation may occur and develop as the result of the interaction of various factors. The supply side argument highlights those factors that enhance the institutional and formal powers of the courts. These include a reasonably empowered, independent and accessible constitutional judiciary; as well as opportunities in the form of disputes and conflicts which arise in interpreting (unclear) constitutional norms. On the demand side, these conflicts can become constitutional cases that are brought before the court by different actors including individuals, interest groups or the government. The judiciary is involved in addressing or resolving such conflicts by exercising its jurisdiction. Therefore, relatively easy or direct access to the constitutional judiciary combined with the increasing influence of public interest groups appears to support the ability of individuals and marginalised groups to bring their cases to the courts.

The fourth section explores opportunities and challenges for judicialisation to emerge and continue in transitional states, considering a number of factors which are relevant to the periods leading to the transitional moments, during the constitution writing process and in the immediate years following these crucial moments. Factors such as incomplete and often unclear constitutional structures and rules governing a country together with the fragility and weakness of the political and constitutional culture and institutions. Thus, the very difficulties of transition might provide for broader interaction between ‘supply and demand’ factors. Thus, the interaction here implies that the government and individuals might turn to the judiciary to resolve potential conflicts in interpreting the provisions of the new constitution. If a newly established court begins to gain power and influence within this transitional

context, this could also affect its independence with the other branches of government trying to establish their powers. Comparative insights from the case law of some constitutional courts in countries going through a democratic transition reveals the common difficulties they have faced. These courts can find themselves at the centre of inter-institutional and jurisdictional power struggles involving state institutions and entities. Thus, the formal rule of law might become the central focus of constitutional judiciaries in transitional democracies, leading them to frequently refrain from deciding on substantive matters. This is due to the fact that involvement in substantial questions might provoke political interference, undermining judicial independence and bringing about a counter-reaction that will infringe on the judiciary's institutional autonomy.

Chapter Four applies the main argument developed in the previous chapters to the experience of the post-2003 Iraq and its constitutional judiciary. It begins by evaluating the institutional aspects of the constitutional judiciary in Iraq. From the supply side and demand side perspectives, important contributing factors may be the FSC and its assigned jurisdictions, including constitutional review, review of the conformity of legislation to Islamic law, and election-related disputes. The Court has the final say in the arbitration of disputes and conflicts of interpretations concerning separation of powers. The FSC has the pivotal role of policing the boundaries of the constitutionally specified powers given to the institutions of the federal and the sub-federal entities. The Court is also relatively accessible to individuals, interest groups, politicians, and the government. However, despite the constitutional guarantees of the independence of the Court, there are significant concerns about its institutional independence. It is argued that the inclusion of Islamic jurists might put the Court in danger from external pressure from some of the strongest religious institutions. The context within which the FSC operates and the fragility of the rule of law and constitutional culture might also threaten the Court's independence from political interference, especially from the executive authority.

The second section focuses more closely on the structural and political context within which the FSC operates. In the last decade, the implementation of the new constitution and transition to democracy have been hindered by a

range of factors including the legacy of decades of legal and political practices under an authoritarian regime, a difficult democratic transition characterised by widespread post-transition violence, ethnosectarian conflict, corruption, and political instability. Furthermore, state institutions remain for the most part fragile and failing. Under a broad coalition government, agreement and compromises can become very difficult and there are struggles concerning the exact meaning of the rules, and where the boundaries of power lie. Therefore, these challenges and opportunities in the form of constitutional disputes are likely to increase the potential for the FSC to be involved in constitutional issues.

Section three discusses the relevance and the use of available support structures for legal mobilisation concerning constitutional litigation in Iraq; and identifies those factors that could contribute to the emergence of a relatively functioning support structure in Iraq. Therefore, the possibility that the Court could develop an expanded concept of standing for public interest groups might serve to broaden access to constitutional judiciary. This standing may also play an essential role in initiating and supporting constitutional litigation that questions the exercise of powers by the government. Although civil society organisations are relatively new in post-transition Iraq, and face obstacles especially in the legal realm, examples from the case law of the FSC indicate that their attempts to use legal means and the judiciary have been reasonably effective.

Chapter Five presents an in-depth analysis of the case law of the FSC, focusing on some of the most contested constitutional and political questions which have been subject to or affected by the Court's decisions. Each of the four sections in this chapter addresses one particular set of constitutional issues, taking into consideration that the questions involved and decisions issued have or might have had significant implications for Iraqi society as a whole. First, it considers how different actors have frequently used the FSC, noting that to a large extent the Court was involved in questions and cases regarding legislative-executive power struggles and conflicts of interpretation concerning the 'constitutional balance' of powers between these two branches. The result has often been substantial for the entire legal and political system in the sense that powers might become consolidated in one or two branches of the government.

The erosion of such constitutional balance might also be construed as political interference by and in the Court, raising serious concerns regarding its ability to check and preserve arbitrary powers or government attempts to concentrate power. The FSC's struggles over an ongoing public concern, related to widespread institutional corruption in the state institutions and officials, especially the members of the Parliament, are also addressed. The cases analysed in this part show that conceptual difficulties regarding the rule of law might explain the Court's approach to avoiding the substance of the laws and government policies, and instead reviewing the formal and procedural aspects of law making.

The second section examines a series of questions which are of central importance to the implementation of the federal structure of the state. It discusses the general constitutional principles and rules of allocation of powers to federal government and sub-federal entities. It is generally agreed that the Constitution establishes a federal system in which the federal government is relatively weak and takes a distinctive approach to distributing powers, allocating the sub-federal entities with significant authority. The laws enacted by the sub-federal government take precedence over federal statutes in matters of shared competence. The conflicts in interpreting the constitutional rules and boundaries of powers have created an ongoing crisis between the federal government and the Kurdistan Regional Government, the only existing federal region. This constitutional and political crisis involves the constitutional provisions on regulating Iraq's natural resources, namely oil and gas. Despite the frequent calls for the FSC to decide the issue, the Court has often refrained from addressing the substance of the issue explicitly.

The following section considers the role of the FSC regarding questions and issues central to the democratic transition and the peaceful alteration of power. There has been an increase in election-related cases in the periods leading up to or immediately following the general elections. The FSC has been involved in addressing and resolving questions significant to the principle of representation in a democracy such as the reallocation of the seats in the Parliament. These election cases might be viewed as one of the few areas in which the Court seemed determined to initiate or support reform of the legal and

political system. The Court is also involved in crises of government formation, which by implication had indeed threatened the court's institutional autonomy.

The final section addresses the area in which the Court has exercised the most self-restrained approach, declining to rule on the substance and conformity of current legislation with Islamic law. Such an approach seems interesting as, although Islamic jurists are constitutionally members of the Court, they do not currently sit in the FSC. Therefore, this review is carried out solely by judges.

Chapter Six brings together the main arguments concerning the rule of law, judicialisation and transitional democracy. It also reflects on the main findings of this case study and attempts to situate them within a broader perspective. The thesis applies a vast and controversial body of literature related to the rule of law, judicialisation and courts in transitional democracies to the context of Iraq with its entirely new constitutional democratic order. The Court has addressed and resolved some of the major constitutional questions about the nature and function of state institutions and officials affecting the future of the country and society. The major findings based on the analysis of the case study consist of the following. First, the Court has exhibited a considerable degree of inconsistency in deciding apparently similar cases and in observing jurisdictional and admissibility rules. A good number of judgments appear to be inadequately or poorly reasoned, and many others have been written using ambiguous language. This lack of clarity and consistency in its approach raises the question of why the FSC has behaved in this way and raises concerns over the capability of such rulings to guide litigants and provide for certainty and predictably in applying legal norms, which is crucial for the rule of law.

Second, in the absence of already established judicial precedents and the lack of a tradition of functioning constitutional adjudication, the Court has often seen fit to take a pragmatic approach to constitutional issues. In particular areas, such as election laws or reviewing the constitutionality of the pre-2005 legislation and decrees, it seems to have taken into consideration the practical consequences of its decisions supporting legal and political continuity and stability.

Third, the FSC's composition, extensive jurisdictions and its frequent involvement in contentious constitutional questions has arguably created considerable political interest in and sensitivity to the court's addressing and

resolution of such issues. Therefore, there has been considerable potential for external interference or pressure that might partially explain the Court's inconsistency, its deliberate choice to favour ambiguity in its judgments or to take a relatively pragmatic approach to decision making. It can be argued that such threats to its institutional autonomy might have affected its general reluctance to address or resolve issues of substance related to government policies and to focus instead on the forms and procedures of law-making.

The fourth finding is related to the role of the FSC in preserving the constitutional balance of power. Constitutionally, both the Parliament and the sub-federal authorities have significant powers at federal level. The Parliament is the principal authority in matters of policy making, law making and holding to account the executive authority. There has been a noticeable trend towards the executive branch attempting to consolidate its powers. Conflicts involving this balance of powers, in particular between the executive and the legislature, have constantly been brought before the Court. The case law of the FSC might suggest that it has often legitimised the government's exercise of powers and supported policies changing the constitutional balance of competences. This interference has weakened the Parliament and further strengthened the government, and affected the development of the federal structure of the state. Given the general implications of the FSC's decisions for the constitutional and political development in the country, many would question its legitimacy and independence in these cases. On the one hand, there are continuing demands for constitutional adjudication; the court's ambition is to remain influential and there is an increasing danger of potential infringements of its institutional autonomy if it decides to interfere further in contested political areas. On the other hand, there has been a slight change of approach that suggests that the FSC has reconsidered its position and role regarding some key decisions that were largely criticised by politicians and scholars.

Furthermore, the expectation is that this research will provide a theoretical framework for understanding the constitutional judiciary in Iraq and link its experience to the broader literature in this area. These findings might also point to some general observations that would apply to any emerging democracy. Thus, exploring judicialisation through the lens of the rule of law serves as a means of understanding issues of substantial importance to any

emerging democracy. It is concluded that the importance of neither the rule of law and independence of the judiciary should be underestimated nor overestimated in transitional states. In a fragile transitional democracy, the government's constant use of the formal rule of law in the absence or ignorance of its substantive values might enable it to claim its conformity with the rule of law, or to be seen to do so. The increase in judicialisation of constitutional issues might further exacerbate the challenges to the rule of law itself. Thus, there are growing concerns over weak or totally absent judicial independence, authority, accountability and constitutional culture as well as widespread institutional corruption. Given these concerns, a constitutional court with an expanded jurisdiction and relatively open accessibility might become central to political interest, sensitivities and interference. It is possible, therefore, that the government would use the judiciary and its consistent use of formal rule of law reasoning to legitimise the exercise of powers and conformity of such exercises with the rule of law as a means to hold onto power and avoid this being contested. Moreover, the concluding chapter suggests that there is significant potential that the FSC will encounter further challenges, face various questions and become the focus of comparative studies on the role of courts in new democracies.

Chapter Two: Towards an Understanding of the Importance of the Rule of Law in Transitional Democracies

Introduction

This thesis engages in an in-depth inquiry of the relevance and role of the judicialisation of constitutional issues from a rule of law perspective focusing on the post-2003 Iraq. It is imperative to begin with a conceptual understanding of and framework for the relevance and role of the rule of law in transitional democracies.

It is generally agreed that the essence of the rule of law is the supremacy of the law, and limiting the arbitrary exercise of power. Beyond that, disagreements occur concerning how the rule of law should approach these ends and what qualities the law must have to limit the arbitrary exercise of power.⁶⁷ There are two common approaches to defining the rule of law. The formal rule of law focuses on the form and manner through which the law is made and applied. The substantive rule of law considers the content of the law and the substantive values these basic formal tenets should enforce.

The rule of law and democracy are often understood to be interrelated and aimed at limiting arbitrariness in government powers. Both concepts might share similar principles and values but in some aspects they might be in contradiction, such as when it comes to constitutional judicial review. Different political and legal systems might observe formal and substantive understandings of the rule of law differently. A reasonably developed democracy observes and conforms to a broader and more substantive version of the rule of law. Often for a transitional or emerging democracy with a longstanding tradition of authoritarian rules, the primary concern is to establish and strengthen the basic formal tenets of the rule of law before considering more substantive versions. Therefore, as the level of recognition and conformity to the principles of the rule of law and democracy might differ, the difficulties associated with applying the rule of law might also vary. In any case, the position and the role of the constitutional judiciary is a central focus of debate in theory and practice.

⁶⁷ Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press 2014) 20 –21.

Accordingly, this chapter consists of three sections. The first section analyses an extensive body of literature discussing the rule of law as it is often understood in more developed democracies. The second section discusses a longstanding scholarly debate concerning the interrelation of the rule of law, democracy, and judicial review. The third section explores these conceptual understandings of the rule of law as applied to transitional states.

2.1 The Rule of Law as a Contested Concept

The rule of law is regarded as ‘one of the most important political ideals of our time’,⁶⁸ and one of ‘today’s universally recognised fundamental values’.⁶⁹ However, it has no agreed definition; rather, ‘there are almost as many conceptions of the rule of law as there are people defending it.’⁷⁰ Indeed, this is the initial observation on the rule of law literature because, as Brian Tamanaha rightly argues, the concept gives rise to ‘rampant divergence of understanding.’⁷¹ It has been described as ‘an essentially contested concept’,⁷² or a ‘deeply contested’ concept in legal and political theory.⁷³ Some define the rule of law using formal and procedural perspectives, while others add substantive and value-oriented content. Lon Fuller’s account of the rule of law is an abstract and formal theory that requires certain formal criteria to be fulfilled before any law can be recognized as such.⁷⁴ For Albert Venn Dicey three fundamentals, emphasising the British constitutional system, are the essence of the rule of law: no punishment except for the breach of the law; all including state authorities are equally subject to the ordinary laws of the land;

⁶⁸ The other ideals of modern political morality include: human rights, democracy, and the principles of free market economy. See Jeremy Waldron, ‘The Concept and The Rule of Law’ (2008) 43(1) *Georgia Law Review* 1 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273005> accessed 7 December 2015.

⁶⁹ Brian Z Tamanaha, ‘The Rule of Law for Everyone?’ (2002) 55 *Current Legal Problems* 97; Tom Bingham, *The Rule of Law* (Allen Lane Penguin 2010) 3.

⁷⁰ Taiwo Olufemi, ‘The Rule of Law: The New Leviathan?’ (1999) 12(1) *Canadian Journal of Law and Jurisprudence* 154.

⁷¹ Bingham, *The Rule of Law* 3.

⁷² Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) 21 *Law & Philosophy* 137.

⁷³ Margaret Jane Radin, ‘Reconsidering the Rule of Law’ (1989) 69 *Boston University Law Review* 781.

⁷⁴ Lon L Fuller, *The Morality of Law* (rev. edn, Yale University Press 1969) 39–91.

and that general principles of the constitution are the result of judicial decisions defining the rights of individuals.⁷⁵

Indeed, as Richard Fallon rightly argues, these diverse opinions regarding the rule of law have commonly been associated with disagreements concerning the meaning of the ‘contestable normative issues’ that are considered and included as components of the definitions of the rule of law.⁷⁶ This is particularly observable in substantive accounts of the rule of law, which may include concepts, the meanings of which are subject to extensive disagreements, such as human rights, democracy and justice. The rule of law is thus perhaps ‘in the particular state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means’.⁷⁷

There is much that can be said about theories and arguments concerning the rule of law; one way which may suffice for the present purpose is to discuss the meanings and basic tenets of the rule of law from formal and substantive perspectives.

2.1.1 Formalist Perspectives on the Rule of Law

Formal theories concerning the rule of law focus on the supremacy of the law, as well as on a set of formal criteria, with which laws must comply under a rule of law system. Theorists and scholars vary in their views regarding the criteria with which the law must comply. Fuller argues that for ‘a system of legal rules’ to exist, eight criteria which he called ‘principles of legality’ must be fulfilled. Thus, there must be rules that are: general; publicized, or at least available ‘to the affected party, the rules he is expected to observe’; not retroactive; be understandable or clear; non-contradictory; must not require the impossible; relatively persistent over time, and there must be ‘congruence between the rules as announced and their actual administration’.⁷⁸ Accordingly, Fuller emphasises that ‘[t]otal failure in any one of these eight directions does

⁷⁵ See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Basingstoke: Macmillan Education 1985).

⁷⁶ Richard Fallon, ‘The Rule of Law’ as a Concept in Constitutional Discourse’ (1997) 97(1) *Columbia Law Review* 7.

⁷⁷ Brian Z Tamanaha, *On the Rule of Law History, Politics, Theory* (Cambridge University Press 2004) 4 [Original emphasis].

⁷⁸ Fuller, *The Morality of Law* 39-41.

not simply result in a bad system of law; it results in something that is not properly called a legal system at all'.⁷⁹ Other theorists and scholars often share this account.⁸⁰ Joseph Raz, in addition to these above criteria and principles, underlines the importance of principles of natural justice, an independent and accessible judiciary, and judicial review that 'ensure[s] conformity to the rule of law.'⁸¹

It is evident, then, that the formalist perspective pays scant attention to the content of the law. Thus, formal theories of the rule of law are principally interested in 'the way in which the law is good at its job of governing, setting no requirements as to the content of legislation enacted',⁸² or the nature of law-making institutions; rather the restrictions are apply to the form of the law.⁸³ Therefore, it is not surprising that an authoritarian regime might claim that its legal system conforms to the rule of law, although the law that fulfils these formal criteria can serve different ends, as long as the content of the law is of no relevance.⁸⁴ In other words, the formal rule of law provides for formal justice, which is 'compatible with both morally commendable and morally egregious ends'.⁸⁵ A government might well abuse this formal definition so that the law becomes merely an instrument to achieve what the ruler desires it to be.⁸⁶

This is one of the essential criticisms of formal accounts of the rule of law. In practice, contemporary literature provides examples where a strict adherence and compliance with the formal rule of law was incapable of preventing arbitrary exercise and abuse of powers. Nazi Germany is one such well-known example of a state which complied with the formal rule of law criteria. For example, Michael Stolleis observes: 'The German legal system was

⁷⁹ Fuller, *The Morality of Law* 39.

⁸⁰ See Friedrich A Hayek, *Law, Legislation and Liberty* (London: Routledge & Kegan Paul 1982) 55–6, 85–8; C T Ten, 'Constitutionalism and the Rule of Law' in Robert E Goodin (ed), *A Companion to Contemporary Political Philosophy* (Blackwell 1993) 395–402. See also John Rawls, *A Theory of Justice* (Rev ed, Oxford University Press 1999) 235–243.

⁸¹ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 214–218.

⁸² Alison L Young, 'The Rule of Law in the United Kingdom: Formal or Substantive?' (2012) 6 (2) *Vienna Online Journal on International Constitutional Law* 273.

⁸³ Paul P Craig, 'Formal and Substantive Conceptions of the Rule of Law' [1997] *Public Law* 467–487.

⁸⁴ Raz, *The Authority of Law* 211– 216

⁸⁵ William Lucy, 'Abstraction and the Rule of Law' (2009) 29 (3) *Oxford Journal of Legal Studies* 494.

⁸⁶ Brain Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 24–40.

rife with procedural regularity',⁸⁷ yet the violation and abuse of power and human rights were rampant. Similarly, Robert Summers, pointing to the examples of the Nazi and Soviet regimes, views the formal concept as 'logically compatible with the existence of laws that are bad or wrong or even evil in content'.⁸⁸ In the same way, Judith Shklar argues that in a certain version, perhaps the formal one, the rule of law is associated with 'governments of the most repressive and irrational sort.'⁸⁹ It might, therefore, be argued that such regimes were compatible with the formal rule of law that served them to hold to power and avoid contestations against their power.

Scholars mostly tend to recognise and accept these criticisms and the potential dangers associated with adherence to a mere formal rule of law. However, some argue that the formal components of the rule of law are 'necessary requirements for both subjecting human conduct to the governance of rules and for guaranteeing a (perhaps minimal) degree of stability and autonomy in human affairs,' as government actions must accord with legal norms.⁹⁰ Paul Craig maintains that the formal rule of law has an 'independent function' from other political ideals,⁹¹ or as Summers puts it, it is 'content independent.'⁹² According to Raz, the rule of law is only one virtue of a legal system and should not be 'confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.'⁹³ It can be argued, though, that a purely formalist view on the rule of law might prove useful in its own right for the purposes of establishing the minimum requirements of any legal system. Crucially, however, this formal rule of law should serve to recognise some values and content-oriented elements. Perhaps, as it is argued in the following discussion, the additional elements and values emphasised by substantive theories of the rule of law can be seen as the most controversial aspects of any rule of law definition.

⁸⁷ Michael Stolleis, *Law under the Swastika* (1998) [Its German title, *Justice within Injustice (Recht Im Unrecht)*] (as cited in Jonathan Rose, 'The Rule of Law in the Western World: An Overview' (2004) 35 (4) *Journal of Social Philosophy* 460).

⁸⁸ Robert S Summers, 'A Formal Theory of the Rule of Law' (1993) 6(2) *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law* 140.

⁸⁹ Judith N Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell Legal Publications 1987) 13.

⁹⁰ Lucy, 'Abstraction and the Rule of Law' 494.

⁹¹ Craig, 'Formal and Substantive Conceptions of the Rule of Law' 468.

⁹² Summers, 'A Formal Theory of the Rule of Law' 135.

⁹³ Raz, *The Authority of Law* 211.

2.1.2 Substantive Perspectives on the Rule of Law

Arguably, the earliest legal and political theorists who contrasted ‘the rule of law’ with ‘the rule of man’ understood the law not to be a mere realization of formal elements, but rather to represent the ‘common good’.⁹⁴ The majority of the contemporary theories and practices of the rule of law share this view. This argument is also clearly illustrated by the former Chief Justice of South Africa, Arthur Chaskalson, who stated that:

[T]he apartheid government, its officers and agents were accountable in accordance with the laws; the laws were clear; publicized, and stable, and were upheld by law enforcement officials and judges. What was missing was the substantive component of the rule of law. The process by which the laws were made was not fair (only whites, a minority of the population, had the vote). And the laws themselves were not fair. They institutionalized discrimination, vested broad discretionary powers in the executive, and failed to protect fundamental rights. Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is ‘an empty vessel into which any law could be poured’.⁹⁵

This observation, regarding apartheid governance, might also apply to other contexts where the law is largely compliant with the formal rule of law. However, such conformity does not satisfy ‘a substantive test of moral correctness or, at least, acceptability’⁹⁶ or ‘envisage some clear limits to the immorality or injustice such a legal system could bring about’.⁹⁷ Determining what is moral correctness or acceptance or other similar propositions as basic for the substantive understanding of the rule of law is controversial.

The substantive accounts of the rule of law share certain principles and values as essential components. Almost all accounts of a substantive rule of law

⁹⁴ Courtney Taylor Hamara, ‘The Concept of the Rule of Law’ in Imer B Flores and Kenneth Einar Himma (eds), *Law, Liberty, and the Rule of Law* (Dordrecht 2013) 18-23.

⁹⁵ Remarks at the World Justice Forum I (Vienna, Austria, July 2008), (as quoted in M Agrast, J Botero, and A Ponce, ‘WJP Rule of Law Index 2011’ (*World Justice Project*, Washington DC 2011) [9 <http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf>](http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf) accessed 10 December 2015).

⁹⁶ Fallon, ‘Rule of Law as a Concept in Constitutional Discourse’ 22.

⁹⁷ Lucy, ‘Abstraction and the Rule of Law’ 505.

confirm that the content of the law should recognise and protect fundamental rights. For example, central to Ronald Dworkin's understanding of the rule of law ideal is that,

citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts [...].⁹⁸

Dworkin affirms that formal aspects of the rule of law should enforce these 'moral rights.'⁹⁹ Indeed, many state constitutions and other statutes contain a Bill of Rights which may include an expanded list of rights such as the 2005 Iraqi Constitution. Shklar criticises the disappointing performance of the rule of law, asserting that its meanings should recognise an 'essential element of constitutional government generally and of representative democracy in particular.'¹⁰⁰ Therefore, a particular form of government, fundamental rights or other values are often considered essential elements of a substantive rule of law account.

Moreover, a more comprehensive account of the rule of law is developed by Lord Bingham, who defines the rule of law much more broadly. In its formal concept, 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.'¹⁰¹ Bingham also underlines the substantive aspects of the rule of law. He incorporates certain normative principles, the most important of which are: clarity, limited discretion, and equality in applying laws; appropriate resolution of civil disputes, and fairness in adjudicative procedures. Most notably, for Bingham, the rule of law incorporates protection of human rights and state compliance with international law obligations.¹⁰²

Understanding what these substantive values entail and ought to protect is difficult and contested. Many conceptual approaches in defining the rule of law illustrate the importance of relying on and promoting formal criteria of the

⁹⁸ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 11-12.

⁹⁹ Dworkin, *A Matter of Principle* 11-12

¹⁰⁰ Shklar, 'Political Theory and the Rule of Law' 16.

¹⁰¹ Bingham, *The Rule of Law* 37.

¹⁰² *ibid* 37.

rule of law *and* the necessity of also taking into consideration the content of the laws. The formal rule of law is almost necessary for the realisation of a substantive conception. Keith Ewing argues that ‘disrespect for the rule of law (as an instrument of formal legality) will almost certainly help to ensure that they [civil liberties] are fatally undermined.’¹⁰³ It is also argued that the emphasis on the substantive components of the rule of law rather than the form and the manner of its exercise would mean depriving the concept of its ‘independent function.’¹⁰⁴ Furthermore, the meaning of those substantive values and principles, such as justice, for example, is itself contested, adding further debates to those already existing. For instance, some might argue that the law that fails to recognise and protect individual rights cannot be seen as the law that prevents arbitrariness, therefore, it does not conform to the rule of law.

So far the discussion regarding problems in conceptualising the rule of law asserts that both formal and substantive theories disagree on what qualities the law or a political and legal system must have so as a government’s exercises of power conform to the rule of law. However, almost all accounts underline the supremacy of the law and oppose the rule of law to the arbitrary exercise of power. In other words, the rule of law entails the ‘legal reduction of the possibility of arbitrary exercise of power by those in a position to wield significant power’¹⁰⁵ Of course, arbitrariness is a matter of degree and therefore the rule of law should not be understood to be able to prevent this fully, but to minimise it.¹⁰⁶ Furthermore, as Raz has noted, although it is rather difficult to define an arbitrary act, an act of exercise of power can be arbitrary,

[o]nly if it was done either with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them. The nature of the purposes alluded to vary with the nature of the power. This condition represents ‘arbitrary power’ as a subjective concept.¹⁰⁷

¹⁰³ K D Ewing, *Bonfire of The Liberties: New Labour, Human Rights, and The Rule of Law* (Oxford University Press 2010) 7.

¹⁰⁴ Craig, ‘Formal and Substantive Conceptions of the Rule of Law’ 468.

¹⁰⁵ Martin Krygier, ‘Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?’ (UNSW Law Research Paper 22/ 2010, 18 June 2010) 14, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1627465> accessed 3 December 2015.

¹⁰⁶ *ibid* 17.

¹⁰⁷ Raz, *The Authority of Law* 219.

On the same issue, Philip Pettit considers an act arbitrary when ‘it is chosen or not chosen at the agent’s pleasure. [...] without reference to the interests, or the opinions, of those affected. The choice is not forced to track what the interests of those others require according to their own judgments’.¹⁰⁸ Therefore, it can be said that an act or exercise of power is arbitrary when it cannot guide the conduct of individuals, otherwise preventing or denying their perspective, or does not treat them as ‘active and self-directing subjects’ but rather as objects of this power.¹⁰⁹ The government is arbitrary when it ‘is not committed to principled action and decision-making, and does not accept that any norms should operate as prior constraints on its action’.¹¹⁰ It is argued that the rule of law and its various components at least minimise, and of course ideally prevent, such acts of arbitrariness.

Therefore, the rule of law is an *ideal* aimed at correcting the danger of an abusive exercise of power.¹¹¹ Indeed, the realization of and compliance with this ideal is a matter of degree. As Raz observes, ‘[C]onformity to the rule of law is a matter of degree. Complete conformity is impossible (some vagueness is inescapable), and maximal possible conformity is on the whole undesirable (some controlled administrative discretion is better than none).’¹¹² In general, the rule of law ‘occurs insofar as a valued state of affairs exists’ wherein ‘the law rules’.¹¹³ The degree to which this core of the rule of law is achievable is both variable and relative; it is ‘not all or nothing. But one can say it exists in good shape or repair insofar as a certain sort of valued state of affairs, to which law contributes in particular ways, exists.’¹¹⁴ Under this state of affairs, the law rules against the arbitrary exercise of power.¹¹⁵

So far the discussion focused on the core of the rule of law and various understandings of the concept. The next section sets out to address briefly the

¹⁰⁸ Phillip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997) 55.

¹⁰⁹ Krygier, ‘Four Puzzles about the Rule of Law’ 20.

¹¹⁰ David Feldman, ‘Democracy, the Rule of Law and Judicial Review’ (1990) 19 (1) *Federal Law Review* 12.

¹¹¹ Waldron, ‘The Concept and the Rule of Law’ 4, 6.

¹¹² Raz, *The Authority of Law* 222.

¹¹³ Krygier, ‘Four Puzzles about the Rule of Law’ 7.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

relationships between democracy and the rule of law in a broader context before moving into the more specific context of transitional democracies.

2.2 Relationship between the Rule of Law and Democracy

It might be argued that any conceptual discussion addressing the potential interrelation between democracy and the rule of law would basically address the possible role of courts with a constitutional review power that could overrule legislation. This is essentially discussed under the rubric of counter-majoritarian arguments. The following discussion is intended to underline briefly some of the relevant arguments to this thesis; it is not, however, an in-depth inquiry of the already established and extensive body of literature in this regard.

2.2.1 The Rule of Law and Democracy

The relationship between democracy and the rule of law has generated an extensive body of literature. Just as with the rule of law, theorists and scholars are at odds both in their attempts to define democracy as a concept and in addressing its practical aspects. The two most common forms of democracy are procedural or minimalist electoral democracy and liberal democracy. Samuel Huntington argues that democracy is a system in which ‘most powerful collective decision makers’ are selected through fair, free and regular elections, and widespread participation in voting.¹¹⁶ The majority of scholars, however, might challenge such understandings of democracy, arguing that although elections are necessary and central to any democratic system, democracy requires much more. According to Robert Dahl, to achieve what he calls ‘polyarchy’ further conditions are required. These include political rights such as freedom of expression and association, access to alternative information, free and fair elections, elected officials, and the right to run for office.¹¹⁷ In Dahl’s view, polyarchy is ‘a set of institutions that, taken together, distinguish modern representative democracy from all other political systems, whether non-

¹¹⁶ Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) 7.

¹¹⁷ Robert Alan Dahl, *Democracy and its Critics* (Yale University Press 1989) 221.

democratic regimes or earlier democratic systems.’¹¹⁸ In a similar vein, Larry Diamond underlines the significance of these institutional requirements, most importantly the rule of law, the necessity for constitutional principles, a system of checks and balances and judicial review.¹¹⁹ The latter understanding can also be referred to as liberal democracy wherein elections are not the defining characteristics of democracy; liberty is as relevant as elections. Thus, as a matter of principle, democracy should combine both minimalist electoral and liberal elements.

In other words, as is the case with the rule of law, democracy is also understood from a formal and minimalist or/and a substantive and liberal perspective. Arguably, these conceptual difficulties in defining the two concepts are manifested in the ongoing debates concerning the nature and extent of the relationship between the rule of law and democracy. In general, both share and value certain principles and institutions. More specifically, the differences between them become more noticeable when democracy and the rule of law are interpreted in a minimalist and formal manner. In other words, when democracy is defined purely in terms of elections; and the rule of law as a set of formal qualities, thus, the relationship is not one of coexistence or mutual dependence. Moreover, the essence of democracy is majority rule, yet the rule of law is based on ‘the protection of [the] individual’.¹²⁰ Thus, both approach good governance in different ways. The supremacy of the power of the people by means of extensive political participation is central to the democratic notion of good governance. Under the formal rule of law, a government whose powers are limited by means of the law and which acts within the boundaries of the constitutional law is seen as a good government.¹²¹

Thus, representative democracy is about creating a government that represents the majority, and a majority that is qualified to make laws. The rule of law, however, aims at regulating and constraining the government, whether

¹¹⁸ Dahl, *Democracy and its Critics* 218.

¹¹⁹ Diamond, *Developing Democracy* 10-11.

¹²⁰ Tim Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge University Press 2003)123. Also see Allan C Hutchinson and Patrick Monahan, ‘Democracy and the Rule of Law’ in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* 99-100.

¹²¹ Wei Pan, ‘Toward a Consultative Rule of Law Regime in China’ in Suisheng Zhao (ed), *Debating Political Reform in China: Rule of Law Vs. Democratization* (Routledge 2014) 8; Hutchinson and Monahan, ‘Democracy and the Rule of Law’ 100.

democratic or non-democratic, keeping it within the boundaries of the law.¹²² From an institutional perspective, the elected political institutions, parliament, and government, are arguably the most important institutions of democracy; whereas the judiciary and other institutions engaged in enforcement, mostly unelected, are crucial institutions of the rule of law.¹²³

Indeed, the above observation seems rather simplistic by dismissing any relation between democracy and the rule of law. The rule of law also matters for minimalist democracies, where democracy is understood as being people's participation in decision-making; such participation requires a firm legal framework to regulate and protect fair, free and regular elections. Furthermore, even those who define democracy as a minimalist, procedural concept, which centres on elections, presume the existence of fundamental freedoms as a prerequisite for elections.¹²⁴ Meaningful competition and participation in decision-making would require that the law guarantees and regulates certain political rights such as freedom of speech and assembly.¹²⁵ These rules are often prescribed in the constitution and other statutes. Thus, in Cass R Sunstein's words, constitutional rules can be described as 'rules of grammar,' setting out 'the rules by which political discussion will occur',¹²⁶ rules for the formation of branches of government and their relations. Under a rule of law system, these rules must comply with the principle of legality in a sense of clarity, certainty, predictability and respect for the supremacy of the law.¹²⁷

On the other hand, the extent of the principles and institutions shared by the substantive rule of law and liberal democracy is greater.¹²⁸ Thus, the rule of law protects the core of the democratic system by protecting and institutionalising political and civil liberties. Moreover, it establishes institutions of 'horizontal accountability', according to which some 'state institutions are authorized and willing to oversee, control, redress, and/or

¹²² Pan, 'Toward a Consultative Rule of Law Regime in China' 7-8.

¹²³ John Ferejohn, Pasquale Pasquino, 'Rule of Democracy and Rule of Law' in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press 2003) 241.

¹²⁴ Guillermo O'Donnell (ed), *Dissonances: Democratic Critiques of Democracy* (University of Notre Dame Press, c2007) 15-16.

¹²⁵ Diamond, *Developing Democracy* 8.

¹²⁶ Cass R Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press 2001) 98.

¹²⁷ Feldman, 'Democracy, The Rule of Law and Judicial Review' 16.

¹²⁸ Diamond, *Developing Democracy* 10-11.

sanction unlawful actions of other state institutions'.¹²⁹ In general, it is argued 'that democracy goes hand in hand with the rule of law; where one of the two disappears; the other is in danger of being abandoned.'¹³⁰

While the basic tenets of the rule of law may not require democracy as a form of governance, in some sense, a democratic government requires some understanding of the rule of law. On the other hand, both democracy and the rule of law can share the common aim of preventing the arbitrary exercise of powers; the people create the laws that they then have to obey; the effect is to establish the supremacy of the people and supremacy of the law. Thus, some may also argue that, in a democratic system, understanding the rule of law should go beyond a mere legal system and courts. In Guillermo O'Donnell's words, it should be a democratic rule of law that upholds fundamental rights and freedoms, subjecting all persons and government officials to an established network of responsibility and accountability which serve to constrain and control exercises of powers.¹³¹ It can be seen to ensure that the government does not exceed those formal and substantive constitutional restrictions.¹³² Therefore, the rule of law is of significant relevance whether it is understood in minimalist or substantive terms. The absence of a functioning rule of law will lead to the disregarding and manipulation of the constitution and misuse of the public powers.

There is much that might be said about these and other conceptual understandings and difficulties concerning the relations between the rule of law and democracy. The two concepts might be in conflict in some ways. There is an ongoing debate on the position and role of courts in reviewing constitutionality of legal norms and acts of an elected legislature in a democratic system.

¹²⁹ O'Donnell, 'Horizontal Accountability in New Democracies' 62. See also Scott Mainwaring and Christopher Welna (eds), *Democratic Accountability in Latin America* (Oxford University Press 2003).

¹³⁰ Koopmans, *Courts and Political Institutions* 123.

¹³¹ Guillermo O'Donnell, 'Why the Rule of Law Matters' (2004) 15(4) *Journal of Democracy* 36.

¹³² T R S Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44(1) *Cambridge Law Journal* 111-143,129.

2.2.2 Judicial Review and Counter-majoritarian Debates

It has been argued that some form of constitution is necessary to the existence and preservation of a democratic state. However, when such a constitution starts to provide rules and institutions that ‘constrain what democracy does’, concerns begin to be raised over the position of these institutions within a democratic regime.¹³³ Judicial review may be considered to be one of these institutions. For the purposes of this research, judicial review refers to the strong form of constitutional review of legislation rather than merely the review of the legality of executive actions within its allocated powers. Judicial review of constitutionality of legislation gives judiciary, mostly high courts, power ‘to decline to apply a statute in a particular case [...] or to modify the effect of a statute to make its application conform with individual rights. [...] or to establish as a matter of law that a given statute or legislative provision will not be applied’.¹³⁴ Here, the rule of law, which among other principles establishes judicial review of legislation, may be in tension with the supremacy of the people and its representative democratic government.

In general, there is an on-going debate concerning the role of judicial review in a democratic society and ‘whether the democratic principle of majority rule can be reconciled with the practice of remotely accountable judges invalidating legislation enacted by electorally accountable representatives.’¹³⁵ Alexander Bickel argues that ‘the root difficulty is that judicial review is a counter majoritarian force in our [American] system’.¹³⁶ Bickel, then defends judicial review and responds to charges against the US Supreme Court’s counter-majoritarianism, asserting that ‘judicial review is the principled process of enunciating and applying certain enduring values of our society.’¹³⁷ Many

¹³³ Christopher J Peters, *A Matter of Dispute: Morality, Democracy, and Law* (Oxford University Press 2011) 247.

¹³⁴ Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115(6) *The Yale Law Journal* 1346.

¹³⁵ Michael J Klarman, ‘Majoritarian Judicial Review: The Entrenchment Problem’ (1997) 85 *Georgetown Law Journal* 337. See also Waldron, ‘The Core of the Case against Judicial Review’ 1346; Paul Gowder, ‘The Counter Majoritarian Complaint’ (2014) 23(7) *Transnational Law and Contemporary Problems* 8.

¹³⁶ Alexander Mordecai Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill 1962) 16-17. See also Barry Friedman, ‘The History of the Counter Majoritarian Difficulty, Part One: The Road to Judicial Supremacy’ (1998) 73 (2) *New York University Law Review* 333–433.

¹³⁷ Bickel, *The Least Dangerous Branch* 58.

scholars have been inspired by Bickel's explication of judicial counter-majoritarianism and have developed different theories on the relevance of judicial review and responded to courts' counter-majoritarian difficulties. For instance, the premise of John Hart Ely's representation-reinforcement theory of judicial review is that 'the general theory is one that bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of political choice under attack.'¹³⁸ In other words, Ely maintains that courts are better prepared to deal with questions of governmental structure than with questions of substance.¹³⁹ Furthermore, judicial review is said to protect minorities from tyranny of majority government.¹⁴⁰ Robert Dahl argues that 'one influential view of the Court [US Supreme Court], however, is that it stands in some special way as a protection of minorities against tyranny by majoritarian.'¹⁴¹ These two arguments can also be found in Alec Stone Sweet's words that: '[A] precept of the new constitutionalism is that regimes are not democratically legitimate if they do not constrain majority rule through rights and review'.¹⁴²

The discussion so far illustrates that the two frequently cited understandings supporting judicial review would consider such review to serve the preservation of rights, in particular of political minorities as well as marginalised groups in society, from the majority government. Equally relevant, it would be used to limit 'the scope of arbitrariness, and ensure that those who exercise public powers respect the boundaries of those powers'.¹⁴³ In other words, judicial review might provide legal accountability for the exercise of power, in particular where the political process fails to secure this.¹⁴⁴

¹³⁸ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 181.

¹³⁹ *ibid.*

¹⁴⁰ *ibid* 135-179.

¹⁴¹ Robert Alan Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' [Reprint] (2001) 50(2) *Emory Law Journal* 567. See also Roberto Gargarella, 'In Search of a Democratic Justice: What Courts Should Not Do' (2003) 10(4) *Democratization* 182; Or Bassok, 'The Two Counter Majoritarian Difficulties' (2012) 31(2) *St. Louis University Public Law Review* 333-382; Alon Harel, Adam Shinar, 'Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review' (2012)10 (4) *International Journal of Constitutional Law* 954.

¹⁴² Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 816-828.

¹⁴³ Feldman, 'Democracy, The Rule of Law and Judicial Review' 13.

¹⁴⁴ *ibid* 6-7.

However, the opponents of judicial review would argue that unelected, and mostly appointed, judges claim a right and a duty to stand in the way of what the majority's representatives think. It challenges 'the policy preferences of democratic majorities.'¹⁴⁵ Although other elected branches are enabled to interpret a constitutional text under a constitutional judicial review system, judicial interpretations are often final and can override the legislature's interpretation of the constitution. In principle, the legislature is incompetent to overrule or minimise the impact of these judicial decisions,¹⁴⁶ since this would be difficult, often requiring constitutional amendments. Therefore, some scholars, including Mark Tushnet, argue that the constitution should be taken away from the judiciary, allowing political branches to develop its meanings.¹⁴⁷ In justifying such a proposition, some argue that judicial decisions reflect the political preferences of judges who issue them. In other words, it is claimed that judges are affected by their political preferences; thus, 'politically liberal judges tend to reach politically liberal results and politically conservative judges tend to reach politically conservative ones.'¹⁴⁸

On the other hand, Jeremy Waldron argues that judicial review of legislation is inappropriate in 'reasonably democratic societies', wherein elected institutions and the judiciary are functioning reasonably; individual and minority rights are mostly protected by both citizens and the government; and there is 'persistent, substantial, and good faith disagreement about rights'.¹⁴⁹ Conversely, some scholars believe that judicial review is appropriate and successful in such reasonably democratic contexts wherein certain conditions are in place, usually requiring a highly developed political system.¹⁵⁰ Under such conditions, it is argued that judicial review could become a successful counter-majoritarian means for limiting arbitrary and overreach of powers.

¹⁴⁵ Gowder, 'The Counter Majoritarian Complaint' 8.

¹⁴⁶ See e.g. James Bradley Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7(3) *Harvard Law Review* 129; Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter Majoritarian Difficulty' (1995) 94(2) *Michigan Law Review* 245; Harel, Shinar, 'Between Judicial and Legislative Supremacy' 954.

¹⁴⁷ Mark V Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999) 54–56.

¹⁴⁸ Peters, *A Matter of Dispute* 284.

¹⁴⁹ Waldron, 'The Core of the Case against Judicial Review' 1355.

¹⁵⁰ Henry J Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France* (6th edn, Oxford University Press 1993) 271.

However, such a highly developed political system might not be always fulfilled in many developed democracies, let alone in transitional or emerging democracies. In these latter contexts, there are real concerns about the independence of the judiciary and the competence of institutions of democracy and accountability. Therefore, one should also bring the rule of law as a central focus of the debates on the role and position of judicial review in transitional democracies. The discussion that follows will address these questions. Before that, though, it is important to understand the rule of law and its relevance to a transitional democracy.

2.3 The Rule of Law in Transitional Democracies

The conceptual understanding discussed in the previous part suggests that both concepts of the rule of law and democracy require the existence and functioning of an independent judiciary. Courts can arguably play different roles and might serve to uphold the supremacy of the law and limit arbitrariness in exercises of power through the rubric of judicial review. This part develops a framework to assess the role and relevance of the rule of law to transitional democracies, analysing the challenges and opportunities for legal reforms and the constitutional judiciary.

2.3.1 The Relevance of the Rule of Law to a Transitional Democracy

Transition ideally aims at ending a non-democratic regime, and inducting and consolidating a democratic system.¹⁵¹ A review of the relevant literature suggests that the rule of law might become relevant to various extents to each of these stages.¹⁵² Though some may argue that ‘with democracy it is

¹⁵¹ Huntington, *The Third Wave* 9.

¹⁵² It should be said that although transition to democracy aims to achieve these rather normative and ideal of transitions that lead to a consolidated and then an established democratic regime, the literature indicates that not all transitions succeed. Indeed, a democratization process that starts and then encounters a variety of obstacles may revert to authoritarian governance or develop other forms of governance. This may combine and coexist with features and institutions of both democracy and authoritarian regimes; in other words, it becomes a ‘hybrid regime’. These states possess the formal institutions of democracy, for example regular elections serve ‘as a source of legitimacy’; there is a weak but functioning parliament; there is a weak rule of law; and there are functioning high courts with a regular tendency to support the current government. See Larry Jay Diamond, ‘Thinking about Hybrid Regimes’ (2002) 13 (2) *Journal of Democracy* 21–35; Leonardo Morlino, ‘Are there Hybrid Regimes? OR Are they just an Optical Illusion?’ (2009) 1(2) *European Political Science Review* 283; Joakim Ekman, ‘Political

only a matter of time before obtaining the rule of law,¹⁵³ in practice, it might be rather problematic as enhancing a rule of law system may become more challenging than establishing a functional democratic system.

The earliest stage of democratization mostly focuses on the extent to which elections are active in democratising political institutions of the non-democratic regime,¹⁵⁴ wherein previously unelected rulers will be chosen in free, fair and regular elections.¹⁵⁵ The minimalist procedural democracy, therefore, might become the underlying issue at this stage. It is rather immediate and might be less challenging than proceeding with parallel developments in other defined aspects of liberal democracy.¹⁵⁶ Liberalisation, in O'Donnell's view, refers to the process of introducing the replacement of rules and procedures of citizenship. Citizenship, in his view, is the right to equal treatment in the 'making of collective choices and the obligation of those implementing such choices to be equally accountable and accessible to all members of the polity.'¹⁵⁷ Accordingly, constraining the arbitrary exercise of powers and holding elected state institutions and officials accountable is also relevant to a minimalist democracy. Although both democratization and liberalization might occur in the absence of each other, the two processes are often observed to be interrelated even if one is progressing further than the other.

A broad understanding of democracy might also underline the relevance of the rule of law. Relevant studies often correlate democracy with the rule of law and authoritarian rule with the 'rule of man'.¹⁵⁸ For instance, Adam Przeworski argues that transition from these authoritarian regimes to democratic

Participation and Regime Stability: A Framework for Analysing Hybrid Regimes' (2009) 30(1) *International Political Science Review* 7–31.

¹⁵³ Pan, 'Toward A Consultative Rule of Law Regime in China' 14.

¹⁵⁴ Thomas Denk, Daniel Silander, 'Problems in Paradise? Challenges to Future Democratization in Democratic States' (2012) 33(1) *International Political Science Review* 26. See also O'Donnell, Schmitter, and Whitehead (eds.), *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* 6-7; Veronica Federico and Carlo Fusaro (eds), *Constitutionalism and Democratic Transitions: Lessons from South Africa* (Firenze University Press 2006).

¹⁵⁵ Huntington, *The Third Wave* 9.

¹⁵⁶ Diamond, *Developing Democracy* 27.

¹⁵⁷ O'Donnell, Schmitter, and Whitehead (eds), *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* 7-8.

¹⁵⁸ Jai Kwan Jung, Christopher J Deering, 'Constitutional choices: Uncertainty and institutional design in democratising nations' (2015) 36(1) *International Political Science Review* 62; Gerard Alexander, 'Institutionalised Uncertainty, the Rule of Law, and the Sources of Democratic Stability' (2002) 35(10) *Comparative Political Studies* 1146, <<http://people.virginia.edu/~ga8h/CPS.pdf>> accessed 8 July 2015.

ones is ‘the devolution of power from a group of people to a set of rules.’¹⁵⁹ Therefore, institutionalising the rule of law can be considered crucial to democratization in that it aims to check and minimise the uncontrolled exercise of powers of the previous regime.¹⁶⁰ Thus, in the absence of the rule of law, elections can create majoritarian governments, which concentrate power, eventually turning these new, minimalist democracies into majoritarian tyranny,¹⁶¹ or what some referred to as ‘a gambling game of shifting dictators.’¹⁶² Some scholars, speaking of the Latin American transitions, would describe many of the new democracies in the region as states of ‘(Un)rule’ of law wherein democratic procedures in the form of elections are often combined with authoritarian practices.¹⁶³

Conversely, in a consolidated democracy, or at a more advanced stage of democratization wherein elections take place regularly, there is consensus on relying on a democratic form of government, and democracy is often considered as ‘the only game in town’.¹⁶⁴ The rule of law is seen to be of particular relevance. Some have argued that ‘[W]ithout the rule of law, democratic consolidation may never occur.’¹⁶⁵ Juan J Linz and Alfred Stepan argue that the rule of law guarantees the supremacy of the law, and it is one of the three ‘virtually definitional prerequisites of a consolidated democracy.’¹⁶⁶ Thus, the rule of law is said to increase people’s trust in the principles, institutions and practices of democratic systems. Upholding the rule of law, furthermore, implies that all actors play by the rules of the game and is claimed to constrain

¹⁵⁹ Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge University Press 1991) 14.

¹⁶⁰ Jung, Deering, ‘Constitutional Choices’ 62. See Paul Blokker, ‘Dilemmas of Democratization from Legal Revolutions to Democratic Constitutionalism?’ (2012) 81 *Nordic Journal of International Law* 449.

¹⁶¹ Pan, ‘Toward A Consultative Rule of Law Regime in China’ 9-10.

¹⁶² *ibid* 14.

¹⁶³ Juan E Méndez, Guillermo O’Donnell and Paulo Sérgio Pinheiro (eds), *The (un)rule of Law and the Underprivileged in Latin America* (University of Notre Dame Press 1999). See also Getulio Vargas, ‘Polyarchies and the (Un) Rule of Law’ in O’Donnell (ed), *Dissonances: Democratic Critiques of Democracy* 111-138.

¹⁶⁴ Linz, and Stepan, *Problems of Democratic Transition and Consolidation* 5. See also Denk, Silander, ‘Problems in Paradise? Challenges to Future Democratization in Democratic States’ 26; Diamond, *Developing Democracy* 49.

¹⁶⁵ Rebecca Bill Chavez, ‘The Rule of Law and Courts in Democratizing Regimes’ in Keith E Whittington, R Daniel Kelement and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 64.

¹⁶⁶ This is besides ‘a lively and independent civil society, a political society with sufficient autonomy and a working consensus about procedures of governance’. See Linz and Stepan, *Problems of Democratic Transition and Consolidation* 10.

anti-democratic attempts.¹⁶⁷ In other words, it serves to create a legal culture wherein the public authorities respect and adhere to the constitutional limitations on their exercise of powers. In cases where powerful groups, individuals or even an elected majority government might threaten elections, and peaceful alteration of authority, they can be subordinated to the laws and the rule of law principles.¹⁶⁸ The law thus provides the structure in which democracy operates.

Furthermore, the rule of law seems to be central to studies that discuss the ‘quality of government’ in a consolidated democracy. Such studies would address issues concerning individual and government adherence to the rule of law, analysing the functioning of some institutions and their implications for democracy including an independent judiciary, human rights protections, or horizontal accountability.¹⁶⁹ Even if some would argue that democracy, in its basic electoral sense, might exist in the absence of the rule of law, others would claim that consolidated democracies with a weak rule of law imply substantial deficiencies regarding the quality of their democracy.¹⁷⁰

There are differences when it comes to the extent to which elections have combined with parallel developments aimed at establishing and upholding the rule of law in transitional democracies. There is an ever increasing programme of legal reform that is said to serve to [re]establish the rule of law in transitional states. The following discussion will further explore that.

2.3.2 The Rule of Law Reforms in Transitional Democracies

In view of the conceptual understandings of the rule of law as discussed above, it is imperative to explore how transitional democracies have applied the concept of the rule of law; as well as the increasing use of and support for rule

¹⁶⁷ Linz and Stepan, *Problems of Democratic Transition and Consolidation* 5-7.

¹⁶⁸ Feldman, ‘Democracy, The Rule of Law and Judicial Review’ 17-18.

¹⁶⁹ Mary Fran T Malone, ‘An Uneasy Partnership? Democratization and the Rule of Law in Latin America’ (Conference Papers - Southern Political Science Association, 8 January 2004) 2<http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/6/7/6/1/p67611_index.html?phpsessid=7121leq8tri164d751h8da60i1> 12 October 2015. See also Linz, and Stepan, *Problems of Democratic Transition and Consolidation* 5-15.

¹⁷⁰ O’Donnell, ‘Why the Rule of Law Matters’ 35-37; Amichai Magen, ‘The Rule of Law and its Promotion Abroad: Three Problems of Scope’ (2009) 45 *Stanford Journal of International Law* 88.

of law reforms by the international community.¹⁷¹ The rule of law conceptions which are promoted by the international community might not bring or add any new principle or components to the constitutional scholarship which dominates the national contexts. However, scholars and practitioners interested in promoting the rule of law in transitional and developing democracies might principally disagree on whether the reform should be broad as to include both formal and substantive aspects of the rule of law or should instead begin with the formal rule of law. The answer to these questions might determine how transitional states apply and use the rule of law.

A comprehensive version of the rule of law might be seen in the United Nation Secretary General's definition of the rule of law which states that,

[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁷²

On the other hand, an international organisation with specific and limited objectives would focus on those aspects of the rule of law that serve its purposes. For instance, the International Bar Association (IBA), that supports the independence of the judiciary, focuses on the procedural and formal aspects of the rule of law.¹⁷³ Its definition of the rule of law concentrates on some of the relevant principles including the independence and impartiality of the courts,

¹⁷¹ Thomas Carothers, 'The Rule-of-Law Revival' in Carothers (ed), *Promoting the Rule of Law Abroad* 9. See also Frank Schimmelfennig, 'A Comparison of the Rule of Law Promotion Policies of Major Western Powers' in Michael Zurn, Andre Nollkaemper and Randy Peerenboom (eds), *Rule of Law Dynamics in an Era of International and Transnational Governance* (Cambridge University press 2012) 111-132.

¹⁷² United Nation Secretary-General, 'the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (6, UN Doc. S/2004/616, 23 August 2004).

¹⁷³ IBA is 'the world's leading organization of international legal practitioners, bar associations and law societies' International Bar Association
< http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx > accessed 8 January 2015.

the principle of due process, a robust and independent legal profession and equality of all before the law.¹⁷⁴

Moreover, some have argued that the primary explanation for international efforts in initiating and supporting rule of law reforms is their relevance to deliver other ends. Martin Krygier refers to this argument as ‘institutional means’ which should be associated and established to achieve ‘valued ends.’¹⁷⁵ Krygier underlines preventing and minimising the arbitrary exercise of power as the most common ‘imminent ends’ of the rule of law, which makes it good at delivering other related ‘external ends’ such as democracy and protection of human rights.¹⁷⁶ In other words, the rule of law actually constrains and channels the exercise of public power ‘to a significant extent by and in accordance with law, so that non-arbitrary exercises of such powers are relatively routine, while other sorts, such as lawless, capricious, wilful exercises of powers routinely occur less’.¹⁷⁷ Similarly, Charles T Call argues that the rule of law is believed to be ‘essential to virtually every Western liberal foreign policy goal, human rights, democracy, economic and political stability.’¹⁷⁸

For example, there is an increasing trend towards promoting democracy, as an external end, through preventing the arbitrary exercise or abuse of power, establishing a system of the rule of law. Just to take one example, the European Commission for Democracy through Law (the Venice Commission), an institution of the Council of Europe promotes the rule of law in a variety of ways. Its primary focus is on democratic institutions and fundamental rights; constitutional justice; electoral reform and political parties, as well as assisting constitutional and legislative process so as to ensure the democratic functioning of their institutions and respect for fundamental rights.¹⁷⁹ Thus, those principles that ‘define the core meaning of the rule of law as a common value of the EU’

¹⁷⁴ International Bar Association, ‘Rule of Law Resolution’ (September 2005) <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=A19DE354-AOD7-4B17A7FFF6948081CD85>> accessed 1 November 2015.

¹⁷⁵ Krygier, ‘Four Puzzles about the Rule of Law’.

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ Charles T Call (ed), *Constructing Justice and Security after War* (US Institute of Peace Press, Washington 2007)4

<https://bookstore.usip.org/sites/usip/resrcs/frontm/1929223897_intro.pdf> accessed 4 June 2014.

¹⁷⁹ Council of Europe, Human Rights and the Rule of Law, The Venice Commission of the Council of Europe <<http://www.venice.coe.int/webforms/events/>>.

are considered ‘not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights’.¹⁸⁰ Those include:

legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.¹⁸¹

In any case, the ‘external ends’ reflects on substantive values and principles that are also essential in the substantive theories of the rule of law. It can be argued that both the imminent and the external ends are central to what the rule of law is intended to promote, that is, preventing the arbitrary exercise of public powers.

Conversely, some would argue that the state of affairs of the rule of law in a particular context to which reforms are applied might determine the content of those reforms. Thus, to prioritise a particular principle or account is determined by evaluation of its relevance to the state. Thus, establishing the rule of law may require ‘baselines, conditions of existence, of survival’, or in more advanced contexts helping it to flourish.¹⁸² Where certain basic tenets of the rule of law are not in place, many would be concerned to introduce substantive elements,¹⁸³ which may not survive in the absence of a basic formal rule of law.¹⁸⁴ For example, if legality is weak, thought needs to be given to establishing conditions that will improve it. Accordingly, reforms might promote functional aspects of the rule of law rather than stick to the ‘ideals’ of the concept.¹⁸⁵ Thus, in contexts where the rule of law is almost absent, reforms that introduce

¹⁸⁰ European Commission, ‘A new EU Framework to strengthen the Rule of Law’ (Brussels, 19.3.2014, COM (2014) 158 final/2), 4 <http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf> accessed 22 January 2015.

¹⁸¹ *ibid.*

¹⁸² Krygier, ‘Four Puzzles about the Rule of Law’ 36-37.

¹⁸³ Martin Shapiro, ‘Some Conditions for Success of Constitutional Courts: Lessons from the U.S. Experience’ in Wojciech Sadurski (ed), *Constitutional Justice, East and West Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2002) 55-56.

¹⁸⁴ Sebastian R Astrada, ‘Exporting the Rule of Law to Mongolia: Post-Socialist Legal and Judicial Reforms’ (2010) 389(3) *Denver Journal of International Law and Policy* 467.

¹⁸⁵ Ruti Teitel, ‘Transitional rule of law’ in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law After Communism* 267-276.

substantive accounts may also form part of the process, but they are not immediately essential to it.

In any case, transition involves redistribution and regulation of power. Therefore, the rule of law reformers put considerable effort to establish and support institutions ‘for the creation, interpretation, and enforcement of rules of social order.’¹⁸⁶ In transitional democracies, legal reforms might cover and target a variety of state institutions. Scholars and the rule of law promoters would suggest that rule of law reforms should serve ‘reforming the laws, enhancing rule-related institutions and increasing government compliance with the law’.¹⁸⁷ Often, a transition from authoritarian to a democratic system coincides with constitution making. It involves enacting a new constitution or amending the existing one to include rules and institutions that replace arbitrary standards and institutions of the former regime. Similarly, almost any rule of law reform would include judicial reform that aims to improve the independence, authority, accountability and accessibility of the courts.¹⁸⁸

In general, some commentators criticise the optimism behind the formal-based reforms, arguing that ‘[S]tripping the law of its moral content does not guarantee efficiency or systemic fairness.’¹⁸⁹ Although the pre-transitional legal system might to some extent conform or be said to conform to the basic formal rule of law, the law remains mostly an instrument serving to legitimise the rulers’ ignorance or exclusion of substantive elements of the rule of law, including human rights protection.¹⁹⁰ As a result, reforms should concentrate on human rights, or other substantive aspects of the rule of law, rather than on merely establishing ‘formal legality.’¹⁹¹

In transitional states, government might use the formal rule of law to hold on to power and to legitimise its authority. The lack of constitutional

¹⁸⁶ Daniel H Levine, ‘Rule of Law, Power Distribution, and the Problem of Faction in Conflict Interventions’ in Mortimer Sellers and Tadeusz Tomaszewski (eds), *The Rule of Law in Comparative Perspective* (Springer Dordrecht Heidelberg 2010) 147.

¹⁸⁷ Thomas Carothers, ‘The Rule-of-Law Revival’ 7.

¹⁸⁸ Yusuf, Mystris, ‘The Rule of Law Revival in Transition States’ 8.

¹⁸⁹ Thom Ringer, ‘Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the “Rule of Law” and its Place in Development Theory and Practice’ (2007) 10(1) *Yale Human Rights and Development Journal* 159

¹⁹⁰ Jir Přibáň, ‘From “Which Rule of Law?” to “The Rule of Which Law?”’ Post-Communist Experiences of European Legal Integration’ (2009) 1(2) *Hague Journal of the Rule of Law* 337, 339.

¹⁹¹ Gerald Staberock, ‘A Rule of Law Agenda for Central Asia’ (2005) 2 (1) *Essex Human Rights Review* 4.

practice and the decades of the concentration of powers often in the executive branch will be more likely to create obstacles for constitutional reform. Therefore, such obstacles might be seen to undermine the rule of law in the sense that the exercise of power by the government, in particular, the executive authority is outside the constitutional framework and the law. On the other hand, one would be more concerned about a greater potential for external interference in the judiciary. This is especially true where there is great concern over the independence and authority of the judiciary, as well as mechanisms that hold it accountable to the law and above all widespread institutional corruption. Thus, the government might use courts to legitimise its excesses and arbitrary powers.¹⁹²

The role and implications of an independent judiciary for the rule of law in transitional states is further discussed through analysing the special criteria of constitutional judiciary. Such a judiciary, carrying out robust constitutional review of legislations, may affect the process of democratic transition in various ways. The following discussion addresses the constitutional judiciary as an institutional means to serve the expectations of the rule of law's ends.

2.3.3 Constitutional Judiciary in Transitional Democracies: A View from an Institutional Means that Serves Ends of the Rule of Law

As already discussed, scholars and practitioners might consider independent courts essential to the rule of law. The role and the institution of the judiciary is further emphasised in the context of transitional democracies as to serve the re-distribution of power and arbitration of disputes.¹⁹³ Often, ensuring this re-distribution of power takes place requires a constitution to establish rules of distribution, legal institutions to implement these rules, and a set of checks and balances to prevent and constrain the arbitrary exercise of power. Neil Kritz argues that in transitional states, in particular those emerging from conflict, demands are high for judicial settlement of a broad range of disputes relating both to the previous regime and the newly established one.

¹⁹² Yusuf, Mystris, 'The Rule of Law Revival in Transition States' 8.

¹⁹³ Levine, 'Rule of Law, Power Distribution, and the Problem of Faction in Conflict Interventions' 173.

Thus, as a crucial rule of law institution, Kritz views the judiciary as providing ‘a peaceful and trustworthy means’ for arbitration of disputes.¹⁹⁴

Many, if not all, newly adopted constitutions in transitional democracies have established some form of constitutional judiciary with robust constitutional review powers.¹⁹⁵ The drafters of these constitutions might have taken different factors into consideration for their choice of constitutional adjudicators. The spread of constitutional judicial review and ‘constitutional justice’ in post-Second World War Europe, for instance in Germany, Italy and Austria, was often viewed by their constitutional drafters as the ‘ultimate crowning of the Rule of Law, hence the foremost development of a truly democratic and civil libertarian state’.¹⁹⁶ The relatively successful experience of such constitutional judiciaries has, and might still, contribute to the spread of judicial review and constitutional courts in other transitional democracies. Another factor that might have affected such choice can be the significant expansion of judicial powers and growth of influential courts at both the national and international levels.¹⁹⁷

Studies on the role of the courts in nascent democracies contain ample examples revealing the controversial impact of constitutional judiciaries from a rule of law perspective. These courts have been asked to decide on significant and controversial questions; their impact on constitutional and political developments is often considered remarkable. Some of them might be seen to have considerably contributed to the development of the rule of law.¹⁹⁸ For example, many would refer to the Hungarian Constitutional Court, which often explicitly used the rule of law as a ground for constitutional review. The Court ‘presumed that the change of regimes could not mean anything for the law other than that the entire legal order was to conform (or have its conformity

¹⁹⁴Neil Kritz, ‘The Rule of Law in Conflict Management’ 406, <https://bookstore.usip.org/sites/usip/resrcs/chapters/192922396X_otherchap.pdf> accessed 7 December 2015.

¹⁹⁵Blokker, ‘Dilemmas of Democratization from Legal Revolutions to Democratic Constitutionalism?’ 437-470.

¹⁹⁶Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989) 162.

¹⁹⁷Laszlo Sólyom, ‘The Hungarian Constitutional Court and Social Change’ (1994) 19 *Yale Journal of International Law* 224.

¹⁹⁸Venelin I Ganey, ‘The Rule of Law as an Institutionalized Wager: Constitutions, Courts and Transformative Social Dynamics in Eastern Europe’ (2009) 1(2) *Hague Journal on the Rule of Law* 268.

retained) to the new Constitution based on the rule of law'.¹⁹⁹ The Court is said to uphold, in many instances, the principle of legal continuity irrespective of legitimacy. Thus, in many instances, it upheld the pre-transitional laws; although they had been enacted by the former government which had no legitimacy anymore.²⁰⁰ Similarly, studies have cited one of the remarkable rulings of the South African Constitutional Court in post-apartheid South Africa, in which it declared the initial Mandela-era constitution to be 'insufficiently faithful to the principles of the pacted transition from apartheid in effect,' acknowledging 'the unconstitutionality of the constitution itself.'²⁰¹

Constitutional judiciaries and judicial review may indeed 'constrain political elites and create a political milieu where every politician is forced to realise that constitutional provisions matter', in particular when asked to settle 'the core political controversies that define (and often divide) whole polities.'²⁰² However, it can be seen that, at times, the judiciary may become a dysfunctional, ineffective or even irrelevant institution in democratic transition, bypassed in a context where power has become consolidated.²⁰³ While courts operating in more stable and developed democracies might be accused of being agents of the most important political alliance, of the government, or even acting 'above politics',²⁰⁴ these indictments might intensify further in the transitional context. Some may even argue that in the majority of post-authoritarian democracies, courts 'are not merely the agents of governments; they are their servants.'²⁰⁵

Furthermore, it might not suffice that the judiciary is seen as relatively independent, in an institutional and even personal manner, from political or external interference. The lack of sufficient mechanisms for judicial

¹⁹⁹ See Laszlo Solyom, Georg Brunner (eds), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (The University of Michigan Press 2000) 39.

²⁰⁰ *ibid.*

²⁰¹ The *re Certification Decision* of the South African Constitutional Court, 1996 (4) SALR 744 (CC), (as cited Samuel Issacharoff, 'Constitutional Courts and Consolidated Power' (2014) 62 (3) *American Journal of Comparative Law* 592).

²⁰² Ran Hirschl, 'The Judicialization of Politics' in Keith Whittington, R Daniel Kelemen and Gregory Caldeira (eds), *The Oxford Handbook of Law and Politics* 123.

²⁰³ Samuel Issacharoff, 'Constitutional Courts and Consolidated Power' (2014) 62(3) *American Journal of Comparative Law* 589.

²⁰⁴ Armen Mazmanyan, 'Constrained, Pragmatic Pro-Democratic Appraising Constitutional Review Courts in Post-Soviet Politics' (2010) 43 (4) *Communist and Post-Communist Studies* 413.

²⁰⁵ *ibid.*

accountability and of a tradition of democracy might affect the role and contribution of the judiciary to the rule of law. In a post-authoritarian transition, Stephen Holmes would observe that:

[a] significant danger during transition, in fact, is halfway reform. Halfway reform occurs when the judiciary manages to free itself from authoritarianism without adapting to democracy. It can refuse orders from the executive branch without giving any particular deference to the interests of society expressed in the constitution or ordinary acts of the elected legislature. The post-authoritarian judiciary can instead work exclusively to perpetuate and augment its own corporate advantages. The private guild interests of judges can refuse all compromise with the common interest of society and, remarkably enough, can defend this recalcitrance with the language of liberalism.²⁰⁶

It can be said, therefore, that an independent judiciary which is not subject to the law can be as dangerous to the rule of law as a court that lacks independence. Similarly, the rather rapidly introduced formal guarantees of autonomy combined with personal independence might be said to ‘distance’ the judiciary from the context which its decisions affect. Such an effect could be of concern knowing that constitutional adjudication affects both the legal as well as the political system. These arguments may signify the extent to which courts can become a mere instrument of the government, upholding and supporting its exercise of powers, rather than checking and constraining the abusive exercise of those powers. The next chapter will provide further insights into the independence of the constitutional judiciary as part of the discussion of the phenomenon of judicialisation.

²⁰⁶Stephen Holmes, ‘Judicial Independence as Ambiguous Reality and Insidious Illusion’ in Ronald Dworkin (ed) *From Liberal Values to Democratic Transition: Essays in Honor of Janos Kis* (Central European University Press, Budapest 2003) 9.

Conclusion

This chapter has explained an already extensive body of literature discussing the complexity of defining the rule of law and its relation with democracy. It underlines the importance, relevance and role of the rule of law for the newly established constitutional order in transitional states. The question to ask here is not: should the rule of law precede democratic transition or should the democratic transition precede rule of law? One point should be clear: that transitions often, if not always, aim to restrain previously unconstrained exercises of power as much as to transform an authoritarian regime into a democratic one.

In any case, the essence of the rule of law is understood to acknowledge the supremacy of the law that satisfies certain formal and substantive principles, the exact meaning and extent of which is as contested as the rule of law itself. The rule of law is crucially understood as the opposite of the arbitrary and abusive exercise of power. Importantly, strict adherence to the ideal of the rule of law is almost impossible; rather, approaching this ideal is a matter of degree which may vary significantly from one context to another. Establishing the rule of law in transitional democracies by sticking to the ideals of the rule of law might not serve its purpose in a context that may struggle to establish the basic formal principles of the rule of law. Therefore, a functioning understanding of the rule of law should also take into consideration that transition involves redistribution of power as well as establishing or strengthening the rules and institutions for a peaceful arbitration of disputes.

On the other hand, establishing and strengthening the rule of law in such contexts has increasingly attracted international actors that might support national governments in introducing relevant legal reforms. Noticeably, conceptual problems concerning the rule of law have also been reflected in the extent and contents of the reforms. Reformers often support different formal and substantive accounts of the rule of law, mainly, in line with their broader political, economic and others ends which the rule of law is said to achieve. Although many such reforms cover substantial aspects of the constitutional and legal system, they often prioritise those principles, rules and institutions that reflect the challenges and opportunities in the context in which the reform is to

apply. Thus, they may focus on institutional means that can serve to support the imminent end of the rule of law, the reduction of the arbitrary exercise of power, which in itself may be seen as good for delivering other external ends, such as democracy.

This thesis argues that courts, as an essential institution of the rule of law, might have a variety of jurisdictions and play different roles in a democratic constitutional order, and constitutional review is the most controversial of them. It acknowledges the counter-majoritarian debates which originated from a longstanding discussion concerning law and democracy without re-evaluating them. Instead, it looks beyond this, assessing the expansion of judicial power and the implications for the rule of law in transitional democracies.

As will be further discussed in the next chapter, transitional democracies might face some extraordinary, albeit temporary, challenges including a weak rule of law system, an unstable political system, or an insufficiently functioning parliament. In this situation, the role and implications of judicialisation need further discussion. Alongside the already discussed counter-majoritarian arguments, there are growing concerns over the independence of courts where they become involved in resolving some of the most controversial constitutional questions that affect the whole constitutional order. In such a situation, where the parliament struggles to function, some might challenge and re-evaluate the main arguments made by opponents of judicial review, who claim that the legislature, as the legitimate representative of the people's interests, should be authorised to develop constitutional meanings, rather than unelected judges.

These are some arguments that the next chapter will discuss further. It will examine the constitutional judiciary as one of the core institutional factors for judicialisation in general, focusing more specifically on questions including to what extent should constitutional judiciaries in transitional democracies be involved in issues regarding constitutional rights and structure? In which ways might the independence of the judiciary be undermined in contexts without any tradition of an independent judiciary? What are the potential outcomes of judicialisation from the perspective of the rule of law?

Chapter Three: The Judicialisation of Constitutional Issues: Potential Factors and Implications

Introduction

Chapter Two argued that the conceptual and structural analyses concerning the rule of law, democracy and transitional democracies have all recognised the importance of the judiciary. The literature confirms that there has been a substantial increase in court authority and the influential role that this is playing in countries around the world. Given their jurisdictions, position and the implications of their decisions for both political and legal systems, constitutional judiciaries can be seen to be involved in addressing and resolving virtually any question or dispute concerning public policy and state power.²⁰⁷

There is an ongoing scholarly debate regarding those factors that may have contributed to or facilitated this growth in judicial powers or the ‘judicialisation of politics.’ The implication that this may have for the rule of law and democracy is another issue central to these debates. The comparative insights presented in this chapter have been gathered from the experiences of constitutional courts in different contexts and suggest various explanations. This thesis argues that judicialisation of constitutional issues may occur and develop as the result of the interaction of multiple factors that can be discussed under so-called ‘supply side’ and ‘demand side’ arguments.²⁰⁸ The ‘supply side’ factors refer to a set of factors that arguably supply courts with institutional and formal powers, as well as opportunities in the form of disputes and conflicts of interpretation of constitutional norms. The ‘demand side’ refers to the growing demand, from different actors including individuals, interest groups or the governments placed on constitutional adjudication in resolving or contributing to the resolution of disputes of this kind. It analyses how these actors can turn political conflicts into constitutional cases or use constitutional review to further judicialise the constitution.

²⁰⁷ Mario P Chiti, ‘Judicial and Political Power: Where is the Dividing Line? A Praise for Judicialization and for Judicial Restraint’ (2015) 21(4) *European Public Law* 708.

²⁰⁸ The use of the supply and demand side arguments in this thesis is taken from the Cornell W Clayton, ‘The Supply and Demand sides of Judicial Policy-making (Or, why be so Positive about the Judicialisation of Politics?)’ (2002) 65(3) *Law and Contemporary Problems*.

Although it can be said that, for the most part, the relevant literature has focused on courts operating within reasonably stable and developed democracies, it seems that the newly established courts in transitional democracies have also grown in power and influence. One may argue that the relatively context-specific and often temporary challenges and opportunities in transitional states could bring the rule of law to the centre of the debate, becoming an essential factor in explaining judicialisation and its implications for transitional states. Therefore, it can be assumed that judicialisation both affects and is affected by the rule of law.

This chapter discusses these arguments. The first section presents a framework for conceptualising judicialisation. The second and third sections respectively, examine the explanations that have been advanced to explain judicialisation, discussing the ‘supply side’ and ‘demand side’ factors. The fourth and final section focuses on the role of transitional democracies and the rule of law within these debates, discussing the constitutional challenges and opportunities faced by states undergoing the transition to democracy, as a potential attribute which may enable judicialisation.

3.1 Expansion of Judicial Powers: Institutional and Non-Institutional Explanations

Increasingly, the courts are becoming involved in addressing and resolving significant political and institutional questions. The ever-growing role and the authority of courts are also being analysed under the ‘judicialisation of politics’ arguments. Judicialisation entails ‘the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies’.²⁰⁹ It is argued that by and large the ‘decision-making rights’ seem to be shifting, either formally or informally, from elected branches of the government to the judiciary.²¹⁰ In other words, constitutions and other statutes are increasingly empowering judiciaries with a range of jurisdictions. The judiciary itself often seems to have developed an expanded interpretation

²⁰⁹ Hirschl, ‘The New Constitutionalism and the Judicialisation of Pure Politics Worldwide’ 721.

²¹⁰ Torbjörn Vallinder, ‘When the Courts Go Marching’ in C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power: The Judicialisation of Politics* (New York University Press 1995) 13.

of formal rules of jurisdiction and standing or admissibility. As a result of the judicialisation of the constitution, it is inevitable that certain ‘elements of legal discourse penetrate and are absorbed by political discourse’.²¹¹ Therefore, it has been widely observed that courts have become ‘powerful institutional actors or policymakers,’²¹² in terms of directing public policy-making,²¹³ and being involved in legislative processes.²¹⁴ For example, it can be seen that courts increasingly tend to ‘limit and regulate the exercise of parliamentary authority by imposing substantive limits on the power of legislative institutions. Thus, the judiciary could become an avenue for making substantive policy.’²¹⁵ Similar developments can also be seen in relation to procedural ‘rules governing the exercise of legislative power’.²¹⁶

An initial reading of the literature attributes the expansion of judicial power to the values and practices spread with the global trend of democratization, constitutionalism, human rights, the relative decline in parliamentary supremacy and the ineffectiveness of majoritarian or policy-making institutions, and government’s increasing interference in all aspects of social life.²¹⁷ However, a deeper review suggests that scholars have developed different theories to account for this increasing expansion of judicial power. There are two predominant arguments. The first one focuses on institutional and legal factors and their impact on judicial power. Thus, it is argued that an entrenched constitution that guarantees a bill of rights and a reasonably independent, accessible and constitutionally empowered judiciary can increase

²¹¹ Alec Stone, ‘Judging Socialist Reform: The Politics of Coordinate Construction in France and Germany’ (1994) 26 (4) *Comparative Political Studies* 446.

²¹² Martin Shapiro, Alec Stone, ‘The New Constitutional Politics of Europe’ (1994) 26 (4) *Comparative Political Studies* 401 <<http://cps.sagepub.com/content/26/4/397.full.pdf+html>> accessed 10 December 2015.

²¹³ C Neal Tate, ‘Why the Expansion of Judicial Power?’ in Tate, Vallinder (eds), *The Global Expansion of Judicial Power* 28.

²¹⁴ Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press 1992) 119-138.

²¹⁵ John Ferejohn, ‘Judicializing Politics, Politicizing Law’ (2002) 65(3) *Law and Contemporary Problems* 41.

²¹⁶ Alec Stone Sweet, *Governing with Judges Constitutional Politics in Europe* (Oxford University Press 2000) 195.

²¹⁷ See Shapiro, Stone, ‘The New Constitutional Politics of Europe’ 397-420; C Neal Tate, ‘Why the Expansion of Judicial Power?’; Ferejohn, ‘Judicializing Politics, Politicizing Law’ 41-68.

the potential for the expansion of judicial powers beyond procedural matters into the realm of ‘substantive political issues central to the polity’.²¹⁸

Indeed, institutional and legal factors are the most cited grounds, and indeed the most cited defence, for court activism from the judges’ perspective. The UK courts seem to frequently emphasise that the Parliament has empowered them with weak forms of legislative review under the Human Rights Act 1998. It was explicitly expressed in the *Nicklinson case* that ‘Parliament has cast on the courts the function of deciding whether a statute infringes the Convention.’²¹⁹ In other words, Lord Kerr argued that by exercising this jurisdiction,

the courts do not usurp the role of Parliament, much less offend the separation of powers. A declaration of incompatibility is merely an expression of the court’s conclusion as to whether, as enacted, a particular item of legislation cannot be considered compatible with a Convention right [...] it is open to Parliament to decide to do nothing.²²⁰

In other words, the legislature expanded judicial powers by introducing the Human Rights Act of 1998. Although these institutional and legal explanations and factors are of significant relevance to judicial power in general and judicialisation in particular, one should be aware of overestimating and generalising similar arguments. The literature refers to a variety of different cases in which courts with similar jurisdictions and institutional structures have performed differently.

One of the examples academics cite for ineffective judicial review is the Swedish Supreme Court.²²¹ It is argued that the legal and constitutional factors (including a hierarchy of legal norms, a bill of rights, and the preview of bills of legislation by the Law Council, staffed with judges, before they come into effect) have not led to greater judicialisation in Sweden.²²² It should be noticed

²¹⁸ Ran Hirschl, ‘The Struggle for Hegemony: Understanding Judicial Empowerment through Constitutionalism in Culturally Divided Politics’ (2000) 36(1) *Stanford Journal of International Law* 74 (footnotes 4).

²¹⁹ [2014] UKSC 38 Para [100].

²²⁰ *ibid* Para [343].

²²¹ Barry Holmstrom, ‘The Judicialisation of Politics in Sweden’ (1994) 15(2) *International Political Science Review* 153-154; Thomas Bull, ‘Judges without a Court: Judicial Preview in Sweden’ in Tom Campbell, K D Ewing, and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2001) 393-402.

²²² Holmstrom, ‘The Judicialisation of Politics in Sweden’ 153-154.

that the Swedish ‘preview-system’ contributes to that. The system consists of ‘legislative committees in preparing legislation, open access to public documents and the right to publish those, the experts’ opinions of the Law Council and scrutiny by the Constitutional Committee of the Parliament’ which results in carefully drafting legislative bills minimising the potential for challenging their constitutionality.²²³

Similarly, scholars have frequently made reference to the Japanese Supreme Court as an example of a self-restrained court. It is reported that in the course of the fifty years since the Court began functioning, it has declared only eight laws unconstitutional.²²⁴ Many would argue that even these were in cases that ‘the unconstitutionality of public policy becomes so obvious, or administrative discretion becomes so unreasonable and arbitrary’,²²⁵ that judges had no option but to overrule them.

The second set of arguments concern judges, their preference and willingness to engage in controversial questions of a constitutional and political nature. Thus, it is argued that judges decide cases according to their ideological, political or legal policy preferences.²²⁶ Therefore, it is claimed that ‘changing judicial and legal culture, not changing documents, is what leads judges to assume a more activist posture toward the other branches of government.’²²⁷ On the importance of the judges’ willingness to expand judicial powers, C Neal Tate, while underlining the formal and institutional factors, argues that for judicialisation to occur and develop, judges’ personal attitudes and policy preferences are critical factors. In his opinion, such developments depend on judges’ decisions, and he maintains that judges ‘*should* (1) participate in policy-making that could be left to the wise or foolish discretion of other institutions,

²²³ Bull, ‘Judges without a Court: Judicial Preview in Sweden’ 394.

²²⁴ David S Law, ‘Why Has Judicial Review Failed in Japan?’ (2011) 88 *Washington University Law Review* 1426.

²²⁵ Hiroshi Itoh, ‘Judicial Review and Judicial Activism in Japan’ (1990) 53(1) *Law and Contemporary Problems* 177.

²²⁶ Druscilla L Scribner ‘The judicialisation of (Separation of Powers) Politics: Lessons from Chile: La judicialización de la (separación de poderes) política: lecciones de Chile (2010) 2(3) *Journal of Politics in Latin America* 84.

²²⁷ Samuel A Bottomley, ‘Implied Constitutional Rights and the Growth of Judicial Activism’ (PhD, the University of Calgary 1997) 5, <<http://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/ftp04/mq24575.pdf>> accessed 1 December 2015.

and at least on occasion, (2) substitute policy solutions they derive for those derived from other institutions.²²⁸

Furthermore, judges' perception of their professional role or, as James Gibson puts it, what they 'think they ought to do',²²⁹ is of considerable relevance. In general, some judges might see their role or the extent of their influence as being restricted to applying laws without attempting to intrude into the political domain.²³⁰ For example, it can be seen that although judges in Scotland have the power to strike down unconstitutional Acts issued by the Scottish Parliament, they have explicitly refused to decide on issues of 'considerable public controversy.'²³¹ In the *Adam v The Scottish Ministers case*, which was challenging the Protection of Wild Mammals (Scotland) Act 2002, prohibiting mounted foxhunting, on the grounds that it was outside legislative competence of Scottish parliament and also it was incompatible with the Convention rights, Lord Nimmo Smith argued that the matter in question was 'recognised as being more appropriate for decision by a democratically elected representative legislature than by a court.'²³²

Other judges may see their role as being unrestricted by boundaries between the political and the legal realm. In this situation, judges may view their role as being that of the reformers striving to bring about political liberalization through legal channels.²³³ Some may even blame the 'power hungry' courts for being too assertive about deciding on moral and political issues.²³⁴ Indeed, it is observed that,

judges have been increasingly willing to regulate the conduct of political activity itself- whether practiced in or around legislatures, agencies, or the electorate- by constructing and enforcing standards of acceptable behavior for interest groups, political parties, and both elected and appointed officials.²³⁵

²²⁸ Tate, 'Why the Expansion of Judicial Power' 33, [Original emphasis].

²²⁹ James L Gibson, 'From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior' (1983) 5(1) *Political Behavior* 9.

²³⁰ Mahmoud Hamad, 'When the Gavel Speaks: Judicial Politics in Modern Egypt' (*Ph.D.*, The University of Utah 2008) 292.

²³¹ Ewing, *Bonfire of The Liberties* 279.

²³² [2004] SC 665.

²³³ Hamad, 'When the Gavel Speaks: Judicial Politics in Modern Egypt' 292.

²³⁴ Hirschl, 'The Judicialization of Politics' 134.

²³⁵ Ferejohn, 'Judicializing Politics, Politicizing Law' 41.

Therefore, not any court that has constitutional review powers and a mandate to enforce an entrenched bill of rights will inevitably exercise such powers or enlarge its role and influence on public policy. There is an implicit assertion that judges' willingness to expand judicial powers and to affect or direct public policy-making is of significant relevance for explaining judicialisation. In any case, one could argue that the conceptual difficulties regarding the rule of law and democracy could also reflect the essence of the arguments mentioned above. Understanding and applying the substantive conceptions of the rule of law and democracy would potentially provide greater expansion in judicial powers as the grounds for constitutional review would expand, as compared to under formal and procedural understandings of these two concepts.

This thesis acknowledges the judge's role without further engaging in the relevant debates. Instead, it argues that judicialisation is said to emerge and develop as a result of the interaction of multiple factors. These factors include a relatively independent, accessible and constitutionally empowered constitutional judiciary. In addition, the fragmentation of political powers within and between political branches of the government may increase the amount of unresolved constitutional controversies and questions, and minimise counter-reactions by the government against the judiciary. A growing demand from individuals, government and interest groups to involve the judiciary in addressing and resolving these controversies could potentially lead to a greater judicialisation of the constitution. It seems important to discuss these factors in some detail drawing on supply and demand side explanations.²³⁶

3.2 The Supply Side Factors: Institutional and Structural Factors

The following discussion is not an exclusive account of institutional and structural factors that may explain judicialisation, rather it will reflect only on those considered to be the most relevant issues. Taking into consideration the variety from country to country, it analyses the relevance of two factors to the

²³⁶ The arguments for a model of explanation: demand and supply factors, can be found in a broader body of literature that to a different extent focuses on particular factors as being the most significant in explaining judicial power. For example, Epp, *The Rights Revolution*, has focused on factors that might increase the demand on judicial resolution of constitutional controversies. Ginsburg, *Judicial Review in New Democracies*, addressed factors that might supply side for the development of judicialisation.

judicialisation: first, the extent and variety of the powers that the constitutional judiciary might exercise. Secondly, it explains the relevance of the fragmentation of political powers in the elected branches of the government.

3.2.1 The Structure of the Constitutional Judiciary: Jurisdictional Rules

The structure and the rules of jurisdiction regarding the constitutional judiciary can be considered relevant institutional factors in explaining judicialisation. Jurisdictional rules address the scope of authority of the courts. It is noted that a court with broader jurisdiction would have more opportunities to expand its powers.²³⁷ Constitutional review is the primary jurisdiction of the constitutional judiciary that has the effect of ‘subordinating state actions to higher principles.’²³⁸ Courts may have the power to exercise an abstract and/or concrete constitutional review. The court exercises an abstract review of the constitutionality of legislation without need for a specific concrete case or controversy to arise. The court may also have the power to exercise concrete review of the constitutionality of legislation which is coincidental to a specific concrete case or dispute.²³⁹ Some courts including the German and Spanish constitutional courts exercise both concrete and abstract constitutional review. The US Supreme Court exercises only concrete review.²⁴⁰ The *French Conseil Constitutionnel* was only able to exercise abstract review before the constitutional reforms in 2008. These constitutional amendments in France provide for the concrete constitutional review of legislative provisions that infringe the constitutional rights and freedoms upon referral from the ordinary courts.²⁴¹ Constitutions may provide for an *ex post* review that involves an already enacted legislation or legal norm or an *ex ante* control that involves legislation that has been passed by the parliament but has not been promulgated.²⁴² For example, the courts in Hungary and Poland exercise the *ex*

²³⁷ Cristina M Ruggiero, *Judicial Power in a Federal System: Canada, United States and Germany* (LFB Scholarly Publishing LLC 2012) 30.

²³⁸ Cappelletti, *The Judicial Process in Comparative Perspective* 120.

²³⁹ Stone, *The Birth of Judicial Politics in France* 226.

²⁴⁰ See *ibid* 57.

²⁴¹ Otto Pfersmann, ‘Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective’ (2010) 6 *European Constitutional Law Review* 227.

²⁴² Stone, *The Birth of Judicial Politics in France* 226.

ante review wherein the President of the Republic before ratifying legislation can ask the court to exercise such review.²⁴³

In any case, constitutional review provides the potential for judicialisation to different extents. An abstract review which is usually initiated by certain state officials and institutions often create a direct relation between policy debates amongst legislators and the judiciary.²⁴⁴ Thus, the parliamentary opposition and minorities may repeatedly use such abstract review powers as a means of challenging the constitutionality of a legislative bill, in the wake of largely failed attempts to secure their interests during parliamentary debates. It could be argued that actions of this kind are more likely to place courts at the centre of ongoing political debates.²⁴⁵ It would invite the judiciary 'to intervene in and alter legislative processes and outcomes', that when used regularly, could lead to 'a judicialisation of policymaking processes'.²⁴⁶ Judges, as Sweet Stone notes, 'have seized these opportunities, if only to defend their own institutional legitimacy, producing an increasingly dense, inherently expansionary, case law'.²⁴⁷ Furthermore, it can be said that courts that combine these above review powers would be more likely to contribute to a greater level of judicialisation, adding a political function to courts' general social and judicial mandates.²⁴⁸ According to Ackerman:

If a court must wait for a specific complaint by an ordinary individual, it may take a while before a bitterly politicized dispute makes its way into the judges' chambers. This delay provides the court with a valuable political resource to sustain itself as part of the new constitutional order.²⁴⁹

Seemingly, an abstract constitutional review would bring the judiciary central to the political crisis than a concrete review. This seems important knowing that often a court's rulings can only be overruled through constitutional amendments

²⁴³ Sadurski, 'Judicial Review in Central and Eastern Europe' 503.

²⁴⁴ Stone, *The Birth of Judicial Politics in France* 4.

²⁴⁵ Donald L Horowitz, 'Constitutional Courts: A Primer for Decision Makers' (2006) 17(4) *Journal of Democracy* 128.

²⁴⁶ Stone, *The Birth of Judicial Politics in France* 235.

²⁴⁷ Stone Sweet, *Governing with Judges constitutional politics in Europe* 74.

²⁴⁸ Carla L Thorson, *Politics, Judicial Review and the Russian Constitutional Court* (Basingstoke, Palgrave Macmillan 2012) 17-18.

²⁴⁹ Bruce Ackerman, *The Future of the Liberal Revolution* (Yale University Press 2008) 108.

or specific procedures. This may explain the growing reliance on legal arguments in legislative debates; it is perceived that policy makers take into consideration court judgments and the constitutional jurisprudence that has been developed towards a given policy issues while drafting legislation.²⁵⁰

Furthermore, the courts may provide a binding abstract interpretation of the constitution independent of any review of the constitutionality of legislation or legal norms. Importantly, the government may use this procedure to seek an advisory opinion on a matter that is the subject of a legislative bill already under debates in parliament. It is reported that the Hungarian Constitutional Court was often asked to provide abstract constitutional interpretations, many would consider to be advisory opinions, in the process of legislative drafting. Possibly this procedure would invite the judiciary more closely into an ongoing legislative debate. This may be the reason courts often try to limit the possibility of becoming an advisory board to politicians especially during the process of drafting legislations. As a result courts often require the existence of an actual dispute for exercising an abstract interpretation of the constitution.²⁵¹ Another crucial power that a constitution may provide for is the constitutional complaint proceedings which is a particular legal remedy enabling individuals to directly challenge public authorities for violating their fundamental rights.²⁵² Some have argued that this procedure is directly correlated with ‘the existence of an activist and powerful constitutional court.’²⁵³

Moreover, the constitutional judiciary may also have a variety of jurisdictions other than constitutional review. These additional powers, or as Tom Ginsburg refers to them, ‘ancillary powers’, vary from one constitution to another.²⁵⁴ The most common of these ancillary powers include deciding on conflicts of jurisdiction or competence between different governmental branches or between central/federal and local/sub-federal entities, election-related disputes, impeachment of certain high-ranking state officials, and determining the constitutionality of political parties. In a few instances

²⁵⁰ See Stone, *The Birth of Judicial Politics in France* 119-140; Stone Sweet, *Governing with Judges constitutional politics in Europe* 62-90.

²⁵¹ Sadurski, ‘Judicial Review in Central and Eastern Europe’ 504.

²⁵² Bojan Bugarcic, ‘Courts as Policy-Makers: Lessons from Transition’ (2001) 42(1) *Harvard International Law Journal* 273.

²⁵³ Sadurski, ‘Judicial Review in Central and Eastern Europe’ 503.

²⁵⁴ Ginsburg, *Judicial Review in New Democracies* 40. See Tom Ginsburg, Zachary Elkins, ‘Ancillary Powers of Constitutional Courts’ (2009) 87(7) *Texas Law Review* 1440.

constitutional drafters have attempted to even go further. For example, the constitutional drafters in Azerbaijan even tried to grant the constitutional judiciary the power to ‘dissolve parliament when it repeatedly passes laws that violate the constitution’; not surprisingly this was not included in the final draft of the constitution.²⁵⁵ Another unusual power which has already been exercised is that of the Thai Constitutional Court concerning the approval of the recommendations of the National Anti-Corruption Commission in banning officials who are unable to provide a truthful statement of their finances.²⁵⁶

It is argued that the powers discussed above may indeed bring the courts to the centre of political controversies and crisis. One may argue that the implications of courts addressing and resolving controversial constitutional questions would inevitably raise concerns about the independence and impartiality of courts operating in transitional democracies.²⁵⁷ That is as argued later, given that transitional constitutions may provide for an unclear structure and division of powers amongst state institutions, officials and state entities.²⁵⁸ Questions and controversies of this kind can be frequent and may have crucial implications in the case of a newly established constitution.

As already mentioned at the outset of this chapter, a constitution may formally expand the powers and mandate of the constitutional judiciary. On the other hand, courts regardless of the extent of their formal jurisdiction might expand their own powers, for instance through interpreting rules relating to jurisdictions and standing. This could be seen as enabling courts to address or resolve questions and controversies which many would argue lie beyond a court’s jurisdiction. Although there is no direct relation between formally entrusted powers and judicialisation, it can be argued that the more powers a court has, the greater the potential for it to become the centre of political controversies.

Given the nature of constitutional judiciaries, their jurisdiction, and the questions they deal with, they will always be involved in some decisions that are affected by or touch upon the realm of politics. Indeed, some would argue

²⁵⁵ Ginsburg, *Judicial Review in New Democracies* 40.

²⁵⁶ Ginsburg, Elkins, ‘Ancillary Powers of Constitutional Courts’ 1441.

²⁵⁷ Sadurski, ‘Judicial Review in Central and Eastern Europe’ 504; Ginsburg, Elkins, ‘Ancillary Powers of Constitutional Courts’ 1448.

²⁵⁸ See Chapter Three (3.4.1).

that what differentiates the constitutional judiciary from the ordinary courts is that it is not ‘detached from the gravitation field of contention for gaining, exercising and preserving political power.’²⁵⁹ In other words, almost any decision which it takes may carry implications for the whole legal and political system. It also establishes judicial precedents that are crucial in deciding future constitutional questions of a similar kind.²⁶⁰ Thus, legally an annulment decision is understood to overturn an unconstitutional law and at the same time, this can be viewed politically as a retrospective defeat of the majority in parliament that passed this law.²⁶¹ Moreover, it can be argued that such a decision would also affect the rule of law where it is intended to reinforce the supremacy of the law or hold the government to account for excessive or arbitrary exercise of public power.

A court operates within a political context and applies its decisions to that context. Therefore, it is also affected by that context and this may also explain the differences in the actual powers that the courts exercise. Many would argue that the potential for judicialisation to occur and develop is greater where there are fragmented political powers. Thus, arguably such conditions might result in the greater independence of the court where fragmentation of political powers could serve to diminish the potential external interference with or influencing of the judiciary. Therefore, it is important to address the impact of the political context within which the judiciary operates focusing on the fragmentation arguments.

3.2.2 Fragmentation of Political Powers and Judicialisation

It has already been argued that the constitutional judiciaries have implications for the legal and political system. Therefore, it is assumed that they take into consideration the legal and political constraints. The judiciary not only affects the other branches of the government, but is also dependent on them in

²⁵⁹Böckenförde, E.-W. (1999). Verfassungsgerichtsbarkeit. Strukturfragen, Organisation, Legitimation [Constitutional Review. Structural Issues, Organization, Legitimacy], *Neue Juristische Wochenschrift* 44(1): 10-11, (as quoted in Michael Hein, ‘Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoretical Approach’ (2011) 3(1) *Studies of Transition States and Societies* 17).

²⁶⁰ Aharon Barak, ‘Foreword: A Judge on Judging: The Role of a Supreme Court in A Democracy’ (2002) 116 (1) *Harvard Law Review* 63.

²⁶¹ Hein, ‘Constitutional Conflicts between Politics and Law in Transition Societies’.

many ways: for example, this might be related to their role and involvement in judges' appointment, promotion, discipline and the enforcement of judicial decisions. Given these interrelations between the judiciary and the political branches, scholars may argue that fragmentation in political powers is one of the factors that may explain the potential for judicialisation. Fragmentation here means that different political parties control different branches of the government, something that can increase difficulties in coordination and decision making.²⁶² As the complexity in coordination between government branches increases the potential for unresolved controversies, political deadlocks may also rise, affecting competence in policy making and serving as checks and balances.²⁶³ In such situations, it is also possible that political actors and interest groups or individuals rely on constitutional litigation for seeking policy goals that they could not have achieved by political means.²⁶⁴

In other words, under a majority government, where one political party controls both elected branches, courts which constitutionally authorised to overrule legislation, might find less room to actually exercise such power. For example, some might argue that the self-restrained approach and the ineffective constitutional review power of the Japanese Supreme Court might be related to the consecutive majority governments that were controlled by the Japanese Liberal Democratic Party (LDP) for over three decades (1955-1993).²⁶⁵ It is argued that 'judges who decided politically sensitive cases according to non-LDP political preferences incurred a substantial risk that the Secretariat [government body] would assign them to a series of low-status positions.'²⁶⁶

²⁶² Popova, *Politicized Justice in Emerging Democracies* 26-40.

²⁶³ R D Cooter, T Ginsburg, 'Comparative Judicial Discretion: An Empirical Test of Economic Models' (1996) 16(3) *International Review of Law & Economics* 296; J Rios-Figueroa, 'Fragmentation of Powers and the Emergence of an Effective Judiciary in Mexico, 1994-2002' (2007) 49(1) *Latin American Politics and Society* 34. See also Shannon Ishiyama, Smithey John Ishiyama, 'Judicial activism in post-communist politics' (2002) 36(4) *law and Society Review* 738.

²⁶⁴ Clayton, 'The Supply and Demand Side of Judicial Policy-Making' 77-79; Ferejohn, 'Judicialising Politics, Politicizing Law' 59.

²⁶⁵ Other contributed factors include: the existence of a 'pre-enactment review by the Cabinet Legislation Bureau; the personnel exchange between the judiciary and the Ministry of Justice and the bureaucratic structure and internal discipline of the judiciary. Law, 'Why Has Judicial Review Failed in Japan?' 1445-50; Hiroshi Itoh, 'Judicial Review and Judicial Activism in Japan' 177. See also Sigal Ben-Rafael Galanti, Alon Levkowitz 'Attitudes towards Judicial Review in Japan and South Korea: Indications for the Existence of a Liberal-democratic Civic Culture' (2015) 25(2) *International Review of Sociology* 318.

²⁶⁶ J Mark Ramseyer, 'The Puzzling (In)Dependence of Courts: A Comparative Approach' (1994) 23(2) *The Journal of Legal Studies* 728.

Thus, the majority government could easily, if it chose, undertake counter reactions to the Court's involvement in controversial questions.

However, fragmentation arguments do not appear to explain the independence of the judiciary in the United Kingdom where, often, a single political party controls both the legislative and the executive branches of government. Indeed, this example is of relevance and an interesting one. There, the judiciary has limited or weak constitutional legislative review powers under the Human Rights Act 1998. The potential for expansion of judicial powers and the introduction of strong constitutional legislative review under exceptional circumstances has been recently discussed by the courts. In the *Jackson case*, Lord Steyn famously expressed the view that,

The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. [...]. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign parliament is acting at the behest of a complaisant House of Commons cannot abolish.²⁶⁷

Therefore, judges have expressed concerns about the danger of strong majority government and how the court may need to become more active in such circumstances. Similarly, in the *Axa case*, Lord Hope expressed the view that,

It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. [...] The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.²⁶⁸

²⁶⁷ [2005] UKHL 56, Para 102.

²⁶⁸ [2011] UKSC 46, Para 51,

The fragmentation thesis argues that courts under a strong majority government are more cautious about expanding their powers mainly because of the potentiality of responses from the government that might undermine their independence. However, here an independent judiciary highlights the threat that a strong majority government may pose by violating the rule of law principles and, therefore, affecting courts supporting or evaluating the possibility of expansion of constitutional legislative power and judicialisation

The United Kingdom example is different from transitional democracies in many ways, not least because principles of the rule of law, democracy and independence of the judiciary are far more firmly entrenched. One could argue that in transitional democracies, fragmentation arguments may explain the rise of the politicians' desire to establish independent courts. It can be seen that,

In the uncertainty of democratization, politicians who fear electoral loss create a strong and independent judiciary to protect themselves from the tyranny of election-winners in the future. Weak political parties or several deadlocked ones are likely to produce powerful, independent, and accessible judicial institutions.²⁶⁹

Thus, the fragmentation of political power and the potential increase in judicialisation of the constitution in transitional democracy may be related. It can be argued that a transition to democracy would often increase fragmentation of political powers. This is an important argument given that in many transitional democracies the political parties, once elected, will be in power without any real restraints on their powers 'until they are outvoted, overthrown, impeached, exiled or murdered.'²⁷⁰ Therefore, when powers are fragmented, undertaking actions that may overrule the controversial judicial decisions would need a broad coalition and coordination between government branches. When parliament is deadlocked or a government divided such coordination often proves to be impossible.

Furthermore, fragmentation of political powers may also increase the use of constitutional litigation. Although an increase in the courts' involvement

²⁶⁹ Alexei Trochev, 'Courts as Losers: The Impact of Constitutional Crises on Judicial Power in Russia and Ukraine' (Conference Papers, *American Political Science Association* 2009) 3-4.

²⁷⁰ *ibid* 6.

in addressing and resolving constitutional controversies is an indication of the greater level of judicialisation, it is not a sign of the court's independence. As some literature illustrates, judicialisation under a fragmented political system can severely undermine court independence in transitional democracies. Thus, at times of constitutional crisis those in power may use constitutional judiciaries to serve to rule in their interests. If they succeed in influencing judicial decisions, then the court may be seen to be supporting the government and legitimizing its exercise of powers, whereas protecting the rule of law might come to its margins.²⁷¹

Therefore, this thesis argues that fragmentation of powers in government branches does not necessarily result in a more independent judiciary; indeed, it can threaten the courts' independence. There may be an interrelation between fragmentation, the increase in constitutional litigation and judicialisation of constitutional issues. The case study of this thesis will further test these arguments in some detail in Chapter Four. Before that, it is essential to address the rules of standing and bringing constitutional litigation before the constitutional judiciary and the implications for the rise in judicial powers.

3.3 The Demand Side Factors: Accessing the Judiciary and Legal Mobilisation

Constitutions and other statutes define who can initiate constitutional cases and bring constitutional controversies and disputes before the constitutional judiciary. The judiciary itself is also essential in defining the extent of accessibility of the court. It is imperative to understand the relevance of the rules of standing to the increase in judicialisation. The following discussion focuses firstly on the accessibility of the constitutional judiciary and secondly, the support structure for legal mobilisation around constitutional litigation.

²⁷¹ Trochev, 'Courts as Losers: The Impact of Constitutional Crises on Judicial Power in Russia and Ukraine' 34.

3.3.1 Accessing the Constitutional Judiciary

Constitutions adopt different positions on who can access and initiate litigation before the constitutional judiciary. The ‘rules of justiciability’ and ‘standing’ address procedural matters such as the type of cases or controversies the courts may hear and the eligibility of the petitioner to bring a case to the court. These rules determine the extent of the cases that the court decides and arguably the court’s powers.²⁷² Indeed, as Yves Mény argues, constitutional courts respond to litigation that is brought before them; to issue rulings, they are ‘obliged to wait for a favourable opportunity to arise.’²⁷³ Some courts may be more accessible and therefore hear more cases and controversies than others, which could increase the potential for judicialising constitutional issues. Taking into consideration the differences from one country to another, individuals, governments, politicians, lower courts and even the constitutional judiciary itself or public interest groups may have the right to initiate constitutional litigation.

Individuals may access the court using constitutional complaint proceedings and concrete judicial review. The exhaustion of all other ordinary legal remedies may or may not be a precondition for instigating a constitutional complaint, depending on the constitution. For example, in Germany, any person who believes their constitutionally protected rights have been infringed by public authorities can make a constitutional complaint to the Federal Constitutional Court, once all other ordinary legal remedies have been exhausted.²⁷⁴ Conversely, in Israel, unless otherwise required by specific law, principally ‘controversies in which public agencies are involved as respondent, make their way *directly* to the Supreme Court’.²⁷⁵ The Court has often developed ‘liberal rules of standing’ which have allowed judicial review in cases brought by those who had not suffered an injury in fact.²⁷⁶ It has been

²⁷² Ruggiero, *Judicial Power in a Federal System* 31.

²⁷³ Yves Mény, *Government and Politics in Western Europe: Britain, France, Italy, Germany* (Oxford University Press 1998) 349.

²⁷⁴ J Ferejohn, P Pasquino, ‘Constitutional Adjudication: Lessons from Europe’ (2004) 82(7) *Texas Law Review* 1682-1683.

²⁷⁵ Dotan, *Lawyering for the Rule of Law* 19 [original emphasis].

²⁷⁶ Barak, ‘Foreword: A Judge on Judging’ 107.

asserted that a direct access to the constitutional judiciary can clearly be correlated with the expansion of judicial power and active courts.²⁷⁷

Furthermore, courts are limited in exercising constitutional judicial review and other jurisdictions by cases that are brought before them by a state institution, an authorised individual or court itself. Within the framework of concrete review of legislation lower courts are authorised and obliged to submit a petition for judicial review to the constitutional judiciary, if a doubt has arisen about the constitutionality of legal norms to be applied in a concrete case pending at this court. Furthermore, any litigant who can assert an injury can initiate constitutional review. Conversely, within the framework of its abstract review, the constitutional judiciary reviews constitutionality of legislation challenged mostly by actors other than courts. These may include a state body, a number of politicians, or the governments of federal entities.²⁷⁸ For example, in Austria, an abstract review can be initiated by one-third of the members of the National Council or the Federal Council, as well as one-third of the members of a provincial Parliament.²⁷⁹

Other less common procedures may be used for bringing constitutional cases. The constitutional judiciary itself may initiate constitutional litigation acting as '*sua sponte*- on its own motion'. The Hungarian Constitutional Court is usually seen as the leading example here. Some may also argue that constitutional judges who decide or act without being seen to be bound by the limit of the petition that is submitted to the court are probably exercising the 'self-initiated procedure'.²⁸⁰ Moreover, some courts can be accessed directly by the public interest groups as third parties to the litigation. This will be analysed in detail in the discussion that follows in next part.

Therefore, given this possibility that a court might expand its powers, it can be argued that the accessibility of the constitutional judiciary also depends to a significant degree on the court's interpretation of these formally and

²⁷⁷ Sadurski, 'Judicial Review in Central and Eastern Europe' 503.

²⁷⁸ Alec Stone, *The Birth of Judicial Politics in France* 226. See also Cappelletti, *The Judicial Process in Comparative Perspective*.; Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France*.

²⁷⁹ The Constitutional Court of Austria, <<https://www.vfgh.gv.at/cms/vfgh-site/english/jurisdiction1.html>> accessed 22 January 2015.

²⁸⁰ Sadurski, 'Judicial Review in Central and Eastern Europe' 503. See also Hirschl, 'The Judicialisation of Politics' 132.

constitutionally guaranteed rules of justiciability and standing.²⁸¹ The Constitutional Court of Kosovo expanded its powers by interpreting the rules of standing and admissibility of constitutional cases broadly. The Court has recently established the notion of a ‘continuing situation’ according to which ‘a set of circumstances [...] repeats anew every day, thereby preventing a legal time limit from beginning to run until the situation ceases’.²⁸² The Court has used this to expand its jurisdiction. It is argued that, in some cases, reverting to this notion has had significant outcomes on the constitutional order and the stability of the political system.

In a case that involved the country’s President, in September 2010, the Kosovan Court held that the President ‘could not simultaneously serve as President and the chairman of his political party’.²⁸³ The decision came when the Court was asked to decide whether the president’s position as the Chairman of his political party violated the constitution, which explicitly bans the President from exercising any political function.²⁸⁴ Remarkably, the case was brought outside the allotted time limit for referring to the Court, and it was assumed that the Court could dismiss the case on the grounds of inadmissibility. The Court however considered the matter as a continuing situation that is not affected by the statute of limitations.²⁸⁵ Regardless of the outcomes, this example indicates the importance of the court’s role in determining the extent of accessibility.

Therefore, it can be argued that a more expanded and liberal interpretation of rules of standing and accessibility, and the existence of fewer barriers to adjudication would increase the potential for judicialising more questions and controversies. It may also increase the diversity of actors who bring these constitutional cases. In other words, as the US Supreme Court Justice Powell argues, ‘[r]elaxation of standing requirements is directly related

²⁸¹ Hirschl, ‘The Judicialization of Politics’ 132.

²⁸² David M Palko, ‘The Risks of “Continuing Situation” Litigation in Transitional Political Systems: Lessons from the ECtHR for the Constitutional Court of Kosovo’ (2012) 25(1) *Harvard Human Rights Journal* 183.

²⁸³ Palko, ‘The Risks of “Continuing Situation” Litigation in Transitional Political Systems’ 186-187.

²⁸⁴ (as cited in *ibid* 190-191).

²⁸⁵ *ibid* 186-187.

to the expansion of judicial power'.²⁸⁶ Thus, the expanded standing may improve the accountability function of the judiciary in serving to strengthen the checks against those in power and constitutional violations.²⁸⁷ Given the binding nature, finality and wider implications of constitutional decisions, one may argue that constitutional litigation can often be used strategically and regularly as a means of challenging a government's exercise of powers.²⁸⁸ From that perspective, an accessible court is essential for the rule of law. On the other hand, an expanded standing may be seen to contradict democracy as it potentially gives rise to greater judicialisation and that in itself may increase judicial interference in areas which should be reserved for majoritarian policies.²⁸⁹ The next part will discuss these arguments in further depth.

The discussion so far has addressed the relevance that direct access to the constitutional judiciary may have for potentially increasing judicialisation. The court may also be accessed indirectly, namely, by public interest groups demanding judicial protection for their policy interests by assisting others who are unable to exercise this right despite being entitled to standing. The next section considers support structure arguments, addressing the role that indirect access plays, focusing on litigating for public interest and the implications of this for judicialisation and the rule of law.

3.3.2 The Support Structures for Constitutional Litigation

This part develops the argument that an expanded standing increases access to the constitutional judiciary and then increases the judicialisation of constitutional issues. Courts are largely dependent on others to bring questions and controversies forward.²⁹⁰ Although individual access to the constitutional judiciary is relatively well-established and courts are reasonably accessible, in practice, the capability of individuals who have suffered an injury to litigate or sustain their litigation once it has been initiated is limited. Their intellectual,

²⁸⁶ See the *US v Richardson* (1974. 418 US 166,188) (as quoted by Ruggiero, *Judicial Power in a Federal System* 31).

²⁸⁷ Ginsburg, *Judicial Review in New Democracies* 36-39.

²⁸⁸ Paul M Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (Oxford University Press 2008) 20- 25.

²⁸⁹ Aparna Polavarapu, 'Expanding Standing to Develop Democracy: Third Party Public Interest Standing as a Tool for Emerging Democracies' (2016) 41 *Yale Journal of International Law*.

²⁹⁰ Donald J Farole, *Interest Groups and Judicial Federalism: Organizational Litigation in State Judiciaries* (Greenwood 1998).

financial and legal abilities to surmount cost barriers or restrictive procedural requirements limit their access.²⁹¹ Marc Galanter differentiates between what he called the ‘have-nots’ and the ‘haves’ (in relation to their power, wealth and status).²⁹² The latter are in a more advantageous position regarding litigation and seeking judicial protection for their interests.

Therefore, the accessibility of the courts becomes meaningful if these individuals can have real access and bring their cases forward. Charles Epp, referring to the emergence of the ‘rights revolutions’ in several common law democracies, underlines the necessity of support structures for legal mobilisation. Epp argues that:

Cases do not arrive in supreme courts as if by magic. [...] the process of legal mobilization - the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights- is not in any simple way a direct response to opportunities provided by Constitutional promises or judicial decisions, or to expectations arising from popular culture. Legal mobilization also depends on resources and resources for rights litigation depend on a support structure of rights-advocacy: lawyers, rights advocacy organizations, and sources of financing.²⁹³

As previously argued in this chapter, institutions and rules are essential but the extent to which they can be used and applied to a context is complex. Although rights protection is the central focus of Epp’s thesis, one can argue that support structures for legal mobilisation involving constitutional judiciary can also be of significant relevance to cases concerning the accountability of those in power and the rule of law.

Therefore, public interest groups or civil society organisations are increasingly involved in litigation defending their own policy interests either directly or indirectly by supporting others’ cases. They can support those individuals who may be considered to be in a disadvantaged position regarding

²⁹¹ Marc Galanter, ‘Why the ‘Haves’’ Come out Ahead: Speculations on the Limits of Legal Change’ (1974) 9(1) *Law & Society Review* 119.

²⁹² *ibid* 150.

²⁹³ Epp, *The Rights Revolution* 18.

having adequate resources, skills, and information to support their cases.²⁹⁴ Richard Cortner maintains that the public interest groups may choose litigations,

because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy. If they are to succeed at all in the pursuit of their goals they are almost compelled to resort to litigation.²⁹⁵

In other words, litigating for ‘public interest’ can be used strategically, and especially when these groups seem to lack the support of the elected branches for their policy interests, the judiciary is seen as being the next most reliable institution. As Cortner has argued, their use of the judiciary serves to develop constitutional jurisprudence, whether it takes the form of the ‘aggressive litigant’ who seeks a new constitutional interpretation from the court or the ‘defensive litigant’ who does not.²⁹⁶ Furthermore, one can argue that there are two groups of ‘disadvantaged’ litigants. First are individuals who, because of their weak position regarding resources or expertise, seek or attract support from a network of support structures such as public interest groups or organizations. Second are public interest groups which may themselves be in a disadvantaged position regarding their inability or difficulties to gain or protect their interests using political means or in the political arena. The cooperation between these two actors may indeed contribute to the growing demands for judicial powers or judicialisation.

Supporting individuals with their cases may include providing financial and intellectual support through third party intervention or *amicus curiae* briefs.²⁹⁷ *Amicus* briefs, originally introduced as a means of supplying courts with information not delivered by the parties who are involved, have become ‘a

²⁹⁴ Sergio Carrera, Bilyana Petkova, ‘The Potential of Civil Society and Human Rights Organisations through Third –Party Interventions before the European Courts: the EU’s Area of Freedom, Security and Justice’ in Mark Dawson, Bruno De Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* 241.

²⁹⁵ Richard Cortner, ‘Strategies and Tactics of Litigants in Constitutional Cases’ (1968) 17(2) *Journal of Public Law* 287.

²⁹⁶ *ibid* 288- 289.

²⁹⁷ Lucius J Barker, ‘Third Parties in Litigation: A Systemic View of the Judicial Function’ (1967) 29(1) *The Journal of Politics* 42.

partisan advocacy of specific positions'.²⁹⁸ Third-party intervention implies that non-parties to a case with an interest in its outcome seek leave from the court to intervene in the litigation.²⁹⁹ In any case, the third party or the *amice* may highlight issues not being raised by other parties. For instance, in constitutional cases it may bring to the court's attention the wider economic, social and policy implications of a decision.³⁰⁰ Thus, in some instances, the complexity and sensitivity of constitutional contestations may discourage or even prevent a person who is the injured party from bringing forward their cases, being unable to present or otherwise insufficiently presenting them.³⁰¹

Furthermore, public interest groups have been crucial to the support structures, in particular, the third party intervention and *amicus curiae* briefs. Constitutions and indeed courts are varied in providing for public interest standing. Some constitutions provide for 'third-party public interest standing' whereby the public interest groups are authorised to access directly the constitutional judiciary on behalf of individuals. The most recent constitution in Kenya authorises 'a person acting in the public interest' (not necessarily the injured or concerned party) to institute litigation claiming that a constitutionally protected right 'has been denied, violated or infringed, or is threatened.'³⁰² A similar application is possible in Croatia wherein 'any person' can access the constitutional judiciary in other words; '[E]very individual or legal person has the right to propose the institution of proceedings to review the constitutionality of the law [...]'.³⁰³ The doctrine or practice of third-party public interest, whether authorized explicitly in the constitution or developed by judges, is that

A third party or bystander litigant [...] assert[s] constitutional rights on behalf of other individuals or groups. Dissimilar to a class action litigant, the third-party public interest litigant does not suffer the injury

²⁹⁸ Barker, 'Third Parties in Litigation' 53. See also Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (State University of New York Press 2002) 17-40.

²⁹⁹ Harriet Samuels, 'Feminist Activism, Third Party Interventions and the Courts' (2005) 13 (1) *Feminist Legal Studies* 17.

³⁰⁰ Collins, *Friends of the Supreme Court* 29; Samuels, 'Feminist Activism, Third Party Interventions and the Courts' 22-23.

³⁰¹ Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 (4) *The American Journal of International Law* 617-118.

³⁰² Constitution of Kenya 2010, art 22(1).

³⁰³ Constitutional Act on the Constitutional Court of the Republic of Croatia, <<http://www.usud.hr/en>> accessed 12 December 2015.

of the alleged violation but is permitted to litigate the constitutional violation, whether as the sole petitioner or in addition to other direct or indirect plaintiffs.³⁰⁴

Furthermore, it is observed that courts might expand rules of standing for public interest, deciding which of the cases involving public interest can be initiated without the need for an injury in fact or personal harm. The Israeli Supreme Court has developed the view that ‘when the claim alleges a major violation of the rule of law (in its broad sense), every person in Israel has legal standing to sue.’³⁰⁵ Similarly, the Indian Supreme Court has played a leading role in developing procedural rules for public interest litigation. It reduced the standing barrier for litigants arguing that ‘it would not reject a claim in the community interest based solely on lack of *locus standi*’. The Court emphasised the need to liberalise standing in order ‘to meet the challenges of the times’, and ‘to embrace all interests’ that protect ‘public resources and the direction and correction of public power so as to promote justice’.³⁰⁶ It can be argued that an expansion of judicial power driven by increasingly active litigation in the public interest and made possible by an expanded standing may enable the judiciary to check and limit the government power in controversial policy areas. Thus, many would argue that under the rubric of public interest litigation the Indian Supreme Court ‘has altered accountability norms and administrative structures through the creation of investigative bodies and oversight commissions that have supplanted the role of ministries.’³⁰⁷

On the one hand, some may argue that since public interest litigation can enhance and expand individuals’ access to the constitutional judiciary and serve to protect their interests and rights through legal means, it can serve to hold governmental exercise of powers within constitutional limits.³⁰⁸ This procedure may allow ‘the judiciary to hear abstract cases [brought by a third-party] to examine the constitutionality of legislations.’³⁰⁹ It is reported that *actio*

³⁰⁴ Polavarapu, ‘Expanding Standing to Develop Democracy’ 106-107.

³⁰⁵ Barak, ‘Foreword: A Judge on Judging’ 108.

³⁰⁶ Polavarapu, ‘Expanding Standing to Develop Democracy’ 119.

³⁰⁷ Manoj Mate, ‘Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective’ (2010) 12 (1) *San Diego International Law Journal* 216.

³⁰⁸ Pilar Domingo, ‘Judicialisation of Politics or Politicization of the Judiciary? Recent Trends in Latin America’ (2004) 11 (1) *Democratization* 117-118; Barker, ‘Third Parties in Litigation’ 43.

³⁰⁹ Polavarapu, ‘Expanding Standing to Develop Democracy’ 137.

popularis was central to Hungary's Constitutional Court decision to uphold the limitations on the executive's powers before this procedure was abandoned in its 2011 law reform.³¹⁰

Therefore, the procedure serves to promote the ends of the rule of law and the legal arbitration of controversial matters brought into court cases concerning government infringement of rights or other abusive exercises of power.³¹¹ It is also argued that allowing access to interest groups, in particular, those with similar interests to politicians, may serve to improve their attempts at monitoring government through judicial means.³¹² Aharon Barak argued that '[T]he rules of standing are closely related to the principle of the rule of law. Closing the doors of the court to a petitioner with no injury in fact who warns of a public body's unlawful action means giving that government agency a free hand to act without fear of judicial review.'³¹³ Thus, one could also see this procedure as being central to the rule of law reforms in transitional democracies that target judicial institutions.

On the other hand, the interrelation between expanded standing, broad public interest litigation and the judicialisation of state policy and governance has also raised serious concerns challenging the role of the court. The experience of the Indian Supreme Court suggests that the Court's decisions concerning public interest litigation may be seen as 'too arbitrary, or too pragmatic, and not guided by predictable standards from both outside and even from within the Court.'³¹⁴ This remark may also apply to other courts that have significantly expanded their powers by substantially loosening rules of standing for public interest groups. As a result, the judiciary may become 'less constrained by legal doctrine and precedent, and more constrained by policy/political factors, in adjudicating governance disputes than ordinary claims.'³¹⁵ These are serious concerns since a court with such an expanded

³¹⁰ Polavarapu, 'Expanding Standing to Develop Democracy' 149.

³¹¹ Domingo, 'Judicialisation of Politics or Politicization of the Judiciary?' 117-118; Barker, 'Third Parties in Litigation' 43.

³¹² Ginsburg, *Judicial Review in New Democracies* 36-39.

³¹³ Barak, 'Foreword: A Judge on Judging' 109.

³¹⁴ Mate, 'Two Paths to Judicial Power' 216. *See also* Sarbani Sen, 'The 'Public Interest' in India: Contestation and Confrontation before the Supreme Court (2013) 60 (3-4) *Diogenes* 43.

³¹⁵ *ibid.*

accessibility might be more likely to trespass into political fields and exceed its jurisdictional limitations. In other words, some may argue that:

[L]imiting standing to injury-in-fact claims prevents the judiciary from exercising too much power, the fear being that if the judiciary agrees to hear abstract cases about what a law may do, the judiciary is essentially taking on a role more suited for a publicly elected body.³¹⁶

Of course, there is no denial that this may be the plausible scenario. Even if public interest litigation must be important to the constitutional adjudication, there should be some limitations. For example, one could argue that litigating for public interest through a third party can only bring abstract review cases that challenge the constitutionality of legislation.³¹⁷

3.4 Transitional Democracy: A Challenge and Opportunity for Judicialisation

It may be argued that judicialisation can also occur in authoritarian regimes, therefore, it is not solely related to democracy.³¹⁸ Tamir Moustafa argues that the economic factors, specifically foreign investment, explain the rise of a relatively independent and influential Supreme Constitutional Court in Egypt. There, constitutional judicial review was introduced mainly to provide legal protection for property rights and to restrict government power in this regard.³¹⁹ Whilst acknowledging the above argument, however, this thesis considers transition to democracy to be one of the relevant factors explaining the rise of influential constitutional judiciaries and the potential for greater judicialisation of constitutional issues in transitional states. Thus, many would argue that democratization and the expansion of judicial powers are correlated. An authoritarian regime, as Tate notes, would not invite or permit ‘even nominally independent judges to increase their participation in the making of

³¹⁶ Polavarapu, ‘Expanding Standing to Develop Democracy’ 137.

³¹⁷ *ibid.*

³¹⁸ Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008); S Roesler, ‘Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority’ (2007) 32(2) *Law & Social Inquiry* 569.

³¹⁹ Tamir Moustafa, ‘Law versus the State: The Judicialization of Politics in Egypt’ (2003) 28(4) *Law and Social Inquiry* 890-891.

major public policies’ nor would it tolerate ‘decision-making processes that place adherence to legalistic procedural rules and rights above the rapid achievement of desired substantive outcomes.’³²⁰

The following discussion concerns the plausibility of expanding the judicialisation of constitutional issues under a newly established democratic constitutional order and the implications for the rule of law. It goes beyond the problems of the legitimacy of constitutional judiciaries, arguing that the courts are increasingly involved in significant controversies and questions of both a constitutional and political nature which could have various implications for the legal and political system as a whole. Two points may be considered relevant here: the newly adopted constitutional text as it is written and functions, as well as the context to which it applies.

3. 4.1 Constitutional and Institutional Opportunity Structures for Judicialisation in Transitional Democracies

States in their path toward transition to constitutional democracy often appeal to new principles, rules and institutions to redistribute powers subject the exercise of power to the supremacy of the law and the supremacy of the people through their representatives. Thus, the newly established constitution creates a ‘constitutional balance’ of powers and means for arbitration of potential conflicts in interpreting this balance or any controversy concerning power struggles. Given the nature of political transition and the context to which it applies, the enforcement of the constitution always proves challenging and can result in major controversies, disputes and ongoing crises that test the conceptual and structural aspects of the rule of law and democratic transition.

3.4.1.1 Constitutions in Transitions: Normative and Transformative

The constitutions of post-authoritarian transitional states are often defined as putting an end to an authoritarian rule and setting the foundation for a new democratic order.³²¹ The transition to democracy involves restructuring

³²⁰ Tate, ‘Why the Expansion of Judicial Power?’ 28.

³²¹ Ruti Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ (1997) 106 (7) *The Yale Law Journal* 2057; Sadurski, ‘Judicial Review in Central and Eastern Europe’ 507.

the constitution, rules and institutions; holding elections, and balancing the relation between the pre-transitional legal system and the post-transition democratic constitutional order.³²² It is inevitable that the conceptual and structural difficulties regarding the rule of law become relevant. There is a constant tension between legal and political continuity and change. Thus, constant conflicts exist concerning upholding legal continuity and the legitimacy of the former regime; between retroactive or prospective aspects of legal norms. The constitution aims to address and regulate these and similar issues. Thus, the constitutional text should be reasonably clear, consistent and non-contradictory and capable of guiding state officials, institutions and also individuals exercising their powers. It should guarantee formal and substantive principles of democracy. It is almost inevitable that there will be frequent and immediate conflicts in interpreting the constitution and disputes about competences in transitional states. As a result, the constitution becomes vital insofar as the resolution of these controversies and disputes is concerned. It can be seen as being essential with regard to holding public authorities (present and past; elected or appointed) accountable for their exercise of power, the supremacy of the law and the newly established democratic principles.³²³

There are many reasons that the constitutional text may contribute to the occurrence of potential controversies and conflicts involving state power or may become largely irrelevant to their resolution. During the transition to democracy, the constitution making process and consequently the final constitutional texts are often affected by the growing lack of trust among parties aiming to establish a stable constitutional democracy. The constitutional text then ‘can often be characterized as aspirational documents’ containing a great deal of ‘ambition but little specificity’.³²⁴ It is observed that ‘the participants in the constitutional bargain are unlikely to have longstanding relations of trust among themselves, nor much experience with what may be the difficult issues of implementation in the new constitutional order’.³²⁵

³²² Huntington, *The Third Wave* 209-214.

³²³ Hakeem O Yusuf, ‘The judiciary and political change in Africa: Developing Transitional Jurisprudence in Nigeria’ (2009) 7(4) *International Journal of Constitutional Law* 659.

³²⁴ Samuel Issacharoff, ‘Constitutional Courts and Democratic Hedging’ (2011) 99 (4) *Georgetown Law Journal* 983.

³²⁵ *ibid.*

Therefore, it seems almost impossible to establish constitutional principles and rules regarding contested matters, that would be accepted by all parties involved in constitution writing.³²⁶ Thus, they may opt to adopt an ambiguous formula that could allow agreements to occur over time as legal and political institutions interact.³²⁷ The result may often be ‘thoroughly transformative documents by necessity’.³²⁸ Even when the constitution is defined as permanent, to distinguish it from the provisional constitution that is usually written to regulate the immediate period of transition, it still can be regarded of as transitional and transformative.

The constitution has a ‘constructive relation’ to the changing and unstable political order. It contains provisional political arrangements that govern constitutional and political order for a specific period. Its unamendable provisions, especially regarding individual rights and the basic foundation of the state,³²⁹ are intended to protect the core of the new constitutional order.³³⁰ Furthermore, the distribution of powers and constraints of state powers are often affected by the political and constitutional legacy of the pre-transitional regime. For instance, it is said that the German Basic Law responded to the Weimar Republic by establishing a symbolic presidency.³³¹ On the other hand, the constitutional text is often detailed and thick; for example, containing ‘large amounts of material – socio-economic provisions, group rights, etc.’³³² It may also provide for considerable ambiguity in defining the institutional structure of the state power, and defer various matters of significant importance to implementing legislations.³³³ Thus, much about the new power sharing or redistribution of powers is left undefined, and is often subjected to a series of

³²⁶ See Issacharoff, ‘Constitutional Courts and Democratic Hedging’.

³²⁷ Lee Epstein, Jack Knight and Olga Shvetsova, ‘The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government’ (2001) 35 (1) *Law and Society Review* 155-156.

³²⁸ David Landau, ‘Political Institutions and Judicial Role in Constitutional Law’ (2010) 51(2) *Harvard International Law Journal* 325.

³²⁹ Basic Law of the Federal Republic of Germany (1949), art 79 (3) stipulates that: certain constitutional principles are unamendable including ‘basic principles’ in art 1 and 20, and ‘the division of the Federation into Länder, their participation on principle in the legislative process’.

³³⁰ Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ 2076.

³³¹ *ibid* 2065-2066.

³³² Landau, ‘Political Institutions and Judicial Role in Constitutional Law’ 324.

³³³ Martin Shapiro, ‘The Success 1 of Judicial Review and Democracy’ in Martin Shapiro and Alec Stone Sweet (eds), *On Law, Politics, and Judicialisation* (Oxford University Press 2003) 162.

constitutional reviews or amendments that are intended to be conducted immediately.³³⁴

Given this explanation of the transitional constitutions, seemingly the line or differences between ordinary and constitutional politics can be distinguished by only the narrowest of margins, and the ‘standard dichotomy’ between the two seems unclear.³³⁵ Whilst the constitution can be seen principally as superior to the ordinary politics, in the transitional state often the latter transcends the former.³³⁶ Having said that, the constitutional issues and questions are increasingly expanding into policy areas, and ‘it becomes ‘thicker’ in each domain (more dense, technical, and differentiated)’.³³⁷ These constitutional issues will at some point be subjected to the scrutiny of the constitutional judiciary, giving the court a thicker ‘grounds for judicialised debate’.³³⁸ Furthermore, this expanded list of constitutional issues when combined with ambiguity, lack of openness, clarity and stability may become an insufficient guide for the exercise of power and for enacting implementing legislation, or the ‘making of particular laws’.³³⁹ Thus, one would challenge the conformity of the constitution itself to the basic tenets of the rule of law, along with its ability to guide politicians, and ultimately judges, and to serve to strengthen the state of the rule of law and democracy. The implementation of such a constitutional text would certainly be affected by the context to which it is applied wherein there are growing concerns regarding a weak constitutional rule of law culture.

3.4.1.2 A Weak Constitutional and Rule of Law Culture

The discussion of the relevance of the rule of law for transitional democracies in the previous chapter refers to many examples from emerging democracies that evidence the existence of a large gap between the constitutional balance of powers in theory and in practice.³⁴⁰ In the immediacy

³³⁴ Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ 2057-63.

³³⁵ A Edsel CF Tupaz, ‘Deliberative Democracy and Weak Courts: Constitutional Design in Nascent Democracies’ (2008) *Ateneo Law Journal* 346.

³³⁶ Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ 2057.

³³⁷ Stone Sweet, *Governing with Judges Constitutional Politics in Europe* 55.

³³⁸ *ibid.*

³³⁹ Raz, *The Authority of Law* 217.

³⁴⁰ Chapter Two (2.3).

of the transition, the exercise of power by the newly elected or appointed state officials and institutions seems to have put the constitutional balance of powers to its ultimate test. As a result, this may lead to growing concerns about these powers being concentrated in one body at the expense of the other. These comparative insights from emerging democracies also illustrate the weak rule of law tradition and the danger that the transitional states may become states of ‘unrule’ of law,³⁴¹ or at best ‘ruled by law’.

Although, it is to be expected that state institutions would experience different degrees of incompetence and challenges to their legitimacy, it is noticeable that parliaments are the institutions whose performance tends to be poor, causing them to be considered ineffective representative bodies. In some cases, they can be seen as ‘irrelevant actors in the public-policy process, or even obstructionist’.³⁴² Conversely, in both presidential and parliamentary systems, the executive branch may become more powerful and influential.³⁴³ Any number of factors may contribute to that: for example, the dominance of the political elite’s narrow interests, the weakness of political parties, institutional deadlock or the authoritarian practices of the government.³⁴⁴ In this case, this excess of power would certainly eliminate the constitutional balance of power and undermine the newly established democratic order and the rule of law.³⁴⁵

Whilst in relatively developed and stable democracies, other political and peaceful means exist that can serve to overcome the ineffectiveness of elected branches of the government including check and balances, accountability mechanisms and holding new elections. In a fragile and emerging democracy, even though these means are formally secured, in practice exercising them seems challenging. As Teitel puts it: ‘the relative competence and capacities of judiciaries and legislatures in ordinary times [...] simply do

³⁴¹ Méndez, O’Donnell and Pinheiro (eds), *The (un)rule of Law and the Underprivileged in Latin America*. See also Getulio Vargas, ‘Polyarchies and the (Un)Rule of Law’ in O’Donnell (ed), *Dissonances: Democratic Critiques of Democracy* 111-138.

³⁴² Fernando Carrillo-Flórez, Dennis P Petri, ‘Quality of Democracy and Parliamentary Reform in Latin America: How Europe Can Help’ (*International Institute for Democracy and Electoral Assistance*, 15 November 2009) 8, <<http://www.idea.int/resources/analysis/loader.cfm?csmodule=security/getfile&pageid=3795>> accessed 21 October 2013.

³⁴³ Larry Diamond, *Developing Democracy* 49.

³⁴⁴ Carrillo-Flórez, Petri, ‘Quality of Democracy and Parliamentary Reform in Latin America: How Europe Can Help’ 8.

³⁴⁵ Polavarapu, ‘Expanding Standing to Develop Democracy’ 139-140.

not hold in unstable periods.³⁴⁶ In other words, the ‘implicit assumptions about democracy and democratic accountability [...] ought not be automatically applied to illiberal regimes, nor to regimes beginning to move away from such rule.’³⁴⁷ Thus, in a weak constitutional culture, wherein constitutional rules are often ignored or violated and there is a lack of a ‘sustained institutional experience and practice of constitutional democracy’,³⁴⁸ political arrangements and compromises may often prove inappropriate as conflicts are ongoing.³⁴⁹

Often, in the early stages of democratization political actors increasingly try to test constitutional boundaries of powers in an attempt to expand their powers.³⁵⁰ Conflicts of competence, therefore, are more likely to occur, the resolution of which may define or redefine balance of powers. However, it seems highly unlikely that even basic contestations over the exercise of power can be resolved through democratic means, in parliament.³⁵¹ Although the judiciary may not be ‘any better attuned to constitutional values than politicians; judicial interpretations of the constitution that create constitutional practices and discourses may nevertheless serve to develop constitutional culture.’³⁵² Furthermore, Barak maintains that in ‘young and fragile democracies’ there is a crucial ‘need to establish preliminary understandings of the basis of democracy’, whereas in ‘an old and established democracy like the United States the main principles of the constitutional framework have already been established, and judicial corrective –which assume the existence of democracy– is limited in its role.’³⁵³

In transitional states, the law can be in a state of flux as the political system too is unstable; consequently many of the controversial issues and power

³⁴⁶ Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation 2032.

³⁴⁷ *ibid.*

³⁴⁸ Yusuf, ‘The judiciary and political change in Africa: Developing Transitional Jurisprudence in Nigeria’ 659. *See also* Landau, ‘Political Institutions and Judicial Role in Constitutional Law’ 326-328.

³⁴⁹ Jasper de Raadt, ‘Contestable Constitutions: Ambiguity, Conflict, and Change in East Central European Dual Executive Systems’ (2009) 42 (1) *Communist and Post-Communist Studies* 89.

³⁵⁰ Diana Kapiszewski, ‘Power Broker, Policy Maker, or Rights Protector? The Brazilian Supremo Tribunal Federal in Transition’ in Gretchen Helmke and Julio Rios-Figueroa (eds.), *Courts in Latin America* (Cambridge University press 2011) 155,164-165.

³⁵¹ Issacharoff, ‘Constitutional Courts and Democratic Hedging’ 971.

³⁵² Landau, ‘Political Institutions and Judicial Role in Constitutional Law’ 327. *See also* Kaarlo Tuori, ‘Judicial Constitutional Review as a Last Resort’ in Campbell, Ewing, and Tomkins, *The Legal Protection of Human Rights: Special Essays* 376.

³⁵³ Barak, ‘Foreword: A Judge on Judging’ 63. *See also* Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ 2032.

struggles that often require speedy solutions may lack relevant laws that would serve to resolve them.³⁵⁴ The contested parties may make significant use of ‘case-by-case’ resolution of constitutional disputes in an attempt to defend their particular interpretations of constitutional rules, filling gaps left by the politicians’ failure to enact the necessary implementing legislation to ensure the functioning of the new constitutional order. The assumption that judiciary and legislature are reasonably functioning in ordinary times may not be applicable due to the circumstances of transitional states here.³⁵⁵ Therefore, some may argue that the case-by case resolution of the constitutional controversies could provide substantial solution at a time when the other branches of the government are unable to compromise or function.³⁵⁶

Thus, it may be argued that the constitution often establishes ‘a weak and incompletely realized commitment to democratic processes’.³⁵⁷ Thus, the judiciary may support a ‘quick transition to basic democratic governance before they [drafters and parties to the constitutional negotiations] are capable of full agreement’.³⁵⁸ Therefore, it can be said that the newly established constitutional judiciaries are expected to ‘act as stabilizing anchors to protect freedom in a turbulent age’,³⁵⁹ and also ‘provide a convenient outlet that enables citizens to bring into the public arena issues ignored or neglected by the political system’.³⁶⁰ Courts can be equally aware of their role in such contexts and sometimes explicitly comment on this. For example, Justice Albie Sachs of the South African Constitutional Court said, ‘[W]e are aware that we are simultaneously both heirs to a timeless international tradition, and promoters of a new constitutional jurisprudence, this in a country that both longs for transformation and desperately needs predictability’³⁶¹

³⁵⁴ Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation 2033.

³⁵⁵ *ibid* 2034.

³⁵⁶ *ibid* 2033.

³⁵⁷ Issacharoff, ‘Constitutional Courts and Democratic Hedging’ 979.

³⁵⁸ It is observed that post conflict transition to democracies may revert to some kind of violence or civil war, the incomplete constitution is therefore contributing to that failure. As the elections alone in this context are insufficient for consolidating democracy. *See ibid* 985.

³⁵⁹ Cappelletti, *The Judicial Process in Comparative Perspective* 161-162.

³⁶⁰ Julio Faundez, ‘Democratization through Law: Perspectives from Latin America’ (2005) 12(5) *Democratization* 762.

³⁶¹ Justice Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press 2009) 50, (as quoted in Issacharoff, ‘Constitutional Courts and Democratic Hedging’ 979- 980).

The discussion so far suggests that judges may constantly argue that they are promoting the rule of law and fostering the transition to a democratic system whilst they are becoming increasingly involved in addressing and resolving contested constitutional controversies. Thus, it can be argued that under a weak rule of law system in transitional states, constitutional questions and controversies would often be transferred into constitutional cases brought before the constitutional judiciary. The inevitable expansion of judicial powers and influential role of the courts may or may not mean an improvement in the rule of law. Therefore, it is imperative to discuss the potential implications of expansion of the judicial powers for the rule of law. The next part briefly analyses judicialisation through the lens of the rule of law in transitional democracies and develops the conceptual arguments that form the basis for the analysis of the case study used in this thesis that will follow in chapters four and five.

3.4.2 The Potential Implications of Judicialisation on the Rule of Law

Some studies have suggested that the legitimacy problems of constitutional judicial review are almost irrelevant to the constitution making processes that often coincide with the transition from an authoritarian regime to a democratic order. Indeed, commenting on the process of post-communist constitution making, Sadurski notes that ‘the debate about the wisdom (or otherwise) of setting up a system which importantly limited the supremacy of parliaments was almost non-existent, and constitutional courts enjoyed their legitimacy largely by default.’³⁶² Others were of the opinion that,

The most difficult problem facing the countries of Eastern Europe today is the creation of a government that can pursue effective reforms while retaining public confidence and remaining democratically accountable. The core institution of the fledgling democracies, therefore, is the parliament. [...] To over legitimate the court [...] is to diminish the assembly in the public’s eyes and to help discredit the

³⁶² Sadurski, ‘Judicial Review in Central and Eastern Europe’ 507.

entire concept (which has barely been learned) of representation through periodic elections.³⁶³

Of course, there are serious concerns about ‘overemphasising’ the role of the constitutional judiciary and the implication of a rapid and substantial judicialisation of constitutional issues. It is said that transitional states or the, arguable, ‘exceptionalism’ of their circumstances should not be seen ‘as a means of side-stepping the objections that we might raise elsewhere to the institutional anomalies of strong judicial review.’³⁶⁴ Thus, judicialisation may create conflicts between strengthening the rule of law and enhancing democracy.

On the other hand, as argued in the previous chapter, almost all legal systems have introduced some form of a constitutional judicial review of legislation.³⁶⁵ Some scholars even correlate the success or the relevance of judicial review to a reasonably functioning democracy and judiciary. Despite serious concerns about the functioning of the institutions of democracy and judiciary in transitional democracies, almost all new constitutions have set up constitutional courts with some crucial powers.³⁶⁶ One of the reasons for this may be that somewhat exceptional circumstances and differences between those countries that have newly emerged from authoritarianism and the established democracies may make it possible to introduce rules, institutions, and practices which are usually criticised in developed democracies, including judicial review. However, such exceptions should be used to hold government officials accountable to the law and the constitution.³⁶⁷ In other words, under the rubric of constitutional review, these courts are intended to serve to protect the new constitutional order, smoothing the transition from formal to the substantive rule of law and from an authoritarian to a more liberal system.³⁶⁸ In doing so, it may

³⁶³ Stephen Holmes, ‘Conceptions of Democracy in the Draft Constitutions of Post-Communist Countries’ in Beverly Crawford (ed) *Markets, States, and Democracy* (Westview Press 1995) 79 [original emphasis].

³⁶⁴ Sadurski, ‘Judicial Review in Central and Eastern Europe’ 513.

³⁶⁵ See Chapter Two (2.2.2).

³⁶⁶ Mazmanyan, ‘Constrained, Pragmatic Pro-Democratic Appraising Constitutional Review Courts in Post-Soviet Politics’ 410.

³⁶⁷ Polavarapu, ‘Expanding Standing to Develop Democracy’. See also Issacharoff, ‘Constitutional Courts and Consolidated Power’; Kim Lane Scheppelle, ‘Constitutional Negotiations Political Contexts of Judicial Activism in Post-Soviet Europe’ (2003) 18(1) *International Sociology* 219.

³⁶⁸ Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ 2031-2032.

define and redefine the constitutional balance of powers and constraints on state power.

Moreover, judicialisation in new democracies has potential implications that may define or redefine the constitutional balance of powers and the rule of law.³⁶⁹ It is assumed that constitutional judicial review would be most effective and ‘intense in those political systems in which the *Rechtsstaat* had been established before the advent of democracy [...]’.³⁷⁰ Constitutions in transitional democracies are by and large transformative, their legal and the political systems are also usually unstable and changing. Often, constitutional adjudication and decisions may reflect this transformative nature. Thus, the strength of judicialisation may not be the same as the rule of law. One can argue that judicialisation both affects and is affected by the rule of law. The expansion of judicial powers and the emergence of influential courts under a fragile rule of law system may result in yet another challenge for democratization and the rule of law itself.³⁷¹ Thus, it is argued that

[E]arly signs of political independence at the top level of judicial hierarchies may prove to be conjectural rather than a true reflection of any systemic change within the judicial branch more generally. And they may prompt a defensive reaction by incumbent power holders in the executive branch, unwilling to make long-term concessions to judicial scrutiny and independence. Thus, the balance of power between branches is continually shifting and being tested.³⁷²

In other words, challenges to judicial independence are more frequently found in transitional and developing democracies, although, in principle, the courts are protected through institutional guarantees of independence and it is difficult to overturn their decisions. However, as Gretchen Helmke asserts, in practice such institutional guarantees are absent or largely undeveloped in most developing

³⁶⁹ Bugaric, ‘Courts as Policy-Makers: Lessons from Transition’ 248.

³⁷⁰ Klaus von Beyme, ‘The Genesis of Constitutional Review in Parliamentary Systems’ in Christine Landfried (ed) *Constitutional Review and Legislation* (Nomos: Baden-Baden 1988) 37, (as quoted in Wojciech Sadurski, ‘Legitimacy and Reasons of Constitutional Review After Communism’ in Sadurski (ed), *Constitutional Justice, East and West Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* 164).

³⁷¹ Popova, *Politicized Justice in Emerging Democracies* 40; Domingo, ‘Judicialisation of Politics or Politicization of the Judiciary?’ 123.

³⁷² Domingo, ‘Judicialisation of Politics or Politicization of the Judiciary?’ 120.

democracies.³⁷³ The author makes several observations in this regard, noting that judges in developing countries are threatened not only by their decision being overturned, but also physical intimidation and violence. Moreover, although the legislature is formally granted powers designed to provide institutional protection, and to promote an independent and accountable judiciary, the ‘*de facto*’ powerful executive that concentrates power, mostly dominates the implementation of such mechanisms.³⁷⁴ Furthermore, given the significance of the constitutional judiciary and the implications of their decisions, the powerful state actors may turn to the judiciary to serve to legitimise their excess of power.³⁷⁵

Given the struggles of the judiciary to establish its independence and legitimacy in such contexts, it is argued that a court ‘may have to build its own constituency before it can even attempt to assert its power.’³⁷⁶ Some studies have suggested that constitutional judiciaries should aim to create a balance between the growing demands for the resolution of constitutional disputes and their own legitimacy and independence. For example, some may argue that the court should consider its approach depending on the type of questions which it is being asked to resolve. It may decide to settle constitutional issues, which enjoy significant political consensus and substantial agreement. In this situation, the court’s decision provides further guarantees or reinforces those matters that are already clear and accepted.³⁷⁷

Equally important, in transitional democracies where the formal rule of law is still at risk the government does not obey its own laws, judicial rulings and the proclamation of rights seem to place an ineffective obligation on the government.³⁷⁸ Thus, studies have suggested that in the early stages of transitions, courts may avoid addressing and resolving the substance of sensitive constitutional questions in order to protect judicial independence from external

³⁷³ G Helmke, ‘The Logic of Strategic Defection: Court-executive Relations in Argentina under Dictatorship and Democracy (2002) 96(2) *American Political Science Review* 291.

³⁷⁴ Helmke, ‘The Logic of Strategic Defection’ 292-293, [original emphasis].

³⁷⁵ Mazmanyan, ‘Constrained, Pragmatic Pro-Democratic Appraising Constitutional Review Courts in Post-Soviet Politics’ 413; Yusuf, Mystris, ‘The Rule of Law Revival in Transition States’ 8.

³⁷⁶ Roesler, ‘Permutations of Judicial Power’ 548.

³⁷⁷ Epstein, Knight, and Shvetsova, ‘The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government’ 155-156.

³⁷⁸ Shapiro, ‘Some Conditions for Success of Constitutional Courts’ 55-56.

and political counter reactions.³⁷⁹ These include constitutional issues which are central and crucial to the constitutional democracy, yet deeply contested among political actors. Some of them are extensively contested among political actors and require specific legislation passed by a supermajority in the parliament which would be highly unlikely to be achieved. On the other hand, principally judicial decisions of constitutional courts ‘supplant the choices made through the political process’ which often difficult to be changed.³⁸⁰

For example, the above assumption may explain, partially, the Russian constitutional judiciary’s shift from resolving the disputes concerning competence and separation of powers to ruling on conflicts concerning protection of rights. One could argue that human rights cases were safer for the Court to rule on than intruding on decisions relating to cases involving the separation of powers which put the court at the centre of the conflicts between political branches.³⁸¹ The first Russian post-communist Constitutional Court is considered to be a well-known example of a court that endangered its legitimacy and existence by deeply interfering in constitutional conflicts involving political actors.

In the case of the Russian Communist Party in 1992, the Court was central to a constitutional conflict between the parliament and the President. When the President, Boris Yeltsin, ‘in a series of decrees after the 1991 coup attempt, disbanded the Communist Party and seized its property and assets, the Communists challenged the decrees as exceeding presidential power’.³⁸² The Court’s decision, to uphold President’s decree banning ‘the organs of the national Communist Party of Soviet Union’ but not the local organs of the Party, did not settle the dispute, and was not accepted by the parties to the conflict. The Court then became further embroiled in the crisis by negotiating a compromise between the parliament and the President. In another move in 1993 the Court ruled unconstitutional a presidential decree that had granted Yeltsin emergency powers.³⁸³ What happened in the few months following was

³⁷⁹ Epstein, Knight and Shvetsova, ‘The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government’ 155-156.

³⁸⁰ Issacharoff, ‘Constitutional Courts and Democratic Hedging’ 962.

³⁸¹ Epstein, Knight, and Shvetsova, ‘The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government’ 149-155.

³⁸² Ginsburg, Elkins, ‘Ancillary Powers of Constitutional Courts’ 1460.

³⁸³ *ibid.*

remarkable, as the President himself ‘dissolved the parliament and suspended the Court’s operation’.³⁸⁴ Many would argue that the Court’s involvement in these controversial questions and their central role in this crisis provoked government responses that ultimately affected the jurisdiction of the Court. Indeed, when the Court reconvened in 1995, it no longer had the power to determine the constitutionality of political parties, a jurisdiction that it had previously held.³⁸⁵

In any case, judges may tend to protect the power and legitimacy of their courts by deliberately avoiding becoming embroiled in politically sensitive issues, settling disputes or ruling against powerful politicians. Instead, they focus on the procedural aspects of the case.³⁸⁶ Declining jurisdiction or focusing on the procedural matters implies that the courts mainly scrutinise *how* the legislature and executive have made their decision not *what* they decided. Another prevailing approach in constitutional adjudication is that the courts often focus on the legal continuity. In general, the rule of law requires that the law is ‘continuous and prospective.’ However, it can be said that the law in transitional contexts seems to be ‘simultaneously continuous and discontinuous, retrospective and prospective.’³⁸⁷ The conflicts concerning legality and legitimacy of the law are often raised when the question or the legal norm before the court involves a pre-transition law. Thus, the courts often uphold the formal aspects of the rule of law rather than the substance of the law itself until the time that the law is replaced or amended by the parliament.³⁸⁸

The courts may also adopt several strategies which are intended to preserve and expand the democratic and constitutional government’s authority, while at the same time protecting and expanding the courts’ power.³⁸⁹ The constitutional judges may use a number of methods available to any court or develop its own approach to avoid deciding on the substance of an issue. The most obvious method includes interpreting jurisdictional and justiciability rules in their narrower sense. For example, a literalist interpretation of rules may

³⁸⁴ Ginsburg, Elkins, ‘Ancillary Powers of Constitutional Courts’ 1460.

³⁸⁵ *ibid.*

³⁸⁶ Peter Vondoepp, ‘Politics and Judicial Assertiveness in Emerging Democracies: High Court Behaviour in Malawi and Zambia’ (2006) 59 (3) *Political Research Quarterly* 391.

³⁸⁷ Teitel, ‘Transitional Jurisprudence: The role of law in political transformation’ 2077.

³⁸⁸ See H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) *Harvard Law Review* 614.

³⁸⁹ Jonathan Zasloff, ‘The Tyranny of Madison’ (1997) 44 *UCLA Law Review* 795.

provide greater certainty about the law, and the objectives that the legislature aims to achieve. Since the judges' long-term objective should be to develop gradually a culture in which judicial decisions are respected and defended, this clarity contributes to the legitimacy of the decisions.³⁹⁰

Although some may claim that since the constitutions in transitional democracies are principally transformative in nature, constitutional adjudication may also be seen as transformative and 'self-regarding'. Thus, it can be seen that the courts might change previous principles and precedents in response to changing legal and political systems especially when dealing with 'high-profile cases.'³⁹¹ Consistency or application of *stare decisis* may further assist a judge in an unstable and untested political context.³⁹² Overturning precedent might become very costly on the court,

Obviously, every judge follows precedent to some degree, [...]. But it is equally obvious that judges can and do place many values far above precedent. Judges in a stable democracy can place *stare decisis* further down the list because they know that shifts in judicial policy explicitly on grounds of policy will not threaten their legitimacy. A judge in a fragile democracy, though, must be far more circumspect. She realizes that every precedent overturned brings her closer to political irrelevance. This is slightly different in stable democracies in which changes in court's policy 'will not threaten their legitimacy'.³⁹³

Therefore, it can be seen that ambiguous and open ended judgments, overturning precedents or inconsistency in deciding similar cases alike may also undermine court legitimacy and the rule of law. Thus, one could question the extent to which the court itself upholds the rule of law. These arguments are further developed in the following chapters that focus on the experience of the newly established constitutional judiciary in Iraq's post-2003 democratic transition, comparing this to the theoretical insights developed in this chapter.

³⁹⁰ Zasloff, 'The Tyranny of Madison' 854.

³⁹¹ Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' 2033.

³⁹² Zasloff, 'The Tyranny of Madison' 850-854.

³⁹³ *ibid* 852 [original emphasis].

Conclusion

It is in general agreed that the rise of judicialisation is increasingly correlated with the interplay of multiple factors. Thus, a relatively independent, accessible constitutional judiciary under the rubric of judicial review and other jurisdictions that often put the judges at the centre of highly contested constitutional questions can expand judicial power. This thesis argues that the fragmentation of political powers, the lack of constitutional culture and indeed of a rule of law culture in the years immediately following democratic transition may increase the number of controversies and disputes regarding the new constitutional order. In the case of the often unstable and changing political and legal circumstances of transitional states, judicialisation may have two implications. On the one hand, an expansion in judicial powers may serve the basic tenets of the rule of law, namely to minimise the arbitrary and excessive use of power, by upholding the supremacy of the law and arbitration of disputes. That might be largely true regarding judicialisation that has implications concerning the formal elements of the rule of law. Thus, the court checks that the government understands and conforms to ideas of legal certainty, clarity, stability, predictability in implementing general constitutional norms, and guiding the state officials and institutions in exercising their powers and enacting the implementing laws.

On the other hand, judicialisation may undermine the rule of law, if the courts become increasingly involved in addressing and resolving controversial questions that are central to the government policy. Courts may undermine their legitimacy and conformity to the rule of law by exceeding the constitutional limitations and boundaries of the distribution of powers. Furthermore, as a result of the growing concerns about the judiciary's independence from political interference and external influence, the government may use courts and the formal rule of law as a means of legitimising arbitrary and overreaching powers.

Given the ongoing demands placed on constitutional adjudication, the court's increasing vulnerability to potential political interference, and its desire to further influence constitutional and political developments in transitional democracies, it appears that the judiciary tend to respond gradually to the broader implications of their decisions and involvements. Hence, the courts may

interpret rules concerning jurisdiction and standing or use precedents to limit their involvement in contested constitutional issues and avoid ruling on the substance of controversial constitutional cases.

These above arguments will be expanded in Chapter Five of this thesis by conducting a detailed analysis of the case law of the Iraq Federal Supreme Court. However, before presenting this analysis, it is important to explain the institutional and structural aspects of the Iraqi constitutional judiciary and the political context within which it operates. Therefore, this will be considered in the next chapter in order to identify those factors that facilitate judicialisation and to highlight the potential implications that this has for the rule of law in a transitional democracy.

Chapter Four: Understanding the Iraqi Federal Supreme Court: Applying the Judicialisation Factors

Introduction

Chapter Three maintained that, in general, judicialisation of constitutional issues occurs and develops as a result of the interaction of multiple factors. It argued that the structural and political context of transitional and emerging democracies provided institutional opportunities in the form of constitutional contestations and disputes. It also implied that the newly established or empowered constitutional judiciaries are intended to be reasonably independent and accessible. The analyses then illustrated that there can be a growing demand on the judiciary to address and resolve a broad range of constitutional questions that might even include the basics of the newly established constitutional order. The focus then shifted to the implications of the judicialisation of constitutional issues for the rule of law and democratic transition. It highlighted the possibility that government might use the judiciary and the formal rule of law as a means of legitimising its own exercise of excessive powers.

In view of the above arguments and the detailed analyses of the Iraq Federal Supreme Court (FSC) case law in Chapter Five, it is important to understand how the FSC interacts with institutional, political and socio-structural factors. It should be noted that Iraq was one of the first countries in the region with a constitution that had explicitly established constitutional judicial review (1925-1958). In the aftermath of the overthrow of the monarchy, judicial review became entirely absent from the political and constitutional tradition of Iraq for decades, save for the 1964 constitution where it remained only on paper. The FSC was established in the course of Iraq's transition from a longstanding authoritarian regime to a constitutional democracy under TAL (2004). It is anticipated that the newly established constitutional judiciary will be drawn deeper into the political and constitutional process.

This chapter argues that the 2005 Constitution and the context within which the FSC acts and with which it interacts have contributed to the rise of the judicialisation of constitutional issues and consequently the potential

politicisation of the judiciary, which directly affect the rule of law. Therefore, this chapter is divided into three sections. Section one provides significant insights into the constitutional and political context within which the FSC operates. Section two concerns the institution and powers of the constitutional judiciary in post-2003 Iraq. Section three analyses the potential for an emerging network of support structures for legal mobilisation of constitutional litigation.

4.1 Post-2003 Constitutional and Political Developments in Iraq

Chapter Three suggested that the composition of and performance of the two political branches, the executive and the legislature, are of significant relevance to judicial power. It also underlined that the institutional fragmentation of governmental branches may serve to provide the judiciary with constitutional questions and disputes that might expand its judicial powers. The key ideas which were discussed there were the extent to which the parliament can be marginalised and the executive authority may attempt to consolidate power and weaken the legislature or subvert its competence. Furthermore, in countries that adopt some form of federal system with a devolution of powers, conflicts of competences involving different levels of government tend to also be common controversies dealt with by the constitutional judiciary. These arguments are the basis for the discussion of the case study examined in this thesis.

4.1.1 Horizontal and Vertical Distribution of Powers under the 2005 Constitution

It is vital from the outset to understand the foundations of the constitutional system in post-2003 Iraq, focusing on the 2005 Constitution.³⁹⁴ Article (1) of the 2005 Constitution states that, ‘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.’ The Constitution distributes powers horizontally among three branches of the federal government: the

³⁹⁴ The 2005 Constitution of the Republic of Iraq includes a preamble, fundamental principles, a bill of rights and liberties, the structure of the federal government, powers of the federal and sub-federal governments, amendment procedure, and transitional provisions.

legislature, the executive, and the judiciary; and vertically between federal and sub-federal governments (regions and governorates). The federal system in Iraq 'is made up of a decentralized capital, regions, and governorates, as well as local administrations.'³⁹⁵ Article 117 of the Constitution explicitly recognizes 'the region of Kurdistan, along with its existing authorities, as a federal region', and affirms the right of other governorates to form their regions. Thus, the Constitution distributes powers, vertically, between federal and sub-federal governments (regions and governorates).

4.1.1.1 Legislative and Executive Authorities: Formulation and Powers

On the federal level, the Constitution expressly addresses the relationship between the three branches of government, based on the principle of separation of powers.³⁹⁶ The federal legislature consists of the Council of Representatives (Parliament), which represents the entire Iraqi people and the 'Federation Council' (FC) which is intended to represent the sub-federal entities.³⁹⁷ The Constitution regulates, in some considerable detail, the composition and competences of the Parliament.³⁹⁸ Its members are 'elected through a direct secret general ballot,'³⁹⁹ for the duration of four years.⁴⁰⁰ An absolute majority of its members is required to achieve the quorum with which the Parliament opens its sessions, after which a simple majority is needed for a decision to be made unless otherwise stipulated.⁴⁰¹ With regards to the FC, the Constitution states that a law passed by a two-third majority of the Parliament shall regulate the formation, membership conditions, competences and all other matters.⁴⁰² Despite the importance of the FC for the federal structure of the new Iraq, like many other crucial implementing legislation it has not been enacted due to the controversies and disagreements among political parties.

³⁹⁵ Constitution of Iraq (2005), art 116.

³⁹⁶ *ibid*, art 47.

³⁹⁷ *ibid*, art 48.

³⁹⁸ *ibid*, art 49- 64.

³⁹⁹ *ibid*, art 49 (1): '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. [...]. The representation of all components of the people shall be upheld in it.'

⁴⁰⁰ *ibid*, art 76 (1).

⁴⁰¹ *ibid*, art 59 (1), (2).

⁴⁰² *ibid*, art 65.

Iraq's Parliament has crucial powers; its legislative powers include proposing and enacting federal laws.⁴⁰³ The Parliament's second and most crucial authority is to oversee 'the performance of the executive authority,' using 'formal questioning'⁴⁰⁴ directing inquiries to government ministers and the Prime Minister (PM), granting and withdrawing confidence from a minister or the whole cabinet according to the given situation. It also has the power to question the President of the Republic and heads of independent commissions such as the High Commission for Human Rights and the Independent Electoral Commission.⁴⁰⁵ Iraqi Parliament also decides on number of key issues and policies ranging from ratifying international treaties to providing consent for a declaration of war or state of emergency. Furthermore, parliamentary approval is necessary for the appointment of several high-ranking government officials and of members of the judiciary including the President and members of the Federal Court of Cassation, the Chief Public Prosecutor, the President of Judicial Oversight Commission, and the Iraqi Army Chief of Staff. Thus, constitutionally the Parliament has significant powers; and in the absence of the FC, it is the only legislative body and institution that is entrusted to exercise crucial mechanisms of checks and balances against the executive authority.

The executive branch consists of the President of the Republic (the Presidency Council) and the Council of Ministers.⁴⁰⁶ The Presidency Council was established during the transitional period, and it was constitutionally extended for the first legislation term (until 2010).⁴⁰⁷ This was elected by a two-thirds majority of the Parliament and was composed of three members, each representing the major Iraqi communities: Shia, Sunni, and Kurds. Any of the members could veto legislation, meaning that unanimous approval by the Presidency Council was needed for any law to be enacted. Moreover, the Presidency Council had the final word in appointing members of the FSC.⁴⁰⁸

⁴⁰³ Constitution of Iraq (2005), arts 61, 62.

⁴⁰⁴ The formal questioning with the view to vote of confidence is used in this thesis to refer to the formal procedure with serious consequences that must be followed before the vote of confidence in minister/s or Prime Minister.

⁴⁰⁵ *ibid*, art 102.

⁴⁰⁶ *ibid*, arts 66.

⁴⁰⁷ *ibid*, art 138.

⁴⁰⁸ This method has result at each major community of the Iraqi society to have representative in the FSC. TAL (2004), arts 36(1), 37, 39(1,2), 44(4).

Arguably, this constitutional extension of the Presidency Council transformed it into a powerful institution, even though it was intended to be temporary and an exception to the rule that provided for a single and largely symbolic presidency.⁴⁰⁹

The President, who since 2010 replaces the Presidency Council, is elected by a two-thirds majority of the Parliament, and the term of office coincides with the end of the term of the Parliament with the possibility of re-election for the second term only.⁴¹⁰ The Constitution stipulates that the President shall exercise a range of powers, some of which are crucially important including presenting draft laws to the Parliament.⁴¹¹ However, most powers are not considered to be of significance compared to the powers of the other institutions. These powers mostly relate to the ratification of acts of Parliament or the Prime Minister. It means that the act is considered approved if not rejected by the President during a specific time frame and, if rejected, still a special majority of the Parliament can override that rejection.⁴¹²

The Prime Minister, who is nominated by the President from the largest parliamentary bloc, heads the Council of Ministers, after gaining the confidence of an absolute majority of Parliament to form the government.⁴¹³ The office of the Prime Minister is said to be the most powerful and competent institution in the Council of Ministers, being constitutionally empowered with indispensable powers and responsibilities:

[T]he Prime Minister is the direct executive authority responsible for the general policy of the State and the commander-in-chief of the armed forces. He directs the Council of Ministers, presides over its meetings, and has the right to dismiss Ministers, with the consent of the Council of Representatives [Parliament].⁴¹⁴

⁴⁰⁹ Constitution of Iraq (2005), arts 63, 66.

⁴¹⁰ *ibid*, art 72.

⁴¹¹ *ibid*, art 60 (1).

⁴¹² *ibid*, arts 73 (2): '[T]o ratify international treaties and agreements after the approval by the Council of Representatives. Such international treaties and agreements are considered ratified fifteen days after the date of receipt by the President. [...] To ratify and issue the laws enacted by the Council of Representatives. Such laws are considered ratified after fifteen days from the date of receipt by the President.'

⁴¹³ *ibid*, arts 76.

⁴¹⁴ *ibid*, art 78.

The Council of Ministers, along with the President and the Parliament, has a significant role in legislating, since it can present draft laws. Furthermore, it has a range of other powers including planning and executing ‘the general policy and general plans of the state’, overseeing the work of government ministers, preparing the draft of the national budget, and other powers regarding international relations from negotiating to signing international treaties.⁴¹⁵

Furthermore, one innovative feature of the Constitution is that it establishes a series of ‘independent commissions’. Most of these are constitutionally subject to supervision or monitoring by Parliament, or otherwise connected to the legislature including the High Commission for Human Rights, the Independent Electoral Commission and the Commission on Public Integrity. Conversely, the Constitution explicitly attaches the Board of Supreme Audit, the Communication and Media Commission and the Endowment Commissions to the Council of Ministers.⁴¹⁶ These institutions are designed to oversee government and act independently from it.

4.1.1.2 The Foundation of the Iraqi Federation

The 2005 Constitution distributes powers, vertically, among three levels of governmental entities: the federal government, the federal regions (as of now Kurdistan is the only region), and numerous governorates not incorporated into a region. Section four of the Constitution, which defines ‘Powers of the Federal Government’, begins with Article 109 which makes the federal authority responsible for preserving ‘the unity, integrity, independence, and sovereignty of Iraq and its federal democratic system’. Article 110 then enumerates those powers exclusive to the federal government in Baghdad: foreign affairs, national security, fiscal policy, customs and commercial policy across sub-federal boundaries, citizenship and broadcasting policies; general and investment budgeting; international water resources and distribution of internal water resources; and general population survey. The following articles address separately powers over oil and gas: it begins with Article 111, which states that ‘oil and gas owned by all the people of Iraq in all the regions and governorates.’ Article 112, in rather unclear text details the powers of federal and sub-federal

⁴¹⁵ Constitution of Iraq (2005), art 80.

⁴¹⁶ *ibid*, arts 102-108.

governments over oil and gas in terms of management and strategic policy making, which many would maintain to have left the federal government with extremely limited authority, this will be discussed in detail in Chapter Five.⁴¹⁷

The Constitution, then, provides some key principles regarding Iraqi federalism. Thus, Article 114, details shared competences between the federal and sub-federal governments, such as customs; energy; environmental, health, and education policies; development and general planning; and internal water resources. Article 115 provides that '[A]ll powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region.' In addition to that, the most innovative feature of this Article provides that in any conflict of competence involving matters that is considered of shared competence, 'priority shall be given to the law of the regions and governorates not organized in a region'. Article 121 provides another important principle regarding the contradiction between regional and federal laws: 'in matters outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region'.

The above is a brief account of the key aspects of federalism under 2005 Constitution. It seems important to further examine how the constitutionally allocated public powers are exercised; and whether the 2005 Constitution and the context within which the FSC acts and with which it interacts have contributed to the rise of judicialisation of constitutional issues.

4.1.2 Iraq's Emerging Democracy: A State of Consociational and Transitional Justice

It is generally agreed in the literature on constitution making in transitional states that a constitution is viewed 'as foundational and forward looking' and is said to look 'back to undoing problems of the past as well as laying foundations for future.'⁴¹⁸ The 2005 Constitution is about more than providing the foundation for organising the government; it also underpins the

⁴¹⁷ Chapter Five (5.2.3).

⁴¹⁸ John Morison, 'Ways of Seeing? Consociationalism and Constitutional Law Theory' in Rupert Taylor(ed), *Consociational Theory McGarry, O'Leary, and the Northern Ireland Conflict* (Routledge 2009) 283-284.

potential mechanisms addressing and dealing with the past and future problems that a divided society may have to face. Before further discussing power sharing in post-2003 Iraq, it is relevant to briefly point to another increasingly important aspect of many transitional democracies, namely, that post-conflict societies may adopt some policies and measures of transitional justice to deal with the human rights' violations and unjust practices of previous regimes.⁴¹⁹ Among other measures of this type, the 2005 Constitution underlines the need for the de-Baathification of post-2003 Iraqi society and politics in order to 'liberate' these from the 'ideas' and structure of the former ruling Baath party.

The very first order issued by the Coalition Provisional Authority (CPA) banned the top four ranks of Baath Party members 'from future employment in the public sector.'⁴²⁰ It is interesting to note that the membership of the Baath Party was previously a requirement for getting employment in the public sector and for obtaining promotion.⁴²¹ The Constitution also bans 'the Saddamist Baath in Iraq and its symbols, under any name whatsoever', and bans it from being 'part of political pluralism in Iraq'.⁴²² The Constitution also excludes those who are 'covered by De-Baathification statutes' from running in elections.⁴²³ In 2008, the Iraqi government reformed this process by establishing

⁴¹⁹ I have by no means reviewed in detail the literature or explored specific legislative developments on transitional justice. There are diverse measures through which post-transitional states in particular sought to restore transitional justice. For example, one classification is according to the area of the law such as constitutional justice, criminal justice, administrative justice, etc. See e.g. Roman David, *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary, and Poland* (University of Pennsylvania Press 2011) 22. Mark S Ellis, 'Purging the Past: The Current State of Lustration Laws in the Former Communist Block' (1996) 59 (4) *Law and Contemporary Problems*; Cynthia M Home, 'International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context' (2009) 34(3) *Law & Social Inquiry* 713-744; Katarína Šípulová, Vít Hloušek, 'Different Paths of Transitional Justice in the Czech Republic, Slovakia and Poland' (2013) 9 (1) *World Political Science Review* 31- 69

⁴²⁰ CPA/Order 5: Establishment of the Iraqi De-Baathification Council, rescinded per Memo 7 Sec 3 (25 May 2003); CPA/ Order 1: 'eliminating the party's structures and removing its leadership from positions of authority and responsibility in Iraqi society'. See also Miranda Sissons, Abdulrazzaq al-Saiedi, 'A Bitter Legacy: Lessons of De-Baathification in Iraq' (*International Centre for Transitional Justice*, Report 3 April 2013) <<https://www.ictj.org/publication/bitter-legacy-lessons-de-baathification-iraq>> accessed 10 May 2015; Aysegul Keskin, 'De-Ba'athification: An Analysis of Existing Lustration Framework' (*Conference Papers* - International Studies Association 2009).

⁴²¹ Nussaiba Younis, 'Set Up to Fail: Consociational Political Structures in Post-War Iraq, 2003-2010' (2011) 4(1) *Contemporary Arab Affairs* 9.

⁴²² Constitution of Iraq (2005), art 7.

⁴²³ *ibid*, art 135.

the Accountability and Justice Commission (AJC), the body in charge of implementing de-Baathification legislation. This legal reform also ensures that the AJC's decisions can be appealed before the FCC.⁴²⁴

It has been argued that de-Baathification undermines the legitimacy and stability of the political process. Thus, one of the primary criticisms of implementing de-Baathification policies in the period immediately following the transition was that it seems to be related to the removal of a significant segment of the population, mostly secular Sunnis, from the public sector.⁴²⁵ Importantly, from a Sunni perspective, the implementing of the de-Baathification policies has resulted in a collective punishment of them. This has been one major criticism from Sunni politicians and the broader public view that is said to have discouraged them from participating in the early stages of the post-2003 political process.⁴²⁶

4.1.2.1 Power-Sharing in Post-2003 Iraq

It has been generally agreed that Iraq has always been a divided nation, an unfortunate perception that has intensified since the transition in 2003. Therefore, it was a primary concern during the constitution-writing process that the new constitution would adopt some forms and institutions of power-sharing. Brendan O'Leary, who played an important role during the 2005 constitution writing, defines power-sharing as 'Any set of arrangements that prevent one agent, or organised collective agency, from being the "winner" who holds all critical power, whether temporarily or permanently.'⁴²⁷ Thus, post-Saddam Iraq was intended to be based on Arend Lijph Lijphart's main principles of a constitution that is based on power-sharing. These include a grand coalition, proportional representation, mutual veto, and autonomy.⁴²⁸ During constitution drafting, there was an implicit consensus that the post-2003 political system

⁴²⁴ The Law of the National High Commission for Accountability and Justice (10) 2008, art 15, prior to this amendment the Commission was only answerable before the parliament.

⁴²⁵ A Dawisha, 'Iraq: Setbacks, Advances, Prospects' (2004) 15(1) *Journal of Democracy* 5-20.
⁴²⁶ *ibid.*

⁴²⁷ Brendan O'Leary, 'Power Sharing: An Advocators Conclusion' in Joanne McEvoy, Brendan O'Leary (eds) *National and Ethnic Conflict in the 21st Century: Power Sharing in Deeply Divided Places* (University of Pennsylvania Press 2013)388.

⁴²⁸ Arend Lijph Lijphart, *Democracy in Plural Societies a Comparative Explanation* (Yale University Press 1977) 25.

necessitates the recognition and acceptance of some form of consociational democracy, with which Iraq:

[W]ould have a largely ceremonial President, a more powerful Prime Minister, and that both of these offices would be chosen by an elected Parliament. The assumption among Iraqi political leaders was that these posts –together with the Speakership of the National Assembly [Parliament] – would be divided among the major communities, to ensure representation for each at the most senior levels of the Iraqi government.⁴²⁹

The consociational system is said to have been initially introduced by the CPA in 2003 which appointed members of the Interim Governing Council, the provisional government that was established and supervised by the CPA (July 2003-June 2004), on the basis that they represented all the ethnosectarian groups in the country. This ‘relied on the notion that both the mutual fear among sectors of the Iraqi population as well as a deep historical sense of mistrust necessitated the active prevention of any one political, sectarian group from ruling alone’.⁴³⁰ In addition to certain constitutionally recognised aspects of power sharing, over time other informal arrangements have developed which in their totality affected the composition and performance of the state institutions.⁴³¹ For example, the three-member Presidency Council was established under TAL (2004) and then the 2005 Constitution extended its work until 2010, that is, the first legislation term under the 2005 Constitution. Although Parliament through the special majority of legislators (two-thirds or three-fifths under TAL (2004) and the 2005 Constitution respectively) could overrule the veto issued by the Presidency Council, this in practical terms proved rather problematic. The Bylaw of the Parliament (2006) in Article 8

⁴²⁹ N Feldman, R Martinez, ‘Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy’ (2006) 75(2) *Fordham Law Review* 911.

⁴³⁰ Khader Abbas Radwan, ‘The Political Regime in Iraq: Between Reform and Legitimacy’ (*Arab Centre for Research and Policy Studies*, 16 January 2012) 7 <<http://english.dohainstitute.org/release/db281bc3-5eaf-419e-a59f-3d7a612231df>> accessed 22 July 2014.

⁴³¹ See e.g., Paul Dixon, ‘Is Consociational Theory the Answer to Global Conflict? From the Netherlands to Northern Ireland and Iraq’ (2011) 9(3) *Political Studies Review* 309–322; Reidar Visser, ‘The Emasculation of Government Ministries in Consociational Democracies’ (2012) 6 (2) *International Journal of Contemporary Iraqi Studies* 231.

established a three-member collective speakership of the Parliament (the Presidency Commission). Although this arrangement was later declared unconstitutional by the FSC in 2010.⁴³² Interestingly, the Presidency Commission is still being followed as the Parliament has yet to amend the Bylaw corresponding to the Court's decision. In practice, the allocation of the position of deputies for the President of the Republic, the Speaker of the Parliament and the Prime Minister to the representatives of each major group (Shi'a, Sunni, and Kurd) has become a constitutional tradition.

4.1.2.2 Proportional Representation and Coalition Government

Under the Baath regime, political parties were far fewer in number.⁴³³ Conversely, post-2003 Iraq has seen a substantial increase in the number of political parties and organisations.⁴³⁴ While a stable party system and competing parties with clear identical ideologies and political platforms operating within institutional rules and structures are said to be crucial for democratic transition,⁴³⁵ these are almost absent in post-2003 Iraq.⁴³⁶ Most political parties appeal to specific sects or ethnic communities, and very few of them might be able to have a broader appeal.⁴³⁷ Shia and Sunni Islamic parties, together with secular nationalist Kurdish parties, have dominated the political process. The

⁴³² IRQFSC 87/2010 [2/12 /2010].

⁴³³ Asmaa Jameel, 'Project on the Development of Political Parties in Arab Countries: The Case of Iraq Political Parties in Iraq', within the research project: Political Parties Development in the Arab World (*Lebanese Centre for Policy Studies*, Beirut 2007) <www.appstudies.org> accessed 22 October 2014.

⁴³⁴ Under the Baath regime, political parties were far fewer in number. Conversely, post-2003 Iraq has seen a substantial increase in the number of political parties and organisations. For example, in January, running up to the 2005 election, there were 167 parties and in December, 249 movements, gatherings and blocs were registered with the Iraqi Higher Electoral Commission. Reportedly, the number decreased in the following elections. Jameel, 'Project on the Development of Political Parties in Arab Countries: The Case of Iraq Political Parties in Iraq'. See Iraqi Higher Electoral Commission <<http://www.ihec.iq/en/>> accessed 22 June 2015.

⁴³⁵ Adeed Dawisha, 'Post Occupation Iraq: The Brittleness of Political Institutions' (*Woodrow Wilson International Centre for Scholarship, Middle East Program*, Occasional Paper, Spring 2012) 6.

⁴³⁶ Importantly, apart from the constitutional principles and rules that define the conditions of political pluralism, or the legal framework for regulating elections and the Law of the Electoral Commissions, it took long time for the parliament to enact the Law of the Political Parties and Organisations 2015/36. Before that it was regulated by the CPA/Order 97: Political Parties and Entities Law (15 June 2004).

⁴³⁷ Dawisha, 'Post Occupation Iraq: The Brittleness of Political Institutions' 6.

outcomes of the general elections so far held in the country have largely reflected this division of political parties and voters along the main sectarian and ethnic lines of Iraqi society.⁴³⁸

There have been three national and local elections which were based on proportional representation. The adoption of proportional representation was largely based on the assumption that ‘some form of proportional representation is needed in the face of deep-rooted ethnic divisions, in order to give minorities adequate representation.’⁴³⁹ Many scholars and observers have pointed to the ethnosectarian division of the political parties and voters which seems to have been exacerbated by and attributed to the adoption of proportional representation. The first election under the 2005 Constitution for the Parliament was based on the closed-list proportional representation and a single national electoral district. Accordingly, the parties with absolute control over the electoral list were elected, rather than individual candidates, resulting in a fragmented parliament consisting of many small political parties.⁴⁴⁰ Since 2009, elections have been held using the open-list system that is said to have served to weaken slightly the political parties and voters’ focus on ethnosectarian appeals. Many have referred to the advance of the cross-sectarian and secular *Iraqiya* list in the 2010 parliamentary election as a promising example in this regard.⁴⁴¹

It is claimed that a proportional electoral system guarantees the representation of minority groups, and increases ‘the quantity of political parties, which itself can facilitate pluralism since they are more likely appeal to and strengthen the identity group’, which results in a coalition or national unity governments.⁴⁴² Such an outcome is evident insofar as the representation of minorities and coalition governments is concerned. However, many observers

⁴³⁸ See Independent High Electoral Commission of Iraq (*IHEC*)
< <http://ihec.iq/en/index.php/ntaj.html> >

⁴³⁹ Alina Rocha Menocal, ‘Why Electoral Systems Matter: An Analysis of their Incentives and Effects on Key Areas of Governance’ (*Overseas Development Institute*, Research Report and Studies, October 2011) 7 <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7367.pdf>> accessed 22 December 2015.

⁴⁴⁰ Younis, ‘Set Up to Fail’ 5.

⁴⁴¹ Dawisha, ‘Post Occupation Iraq: The Brittleness of Political Institutions’ 6.

⁴⁴² David Ciepley, ‘Dispersed Constituency Democracy: Deteritorializing Representation to Reduce Ethnic Conflict’ (2013) 41 *Politic and Society* 141; Radwan, ‘The Political Regime in Iraq’ 7.

have noticed that this has further deepened the already divided ethnosectarian political parties and voters, facilitating the fragmentation and instability of the political system.⁴⁴³ Clearly, elections in which no political party can gain the majority needed for forming a government have resulted in inclusive national unity governments after months of political deadlock. Therefore, as Nussaibah Younis noted, the primary implication of the proportional representation of the political system in post-2003 Iraq is that:

Firstly, there is always likely to be a delay between the declaration of election results and the formation of a government— opening the door to violent instability after each election. Secondly, because smaller parties are incentivized to wait until after the election before entering into coalitions, political alliances are made secretly and on the basis of political expedience without voters having any say on subsequent alliances. This period of power brokering takes place between the political elites and prevents the development of an inclusive and accountable national politics based on policy rather than on elite bartering.⁴⁴⁴

Furthermore, during this period of negotiations, or indeed ‘political conflicts’, often more informal power-sharing arrangements will be introduced that may alter the constitutional balance of powers or establish new institutions outside the constitution itself. The impact suggests that those in power tend to rule by law than by the rule of law, bypassing the Constitution itself. For example, in 2010, following the first general elections under the 2005 Constitution, the long ongoing political and constitutional crisis left Iraq in a ‘power vacuum’ that was seen to threaten the already fragile political and security environment of the country. The competing political parties gathered in Erbil, the capital city of the Kurdistan Region of Iraq, to reach an agreement regarding forming the new government. The 2010 Erbil Agreement is said to have resulted in the formation of an inclusive coalition government representing almost all the major competing political parties in the 2010 elections. It also provided for several ‘extra-constitutional provisions that go in the direction of enhanced

⁴⁴³ See Ciepley, ‘Dispersed Constituency Democracy’ 141.

⁴⁴⁴ Younis, ‘Set Up to Fail’ 14.

consociationalism'.⁴⁴⁵ Many would argue that these arrangements were designed to restrict the exercise of the executive's power, in particular that of the then Prime Minister al-Maliki.⁴⁴⁶

There is a substantial gap between how the constitution works in theory and in practice. Although some might claim that power sharing arrangements served to stabilise the transition to democracy, such arrangements have certainly proven to be problematic for the rule of law in Iraq and the stability of the state. It can also be argued that having representatives of all the major groups in a government in which often none of them are prepared to work together increases the already existing tension between them. Moreover, as the number of parties in the coalition increases 'their individual legislative weights decrease, making it more difficult to form a decisive coalition'.⁴⁴⁷ For example, in the first legislative term, there were nine parties in the government; for any legislation to be enacted a legislative coalition of all these parties was necessary.⁴⁴⁸ More importantly, this has also been said to diminish the potential for an active political opposition within the parliament or for effective checking and oversight of the government.

This experience of Parliament in post-2003 Iraq illustrates that it has mostly struggled to legislate and oversee government performance. It has been almost impossible to agree to enact a great deal of constitutionally vital implementing legislation including laws intended to regulate the FSC, the FC, the oil and gas sector, and also political parties, something which has legal, political and economic implications for the balance of power and the entire country. This has occurred in part because it seems so difficult given the extremely unstable, ethnosectarian divisions amongst the political parties in Iraq; what makes this worse is that the legislature has chosen to ignore this legislation although this could potentially exacerbate the situation. The political

⁴⁴⁵ Visser, 'The Emasculation of Government ministries in Consociational Democracies' 234.

⁴⁴⁶ The Erbil Agreement on November 10, 2010. See Toby Dodge, 'State and Society in Iraq Ten Years after Regime Change: the Rise of a New Authoritarianism' (2013) 89(2) *International Affairs* 245; M Fantappie, 'Iraq: Maliki Stalls for Time' (*Carnegie Middle East Centre*, 10 March 2011) <<http://m.ceip.org/beirut/2011/03/10/iraq-maliki-stalls-for-time/a4kx>> accessed 21 May 2013; Leila Fadel, Karen DeYoung, 'Iraqi Leaders Crack Political Deadlock' *Washington Post* (Washington, 11 November 2010).

⁴⁴⁷ Peter Colum Casey and others, 'Assessing Policy Stability in Iraq: A Fuzzy Approach to Modelling Preferences' (2012) 151 (3/4) *Public Choice* 415.

⁴⁴⁸ *ibid* 415.

parties competing in Parliament have shown more concern for their short-term interests than the longer-term interests of the country. Furthermore, both Parliament and Council of Ministers have experienced a great degree of internal dysfunction that has further weakened their performance.⁴⁴⁹ Legislators and ministers have frequently boycotted parliamentary and ministerial sessions.⁴⁵⁰ For example, during the first three months in 2013, the Parliament held 13 sessions and received 25 draft laws; during the same period scheduled sessions were postponed 11 times due to the lack of quorum.⁴⁵¹ This has been more frequent in the case of important policies and legislation that is extremely contested, such as the oil and gas legislation and the law of the FSC.⁴⁵² Thus, it is noted that in the case of the Iraqi Parliament:

The most important body in the new oversight framework as it holds the key to reform in all areas of governance is perhaps the most ineffective of all. Its inner workings are hopelessly sectarian, and its Bylaws are so cumbersome and deficient that it has been incapable of enacting long-overdue legislation designed to repair the damage caused to state institutions since 2003. Moreover, as a result of the delicate political balances struck following [...] elections, which saw the rise of broad coalition governments deprived of a real parliamentary opposition, the Council [Parliament] has been unable to exercise

⁴⁴⁹ Marisa Sullivan, 'Maliki's Authoritarian Regime' (*The Institute for the Study of War*, Middle East Security Report No 10, 2013) <<http://www.understandingwar.org>> accessed 6 May 2015.

⁴⁵⁰ See al-Saadi MJ, 'The Iraqi Parliament Monitor: The First Quarterly Report 2013 on the Work of the Iraqi Council of Representatives: January, February, and March' (Monitor, Madarik Foundation, 30 March 2013) <www.madarik.com> accessed 6 January 2015.

⁴⁵¹ Reportedly, an expanded ministerial cabinet has increasingly threatened by boycotting its sessions. For example, at one point in mid-2007, political parties withdrew 16 of their ministers out of 37 in the government coalition. Kenneth Katzman, 'Iraq: Government Formation and Benchmarks' (*CRS Report for Congress* 10 August 2007) 4 <<http://fpc.state.gov/documents/organization/91006.pdf>> accessed 2 June 2014.

⁴⁵² For these reasons, at times, even the most exceptional session can turn into a consultative one, such as the one held on 06/01/2013. In another instance, in protest against government military operations in 2013 in Anbar [a Sunni province], more than 44 MPs resigned, meaning that parliament was effectively unable to function. Ammar Saadoon Albadry, Kamarulnizam Abdullah, 'Exploring the Key Challenges Affecting Iraqi Parliamentary Institution Post Remove Saddam Hussein' Regime' (2014) 4 (7) *International Journal of Humanities and Social Science* 207 <http://www.ijhssnet.com/journals/Vol_4_No_7_May_2014/24.pdf> accessed 3 October 2015.

effective oversight on government, for fear it might upset the political alliances that undergird it.⁴⁵³

Furthermore, the frequent recourse to the informal power-sharing arrangements so as to resolve, temporarily, political crises have created a tradition wherein it seems common that major policy debates have been conducted outside the Parliament. The role of the Parliament could be seen as the role of approving such policies instead of discussing them.⁴⁵⁴

Interestingly, the impact has been somewhat different on the office of the Prime Minister which has significant powers. This has had serious implications, the most obvious being the abuse of this Office; the extraordinary competition for that position has often delayed efforts to establish a coalition government. It has been observed that during the last three national elections that resulted in coalition governments, all those parties participating were extremely focused on the position of the Prime Minister, leaving the transfer of powers ineffective and endangering the political stability and even the security of the country.⁴⁵⁵ The first elected prime minister under the 2005 Constitution, al-Maliki (2006-2014), has been accused of abusing his office and committing serious constitutional violations which severely compromised democracy.⁴⁵⁶ It has been argued that he built:

a personal power base in the security establishment and bolstered the electoral prospects of his Dawah Party, thereby demonstrating the immense power that the office of Prime Minister affords. Maliki took direct control over security forces and military operations, placing personal allies in the security apparatus. He has taken security decisions without consulting the cabinet for authorization, including unilaterally forming personal intelligence and military units outside the jurisdiction of the Ministry of Defence and the Ministry of the Interior. Maliki also

⁴⁵³ International Crisis Group, 'Failing Oversight: Iraq's Unchecked Government' (Middle East Report 113, 26 September 2011) <<http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/iraq/113-failing-oversight-iraqs-unchecked-government.aspx>> Accessed 2 June 2014.

⁴⁵⁴ Sullivan, 'Maliki's Authoritarian Regime' 27.

⁴⁵⁵ Younis, 'Set Up to Fail' 5.

⁴⁵⁶ Kenneth M Pollack, 'The Fall and Rise and Fall of Iraq' (*The Brookings Institution*, Middle East memo 2013) 15 <http://www.brookings.edu/~media/research/files/papers/2013/07/30-fall-rise-fall-iraq-pollack/pollack_iraq.pdf> accessed 22 May 2014. *See also* Dodge, 'State and Society in Iraq Ten Years after Regime Change' 245.

created tribal-support councils in provinces across Iraq that are seen as Dawah Party tools for controlling and influencing local populations.⁴⁵⁷

The Prime Minister held the Office of Commander-in-Chief and acted as Interior minister. He also directly commanded newly established security organisations including the National Counter-Terrorism Forces and the Baghdad Brigade for the security of the capital.⁴⁵⁸ He was in charge of choosing Generals and directing governorate command centres, which were established in unstable areas across southern and central Iraq,⁴⁵⁹ certainly without any consultation with the cabinet or the Parliament which is constitutionally empowered to approve such appointments.

Thus, with such expanded powers, the Prime Minister emerged as the most powerful political actor, securing a third term in office which led to serious criticism within the coalition parties. Maliki himself claimed, however, that ‘there were too many constitutional limitations to his power’.⁴⁶⁰ Reportedly, since his first term in office (2006-2014), he ‘sought to place the office of the Prime Minister at the centre of state power, diminishing the ability of the cabinet and Parliament to influence the formulation and application of policy’.⁴⁶¹ In addition, many observers have accused him of creating a sense of marginalization among Sunnis and Kurds, as main partners in the government. Some have referred to a series of arrests targeting prominent Sunni leaders including the Vice President, Hashmi, and the Finance Minister, Issawi.⁴⁶² Many have indicated that the Prime Minister was also relying on FSC decisions to serve to legitimise his powers.⁴⁶³ Some maintained that such concentration of

⁴⁵⁷ Younis, *Set Up to Fail* 5. See ‘Make or break: Iraq’s Sunnis and the state’ (*International Crisis Group*, Middle East, Report 144, 2013) 1-36; Erkmen, ‘Change in Iraqi Politics: From Ethnic-Sectarian Lines to Centralization Question’; Dodge, ‘State and Society in Iraq Ten Years after Regime Change’ 244.

⁴⁵⁸ Kenneth Katzman, ‘Iraq: Politics, Elections, and Benchmarks’ (*US Congressional Research Service*, 16 November 2010) 3.

⁴⁵⁹ Toby Dodge, ‘Can Iraq Be Saved?’ (2014) 56(5) *Survival* 13.

⁴⁶⁰ David Romano, ‘Iraq’s Descent into Civil War: A Constitutional Explanation’ (2014) 68(4) *Middle East Journal* 557.

⁴⁶¹ Dodge, ‘State and Society in Iraq Ten Years after Regime Change’ 245.

⁴⁶² See Kenneth Katzman, ‘Iraq: Politics, Security, and U.S. Policy’ (*US Congressional Research Service*, 16 April 2015) 22.

⁴⁶³ Stephen Wicken, Marisa Sullivan, ‘De-Ba’athification Body Ousts Iraq’s Chief Justice as Protests Continue’ (*Institute for the Study of War*, 15 February 2013) <<http://iswiraq.blogspot.co.uk/2013/02/2013-iraq-update-7-de>

power was a reaction to the necessity for greater security, a claim which was dismissed by others who believe that,

security from the government is a primary concern, along with fears that the elected government is exhibiting increasingly authoritarian tendencies. The fear of the ‘tyranny of the majority’ is high at a time when these communities are still plagued by memories of their respective experiences of persecution, living in the spectre of civil war and conditioned by a decade of power-sharing politics.⁴⁶⁴

Formally and constitutionally, most of the institutions and separation of powers on the federal level is based on majoritarian rule. It has been noted that under Article 76, it is possible to form a majority cabinet or government consisting of only Arabs or even Shia Arabs.⁴⁶⁵ However, proportional representation would make it difficult for a single party to form a majority government or to make decisions and policies on a majority basis. It was asserted that strong majority government in Iraq is problematic because the ‘current political leadership is overwhelmingly based on communal or ethnic groups, that would exclude minorities.’⁴⁶⁶ Similarly, the federal system whereby significant autonomy and powers were assigned to regions was said to act as a check on any majority government in Baghdad.⁴⁶⁷

4.1.2.3 Asymmetrical Federalism and Decentralization

Federalism is another arrangement that has been considered as being integral to power-sharing. Many scholars, Kurdish negotiators and the US itself openly advocated a federal system in post-2003 Iraq, others, including Sunnis, refused and considered any such attempt. One of the reasons for establishing

[Ba'athification.html#!/2013/02/2013-iraq-update-7-de-Ba'athification.html](#)> accessed 12 December 2014.

⁴⁶⁴ Claire Spencer, Jane Kinninmont and Omar Sirri (eds), *Iraq Ten Years On* (The Royal Institute of International Affairs 2013).

⁴⁶⁵ John McGarry, Brendan O’Leary, ‘Iraq’s Constitution of 2005: Liberal Consociation as political prescription’ (2007) 5(4) *International Journal of Constitutional Law* 690; Visser, ‘The Emasculation of Government Ministries in Consociational Democracies’ 231.

⁴⁶⁶ McGarry, O’Leary, ‘Iraq’s Constitution of 2005’.

⁴⁶⁷ K al-Hamdani, ‘al-Federaliya fi al-Iraq bayn al-Dustur wa al-Tatbig al-Amali [Federalism in Iraq in the Constitution and Practice] (2009) 360(31) *al-Mustaqbal al-Arabi* 25-47; al-Istrabadi, ‘A Constitution Without Constitutionalism’ 1627–1655; Younis, *Set Up to Fail* 11-13.

such a federal system was believed to be the extreme mistrust among the parties that negotiated and drafted the Constitution in 2005. The Sunnis boycotted the 2005 election for the Interim National Assembly that was primarily in charge of writing the 2005 Constitution. Therefore, this is said to have left the Kurds and the Shia' parties dominating the process; in fact, in the final months leading up to the referendum, there were some Sunni representatives included in the constitutional committee.⁴⁶⁸ On the other hand, many have supported the need for specific recognition of Kurdistan, which has had a long historical struggle for autonomy, having been suppressed by consecutive strong central governments; Kurdistan has enjoyed a *de facto* semi-independence since 1991.⁴⁶⁹ Thus, such significant differences between the Kurdistan Region and rest of the country can be said to require different relations with the federal government or 'constitutional asymmetries' in Iraq with regard to Kurdistan.⁴⁷⁰ The compromise was that the Constitution established a federal system wherein sub-federal governments have guaranteed substantial authority over local policy and resources, and share significant powers with the federal government. In fact, in practice, the existing federal structure only covers the Kurdistan Region; the Constitution, and the implementing laws allow the governorates outside Kurdistan to form parallel federal regions.⁴⁷¹

In general, many have argued that the federal structure is likely to create 'an exceedingly weak central government and extraordinarily powerful

⁴⁶⁸ Younis, *Set Up to Fail* 11-13.

⁴⁶⁹ See e.g. George Black, *Genocide in Iraq: The Anfal Campaign Against the Kurds* (Human Rights Watch 1993); Kerim Yildiz, Kurdish Human Rights Project, *The Kurds in Iraq: The Past, Present and Future* (the University of Michigan 2004); Joost R Hiltermann, *A Poisonous Affair: America, Iraq, and the Gassing of Halabja* (Cambridge University Press 2007); Mahir A Aziz, *The Kurds of Iraq: Nationalism and Identity in Iraqi Kurdistan* (I.B.Tauris 2014); Michael J. Kelly, 'Kurdish Regional Constitutional within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause' (2010) 114 (3) *Penn State Law Review* 707.

⁴⁷⁰ Tarlton argued that 'symmetry refers to the extent to which component states share in the conditions and thereby the concerns more or less common to the federal system as a whole. [...] asymmetry expresses the extent to which component states do not share in these common features. Whether the relationship of a state is symmetrical or asymmetrical is a question of its participation in the pattern of social, cultural, economic, and political characteristics of the federal system of which it is part. This relation, in turn, is a significant factor in shaping its relations with other component states and with the national authority. Charles D Tarlton, 'Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation' (1965) 27(4) *Journal of Politics* 861-874. See also, Ferran Requejo, Klaus-Jurgen Nagel (eds) *Federalism beyond Federations: Asymmetry and Processes of symmetrisation in Europe* (Ashgate 2011).

⁴⁷¹ Constitution of Iraq (2005), art 116.

regions.⁴⁷² It is also noted that the federal government lacks ‘sufficient power to keep Iraq together and functioning’.⁴⁷³ One of the main reasons for defining the 2005 Constitution in this way is the constitutional provisions regarding oil and gas which assign significant powers to the region; not surprisingly, any call for constitutional amendment focuses on relevant oil and gas provisions.⁴⁷⁴ In practice, many have called for constitutional amendment in favour of less decentralization.⁴⁷⁵ In other words, federalism remains controversial and arguably the majority of the political parties have been unsupportive of implementing federalism and in fact ‘worked assiduously -if fruitlessly- to amend decentralization articles in the Constitution and to clarify the document’s textual ambiguities in favour of greater central government control.’⁴⁷⁶ The failure to agree on a kind of federation that would feature post-2003 Iraq is said to be a main impediment to an effective government, and has contributed to constant delays and deadlocks in decision making in general and enactment of key implementing legislations.⁴⁷⁷

This may also be true to a large extent regarding the federal regions which have more powers than governorates. The former, and not the latter, have the power to ‘adopt a constitution of its own that defines the structure of powers of the region, its authorities, and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution.’⁴⁷⁸ Regional authorities can amend the application of any federal laws that contradict or differ from the laws of the region, on matters not exclusive to the federal government.⁴⁷⁹ On the other hand, a governorate council is not subject ‘to the control or supervision of any ministry or any institution not linked to a ministry.’⁴⁸⁰ Constitutionally, it has ‘broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration,

⁴⁷² Donald L Horowitz, ‘The Sunni Moment’, *The Wall Street Journal* (New York, 14 December 2005)

⁴⁷³ Romano, ‘Iraq’s Descent into Civil War’ 557.

⁴⁷⁴ McGarry, O’Leary, ‘Iraq’s Constitution of 2005’ 680-682.

⁴⁷⁵ Maliki Calls for Stronger Central Government (*Agence France Presse*, 11 July 2009)

⁴⁷⁶ Raad Alkadiri, ‘Oil and the Question of Federalism in Iraq’ (2010) 86 (6) *International Affairs* 1318.

⁴⁷⁷ *ibid* 1318.

⁴⁷⁸ Constitution of Iraq (2005), art 120.

⁴⁷⁹ *ibid*, art 121 (2).

⁴⁸⁰ *ibid*, arts 122(5).

and this shall be regulated by law'. In addition to explicitly emphasising 'the independent finances' of the governorate council,⁴⁸¹ the Constitution treats governorates the same as the regions in guaranteeing the allocation of an 'equitable share of the national revenues sufficient to discharge their responsibilities and duties.'⁴⁸² Both federal and governorate authorities can exercise each other's powers 'with the consent of both governments', such a process to be 'regulated by law.'⁴⁸³ Thus, in principle, the federal government cannot exercise powers over matters that are constitutionally considered within the competence of the governorates without its consent. Moreover, governors and members of the governorate council are elected; they are representatives of the governorate's people, and are therefore responsible for them and not the federal authorities.

With regards to the federal structure, the Constitution is substantially ambiguous on many aspects of this, and much more was left to implementing legislation; this still remains to be developed. The Law of Governorates Not Incorporated into a Region (Governorates Law) is an essential implementing legislation enacted in 2008 to devolve powers to governorates and to provide a legal framework for establishing federal regions equivalent to the Kurdistan region.⁴⁸⁴ The extent of the devolution of powers and decentralization in the Governorate Law and its conformity to the constitutional mandate for a federal system is contentious. Some have criticized this Law for expanding federal powers. The Governorates Law is said to have explicitly adopted a narrow understanding of the constitutional mandate on the federal structure of Iraq and established a new institutional and structural framework for the relations between the federal government and the governorates.⁴⁸⁵ It subjects governorate councils to supervision by the federal Parliament.⁴⁸⁶ The Law makes governors directly responsible before the federal authorities, meaning they can be removed from office by an absolute majority of the Parliament at the request of the Prime

⁴⁸¹ Constitution of Iraq (2005), art 122(5).

⁴⁸² *ibid*, art 121(3).

⁴⁸³ *ibid*, art 123.

⁴⁸⁴ The Governorates Not Incorporated into a Region Law (21) 2008 [Governorates Law 2008] and its amendments (15) 2010 and (19) 2013.

⁴⁸⁵ Hamoudi, *Negotiating in Civil Conflict* 169-170.

⁴⁸⁶ Governorates Law 2008, art 2(2).

Minister.⁴⁸⁷ Others maintain that this Law clearly contradicts Article 115, which granted governorates the residual competences,⁴⁸⁸ and Article 122 of the Constitution that limits governorate powers by the principle of administrative decentralisation.⁴⁸⁹ In practice, governorates are mostly weak and incapable of exercising their powers partially for reasons related to the increasing dependence on the federal authorities for all budget and their administrative and delivery of public services is also under the authority and direction of the federal government ministers. Some have argued that the constitutional and legal rules as well as budgeting have been considered the ‘weapons’ that often used by the federal and local authorities ‘in the competition for influence, authority, and power.’⁴⁹⁰

4.1.2.4 *The FSC and the Power-sharing Arrangements*

The above discussion suggests that the informal power-sharing arrangements could alter the constitutional balance of powers, bypassing the Constitution and undermining the rule of law. Furthermore, the subsequent new balance of powers can be said to have resulted in a more marginalised and weaker legislature that struggles to fulfil its constitutional role; amongst other things, this could mean that its function of checking the excesses of government has been largely neglected. This is compounded by the ambiguous nature of the Constitution, largely a deliberate policy originally used to speed up the process of constitution writing. Taken as a whole, this means that many questions remain unresolved, contributing to the rise of constitutional disputes.⁴⁹¹

It might be expected that under such conditions the judiciary would be drawn deeper into constitutional contestations and political crises. For example,

⁴⁸⁷ Governorates Law 2008, art 7 (8/2).

⁴⁸⁸ Visser, ‘Policing a Messy Federation’ 14.

⁴⁸⁹ Hamoudi, *Negotiating in Civil Conflict* 167-170.

⁴⁹⁰ Lamar Cravens, Derick W Brinkerhoff, ‘Provincial Governance in Iraq: Councils, Contestation, and Capacity Building’ (Research Triangle Park, NC: RTI Press, August 2013) 18 <<https://www.rti.org/pubs/OP-0015-1308-Brinkerhoff.pdf>> accessed 12 November 2014.

⁴⁹¹ See Zaid Al Ali, ‘Ten Years of Hubris and Incompetence’ (*Open Democracy* 22 March 2013) <http://www.opendemocracy.net/zaid-al-ali/iraqten-years-of-hubris-and-incompetence>; ‘The Next Iraqi War? Sectarianism and Civil Conflict’ (International Crisis Group, February 2006) 12, 13 <http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/Iraq%20Syria%20Lebanon/Iraq/52_the_next_iraqi_war_sectarianism_and_civil_conflict.pdf> accessed 21 January 2014)

those in power might turn to the judiciary to legitimise and institutionalise their exercise of power and their excesses. Similarly, other political actors, whose participation in the government and policy-making might be endangered and marginalised as a result of this, may turn to the judiciary in the hope of taking legal action against the government's arbitrary exercise of power or of gaining their policy interests. When the parliament is marginalised, even individuals and emerging public interest groups may frequently turn to the judiciary to protect their interests or to challenge the government's abuse of power. As will be evident throughout the analysis of FSC case law in Chapter Five, various actors have used the Court to some extent for reasons of this kind. Moreover, considering the extent of the policies and constitutional legislation that the country relies on in continuing its transition to democracy, it is expected that the judiciary will frequently be asked to resolve a range of disputes and policy conflicts.

Another crucially relevant issue concerns the impact that power-sharing arrangements may have on the constitutional judiciary. It is debatable whether appointments to the courts should be based on power-sharing, whether a court should rule according to a qualified majority rule or consensus and whether judges should uphold, modify or strike down power-sharing deals specifically based on ethnosectarian divisions that might conflict with the constitutional structure and rights.⁴⁹² The Constitutional Court of Bosnia is one such example. Six of its nine justices are appointed as representatives of major groups in the country: the Bosniaks (Bosnian Muslims), the Croats and the Serbs. The three remaining members come from outside the country and are selected by the President of the European Court of Human Rights. These non-citizen members are believed to serve 'to prevent ethnic deadlock in adjudication.'⁴⁹³

In response to the role of the courts regarding power-sharing, some scholars point to their general mandate, arguing that emerging democracies usually establish strong constitutional courts and constitutional judicial review since these are seen as 'an indication that they are expected to play a more direct

⁴⁹² Samael Issacharoff, 'Courts Constitutions and The Limits of Majoritarianism' in McEvoy, O'Leary (eds), *National and Ethnic Conflict in the 21st Century: Power Sharing in Deeply Divided Places* 215; Brendan O'Leary, 'Power Sharing: An Advocate Conclusion' 396-397.

⁴⁹³ Issacharoff, 'Courts Constitutions and The Limits of Majoritarianism' 218-219.

role in superintending the institutions of democracy and, particularly, in defining the limits of democratic decision-making.⁴⁹⁴ Others hold that courts ‘should avoid allowing themselves to become forums for ‘lawfare’ by national, ethnic or religious protagonists who may seek to reverse what they previously conceded at the negotiating table.’⁴⁹⁵ This might suggest that courts should uphold power-sharing arrangements, but it does not address how courts should respond to new, informal, power-sharing arrangements that contradict constitutional principles and fundamental rights. On a few occasions the FSC has tackled and, in fact, has overruled some informal power-sharing arrangements as evidenced in its case law, discussed in the next chapter.

Overall, the 2005 Constitution was written to put an end to authoritarian rule and set the foundation for the constitutional democratic system, and it is affected by the political and constitutional legacy resulting from decades of an authoritarian regime. Many of the Constitution’s arrangements were said to prevent the consolidation of powers in one state institution, whilst still allowing for a majoritarian, possibly sectarian or ethnic, government. It is widely argued that post-2003 Iraq is in a paradoxical situation. The country has seen substantial improvements regarding electoral democracy, the general referendum, the three national and local elections for governorates councils and two prime ministers have been voted out of office. The Sunnis boycotted the first election in 2005 which resulted in their underrepresentation, but they have participated substantially in the subsequent elections.⁴⁹⁶ However, it is also widely noticed that ‘consolidation of democracy is still distant’,⁴⁹⁷ and parallel improvements regarding the rule of law are largely absent.⁴⁹⁸

Furthermore, the development of the post-2005 constitutional and political system over the course of the last decade has encountered a series of formidable challenges. The most obvious of these include pervasive and almost continuous violence, terrorist attacks, the Sunni-Shiite sectarian violence and the

⁴⁹⁴ Issacharoff, ‘Courts Constitutions and The Limits of Majoritarianism’ 223.

⁴⁹⁵ O’Leary, ‘Power Sharing: An Advocators Conclusion’ 398.

⁴⁹⁶ Matthew S Mingus, ‘Progress and Challenges with Iraq’s Multilevel Governance’ (2012) 72(5) *Public Administration Review* 769.

⁴⁹⁷ Spencer, Kinninmont and Sirri (eds), *Iraq Ten Years On*, xii.

⁴⁹⁸ Kamal Field Al-Basri and Mudhar Sebahi, ‘Iraq’s Paradox: Winning Democracy and Losing the Rule of Law’, in Spencer, Kinninmont and Sirri (eds) *Iraq Ten Years On* 30.

Kurd-Arab ethnic conflict,⁴⁹⁹ the instability of state institutions,⁵⁰⁰ and widespread corruption.⁵⁰¹ On the other hand, many would argue that in practice the KRG's relations with Baghdad might be seen as having a somewhat confederal nature. The Kurds have had ongoing power-struggles with the federal government in Baghdad, leading to numerous political and constitutional crises.⁵⁰² This challenging internal environment, not to mention the impact of the international and regional problems, have contributed negatively to the performance of Iraq's state institutions. All this has contributed to the fact that the Constitution has yet to be fully implemented; key institutions are still not established; numerous gaps and contradictions are yet to be filled and resolved.

Given the above discussion, the degree of FSC's independence is open to debate as will be discussed in the next section.

4.2 The Iraq Federal Supreme Court: Composition, Powers, and Independence

The first post-2003 constitution, TAL (2004), established the FSC with powers of constitutional legislative review.⁵⁰³ The TAL was an interim constitution and was replaced by the 2005 Constitution, which establishes the new FSC. The implementing legislation, the Federal Supreme Court Law 30/2005, was enacted under TAL (2004), before the 2005 Constitution came into force. The composition and the powers of the FSC as established in the TAL were far less controversial than they proved to be during the drafting

⁴⁹⁹ See e.g., Dina Rizk Khoury, 'The Security State and the Practice and Rhetoric of Sectarianism in Iraq' (2010) 4 (3) *International Journal of Contemporary Iraqi Studies* 325–338; Kenneth Katzman, 'Iraq: Post-Saddam Governance and Security' (*Congressional Research Service*, 29 December 2009) 25.

⁵⁰⁰ Dodge, 'Can Iraq Be Saved?' 7.

⁵⁰¹ According to Transparency International in the 2015 Corruption Perceptions Index, Iraq ranked at 161 out of 175 countries, see <<http://www.tradingeconomics.com/iraq/corruption-rank>> accessed 20 January 2016. See also Antony H Gordsman, Sam Khazai, Iraq in Crisis (A report of the CSIS Burke Chair in Strategy, May 2014); Mohammad al-Rubaie, 'Award-winning Investigation Implicates Iraq's Parliament in Major Corruption Scandal' (*The Network of Iraqi Reporters for Investigative Journalism [NIRIJ]*, 11 December 2013) <<http://www.mediasupport.org/award-winning-investigation-implicates-iraqs-parliament-in-major-corruption-scandal/>> accessed 14 July 2014.

⁵⁰² Shamsul Khan, Sherko Kirmanj, 'Engineering Confederalism for Iraq' (2015)17 (4) *National Identities* 371.

⁵⁰³ TAL (2004), arts 60, 61.

process of the 2005 Constitution. Religious groups insisted on a constitutional council that reviewed legislation before it was enacted to ensure its conformity with *sharia* law. This view was strongly opposed by both secular and Kurdish political parties.⁵⁰⁴ They eventually reached a compromise, reflected in Article 92, that specifies that the new FSC will consist of a number of Islamic jurists and legal experts together with judges. However, all other aspects regarding the composition and the ‘work’ of the Court were deferred to future implementing legislation which requires a two-thirds majority of the Parliament.⁵⁰⁵

Insofar as it concerns the new FSC, the Parliament has continually failed to pass the implementing legislation. The draft law relating to the new FSC was first introduced into the Parliament in 2008, and since then the draft has frequently come before the Parliament (a total of 14 times as of May 2015). The debates that brought the draft closest to the voting stage were held in 2011, 2013 and, most recently, in May 2015. In August 2014, the legislature established a ‘provisional law committee’ within the Parliament with a specific mandate to pass the new FSC Law.⁵⁰⁶ The legislature’s failure to enact is seen to be severely impeding the Court’s legitimacy and independence and is leading to increasing political attacks on the Court. Until the Parliament passes the implementing legislation, the current FSC with its pre-constitutional composition exercises powers specified in the TAL, the 2005 Constitution or any federal legislation. Thus, Article 130 of the Constitution seems to uphold legal continuity rather

⁵⁰⁴ Hamoudi, *Negotiating in Civil Conflict* 94.

⁵⁰⁵ See Choudhry, and others, ‘Constitutional Courts after the Arab Spring’ 63-75.

⁵⁰⁶ The first [full] reading of the draft took place in parliamentary session No 29 on 5 February 2011 <<http://www.parliament.iq/english/>>; <http://alsabaah.iq/ArticleShow.aspx?ID=110038>. The debates on this piece of legislation has attracted academic and media reports, *See e.g.*, Jeffrey J Coonjohn, Zuhair al-Maliki, ‘Chaos in the Courts: Can Iraq’s Embattled Chief Justice Fend-off Presidential Strategists’ (*Jeffrey Coonjohn Blog*, 26 February 2013) <<http://jjcoonjohn.com/middle-east/chaos-in-the-courts> >; ‘National Alliance Seeks to Pass Law on the Federal Supreme Court’ (*Iraqi Media Network* [Arabic Text], 22 January 2013) <<http://www.alrafedain.net/index.php?show=news&action=Article&id=94375> > accessed 22 January 2014 ; Ahmed Hussein, ‘Iraqi Parliament Postpones Vote on Federal Court, Supreme Judicial Council Law Drafts’ (*All Iraq News*, 3 December 2012) <<http://www.iraqinews.com/baghdad-politics/iraqi-parliament-postpones-vote-on-federal-court-supreme-judicial-council-law-drafts/>> accessed 2 July 2014; Mustafa Habib, ‘One Court to Rule them All: Why Not All Iraqi Politicians Want Their Supreme Court to Work Properly’ (*Nigash*, 10 December 2015) <<http://www.niqash.org/en/articles/politics/5179/Why-Not-All-Iraqi-Politicians-Want-Their-Supreme-Court-To-Work-Properly.htm>> accessed 13 December 2015.

than legitimacy thereby ensuring that all pre-transitional and any other existing laws ‘remain in force unless annulled or amended in accordance with the provisions of this Constitution.’

The following explains, in some detail, the constitutional and legal framework within which FSC is regulated, both before and after the ratification of the 2005 Constitution.

4.2.1 Pre-constitutional FSC versus Prospective FSC: Composition and Jurisdiction

The current or pre-constitutional Court (the FSC) consists of nine judges, all appointed through the executive-judiciary process. Thus, the Presidency Council that reflected the dominant (ethno sectarian) political powers during the early stage of the transition approved appointments without any input from the legislature. In consultation with the regional judicial councils, the Higher Judicial Council (HJC) presented three nominees for every FSC vacancy to the Presidency Council for approval.⁵⁰⁷ The pre-constitutional FSC, which is the *de facto* constitutional judiciary, or a ‘caretaker institution’ has been exercising the powers provided for the new court in the 2005 Constitution. Under the 2005 Constitution,

The Federal Supreme Court 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 Council of Representatives [Parliament].⁵⁰⁸

In practice, changes regarding the integration of non-judge members have not affected the current composition of the pre-constitutional FSC and will not come into effect until the Parliament enacts the new law of the FSC.

The 2015 draft law of the new FSC (which is still under debate in Parliament) stipulates a comprehensive appointment process which involves wide-ranging actors. Accordingly, the new Court is to consist of fifteen members in addition to the Chief Justice and one deputy: seven judges are to be

⁵⁰⁷ TAL (2004), art 44; Law of the Federal Supreme Court (30) 2005.

⁵⁰⁸ Constitution of Iraq (2005), art 92.

nominated by the FSC in consultation with the Higher Judicial Council and the regional judicial councils. The draft considers the non-judge members to be an advisory board; two legal experts are to be nominated by the Ministry of Higher Education, and four (this was initially two) Islamic jurists (two Shi'a and two Sunni) will be nominated by the two Islamic endowment authorities. For each vacancy on the FSC, there must be three nominees of whom two will be selected by the Council of Minister and Parliament will then approve the candidate who has been elected by a majority. The draft law also stipulated that the FSC's members would serve a twelve-year term with the possibility of the tenure of the Chief Justice being extended for two more years.⁵⁰⁹ The draft guarantees that consideration should be given to the constitutional balance among the various groups within Iraqi society in the composition of the Court.⁵¹⁰ In other words, the draft regards appointments to the FSC as forming part of the power-sharing arrangements without specifying how or the number of representatives of each group within the Court.

The 2005 Constitution not only provides for a different composition for the new FSC, but also empowered it with greater jurisdictional powers in three areas. First, it is to exercise constitutional review of legislation and regulations. This power of constitutional review does not apply to *ex ante* abstract review of legislative bills or the procedural decisions issued by the Parliament. This has been reemphasised by the FSC decisions on several occasions; there was ambiguity concerning whether the Court has the jurisdiction to review legislation before being promulgated. The FSC denied jurisdiction to exercise *ex ante* abstract review of legislative bills; it reviews only decisions issued by the Parliament regarding the eligibility of MPs which had already been implemented.⁵¹¹ With regards to the second of these powers, the Constitution expands the FSC's mandate to decide on several other crucial constitutional issues. The Court can provide a binding abstract interpretation of the constitution independent of any review of the constitutionality of legislation. It should be noted that the FSC is not authorised by its statutes to exercise this jurisdiction.

⁵⁰⁹ Draft Law of the Federal Supreme Court (May 2015), art 2.

⁵¹⁰ *ibid*, art 4 (1).

⁵¹¹ Constitution of Iraq (2005), art 52. *See also* IRQFSC 10/2007 [9/7/2007].

Third, the Constitution has followed the contemporary trend regarding constitutional judiciaries' ancillary powers.⁵¹² The FSC has the jurisdiction to resolve disputes or conflicts of competence arising from the application of federal laws, and disputes arising among sub-federal governments. Furthermore, it has the power to impeach the President, the Prime Minister and Ministers. It approves the final results of the national parliamentary elections and decides on any appeals regarding decisions made by the Parliament concerning the eligibility of its members.⁵¹³ The Court can exercise any other powers specified in other legislation. Most recently, the Law of Political Parties empowered the Court to review judicial rulings concerning the dissolution of the political parties.⁵¹⁴ The FSC is also the highest court of ordinary jurisdiction, having appellate powers over the decisions of the administrative courts.

The legal position of the FSC is exceptional, and it operates in legal uncertainty. Its composition is based on legal norms that were suspended by the 2005 Constitution and in fact it infringes Article 92. The constant failure of the Parliament to enact the implementing legislation necessary to regulate fully the FSC's composition and remit has undermined the Court's independence, authority and legitimacy, since an institution that is authorised to uphold the rule of law and the Constitution is itself not subject to clear, stable rules or general principles of legality. Some have maintained that the Court 'represents one of the most meaningful Rule of Law institutions in Iraq, and it is not operating consistently with its constitutional mandate.'⁵¹⁵

The difficult position of the FSC is evident in the extensive debates and disagreements regarding its controversial decisions, including politicians and the government's reactions to these, and the constant failure to pass the FSC's draft Law.⁵¹⁶ These controversies have concerned the number, appointment,

⁵¹² See Chapter Three (3.2.1).

⁵¹³ Constitution of Iraq (2005), art 94.

⁵¹⁴ Law of the Political Parties and Organisations (36) 2015.

⁵¹⁵ David Pimentel, Brian Anderson, 'Judicial Independence in Post-Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy' (2013) 46(1) *George Washington International Law Review* 43.

⁵¹⁶ It is interesting to note that there is an ongoing discussion and media cover of whenever the draft law of the FSC is under debate in parliament, or whenever the Court decides on a controversial and significant constitutional question. This might evidence the position and the role that the Court has had in the emerging transitional democracy in post-2003 Iraq. See e.g. www.niqash.org/en/articles/politics/5179; <www.al-monitor.com/.../iraq-parliament-new-laws-

tenure and the powers of the members of the Court. The issue of incorporating Islamic jurists and vetoing decisions concerning the conformity of the legislation and government acts to Islamic law has provoked the most heated controversy. Those who reject veto powers for Islamic jurists argue that this would significantly alter the Court's function, promoting an Islamic state wherein religious rules take precedence over the existing, mostly secular, legal system. It also increases the possibility of external interference in the FSC's judicial functions.⁵¹⁷ Others have voiced highly contentious views regarding whether the FSC and its Chief Justice should be separate from the HJC, and also whether decisions should be unanimous or by a majority on disputes between the federal government and sub-federal governments.⁵¹⁸

With regard to judicialisation, the Court has been involved in many contentious constitutional and political questions that have major implications for the rule of law and democratic transition. Thus, there have been growing concerns about the independence of the Court. The following discussion analyses some of the most important aspects of the constitutional judiciary in Iraq, analysing their relevance to the potential rise of judicialisation.

4.2.2 The Independence of the FSC

Formally, a number of constitutional provisions explicitly protect judicial independence. Article 19 of the 2005 constitution stresses that '[T]he judiciary is independent, and no power is above the judiciary except the law.' This independence is reemphasized elsewhere: '[T]he judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law'.⁵¹⁹ Subsequently, Article 88 explicitly refers to the independence of judges, stating that '[J]udges are independent, and there is no authority over them except that of the law. No power shall have the right to interfere in the judiciary and the affairs of justice'.

debaathification.htm; musingsoniraq.blogspot.com/2013/.../iraqs-federal-court-returns-chief.ht.; www.ncciraq.org/en/index.php?...iraqi...pass-a-law%2C... accessed 12 June 2015.

⁵¹⁷ Mohammed Emad, 'Law of the Supreme Court into Legislation' (*The Agency of the Future News*, 11 March 2015) <<http://www.khabaar.net/index.php/permalink/43752.html>> accessed 22 July 2015; Habib, 'One Court to Rule Them All: Why Not All Iraqi Politicians Want Their Supreme Court to Work Properly'.

⁵¹⁸ Draft Law of the Federal Supreme Court (May 2015) art 12. *See also* *ibid*.

⁵¹⁹ Constitution of Iraq (2005), art 87.

The independence of the judiciary is also obvious from those articles that refer to the principle of the separation of powers. Article 47, provides that ‘[T]he federal powers shall consist of the legislative, executive, and judicial powers, and they shall exercise their competencies and tasks on the basis of the principle of separation of powers’. Furthermore, the legislators in their oath before assuming their duties make a commitment to protect this independence stating, ‘and I shall endeavor to protect [...] the independence of the judiciary’.⁵²⁰

In addition to that, judges are protected from removal ‘except in cases specified by law’.⁵²¹ Another important means of preventing political influence on the judiciary involves prohibiting judges and general prosecutors from ‘combining a judicial position with legislative and executive position and any other employment.’⁵²² Most importantly, judges are prohibited from joining any political party or organisation or taking part in any other political activity.⁵²³ Remarkably, the Constitution more generally prohibits any legal rules that specify immunity of certain administrative and governmental actions or prevents decisions from being challenged before the judiciary.⁵²⁴ This is considered a significant improvement given that such practice was common in pre-2003 constitutions which excluded substantive governmental acts (the acts of sovereignty) from any judicial scrutiny.⁵²⁵ Finally, the independence of the FSC is protected by constitutional provisions that directly regulate the FSC, which provides that ‘the Federal Supreme Court is an independent judicial body, financially and administratively.’⁵²⁶

These constitutional provisions illustrate that on a formal level the independence of the FSC is substantially protected to a degree that is necessary but not sufficient. Thus, the formal protection does not necessarily prevent the potential informal politicisation of the courts ‘both by the government and by any other political actors (most probably, the opposition).’⁵²⁷ It is equally

⁵²⁰ Constitution of Iraq (2005), art 50.

⁵²¹ *ibid*, art 97.

⁵²² *ibid*, art 98.

⁵²³ *ibid*, art 98 (2).

⁵²⁴ *ibid*, art 100.

⁵²⁵ *See e.g.* Judicial Organisation Law (160) 1979, art 10; The second amendment to the State Shura Council Law (65) 1979 (also known as the Administrative Judicial Court Law (106) 1989), art 7.

⁵²⁶ Constitution of Iraq (2005), art 92(1).

⁵²⁷ Hein, ‘Constitutional Conflicts between Politics and Law in Transition societies’ 18.

important to note that some may also challenge its ‘exceptionally high degree of independence’ that ‘could even encourage a certain degree of politicisation at the informal level.’⁵²⁸ Therefore, the nature of the independence of the FSC seems more complicated than the legal framework outlined above would suggest, especially when considering the relation between the FSC and the HJC, the de-Baathification policies, and the membership of Islamic jurists on the FSC.

4.2.2.1 The Relation Between the FSC and the HJC: An Ongoing Power-Struggle Between Legislature and the FSC

The formal constitutional and legal principles specifying the independence of constitutional judges by means of sufficient financial and organisational resources ‘are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law.’⁵²⁹ The relationship of the judicial system to the executive authority in modern Iraq has experienced constant shifts. Under the Monarchy constitution (the Basic Law 1925) the judiciary was separated from the other two branches, and the Council of Judges, under the presidency of the Chief Justice of the Court of Cassation, the highest court in Iraq, governed the judiciary and oversaw all judicial appointments. In 1979, the Council of Judges became part of the Ministry of Justice, which supervised and controlled all courts.⁵³⁰ In 2003, the CPA re-established the Council of Judges and separated it from the Ministry of Justice, which became responsible for supervising all judges and courts except the Federal Court of Cassation (FCC). The FCC is meant to be supervised by ‘the court's Chairman, due to the particularity of this court being the Supreme Court in Iraq.’⁵³¹ Under TAL (2004) , it was renamed ‘The Higher Juridical Council’ (HJC) and consists of the presidents of the highest courts and is headed by the Chief Justice of the FSC, who is in charge of the administration and supervision of the federal judiciary in Iraq.⁵³² Under Article 90 of the 2005

⁵²⁸ Hein, ‘Constitutional Conflicts between Politics and Law in Transition societies’ 18.

⁵²⁹ Raz, *The Authority of Law* 217.

⁵³⁰ Ministry of Justice Law (101) 1977, art 3, 4. The Judicial Supervision Law (124) 1979.

⁵³¹ CPA/Order 35: Re-Establishment of the Council of Judges (18 September 2003).

⁵³² TAL (2004), art 45.

Constitution, the legislature specifies the rules that regulate the HJC's composition and its jurisdiction.

In December 2012, the legislature passed the Federal Judiciary Law 112/2012, separating the FSC from the HJC. As a result, the President of the FCC became the President of the HJC, instead of the Chief Justice of the FSC, Madhat al-Mahmoud. This also established the HJC as 'the highest administrative body' or supreme authority over judicial affairs.⁵³³ However, in September 2013, the FSC overruled the 112/2012 Law and reinstated Chief Justice Mahmoud as the head of the HJC.⁵³⁴ Interestingly, the grounds cited by the Court for the unconstitutionality of this contested Law were mainly based on the fact that the Law had separated the presidency of the HJC and of the FSC, and it defined the HJC as 'the highest administrative body that administers the affairs of the judicial bodies even though the Constitution affirmed its role as a fundamental part of the judicial authority.'⁵³⁵ As a result of this controversial FSC decision,⁵³⁶ and the failure to enact the new Law, the previous legal norms that regulated the HJC remained in effect, meaning that the Chief Justice of the FSC remains the president of the HJC.⁵³⁷ The only change that was indirectly associated with the 112/2012 Law was the fact that the FSC's Chief Justice is no longer the President of the FCC.

⁵³³ Higher Judicial Council Law (112) 2012 [Invalid]. It is interesting that the 112 Law was originally as mainly drafted by the several civil society organisations and is said to had been 'circulated for several years without the participation of the Judicial Council', the draft was sent through the Presidency Council to the Parliament. It is also reported that at that time the HJC was 'preparing a consolidated draft law to regulate the activity of the judiciary and courts as mandated under Article 89 of the Constitution', in fact the HJC is sad to have requested that the Parliament 'return the draft law so that it could be considered as part of the resource material for the more comprehensive consolidated law' for judicial authority. Mahmood, *The Judiciary in Iraq*.

⁵³⁴ IRQFSC 87/2013 [16/9/2013].

⁵³⁵ Mahmood, *The Judiciary in Iraq*.

⁵³⁶ See several articles which debate this decisions and its consequence, e.g., Haider Ala Hamoudi, 'Decision 88: Balance of Power under the Iraq Constitution' (*Jurist Forum*, 17 March 2011) <<http://jurist.org/forum/2011/03/decision-88-checks-and-balances-in-iraq.php>> accessed 21 May 2014; Oday Mahdi, 'Efforts to Reform the Federal Supreme Court' (*Nigash*, 17 February 2011) <<http://www.niqash.org/Articles/?id=2785>> accessed 21 May 2014; 'Independent Institutions in Iraq' (*The International Journal of Constitutional Law and Constitution Making*, 26 January 2011) <<http://www.icconnectblog.com/2011/01/independent-institutions-in-iraq/>> accessed 21 May 2014.

⁵³⁷ CPA/ Order 2003/35; TAL (2004), art 45.

It is important to note that the Constitution remains silent on the relation of the FSC to the HJC; both are listed alongside other institutions as components of federal judicial power.⁵³⁸ On the statute level, the FSC is ‘the highest judicial body, and constitutionally its relation with the HJC is unclear.’⁵³⁹ It is not clear whether the Court is subject to the supervision of the HJC, which theoretically implies that the FSC judges are supervised by members of the HJC, including those judges who are of a lower rank than the FSC judges. It seems that the legislature has adopted this view in the latest draft laws of the FSC and the Federal Judiciary. In any case, in practical terms there is no legal hierarchy or supervisory relation when it comes to the HJC and the FSC since these are both still chaired by one person, Mahmoud. Any dramatic changes seem unlikely to occur in the near future, especially given a recent FSC decision that gave the judicial authority a dominant role in drafting and eventually deciding on any legislation that regulates the judicial system.⁵⁴⁰

Like many other crucially important pieces of legislation, this has become part of the power-struggles in post-2003 Iraq.⁵⁴¹ Furthermore, this uncertainty and the significant influence and even control wielded by the Chief Justice over the judiciary together with the exceptional formal independence of the FSC may encourage the Court to become involved in political crises. This might also put the accountability of the Court in question, especially given that it has been involved in and decided many controversial constitutional questions central to ongoing political crises. For example, the formation of the government, the extent of the competences of the Parliament and the government and other similar matters on constitutional significance as will be discussed in Chapter Five. Thus, the FSC can be said to have become of outstanding interest to political actors in their struggles to influence the newly established post-2003 constitutional order.

⁵³⁸ Constitution of Iraq (2005), art 89: ‘The federal judicial power is comprised of the Higher Juridical Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts that are regulated in accordance with the law.’

⁵³⁹ Higher Judicial Council Law, art 1.

⁵⁴⁰ See Chapter Five (5.1.1.2), e.g., the *Second Draft and proposal Law (21/2015)* case.

⁵⁴¹ Mahmood, *The Judiciary in Iraq*.

4.2.2.2 The Impact of the De-Baathification Policy on the Independence of the Court

There is an ongoing debate about the challenges that transitional justice may pose to the rule of law and the problem of retroactivity and prosecuting individuals for offenses under the previous regime. Many are concerned that it ‘risks being perceived as political justice, threatening the normative purposes of prosecution.’⁵⁴² This thesis does not intend to engage in this debate. Instead it focuses on the implications of this for the independence of the judiciary. Among other measures that were established by the CPA to deal with former Baath Party members, a Judicial Review Committee was formed to review the eligibility for continued office of those judges who worked under the Baath regime.⁵⁴³ In 2008, the judiciary especially the FCC was given a decisive role in enforcing de-Baathification, and accordingly it now decides on the AJC’s decisions on de-Baathification.⁵⁴⁴

Given the general weakness of Iraq’s institutions and the widespread corruption, this raises serious concerns about the implications of the constitutional provisions regarding de-Baathification policies and the implementing legislation. It could be said to have threatened sitting judges and their institutions; in particular, as a court-curbing measure against activist judges who may rule against powerful officials or politicians. It could also result in potential interference in decision-making and the outcomes of highly politically charged disputes. Therefore, the transparency of the implementation of the de-Baathification Law has been controversial for the rule of law and the independence of the judiciary. This has raised the issue of politicization and the possibility of triggering political interference both in the judiciary and by it.

In an extremely controversial case that occurred just before the 2010 General Elections, the AJC disqualified five hundred electoral candidates who were running in the parliamentary election, mostly from the Sunni community, on grounds of de-Baathification. The decisions were challenged before the FCC. The Court argued that it could not review all the evidence in such a short period

⁵⁴² Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ 2044.

⁵⁴³ CPA/Order 2003/ 35.

⁵⁴⁴ Law of the National High Commission for Accountability and Justice, art 15.

before the election, and therefore allowed candidates to run for election, deferring the matter until after the election. The decision was deeply contested and divided the nation politically. Widespread protests showed the anger among people, mostly within the Shi'a community and political parties. The then Prime Minister Maliki, 'threatened to ignore the Court because it had made, what he viewed, an unconstitutional ruling'.⁵⁴⁵ Remarkably, the FCC then changed its decision and stated that it could review the evidence, and eventually approved all but twenty-six of the five hundred candidates. The events preceding this significant shift of opinion are rather more contentious. It was reported that the FCC's decision followed an informal meeting between the main parliamentary leaders (possibly including Prime Minister himself) and the Chief Justice of the FSC, who was *ex officio* president of the FCC. Some observers have argued that this meeting was decisive for the outcome of this case.⁵⁴⁶

Another highly contentious case involves the removal, albeit temporary, of the Chief Justice of the FSC, from his position.⁵⁴⁷ In February 2013, the nominally independent AJC removed Mahmoud from office on de-Baathification grounds. This occurred following investigations into the links of several judges with the Baath party, including Mahmoud. It was reported that the decision was in response to a request from an independent member of the Parliament who challenged the Chief Justice's eligibility for public office.⁵⁴⁸ As a result of his association with and position during the previous regime, the AJC charged him under the section of the de-Baathification Law relating to 'supporters of the regime.'⁵⁴⁹ It was argued that he had a major role

⁵⁴⁵ Hamoudi, 'The Will of the (Iraqi) People' 54.

⁵⁴⁶ Haider Ala Hamoudi, 'Salem Witch Trials and De-Ba'athification in Baghdad' (*Jurist Forum*, 15 March 2013) <http://jurist.org/forum/2013/03/haider-hamoudi-debaathification.php> accessed 1 December 2015.

⁵⁴⁷ Chief Justice Madhat al-Mahmoud has held high positions in both executive and judiciary in pre and post 2003 Iraq. In 1960 he was appointed as a judicial investigator in the Ministry of Justice. He became a judge in 1968 and continued to work as a judge during the previous regime. In 2003, following the regime change, he was appointed as supervisor of the Minister of justice, and then elected as deputy president of the Federal Court of Cassation before becoming its President in March 2005 till 2012. Since then he has been the Chief Justice of the FSC and the head of HJC. See Mahmood, *The Judiciary in Iraq*.

⁵⁴⁸ See Wicken, Sullivan, 'De-Ba'athification Body Ousts Iraq's Chief Justice as Protests Continue'.

⁵⁴⁹ See Law of the National High Commission for Accountability and Justice, art 6(1).

(1) in the appointment of members of the judiciary to high positions who turned out to be strong supporters of the regime, (2) that the chief justice had been promoted with some rapidity through the ranks of the judiciary (including being appointed to the Court of Cassation in an unusual process that involved the intervention of Saddam) and (3) that the chief justice was given various awards and honours during that period.⁵⁵⁰

Given his association with and role during the Baath regime, these are serious allegations and questions which could undermine not only the Chief Justice's personal career but also the legitimacy of the constitutional judiciary within which he plays such a significant role. Ironically, the application of the de-Baathification rules is taken extremely seriously when it comes to the particular legal requirements for the heads of judicial bodies.⁵⁵¹

Interestingly, the decision to remove the Chief Justice was later invalidated by the highest appellate court (FCC), and he was reinstated.⁵⁵² Some observers claim that the AJC relied on evidence which was regarded as insufficient by the FCC.⁵⁵³ Others, including Visser, argue that the move by the AJC was not controversial, especially given that the Chief Justice was a senior judge under the Baath Regime.⁵⁵⁴ Some even argued that the Chief Justice's retained his position despite de-Baathification due to his support for the Prime Minister's attempts to consolidate both his own power and that of his party.⁵⁵⁵

In general, Mahmoud's case has provoked great controversy and remains unclear. Some commentators are convinced that the crucial motivation behind the whole process was political, and the AJC's involvement, in this case, was linked to ongoing power struggles between the Prime Minister and his

⁵⁵⁰ Hamoudi, 'Salem Witch Trials and De-Ba'athification in Baghdad'.

⁵⁵¹ Reidar Visser, 'The Political Dynamics behind the Downfall of Madhat al-Mahmud, Iraq's Supreme Court Chief' (*Iraq and Gulf Analysis*, 15 February 2013) <<https://gulfanalysis.wordpress.com/>> accessed 14 October 2014.

⁵⁵² Mahmoud appealed the decision and in February 19, the Federal Cassation Court reversed his removal, arguing that there was insufficient evidence against him. 'Iraq's Latest Controversy, The Attempted Removal of Chief Justice Medhat Mahmoud' (20 February 2013) <<http://musingsoniraq.blogspot.co.uk/2013/02/iraqs-latest-controversy-attempted.html>> accessed 22 June 2015.

⁵⁵³ Hamoudi, 'Salem Witch Trials and De-Ba'athification in Baghdad'.

⁵⁵⁴ Visser, 'The Political Dynamics behind the Downfall of Madhat al-Mahmud, Iraq's Supreme Court Chief'.

⁵⁵⁵ Wicken, Sullivan, 'De-Ba'athification Body Ousts Iraq's Chief Justice as Protests Continue'.

opponents.⁵⁵⁶ Thus, in reaction to the decision of the AJC to remove the Chief Justice, the AJC's members immediately dismissed the head of the Commission. The Prime Minister's legal advisor, announcing the dismissal, argued that the Parliament had never approved his appointment as the head of AJC. The FCC, which had previously overruled the decision concerning the removal of Mahmoud, ruled that the Prime Minister is authorised to appoint a new head of the AJC. The Parliament, however, rejected the dismissal of the head of the AJC.⁵⁵⁷

In this case the de-Baathification was part of a much broader conflict and power-struggle, mainly, between opponents and supporters of the Prime Minister. This raises serious concerns about the independence of the judiciary, other rule of law principles, and transparency in the implementation of the De-Baathification Law. In other words, due to this piece of legislation, the judiciary could become central to power struggles among politicians, which threatens 'sitting judges, undermining judicial independence in future cases.'⁵⁵⁸ Importantly, it is not just the De-Baathification Law that has the potential to trigger external interference in the judiciary. There are also concerns that the presence of Islamic jurists in the composition of the FSC might lead to an influential and intrusive role for religious leaders and political actors in Court matters.

4.2.2.3 The Presence of Non-Judge Members in the Composition of the Court

In general, the institutionalization of Islamic law is not a new development. To a greater or lesser extent, it has been recognised and incorporated in most if not all constitutions of the Muslim majority countries. The most obvious and inevitable issues relate to the conflicts that involve Islamic law, and therefore deciding how they should be interpreted and resolved and which institution should be responsible.⁵⁵⁹ Iraq is one of the countries where

⁵⁵⁶ Wicken, Sullivan, 'De-Ba'athification Body Ousts Iraq's Chief Justice as Protests Continue'.

⁵⁵⁷ *ibid.*

⁵⁵⁸ Pimentel, Anderson, 'Judicial Independence in Post-Conflict Iraq' 45.

⁵⁵⁹ Contemporary constitutions of Islamic countries vary in the extent to which they recognise Islamic law and the role of jurists. Intisar Rabb has distinguished between three types of constitutions that could be developing in this regard. First is the 'dominant constitutionalisation', under which Islamic law is the supreme law of the state and Islamic jurists are directly empowered to specify and interpret the substance of Islamic law, e.g. Iran. In

Islam seems to have shifted from playing a largely symbolic role to this becoming an increasingly dominant one. In the pre-2003 Iraqi constitutions, Islam had a limited role, being recognized as the religion of the state.

The role of Islam has become more substantial in the post-2003 constitutional documents. In particular, the 2005 Constitution contains several provisions which illustrate the role which Islamic law could potentially play within the legal system. The Constitution focuses on this role, starting with Article 2, which establishes Islam as the official religion of the state, and states the necessity of future legislation conforming with the established provisions of Islam, and the potential impact on family law.⁵⁶⁰ Most significantly, in a new departure, the drafters of the Constitution included Islamic jurists in the composition of the FSC, alongside judges and legal experts. This has proved to be one of the most contested aspects of the new constitution. Certainly, both the legislature and the judiciary have a significant role in determining the influence of Islamic law in the new legal system.

The 2005 Constitution incorporates Islamic law without shifting all the interpretative power to Islamic jurists.⁵⁶¹ Scholars have extensively debated the broader issues of the constitutionalisation of religion and particularly of Islam in various contexts. Many have discussed the so-called ‘repugnancy clauses’⁵⁶² in Iraq’s post-2003 constitutional developments.⁵⁶³ Some have considered that these provisions pervade the constitutional text. Others argue that they have

‘delegated constitutionalisation’ Islamic law is incorporated in the constitution and jurists sitting in a *sharia* court interpret and articulate Islamic law, this is the case in Gulf Arabic legal system. Under ‘coordinate model incorporates and treat Islamic law equal as principles of democracy and other ‘liberal norms’, as it in the 2005 Iraqi constitution. See Intisar A Rabb, ‘We the Jurists: Islamic Constitutionalism in Iraq’ (2008) 10(3) *University of Pennsylvania Journal of Constitutional Law* 531. See also Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford University Press 2009) chapter 4; Dawood I Ahmed, Tom Ginsburg, ‘Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions’ (2014) 54(3) *Virginia Journal of International Law* 616.

⁵⁶⁰ Constitution of Iraq (2005), art 41: ‘Iraqis are free in their commitment to their personal status according to their religion, sect or choices, and all this shall be regulated by law’.

⁵⁶¹ Rabb, ‘We the Jurists: Islamic Constitutionalism in Iraq’ 551.

⁵⁶² See Daniel J Hulsebosch, ‘The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence’ (2003) 21(3) *Law and History Review* 477.

⁵⁶³ Interestingly, some commentators have argued that Iraqi scholars have given little attention to the Article 2 of the Constitution and its potential impact on the legal and political system of the country. See Hamoudi, ‘Ornamental Repugnancy’ 692.

little if any substantive impact, viewing them as ‘an assertion of *identity*, primarily of the Islamic variety rather than a phrase of *legal substance*’.⁵⁶⁴

In practice, this issue is more challenging. Essentially, the controversy rests on whether interpreting and deciding the consistency of legislation with Islamic law should be the exclusive domain of the Islamic jurist members of the FSC or should involve the entire Court. Furthermore, determining the substance of Islamic law is more complicated due to the historical development, internal diversity, and binding nature of its commands.⁵⁶⁵ Thus, it is more problematic to understand and establish ‘on whom they (Islamic jurists) must rely for determination on questions of what Islamic principles require, the courts may well be open to outside influences, seriously compromising their independence.’⁵⁶⁶ For example, assuming that the interpretation of Article 2 itself is of substantial impact, it has been argued that ‘if Article 2 is interpreted to require judicial fealty to *fatwas*, then anyone authorized to issue a *fatwa* would have direct power to dictate outcomes in judicial cases.’⁵⁶⁷ This is crucial given the diversity of Islamic law and its contested interpretations depending on different sects and schools of Islamic jurisprudence.

Scholars, commentators, policy makers and judges themselves have different perspectives on the potential role of non-judge members of the Court, namely Islamic jurists, and the extent to which they should participate in decision-making processes within the Court. Some have regarded their role to be consultative or advisory, whereas others called for a more inclusive role.⁵⁶⁸ Firstly, the advisory role seems to have some basis in a broader perspective on Islamic governance and democracy.⁵⁶⁹ It is suggested that ‘jurists can or should play a consultative role in defining the nature and content of Islamic law for a

⁵⁶⁴ Hamoudi, ‘Ornamental Repugnancy’ 692 [original emphasis].

⁵⁶⁵ Rabb, ‘We the Jurists: Islamic Constitutionalism in Iraq’ 541.

⁵⁶⁶ Pimentel, Anderson, ‘Judicial Independence in Post-Conflict Iraq’ 49.

⁵⁶⁷ *ibid.*

⁵⁶⁸ See Ali Aisa al-Ya’qobi, ‘al-Mahkama al-Ulya a- Iraqiya: Takvinaha va Tabia’t al-Reqaba allati Tomaresaha’ [The Iraqi Federal Supreme Court: its Composition and Nature of its Review, A Constitutional Perspective] *The Judicial and Legislation Journal* <http://www.tqmag.net/body.asp?field=news_arabic&id=1876&page_namper=p3> accessed 16 May 2014.

⁵⁶⁹ See Khaled Abou El Fadl, ‘Islam and the Challenge of Democratic Commitment’ (2003) 27(4) *Fordham International Law Journal* 71.

democratic Islamic constitutional regime.⁵⁷⁰ Applying such arguments to the FSC, jurists should have an advisory role. Those who advocate this view also refer to the *Sharia* Courts Law (1923), a piece of legislation no longer in force. According to this law, in cases concerning Islamic jurisprudence, a *sharia* court would seek clarification and statement from Islamic jurists on *sharia* rules that apply to a particular issue; although their statement is then included as part of the decision, they were not considered binding for the court.⁵⁷¹

The initial draft law of the FSC, which proposed an advisory role for the non-judge members of the Court, also supports this view.⁵⁷² However, one should consider the extent of the differences which exist between *sharia* courts and the FSC. *Sharia* courts were empowered to deal with specific, individual claims that involve *Sharia* law, namely family law; whereas the constitutional judiciary, the FSC, is entrusted with significant powers, deciding on broad constitutional issues of substantial impact on the whole constitutional and political system.

Second, it is suggested that the non-judge members enjoy the full membership of the FSC. From a comparative perspective, the membership of the constitutional judiciary is not limited to judges; this is because its task is more than of a purely judicial and legal nature. Thus, such courts take into consideration political, social, economic and international factors, and therefore can determine, or at least significantly contribute to policy-making.⁵⁷³ Thus, the drafters of the 2005 Constitution who supported the existence of Islamic jurists within the composition of the court were aware of this role. Arguably, Article 2 of the Constitution necessitates the existence of Islamic jurists in the Court, to review legislation which may contradict Islamic law.

⁵⁷⁰ Rabb, 'We the Jurists: Islamic Constitutionalism in Iraq' 562.

⁵⁷¹ See Maki Naji, *al- Mahkama al-Itihadiya al-Oliya fi al-Iraq: Derasa Tatbiqiya fi Ixtisas al-Mahkama va al- Reqaba alati Tomaresaha Mo'azeza bi al-Ahkam va al- Qararat*, [The Iraqi Federal Supreme Court: An Empirical Study of the Jurisdiction of the Court and the Review that it Exercise Supported by the Decisions and Rulings] (dar al-ziyaah, Najaf al-Ashraf 2011) 128.

⁵⁷² The initial draft law of the FSC included an advisory board of four, [two legal scholars and two Islamic jurists], with no power to participate in issuing judgment. The draft implies a modest role for Islamic judges. See the Draft Federal Supreme Court Law of 2007 [Iraq], (trs, *Global Just Project*, Iraq) < <http://gjpi.org/library/primary/statutes> > accessed 16 January 2014.

⁵⁷³ al-Ya'qobi, 'The Iraqi Federal Supreme Court: its Composition and Nature of its Review'.

A third view, however, might be that the role of the non-judge members of the FSC should vary according to the case. In other words, the nature of the court's jurisdiction should determine the relevance and the extent of participation of non-judge members. This classification of cases is problematic and seems impractical, as it is unclear whether the entire court should decide and determine the nature of these classifications or only certain members. On the other hand, supporters of this view may wish to differentiate between altering the jurisdiction of the FSC and resolving disputes. Thus, the adjudicatory role of the FSC including resolving disputes is exclusive to members of the Court who are judges, so participation in adjudication by non-judges would contradict this fundamental constitutional principle. Other jurisdictions including the constitutional review of legislation and constitutional interpretation can be exercised by Islamic jurists and legal experts alongside judges.⁵⁷⁴ The debate here hinges on the independence of the judiciary, which is left solely to the implementing legislation regarding the new FSC, and whether to grant adjudication powers to non-judges.

It should be noted that the Constitution establishes the presence of Islamic jurists in the FSC which in itself is not in contradiction with the rule of law. However, it can be seen to pose a challenge to the rule of law, especially since the absence of the implementing legislation has left many aspects of the constitutional judiciary uncertain. In other words, the general constitutional rules regarding the FSC are seen to run counter to the rule of law in terms of clarity, stability, predictability and guiding the enactment of a particular law.⁵⁷⁵ Equally important, many are concerned that allowing Islamic jurists to decide on or veto decisions concerning the constitutional review of legislation would facilitate external interference from non-state actors, namely powerful religious institutions. This argument was evident in the constitutional debates during the constitution writing process in the immediate of post-2003. For example, religious parties, namely those supported by Shi'a Muslims, favoured 'a state whose institutions and actors would be constrained by non-state forces, the

⁵⁷⁴ Salim Razwan al-Mosavi, 'al-Sulta al-Taqdiriyya lil-Moshareh al-Iraqi: Mashroh Qanon al-Mahkama al-Ethadiyya al-Olya Nmozajan [The Discretionary Power of Iraqi Legislature: The Federal Supreme Court Law as an Example]' < <http://www.iraqja.iq/index.php> > accessed 31 May 2015.

⁵⁷⁵ Raz, *The Authority of Law* 222.

Najaf jurists, when state officers sought to extend themselves beyond proper Islamic boundaries.⁵⁷⁶ The Najaf-based Shi'ite clerical institution, the *Marjaiyya*, is popular and highly respected, and has played a crucial role in political and constitutional developments in post-2003 Iraq.⁵⁷⁷ Therefore, courts including the FSC are seen to have a mandate

to ensure that the legal machinery of enforcing the law should not deprive it of its ability to guide through distorted enforcement and that it shall be capable of supervising conformity to the rule of law and provide effective remedies in cases of deviation from it.⁵⁷⁸

Furthermore, ensuring that the Court is independent should 'prevent the political interests of the legislative and executive branches from being directly transferred to the court, which would endanger the court's adjudication as adjudication.'⁵⁷⁹ This might also provoke ongoing constitutional crises and potentially result in 'the dominance of politics over law'.⁵⁸⁰

The FSC has been introduced into a troubling political and legal context with the view that its broad constitutional review and other powers should ensure the basics tenets of the rule of law. Some may argue that the flawed experience of the rule of law coupled with a difficult and violent political context has raised serious concerns over the legitimacy of the FSC and there is a growing sense that the executive branch is influencing the FSC. Many have expressed similar concerns about potential religious influence and all of these together could severely undermine the rule of law and the independence of the Court, resulting in 'extra-constitutional' norms dominating the legal system.

The discussion so far has emphasised the importance of the FSC's role and the challenges which it faces. Of equal importance is the degree of accessibility of the Court and of compliance with its decisions.

⁵⁷⁶ Hamoudi, *Negotiating in Civil Conflict* 94.

⁵⁷⁷ For a brief and general view on the Najaf's position in post-2003 Iraq. See Hamoudi, 'Ornamental Repugnancy' 696-697.

⁵⁷⁸ Raz, *The Authority of Law* 218-219.

⁵⁷⁹ Hein, 'Constitutional Conflicts between Politics and Law in Transition societies' 17.

⁵⁸⁰ *ibid.*

4.2.3 Standing before the FSC and Compliance with its Decisions

Previously, it was observed that the rule of law underpins the importance of the judiciary, thus ‘given the central position of the courts in ensuring the rule of law [principles] it is obvious that their accessibility is of paramount important.’⁵⁸¹ Cases or controversies normally reach the FSC in different ways depending on the jurisdiction which it exercises. The ordinary courts play a central role in instigating and bringing cases that raise questions of constitutionality before the FSC. In general, an ordinary court itself or any party to the litigation which believes that the legal rule which is due to be applied to a case is unconstitutional, has the right to challenge the constitutionality of that particular rule. The ordinary court must respond to the request and defer questions of constitutionality to the FSC, thereby obliging the appellant to file a lawsuit. The decision to refuse a request can be appealed before the FSC itself.⁵⁸² In either instance, the ordinary court suspends proceedings until the FSC decides on the issue of constitutionality.⁵⁸³

Accessing the FSC through concrete review has two implications. On the one hand, it provides assurances about the seriousness of the claim to prevent those that are intended solely to delay the resolution of a particular case. On the other hand, it might also limit the powers of the constitutional judiciary in controlling the constitutionality of legislation. It could be argued, in fact, that the ordinary court exercises the FSC’s review power in deciding that there is no contradiction between the legal norm and the Constitution. An immediate referral of a question of constitutionality by the ordinary court may result in the FSC exercising its broader constitutional review powers. However, an appellant may intend to delay the resolution of a particular case, knowing that this case will stay on hold until the FSC makes its decision. Indeed, the possibility of appealing the decision of the ordinary courts, or refusing to grant a request, gives the FSC discretionary powers regarding the extent of its accessibility and judicial review. Finally, the content and legal issues addressed in the constitutional case, that are directly referred from the ordinary court, depend on

⁵⁸¹ Raz, *The Authority of Law* 218.

⁵⁸² Bylaws of the Federal Supreme Court 2005 (1) (Bylaws of the FSC), art 4.

⁵⁸³ See Civil Actions Law (83) 1969, art 83 (1); Bylaws of the FSC, arts 3,4.

the exact constitutional matter or question as specified in the referral decision. Thus, the FSC has emphasized that the referral decision must explicitly define the contested legal provision that raises the question of constitutionality, and the constitutional provision which it is claimed to contradict, otherwise it will be dismissed.⁵⁸⁴

Furthermore, the Constitution guarantees direct access to the FSC without requiring any concrete case. Under the 2005 Constitution, the FSC has jurisdiction to settle matters that arise from the application of legislation and other acts of the federal authorities for the exercise of which the law of the FSC ‘shall guarantee the right of direct appeal to the court to the Council of Ministers, those concerned individuals, and others.’⁵⁸⁵ However, by substituting ‘formal institutions’ [as stated in TAL (2004)] with ‘the Council of Ministers,’ the Constitution might be understood to have limited the extent of direct access to only one institution. In subsequent wording, the use of the word ‘others’ guarantees wider access to other formal or informal institutions. Hence, a formal institution can challenge the constitutionality of legislation provided that there has been an actual ongoing dispute with another formal or informal institution.⁵⁸⁶ The application must also contain the contested statutory provisions, which are claimed to be unconstitutional, and the constitutional provision/s claimed to have been violated. Furthermore, it needs to include a written approval letter from the concerned minister or the head of the body that is not related to any ministry.⁵⁸⁷

On the other hand, the 2005 Constitution explicitly stipulates that the FSC has jurisdiction to provide abstract constitutional interpretation. Given that the current Law of the FSC, enacted before the ratification of the Constitution, does not have such jurisdiction, the Court itself has developed standing rules for initiating abstract constitutional interpretation. It has limited standing to ‘the President of the Republic, the Parliament, the Council of Ministers and

⁵⁸⁴ See FSC’s decisions, exercising its power regarding the direct referral from the ordinary courts, *e.g.* IRQFSC 8 /2006; IRQFSC 9/2006; IRQFSC 10/2006, issued 29/5/2006.

⁵⁸⁵ Constitution of Iraq (2005), art 93 (3).

⁵⁸⁶ In the very first application the Independent High Electoral Commission filed a challenge against the Prime Minister before the FSC claiming the unconstitutionality of CPA/Order 14 of 2005 which cancelled the suspension of Article 136 (2) of Criminal Procedural Law (23) 1971 with Article 24 (4) of TAL (2004). See IRQFSC 1/2006 [9/2/2006].

⁵⁸⁷ Bylaws of the FSC, arts 5,6.

ministers, and has explicitly excluded civil society organisations, political coalitions, and parties from initiating such petitions.⁵⁸⁸ The FSC does not explicitly require that there should be an actual dispute that involves interpreting a contested constitutional provision. In practice, the Court has been noticeably inconsistent in this regard. On occasion, it has dismissed applications for abstract constitutional interpretation on the grounds that there is a dispute between two parties involving the contested constitutional provision and has therefore obliged them to initiate a lawsuit.⁵⁸⁹ There are also examples involving ongoing disputes between two parties for which the Court provided an interpretation without requiring a lawsuit.

In addition to that, the Constitution guarantees that any concerned individual, natural or legal person, can file a constitutional complaint, provided that he/she suffered an actual injury due to the challenged law, that this harm can be undone by overruling the law, and that the injured individual has not partially benefited from the contested law. Thus, harm that is potential, abstract or unknown is not accepted. Another important procedural requirement is that the application is signed by a lawyer or a legal representative from the concerned institution.⁵⁹⁰ The Court seemed to have detailed the ‘injury-in-fact’ condition for individual constitutional complaints and narrowed the possibility of litigation for the public interest, as detailed in the final part of this chapter.

Equally crucial, an accessible, independent and functioning court has no means or power of its own that serves to enforce its decisions; they are only meaningful when enforced. Decisions of the constitutional judiciaries are often defined as binding on all authorities and final; they cannot be appealed or overruled save through constitutional amendments. This has led some to argue that binding decisions of the constitutional judiciary, especially in emerging democracies, might trigger ‘more constitutional harm than constitutional benefit, particularly when governmental non-compliance provokes a constitutional or political crisis that the fragile, and emergent constitutional

⁵⁸⁸ IRQFSC 34/2011 [5/5/2011].

⁵⁸⁹ See Chapter Five (5.2.3.2): the *KRG Oil Contracts* (74/2012) case and the *KRG Oil Export* (59/2014) case.

⁵⁹⁰ See Bylaws of the FSC, art 1 (1).

order is not yet strong enough to weather.⁵⁹¹ Others could maintain that in a post-conflict state, similar to that of Iraq, a ‘partial deviation from strict adherence to democratic norms [and the rule of law] might be justified based on certain conditions that often prevail in transitional societies.’⁵⁹² Principally, it is critical for the rule of law that political branches adhere to court judgments once the decision has been made to seek its rulings.

The FSC’s judges work largely by consensus in most cases and dissents are not issued; rulings and interpretations are final and binding on all, including the government, and cannot be overridden. The Court explicitly expresses this in the final part of its judgments.⁵⁹³ The implications of this, however, are not always immediate. On the one hand, there is a constitutional exception to the general rule of the binding and final force of the Court’s decision. The Constitution empowers Parliament to discharge the President of the Republic by an absolute majority in the case of being convicted by the FSC for ‘perjury of the constitutional oath, violating the Constitution or high treason.’⁵⁹⁴ On the other hand, the implementation of FSC decisions, and the impact of the annulment of unconstitutional legislation require parliamentary action. In principle, when the court declares a contested law unconstitutional, it directs the legislature to replace its unconstitutional provisions with others that comply with the Constitution. Thus, the legislature decides when and how to introduce the required amendments. For example, the FSC states that; ‘[...] therefore, it requires from the legislature, according to its competence, to annul this paragraph, and replace it with a new paragraph which [is] in conformity with [...] the constitution’.⁵⁹⁵ This might suggest that the binding force and effect of

⁵⁹¹ Michael William Dawdle, ‘Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China’ (2002) 35(1) *New York University Journal of International Law and Politics* 28.

⁵⁹² Emily Berman, ‘Democratizing the Media’ (2008) 35(4) *Florida State University Law Review* 834.

⁵⁹³ FSC decisions almost invariably end by insisting that ‘the court issued this binding and final decision according to art 94 of Constitution of Iraq (2005)’.

⁵⁹⁴ Constitution of Iraq (2005), art 61(6).

⁵⁹⁵ IRQFSC 4/2007 [2/7/2007].

FSC decisions is subject to interference on the part of the legislature, which often happens over time.⁵⁹⁶

Furthermore, enforcing FSC's decisions might also become problematic due to the ambiguity of the judgment itself. Some might consider it essential for a self-restrained court to avoid deciding on the substance of certain contested issues by structuring its conclusions in such a way that the outcomes do not favour 'one political actor over another.' Importantly, judges might still issue clear judgments by articulating the conclusion in a manner that does not favour a particular party expressly or implicitly.⁵⁹⁷ Constitutional interpretation is needed when the text of the Constitution is unclear; but an unclear binding interpretation will make the implementation of the Constitution even more challenging. The FSC is often asked formally to explain its ambiguous decisions. In principle, the FSC denies it has jurisdiction to explain its previous rulings, no matter how ambiguous they are. In a somewhat controversial decision, when asked to explain a previous ambiguous ruling, the FSC denied that it had jurisdiction over this matter, arguing that it was within the jurisdiction of the State Shura Council (Shura Council), if asked, to explain judicial judgments.⁵⁹⁸ The Shura Council was originally part of the Ministry of Justice.⁵⁹⁹ Under the Iraqi legal system, when a judgment is considered unclear, the party to the dispute may ask the court or the Shura Council to explain the judgment.⁶⁰⁰ It is important to note that the Law of the Shura Council does not establish such jurisdiction. It provides, when asked, legal advice to governmental institutions, and also to explain legal judgments [although not court rulings] at the request of the interested ministry or bodies not connected to the ministry.⁶⁰¹

This conclusion was problematic and if exercised would undermine the binding effect and final force of the FSC decisions on all authorities. Explaining

⁵⁹⁶ Ali Hadi Atiyah al-Hilali, '*al- Nazariya al-A'mah fi Tafsir al-Dostur wa Tatbiqat al-Mahkama al- Etihadiya al-Uliya* [The General Theory in Interpretation of the Constitution and the Approaches of the Federal Supreme Court]' (Zein al-Hqoqiya 2011) 227.

⁵⁹⁷ Trumbull IV, Martin, 'Elections and Government Formation in Iraq' 380.

⁵⁹⁸ See IRQFSC 57 /2010 [16/8/2010]. Interestingly, the Court cited Article 6 of State Shura Council Law (65) 1979, as the basis for the State Shura Council's jurisdiction in explaining court decisions.

⁵⁹⁹ State Shura Council Law (65) 1979, art 1.

⁶⁰⁰ The Enforcement Law 1980/45, art 10.

⁶⁰¹ State Shura Council Law, art 6 (5).

any unclear judgments by the FSC also risks raising a further challenge, namely, that the Shura Council's explanation may contradict the FSC's ruling, or may expand or narrow the scope of its applicability. To date, there have been no reported cases of the Shura Council providing explanations for ambiguous judgments issued by the FSC. Under Article 101 of the Constitution, it is 'specialized in functions of the administrative judiciary, issuing opinions, drafting, and representing the State and various public commissions before the courts except those exempted by law.' Thus, it has an important role in providing legal advice to ministers on draft legislation.⁶⁰² Therefore, due to the controversy of this issues and the continuing demand to clarify its ambiguous decisions, the draft law of the FSC adds a new jurisdictional power, whereby applicants can formally pursue an interpretation of any unclear and ambiguous rulings issued by the FSC.⁶⁰³

Insofar as judicialisation concerns the fragility and ineffectiveness of the government branches, the power-struggles and the nature of the 2005 Constitution itself suggest there would be an increase in constitutional questions and disputes and in the Court's involvement in contested cases. The current rules of standing also cover the range of actors that can bring cases to the Court. However, a number of factors, regarding finance, skills, and information as well as the complexity of the constitutional issue, may limit individuals' ability to initiate and sustain constitutional litigation. Importantly, though, the broader implications of constitutional questions, beyond interested persons, might also encourage others to litigate in the public interest or to provide a support structure in this regard. This highlights the importance of discussing the prospects of a support structure network of this type emerging in post-2003 Iraq and the extent of the role it might play in addition to the potential implications that this might have for judicialisation and the rule of law.

⁶⁰² Sadiq Mohammad Ali Al-Husseini, 'Consultation in Iraqi Shura Council: A Comparative stay' (Ahl Al-bait University)

<<http://www.ahlulbaitonline.com/karbala/New/html/research/research.php?ID=101#sthash.BNUYHtSh.dpuf>> accessed 20 December 2015.

⁶⁰³ Draft Law of the Federal Supreme Court (May 2015), art 5 (11).

4.3 An Emerging Support Structure: Potential for Public Interest Litigation before the FSC

In light of the general discussion in Chapter Three, this section examines whether the existing legal and institutional frameworks in Iraq can serve to develop a legal support structure. Its main focus is on public interest litigation and the role of governmental and non-governmental institutions towards establishing and developing support structures for constitutional litigation in post-2003 Iraq.

4.3.1 The Legal and Institutional Framework for Developing Public Interest Litigation

The core idea behind public interest litigation is that ‘civil lawsuits are being used in a new way to benefit the condition of groups within society or society as a whole’.⁶⁰⁴ In essence, it ‘aggregate[s] the claims of individuals or resolve[s] contested questions in ways that affect broad numbers of individuals.’⁶⁰⁵ Thus, it is argued that public interest litigation may play a twofold role. First, the ‘law-based advocacy intended to secure court rulings to clarify, expand, or enforce the rights for persons beyond the individuals named in the case at hand’.⁶⁰⁶ It relates to cases that involve the interpretative power of the court regarding constitutional provisions or legislation with wide-ranging implications.⁶⁰⁷ Second, it ‘can help new constitutional principles to take root, as well as increase public awareness of human rights and embolden those with legal claims to come forward’,⁶⁰⁸ serving to improve the rule of law.⁶⁰⁹

⁶⁰⁴ Lesley K McAllister, ‘Revisiting a ‘Promising Institution’’: Public Law Litigation in the Civil Law World’ (2008) 24(3) *Georgia State University Law Review* 696.

⁶⁰⁵ Helen Hershkoff, Hershkoff H, ‘Public Interest Litigation: Selected Issues and Examples’ (Word Bank, working papers, 1 June 2004) <<http://inprol.org/resource/9921/public-interest-litigation-selected-issues-and-examples>> accessed 9 November 2014

⁶⁰⁶ James Goldston, ‘Public Interest Litigation in Central and Eastern Europe, Roots, Prospects, and Challenges’ (2006) 28(2) *Human Rights Quarterly* 492-527.

⁶⁰⁷ Peter A Appel, ‘Intervention in Public Law Litigation: The Environmental Paradigm’ (2000) 78(1) *Washington University Law Quarterly* 215-311.

⁶⁰⁸ H Hershkoff, A McCutcheon, ‘Public Interest Litigation: An International Perspective’ in Mary E MacClymont and Stephen Golub (eds), *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees around the World* (Ford Foundation 2000) 285.

⁶⁰⁹ Goldston, ‘Public Interest Litigation in Central and Eastern Europe’ 492.

Post-2003 Iraq's constitutional development could be said to have increased the prospects of a relatively active support structure. The Constitution guarantees an expanded bill of rights that consists of civil, political, economic, social and cultural rights and freedoms, and recognises those created and protected by Iraq's international obligations.⁶¹⁰ On the other hand, there are numerous examples of rules, specifically those that were issued by the Baath Revolutionary Command Council (RCC), and a large number of CPA/Orders that have been judged by many to have infringed the Constitution and the basis of the rule of law. It should be noticed that under Article 130 of the Constitution, pre-transitional laws remain in force until they are annulled or amended to conform to the Constitution. One case will suffice for the purposes of the argument here. The Constitution explicitly prohibits unlawful detention,⁶¹¹ emphasising that, '[N]o person may be kept in custody or investigated except according to a judicial decision.'⁶¹² In practice, for a long period these provisions were infringed by pre-2003 legal rules that entitled the Interior Minister,⁶¹³ directorate generals,⁶¹⁴ or the governor of Bagdad,⁶¹⁵ to detain offenders, bypassing the judiciary.

Amending, annulling or enacting new legislation to replace the supposedly unconstitutional laws is the principal role of the legislature and it has been seen to be struggling to do so. Litigation that challenges the constitutionality of such legal rules is another crucial means available when other possible methods are absent or weak. However, this method is also limited as the FSC only has the power to annul legal norms when there is a successful application that directly challenges the constitutionality of the contested laws. Importantly, the Constitution entitles any concerned person, institution or court of ordinary jurisdiction to challenge the constitutionality of such legislation.⁶¹⁶

⁶¹⁰ Constitution of Iraq (2005), arts 8, 14-47.

⁶¹¹ *ibid*, art 19 (12) (a).

⁶¹² *ibid*, art 37 (1) (b).

⁶¹³ *See e.g.*, Revolutionary Council, Legislative Decree (27) 1992/2/4, the decree was repealed by Law 2012/66.

⁶¹⁴ Public Customs Law, art 237 (2), (1).

⁶¹⁵ Revolutionary Council, Legislative Decree (55) 1992/3/28.

⁶¹⁶ Constitution of Iraq (2005), art 93(3): '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.'

In practice, their competence to initiate and maintain the litigation process is limited due to necessary resources and expertise. It could be said that any annulment of these unconstitutional rules would protect broader public interests. Therefore, litigating for public interest might become of relevance and interest to a larger group of individuals, governmental and non-governmental institutions.

There are governmental institutions which can play a substantial role in defending and litigating for the public interest. An important and relatively innovative institution in post-2003 Iraq is the ‘Independent High Commission for Human Rights’,⁶¹⁷ and the Ministry of Human Rights. These two institutions are principally in charge of addressing human rights violations, promoting and protecting human rights against state power. Despite several instances whereby the Ministry of Human Rights could have denounced rights violations by challenging the government’s abuses of powers in court, it has played a far less effective role in this regard. For example, there was a dispute between the Directorate General of Customs and the Ministry of Human Rights concerning the Directorate’s decision to detain a number of offenders, bypassing the judiciary. The legal issue was the constitutionality of the Public Customs Law which authorised such decisions.⁶¹⁸ Clearly, the contested law contradicts the constitutional provision which prohibits any detention and investigation ‘except according to a judicial decision.’⁶¹⁹ In the absence of any action taken by the Ministry challenging the constitutionality of this legislation, the issue remained as it was, until an investigation court challenged the constitutionality of the Customs Law during hearings that involved the cases of these detainees. Although the FSC later annulled the contested law,⁶²⁰ if the Ministry had originally challenged the Law, it could have defended and protected the fundamental rights of detainees, in this case, and therefore the broader public interest.

⁶¹⁷ Constitution of Iraq (2005), art 102.

⁶¹⁸ Public Customs Law (23) 1955.

⁶¹⁹ Constitution of Iraq (2005), art 37 (19) (b).

⁶²⁰ IRQFSC 2/2011 [22/2/2011]. The Investigation Court of *al-Ratba* requested the FSC to annul this procedure because the contested provision was inconsistent with the Iraqi Constitution.

Another important governmental institution is the Public Prosecution Department, which is part of the federal judiciary.⁶²¹ It can play an essential role in defending public interests and the rights of certain vulnerable groups in civil lawsuits,⁶²² and more substantially in criminal lawsuits.⁶²³ Under the Public Prosecution Law, one of the appealing ‘purpose clauses’ is that the public prosecutor should protect state security and institutions, the interests of the people, public wealth, the federal democratic structure and principles in post-2003 Iraq.⁶²⁴ These somewhat general principal objectives may serve to develop an active role for Prosecutor General in defending public interests.

In one of the few cases in which the Prosecutor General was seen to have exercised his powers defending ‘the order of the state’, he submitted a letter to Parliament calling for President Jalal Talabani to be replaced due to his prolonged absence as a result of health problems. Many argued that this matter might also have been brought before the Court. This is perhaps a constitutional issue but the relevant constitutional and legal rules are unclear and involve interpretation of Article 72 of the Constitution. This stipulates that ‘[I]n case the position of the President of the Republic becomes vacant for any reason, a new President shall be elected to complete the remaining period of the President’s term.’⁶²⁵ This move was open to debate, but implies that the General Prosecutor may have an important role to play in a broader context. For example, there are calls for an active role for the General Prosecutor, in exercising his power to protect public wealth by initiating lawsuits against corrupt officials and politicians and bringing them to justice.

Other than these governmental institutions, the legal-oriented civil society organisations [CSOs] may play a crucial role in addressing and monitoring government violations of human rights and its broader abuses of power.

⁶²¹ Constitution of Iraq (2005), art 89: ‘The federal judicial power is comprised of the Higher Juridical Council [...] the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts that are regulated in accordance with the law’.

⁶²² Public Prosecution Law (10) 2006- Amendment to Law (15) 1979, arts 13, 14.

⁶²³ *ibid*, arts 2, 3.

⁶²⁴ *See ibid* (Justifying Reasons).

⁶²⁵ Although the President had been treated in hospital in Germany since 20 December 2012, after suffering a stroke, he never resumed his presidential duties nor was replaced. The letter is available on the website of the Iraqi Higher Judicial Council <<http://www.iraqja.iq/mgles.php>> accessed 13 May 2013.

4.3.2 Civil Society Organizations: The Potential for Developing Support Structures

The 2005 Constitution recognises and actually protects both the existence and work of civil society organisations and other interest groups.⁶²⁶ These are regulated through a series of institutional arrangements including the state Ministry CSOs, the CSOs Committee in Parliament, and a General Directorate of CSOs in the Prime Minister's office, which is in charge of supervising CSOs affairs.⁶²⁷ Principally, these organisations and groups are supposed to address and document human rights violations or power abuses conducted by state authorities. One might also see these relations with the government as being controversial since they could affect the effectiveness of their role in challenging government abuses of powers.

CSOs or public interest groups might see litigating in the public interest or supporting others' cases as being more effective than engaging in prolonged social campaigns.⁶²⁸ Given serious concerns over the functioning of the Iraqi legislature and its capability to pass or amend legislation, it might be suggested that these organisations can systematically challenge repressive and unconstitutional rules in the FSC. For example, a key condition for valid individual constitutional complains is that the lawsuit, or petition, must be filed by a lawyer.⁶²⁹ In several instances, the FSC has dismissed cases because the application was not signed and filed by such a lawyer.⁶³⁰ The least that support structure can contribute here is providing lawyers that assist individuals in exercising their right to initiate constitutional complains.

⁶²⁶ Constitution of Iraq (2005), art: [T]he State shall seek to strengthen the role of civil society institutions and to support, develop and preserve their independence in a way that is consistent with peaceful means to achieve their legitimate goals, and this shall be regulated by law.'

⁶²⁷ Post-2003, the NGOs' work has been regulated by CPA/Order 45: Non-Governmental Organizations [Amended per Order 61] (23 February 2004) which provides principles and standards which govern these organisations. In April 2010 a new law was passed by the parliament to replace the previous order and to regulate the creation and the operation of the NGOs in Iraq.

⁶²⁸ Surya Deva, 'Public Interest Litigation in India: A Critical Review', [Reprinted] (2009) 1 *Civil Justice Quarterly Issue* 24 <<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan047384.pdf>> accessed 7 May 2014.

⁶²⁹ Bylaws of the FSC, art 1(1).

⁶³⁰ IRQFSC 12/2009 [2/1/ 2009].

Although there is barely any clear legal provision providing for the explicit right or role of civil society organisations to initiate public interest litigation, the general constitutional legal principles, and judicial precedents suggest such a role. One might consider the constitutional provisions concerning the FSC's jurisdiction that guarantee the right of direct appeal to the Court for the Council of Ministers, those concerned individuals, and *others*.⁶³¹ The word 'others' here suggests a wider access for other institutions, including civil society organisations. The FSC could interpret the 'others' either to allow or to limit standing for these organisations that are litigating in the public interest. To this point, the record of public interest litigation in the FSC is far from impressive, but there is evidence that this can be enhanced and broadened. Most importantly, the few examples of public interest litigation that have been brought before the Court are considered landmark cases in the FSC's jurisprudence, the detail of which will be discussed in the next chapter.⁶³² It might, however, be of relevance to outline briefly the two leading cases.

The very first example related to the post-2010 election crisis and *Open Session of the Parliament* (55/2010) ruling.⁶³³ The Court declared a decision issued by the acting speaker of the Parliament to consider the first session of the Parliament open as unconstitutional.⁶³⁴ The ruling is important as a civil society organisation challenged the unconstitutionality of this decision of Parliament and the delay in forming the new government on the ground that it harmed the public interests of the people. Civil society organisations widely welcomed the decision and considered it to be an example of subjecting officials to the rule of law. The second example which was indirectly supported by civil society organisations is one of those key decisions of the FSC. In the *MPs' Allowance* (79/2013) case the Court held as unconstitutional the controversial Law concerning MPs' Pensions.⁶³⁵ The decision came as protests had spread all over the country demanding basic services fuelled by anger over the corruption of

⁶³¹ Constitution of Iraq (2005), art 93 (3).

⁶³² See Chapter Five (5.3.1).

⁶³³ The parliament elected in March 2010 convened once in June, and the speaker left the session open indefinitely but unattended, meanwhile politicians were negotiating to form the government. This led to extensive debates and criticisms concerning the procedure, the open session, taken by the Parliament. See Chapter Five (5.3.3).

⁶³⁴ IRQFSC 55/2010 [24/10/2010].

⁶³⁵ IRQFSC 79/2013 [23/10/2013]; See Chapter Five (5.3.3).

state officials. One of the protestors' most recurrent demands was to cut the high salaries of MPs. Civil society organisations played a crucial role in supporting these demands, and the National Union of Lawyers went further, challenging the constitutionality of this particular piece of legislation on the ground that this was in the public interest of the Iraqi people.⁶³⁶

Moreover, civil society organisations can be of further significance in providing a support structure for constitutional litigation, particularly in respect to those who have limited access to justice. One of the means by which such support can be provided is by third party intervention. Indeed, the Iraqi legal system recognises third party intervention: '[A]ny person of interest may request to be engaged in the suit as a third party, whether to join one of the suit's litigants or to independently apply for a judgement in his favour.'⁶³⁷ Thus, third party intervention is possible on the request of an outsider; upon the request of a party to the litigation; or on the action of the court itself.⁶³⁸ An intervenor becomes a party to the litigation after he is granted leave to intervene with respect to the remedy and can participate actively and fully in the litigation.⁶³⁹

In one of the very few instances, the Iraqi Union of Journalists entered as a third party in litigation, which had itself been initiated by a group of journalists concerned about the impact of a newly enacted law upon their work. In this instance the Court upheld the law.⁶⁴⁰ This case is important in that it was initiated by a group that sought to defend the public interest and, most importantly, a CSO entered the case as a third-party intervenor. Allowing intervention by non-parties in ongoing litigation, which was originally established to prevent contradictory rulings regarding similar cases with the same interests, might also serve as a means of developing an essential basis for public interest litigation.

In principle, while the Court is receptive to third-party intervention, the law limits this intervention, requiring applicants to demonstrate that they have constitutional standing to sue; it is required that the engagement of third party

⁶³⁶ Although the specific issue was the financial privileges of the MPs and high ranking officials, it is observed that it was part of the much broader issue of corruption in which the parliament has been involved.

⁶³⁷ Civil Actions Law, art 69.

⁶³⁸ *ibid.*

⁶³⁹ *ibid.*, art 70.

⁶⁴⁰ IRQFSC 34/49/2012 [12/6/2012].

is based on ‘a viable interest in the suit’.⁶⁴¹ The FSC itself could have an essential role here through loosening the requirements of standing for public interest litigation and adopting more flexible rules of standing. Thus, the expanded standing that could be developed by the Court would be effective given that the FSC’s interpretations and decisions are binding and not subject to review or annulment, except a constitutional amendment which is another complex matter.⁶⁴²

Overall, the post-2003 legal and institutional framework suggests that emerging CSOs and other interest groups tend to rely on the judiciary as a means of upholding the new constitutional order. An expanded standing for third-party public interest litigation could bring more cases to the Court challenging the government’s exercise of powers and expanding the accessibility of the Court to disadvantaged individuals and groups. This procedure could also serve to promote the ends of the rule of law and the legal arbitration of controversies, bringing into Court cases concerning government infringement of rights or abusive exercise of power.⁶⁴³

This could however further affect the already weak parliament as interest groups might bring matters that should be dealt with in parliament into the Court. It seems that, in the case of Iraq, such groups often turn to the Court, believing that seeking litigation would serve their interests better than the politicians who often spend months struggling to compromise. Both of the cases mentioned above were reported to have been brought before the FSC only after politicians had spent months of unsuccessful debates focusing on particular narrow interests rather than the broader interests of the public. This endangered the already unstable political process and security, increasing potential constitutional infringements, either in form of power-sharing arrangement or the concentration of powers in one body. Thus, the implications were significant for the rule of law and transitional democracy, not to mention for Iraqi citizens. These are just a few illustrative examples, begging the question: is the judiciary

⁶⁴¹ Civil Actions Law, art 71.

⁶⁴² Constitution of Iraq (2005), art 126.

⁶⁴³ Domingo, ‘Judicialisation of Politics or Politicization of the Judiciary?’ 117-118; Barker, ‘Third Parties in Litigation’ 43.

able and willing to accept broader involvement in such cases? Over time, the development of the jurisprudence of the FSC will provide the answer.

Conclusion

This chapter applied the variables which are argued to account for the expansion of judicial powers and judicialisation to the case of the FSC and the context within which it operates. Ongoing political and legal uncertainty and ethnosectarian divisions within Iraqi society and the political parties have put to the ultimate test the rule of law, democracy and the role of the FSC. Constitutionally, the FSC is designed to become an empowered, independent and relatively accessible constitutional judiciary. The current pre-constitutional FSC has been operating in the challenging political and legal context of the post-2003 transition to democracy which continues to be fragmented, divided and unstable. A difficult challenge for the constitutional judiciary is the legitimacy and the legal uncertainty of the current FSC whereby successive legislatures have failed to enact the implementing legislation that would establish the new form of the FSC. One of the most contentious issues concerns the presence of the non-judge members of the FSC, namely Islamic jurists; once incorporated into the Court, their role and relations to the religious institutions could have substantial implications for the country's emerging democracy.

Another potential factor that could determine the extent and implication of judicialisation of the Iraqi Constitution can be the emerging support structure especially the civil society organisations and public interest groups. These actors have grown in quantity and quality as the post-2003 transition can be said to have some success regarding the electoral democracy that opens up the country to new practices and expanded the political rights and activities. The possibility of an expanded standing for litigating for public interests can be said to enhance the accessibility of the constitutional judiciary and increases constitutional cases brought before the FSC. Thus, it could serve to challenge government excesses and arbitrary powers, and support broader legal and political demands for upholding the newly established constitutional order and the rule of law. Although there are some examples illustrating how governmental and non-governmental institutions have pursued litigation to a great effect, it remains unclear if the currently available procedural mechanisms,

including public interest litigation and third-party intervention, will be sufficient to provide the necessary support structures for constitutional litigation.

Thus, many of the factors mentioned above would certainly facilitate the expansion of judicial powers. One reading of the factors discussed and their impact on FSC suggests that the constitutional judiciary has already been involved in some constitutional cases that have served to define and redefine the constitutional balance of powers. The other possible reading might place greater emphasis on the serious challenges the FSC faces from external political pressure that might threaten the independence of the constitutional judiciary. Thus, this view may be concerned that certain political actors or the government itself might rely on the FSC to legitimise their exercise of powers, transferring deeply contested political disputes that have decisive implications for the entire political and legal system to constitutional cases that require judicial resolution. Analysing the case law in next chapter will provide greater insights on whether the FSC has been self-restrained, activist or inconsistent, and whether it has taken on the substantive issues or avoided addressing and resolving the substance of greatly contested constitutional questions as well as the wider implications for the political process and stability in the entire country. From a broader comparative perspective, judges, including those of the FSC, in emerging unstable contexts seem to be relatively aware of the potential challenges they face, especially those concerning the independence of the judiciary. Is it likely that they will develop a variety of mechanisms to defend the independence of their court while at the same time expanding their powers to provide a legal basis for the resolution of constitutional conflicts?

These and other possible suggestions form the central focus of the next chapter that analyses the FSC's case law that has developed over the course of the decade it has been in operation. The chapter will test the theoretical assumptions developed in the previous chapters and consider how the FSC has been influenced by the various factors discussed in this chapter. It will develop these arguments further, discussing the transition to democracy with regard to [re]establishing the key structures of political significance to rule of law through the analyses of the case law of the FSC. It provides significant insights into the court's contribution to and its impact on the rule of law in Iraq's democratic transition.

Chapter Five: The Federal Supreme Court's Judicialisation of Constitutional Issues

Introduction

Previously in chapter two, we saw how it was recognised that the essence of the rule of law is the supremacy of the law, limiting and preventing arbitrary exercises and abuses of powers. The experiences of constitutional judiciaries in transitional democracies largely suggest that courts are extremely vulnerable to interference from politicians and other powerful actors, and to the government's court-curbing actions and non-compliance with their decisions. On the other hand, courts seem also willing to expand their powers into political conflicts which are often transferred into constitutional cases. Therefore, it is anticipated that courts' approach to constitutional questions will vary depending on the nature of the controversy, the parties to the dispute and the broader implications of a given case for the political and legal system.

Based on the aforementioned argument, this chapter evaluates the case law of the constitutional judiciary in Iraq's post-2003 transitional democracy, focusing on the perspective of establishing the rule of law. The 2005 Iraq Constitution establishes pluralism; federalism; a parliamentary and democratic system of governance; it protects human rights; and supremacy of the law and of the Constitution. It also recognises the people as the source of authority and legitimacy. Each of these fundamental constitutional principles has been challenged to differing degrees and has played a central role in constitutional conflicts and litigation. Furthermore, with each new piece of legislation that is passed or with each set of elections, the Court is confronted by new constitutional questions that often have crucial implications for the entire legal and political system.

The following discusses FSC'S case law on selected issues which are anticipated to occur in the immediate of transition to a democratic constitutional order with significant impacts on the development of the constitutional jurisprudence in post-2003 Iraq. For the most part, cases are presented in a chronological order, making it easier to follow the activities of the Court over nearly a decade of functioning. This period can be considered exceptional, not

only for the sheer quantity of cases which were received and decided by the Court but also for the novelty of the cases and decisions, since the first elections under the 2005 Constitution truly tested and challenged the rule of law.

It should be noted that the FSC rulings are short (the average judgment is some three pages long), and often insufficiently detailed in their reasoning. Moreover, the FSC's jurisdiction is limited to the content of the petition for constitutional judicial review and explicitly expressed legal questions; it cannot decide on issues which are not addressed in the petition. Since the FSC is not authorised by its statute to issue abstract constitutional interpretation, it has developed certain requirements for a valid petition for abstract constitutional interpretation. The Court makes a distinction between abstract constitutional interpretation, which only certain state officials and institutions can ask for; and resolving legal disputes that involve constitutional interpretation for which a lawsuit must be filed to the Court. One of the pre-conditions for bringing and considering lawsuit is the existence of an on-going dispute which clearly identified the contested constitutional and legal provisions.⁶⁴⁴

Interestingly, the Court has followed an inconsistent approach as to whether to dismiss a request for abstract constitutional interpretation when it involves an on-going dispute between two parties which would oblige the petitioner to file a lawsuit; or instead to issue an interpretation of the Constitution. The Court, as will be discussed further in this chapter, often uses this distinction as the main grounds for not answering constitutional questions. A further point to bear in mind is that understanding the internal decision-making of the FSC remains problematic since information on this matter is neither accessible nor reliable. At the time of writing, it was not possible to conduct interviews especially with FSC's judges and, so far, there has been no tradition of judges including dissents in the judgment; most judgments are issued by unanimity; only very few in total have been issued with a majority decision.

In this chapter, the discussion of cases is organized into four sections, with each focusing on the Court's approach to a specific subject matter. The first section explores the role of the FSC in legislative-executive conflicts whilst

⁶⁴⁴ Bylaws of the FSC, art 5.

the second evaluates questions of federalism. The focus in the third section is on cases involving elections and government formation and the fourth concerns questions of conformity of legislation with Islamic law.

5.1 The FSC's Rulings on Legislative-Executive Power Struggles

The analysis in Chapter Four provided in-depth discussion of the powers of the legislature and the executive branches and the relations between them at federal level.⁶⁴⁵ This thesis has argued that constitutional courts often receive and decide on a substantial number of disputes of competence between governmental branches. These questions concerning the structure and powers of state institutions may actually test the FSC's accountability function in relation to the separation of powers and in holding officials and institutions to account for bypassing the constitutional boundaries of power and infringing the constitutional balance of power. The resolution of such conflicts and contestations can have a significant impact on the development of the constitutional order and in democratic transition. The following discussion focuses firstly on those key constitutional cases, in which the FSC's rulings have defined or redefined the constitutional balance of power regarding the executive and the legislative branches. The discussion then shifts to one specific controversy in which the Court and litigants were involved in a legal battle regarding the constitutionality of the pension entitlements of parliamentarians and of the state's high-ranking officials.

5.1.1 FSC Rulings on Conflicts of Competences and Inter-Branch Relations

One of the critical aspects of the Constitution, which the Court has been regularly called on to decide, is the respective constitutional powers of the legislative and executive branches and, therefore, the relations between them. The following discussion addresses some of the key rulings in three different types of these constitutional cases respectively: the independent commissions, the law making and the accountability powers of the parliament.

⁶⁴⁵ See Chapter Four (4.1).

5.1.1.1 The Independent Commissions

One of the most controversial of the FSC's rulings involving the respective competences of the legislative and executive branches relates to the Independent Commissions. The Constitution establishes a number of Independent Commissions or bodies, but failed to define the exact nature of their relationship with the state institutions. Thus, some are subjected to parliamentary *monitoring*, such as the Independent High Electoral Commission (Electoral Commission).⁶⁴⁶ Others are *responsible* before the Parliament, such as the Central Bank of Iraq, or are *attached* to the Parliament, such as the Board of Supreme Audit and the Communications and Media Commission.⁶⁴⁷ Only two independent commissions are clearly attached to the Council of Ministers: the Endowment Commission,⁶⁴⁸ and the Martyrs' Foundation.⁶⁴⁹ More significantly, Article 108 of the Constitution provides that '[O]ther independent commissions may be established by law, according to need and necessity'.

Although there had not been any reported contestation concerning the independence of these commissions, the Office of the Prime Minister requested the FSC's view regarding the constitutional provisions on the independent commissions and their relations with other governmental branches. The applicant argued that the relationship which these commissions had with either Parliament or the government, as stipulated in the Constitution, contradicted the principle of separation of powers. It was also argued that the nature of these relations, whether monitoring, responsibility, or attachment, has been interpreted [in practice] in such a way that any relation with the executive branch is effectively denied. The petitioner concluded, therefore, that such an interpretation would be inconsistent with the nature of the executive function of these commissions, claiming that the reference to independence should not mean they are entirely independent of the three branches; rather this should refer only to their financial and administrative independence and having no links with any ministry.⁶⁵⁰

⁶⁴⁶ Constitution of Iraq (2005), art 102.

⁶⁴⁷ *ibid*, art 103(1), (2).

⁶⁴⁸ *ibid*, art 103 (3).

⁶⁴⁹ *ibid*, art 104.

⁶⁵⁰ IRQFSC 88/ 2010 [18/1/2010].

In the *Independent Commissions* (88/2010) case, the FSC scrutinized the relevant constitutional provisions and decided to submit or ‘attach’ these commissions, in particular the Electoral Commission which was the subject of the claim in this case, to the executive branch, arguing that independent commissions are part of state’s structure, perform tasks of an executive ‘nature’ and are not linked to any ministry. Furthermore, those commissions that are not currently explicitly linked to Parliament or the Council of Minister should be attached to the latter.⁶⁵¹ Closer reading of the Court’s reasoning indicates that, first, the decision emphasizes the executive nature of the work of the Electoral Commission, arguing that [in constitutional terms] subordinating the Commission to Parliament contradicts the fundamental principle of separation of powers enshrined in the 2005 Constitution. Second, it argues that some of the commissions that have executive functions are constitutionally subjected to the supervision of the Parliament and linked with it. However, this contradicts the constitutional powers of the legislative and executive branches as stipulated in Articles 61 and 62. In other words, the Constitution does not establish these powers for Parliament to exercise. Third, the Court argued that the attachment of several of these commissions to Parliament does not prevent the Council of Ministers, as stipulated in Article 80(1), from supervising the ‘work of the ministers and departments not associated with a ministry’. Thus, the FSC’s interpretation in this case viewed independent commissions as ‘department not associated with a ministry’, whereby they are to be supervised by the Council of Ministers.

This conclusion and the ruling that Independent Commissions (which are meant to oversee state institutions and in particular the government itself) should be attached to the Council of Ministers has been contested and criticized on a number of grounds. First, it has been argued that by reestablishing the link between these commissions and the governmental branches, the Court has explicitly contradicted the text of the Constitution. Some may even argue that the FSC has found an ‘error’ in the 2005 Constitution, ruling ‘in favour of the government against a constitutional provision itself.’⁶⁵² Thus, the decision

⁶⁵¹ IRQFSC 88/ 2010 [18/1/2010].

⁶⁵² Reidar Visser, ‘The First Step of the New Maliki Government: Attaching the Independent Electoral Commission to the Executive’ (*Iraq Gulf Analyses*, 21 January 2011).

established some level of government supervisory control over these bodies in keeping with its principal executive function in Article 80(1) of the Constitution, even for those commissions which are constitutionally connected to the Parliament.⁶⁵³ Secondly, and more interestingly, the interpretation was requested in the absence of any legal dispute, an admissibility requirement, that has been strictly applied by the Court in other similar cases. In this case, the Prime Minister was not in conflict with any other party. More importantly, in its reasoning the Court states that the legislature attaches to the Parliament the High Commission of Human Rights,⁶⁵⁴ and the Public Integrity Commission,⁶⁵⁵ although the Constitution does not mention either of these. Such a conclusion implies the unconstitutionality of the legislation that established this attachment, and the necessity for its annulment. In this instance, the Court found that the contested statute was unconstitutional but did not rule it to be unconstitutional as the application had not explicitly asked about that matter.

Thirdly and most significantly, the FSC ignored or contradicted its previous interpretation regarding the independence of commissions of this type.⁶⁵⁶ Thus, in an earlier decision, the Court interpreted the term ‘independence’ regarding independent commissions. It found that:

Employees of the commission and each according to their competences are independent in exercising their duties as stated in the law of the Commission [the Public Integrity Commission] subject to nothing but the law and no one can interfere or affect the functioning of the Commission [...] however the Commission is subject to the supervision of the parliament in exercising its acts.⁶⁵⁷

In other words, in the most recent case, the FSC overruled its previous decision on the same legal issue to reach a conclusion that further supported the

⁶⁵³ Jonathan Cohen, ‘Decision 88: Balance of power under the Iraqi constitution’ (Jurist 18 March 2011) <<http://www.jurist.org/forum/2011/03/decision-88-checks-and-balances-in-iraq.php>> accessed 12 January 2014.

⁶⁵⁴ High Commission of Human Rights Law (53) 2008.

⁶⁵⁵ Federal Public Service Council Law (4) 2009.

⁶⁵⁶ The applicant requested from the Court to interpret the meaning of the word ‘independent’ stated in Article 102 of the Constitution that ‘[T]he High Commission for Human Rights, the Independent Electoral Commission, and the Commission on Public Integrity are considered independent commissions subject to monitoring by the Council of Representatives, and their functions shall be regulated by law.’

⁶⁵⁷ *First Independent Commission* (228/2006) case, IRQFSC 228/2006 [9/10/2006].

executive's attempts at and policies for centralisation of powers. Interestingly, when confronted by severe criticism, Maliki, the incumbent Prime Minister, responded that this was 'an attempt to cast the government in a bad light and undermine its efforts to be strong'.⁶⁵⁸ Reportedly, he even took further action, which included issuing an arrest warrant on corruption charges for the head of the Electoral Commission who had publicly complained about and severely criticised the fact that the ruling might result in the Electoral Commission becoming answerable to the Prime Minister.⁶⁵⁹

Similarly, the Court's decision to subject bodies such as the Central Bank and Electoral Commission to the government's general policy can be seen as a cause for concern especially given that the Court has issued other rulings that are said to have shifted the constitutional balance of power in favour of the executive branch and, by implication, the prime minister. This might have been one of the reasons why in the period immediately following that ruling the Parliament pushed for the enactment of the FSC legislation and in the month that followed, the FSC draft law had its second reading of the draft.

5.1.1.2 Parliament's Right to Initiate Legislation

The right to initiate legislation is the first stage of the law-making process, determining the subject and the contents of the law. It is common that both the government and parliament have the right to legislative initiative. Constitutions may limit legislative proposals by either excluding certain laws or requiring the fulfillment of certain conditions. For example, the French constitution gives this right to both the prime minister ('legislative project'), and members of parliament ('legislative proposals'). In practical terms, the government usually exercises this power. Legislative proposals (or amendments) initiated by the parliament are inadmissible 'if their adoption

⁶⁵⁸ Ahmed Rasheed, 'Critics Alarmed as Iraq's Maliki Centralizes Power' (*Reuters* 23 January 2011)

www.reuters.com/article/2011/01/23/us-iraq-politics-cabinet-idUSTRE70M1MV20110123
accessed 10 July 2015

⁶⁵⁹ Romano, 'Iraq's Descent into Civil War' 555.

would have as a consequence either a diminution of public resources or the creation or increase of an item of public expenditure'.⁶⁶⁰

Under the Iraqi Constitution, the legislative initiative right is not exclusive to the Parliament, but is shared with the executive, and indeed in practice this body is more likely to exercise this right. Article 60 stipulates that 'Draft laws shall be presented by the President of the Republic and the Council of Ministers', and that 'Proposed laws shall be presented by ten members of the Council of Representatives (Parliament) or by one of its specialized committees.' Furthermore, Bylaws of the Parliament require that the Fiscal Committee within the Parliament should submit to the government for approval any bill or amendments relating to the law of the general budget or other legislation that would create or increase financial obligations on the government.⁶⁶¹

In a controversial move the Prime Minister filed two lawsuits against the Speaker of the Parliament and the Presidency Council, challenging the constitutionality of a Law that separated certain departments of a government ministry.⁶⁶² This contested law was proposed by the Parliament and the petitioner argued it was not approved by the government. The legal issue was that Parliament's constitutional power to legislate is based on draft laws presented by the government which is in charge of planning and executing 'the general policy and general plans of the state'.⁶⁶³ Therefore, the abolition of a ministry or dismantling of its structure as planned in this proposed Law was an encroachment on the executive role of the federal government. Furthermore, the petitioner argued that there is a constitutional distinction between draft and proposal laws.

In its landmark ruling on the *Draft and Proposal Law* (43/2010), the FSC distinguished between draft laws and proposal laws, maintaining that the executive has the legislative initiative right to create draft laws and not the Parliament. The Court struck down the contested law, arguing that firstly, the

⁶⁶⁰Constitution of the Republic of France (1958), arts 39, 40. <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>> accessed 12 January 2016.

⁶⁶¹ Bylaws of the Iraqi Council of Representatives (15) 2006 [Bylaws of the Parliament], art 130.

⁶⁶² Disengagement of Departments of Ministry of Municipalities and Public Works Law (20) 2010.

⁶⁶³ Constitution of Iraq (2005), art 78.

proposal was presented by the Parliament and lacks government approval. Secondly, the FSC referred to the principle of the separation of powers, arguing, several times, that the executive authority presents draft laws and that any laws that have been passed without being presented by the executive branch would infringe Article 60(1) of the Constitution. Thirdly, the Court argued that the government is constitutionally responsible for fulfilling various commitments created by legislation, including financial, political, international and social obligations.⁶⁶⁴ Therefore, the executive has the exclusive power to submit draft laws, and any law proposal presented by the Parliament is considered to be ‘*an idea*’ but not a draft law, which needs to be developed as a draft law and approved by the government before being passed through Parliament.⁶⁶⁵

The conclusion reached in *Draft and Proposal Law* (43/2010) ruling is of crucial importance and has far-reaching implications which severely limited the legislative role of the Parliament, the state’s only legislative body. The FSC’s interpretation limits the legislative powers of the Parliament to proposal laws which must be submitted to the executive, transferred into draft laws and then approved by the same body, before the draft can be presented to Parliament for enactment. The executive can reject a proposal law and therefore block the legislative powers of the Parliament. Since then, this ruling has been used as the grounds for challenging the constitutionality of any law that was originally a legislative proposal and failed to fulfill the requirements that were created by the Court.

One of the examples whilst illustrates the implications of the above *Draft and Proposal Law* interpretation involves a deeply contested piece of legislation. In January 2013, Parlimnet passed the Term Limit Law for Iraq’s Three Presidencies.⁶⁶⁶ The contested law limits the number of terms in office for the Speaker of the Parliament, the President of the Republic and the Prime Minister. It was passed following concerns that the incumbent Prime Minister, Maliki, would seek a third term in office, which is constitutionally possible. Constitutionally the President of the state is limited to two terms in office;⁶⁶⁷

⁶⁶⁴ Constitution of Iraq (2005), art 80.

⁶⁶⁵ IRQFSC 43-44/2010 [12/7/2010].

⁶⁶⁶ Law of Term Limit of the Mandate of President of Republic and President of the Council of Representatives and President of the Council of Ministers (8) 2013 (Term Limit Law).

⁶⁶⁷ Constitution of Iraq (2005), art 72 (2).

however, the constitution says nothing specifically regarding the two other presidencies [Speaker of Parliament and Prime Minister] that the contested law sought to limit to two terms in office. The Prime Minister's office challenged the constitutionality of the contested law. The applicant argued that this limitation contradicts a fundamental constitutional principle, typical of any parliamentary system, namely, that 'the people' are the source of power and its legitimacy. Since the Parliament is empowered to elect its Speaker,⁶⁶⁸ and the Prime Minister,⁶⁶⁹ it was implied that 'the people' decided not to limit their term of office; otherwise, if they had chosen to do so, they would have specified constitutional limitations similar to those for the President's term. The petitioner further argued that the contested law take effect retroactively as the limitation applies to the three incumbent presidencies, and that the rationales described in the law are of political rather than public interest. Another argument that was presented, the most crucial one, was that the Parliament has no power to add constitutional provisions or regulate matters that need constitutional amendments, such as asserting that the Prime Minister shall resign if half of his cabinet ministers resign.⁶⁷⁰

As many had predicted, in the *Term Limit Law* (64/2013) case, the Court held that the contested Law was unconstitutional due to the procedural means by which the law was enacted. Thus, it had been proposed by the Parliament, bypassing the executive branch; it had not been submitted to the executive to be drafted and approved as required by Court's previous *Proposal and Draft Law* (43/2010) ruling.⁶⁷¹ Interestingly, the subject of the contested law was actually extremely controversial and, although the ruling was largely predictable, it

⁶⁶⁸ Constitution of Iraq (2005), art 55: 'The Council of Representatives [parliament] shall elect in its first session its speaker, then his first deputy and second deputy, by an absolute majority of the total number of the Council members by direct secret ballot.'

⁶⁶⁹ *ibid*, art 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.'

⁶⁷⁰ See e.g., Ali Abel Sadah, 'Maliki to Run for Third Term Following Court Decision' (*al-Monitor*, 26 August 2013) <<http://www.al-monitor.com/pulse/originals/2013/09/iraq-maliki-third-term-court-decision.html#>>; 'Iraq Court Scraps Law Barring Prime Minister Nuri al-Maliki from Third Term' (News, 27 August 2013) <<http://www.news.com.au/world/middle-east/iraq-court-scraps-law-barring-prime-minister-nuri-al-maliki-from-third-term/story-fnh81ifq-1226704670893>> accessed 20 March 2014.

⁶⁷¹ IRQFSC 64/2013 [26/8/2013]. Two lawsuits were, filed separately, challenging the constitutionality of this law. The first was filed by an MP and the second by a Human Rights NGO against the Speaker of the parliament, both were dismissed on formal grounds since the law had not been published in official Gazette and therefore was not in effect at the time. See IRQFSC 6/2013 [12/3/2013].

illustrated the implications that the latter interpretation of the draft and proposal laws would have. It was crucial to see that, despite all the arguments and counter-arguments regarding the substance of the law, the Court's annulment of the time limit for the terms in office of the three presidencies disregarded the substance of the law in this instance. Many upheld that this time limit was needed given the increasing concerns about the consolidation of power in the office of Prime Minister and the potential personalization of powers.⁶⁷² In other words, it can be said that in unstable and transitional state such as Iraq, laws of this kind may protect the transition itself although in its essence it can be seen to contradict the core of the representative democracy and 'the right to vote, elect, and run for office' as guaranteed in Article 20 of the Constitution.

The distinction between proposal and draft laws has been significantly criticized. It can be said that in a series of subsequent cases, the Court has taken these criticisms into consideration, and seems to be trying to limit the implications of depriving Parliament of its legislative initiative right. In one case involving a contested proposal law that had been passed without seeking government approval, the Court clarified its *Draft and Proposal Law* (43/2010) interpretation, whilst still declaring the relevant law unconstitutional on this ground. It insisted that this interpretation does not deprive the legislature of its main and most crucial power in law making. Thus, in order for a proposal law to fulfill constitutional requirements with respect to legislating, it needed to be developed into a draft law in coordination with the government that is responsible for planning and implementing the general policy of the state. The FSC further explained that:

If the executive authority, without any constitutional and legal ground or reason related to the general policy of the state, refrained from transferring a proposal (presented by the Parliament) to a draft law, then the parliament can exercise its accountability powers in Article 61(2) including withdrawal of confidence from the Prime Minister after [formally] questioning him for his violation of the constitution.⁶⁷³

⁶⁷² 'The members of the parliament have different opinions regarding the Term Limit Law', <<http://www.al-vefagh.com/News/85277.html>> accessed 11 December 2015.

⁶⁷³ IRQFSC 19/2013 [6/5/2013]. The contested law was the Law of Salary and Allowance of the President of the Republic 26/2011, which regulated salaries and financial rights of president

The Court thus addressed and clarified a procedural matter to overcome the government's arbitrary refusal of legislative proposals, on which both the Constitution and the previous ruling were silent. However, this is easier said than done; holding the government to account and formally questioning it every time it refuses to approve a proposal law is not practical, mostly because the FSC has also limited Parliament's accountability powers, namely formal questioning of ministers, in a series of rulings which will be discussed shortly.

It took a long time before the Court issued its second landmark ruling on the legislative initiative right of Parliament. When the FSC was asked to determine the constitutionality of a law that regulates the replacement of MPs,⁶⁷⁴ the Court is said to have had clearly considered the occasion as offering an opportunity to shift its approach from an absolute ban on Parliament's direct legislative initiative right to one which set clear limitations to this. Thus, in the most recent development, in the *Second Proposal and Draft Law (21/2015)* case, the Court was more explicit and decisive in the limitation on Parliament's legislative role. Two separate petitions (which were decided jointly) were filed with the Court, challenging the constitutionality of the MPs Replacement Law 2006 on the grounds that the law failed to fulfil the necessary constitutional requirement established by the FSC's *Proposal and Draft Law (43/2010)* decision.

The contested law was a proposal law initiated and passed entirely by the Parliament, without having been approved or transferred into draft law by the government. The FSC ruled that,

According to this principle (separation of powers) each authority exercises its competences and functions completely and as established by the Constitution, the legislative authority exercises its constitutional competences and powers, and the very first of which is to enact federal laws that the public interest necessitates and within the constitutional framework. And laws enacted directly by the Parliament must not contradict this principle, and these laws are laws that establish financial obligations on the government not listed in its manifesto or budget

[the Presidential Council], which was claimed to reduce their salaries, was held unconstitutional because it was proposal and not draft law.

⁶⁷⁴ Replacement of Deputies of the Council of Representatives law (6) 2006 (MPs Replacement Law).

without its consultation and its approval; laws which contradict the government's ministerial manifesto upon which the Parliament gave its confidence; and laws involving the judicial power without the judiciary's consultation as this contradicts the independence of the judiciary. Other than these the Parliament can exercise its original and direct legislative powers to enact federal laws to achieve public interest and within the constitutional framework.⁶⁷⁵

The Court found that the contested law was not included in any of these three categories; it did not create financial obligations on the government, contradict the government's ministerial manifesto, or regulate the judicial powers. Therefore, the FSC said that the contested law which was directly enacted by the Parliament without the involvement of the government did not contradict the principle of separation of powers.⁶⁷⁶ Since then, *the Second Draft and Proposal Law (21/2015)* interpretation of the legislative power of the Parliament has been considered an important step that revises the FSC's jurisprudence and preserves Parliament's role in legislating. The Speaker of the Parliament, together with MPs and political leaders, explicitly noted that the Court has retained and strengthened the legislative role of Parliament, and overruled its previous decision in *the Draft and Proposal Law (43/2010)* case.⁶⁷⁷

It is important to note that the *Draft and Proposal Law (43/2010)* ruling almost paralysed Parliament and blocked its legislative powers, rendering it incapable of legislating without the executive's authority. It could be argued that this violated the principal task of the parliament and the fundamental constitutional principle of separation of powers. In principle, the executive authority may have certain powers, input and impact on legislating and law making. The problem lay with the Iraqi Constitution and the FSC's interpretation in particular since this made the government's right to legislative initiative *the rule*, whilst the legislative initiative right of the Parliament became the *exception*, and was subject to government approval.

⁶⁷⁵ IRQFSC 21, 29 /2015 [14/4/2015].

⁶⁷⁶ *ibid.*

⁶⁷⁷ See 'The Federal Supreme Court and the Parliament's Right to Legislate', <<http://azamil.com/?p=6436>>; 'The Federal Supreme Court Return the Right to Legislate to the Parliament', <<http://azamil.com/?p=6436>> accessed 12 July 2015.

One can make several important observations on these two landmark decisions of the FSC regarding the legislative initiative right. First, the 2015 decision was issued on the basis of a case for which there was no legal dispute or any petition for an abstract interpretation of the relevant constitutional provisions, an admissibility requirement that the FSC's judges rarely disregard. Second, the Court granted the judicial authority a role in the legislative process as it obliges Parliament to consult it regarding any laws that may affect, or are related to, this branch. For example, this will somehow give the judiciary control over the implementing legislation of the new FSC which is still the subject of continuing debates in Parliament.⁶⁷⁸ Third, the Court changed or explicitly explained the precedent established by the 2010 ruling. In the 2010 case, the Court established the general principle that Parliament can only initiate proposals, and since a proposal is an idea and not a draft, then it needed to be transferred into a draft law by either the Council of Ministers or the President of the Republic in order to be consistent with the government's policy manifesto, which was itself approved by the Parliament.⁶⁷⁹ Thus the 2015 interpretation implies that the Court no longer considers a 'proposal' to be an idea that only the government is constitutionally authorised to transfer to draft law, on which basis any law passed exclusively by the Parliament would be unconstitutional.

There may be different understandings of the actual impact of this latest ruling of the FSC: *the Second Draft and Proposal Law (21/2015)*. Some may argue that it has reformed the Court's position on the direct and original legislative powers of the Parliament by means of proposal laws from an absolute ban into three rather broad exceptions. Accordingly, the Parliament has a limited role in initiating legislation, the extent of which is determined by the Court itself and how judges interpret the concepts of financial obligation, government manifesto, and judicial power. Others may believe that the Court's ruling does not actually create something new in this regard. Formally Parliament can now legislate and is said to have the power to directly enact a law, without the approval of the executive, unless it falls within one of the three aforementioned

⁶⁷⁸ See e.g. Article 95 of the Constitution of Afghanistan explicitly provides that the Supreme Court through government proposes for drafting laws regulating the judiciary.

⁶⁷⁹ IRQFSC 21, 29 /2015 [14/4/2015].

categories. But the Parliament's draft law is still to go through government, to be tested against the financial obligation it puts on the government, as well as the public interest and objectives behind it. From this point of view, the Court seems unaware or has not taken into consideration that Bylaws of Parliament obligate the financial committee within Parliament to seek government approval on all proposal laws containing a financial aspect.⁶⁸⁰

Interesting is that the Court has stated that limiting the 'legislative initiative rights of parliament' is also typical practice in parliamentary systems globally. From a comparative perspective this is true to some extent; parliament may frequently be excluded or restrained from the process of law making regarding legislation that creates or increases financial items in the government's expenditure or general budget. Some of the exceptions introduced by the FSC's 2015 decision are matters reserved for government alone, outside the remit of Parliament. This should prevent Parliament from blocking government policies. For example, in Poland, the government has an exclusive right to legislative initiative on budgetary and other financially important laws.⁶⁸¹

Although it is rather rarer for the judicial power to be explicitly authorized to participate in the law-making process, this does happen. The Russian constitution explicitly entitles the highest courts [the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation and the Supreme Court of Arbitration of the Russian Federation] to the right of legislative initiative within their jurisdiction.⁶⁸² Similarly, the Constitution of Afghanistan provides that the Supreme Court through the government can propose legislation regarding judiciary.⁶⁸³ Furthermore, autonomous entities or federal regions within a federal state can also be entitled to initiate legislation on a federal level, as in Spain.⁶⁸⁴

⁶⁸⁰ Bylaws of Parliament, art 130.

⁶⁸¹ Angelika Nussberger, 'Comments on Legislative Initiative in Europe' (*European Commission for Democracy through Law*, Venice Commission, 30 September 2008) 4 <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2008\)102-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2008)102-e)>accessed 12 November 2014.

⁶⁸² Nussberger, 'Comments on Legislative Initiative in Europe' 4.

⁶⁸³ Constitution of Afghanistan (2004), art 95 <<http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>>accessed 2 June 2014.

⁶⁸⁴ Nussberger, 'Comments on Legislative Initiative in Europe' 4.

In practice, it can be said that the three exceptions that the FSC introduced are so broad that if interpreted as such, then, effectively, they do not represent much of a change. It will be interesting to see how the Court reacts to future challenges to laws on these grounds. It remains to be seen if this shift would have made a difference to the laws already annulled on the basis of the 2010 ruling, or whether the outcome would have followed the same lines as this new case, and would have still have been found unconstitutional by the Court. It seems possible that at least some of the laws annulled on the basis of the 2010 ruling would have been constitutional as long as the Court found that they were not included in the three aforementioned exceptions specified.

For example, the Term Limit Law was not related to the judicial authority, nor did it create any financial obligation on the government or contradict the government manifesto, unless the Court should decide to interpret the exceptions broadly enough to suggest this is the case. Interestingly, one of the petitioner's arguments in the *Term Limit Law* case was that the contested law was of no significance to the public interest. This is important given that one of the general requirements for Parliament's original direct legislative initiative right by means of proposal law, including those that are not considered within the three exceptional categories, is that the legislation that enacted by the Parliament must be in the public interest. Whilst it is generally agreed that the 'self-reforming' approach that the Court adopted regarding the legislative power of the Parliament might become a rather formal one, in practice it is still subject to the FSC's discretionary power in interpreting the three exceptions and, most importantly, the public interest with which the proposal law would be associated.

5.1.1.3 Parliamentary Oversight of the Government's Performance

Overseeing, checking and holding the government to account is the second and most important power of the parliament under a democratic constitution. The 2005 Constitution provides for Parliament to monitor government and hold it accountable, ensuring that the exercise of public power conforms to the rule of law and the constitution. In the Iraqi Parliament, overseeing government is addressed in the form of questions (both oral and written), discussion and inquiry, the investigation committee and interrogation.

These procedures enable a dialogue within the Parliament and each seems to carry different implications. Except for the (simple) question which any individual MP can direct to the PM and ministers, other institutional instruments require that at least twenty-five MPs 'raise a general matter for discussion' inquiring about a policy or the performance of the executive or 'to call them to account on the issues within their authority'.⁶⁸⁵ The formal questioning that calls ministers and the PM to account on government policies and performance is stronger in its effect than any other form of questioning. This is because any steps to withdraw confidence from the government or from a minister must follow parliamentary interrogation proceedings. If the outcomes do not satisfy Parliament, MPs can submit a motion of withdrawn confidence. If this is approved by the majority of parliamentary members then the government must be replaced (without elections).⁶⁸⁶

Exercising these institutional means of overseeing government, especially parliamentary questioning or interrogation, is experiencing difficulties in establishing itself in Iraq, and on several occasions the FSC has become involved. One of the major obstacles to effective parliamentary control of government is the fact that all of the post-2003 governments have so far been based on a coalition of different political parties reflecting the ethno-sectarian nature of these parties, meaning there has been an absence of real opposition. Furthermore, political decisions are often the result of difficult compromises between various coalition parties and it is generally not in the interest of the majority to question these compromises.

MPs have been persistently calling on ministers and the PM, directing inquiries and questions to them regarding a range of different issues from delivering basic public services to matters concerning state security and other high profile issues. In response, ministers and especially the PM have largely avoided responding and resisted facing the MPs in Parliament. For instance, PM Maliki constantly refused to respond to questions posed by MPs in Parliament, arguing that questions concerning high profile matters, including national

⁶⁸⁵ Constitution of Iraq (2005), art 61 (8-9).

⁶⁸⁶ *ibid.*

security, should not to be discussed in an open parliamentary session.⁶⁸⁷ Increasingly, ministers who were about to be questioned by MPs challenged the constitutionality of the procedure and at times even the substance of the questions and of the matters due to be asked about. The relevant FSC rulings have important implications regarding Parliament's ability to monitor government performance effectively.

The first case involved the Minister of Higher Education, who was due to be questioned by Parliament, but instead of responding to the questions he requested an interpretation of the constitutional provisions regarding formal questioning from the FSC. In addition, the petitioner sought an interpretation of the constitutional provision that gives the FSC jurisdiction to settle 'accusations directed against the President, the Prime Minister and the Ministers'.⁶⁸⁸ It can be argued that the petitioner added this latter provision to emphasise the seriousness of the outcome of the Parliament's formal questioning session. In the *First Formal Questioning of Minister (35/2012)* case, the Court created a set of conditions whereby a questioning request must fulfill otherwise it would be considered unconstitutional. Most importantly, the Court concluded that the 'questioning request' must include defined facts concerning the breach of the Constitution and law that have caused irreparable damage. In other words, the FSC judges argued that parliamentary interrogation as stipulated in the Constitution and detailed by Bylaws of the Parliament was almost the equivalent of the criminal '*charge sheet*' under the Criminal Procedural Law.⁶⁸⁹ Therefore, the interrogation of ministers by parliament is the most serious ('highest and most dangerous') means of parliamentary supervision over the government.

Thus, the Court said that it might result in a vote of no confidence in the Minister in question or the whole ministerial cabinet collectively if the charges were evidenced. For that reason, a formal request for questioning must include the breach/es of the constitution and the damage it has/they have caused. Additionally, the Court held that deciding on the accusation directed against the President, Prime Minister, and other Ministers (impeachment) falls within the

⁶⁸⁷ 'For Third Time, Maliki Refused Being Questioned before the Iraqi Parliament', <http://www.jornews.com/index.php?option=com_content&view=article&id=34051:-----&catid=43&Itemid=104> accessed 13 April 2014.

⁶⁸⁸ Constitution of Iraq (2005), art 93(6).

⁶⁸⁹ Criminal Procedural Law, art 187.

jurisdiction of the FSC and should be regulated by law. For reasons related to the absence of both the implementing legislation on the new FSC and that regulating the impeachment procedure, the current FSC cannot impeach these officials and any accusations must be dealt with according to existing laws.⁶⁹⁰

Since then, challenges to the constitutionality of the questioning of ministers have continued to be brought before the FSC. In fact, subsequent challenges frequently referred to the FSC's initial ruling, which explained the requirements for a constitutional and legal parliamentary questioning. The Parliament has addressed an important point in all these cases: the formal questioning of ministers is a procedural matter which falls within Parliament's jurisdiction and not that of the Court. It is one of the critical means of holding the government to account. Thus, accountability of government in itself is fundamental to the parliamentary system, and one of the guarantees of upholding principles of legality and democracy.⁶⁹¹

In the first case following the main ruling, the same minister challenged the constitutionality of the parliamentary request to question him, arguing that it did not fulfill the necessary constitutional conditions including those established by the FSC's jurisprudence. The Court reemphasized the need for fulfillment of these conditions, arguing that the specific breach of the Constitution and law needed to be outlined in the questioning request as well as the damage that had been caused by such actions. The decision was based on the judges' evaluation of the kind of questions and accusations provided in the questioning request handed to the Minister by Parliament.⁶⁹²

Faced with substantial criticism, in its subsequent rulings the Court took a more self-restrained approach which is seen to have limited its role in this regard. Thus, in the *Parliamentary Formal Questioning of the Minister for Youth and Sport (95/2012)* case, the Minister for Youth and Sport, who was due to be questioned by the Parliament, challenged the constitutionality of the questioning request, reflecting on the Court's main ruling in this regard. Several facts had been presented in the questioning request and the same arguments were underlined by the Parliament defending its powers to question cabinet

⁶⁹⁰ IRQFSC 35/2012 [2/5/2012].

⁶⁹¹ IRQFSC 41/2012 [8/7/2012].

⁶⁹² *ibid.*

ministers. Importantly, the FSC was seen to distinguish between procedural and substantive aspects of the questioning request, and found that the request fulfilled the formal conditions. Regarding the substance of the questions and accusations made against the minister, it held that it is within the power of the Parliament to determine and decide on the constitutional and legal conditions of a questioning request. This is to happen, said the Court, during a session in which questions are directed to the minister and responded to by him. As a result, the ministerial responsibility regarding these matters should be determined by the MPs, who should decide whether the subject was to be considered a formal questioning or [a simple] question and inquiry.⁶⁹³ Therefore, the presence in Parliament of the minister who is to be questioned is a constitutional obligation, and he must stand before the MPs during the questioning session.⁶⁹⁴

The aforementioned cases illustrate the potential and extent to which a parliamentary power, here the formal questioning of ministers, which is essential for holding government accountable to the rule of law, could be judicialised. In the first ruling (35/2012), the Court clearly surrendered its right to exercise its jurisdiction regarding impeachment, limiting its powers and denying any possibility that it would impeach any of the government ministers or the President. This is despite the fact that it exercised other jurisdictions introduced by the 2005 Constitution for the new Court, including the abstract interpretation of the Constitution and approval of the results of the general elections. It could be argued that exercising this jurisdiction requires implementing legislation to elaborate this before the Court can exercise its jurisdiction and that until then the existing laws govern that issue. Importantly, the relevant existing laws do not establish judicial impeachment of the government official and the available means to oversee the government is exclusive to Parliament.

⁶⁹³ Constitution of Iraq (2005) provides for both methods; questioning and a simple ‘question’ and ‘inquiry’ session. art 61 (7/1): ‘A member of the Council of Representatives may direct questions to the Prime Minister and the Ministers on any subject within their specialty and each of them shall answer the members’ questions.’ Whereas the same article in the same paragraph under section C, states that: ‘a member of the Council of Representatives, with the agreement of twenty-five members, may direct an inquiry [questioning] to the Prime Minister or the Ministers to call them to account on the issues within their authority.’

⁶⁹⁴ IRQFSC 95/2012 [27/1/2013].

On the other hand, the Court's interpretation of the requirements for the formal questioning of government has limited parliament's accountability function and provoked ministers who were due to be questioned by the Parliament, to turn to the Court to try and block Parliament's oversight function in holding them accountable for abuses of power. It seems interesting to note that in the initial case, the Court interpreted the relevant constitutional principles and provisions and determined the requirements that the request for questioning must fulfill, and then in the subsequent cases it examined the fulfillment of these requirements. It is generally agreed that formal questioning is the most extreme and most 'dangerous' form of parliamentary oversight of the government and, by implication, it may result in Parliament moving towards withdrawing confidence from the government. However, interpreting the questioning request as being equivalent to the 'charge sheet' in a criminal investigation can be seen as poor reasoning or a failure to comprehend the Bylaws of Parliament that elaborate these procedures. Thus, even Bylaws do not require the questioning request to contain the constitutional violation and the consequent harm attributed to the act of the minister in question.⁶⁹⁵

In subsequent cases the FSC has seen to have slightly modified its previous approach. It did not examine the facts provided in the lawsuit brought by the Minister of Youth and Sport as part of the parliamentary interrogation. Rather it considered whether the request fulfilled the formal conditions, namely, whether it was signed by at least twenty-five MPs. Most importantly, the judges argued that it was within Parliament's jurisdiction to decide on the substance of the matters and questions to be directed to the minister. In a similar case, the FSC pressed the issue further, arguing that Parliament has the authority to determine whether the request fulfills these conditions and not the FSC. The petitioner listed a series of accusations regarding certain illegal act allegedly committed by the minister in question, and the Court implicitly agreed that these conditions are in place. Thus, it stated that the Minister is constitutionally obliged to attend Parliament to answer questions.⁶⁹⁶

Parliamentary interrogation is not the only means of oversight by which the legislature can hold government to account, nor is it the only one subject to

⁶⁹⁵ Bylaws of Parliament, art 58.

⁶⁹⁶ IRQFSC 95/2012 [27/1/2013].

the FSC's ruling. In *the Investigative Committees of Parliament* (96/2012) case, the Ministry of Health challenged Parliament's power to establish an investigation committee. The contestation was based on the fact that the legislature had formed an investigative committee regarding alleged violations and abuses committed by the Inspector General of the Health Ministry. The petitioner made several arguments. First, that Parliament's constitutional power to check and oversee government actions is limited to a questioning and inquiry. It then argued that Parliament does not have any investigative powers to scrutinize members of the executive branch of the government, with the exception of the Prime Minister and Ministers. Second, an investigation is conducted by either an administrative or judicial body, and the legislature's investigative power contradicts the principle of the separation of powers in Article 47. Third, the parliamentary investigative committees took place within parliament and have no jurisdiction over the executive power.⁶⁹⁷ The FSC upheld Parliament's right to establish investigation committees, arguing that this was essential for parliament to exercise its powers and role in overseeing government. It could obtain any necessary evidence and documentation, which could be used to prove an executive official's violation of the law and the committee is required to submit the case with all relevant evidence and documentation to the competent bodies including the Public Prosecution Office or the Public Integrity Commission for further actions. Therefore, the Court held that Parliament had the power to take these steps as part of its constitutional competences.⁶⁹⁸

The essence of the controversy in this case is perhaps the petitioner's ignorance of the constitutional and statute rules that regulate parliamentary control of government. Thus, the Constitution does not explicitly provide for the investigation committees in Parliament. However, the Bylaws of Parliament do explicitly provide for such a jurisdiction, stating that Parliament's powers of oversight include 'any other officials in the executive branch.'⁶⁹⁹ Thus, the FSC emphasized that there are procedures and methods, not detailed in the Constitution, which the parliament may follow when exercising its

⁶⁹⁷ IRQFSC 96/2012 [12/3/2012].

⁶⁹⁸ *ibid.*

⁶⁹⁹ Bylaws of Parliament, art 32.

accountability function. In other words, the FSC insisted on Parliament's power to hold the executive accountable by means of checks and balances, whether these were established by the Constitution or legislation.

5.1.2 Between Deciding and Avoiding Substance of the Law: Cases Involving Salaries of High-Ranking Officials

One of the critical challenges for the Iraqi people and its government is the extent of corruption within the state institutions and in particular amongst high-ranking government officials. Various factors have contributed to the dramatic increase in corruption in the country, and one of parliament's most crucial tasks is to pass the necessary legislation to tackle or at least minimize its impact. However, it has done little and is often considered to be part of the problem; it grants high salaries and financial privileges to high-ranking government officials including MPs, ministers and the three Iraqi presidency offices. This has placed an enormous burden on the country's general budget, as well as creating a gulf between the financial privileges they enjoy and the living standards of the rest of the civil servants and the ordinary people. Public and civil society organizations have continuously called for widespread protests to demand changes and tackle the problem.⁷⁰⁰

⁷⁰⁰ See e.g., The Telegraph headline: 'Iraqi MPs' Lavish Salaries Causing Public Outrage'. It states that Iraq's lawmakers are being paid over £180,000 a year-for working for only 20 minutes since they were elected in March, and without passing a single law. It reported that 'Iraqi MPs get a base salary of £6,500 a month, on which they pay just 6 per cent tax. In addition, they receive £7,800 a month for housing and security arrangements. There is also a one-off £37,500 stipend to cover expenses during their four-year term. Regardless of whether parliament is in session or not, MPs are entitled to stay free at Baghdad's Rasheed Hotel and collect a £375 per diem when travelling inside or out of Iraq. Once out of office, they get 80 per cent of their salary for life' 27. 'Iraqi MPs Lavish Salaries Causing Public Outrage' *The Telegraph* (London, 2 November 2010) <<http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/8104439/Iraqi-MPs-lavish-salaries-causing-public-outrage.html>> accessed 27 July 2015; Barbara Surk , 'Iraqi MPs Get Handsome Pay for Little Work' *The Washington Post* (Washington, 2 November 2010) <<http://www.washingtontimes.com/news/2010/nov/2/iraqi-mps-get-handsome-pay-for-little-work/?page=all>>; Ali Abel Sadah, 'Iraqi Activists Seek to End Pensions for Parliament' (*al-Monitor*, 13 August 2013) <<http://www.al-monitor.com/pulse/originals/2013/08/iraq-parliament-pension-controversy.html#>>; Iraq to Slash Politicians' Salaries amid Protests (*al-Arabiya* News, 16 February 2011) <<http://www.alarabiya.net/articles/2011/02/16/137896.html>>; 31; 'Iraq's PM Says He'll Cut His Salary by Half' (*al-Arabiya*, 5 February 2011) <<http://www.alarabiya.net/articles/2011/02/05/136332.html>> accessed 2 December 2015.

In 2011, the Parliament enacted two pieces of legislation regulating the pensions of MPs (MPs' Allowance Law 2011),⁷⁰¹ and Ministers (Ministers' Allowance Law 2011).⁷⁰² The *First MPs' Pension* (9/2012) case was an interesting one. A group of retired MPs challenged the constitutionality of the provisions of the MPs' Allowance Law 2011. Their primary claim was that the contested law violated their right to 80% of their salaries under a previous law that regulated retirement pension.⁷⁰³ Petitioners argued that this infringed the fundamental constitutional principle that prohibits the retroactive effect of laws.⁷⁰⁴ In addition, they cited other constitutional provisions including the exemption of low income from taxes,⁷⁰⁵ and the state's obligation to guarantee a 'suitable income'.⁷⁰⁶

The FSC found the contested provision was constitutional, arguing that, firstly, there was no provision in MPs' Allowance Law 2011 stipulating a retroactive effect. Secondly, there was no link between petitioners' arguments and the aforementioned constitutional provisions since the tax exemption applied only to low incomes and the petitioners were not considered to be in the low-income bracket. Thirdly, it lay within the powers of the federal authorities to determine the suitability of income.⁷⁰⁷ The Court manifested a similar approach in the *Pension of Ministers* (16/2012) case, in which a minister challenged the constitutionality of a similar provision of the Ministers' Allowance Law 2011, on similar grounds.⁷⁰⁸ Interestingly, the primary legal issue in both cases was that by the time these two new pieces of legislation had been enacted, the petitioners' retirement pensions had become acquired rights, which cannot be reduced, but can be increased. Most importantly, in both these rulings the Court upheld contested laws and ruled on the substance of the issue. The Court did not address the issue of the pensions in itself, but the issue of

⁷⁰¹ Law of Salary and Monthly Allowance for Members of the Council of Representatives (28) 2011 (MPs' Allowance Law 2011).

⁷⁰² Salary and Monthly Allowance for Ministers (27) 2011 (Ministers' Allowance Law 2011).

⁷⁰³ Unified Retirement Law (27) 2006 [Repealed] (Retirement Law 2006).

⁷⁰⁴ Constitution of Iraq (2005), art 19 (9).

⁷⁰⁵ *ibid.*, art 28 (2): 'Low income earners shall be exempted from taxes in a way that guarantees the preservation of the minimum income required for living. This shall be regulated by law.'

⁷⁰⁶ *ibid.*, art 30: 'First: The State shall guarantee to the individual and the family – especially children and women – social and health security, the basic requirements for living a free and decent life, and shall secure for them suitable income and appropriate housing'.

⁷⁰⁷ IRQFSC 9/2012 [2/5/2012].

⁷⁰⁸ *ibid.*

reducing and increasing these was the subject of the petition rather than the constitutionality of the retirement pension itself.

Since then the allowance and financial privileges of high ranking state officials, MPs in particular, has been central to a number of constitutional cases. There has been a major shift in the approach of the Court towards constitutional litigators. Significantly, the FSC annulled the two contested laws in other cases, on entirely different grounds. The first case of this kind and *Second MPs' Pension* (31/2013) case, was initiated by the Iraqi Union of Lawyers challenging the constitutionality of the high salaries of the MPs and ministers. The Court's previous ruling in the *Proposal and Draft Law* (43/2010) was central to the claim: the petitioner argued that the contested law was a proposal presented and passed by the legislature without being transferred to a draft law and approved by the Council of Ministers. Significantly, the Court found the contested law was unconstitutional, not on the substantial grounds that it reduced or increased pensions, but on procedural grounds. It was a proposal law presented and passed by the legislature that failed to fulfill the necessary constitutional requirements.⁷⁰⁹

In fact, the Court did not address the most crucial issue that the petitioners emphasized in their applications, namely, the constitutionality of the MPs' pension itself. Therefore, the constitutional litigation focusing on the unconstitutionality of the substance of the contested law continued to be brought before the Court. In two subsequent cases, petitioners sought to assert the unconstitutionality of the legal provisions which had initially introduced such pensions for MPs (Articles 3,4 of Law of Parliament 2007).⁷¹⁰ The petitioners did bring to the attention of the judges the essential constitutional issues on the substance of the contested laws. First, it was argued that the law contradicts the Constitution since this expressly provides for legislation regulating MPs' rights and privileges, and remains silent on the issue of retirement pensions.⁷¹¹ Second, the MPs' retirement pension was introduced by Law of Parliament 2007, which treats MPs and ministers alike in terms of rights and privileges including retirement pension, whereas, constitutionally, MPs are not entitled to equal

⁷⁰⁹ IRQFSC 31/2013 [6/5/2013].

⁷¹⁰ Law of the Council of Representatives (50) 2007 and its Amendment (23) 2010 [Law of Parliament 2007].

⁷¹¹ Constitution of Iraq (2005), art 63.

treatment in this regard.⁷¹² Third, the Retirement Law 2006, which regulates requirements for the entitlement of state employees for retirement pensions, required a minimum of twenty-five years in service and not less than fifty years of age for retirement referral;⁷¹³ however, the majority of the MPs failed to fulfill this condition. Despite these challenges to the substance of the contested law, the Court again found it unconstitutional on the same procedural ground as in the main case: the lack of the approval of the government of proposal laws.⁷¹⁴

Indeed, many had anticipated that such pensions would be introduced again. The Parliament could have met the procedural requirements upon which they were annulled, that is, by obtaining government approval of the relevant proposal law, or the executive authority could initiate a draft law reintroducing these pensions. In the most recent development, in 2014, the Parliament passed Retirement law 2014, which also excluded ministers and MPs from the general rules.⁷¹⁵ This exception appears to be reintroducing similarly high pension salaries to those that were previously declared unconstitutional by the Court based on the procedural requirements of law making. Since the enactment of Retirement Law 2014, there have been a considerable number of cases challenging the constitutionality of the specific provisions of the law that introduced these exceptions, arguing that the contested provisions implicitly reintroduce high retirement pensions for high ranking officials including MPs. Not surprisingly, the Court ruled the law unconstitutional again on the same procedural grounds, as it ruled in the *Third MPs' Pension (38/2014)* case.⁷¹⁶

There are several observations on these cases. Firstly, a number of retired MPs initially challenged the constitutionality of the contested legislation for entirely the opposite reasons to the latter cases, claiming that the contested law had decreased their retirement pensions. Later developments included the ongoing widespread public anger and protests, led mainly by the civil society

⁷¹² Constitution of Iraq (2005), art 63 (1): '[A] law shall regulate the rights and privileges of the speaker of the Council of Representatives, his two deputies, and the members of the Council of Representatives.'

⁷¹³ See Retirement Law 2006, art 1 (5).

⁷¹⁴ IRQFSC 79/2013 [23/10/2013], the case was initiated by a lawyer as an individual who challenges the constitutionality of the law. IRQFSC 86/2013 [23/10/2013] which was initiated by an MP [B.H.A']

⁷¹⁵ Unified Retirement Law (9) 2014 (Retirement Law 2014), art 27.

⁷¹⁶ See the series of relevant FSC decisions: IRQFSC 36/2014; IRQFSC 43/2014; IRQFSC 38/2014 issued 24/6/2014.

organizations and most importantly the Iraqi Union of Lawyers, which eventually challenged the *high* salaries of MPs. Secondly, the law in question was challenged in two different ways. In the initial cases, the arguments were based on the FSC's jurisprudence in *the Draft and Proposal Law* (43/2010) case: the formal procedure by means of which these laws were enacted was argued to be unconstitutional. The contested laws were therefore annulled by the FSC on procedural grounds. The second series of cases were brought before the Court claiming the unconstitutionality of the substance of the law and the pension itself. Interestingly, the FSC's decisions that ruled unconstitutional such contested laws were on the same procedural grounds, with no indication as to the substance of the issue.

Despite the fact that the Court continues to annul such laws, the developments in the cases of the MPs' retirement pensions suggest that, unless the substance of the issue is addressed, the battle over this particular issue will continue. The MPs' pension cases also illustrate the general approach of the FSC concerning the conflict between the procedural and substantive aspects of the rule of law. For different reasons, many would argue that the legislature has infringed the principle of equality before the law and some other constitutional principles in granting some state officials such a distinctive financial privilege in comparison to other state employees. In all these relevant cases, judges based their decisions on procedure and how the law is enacted and not on what the law contains. Thus, the FSC tried to uphold the formal rule of law.

In concluding this section, it can be argued that for decades in Iraq, constitutions were written and applied to serve to empower governors, and even when they guaranteed some form of separation of powers, there were significant violations and acts that altered the constitutional balance of power favouring the executive authorities. The outcome was a state that was, at its best, ruled by law. Arguably, executive dominance left the Parliament ineffective and weak and incapable of performing, especially in overseeing the government's performance. Thus, key to the constitutional democracy in post-2003 Iraq emerging from a longstanding tradition of strong executives and overcoming the dangers of an unchecked and unaccountable government, was to provide and safeguard the separation of powers, the supremacy of the Constitution and, most crucially, a state in which both the governed and those who govern are ruled by

the rule of law. The Constitution was generally criticised for adopting an ambiguous and incomplete balance between empowering and restraining government institutions, especially the legislative and the executive branches. Given the position and jurisdiction of the FSC as the final interpreter and arbitrator of constitutional controversies and disputes, it is not surprising that the Court has been central to power-struggles between the legislature and the executive.

The case law of the FSC evidences two points that most of the literature on courts in emerging democracies might also support. First, constitutional questions regarding the structure and powers of the newly established state institutions and officials have become increasingly judicialised including even some basic questions. Thus, it can be said that the Court was facing a growing demand to address and resolve contested constitutional questions that often resulted in the Court being seen to interfere in political issues and intrude into the domain of the political branches, infringing the separation of powers. By implication such an act increased potential political pressure on and even interference in the constitutional judiciary and at times provoked severe government reaction. Second, constitutional adjudication serves to define and 'redefine' the constitutional balance of powers; often the implications have been to serve to legitimise the exercise of powers rather than checking these and holding to account arbitrary decisions of individual government officials or institutions. In general, it is agreed that the FSC has played a substantial role in restructuring the constitutional balance of power, and its interpretations almost certainly affected the performance of the Parliament's powers of law making and overseeing government. Furthermore, its insistence on how the law is made and ignorance or avoidance of what the law actually contains has served to legitimise government exercise of powers and raised serious questions about the capability and willingness of the FSC to uphold substantive attributes of the rule of law, as was evident in the cases concerning the retirement pension of high-ranking government officials.

Many would argue that the FSC could have reached conclusions that upheld the legislative and accountability powers of the Parliament. Given that the Court did not hesitate to establish new relations and rules by broadly interpreting the Constitution, as it did in the case of the Independent

Commissions, then the Court could have also interpreted the principle of separation of powers as providing support for upholding Parliament's original direct right to legislative initiative in *Draft and Proposal Law* (43/2010) ruling. Such an outcome would have prevented challenges to the laws that were then annulled on the basis of that interpretation. It is also noticeable that the FSC is becoming more aware of the implications of its decisions and can be seen to have gradually minimised these. Cases that involved formal questioning or interrogation of ministers provide an example of how, after the Court defined the requirements for a valid parliamentary interrogation procedure, then in the subsequent cases implicitly asking judges to check whether Parliament had observed such requirement, the conclusions it reached often suggested a shift of approach favouring parliamentary control of government. A similar pattern was also seen in the most recent *Proposal and Draft Law* (21/2015) case. It is still unclear how this shift of approach will affect legislative-executive relations and the broader balance of powers. It would be interesting to know whether any of the already annulled legislation would still be tenable under the terms of the *Proposal and Draft Law* (21/2015) ruling.

The separation of powers horizontally might be said to have the effect of limiting arbitrary exercises of powers by preventing consolidation of power in one government body or official. Similarly, the federal structure and division of powers between different levels of governments or other power-sharing arrangements in post-2003 Iraq was also believed to serve to prevent the concentration of power in one state institution, a person or even a single ethnosectarian group. The following discussion analyses the role of the FSC and its approach to cases and conflicts of competence between federal and sub-federal governments.

5.2 The Role of the FSC in Developing Federal Structure of the State

Federalism, decentralization and devolution of powers between the federal government and the sub-federal governments (regions and governorates) are said to be the most innovative and contested constitutional principles in post-invasion Iraq. As was argued in our previous chapter, the constitutional and

legal rules that govern these entities and their powers are mostly characterised by generalities and ambiguities.⁷¹⁷ Various actors, including the CPA officials, constitutional drafters, ethnic and political groups, that were involved in the post-2003 constitution making were generally agreed on some form of federalisation, but deeply divided on almost all related aspects.⁷¹⁸ It is almost inevitable that such a division of power will create constitutional disputes and contestations, which at some point the judiciary will be called upon to resolve; this is, after all, one of the primary reasons for having a constitutional judiciary. A considerable number of jurisdictional disputes and power conflicts have been brought before the FSC. The following discussion analyses some of the key rulings.

The FSC was involved in addressing and resolving three kinds of constitutional questions. First, questions concerning the nature and extent of federalism and decentralization regarding Governorates. Second, questions focusing on 'shared competence' between federal and sub-federal governments. Third, and most controversially, the ongoing power-struggles over resource allocation, in particular the distribution of oil and gas powers.

5.2.1 Boundaries of Powers between Federal Government and Governorates

Chapter Four discussed the constitutional and legal framework for the federal system of Iraq. It was maintained that constitutionally, sub-federal governments enjoy significant autonomy in local decision making and also substantially participate in decision making at the federal level. In addition, their legislation takes precedence over federal laws in any conflict involving the application of shared powers. However, Iraq's federalism and decentralization is said to be 'partial and incomplete', and it is generally agreed that with any such system 'intergovernmental authorities and responsibilities are constantly subject to revision and renegotiation.'⁷¹⁹ It is observed that the passage of legislation that regulates the powers of the governorates (Governorates Law 2008) has created some controversial constitutional questions and disputes

⁷¹⁷ See Chapter Four (4.1).

⁷¹⁸ Cravens, Brinkerhoff, 'Provincial Governance in Iraq' 17.

⁷¹⁹ *ibid* 17-28.

involving the legislative powers of the Governorate Councils and their relationship with the federal authorities in Baghdad.

5.2.1.1 Governorates' Right in Legislating on Matters of Local Interest

The first issue, which was the subject of a series of litigation, was the extent to which governorate councils are empowered to legislate in matters of local interest. Constitutional and legal provisions and even the case law of the FSC was unclear in this regard. In its earlier rulings on this matter, the FSC had some rather contradictory views. Prior to the enactment of the Governorates Law 2008, Parliament requested for a constitutional interpretation of the relations between: on the one hand, Article 115, which provides for two key principles: sub-federal governments have exclusive powers over residual competences, and laws enacted by the sub-federal governments take precedence over federal laws in any conflict concerning a matter of shared competence. On the other hand, Article 122, which underlines governorate administrative and financial independence and powers. The Court was asked to clarify whether governorate councils have legislative powers regarding matters of local importance. In *First Governorates' Legislative Power (9/2007)* case the Court ruled that:

Through scrutiny of the provisions of Article 115 and the other Articles of the constitution of Iraq of 2005, it is apparent that the provincial [governorate] council does not enjoy legislative capacities in reliance on Article 122, paragraph 3, of the constitution, through which the province [governorate] may manage its affairs in accordance with the principles of administrative decentralization and in conformity with the provisions of the law enacted pursuant thereto.⁷²⁰

It is important to notice that this interpretation was issued before the enactment of the Governorates Law, according to which governorate councils can enact legislation regarding local policies. Most important, Article 61 of the Constitution granted the federal legislature the right to enact federal laws, but

⁷²⁰ IRQFSC 9/2007 [16/7/2007]. This is translated by Hamoudi, *Negotiating in Civil Conflict* 168. The first written record of the FSC decisions from 2006-2009 which is published as a book shows two decisions with different numbers, IRQFSC 9,13,16/2007. However, IRQFSC 9, has disappeared from the online record of FSC decisions on its official website.

not local legislation. Therefore, legislating on matters of local interest is not included in the exclusive competence of the federal government, but lies within the powers of governorate councils.

In the *Second Governorates' Legislative Power* (16/2008) case, the Governorate Council of Najaf requested from the FSC to clarify the Council's legislative powers concerning taxation. The FSC issued what appeared to be an opposing interpretation: it emphasized the supremacy of the governorate's legislation, in this case relating taxation, as guaranteed by Article 115 of the Constitution, except for matters of exclusive federal competence.⁷²¹ The Court reached this conclusion citing provisions from the Governorates Law, which provides that the governorate council is 'the highest legislative and supervision authority' within the governorate.

It [council] has the right to enact legislation on local matters within its governorates' borders to enable it to manage its own affairs according to the principle of administrative decentralization, so long as it does not conflict with the constitution or national law. The governorate council and local councils are subject to the supervision of the council of representatives.⁷²²

Accordingly, the Governorates Law recognized governorate councils' right to enact laws, orders and rules to regulate administration affairs according to the principle of administrative decentralization, emphasizing that these laws must not contradict the federal Constitution and laws.

The two interpretations of the legislative powers of the governorate councils appear contradictory: the first ruling denies that the governorate has any legislative powers whilst the second confirm such a power (in taxation). Consequently, Basra's Governorate Council sought a ruling that could clarify and determine which of the two previous interpretations should be adopted; it also sought interpretations for certain phrases that are used in these two rulings. In the *Third Governorates' Legislative Power* (21/2010) ruling, the FSC denied that there was any contradiction between these two interpretations. It insisted, without further explanation, that the principle of administrative decentralization

⁷²¹ IRQFSC 16/2008 [21/4/2008].

⁷²² Governorates Law 2008, art 2.

as adopted in the Constitution and detailed in Governorates Law is the basis for governorate powers. Moreover, in response to the second part of the application, the Court refused to explain its previous rulings arguing that it has no jurisdiction to explain its decisions.⁷²³ Thus, none of these rulings resolve the issue of the legislative power of the governorates and leaves the matter open to debate and different interpretations that could be the subject of further litigation.⁷²⁴

5.2.1.2 *The Administrative and Fiscal Independence of the Governorates*

In regard to the governorates' administrative and fiscal independence from the federal government in exercising their constitutional powers. Article 47 of Governorates Law subjected them to 'oversight and audit by the Board of Supreme Audit, and branches of the independent commissions formed under the Constitution'. This issue was central to *the Administrative Decentralization* (7/2012) case. The Babylon Governorate Council petitioned for an interpretation of the constitutional provision which states that 'The Governorate Council shall not be subject to the control or supervision of any ministry or any institution not linked to a ministry. The Governorate Council shall have independent finances.'⁷²⁵ It also sought judicial interpretation of the relationship between the legal terms: 'control' and 'supervision' in the Constitution and 'oversight' in the Governorates Law.⁷²⁶

The FSC found, as a general principle, that the constitutional powers and administrative independence of governorates is not subject to the control and supervision of any ministry or any institution not linked to a ministry. However, the Court held that according to the Governorates Law 2008, this independence is limited by the administrative decentralization principle and the governorates' coordination with the Council of Ministries.⁷²⁷ Most important, it held that the

⁷²³ IRQFSC 21/2010 [18/5/2010]. In several instances the court has been asked to explain its rulings due to their ambiguity but the court denies it has this jurisdiction. When asked to explain a previous ruling which has been a somewhat controversial decision it argued that it is within the jurisdiction of the State Shura Council to explain court rulings. *See* IRQFSC 57 /2010 [16/8/2010].

⁷²⁴ Hamoudi, *Negotiating in Civil Conflict* 170.

⁷²⁵ Constitution of Iraq (2005), art 122.

⁷²⁶ IRQFSC 7/2012 [26/2/2012].

⁷²⁷ Governorates Law 2008, art 45 (1): 'a high commission shall be formed for coordination between the provinces headed by the president of the Council of Ministers and the membership

governorates' fiscal independence should not contradict the federal government's powers in planning and executing the general policy of the state.⁷²⁸ With respect to the relations between these legal terms, the Court denied jurisdiction, arguing that interpreting ordinary laws, such as the Governorates Law, lay outside the FSC's jurisdiction.⁷²⁹

The decision is considered crucial in terms of determining the extent and the limitations on the independence of the governorates. Thus, it explicitly explains the Court's interpretive approach, emphasizing the necessity of comprehensive interpretation of all relevant constitutional provisions to establish the rationale and philosophy behind their enactment.⁷³⁰ It can be said that the Court could have determined the extent of administrative decentralization as stated in the Constitution and detailed by the federal legislation, yet it avoided doing this on jurisprudential grounds. This is despite the fact that the Court has in many of other instances based its rulings on the interpretation of ordinary laws.

Another issue which has been a heated controversy concerns the extent of the federal authorities' powers regarding the dismissal of governors who are elected by the governorate council, which itself is elected in local elections. The governor can be removed either by the council's members following a questioning session, or by Parliament upon the request of the PM. In any case, a dismissed governor can appeal against the decision of dismissal to the judiciary. In 2009, the Salah al-Din governorate council dismissed its governor, who then challenged the dismissal decision before the FSC. In the *Removal of the Governor of Salah al-Din (58/2009)* case, the Court upheld the decision of the Governorate Council and confirmed the removal was lawful.⁷³¹ However,

of the Governors, and shall be competent to consider the affairs of the governorates, their local administrations, and means of cooperation between them.'

⁷²⁸ Constitution of Iraq (2005), art 80 (1): '[T]o plan and execute the general policy and general plans of the State and oversee the work of the ministries and departments not associated with a ministry'.

⁷²⁹ IRQFSC 7/2012 [26/2/2012].

⁷³⁰ Ibid.

⁷³¹ IRQFSC 58/2009 [13/10/2009]. This ruling could not be found on the official website of the FSC, but it has been discussed in detailed by Haider Ala Hamoudi, *The Will of the (Iraqi) People 51-52*. the supreme court approval of the dismissal of the governor of Salah-din is political and not legal, <http://www.alraeed.net/>; a legal debate among governor of Salah-din, PM and judiciary concerning the dismissal of the governor, <http://wattan4all.org/wesima_articles/index-20091101-32253.html> See <http://www.addustour.com/>.

the removal proved controversial. The dismissed governor refused to comply with the FSC decision and demanded that, unless a presidency decree was issued that confirmed his removal, he would stay in his position. At first, Maliki, the Prime Minister, criticised the removal and then ordered that the dismissed governor must leave his position. In another development, it was also reported that Maliki interfered further to prevent the Governorate Council from electing a new governor without his involvement, and even there were reports that he then placed the office of the dismissed governor under military occupation for several days.⁷³²

Since the first case in 2009, the FSC has not been called upon to decide on dismissal decisions, and in fact the legislature amended the Governorates Law in 2013 which repealed such jurisdiction for the FSC and instead provided that the governor can appeal the dismissal decision to the Administrative Court. It is interesting that some may argue that the amendment indicates how removal can become a highly contested political issue in regard to the extent of the federal authorities' oversight over the 'elected' governor and the involvement of the FSC.

On the other hand, in a number of cases the FSC was called on either by the Administrative Court or the removed governor to decide on cases challenging the constitutionality of the governorates law provision that entitled federal authorities to dismiss the governor on the grounds that such a power contradicts the Constitution and does not lie within the exclusive competences of the federal government. In the aftermath of July 2014, vast territories in northern Iraq fell into the control of ISIS, including the city of Mosul, the centre of the Ninawa governorate. In May 2015, the Parliament dismissed the governor of Ninawa from his position, who appealed the decision to the Administrative Court, which itself referred the case to the FSC on the ground that it is a dispute between federal government and local government. However, the FSC dismissed the case referring to the above mentioned amendment to the Governorates Law in 2013. In another case the dismissed governor of Ninawa again challenged his removal, this time challenging the constitutionality of Article 7(2/B) of the Governorates Law which provides that Parliament, upon

⁷³² Hamoudi, 'The Will of the (Iraqi) People' 56.

the request of the PM, can dismiss the governor. In the *Dismissal of Governor of Ninawa* (106/2015) case, the Court argued that,

the 2005 Iraqi Constitution neither provide for Parliament to dismiss the governor, [...] nor prevent it from that, since Parliament is entitled to oversight the executive branch (Article 61) and the governor is part of the executive branch and as the Parliament pursuant to Article 61, can dismiss ministers, *a fortiori* it is authorised to dismiss governor who is the highest executive chief in his governorate [...] furthermore, Parliament can dissolve governorate councils then it can also dismiss governors.⁷³³

Accordingly, the FSC ruled the contested law constitutional on the above grounds; it can be argued to have legitimize the expansion of the federal authority's power as reflected in the Governorates Law.

There are other examples that many would say clearly indicate the extent of the interference by federal authorities or their attempts to supervise governorate councils. The Salah al-Din Governorate Council challenged the constitutionality of a decision issued by the Parliament establishing a parliamentary committee to investigate the Governorate's budget. In *Fiscal Independence of Governorates* (90/2013) case, the FSC upheld Parliament's decision on two grounds. First, the Court argued that, constitutionally, the legislature has oversight power, and thus the parliamentary committee is a means of exercising this power and establishing facts which are used by other governmental institutions such as the Public Prosecution and the Public Integrity Commission.⁷³⁴ Second, it argued that the Governorates Law 2008 subjected the governorate councils to the supervision of Parliament.⁷³⁵

On the other hand, some may also maintain that the Court has supported the continuity of the legal system, upholding pre-2003 legislation that clearly contradicts constitutional principles and the rules regarding federal structures. For example, according to the pre-2003 Iraq law, the National Company for Water Transportation exclusively controls all maritime services in Iraqi ports.

⁷³³ IRQFSC 106/2015, [26/1/2016].

⁷³⁴ IRQFSC 90/2013 [7/11/2013].

⁷³⁵ Governorates Law 2008, art 2 (2).

This Law was partially suspended by a CPA Order.⁷³⁶ The Ministry of Transportation issued regulations in accordance with that part of this Law, which was not suspended, restricting private companies to offer maritime services in Iraqi ports. The petitioner (a private company offering these services) challenged the constitutionality of the act of the Ministry. The Court dismissed the case arguing that part of the contested regulation had never been published in the Iraqi Gazette, and lies outside its jurisdiction.⁷³⁷ This raised a crucial issue, as it is argued that the FSC,

could have resolved the question by indicating that the central government had no power over regulation of the ports (excluding, of course, matters relating to customs, immigration, and importation of goods, none of which was presumably being contested by the private company seeking to offer maritime services).⁷³⁸

While the aforementioned jurisdiction is not listed in the federal government's exclusive powers, the FSC's decision could be understood as empowering the federal authorities to exercise such powers that are not exclusively listed in Article 110. Thus, this practice and the FSC jurisprudence suggest that the federal government's exclusive competence is not, as many might argue, a limitation on the federal government's powers; it seems that 'exclusive' in this context does not mean that federal authorities cannot exercise other powers that are not listed there.⁷³⁹ It is interesting to consider why the Court remains silent or ineffective in this regard. Is it because the Court is a weak institution and its decisions in supporting and developing federal structures would not be respected and its legitimacy would therefore be endangered? This might be the case to some extent: clearly, examples where the FSC has ruled unconstitutional the federal authorities' policies regarding governorates are few in number. In a very unusual example, the Court upheld Article 115 of the Constitution, arguing that there is no specific jurisdiction listed for the federal government to appoint or dismiss security officials within a governorate, in other words, this is a residual

⁷³⁶ CPA/Order 51: Suspension of Exclusive Agency Status of Iraqi State Company for Water Transportation (14 January 2004).

⁷³⁷ IRQFSC 36/ 2010 [18/5/2010].

⁷³⁸ Hamoudi, *Negotiating in Civil Conflict* 157.

⁷³⁹ *Ibid*, 156-157.

power and belongs to sub-federal governments.⁷⁴⁰ This decision was issued prior to the enactment of the Governorate Law.

5.2.2 Shared Competences

The Constitution provides for shared competences which are to be exercised based on the principle of co-operation between sub-federal governments and the federal government. The nature and extent of this co-operation remain unclear and therefore has been central to considerable constitutional litigation. The following discussion focuses on three important areas of shared powers: international representation, public health, and public education.

The extent to which shared competences depend on the federal government's action was the focal point in the *Governorates' International Representation* (36/2011) case. The Constitution provides for the establishment of offices for sub-federal governments in Iraq's embassies and international diplomatic missions.⁷⁴¹ Although this has been implemented to some extent, with the KRG having representative offices in Iraqi embassies, no similar practice exists in the case of the governorates. The refusal of the federal government and more specifically that of the Ministry of Foreign Affairs to implement this constitutional provision, establishing offices for governorate representatives, was challenged by Diyala Governorate Council. It requested that the FSC oblige the relevant federal authorities to implement the Constitution, but the Court dismissed the case on jurisdictional grounds.⁷⁴²

However, the above decision did not prevent the petitioner from submitting another request, asking the FSC to determine the extent of the federal government's obligation to implement the contested constitutional provision, by establishing representative offices of this kind. It was also asked to decide which governmental institution is responsible for implementing this constitutional provision and what the legal consequences should be for non-implementation. As the Court noted, essentially it was being asked to clarify the government's

⁷⁴⁰ IRQFSC 16/2007 [11/7/ 2007].

⁷⁴¹ Constitution of Iraq (2005), art 121 (4): 'Offices for the regions and governorates shall be established in embassies and diplomatic missions, in order to follow cultural, social, and developmental affairs'.

⁷⁴² IRQFSC 36/2011 [10/5/2011].

obligation in respect to the implementation of Article 121. The FSC argued that the federal government is responsible, and in doing so it must take into consideration the need for establishing such offices and the logistical and physical requirements which this would entail. Most importantly, it should consider international treaties and agreements regarding diplomatic representation and relations in accordance with the principle of reciprocity in international relations. Provided that these conditions were fulfilled, the Ministry of Foreign Affairs in co-ordination with other relevant governmental bodies should implement this provision.⁷⁴³ In practice, it is a difficult and costly undertaking for the federal government to establish representative offices for (fifteen) governorates. Therefore, the decision was taken on pragmatic grounds, bearing in mind the various factors in deciding the case and deferring this issue to the federal authorities.

This was not the first case regarding shared competences. In *the Specialist Doctors* (20/2010) case, the Governorate Council of Nineveh challenged the constitutionality of the decision of the federal Health Ministry regarding practical problems related to the employment and distribution of specialist doctors in the governorate. In principle, local authorities have a role in deciding these matters; however, the Ministry considered specialist doctors to be a ‘federal asset’ and decided to relocate several of them, without consulting the Governorate Council. Therefore, the Court was asked to decide whether governorate councils have jurisdiction in this matter, with reference to Articles 114 (shared competences) and 115 (residual powers). The Court dismissed the case arguing that it did not specifically request an interpretation of the relevant clauses.⁷⁴⁴ In another case, in 2009, the Court had dismissed a request from the governor of Diyala challenging the legality of a decision by the governorate council to eliminate a director working in the government oil sector from his position on the same grounds.⁷⁴⁵ Thus, the Court’s rulings implicitly allow the federal authorities to continue exercising their powers on these matters.

Similarly, both federal and sub-federal governments share power in matters of ‘public educational and instructional policy’.⁷⁴⁶ As with all similar

⁷⁴³ IRQFSC 49/2011 [18/7/2011].

⁷⁴⁴ IRQFSC 20/2010 [23/3/2010].

⁷⁴⁵ IRQFSC 79/2009 [21/12/2009].

⁷⁴⁶ Constitution of Iraq (2005), art 114 (6).

competences, the nature and extent of co-operation between these governments remains unclear; thus, the exercise of such power can be expected to create jurisdictional conflict, as occurred between the KRG and the federal government. The Federal Ministry of Higher Education denied the legality of decisions issued by the KRG concerning legalization of qualifications obtained from overseas universities, claiming that such decisions are valid only within the region and for its residents. A joint committee, which was set up to find a solution for this disputed matter, repeated the same statement.

Applicants seeking employment in the Ministry of Foreign Affairs submitted the KRG's certification of their qualifications to the Ministry as part of their applications. Uncertainty regarding the validity of this documentation led the Ministry of Foreign Affairs to request an interpretation of the term 'sharing' in Article 114 of the Constitution which provides that '[T]he following competences shall be shared between the federal authorities and regional authorities'. Furthermore, it petitioned for a ruling determining the legality of KRG's decisions, specifically those relating to shared competences which had been issued without any coordination or (as in this case) following unsuccessful attempts to reach agreement with the federal authorities. The petitioner insisted on the constitutionality of all KRG's legal actions taken since 1992 unless these are amended or annulled by its authorities.⁷⁴⁷ In *the KRG's Higher Education Ministry* (29/2013) case, the Court dismissed the claim on the grounds that the issue was a legal dispute and required the parties to the dispute to initiate a lawsuit which then would be decided by the FSC. It also concluded that the matter could not be resolved through an abstract interpretation of the constitutional phrase 'shared competence'.⁷⁴⁸ The Court has been somewhat inconsistent in using this admissibility rule to decide cases. The following discussion provides further evidence of the FSC's use of this admissibility rule as a means of avoiding tackling significant constitutional questions.

⁷⁴⁷ Constitution of Iraq (2005), art 141: 'Legislation enacted in the region of Kurdistan since 1992 shall remain in force, and decisions issued by the government of the region of Kurdistan, including court decisions and contracts, shall be considered valid unless they are amended or annulled pursuant to the laws of the region of Kurdistan by the competent entity in the region, provided that they do not contradict with the Constitution'.

⁷⁴⁸ IRQFSC 29/2013 [6/5/2013].

5.2.3 Federalism and Hydrocarbons under Iraq Constitution: Power Struggles over Oil and Gas Sector

The problem of revenue sharing places an additional challenge on the federal system as the oil sector plays a key role in Iraq's economy. This matter is of such importance that the Constitution addresses this explicitly in separate provisions which are interpreted differently by federal and sub-federal governments respectively. This resulted in an ongoing legal conflict between the federal government and the KRG's authorities, the implications of which often extend beyond Iraq's border.⁷⁴⁹

5.2.3.1 Principal Constitutional Provisions on Distribution of Powers over Oil and Gas

There is consensus regarding ownership of oil and gas as stated in Article 111 which states that 'Oil and gas are owned by all the people of Iraq in all the regions and governorates'. Therefore, it is accepted that regional government and governorates contribute to the national budget from their hydrocarbons. The principal disagreement, however, relates to Articles 112 and 115 [the residual competences]. Article 112 stipulates that,

First: The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.

Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary

⁷⁴⁹ Internationally, the federal government has filed a legal case preventing the KRG from exporting oil, with the supreme court of state of Texas in the United States. At the time of writing, the court had ruled that 'the issue is not against US law even if it might violate Iraqi law'. The federal government has appealed this decision. Anthony McAuley, 'Kurdish Government Scores Legal Victory on Oil Exports, but Obstacles Remain' (*The National*, 17 August 2014) < <http://www.thenational.ae/business/energy/kurdish-government-scores-legal-victory-on-oil-exports-but-obstacles-remain> > accessed 1 December 2015.

strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.⁷⁵⁰

Several observations can be made here. First, the federal government has certain powers but not exclusive power over oil and gas activities. This article only refers explicitly to the management powers of a specific nature over those fields actually in production as of the 2006 date of the Constitution's approval. Second, it is largely unclear which powers the sub-federal governments have. The Constitution explicitly requires consultation and collaboration with, and input from the relevant sub-federal governments, as the words *with* and *together* specify. However, the nature and means of cooperation necessary for exercising this power are deeply contested.

Crucially, therefore, the Constitution distinguishes, whether by intention or coincidence, between two kinds of oil fields: it explicitly refers to current fields and therefore implicitly addresses the undeveloped or even non-discovered fields. This differentiation is said to be important. Thus, some may argue that power over the current fields is not listed within either the federal government's exclusive competences or its shared competences. Therefore, based on Article 115, residual powers, governorates and regional governments may be able to even claim a right parallel to that of the federal government to undertake activities involving the 'management' of oil and gas 'extracted' from 'present fields'.⁷⁵¹

In general, involved parties have seized on differences in interpretations and therefore in the oil policies of federal and sub-federal governments respectively. The Kurdistan Regional parliament has passed a law that regulates energy resources within the region.⁷⁵² The KRG-Oil and Gas Law 2007 is enacted based on the KRG's interpretations of the related constitutional principles. Thus, its key principles underline power-sharing with the federal government regarding oil and gas. Accordingly, the KRG 'shall, together with the federal government, jointly manage Petroleum Operations related to

⁷⁵⁰ Constitution of Iraq (2005), art 112.

⁷⁵¹ Rex J Zedalis, 'The Role Provincial Governmental Units Can Play Regarding Oil and Gas Development Agreements in the Kurdish North: Allocation of Iraqi Constitutional Power' (2013) 6 (4) *Journal of World Energy Law and Business* 324-325.

⁷⁵² Alex Danilovich, *Iraq Federalism and the Kurds: Learning to Live Together* (Ashgate 2014) 58,96.

producing fields'.⁷⁵³ It 'shall oversee and regulate all Petroleum Operations pursuant to Article 115 of the federal Constitution and in a manner consistent with Article 112'.⁷⁵⁴ This is where the residual powers, such as those of the KRG, prevail. Furthermore, the KRG shall 'cooperate with the federal government in formulating policies to develop the petroleum resources of the region'.⁷⁵⁵ This implies all fields, present and future. On the other hand, the federal Parliament has failed to pass implementing legislation that would eliminate these constitutional ambiguities. Therefore, the federal authorities rely on pre-2003 legislation, namely, the Law of Oil Ministry 1976, which gives the central government exclusive power over oil and gas.⁷⁵⁶

It can be seen that the two governments are agreed that constitutionally some level of collaboration is needed in this regard; however, there are critical disagreements concerning the substance of this cooperation and its meaning. An initial reading of KRG petroleum legislation indicates that the Law generally accords this region a leading role which is subject to principles of shared competence meaning that the KRG law takes precedence in any conflict. In practice, the KRG has developed oil fields [mostly undiscovered fields] within the region, relying on this regional legislation, until or unless the federal Parliament enacts the federal hydrocarbon law.⁷⁵⁷ Similarly, the KRG claims the legality and validity of its activities and oil contracts, which have been undertaken even prior to 2003, based on the Constitution itself, which states:

Legislation enacted in the region of Kurdistan since 1992 shall remain in force, and decisions issued by the government of the region of Kurdistan, including [...] contracts, shall be considered valid unless they are amended or annulled pursuant to the laws of the region of Kurdistan [...], provided that they do not contradict with the Constitution.⁷⁵⁸

⁷⁵³ Oil and Gas Law of the Kurdistan Region – Iraq (28) 2007 (KRG-Oil and Gas Law 2007), art 3 (3).

⁷⁵⁴ *ibid.*, 3 (4).

⁷⁵⁵ KRG-Oil and Gas Law 2007, art 18 (3); Most importantly, art 18 (4) recognizes that 'all the revenues obtained by the region from the petroleum operations be deposited to a general petroleum revenue fund for Iraq.'

⁷⁵⁶ Law of the Oil Ministry (101) 1976.

⁷⁵⁷ Danilovich, *Iraq federalism and the Kurds* 114-131.

⁷⁵⁸ Constitution of Iraq (2005), art 141.

From the federal government's perspective, since the ownership of the oil and gas is for all Iraqi peoples, then the federal government as the representative of all Iraqi people plays a leading role in the development of the hydrocarbon sector. Thus, federal authorities have the management rights to all fields, including those which were undeveloped, and future discoveries. Most importantly, any development or contracts made by the KRG regarding its fields, even the future fields, is unconstitutional without Baghdad approval. The federal government refers to Article 130 of the Constitution for the legality of its policies based on a pre-constitutional legislation, which guarantees legal continuity; pre-2003 Iraqi laws are valid unless voided or replaced by new legislation. It is clear that the Law of the Oil Ministry was enacted for pre-2003 Iraq where constitutionally power was concentrated in the central government. The Law contradicts the 2005 Constitution that guarantees a federal system and distribution of power between different levels of government each independent and responsible for making policies within the constitutional boundaries of power. However, the issue is much more complicated. These unresolved legal issues and disputes are mostly managed through a series of *ad hoc* informal power-sharing arrangements. The ongoing attempts to enact the relevant federal legislation have created drafts which according to observers are 'almost as vague as the constitution', mainly regarding the extent of contradiction and disagreement regarding the defined legal framework within which administrative and managerial control is shared.⁷⁵⁹

On the other hand, as the issue here requires clear interpretation of the relevant constitutional principles and provisions, then it would be argued that the FSC, as the final interpreter of the Constitution, could in fact resolve the controversy surrounding the exact meaning of these provisions. Interestingly, despite these ongoing legal disputes, the federal government has not challenged the constitutionality of the regional legislation nor has the KRG challenged the constitutionality of the laws under the terms of which the federal government exercises its powers. Significantly, in a few instances the FSC has been called on to decide on the issue.

⁷⁵⁹ Hamoudi, *Negotiating in Civil Conflict* 164.

5.2.3.2 *The FSC's Involvement in Oil and Gas related Disputes*

In the very first case, the *Governorates' Oil Exportation* (8/2012), the Federal Oil Ministry challenged the constitutionality of the decision of the Wasit Governorate Council. The Council had decided that it has the right to prevent export of oil and gas through existing national transport pipelines within the governorate territory. This would occur when the Council finds it necessary or it causes damage to the needs of the governorate for oil products or reduces its share of oil products. The Federal Ministry claimed that this decision was an explicit violation of the constitutional provision that guaranteed ownership of oil for all Iraqis (Article 111) and the current oil legislation, which gave the Ministry exclusive power over oil and gas. Furthermore, it violated the supremacy of the Constitution and federal laws. However, the Ministry did not make any reference to the key constitutional provision on the issue: Article 112. The FSC did take Article 112 into consideration when deciding the case. Following an examination of the constitutional provisions that regulate oil and gas, the Court declared the decision of the Council unconstitutional. It argued:

The constitution requires the enactment of a federal law that regulates the cooperation between federal government with governorates and regional governments in this matter, and due to the absence of this law [yet to be enacted] the implementation of this article [112] is suspended until this law is enacted.⁷⁶⁰

The Court referred to the second part of Article 112, considering it to require cooperation between the federal government and oil-producing governorates and regional government exclusively in terms of strategic policies needed to develop oil and gas resources. Therefore, the Council's ban on oil exports contradicted such development. In conclusion, the Court held that according to Article 130 of the Constitution the Law of Oil Ministry 1976 is in effect;⁷⁶¹ here again the Court established legal continuity of the pre-2003 legal system.

Therefore, the FSC's approach to *the Governorates' Oil Exportation* case may reveal several critical legal outcomes. The Court insisted and actually confirmed that oil and gas policy is not an exclusively federal matter; rather it

⁷⁶⁰ IRQFSC 8/2012 [2/5/2012].

⁷⁶¹ *ibid.*

requires cooperation between federal and sub-federal governments. However, it confirmed the legality of the federal government's adherence to the pre-constitutional law, which was enacted for the pre-2003 centralized state. Furthermore, the FSC's judges formalized and legalized the suspension of implementing Article 112 and therefore of the coordination required for the exercise of oil and gas power between these levels of governments. Accordingly, it can be argued that the FSC has allowed the federal government to continue its exclusive exercise of oil and gas power as long as there is no enacted federal legislation that regulates the issue.⁷⁶²

It is interesting to note that in its subsequent decisions on cases involving KRG, it can be said that the Court entirely ignored the fact that it had decided this issue. More importantly, the Federal Oil Ministry did not reflect on or bring to the attention of the Court or the KRG that the Court had already decided the substance of the issue. In two instances the federal government is said to have challenged the constitutionality of the KRG's policies regarding contracts and exportation concerning its oil fields without the approval of the Federal Oil Ministry.

In *the KRG Oil Contracts (74/2012)* case, the Federal Oil Ministry petitioned for an interpretation of Article 112, and whether and to what extent it is constitutional and legal for KRG and governorate councils to sign oil contracts with international companies without the approval of the federal government. The petitioner argued that some councils and the KRG have signed contracts of this type ignoring the Ministry's powers in this regard. The petitioner also maintained that the application of Article 112(1) of the Constitution required that new implementing federal legislation should regulate the cooperation between these levels of governments. In the absence of this law, this article was suspended and the existing Law of Oil Ministry gave the Federal Government exclusive authority in this regard. The FSC dismissed the case here, arguing that the issue in question was a legal dispute between these aforementioned parties; therefore, it required the parties to initiate a lawsuit to resolve this dispute, which could not be resolved through an abstract interpretation of the contested constitutional provision.⁷⁶³ Thus, the Court chose

⁷⁶²IRQFSC 8/2012 [2/5/2012].

⁷⁶³ IRQFSC 74 /2012 [9/10/2012].

not to interpret Article 112 to clarify and define the powers of both federal government and sub-federal governments in regard to oil and gas. However, it did confirm that there is a legal dispute between two governments and urged both parties to submit a separate lawsuit.

With this dispute unresolved and the KRG having taken the decision to export oil,⁷⁶⁴ an immediate reaction by the Federal Oil Ministry was to seek a ruling from the FSC against KRG- Natural Resources Ministry that would prevent it from exporting oil (from fields within its regional territory) independently from Bagdad. As a result, the Court in *the KRG Oil Export* (59/2014) case, argued that,

the decision on the Federal Oil Ministry appeal would give a sense of a prior opinion in the course of a proceedings and a judgment that will be issued, and this contradicts the applicable judicial context which requires that a ruling be made through a lawsuit.⁷⁶⁵

It again insisted and called upon the parties to the dispute to seek resolution through a lawsuit rather than requesting an abstract constitutional interpretation. It is not explicit whether there has been such a lawsuit before the FSC. A statement was issued by KRG's Natural Resources Ministry following the aforementioned decision by the FSC, which illustrates KRG's view on oil and gas-related policies and its arguments in any future lawsuit concerning KRG's oil policy. The statement maintained that the 'Federal Oil Ministry's claims

⁷⁶⁴ The KRG started to sign contracts with international companies, which were immediately rejected by the federal government. On-going meetings and political efforts between both parties failed to reach agreement resulting in federal government considering all these contracts illegal and threatening to take action against these companies. The federal government took legal action against the Turkish government for allowing KRG oil exports via its territory. In late 2013 following its first exportation of oil via a separate pipeline; Federal Oil Ministry asked the FSC to issue a decision stopping KRG from exporting oil. Meanwhile, the federal government has been following KRG's exports and sought a foreign judgment, as it filed a case against KRG with a US district court accusing the KRG of smuggling oil in particular regarding the shipman that carried the KRG crude oil and that was in territories of the State of Texas in the United States. The court, however, decided that the issue is not a violation of US law, even though it might violate Iraqi law. Two interesting and contradictory reactions to the decision have been reported; whilst the KRG celebrated the decision, the Federal Oil Ministry appealed this decision. The federal ministry declared that it is not bound by this decision, and that it is critical for both parties to rely on the Iraqi court and seek a solution from the FSC without political interference. Laurel Brubaker Calkins, 'Iraq Allowed to Sue Kurds over Texas Oil Tanker in U.S' < [http://www.bloomberg.com/news/articles/2015-01-09/iraq-allowed-to-sue-kurds-over-texas-oil-tanker-in-u-s-1-;](http://www.bloomberg.com/news/articles/2015-01-09/iraq-allowed-to-sue-kurds-over-texas-oil-tanker-in-u-s-1-) Danilovich, *Iraq Federalism and the Kurds* 114-131. See also <http://www.ca5.uscourts.gov/opinions%5Cunpub%5C15/15-40062.0.pdf>.

⁷⁶⁵ IRQFSC 59/2012 [24/6/2014].

were based on its own interpretation of constitutional provisions to claim that the oil and gas affairs fall within federal government's exclusive competence.⁷⁶⁶ It further argues that the Federal Oil Ministry is relying on the pre-2003 legal system, which ignores the fact that 'current constitutional provisions do not incorporate any oil and gas matters within the exclusive powers of the federal government'. The KRG claimed the FSC ruling in this case was another key acknowledgement of KRG's constitutional rights. The KRG maintained that the FSC's decision in this case unanimously rejected the Federal Ministry's appeal and is binding on all authorities including the Federal Ministry itself.⁷⁶⁷

Furthermore, the indications are that only the implementing federal legislation, based on the relevant constitutional principles, could provide certainty and solutions to these disputes. Assuming that the Constitution differentiates between present and future fields, then the cooperation covers all oil- and gas-related activities in respect to the present fields. In regard to the future fields, it is possible that the federal government also shares powers with sub-federal government concerning strategic policies. In other words, the management aspect appears to lie within the residual powers, which belong to the sub-federal governments. Thus, the federal governments' oil policies would not only be challenged by the KRG, but also by the governorates which have almost the same powers as the KRG, except that constitutionally they are unable to amend the application of federal legislation in areas of shared competence. Crucially, the 2013 amendment to the Governorates Law 2008, explicitly gives precedence to provincial laws in areas of shared competence.⁷⁶⁸ Therefore, one can argue that only a constitutional amendment that provides an explicit and clear understanding of the nature of 'shared' powers over oil and gas would eliminate the controversies over Article 112.

Overall, the case law of the FSC and the role of the Court regarding federalism-related constitutional questions might be open to different

⁷⁶⁶ The Kurdistan Regional Government, 'The Supreme Federal Court Rules Against Iraqi Minister of Oil's Request to Prevent KRG Oil Exports' (*Press Release by the Ministry of Natural Resources*, 27 June 2014) <<http://mnr.krg.org/index.php/en/press-releases/385-the-supreme-federal-court-rules-against-iraqi-minister-of-oil-s-request-to-prevent-kr-g-oil-exports>> accessed 02 November 2014.

⁷⁶⁷ *ibid.*

⁷⁶⁸ Second Amendment Law 2013 to Governorates Law 2008, art 7(4).

interpretations. One reading of the previously discussed case law could be that it is generally agreed that the passage of a federal legislation, the Governorates Law 2008, which is said to be crucial in detailing and defining intergovernmental authorities, responsibilities and relationships with the federal authorities, resulted in an increasing demand on judicial resolution of federalism-related disputes and controversies. Before that, for almost five years, the Court had ruled on only a handful of cases of this kind. This piece of legislation appears to have adopted a narrow reading of the constitutional powers of the governorates which many would claim has limited their powers, favoring an expansion of federal power in matters that under the Constitution are not reserved for the latter. Therefore, it was generally anticipated that the governorates would challenge the constitutionality of the law. However, over time it has become clearer that in most of the cases concerning the Governorates Law 2008, the main questions demanding clarification and input were from the federal authorities, suggesting that governorates council had implicitly accepted the legal limitations that the Law is said to impose on their powers.⁷⁶⁹ For example, instead of focusing on matters within the FSC's jurisdiction, a large number of cases demanded the Court's interpretation of the Governorates Law 2008, which as the Court itself argued on several occasions lies outside its jurisdiction.

It could be argued that governorate councils, as the highest legislative and supervisory authority within the administrative boundaries of the governorate, have largely failed, for various reasons, to exercise their constitutional competences. Interestingly, although many would argue that several of the controversial provisions of the Governorates Law 2008 contradicted the Constitution, none of the challenges brought before the Court addressed the constitutionality of this Law. It is generally maintained that the councils remain weak and their lack of fiscal and administrative decentralization can also be attributed to the fact that, despite generation of local revenues being guaranteed, in practice almost all their budget comes from Baghdad. For other

⁷⁶⁹ *e.g.*, Karbala Governorate Council demanded that it should get support in reviewing and advising on its local legislation from the Shura Council, which is a federal body with primary responsibility for providing technical legal advice in the legislative process. The Shura Council stated that provinces are not considered to be 'bodies not linked to a ministry' as per Article 6 of State Shura Council Law which enables it to provide legislative advice to such bodies. IRQFSC 73/2009 [11/8/2009], *See Hamoudi, Negotiating in Civil Conflict* 170-173.

administrative issues they largely operate under the authority and direction of federal government ministers. Others claim that the reason why governorates were not seen to be actively challenging potentially arbitrary exercises of powers by the federal authorities might be because these newly empowered local actors had little experience of decision making. This was largely the legacy of decades of centralisation and meant they lacked awareness of their constitutional powers.⁷⁷⁰

In general the FSC is seen to have taken a self-restrained approach to addressing and resolving constitutional questions concerning federalism. Except for a handful of cases in which the FSC ruled against the federal authorities, it can be said that its decisions have served to legitimize the federal authorities' interpretations of federalism, interpretations that many would claim to be inconsistent with the relevant constitutional provisions. Thus, many observers argue that the Court's decisions serve to protect or recognise the role of the federal Parliament in defining and modifying constitutional principles and the balance of the division of powers and relations between the federal government and the governorates. It is possible that in doing so, the Court frequently dismissed cases involving this piece of legislation on procedural grounds, avoided decision-making on substantive issues; and upheld the federal authorities' broad interpretation of the exclusively federal competencies.

Many factors might have contributed to that. The very notion of federalism and its structure as it was established in the 2005 Constitution was supposed to prevent the concentration of power in any one institution or level of government and this is new and extremely controversial. Many of its structural aspects were left to implementing legislation and many more of those which were detailed in the Constitution are ambiguous. Therefore, implementing the relevant constitutional principles and provisions would certainly result in bitter constitutional disputes and would heighten political tensions. Furthermore, the FSC judges might not be ready to jeopardize the institutional autonomy of their Court by triggering or supporting developments upon which politicians and the public are yet to agree. Instead, it has arguably supported the role of the federal legislature to determine the extent of the

⁷⁷⁰ Cravens, Brinkerhoff, 'Provincial Governance in Iraq' 18.

independence and powers of the governorates. The Court opted to uphold laws and policies which might be considered to do a disservice to federalism since they are often supportive of the centralisation of powers in federal authorities which is arguably inconsistent with what the Constitution establishes. The Court supported these policies and still often tends to avoid challenging their constitutionality.

These factors might serve to explain the FSC's response when in 2013 the federal Parliament amended the Governorates Law and expanded the powers of the governorates. The 2013 amendments came after a series of national protests and wider demands from within communities, including those that had once strongly opposed federalism, which involved taking practical steps to establish their federal regions. They also demanded broader powers that would enable them to gain control over local policies and resources. These amendments were crucial in providing for the supremacy of governorate policies over federal ones in areas of shared competence.⁷⁷¹ It empowered governorate councils to oversee the activities of all officials including senior officials and their appointment, without federal authority interference.⁷⁷² Following the amendments, governorates enjoy more powers in managing and monitoring their revenues including taxation and oil production. The law guarantees their right to tax oil companies for causing environmental damage. The oil-producing governorates receive a specific share of revenue from this natural resource produced from fields within their territories.⁷⁷³

On the other hand, constitutional cases that involved KRG, the only existing federal region, were considerably fewer than those involving governorates, despite the fact that disputes and power-struggles between KRG and the federal authorities have been more complicated and contested. This is in part because the Constitution treats governorates and federal regions almost equally, regions can exercise some substantial powers that governorates cannot. The most relevant of these is the right of the regional authorities to determine conflicts between federal and regional law in matters outside exclusive federal competences, and to amend the application of federal law within the region.

⁷⁷¹ Second Amendment Law 2013 to Governorates Law 2008, art 7(4).

⁷⁷² *ibid*, art 7(9).

⁷⁷³ *ibid* arts 44,45.

With respect to the governorates, the judiciary, and in particular the FSC, decides and resolves such conflicts.

Moreover, it seems highly unlikely that the constitutional disputes involving KRG can be resolved through the FSC's interpretation of the relevant ambiguous constitutional provisions, since these appear to be central to ongoing profound disagreements over power-sharing in Iraq. In this regard, most of the constitutional texts were said to have been deliberately left ambiguous as it had been almost impossible for drafters to agree on a clear view about how powers should be shared and distributed among federal regions and even different ethno-sectarian communities. Thus, the Court was clearly avoiding having to address the implementation of federalism in matters that have created ongoing political and constitutional crises between the two governments. Thus, on the handful of occasions that the FSC has addressed questions of this kind, its conclusions were seen to be considerably different from those in very similar cases involving the governorates, for instance the oil and gas-related cases.

The key points that can be concluded from analysing the case law of the FSC regarding federalism-related questions is that the Court often upheld the legal continuity of existing legislation and most decisions here seem to have served to legitimise the federal authorities' exercise of powers and were based on somewhat pragmatic arguments. The assumption that the Court is often seen to avoid addressing the substance of the laws and government policies that are significantly contested might suggest that judges are aware of the broader disputed nature of federalism in post-2003 Iraq. Thus, avoiding to rule on matters that would further draw the Court into political disputes might increase government counter-reactions and interference in constitutional adjudication.

However, the federal legislature often bypassed the key constitutional provisions that guarantee broad and significant powers for governorates, especially in regulating the powers of the governorate councils, that would certainly bring into question the role of the legislator and the Court. Thus, under the rule of law both making and applying legal rules must conform to certain generally agreed principles including legality and also the independence of the judiciary. Thus, the legislature must conform to the general rules of the Constitution and the principles of the rule of law. As the final arbiter of the constitutional disputes, when the Court is asked to decide upon and review the

constitutionality of legislation, it is also expected that it will uphold the Constitution and be itself subject to the rule of law. Thus, it can be concluded that constant approval of the government's (arbitrary) exercise of power has risen serious concerns that the Court has provided the government with legitimacy for continuing to do so. It might also increase concerns about the independence and legitimacy of the Court itself.

5.3 The FSC's Approach to Elections and Government Formation

Election times are crucial moments but the run-up to elections and their aftermath are even more critical. Thus, election-related constitutional and legal principles and rules might become central to the power struggle, constitutional contestations and legal disputes among political parties, groups and individuals involved in the process. Furthermore, this type of dispute can present a substantial challenge and a test for the peaceful alteration of power and the independence of the judiciary since as part of constitutional review, the Court decides on constitutional challenges to the election laws.

The FSC is also empowered to rule on a variety of election-related issues and its rulings have had broader impact on the democratic transition. This includes ratification of the final results of the general election,⁷⁷⁴ and ruling on the Parliament's decisions regarding the 'authenticity' of its members or MPs and their replacement.⁷⁷⁵ Thus, the election-related cases may provide essential insights into how political actors demanded and responded to the growing involvement of the judiciary in the election-related controversies. The case law can also serve to provide insights into the adherence to the law and the principles of the rule of law by political actors and the government by enforcing election law and submitting to the Court's jurisdiction for the arbitration of disputes.

The following discussion analyses the key decisions of the FSC regarding constitutional challenges to election laws, replacement of MPs and government formation.

⁷⁷⁴ Constitution of Iraq (2005), art 93 (7).

⁷⁷⁵ *ibid*, art 52 states that: First: The Council of Representatives shall decide, by a two-thirds majority, the authenticity of membership of its member within thirty days from the date of filing an objection. Second: The decision of the Council of Representatives may be appealed before the Federal Supreme Court within thirty days from the date of its issuance.

5.3.1 Challenging the Election Laws

Since the US-led invasion of Iraq in 2003, four general elections for Parliament and governorate councils have been held between 2005 to 2016, each of which were critical moments in themselves for the transition to democracy in the country. The January 2005 election, based on a single constituency, was said to have aimed to transfer power to an elected Iraqi government and establish a constitutional committee in charge of drafting a ‘permanent’ constitution for the country. The December 2005 election was seen as critical for broader political participation, especially for Sunnis, who largely boycotted the January election, meaning their representation was minimal.⁷⁷⁶ The December 2005 election was based on a multiple constituency system, with Iraq being divided into 18 electoral constituencies based on its governorates and this principle has been adopted ever since. Both of these elections were based on a closed list. Equally important was the March 2010 election for the Iraqi Parliament as it proved to be a turning point in the post-2003 democratic transition and is thus of major importance in this discussion. This was the first set of elections held under the terms of the 2005 Constitution, testing the constitutional and legal principles of democratic elections. Furthermore, the 2010 and the 2014 parliamentary elections were of crucial importance for the country and the new era of the post-US withdrawal from Iraq.

Responding to the changes between each election, elections laws were amended to different extents which, by implication, resulted in some of the contested constitutional questions. Interestingly, even some of the minor changes to the elections laws were said to have important implications for political stability and development.⁷⁷⁷ The constitutional and legal principles and the rules that regulate the electoral process and procedures have been central to a series of constitutional litigation. The first national election under the 2005 Constitution was held in accordance with the Electoral Law for Council of

⁷⁷⁶ See Ben Smith, ‘The parliamentary election in Iraq, March 2010’ (House of Common, International, Affairs and Defence Section, Library 11 May 2010) 2.

⁷⁷⁷ Meghan L O’Sullivan, Razzaq al-Saiedi, ‘Choosing an Electoral System: Iraq’s Three Electoral Experiments, THEIR Results, and Their Political Implications’ (*Harvard Kennedy School*, Belfer Centre for Science and International Affairs 29 April 2014) 9.

Representatives of 2005 (Parliament Electoral Law) under which some controversial constitutional questions and disputes arose.⁷⁷⁸

5.3.1.1 *The Criteria for Allocating Parliamentary Seats*

The first substantial challenge to the Parliament Electoral Law 2005 involved the distribution of parliamentary seats. The Vice President, Tariq al-Hashmi, challenged the constitutionality of a provision of this Law that allocated each governorate a number of seats proportional to the number of registered voters in the governorate.⁷⁷⁹ The petitioner argued that the contested law provision explicitly contradicted the Constitution that guarantees ‘one seat per every 100,000 Iraqi persons representing the entire Iraqi people’.⁷⁸⁰ In *the Parliamentary Seats’ Distribution (15/2006)* case, the Court found the contested law provision unconstitutional and called on the legislature to amend the contested Law in order to guarantee one seat per 100,000 Iraqi Citizens.⁷⁸¹

The Court was further involved in this issue. In 2009, in preparation for the 2010 parliamentary elections, the legislature amended the Parliament Electoral Law 2005. First, it provided for the open list formula of proportional representation, in which voters can vote for the list (usually one party or more) or an individual within the list. Second, it provided for allocation of surplus seats: those remaining seats in each governorate or nationwide after the initial allocation to the strongest winning list or parties which had already won at least one seat from the outset. Third, and the most controversial of all, it provides that the Parliament ‘consists of [a] number of seats at a ratio of one seat for every hundred thousand people *based on the latest statistics submitted by the Ministry of Trade.*’ In addition to that, eight of the total of sixteen compensatory seats were reserved for minorities; the rest were allocated to electoral lists that do not

⁷⁷⁸ Electoral Law for the Council of Representatives (16) 2005 (Parliament Electoral Law 2005), art 15. It is important to notice that the first election on December 2005, for the Transitional National Assembly was based on the CPA/ Order No 96: The Electoral Law (15 June 2004) which considered Iraq as ‘a single electoral constituency’, established electoral system of proportional representation.

⁷⁷⁹ Parliament Electoral Law 2005, art 15.

⁷⁸⁰ Constitution of Iraq (2005), art 49 (1).

⁷⁸¹ IRQFSC 15/2006 [26 /8/2006].

win any seat in any electoral constituency but have a total number of votes that exceed the national threshold.⁷⁸²

These amendments raised concerns and serious questions. The first major legal issue to raise from the Electoral Law was that the Ministry of Trade statistics exclude Iraqis who were living outside the country and therefore contradicts the constitutional principle of 100,000 for each person; most importantly it counted Iraqis in exile in the compensatory seats. Furthermore, despite increasing the number of parliamentary seats to 325, the number of compensatory seats decreased to 16, half of these being reserved for religious minorities. As the controversy continued, in a letter to the Parliament, Vice President Hashmi objected to the amendments, and argued that this unjustly excluded the estimated four million Iraqis, who, because of the war were forced to live outside the country. Hashmi called on the Parliament to reconsider this matter and amend the contested provision.⁷⁸³ The letter was of significant importance given the fact that as a member of the Presidency Council, Hashmi could easily veto the legislation. Instead of responding to Hashmi's request, the legislature submitted a formal request to the FSC seeking the constitutionality of the reasons cited by Hashmi for vetoing the legislation. In *the Hashmi's Veto of the Election Law Amendment (72/2009)* case, the Court underlined the constitutional principles of one seat per 100,000 Iraqi persons; the representation of all components of the Iraqi people; the necessity of a direct secret general ballot; and female representation of not less than one quarter of the members of the Parliament. It also reemphasized the central role of the Electoral Commission in the election process. Interestingly, the Court held that the Constitution 'did not differentiate between the Iraqi living inside Iraq or outside it.' More importantly, it said that the veto was within the time limit allowed, as the Parliament had argued that the veto or threat to veto the legislation came after the time limit passed.⁷⁸⁴

⁷⁸² Electoral Law for the Council of Representatives (26) 2009 [Parliament Electoral Law (2009) - Amendment to Electoral Law (16) 2005, art 1, [emphasis added] which repealed Article 15 of the 2005 Election Law. The Ministry of Trade issues all Iraqis, including those in Kurdish governorates inside the country, with a card for receiving food rations, an initiative introduced by the UN Oil for Food programme. However, this excludes those Iraqis living outside the country.

⁷⁸³ Iraq MP Vetoes New Election Law, (*BBC News*, 18 November 2009).

< http://news.bbc.co.uk/1/hi/world/middle_east/8365801.stm > accessed 2 June 2014.

⁷⁸⁴ IRQFSC 72/2009 [19/11/2009].

This veto and FSC's very general interpretation created extensive debates. Eventually, the legislature added new amendments: Iraqis in exile are able to vote for candidates in their own governorates and are treated the same as those inside the country. Moreover, registered voters are based on the statistics of the Ministry of Trade for 2005, with 2.8 percent added to allow for the growth rate in each governorate's population per year.⁷⁸⁵ However, the legislature did not respond to another critical request from Hashmi: the need to increase compensatory seats.

5.3.1.2 The FSC Calls for Developing the Electoral System

The second type of constitutional cases involved the electoral system and, interestingly, these raised controversies concerning some of the core aspects of the election law and had direct and crucial implications on the result of the general election; however, the challenges came after the general result of the election had been approved by the FSC. Thus, it was assumed that any decision or annulment of the elections laws would be significant in terms of the political process and stability of the country. One of the controversies was about the allocation of surplus or vacant seats. The Electoral Law 2009, (the amendment to the Electoral Law 2005), provided that the surplus seats are allocated to 'winning lists which acquired a number of seats based on the proportion of the votes they acquired.'⁷⁸⁶ Before this amendment and for the previous elections in 2005, the surplus seats were allocated based on 'the largest remainder method' among all competing parties regardless the number of votes they had gained.⁷⁸⁷ Thus, the result would be that only parties that had won seats could have vacant seats. This could eliminate those parties that had won votes just under the governorates threshold but securing at least one seat based on national threshold, this was said to favor strongest parties.⁷⁸⁸

Therefore, two MPs challenged the constitutionality of Article 3 of this amendment that established this contested method, arguing that it would disregard a significant number of votes and lead to the exclusion of many small

⁷⁸⁵ Parliament Electoral Law 2009, art 1.

⁷⁸⁶ *ibid*, art 3(4).

⁷⁸⁷ Parliament Electoral Law 2005, art 16 (3).

⁷⁸⁸ O'Sullivan, al-Saiedi, 'Choosing an Electoral System: Iraq's Three Electoral Experiments, Their Results, and Their Political Implications' 15.

parties. In *the Surplus Seats* (12/2010) case, the Court found the contested amendment unconstitutional. Interestingly, the Court argued that the decision would not affect the distribution of the parliamentary seats for the 2010 election, in other words, it had no retroactive effect.⁷⁸⁹ Thus, it cited fundamental constitutional principles to declare the contested Electoral Law amendment unconstitutional, stating that the amendment contradicted constitutional provisions that guarantee ‘the right to vote’⁷⁹⁰ and ‘the right to expression’.⁷⁹¹ The Court also argued that under this legislation, allocating surplus seats to ‘the strongest winning lists’ means that the voters’ votes transferred to individuals they had not personally voted for. It can be said that the Court considered the implications for annulling the election law and consequently the election result and perhaps the need for a new election, when it declared that the decision and unconstitutionality of the amendment would not have retroactive effect and would not affect the 2010 election.

It is generally accepted practice that the preparation for a new national election is the crucial moment during which controversial questions and disputes regarding the constitutionality of the election law would arise. Therefore, it was not surprising that this FSC ruling was central to the legal debates and preparations for the April 2014 parliamentary elections. In November 2013 the Parliament passed new amendments to the Electoral Law 2005, which addressed the allocation of surplus seats. Although none of the contested parties challenged the constitutionality of the new amendment, the possibility that they would have challenged meant there was significant potential that the law could be annulled. This was expected because these amendments to the election law were proposed by the Parliament and not the executive.⁷⁹² There was serious concern about the possibility that if this was challenged, the Court would nullify it based on judicial precedent already established since the *Proposal and Draft Law* (43/2010) case. This issue was of real concern given that at that time the *Second Proposal and Draft Law*

⁷⁸⁹IRQFSC 12/2010 [14/6/2010].

⁷⁹⁰ Constitution of Iraq (2005), art 20: ‘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.’

⁷⁹¹ *ibid*, art 38(1): ‘The State shall guarantee in a way that does not violate public order and morality: A. Freedom of expression using all means.’

⁷⁹² Electoral Law for the Council of Representatives (45) 2013 [Parliament Electoral Law 2013].

(21/2015) ruling had not been issued, under the terms of which the law might be considered to have been passed within the direct and original legislative powers of the Parliament and would therefore be immune from annulment on the basis that they lacked the approval of the government.

5.3.1.3 Cases Involving Minority Quotas and Power-Sharing Deals

In addition to proportional representation, the post-2003 power-sharing arrangements introduced a minority quota system, intended to guarantee political representation for religious minorities. The arrangement proved to be an equally controversial election-related issue. The Court has received a series of questions concerning the reserved parliamentary seats for religious minorities. According to the quota, the reserved parliamentary seats are distributed as follows: five seats for the Christian constituency in the governorates of Baghdad, Nineveh, Kirkuk, Dohuk, and Erbil ('within one electoral district'); one for Yezidi's and one for the Shabak people in Nineveh Governorate; and one for the Sabean Mandeian population in the Baghdad Governorate.⁷⁹³ The Elections Law 2009 clearly differentiates between quotas given to religious minorities. For example, the Sabeans minority group has one seat for Baghdad, despite the fact that their population is spread across the country like the Christian constituency. At least this was argued by a representative of this group who challenged constitutionality of such legal differentiation. The petitioner argued that the difference in treating minorities contradicted the constitutional principle which states that 'all Iraqis are equal before the law',⁷⁹⁴ and prevented the Sabean population in other parts of the country from exercising their political rights and participating in elections. Thus, this in itself violated another constitutional principle guaranteeing that all Iraqis can exercise their political rights including the right to vote, elect, and stand as candidates themselves. In *Mandeian Sabeans* (7/2010) case, the Court found unconstitutional the contested provision of the Electoral Law that introduces this differentiation, therefore, again underlining the non-retroactive effect of the decision on the 2010 election result.⁷⁹⁵

⁷⁹³ Parliament Electoral Law 2009, art 1.

⁷⁹⁴ Constitution of Iraq (2005), art 14.

⁷⁹⁵ IRQFSC 7/2010 [3/3/2010].

A similar pattern was manifested in *Yezidis Quota* (11/2010) case, which challenged the constitutionality of the above allocation of minorities' seats. The Court upheld the constitutional principles concerning the equality of all Iraqis,⁷⁹⁶ and 'equal opportunities'.⁷⁹⁷ The FSC therefore found the contested provision unconstitutional, arguing that the quota must represent the genuine Yezidi population.⁷⁹⁸ Implicitly, it increased their representation in the Parliament. Thus, the FSC's ruling obligated the legislature to ensure that in the 2014 general elections the number of parliamentary seats reserved for Yezidis is proportionate to their population. Despite this, the 2013 amendments to Electoral Law were passed without any increase in the number of seats reserved for Yezidis. As a result, the head of the Yezidis Independent List challenged the constitutionality of the Electoral Law, this time, on the grounds that it was a proposal law and was not approved by the government. The petitioner referred to the previous *Yezidis Quota (11/2010)* ruling and requested the Court to declare the contested Electoral Law provisions unconstitutional and to oblige the legislature to implement its previous ruling regarding the Yezidis quota. The Court adhered to its previous decision, that the legislature must ensure the number of Yezidi seats represents the size of their population. However, it rather carefully avoided annulling the contested law, arguing that the issue had been decided previously and the representation of the Yezidi should reflect on the size of their population as stipulated in Article 49 of the Constitution. This requires and depends on the prospective new national census, because this case was brought prior to such census which was yet to be conducted, the Court dismissed the case on these grounds.⁷⁹⁹ In other words, the FSC made the implementation of its ruling in this regard conditional on the future national population census.

The last of the FSC's rulings regarding Electoral Law which merits consideration here relates to the power-sharing arrangements concerning the

⁷⁹⁶ Constitution of Iraq (2005), art 14 states: 'Iraqis are equal before the law without discrimination based on gender, race, [...]'.
⁷⁹⁷ *ibid*, art 16.

⁷⁹⁸ IRQFSC 11/2010 [14/6/2010]. The UNAMI, the especial representative of the UN security general in Iraq cited and welcomed this decision, among few others, in its report in 2010. See Reidar Visser, 'The UN Security Council, UNAMI and the Yezidi Paradigm in Iraq' (*Iraq and Gulf Analysis*, 4 August 2010) < <http://gulfanalysis.wordpress.com> > accessed 12 May 2014.

⁷⁹⁹ IRQFSC 8/2014 [13/7/2014].

distribution of governmental posts in the disputed city of Kirkuk.⁸⁰⁰ Since this case can be considered the first of its kind to challenge a power-sharing arrangement that is said to have infringed general constitutional principles and, more importantly, human rights, it is crucial to understand how the FSC handled and balanced power-sharing arrangements following profound disagreements and conflict among major political parties with ethno-sectarian divisions, and the necessity for upholding the Constitution itself. In *Kirkuk's Power-Sharing* (45/2009) case, the Court struck down a proposal presented before the Parliament that introduced criteria to 'subdivide the electoral constituency of Kirkuk into three ethnic districts (Arab, Turkmen, and Kurds)'. The Court found the contested proposal unconstitutional on the grounds that Article 7 of the Constitution guarantees one seat per 100,000 Iraqi persons on a geographical basis, and prohibits any kind of discrimination including that based on ethnicity.⁸⁰¹

In 2013, a similar question was brought before the Court, in *Second Kirkuk's Power-Sharing* (24/2013) case, challenging the constitutionality of Article 23 of the Electoral Law for Governorates, which detailed a mechanism of division of powers and distribution of governmental posts in the city. It also provided for a committee within the Parliament to be established representing the 'main three components' of the city who would take decisions by agreement. Importantly, it makes the election for the Kirkuk council conditional on implementing this arrangement. Thus,

⁸⁰⁰ Certain territories in Iraq are considered 'disputed territories' between the federal government and the Kurdish authority. The foremost conflict concerns the city and governorate of Kirkuk which is an ethnically mixed oil rich city in northern Iraq, with majority of Kurds, and Arabs and Turkomen. Throughout twentieth century, consecutive Iraqi governments changed the demography of the city increasing Kirkuk's Arab population and forcing locals to leave the city. In post-2003 invasion, Kurds called to reverse the Arabization of the city, which is a constitutionally recognised call, however, these efforts have been challenged by national and regional governments. Constitution of Iraq (2005), art 140: 'The executive authority shall undertake the necessary steps to complete the implementation of the requirements of all subparagraphs of Article 58 of the Transitional Administrative Law. The responsibility placed upon the executive branch of the Iraqi Transitional Government stipulated in Article 58 of the Transitional Administrative Law shall extend and continue to the executive authority elected in accordance with this Constitution, provided that it accomplishes completely (normalization and census and concludes with a referendum in Kirkuk and other disputed territories to determine the will of their citizens), by a date not to exceed the 31st of December 2007'. See Liam Anderson, Gareth Stansfield, *Crisis in Kirkuk: The Ethno politics of Conflict and Compromise* (University of Pennsylvania Press 2009).

⁸⁰¹ IRQFSC 45/2009 [20/7/2009].

The election of Kirkuk governorate and its affiliated Districts and Sub-Districts shall be held after implementing the process of dividing the administrative and security powers and public posts including the position of the chairman of the provisional (governorate) Council, governor and deputy governor, among the components of Kirkuk governorate in equal percentages among the main components.⁸⁰²

The petitioner, a member of the Kirkuk Governorate Council, argued that this had established ethnic discrimination by introducing quotas and power-sharing in the local government, and creating a special parliamentary committee to set up special electoral measures for the city in this regard. He referred to the Court's previous (above) ruling on Kirkuk elections regarding the ethnic division of Kirkuk. The FSC here, declared Article 23 of the contested law unconstitutional on similar grounds. It insisted that 'the Kirkuk arrangements' prevented equal opportunities for all Iraqis, including state employees, as the law excluded those who were not from the main components of the population of the city of Kirkuk. It concluded that restrictions and measures of this kind contradicted the constitutional principles including Article 14 of the Constitution which guarantees that 'Iraqis are equal before the law'. Furthermore, in the absence of a general census for Kirkuk, it is impossible to determine the size of each of these communities.⁸⁰³

The Court's ruling in such contested questions as the power-sharing arrangements for the disputed city of Kirkuk is crucial in upholding the Constitution. This is partly because this arrangement is actually the result of the core of the Iraq post-2003 constitutional and political system that recognises and provides for some form of power-sharing based on the diversity of religious and ethnicity in Iraqi society. It is also interesting to know that the members of the current FSC, and potentially the new Court, were appointed taking into consideration the multi-ethnic and religious nature of the society and the post-2003 power-sharing arrangements.

Moving from the key cases involving the election laws, the second important issue is the eligibility of electoral candidates, MPs, and most importantly the replacement of MPs. The case law of the FSC illustrates that the

⁸⁰² Elections Law (36) 2008- Governorate, Districts, and Sub-District Councils, art 23.

⁸⁰³ IRQFSC 24/2013 [26/8/2013].

cases concerning replacement of MPs have drawn the judiciary deeper into the political domain, especially the electoral process, and contributed to the greater judicialisation of constitutionally contested questions.

5.3.2 The FSC's Inconsistent Approach in Deciding the Replacement Cases

As part of the preparation for elections, the Electoral Commission decides on the authenticity of the electoral candidates. It may de-list electoral candidates who lack the required constitutional conditions or are currently subject to the terms of the De-Baathification Law for their association with the pre-2003 Baath party. Some of these decisions may eventually be appealed before the Court. Moreover, following the elections, there may be objections to eligibility of MPs. The Parliament must decide on this issue by a two-thirds majority, and the Parliament's decision may be appealed before the FSC.⁸⁰⁴ On the other hand, a parliamentary seat might fall vacant for different reasons including resignation, dismissal, or death.⁸⁰⁵ It is also possible that an MP's promotion to a ministerial post will mean that his/her seat will be allocated to another electoral candidate. The Constitution remains silent on addressing this latter possibility. The MPs' Replacement Law 2006 provides for legal and formal procedures regulating the replacement issue.

It is important to notice that the MPs' Replacement Law states that the candidates for this replacement must be from the same governorate and same electoral list, coalition, entity or bloc.⁸⁰⁶ However, both the Constitution and the Law are silent on addressing two relevant issues in this regard. The first is the instance of ministers returning to their parliamentary seats, once these have been allocated to other MPs. Although this may be seen as uncommon, it has been of great concern, especially following the downsizing of the ministerial cabinet in July 2011.⁸⁰⁷ Secondly, the Law is also silent on replacement cases involving candidates who are from the same governorate and the same electoral list.

⁸⁰⁴ Constitution of Iraq (2005), art 52.

⁸⁰⁵ *ibid*, art 49.

⁸⁰⁶ MPs' Replacement Law.

⁸⁰⁷ Reidar Visser, 'Replacement Chaos in the Iraqi Parliament (II)' (*Iraq and Gulf Analysis*, 15 August 2011) <<http://gulfanalysis.wordpress.com>> accessed 2 June 2013> accessed 14 July 2014.

The MPs' Replacement Law 2006 has therefore produced an increasing amount of constitutional litigation. The FSC has a rather inconsistent approach to replacement cases. At first, the Court denied any jurisdiction over such cases. In January 2011, when the Parliament requested an interpretation of a specific provision of the MPs' Replacement Law, the Court ruled that it lacked the jurisdiction to interpret ordinary legislation.⁸⁰⁸ This initial approach has been criticized for several reasons. First, whilst this denial of any interpretive jurisdiction over legislation is consistent with some previous rulings, it is however inconsistent with a number of cases in which the FSC did interpret legislation.

In some instances, the FSC's rulings were based mainly on the Court's interpretation of the law in question. For example, it had declared an article of the Retirement Law 2006,⁸⁰⁹ constitutional, and on this occasion, its reasoning involved an interpretation of the contested provisions of Retirement Law in order to explain the rationale for this, followed by its interpretation of the constitutional provision under which the law was challenged.⁸¹⁰ Secondly, one might also argue that the replacement disputes are directly related to the criterion of one seat per 100,000 persons guaranteed by the Constitution. Therefore, deciding and replacing vacated parliamentary seats without considering the balance between governorates is an explicit violation of this constitutional principle. Third, as Visser rightly argues, the Court has jurisdiction to decide on disputes that involve the application of federal law, and the legislation that applies to replacement disputes was passed by the federal Parliament.⁸¹¹

Following the June 2011 downsizing of the ministerial cabinet, replacement disputes again appeared frequently before the FSC. A number of ministers, including those who had won parliamentary seats in the 2010 election and had given up their seats as a result of promotion to ministerial posts attempted to retake their vacant seats after losing their ministerial posts. Although there is no legal basis to support such claims, the State Shura Council

⁸⁰⁸ IRQFSC 13/2011 [18/1/2011].

⁸⁰⁹ Retirement Law 2006.

⁸¹⁰ IRQFSC 8/2007 [16/7/2007].

⁸¹¹ Reidar Visser, 'The Federal Supreme Court Refuses to Intervene in the Parliament Replacement Issue' (*Iraq and Gulf Analysis*, 18 January 2011) <<http://gulfanalysis.wordpress.com>> accessed 2 June 2013.

(Shura Council), the highest administrative court, introduced a general principle in this regard, arguing that since ‘there is no law that prevents the dismissed ministers from returning to vacant seats,’⁸¹² a dismissed minister could retake his parliamentary seat provided the seat remained unoccupied.⁸¹³ With regard to already allocated seats, one possible way for dismissed ministers to retake their parliamentary seats was to challenge the constitutionality and validity of the original replacement decision made by the Parliament. It should be mentioned that the Court had dismissed nearly all those challenges to *the initial* replacements on jurisdictional grounds. In these new challenges to the initial replacement, which involved ministers, the FSC considered and reviewed the substance of the initial replacement and, by deciding the initial replacement was unconstitutional, it arguably eased the way for dismissed ministers to retake their seats.

One of the key decisions issued in this regard was in *al-Batikh* (73/2011) case. Batikh was a winning candidate from the White Iraqiya electoral list,⁸¹⁴ a post-election list announced in the Parliament, and was initially part of the Iraqiya list which participated in the 2010 election. He was then promoted to a ministerial post and his parliamentary seat was given to al-Gharbawi of the al-Iraqiya list [not the White Iraqiya list], both candidates being from Wasit Governorate. Batikh lost his post following the 2011 downsizing of the ministerial cabinet. Therefore, in order to retake his parliamentary seat, he challenged the constitutionality of the Parliament’s initial decision regarding the allocation of his winning seat, implicitly demanding to return to this. The Court ruled against the Parliament, founding the initial replacement decision to be unconstitutional on the grounds that the replacement was between candidates from different lists.⁸¹⁵ The decision gave the petitioner a strong possibility of retaking his seat. According to the Court, the post-election list announced in the

⁸¹²Reidar Visser, ‘Nujayfi, Maliki, and the Parliamentary Seats of the Iraqiyya Breakaway Factions’ (*Iraq and Gulf Analysis*, 18 October 2011) <<http://gulfanalysis.wordpress.com>> accessed 3 June 2013.

⁸¹³ The State Shura Council Decision 85/2011 [18/8/2011], same principle was repeatedly confirmed by the FSC. *See e.g.* IRQFSC 15/2012 [2/5/2012].

⁸¹⁴ It should be said that titles of electoral lists do not necessarily same as the name of political parties, for example, number of political parties may run under one electoral list or bloc for election.

⁸¹⁵ IRQFSC 73/2011 [26/12/2011].

Parliament was a new and different list, and this was of key importance in the Batikh case since the replacement was between different lists.

The case law of the FSC indicates substantial inconsistency and most importantly seems to overlook one of the most crucial criteria: the number of personal votes acquired by each candidate. Taking into consideration the number of personal votes acquired by each candidate is a vital criterion, particularly in cases involving candidates from the same governorate and electoral list which was crucial to *MPs' Replacement* (133/2014) case. The FSC's reasoning combines two relevant pieces of legislation here: the MPs' Replacement Law 2006 and the Electoral Law 45/2013. The Court maintained that the Replacement Law was enacted in a period when elections were held under a closed list and thus determines only two criteria for replacement cases: candidates must be from the same governorate and the same electoral list. The petitioner, the Court argued, acquired a higher number of votes than the other parties to the dispute and continued that,

since the Replacement Law does not include any provisions regarding the personal votes, the Electoral Law 45/2013, which was enacted under the open list formula, complies better with the essence of the Constitution and Article 38 which obligates state to ensure freedom of expression using all means that conform with the freedom of voters to elect their parliamentary representatives to the Parliament and those who replace them in case of a vacant seat to those with largest number of votes. Thus, the Electoral law 45/2013 states that 'seats shall be divided by re-arranging the candidates order based on the number of votes acquired by each candidate. The first winner shall be the candidate who gets the highest number of votes. The same applies to other candidates[...]'.⁸¹⁶

The Court then ruled that the candidate's number of votes should decide their eligibility to replace a vacant parliamentary seat. It can be said that the above decision is one of the handful of rulings in which the FSC was not limited by the extent of the questions addressed explicitly in the petition. It might also illustrate that the Court was willing to fill in legal gaps for which there is no

⁸¹⁶ IRQFSC 133/ 2014 [17/2/2014].

explicit constitutional and legal provision. This case is said to have marked an important development in the FSC's jurisprudence, as Visser argues:

This interpretation by the court seems quite radical for a country with a strict civil-law tradition, since words such as 'replacement' and 'membership' do not even occur in the electoral law, and since the replacement law which outlines criteria for governorate and *kutla* [electoral list] (but not personal vote) is still in force. In this way, the ruling seems to be of a rather innovative variety.⁸¹⁷

This example suggests that the Court has the competence to reach abstract and general constitutional principles if it willing to do so. This shift was further evidenced in the *Time Limit for MPs' Replacement* (51/2015) case, which challenged Parliament's decision to refuse challenges to the authenticity of a number of its members on the grounds that these were not made within 30 days after the MP had sworn the constitutional oath. The Court determined another important aspect of the MPs' replacement Law by declaring a decision of the Parliament that sets a time limit for challenging the eligibility of its members unconstitutional.⁸¹⁸

Another post-election dispute that was high on the political agenda concerned the formation of the new government.

5.3.3 FSC Involvement in the Government Formation Crisis

Under the provisions of the 2005 Constitution, the formation of the government following general elections and, in particular, the nomination of the Prime Minister, has the potential to become a controversial and complex issue and even to lead to some form of constitutional crisis. The Constitution is both detailed and relatively clear on this matter, providing that:

The President of the Republic shall charge the nominee of the largest Council of Representatives [Parliament] bloc with the formation of the

⁸¹⁷ Reidar Visser, 'Ground breaking Iraq Supreme Court Ruling on the Law on MP Replacement' (*Iraq and Gulf Analysis*, 16 December 2014) <<http://gulfanalysis.wordpress.com>> accessed 13 June 2015.

⁸¹⁸ See IRQFSC 51, 52, 53, 54, 55, 56, and 57/2015 [22 /6/2015].

Council of Ministers [cabinet] within fifteen days from the date of the election of the President of the Republic.⁸¹⁹

In other words, within 15 days of his election, the new president, who is elected by the Parliament, must charge the candidate of ‘the largest parliamentary bloc’ with forming a new government within 30 days. Then, the Parliament must approve individual ministers and the government manifesto by an absolute majority. The largest parliamentary bloc was understood to refer to the electoral list that gained the largest numbers of parliamentary seats after the FSC has approved the final results of the general elections and before the first session of the Parliament. Accordingly, in the 2010 election, the largest bloc was the Iraqiya list, whose nominee was the former Prime Minister al-Allawi, with 91 seats out of 325 parliamentary seats, followed by the State of Law list of the then Prime Minister Maliki with 89 seats. It was expected therefore that the Iraqiya list would form the government. However, on 10 June 2010, immediately before the first session of the Parliament on 14 June 2014, the State of Law list [with 89 seats] and the National Coalition [with 70 seats] jointly formed the National Coalition bloc, and then announced in the first session of the Parliament, that it had become the largest bloc in the Parliament at that time.

With this new development, the Iraqiya as the largest pre-electoral list and the newly announced National Coalition as the largest post-electoral coalition tested the constitutional principle to breaking point and the formation of the government became an ongoing constitutional crisis. One of the relevant legal questions was whether the largest bloc, from whom a candidate is charged to form the government, is a pre-electoral or a post-electoral bloc formed in Parliament. Prior to this announcement, in March 2010 Maliki had petitioned for an interpretation of ‘the largest parliamentary bloc’. In its ruling on the *Largest Parliamentary Bloc* (25/2010), the Court scrutinized the relevant constitutional provisions, which describe the process of government formation,⁸²⁰ and considered Article 76 as a whole, not only the section concerning the largest bloc. As a result, the FSC concluded that the implementation of Article 76 came into effect after the acting President, the oldest member of the Parliament, invites the Parliament to convene its new

⁸¹⁹ Constitution of Iraq (2005), art 76 (1).

⁸²⁰ *ibid*, arts 54, 55, 70 and 76.

session.⁸²¹ In this session, the Parliament elects its speaker, the two deputies, and the new President of the state.⁸²² Then the elected President charges the nominee of the largest parliamentary bloc to form new government.⁸²³ The FSC established that:

the largest parliamentary bloc is: either the bloc which is formed after the election from an electoral list which participated in the election with a specific name and number, and then gained the largest number of seats, or it is a bloc which consists of two or more electoral lists which participated in the election under different names and numbers and then formed one bloc in the Parliament; the president empowers the candidate from the parliamentary bloc which either won most seats or which has most seats *in the first session of the Parliament*, whichever one of these has the larger number of seats.⁸²⁴

This interpretation clearly indicates that the largest parliamentary bloc should be either the largest pre- or post-election parliamentary bloc. In its reasoning the Court referred to a textual argument provided in Article 76, namely that a post-election parliamentary bloc cannot exist until the Parliament is convened by the President and its elected members have taken the constitutional oath.⁸²⁵ From this perspective the interpretation can be said to be reasonable as the most fundamental basis of any parliamentary democracy is the relation between the executive and the legislative branches of the government, and the accountability of the government before the Parliament. Therefore, the Parliament has the right to approve or reject the candidate for prime minister.⁸²⁶ In practice, ‘this means that unless one party wins an outright majority, election results generally leave open a number of different coalition possibilities that will command the support of a majority of Parliament.’⁸²⁷ In other words, it is argued that the Court’s

⁸²¹ Constitution of Iraq (2005), art 54.

⁸²² *ibid*, art 55.

⁸²³ *ibid*, art 70.

⁸²⁴ IRQFSC 25/2010 [25/3/2010]. [emphasis added] This is translated by Haider Al Hamoudi, ‘The Iraqi High Court’s Rise to Legitimacy’ (*Jurist Forum* 23 April 2010) <<http://jurist.org/forum/2010/04/iraqi-high-courts-understated-rise-to.php>> accessed 7 June 2013.

⁸²⁵ Trumbull IV, Martin, ‘Election and Government Formation in Iraq’ 372.

⁸²⁶ See e.g., José Antonio Cheibub, Shane Martin, Bjørn Erik Rasch, ‘Government Selection and Executive Powers: Constitutional Design in Parliamentary Democracies’ (2015) 38(5) *West European Politics* 969.

⁸²⁷ Trumbull IV, Martin, ‘Election and Government Formation in Iraq’ 371.

interpretation ‘reinforces the principle that the executive’s right to govern is derived from parliamentary approval rather than the percentage of votes it obtains in the national election’.⁸²⁸

However, one can argue that the critical point from the Court interpretation is the timing of the announcement of the post-electoral bloc [coalition], which must be in the first session of the Parliament; it disregards any coalition or announcement before or after the first session of the Parliament and this has provoked profound debates among politicians and scholars. Some might argue that:

[I]t is not clear why, after the general principle of post-election bloc formation has already been admitted, there should be any reason to consider the first meeting of parliament as particularly important from the constitutional point of view. After all, parliament can be expected to have several meetings before the PM is nominated even if the constitutional timelines are strictly adhered to, and it would for example be far more logical to establish a cut-off point following the election of the president, when a 15-day window for finding the PM nominee begins.⁸²⁹

It is possible that the Court was conscious of the fact that without having a time limit for forming and announcing a post-election coalition, the new coalitions and ongoing negotiations on forming the government might have prolonged the constitutional crisis and had severe implications for political stability and security which were already fragile. Some observers even argued that the Court ruled in a manner to favor ‘the nominee from the parliamentary bloc or list which has more parliamentary seats than any in its first session, in this case it was the Prime Minister’s, Maliki, bloc’.⁸³⁰

The formation of the new government in the post-2010 general elections proved to be particularly complicated. As disagreements amongst the winning electoral lists and political leaders continued and opinions became more entrenched, the FSC was further drawn into the constitutional crisis. The acting speaker of the Parliament declared the first session of the Parliament to be open.

⁸²⁸ Trumbull IV, Martin, ‘Election and Government Formation in Iraq’ 371.

⁸²⁹ Reidar Visser, ‘PM Nomination Trouble in Iraq’ (*Iraq and Gulf Analysis*, 29 July 2014) <<http://gulfanalysis.wordpress.com>> accessed 13 June 2015.

⁸³⁰ Hamoudi, ‘The Iraqi High Court’s Rise to Legitimacy’.

The decision however was challenged by a group of civil society organisations, which argued that this was unconstitutional and caused delay in the political processes, directly harming and affecting public interests and the Iraqi people.⁸³¹ In other words, the decision to consider or accept that the first parliamentary session was indefinitely open clearly violated the constitutional time limits in this regard.⁸³²

In its ruling, *an Open Session of the Parliament* (55/2010), the Court emphasized the constitutional provisions that establish and guarantee the parliamentary system and the principle of the separation of powers. It reemphasized the constitutional tasks of the Parliament in its first session; electing its speaker and its two deputies, then within thirty days to elect the President who then charges the nominee of the largest parliamentary bloc with forming the government.⁸³³ Accordingly, the FSC held that failure of the Parliament to accomplish these constitutional tasks ‘within the constitutional time limits’ and the indefinite postponement of the first session contradicted and violated Parliament’s mandate. Therefore, the Court found the open session of the Parliament unconstitutional, and ordered the Speaker of the Parliament, in his official competence, to invite the Parliament to resume this session and to accomplish its constitutional tasks. Furthermore, it underlined the fundamental role of parliament in a parliamentary system and considered its failure as,

[A]deficiency in the pillars of the republican parliamentary system [which moved] governance away from the democratic path chosen by the people when they voted on the Constitution and when they expressed their choice through ballot boxes to elect their representatives in the legislative.⁸³⁴

⁸³¹ Trumbull IV, Martin, ‘Election and Government Formation in Iraq’ 374.

⁸³² Constitution of Iraq (2005), art 72:

Second: B- The President of the Republic shall continue to exercise his duties until after the end of the election and the meeting of the new Council of Representatives, provided that a new President of the Republic is elected within thirty days from the date of its first convening term of the Council of Representatives.

⁸³³ *ibid*, art 55.

⁸³⁴ IRQFSC 55/2010 [24/10/2010]. [The FSC approves the result of general election on 1/6/2010, the first session was held on [...] and the court referred to Articles 47, 55, 70, 72, 76, 80, explaining how the parliamentary system works according to the Constitution. Translation of the ruling quoted from Trumbull IV, Martin, ‘Election and government formation in Iraq’ 375.

The Parliament resumed its session and complied with the Court decision but it took a long time for political leaders to agree on forming the new government - almost eight months.

The FSC held that an open session of the Parliament was unconstitutional, and made the first session of Parliament the decisive moment for the announcement of the post-election bloc that would determine who would have the initiative to form the new government. Since it was such a long opening session, it was far from clear which day was to be considered the date of the first parliamentary session. The Constitution is clear that the first session must be held within fifteen days from the date of the FSC's approval of the results of the general election.⁸³⁵ The Parliament was convened on 14 July 2010, and remained open until 11 November 2010. Determining the date proved to be decisive, for example, in defining the largest parliamentary bloc, the start and the end dates of the legislative term, and the beginning of the caretaker government.⁸³⁶ Therefore, when it was asked on 8 December 2010 to determine the date of the first session of the Parliament the Court held that the first date on which the Parliament met, that is 14 June 2010, was to be considered its first session.⁸³⁷

An extensive debate has since continued regarding the role of the FSC in the *Largest Parliamentary Bloc (25/2010)* ruling, and the implications of this decision for the democratic transition in the country. Many would in general agree that the FSC had 'used the law to defuse a potentially violent debate.'⁸³⁸ However, political leaders have reacted differently. At that time, Alawi, the head of the al-Iraqiya list that won the largest seats of the Parliament explicitly dismissed the ruling and even denied the Court's interpretative powers. He

⁸³⁵ Constitution of Iraq (2005), art 54, 55.

⁸³⁶ *ibid*, art 56 states that, 'First: The electoral term of the Council of Representatives shall be four calendar years, starting with its first session and ending with the conclusion of the fourth year.'

⁸³⁷ IRQFSC 89/2010, [8/12/2010]. This controversy over the date of the first session of the parliament was also determined by the FSC following the 2005 election. The parliament first convened on March 16, 2006, and on April 22, elected its speaker. Constitutionally, the legislative electoral term is 'four calendar years, starting with its first session', in which it elects its speaker. Therefore, it was unclear which of these two dates the first session was. The Court held that the first meeting on March 16, which was held under the presidency of its oldest member, is the start of the electoral term. Accordingly, the end of the legislative term was March 15, 2010 which means that election should have been held no later than January 30, 2010. IRQFSC 29/2009 [13/5/2009].

⁸³⁸ Hamoudi, 'The Iraqi High Court's Rise to Legitimacy'.

argued that the law of the Court and the TAL, according to which the FSC was established, do not authorise the Court explicitly with the jurisdiction to interpret the Constitution. He went even further, challenging the existence of the FSC on the grounds that the true court of interpretive jurisdiction, which is still to be established under the terms of the 2005 Constitution, did not yet exist.⁸³⁹

It should be noted that the formation of the government takes place within a constitutional framework established in Article 76. The question of who has the first opportunity to form a government became subject to differing views in the 2010 government formation. The controversy resulted in a lack of clarity as to the form of an alternative government and led to a significant power ‘vacuum’ and uncertainty in political process. It is not uncommon for such a controversy to arise when no single political party or bloc of allied parties has an absolute majority of seats in the parliament (a hung parliament) and therefore no party has the first opportunity to continue in office and form a government. This difficult situation occurred in the 2010 General Election for the House of Commons in the United Kingdom; the general constitutional convention is that the incumbent prime minister has the first opportunity to form the government.⁸⁴⁰

Therefore, there might be two relevant points of view about who should have the first opportunity to form a government in a ‘hung parliament’. It could be argued that the incumbent prime minister should have the first opportunity to form the government, as it seems to be the practice in the United Kingdom. Another view might be that the party or bloc that has gained the largest number of votes and seats, but not an absolute majority, should have the first opportunity to form a coalition government with other parties.⁸⁴¹

The FSC interpretation of the largest parliamentary bloc did not solve the controversy and it opened up the possibility of the first of the scenarios mentioned above. This implied that the party of the incumbent Prime Minister,

⁸³⁹ Ayad al-Allawi, ‘The Risk of Losing Iraq’ *Washington Post* (The Washington Post, 10 June 2010) 19 <<http://www.washingtonpost.com/wp-dyn/content/article/2010/06/09/AR2010060903807.html>> accessed 10 November 2015.

⁸⁴⁰ See Political and Constitutional Reform Committee, (Fourth Report of Session 2010–11) Lessons from The Process of Government Formation After the 2010 General Election (2011-1, HC) <<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/528/528.pdf>> accessed 22 June 2015.

⁸⁴¹ Ibid.

Maliki, had the opportunity to do this despite the fact that it has just appeared to have lost power. Therefore, many commentators argued that the party or electoral bloc that had the greatest number of votes and seats should have been given the first opportunity to form the government; if it could not command the confidence of the Parliament, then the other option should be taken.

This latter view then became a hotly contested point in the formation of the 2014 government. This time, the leader of the party within the coalition of allied parties that won the most votes and seats claimed to have the right to be the nominee for the prime minister. Thus, despite the previous interpretation in 2010, it was still unclear which list was to be charged with forming the government. In this instance, the legal issue related to the fact that the National Coalition had the largest number of parliamentary seats. This consisted of a number of electoral lists including that of former Prime Minister Maliki's State of Law list. The Coalition, which was a post-electoral bloc announced in a press conference before the first session of the Parliament and not in the first session, insisted that they were the largest parliamentary bloc. As the largest parliamentary bloc the Coalition claimed it should have the initiative to form the government, as no other coalition was formed or announced in the first session of the Parliament. The disagreement arose from the fact that the then Prime Minister Maliki was the nominee of the State of Law list but not of the National Coalition itself. Therefore, the State of Law list insisted that it had the right to form the government, since it had 92 seats, a larger number of seats than any other list in or outside the National Coalition bloc.

As the pressure increased the President of the state petitioned for a ruling that would determine the largest parliamentary bloc. In the *second Largest Parliamentary Bloc (45/2014) case*, the FSC adhered to and indeed attached its previous interpretation in *Largest Parliamentary Bloc (25/2010)* ruling, arguing that this interpretation was valid and binding for all authorities including the federal judiciary namely the FSC itself.⁸⁴² The Court did not name the largest bloc, and the disagreements over which was the largest parliamentary bloc according to the Court's interpretation continued. In a significant development, the President charged Haider al-Abadi from the National Coalition and the State

⁸⁴² IRQFSC 45/2014 [11/8/2014]

of Law list with forming the government. This decision was issued in an unstable political and security context and under international pressure, especially from the US, as Iraq was facing a major attack from the so-called Islamic State group, and some major cities had already fallen under the group's control.⁸⁴³ Maliki, who claimed to be eligible to form the government, rejected the President's choice of nominee and regarded the act as unconstitutional, claiming he would file a lawsuit before the FSC against the President.⁸⁴⁴ The subsequent developments indicate growing pressure from the international community and most political and religious actors in the country on Maliki to step down. The pressure accelerated, ever since major Iraqi cities had fallen to ISIS, and there was growing support for the move by the President to charge Abadi from the same political party as of Maliki (Dawa Party) to form the new government. For example, a statement by State Department Deputy Spokesperson Marie Harf made clear that, 'The United States fully supports President Fuad Masum in his role as guarantor of the Iraqi Constitution [...] . We reject any effort to achieve outcomes through coercion or manipulation of the constitutional or judicial process.'⁸⁴⁵ Thus, Abadi formed a new and broad

⁸⁴³ Abu-Bakr al-Baghdadi, 'a former US detainee' took the leadership and started to rebuild the so called Islamic State of Iraq and Syria (ISIS), or the most violent 'jihadist group Islamic State (IS)'. The ISIS focused on attacking Iraq just days before January 2014, arguably exploiting a political stand-off between the Shia-led government and the minority Sunni Arab community. It is claimed that aided by tribesmen and former Saddam Hussein loyalists, Isis took control of the central city of Fallujah.' It was June 2014 when ISIS took control of the second largest city of Iraq, Mosul, and started advancing toward the capital, Baghdad, and the region of Kurdistan in North, and took control of vast territories of the country. What is 'Islamic State'? (BBC, 2 December 2015); Islamic State: Can its savagery be explained? (*BBC News*, 9 September 2014) <<http://www.bbc.co.uk/news/world-middle-east-29052144>>; William McCants, 'How the Islamic State declared war on the world' (*Brookings*, 17 November 2015) ; Kenneth M Pollack, 'Iraq after the fall of Ramadi: How to avoid another unravelling of Iraq' (*The Brookings Institution*, 22 May 2015) <<http://www.brookings.edu/blogs/markaz/posts/2015/11/17-how-isis-declared-war-on-the-world-mccants>> accessed 12 December 2015.

⁸⁴⁴ With ISIS's control over dozens Iraqi cities and town, the Prime Minister Nuri al-Maliki was nationally and internationally being largely blamed for monopolising power and marginalizing Sunni communities which contributed to the rise of the ISIS in Iraq. Religious leader started to shift their support from al-Maliki to form a government, as the highest Shia religious cleric in Najaf, Grand Ayatollah Ali al-Sistani, called for an inclusive government, implicitly opposing a third term of office for al Maliki. *See* Kenneth Katzman, 'Iraq: Politics, Security, and U.S. Policy' (Congressional Research Service, 26 May 2015). *See also* the Media headlines on the government formation crises. 'Iraq PM Maliki Rejects Emergency 'Salvation' Government' (*BBC Middle East*, 25 June 2014) <<http://www.bbc.co.uk/news/world-middle-east-28015169>>; 'Iraq's Maliki: I Will Never Give up my Candidacy for a Third Term' (*al-Alam*, 4 July 2014) <<http://en.alalam.ir/news/1608269>> accessed 2 December 2015.

⁸⁴⁵ 'Iraq Prime Minister al-Maliki to File Complaint Against President', <<http://www.nbcnews.com/storyline/iraq-turmoil/iraq-prime-minister-al-maliki-file-complaint-against-president-n177311>> available 12 October 2015.

national coalition government; Maliki, however, did not go further with the complaint and since then he has been a vice president of the Republic of Iraq.

One can conclude that in general the FSC has played a vocal role in election-related constitutional controversies and even the political crises that often deepen during the preparation for the new election, when the political debates and disagreements challenge constitutional and legal principles and rules. Thus, reforming or amending the existing election legislation was also a crucial test of the extent to which politicians and the government itself were willing to enforce and uphold the FSC's decisions and its growing involvement and relevance for the elections. The possibility that the FSC was seen as being increasingly relevant to the elections had implications for the legal and political system.

First, as the aforementioned cases have illustrated, the growing demand on FSC's involvement in election-related controversies and disputes has also raised significant concerns about the dangers of the judiciary becoming embroiled in the political process. Of course, this is partially the result of the FSC's jurisdiction which includes constitutionally reviewing electoral legislation, approving the result of the parliamentary elections, resolving disputes concerning the eligibility of the electoral candidates, the replacement of MPs, and most importantly interpreting constitutional provisions. Thus, it can be said that each new election often required that the existing electoral rules were amended in line with new political developments and the FSC's decisions. That in itself was a ground for challenging the constitutionality of new legal rules. Furthermore, some might argue that politicians have found the FSC to represent the last hope when all other possible political choices failed or it could be that, for the incumbent government officials, the Court was a reliable source that could legitimise their exercise of powers, helping them to hold onto power.

The implication of the FSC's involvement in addressing and resolving the election-related constitutional questions during the transition to democracy was at the very least that it allowed recourse to constitutional and legal means for resolving disputes, avoiding other non-legal solutions including violence in such a divided, unstable and fragile post-conflict country. Case law was seen as an important factor for initiating some relevant electoral reforms that were said to conform to the Constitution. Moreover, the implications from the rule of law

perspective seem to be of considerable significance. It is generally agreed that the inconsistency in deciding like cases such as those concerning the replacement of MPs has undermined the role of the Court and led some to question its independence from powerful governmental and political actors.

Overall, it can be said that the Court's general self-restrained approach was of little relevance in this context, since there was evidence that the Court did actually decide on the substance of the law and what the law contains, especially electoral laws. This seemed to mark a shift from its general approach of making decisions relevant to the form and procedure of law making or structural aspects of the constitution. Thus, its election-related decisions, perhaps as part of its broader involvement in the power struggles, were also seen as of relevance to the protection of a specific kind of political rights, in particular those of minorities, which again is central to the substantive understanding of the rule of law. Importantly, the FSC can be said to have largely upheld the principle of legal continuity. The Court was also pragmatic in avoiding necessary yet challenging amendments that would have undermined an already fragile political system and democratization process. If the annulment of the elections laws had taken retroactive effect, it would then have endangered the country's political process and security, which was in crucial need of a functioning government given the violence and instability of the political process.

On the other hand, the 2005 Constitution provides that no law enacted may contradict 'the established provisions of Islam' and it then adds that no law enacted may contradict 'principles of democracy' or 'the rights and basic freedoms stipulated in this Constitution'.⁸⁴⁶ The frequency and quantity of the cases involving these basic principles and the FSC's approach to resolving them reveal considerable variation. The analysis in the previous sections of this chapter provides insights into the extent that principles of democracy and constitutional rights have been subject to constitutional litigation. Given that the current FSC has not yet incorporated Islamic jurists, it seems important to address briefly the role it has played in reviewing the constitutionality of legislation involving their conformity to Islamic law.

⁸⁴⁶ Constitution of Iraq (2005), art 2.

5.4 A Deferential and Self-Restrained Approach to Questions of Islamic Law

The discussion in this thesis illustrates that the post-2003 constitutional and political developments suggest a growing role for Islam. This is a significant shift from the pre-2003 constitutional developments: Islam is not only considered ‘the official religion of the State’ and ‘a foundational source of legislation’, but the constitution goes further by providing that no law can be enacted that contradicts ‘the established provisions of Islam’.⁸⁴⁷ Therefore, any legislation that is believed to contradict Islamic law can be challenged for its constitutionality. There have been extensive debates on the impact of this Article and the incorporation of Islamic jurists in the FSC is of particular importance in the Iraqi legal system, as argued previously.⁸⁴⁸ Furthermore, there have been number of cases questioning the conformity of legislation with Islamic law.

In principle, the FSC has adopted a self-restrained approach regarding cases that question the conformity of legislation with Islamic law, usually avoiding ruling on the interpretation of Islamic law and deferring such cases to the legislature. In fact, the first and the only example in which the Court interpreted Islamic law was *Contract Law* (60/2010) case. This involved a Law of Evidence provision stipulating that contracts over a set amount must be in writing.⁸⁴⁹ A party to a contract who sought to prove this contract using oral testimony challenged constitutionality of this legal provision arguing that it contradicts Islamic law and ‘settled provisions of Islam’. The Court upheld the constitutionality of the contested provision on its own interpretation of the requirements of contract in Islamic law and without seeking opinion from Islamic jurists outside the Court; instead it cites two Qur’anic verses to prove its interpretation.⁸⁵⁰

It is important to note that the question at issue in the *Contract Law* (60/2010) case gives the Court the ability to interpret it differently. The Court could have ruled the contested provision unconstitutional by citing the opinions

⁸⁴⁷ Constitution of Iraq (2005), art 2.

⁸⁴⁸ See Chapter Four (4.2.2.3).

⁸⁴⁹ Law of Civil Evidence (107)1979, art 77.

⁸⁵⁰ IRQFSC 60/2010 [21/12/2010].

of leading Islamic jurists, Sunni and Shi'a, who favour oral contracts. Some may argue that the ruling suggests that the Court did challenge the jurists' interpretations, implying 'that written contracts were at the very least Islamically recommended, if not required.'⁸⁵¹ In the rather more implicit language in *Abusive Divorce* (10/2015) case, the Court upheld the contested Personal Statute Law 188/1959 provision which guarantees a wife's right to compensation if it is established by the judiciary that the husband abused his right to issue divorce [*Talaq Taa'sofi*]. The FSC found that, without developing its own interpretation of the Islamic law, the compensation does not contradict Islamic law as argued by the petitioner. The Court said that this was a compensation for the damage caused to the wife as a result of abusive use of the right to issue a divorce; therefore, there was no contradiction with Islamic law.⁸⁵²

However, in other cases the Court dramatically changed its approach to Islamic law. For example, *the al-Waqf* (61/2012) case, in which a petitioner challenged the constitutionality of a law that allows the administration of the 'Islamic Charitable Foundation [*Waqf*]' to take ten percent of the value of the *Waqf* as administrative fee. The petitioner claimed that this legal provision violates the relevant Shi'a rules, and therefore, contradicts Article 2 of the Constitution, 'the established provisions of Islam'. The Court found that the issue in question [*Waqf*] required a comprehensive and specialised study of the relevant jurisprudence of all Islamic schools in the development of the law of the administration of the *Waqf*. Therefore, there was a need for a single piece of unified legislation, which took into account the various opinions and understandings of the jurists on this issue. Importantly, the Court upheld the contested legislation as constitutional, arguing that it would remain as it is unless a new law was to be enacted.⁸⁵³ Furthermore, in *Divorce through Agent* (59/2011) case,⁸⁵⁴ the FSC used similar grounds to uphold the Personal Status Law provision that prohibits divorce through an agent,⁸⁵⁵ which the petitioner

⁸⁵¹ Haider Ala Hamoudi, 'Religion and Law in Iraq: A Noteworthy Federal Supreme Court Opinion' (*Jurist Forum*, 10 February 2011).
<http://jurist.org/forum/2011/02/Religion_and_Law_in_Iraq_A_Noteworthy_Federal_Supreme_Court_Opinio> accessed 21 July 2014.

⁸⁵² IRQFSC 10/ 2015 [18/2/2015].

⁸⁵³ IRQFSC 61/ 2011 [31/1/2012].

⁸⁵⁴ IRQFSC 59/2011 [21/11/2011].

⁸⁵⁵ Personal Status Law (188) 1959.

claimed to be in contradiction with certain Shia Muslim jurisprudence and that contradict Constitution which guarantees freedom of ‘commitment to their personal status according to their religions’, sects, beliefs, or choices’ for all Iraqis.⁸⁵⁶

In general, with regards to the Court’s jurisprudence on Islamic law, it can be said that in over a decade of the Court’s functioning, for almost half of this duration, it was entirely self-restrained and avoided and deferred any issue that involved Islamic law. This has changed since 2010, and at times the FSC has made decisions about the substance of cases that raise issues concerning the conformity of Iraqi legislation with Islamic law. Its case law illustrates that the FSC often successfully managed to avoid or defer judgment and rarely had to develop a narrow judicial review of Islamic law. In most cases, it achieved this by dismissing the case or avoiding the issue on grounds of admissibility and restricting adherence to the rules of standing, or adopting a narrow understanding of its jurisdiction.⁸⁵⁷ Indeed, its involvement in *the Contract Law* (60/2010) case and the subsequent shift of approach in following cases suggests that the Court tried to be extremely selective. In very rare instances when the matter posed less controversial challenges to Islamic jurists, then it develops its own interpretation of Islamic law.

The FSC defers to the legislature on issues of Islamic law and calls for the need for new laws regulating matters that require comprehensive, detailed and specialised reviews of Islamic law. It can be seen that judges handled these issues very carefully; it did not exclude the possibility that the contested provisions are repugnant to Islam. On the other hand, at least temporarily, it protected the legal rules from judicial review for conformity to Islam.⁸⁵⁸ Furthermore, referral to the legislature and avoiding making decisions on the substance of Islamic law implies that the Court recognises the complexity of the issue ‘which only the legislature could sensibly amend to conform to Islam.’⁸⁵⁹ It has become more aware of the political and legal context within which it operates, and most importantly, concerns about its legitimacy and position in

⁸⁵⁶ Constitution of Iraq (2005), art 41.

⁸⁵⁷ IRQFSC 39/2011 [30/1/2012], and IRQFSC 99/2011 [18/10/2011].

⁸⁵⁸ Hamoudi, ‘Repugnancy in the Arab World’ 441.

⁸⁵⁹ *ibid.*

relation to the powerful religious institution of Najaf.⁸⁶⁰ It is argued that ‘the idea that secular judges would be permitted to develop novel approaches to Shari’a, or any aspect of Islam for that matter, in derogation of Najaf would be deeply offensive to core Shi’a sensibilities.’⁸⁶¹ Another observation is that the Court seemingly found it easier to decide on cases that involved legal questions and matters, which were originally or mostly based on non-Islamic jurisprudence and transferred from such areas as commercial law. It is more cautious not to challenge or decide on legislation that was originally or largely based on Islamic law including for example the Personal Statute Law and the Administration of Islamic Charitable Foundation (*Waqf*) Law.

Conclusion

It was anticipated that the pre-constitutional FSC would be essentially involved in the judicialisation of constitutional issues given its rather broad constitutional jurisdiction, relative accessibility and the context within which it operates. The case law discussed here and the general overview of the Court’s handling of constitutional questions and cases illustrate its different approaches to constitutional questions depending on the types of related dispute, the degree of controversy they entailed, and the parties they involved. The Court has operated in an extraordinary transitional democracy, encountering numerous challenges; its rulings at times have had crucial, decisive implications for the entire constitutional order and on the democratic transition itself. This analysis suggests that, like emerging courts elsewhere, the FSC is often cautious, and acutely aware of the potential threat of political interference, of pressure from powerful religious institutions, of being accused of interference in political issues and of the government’s court-curbing actions and disobedience. This is evidenced, for example, in its self-restrained approach to cases that involve Islamic law.

It can be said that the case law of the FSC provides significant practical insights into the potential experiences of constitutional judiciaries in transitional democracies. It suggests that in the aftermath of democratic transition and during the adoption of new constitutions there was an increase in the quantity

⁸⁶⁰ See Chapter Four (4.2.2.3).

⁸⁶¹ Hamoudi, ‘Ornamental Repugnancy’ 697.

of the contestations of power and jurisdictional conflicts and the Court's involvement in such cases. In general, the FSC has been self-restrained but somewhat inconsistent; it has used procedural grounds, including jurisdiction and standing, to defer to the legislature to decide on the substance of the contested laws or constitutional matters. A closer reading of the FSC's case law indicates that the majority of the landmark rulings address questions related to the structural and institutional aspects of the constitutional order and democratization. The Court has defined or redefined the boundaries of powers between executive and legislative branches, between the federal and sub-federal governments, issuing rulings which have had crucial and broad implications for the political and legal system.

It has contributed to the rule of law in the sense that disputed parties sought legal and constitutional solutions, and it has attempted to uphold the supremacy of the law. Given the extraordinary context of the transition in which the Court acts and upon which it impacts, there was the possibility that disputed parties or institutions would adopt other non-peaceful means in handling these power conflicts and contestations. It has been noted that the FSC has often upheld a very thin, formal version of the rule of law such as checking the procedural aspects of law-making, focusing on how the law is made rather than what it contains. It has mostly refrained from ruling on the substance of the politically charged and contested matters that have deeply divided politicians and people. From this perspective, it has protected its institution and legitimacy by not entering into contentious disputes that may have served to undermine the judiciary. This does not mean, however, that the FSC has not entered some divisive political areas. Indeed, its jurisprudence on the legislative-executive jurisdictional conflicts at the federal level, or its involvement in the 2010 government formation crises, suggests otherwise.

Occasionally, with specific laws, the Court's jurisprudence has suggested a degree of adherence to the substance of the rule of law. For example, by upholding the substantive constitutional principles and provisions on matters involving elections laws, it has contributed to the development of this area of law, at times triggering or supporting reform and holding the government to account for violating the substance and supremacy of the law. On rare occasions, the Court has used abstract and general constitutional principles, namely

democracy, to solve and even develop detailed and specific aspects of the elections laws. Apart from that, however, its effectiveness in holding government in check, particularly in the periods between elections, has arguably been weak and of significant concern.

The following chapter will detail the conclusions, of this dissertation, and in particular of its case study, and evaluate the broader role of the courts in general regarding the rule of law and democratization.

Chapter Six: Conclusion and Synthesis

The judicialisation of politics is seen in countries with different political and legal systems. It is in general agreed that in transitional democracies, courts are being called upon to resolve even the most basic conflicts in interpretation of the newly established constitutional order. This thesis concerned itself with the implications of and the interrelation between judicialisation and the rule of law in transitional democracies. One may argue that the relatively context-specific and often temporary challenges and opportunities in transitional states could bring the rule of law to the centre of the debate, becoming an essential factor in explaining judicialisation and its implications for transitional states.

Therefore, this research was set to provide an understanding of the relationship between the rule of law and the role of the judiciary in a transitional democracy when it is viewed through the lenses of the formal and substantive approaches. Thus, when the government is not bound by the basic rule of law and the law is not sovereign over all, judicialisation, which introduces the more substantive elements of the rule of law, would be likely to raise serious concerns. For example, it might expose the court to external interference, as well as affecting the functioning of a new parliament which is attempting to establish its powers and legitimacy.

Moreover, courts might frequently use formal rule of law reasoning to avoid deciding on matters of constitutional substance with broad implications for the transition and the country as a whole. Therefore, it can be assumed that judicialisation both affects and is affected by the rule of law. This was the main argument developed in this thesis which used in-depth analysis of the experiences of post-2003 Iraq's newly established Federal Supreme Court (FSC) as a case study concerning the enforcement of the new democratic constitutional order.

The first part of this chapter brings together the main arguments about the rule of law, judicialisation, and transitional democracy, and reflects on the main findings of this case study, attempting to locate these within a broader conceptual perspective. The second part presents a way forward for the FSC and makes suggestions regarding further research directions in this area.

6.1 Research Findings and Synthesis

6.1.1 Conceptual Understanding of the Rule of Law and Judicialisation in Transitional Democracies

The theoretical analysis in Chapter Two reveals that the rule of law is a contested ideal, the realisation of which is a matter of degree which also varies according to the specific conditions in any given country. It can have various interpretations and be conceptualised in different ways; however, every country, regardless of its political, legal or cultural traditions and values, should acknowledge certain principal tenets of the rule of law.⁸⁶² In more developed democracies, the formal notion of the rule of law, which focuses on the manner and the form the law takes and the instrumental limitations on the exercise of state power, might be taken for granted. For the most part, the rule of law debate there has become more focused on the substantive attributes to the rule of law, assuming that these formal aspects should enforce substantive values, for example, the protection of human rights, or a particular form of political or economic and governmental system.⁸⁶³ These conceptual difficulties related to the application of the rule of law should not underestimate the importance of the basic principles of the rule of law in subjecting the exercise of state power to the law, ensuring equality before the law, holding governments accountable for arbitrary and overreaching power, and preserving individual rights. Equally, it emphasises the importance of arbitration of disputes in an independent and impartial manner and according to the law through the courts.

The conceptual and concrete analyses of transitional democracies reveal that the concept of the rule of law, democratisation and judicialisation are symbiotically interrelated. These transitional democracies constitutionally accept and preserve substantive attributes of the rule of law, as being equal to or more important than the formal ones. In practice, the substantive attributes are often disregarded and may or may not be the central focus or priority when considering this context. On the other hand, introducing even minimalist electoral democracies requires that the newly elected and appointed state

⁸⁶² Samuel L Bufford, 'Defining the Rule of Law' (2007) 46(4) *Judges' Journal* 16.

⁸⁶³ Simon Chesterman, 'An International Rule of Law?' (2008) 56(2) *American Journal of Constitutional Law* 13.

officials and institution comply with the rule of law and do not merely rule by law. This thesis argues that the absence of the rule of law in transitional democracies or weak adherence to this would increase the potential for what some scholars describe as ‘the unrul[e] of law’ democracies. Accordingly, although the transition in such countries might be quite successful in developing electoral democracy often regarding the peaceful alteration of power through elections, there might be inconsequential development relating to the rule of law.⁸⁶⁴

Thus, the right question to ask might not be whether the rule of law should precede democratic transition, or whether democratic transition should precede the rule of law. The concern is whether democratization improves in the absence of parallel enhancements regarding the rule of law or whether mere adherence to the basic tenets of the rule of law serves to strengthen democratic transition. It might be possible that some form of the rule of law will successfully apply to those contexts that have not embraced democratization, mainly where the transition focuses on economic developments. It is also true that, in transitional states that underestimate the relevance of democratization in comparison with the rule of law reform, the government is likely to use the rule of law, and often formal understandings of this, to legitimise holding onto power and to avoid this being contested. Thus, when constitutional culture and practices of the democratic accountability of rulers are weak or totally lacking, the low level of legal accountability in the sense of horizontal accountability is likely to undermine the development of the democratic transition, and infringe on the ‘constitutional balance’ of power.

Thus, reforms targeting the rule of law in transitional democracies should not cling to the ideals of the rule of law, but rather develop more practical and workable accounts which need to take into consideration the changing circumstances of the transition. Given that, the primary concern of the rule of law reforms then should become the establishment of those institutions required for creating, interpreting, and enforcing laws, and for checking and holding to account arbitrary and abusive exercise of power and, most importantly, restoring non-violent settlement of disputes.

⁸⁶⁴ Méndez, O’Donnell and Paulo Sérgio Pinheiro (eds), *The (un)rule of Law and the Underprivileged in Latin America*.

The majority of newly adopted constitutions provide for some form of constitutional judiciary: a supreme or constitutional court with expanded jurisdiction that serves to hold these different actors legally accountable for infringing the newly established constitutional boundaries and rules of redistribution of state power.

It is generally agreed that these courts have grown in authority and influence as a result of being involved in the judicialisation of the constitution. This thesis maintains that judicialisation may emerge and develop as the result of the interaction of multiple factors. These factors arguably supply courts with institutional and formal powers, a reasonably independent and accessible constitutional judiciary, as well as opportunities, in the form of disputes and conflicts, to interpret (unclear) constitutional norms. The judiciary faces growing demands from different actors such as individuals, interest groups or the government itself, to exercise its jurisdiction for resolving or contributing to the resolution of such disputes. Moreover, particular factors might contribute significantly to the greater potential for judicialisation of the constitution, during the periods leading up to the transitional moments, during the constitution writing process and in the immediate years following transition. The rather challenging conditions of the transition may result in constitutional texts that are often unclear and inconsistent, leaving a number of grey areas. As a result, when these are applied they are likely to create considerable conflicts in interpretation for which the governmental branches and politicians might turn to the judiciary.

For example, as this case study reveals, the 2005 Iraq Constitution, which was written in the course of the transition from an authoritarian regime to a democratic one, was the result of time-consuming constitutional negotiation and political compromise among various national actors and groups facing domestic and international pressure. Although the Constitution was approved in a national referendum, it remains a work-in-progress. In the last decade, the implementation of the new constitution and transition to democracy have been hindered by factors including the legacy of decades of legal and political practices under an authoritarian regime, a difficult democratic transition characterised by widespread post-transition violence, ethno-sectarian conflict, corruption, and political instability. Furthermore, state institutions remain for

the most part fragile and failing and, despite the dire need, politicians find it difficult to compromise and reach agreements on virtually all policies.⁸⁶⁵ Thus, this was not because the politicians were ignorant of the values and practices of separation of powers and the rule of law, and in a broader sense of the Constitution itself, but because they often chose intentionally to ignore these values and relentlessly pursued a course of weakening the newly established governmental institutions. Ignorance might be a crucial factor but even when they took these rules seriously, they found it difficult to agree on the exact meaning of the rules and where the boundaries of power lie.

Therefore, the interplay of the above factors may result in significant controversies, most of them unresolved, and a tendency among various actors participating in the constitutional and political process to exceed the boundaries of power. Enforcing these general rules is not only the task of the legislature through elaborated and specific legislations. The constitutional judiciary also plays a crucial role in determining the contradictions between the detailed text of specific statutes and the more abstract general rules of the Constitution, thereby determining what constitutes arbitrary or abusive use or overreach of power. This can be the most controversial role that the court is expected to play: setting out the basis on which it is necessary to check government and hold it to account for the exercise of power.

Furthermore, when the government is not bound by the basic rule of law and the law is not sovereign over all, judicialisation, which introduces the more substantive elements of the rule of law, would be likely to raise serious concerns. For example, it might expose the court to external interference, as well as affecting the functioning of a new parliament which is attempting to establish its powers and legitimacy. In other words, if difficulties remain in accepting and implementing the basic tenets of the rule of law, the primary concern of the judiciary should be its institutional independence. Thus, its role in checking and holding the government to account might be seen primarily as that of upholding the supremacy of the law, how the law works and what form it should take rather than what the law itself contains.

⁸⁶⁵ See Chapter Four (4.1.2).

The case study used in this research confirms the argument that demands for and use of the rule of law and constitutional judiciaries tend to increase as democracy itself is strengthened. For a long time in Iraq, the principle of separation of powers was replaced in both theory and practice by the doctrine of concentration of powers in one governing body or in a single individual. Party politics were minimal or non-existent, and the rule of law and the constitutional judiciary were weak, if they can be said to have existed at all. In the aftermath of the 2003 regime change, Iraq started its transition towards constitutional democracy which constitutionally recognised and provide for a state based on the rule of law and democratic principles and values. The position and the role of its newly established constitutional judiciary have put its constitutional mandate of upholding the principles and values of the rule of law to the ultimate test. The FSC is a pre-constitutional court with a mandate to enforce and preserve the democratic constitutional order which is still in its infancy. The following discussion reflects on some underlying findings regarding the FSC's decade of experience in constitutional adjudication in post-2003 Iraq.

6.1.2 Principal Findings Regarding the FSC's Function and Policy

Two key areas merit consideration regarding the role and functioning of the constitutional judiciary under a new constitution in the post-2003 Iraq democratic transition: how the FSC approaches constitutional questions and the extent to which it has been involved in constitutionally sensitive and significantly contested questions. First, the FSC has often taken a deferential and self-restrained approach toward the substance of constitutional issues which seems to be a fairly common approach amongst emerging courts in transitional democracies. This self-restrained approach involves mostly literalist interpretations of constitutional and legal rules. A significant number of constitutional cases on procedural, admissibility and jurisdictional grounds were dismissed so that the other elected branches of the government had to develop the substance of the constitutional issues and non-judicial resolution of disputes. It was noted that the Court had engaged with the issue of election laws, reviewing and considerably checking government policies from both substantive and formal perspectives.

The Court's most prominent area of self-restraint concerns the implementation of the 'repugnancy clauses' of Article 2 of the Constitution: the established provisions of Islamic law, principles of democracy, and constitutional rights. Indeed, the unique composition of the FSC (which is to consist not only of judges but also Islamic jurists and legal scholars) is primarily intended to protect and review the constitutionality of legislation, and to confirm and balance these three repugnancy clauses.⁸⁶⁶ During the period covered by this research not a single instance occurred which involved a question of balancing these three requirements in a given piece of legislation; rather, the handful of cases which arose involved scrutinising the legislation for conformity with one of them.

Although the FSC's deferential approach was relatively successful regarding certain issues such as Islamic law, the Court has had different approach to other cases of significance in regard to the implementation of the structure and function of the newly established constitutional order. Thus, a similar deferential approach to these latter constitutional issues could have other implications. In other words, one might say that politicians and law makers would have ultimately continued for months opposing each other before compromising and agreed on more power-sharing deals that possibly in contrast with the Constitution, let alone the implication on the country's political stability and security.

Secondly, the Court has frequently been involved in some of the most controversial questions and disputes central to institutional power struggles and separation of powers concerning the nature, function and existence of the entire constitutional order and wider society. The Court has also often declined to become involved, claiming the issue lay outside its jurisdiction. When it has become involved, this has led to serious problems of legitimacy as the FSC has increasingly addressed and resolved contested constitutional issues. It faces consistent demands to continue to exercise influence over Iraqi national policy. There is also the risk that further interference in sensitive political areas will produce a counter-reaction that may infringe on the Court's institutional autonomy. This generated a long-lasting debate questioning the FSC's position

⁸⁶⁶ See Chapter Four (4.2.2.3).

and its independence from the executive and its capability of checking government excesses. As some comparative literature has noted, the lack of a firm constitutional and legislative framework to define the judiciary's composition and protect its independence may jeopardise its role as well as posing a threat to its continued existence.⁸⁶⁷

In this broader context, much can be said about the experiences of the FSC in Iraq, however, four key findings are of greater significance. First, there is often uncertainty and inconsistency in decision making. Secondly, there is noticeable pragmatism and novelty in deciding cases. Third, there is considerable political pressure on the Court and the potential for politicisation of the FSC. Fourth, the Court has been seen to support the centralisation of power in the federal executive authority.

1. Uncertainty and Inconsistency in Decision Making

The FSC's case law indicates that there is a considerable degree of inconsistency in its decision-making, since it has failed to treat similar cases alike or to observe jurisdictional and admissibility rules. A good number of judgments are inadequately or poorly reasoned, and many others have been written in ambiguous language. Such judgments have often resulted in an increase in subsequent petitions to the FSC requesting clarification of previous ambiguous rulings. The Court's response has been to decline jurisdiction for clarifying its judgments once these have been issued. At times, this not only failed to resolve the original ambiguity in the Constitution that the ruling was meant to address, but indeed added another binding interpretation that lacked clarity and further challenged the implementation of the Constitution.⁸⁶⁸

It could be argued that ambiguity of this kind might preserve the judiciary from the criticism of openly favouring one party against another, allowing the non-judicial resolution of disputes. A final binding judgment which lacks clarity can be interpreted by each litigant and any interested individual or institution as serving their own interests. This could result in ongoing constitutional crises and create the potential for bringing further constitutional litigation regarding the same question back to the Court. Moreover, this could

⁸⁶⁷ Dotan, *Lawyering for the Rule of Law* 50.

⁸⁶⁸ See e.g. Chapter Five (5.2.1.1 and 5.3.2)

affect the seriousness with which individuals and institutions treated the constitutional judiciary. Similarly, this could result in the Court contradicting itself, and overruling previous decisions or already established judicial precedents. This ambiguity might have had a crucial impact as at times it was unclear which of the contradictory decisions was to be applied, such as in cases concerning *Legislative Powers of the Governorate Councils or the Independent Commissions*.⁸⁶⁹ Therefore, the legislature added another jurisdiction in the latest available draft of the law regarding the new FSC. This will allow the new FSC to interpret any previously unclear or ambiguous judgments for which a petition is filed with the Court.⁸⁷⁰

Inconsistency in the decision making of the FSC is evident in its use of admissibility and jurisdictional rules to decide whether or not to respond to questions. It was seen to be rather more flexible with regards to requirements in cases concerning certain political rights in comparison with its general approach to other rights-based cases. It took this approach in election-related cases involving or affecting political rights as part of the power struggles between different political actors participating in the political process.⁸⁷¹

On the other hand, it can be seen that FSC is bound by the limits of the petition submitted before it and the explicitly expressed legal questions. It is prohibited (or prohibits itself) from going beyond the original submission. Although the Court often adheres to this requirement and is bound by the content of the petition, in some of its more controversial rulings the judgments do address and indeed introduce crucial and positive rules on matters not addressed by the litigants, as in the case of *Second Draft and Proposal Law* (21/2015). When a question was raised regarding the constitutionality of the law concerning the replacement of MPs, the Court held that the law was constitutional and went into detail regarding the legislative initiative rights of the Parliament, and introduced exceptions and general rules relating to this right.⁸⁷² Similarly, the FSC's jurisdiction to provide a binding interpretation of the Constitution independent of any examination of the constitutionality of a legislation is listed in the 2005 Constitution but not in the current FSC's law.

⁸⁶⁹ See e.g. Chapter Five (5.2.1.1 and 5.1.1.1).

⁸⁷⁰ See Chapter Four (4.2.1).

⁸⁷¹ Chapter Five (5.3.1).

⁸⁷² See Chapter Five (5.1.1.2).

Therefore, the Court has developed the pre-conditions for a valid application for abstract constitutional interpretation: only certain official institutions can initiate a petition of this kind, there must be an ongoing actual dispute calling for an interpretation of the Constitution and explicit reference to the respective (unclear) constitutional provision.

It was noted that the Court's observation of these conditions has varied considerably, even when cases appeared to be similar. At times the petition was dismissed and the petitioner was obliged to file a lawsuit, but in other cases an interpretation of the Constitution was issued. This was particularly frequent when observing the requirements of 'an ongoing actual dispute.' The majority of cases concerning oil and gas involving the KRG-federal government were dismissed on these grounds, whereas the Court was more flexible in observing this requirement in cases involving legislative-executive power struggles.⁸⁷³ In general, the FSC avoided drawing conclusions on the substance of highly divisive and contentious legal and political matters such as cases relating to federalism or Islamic law.⁸⁷⁴ In other instances, it reached influential verdicts regarding the contents of some of the most controversial question that had an impact on the future of the entire country, its constitutional development and political stability such as in the cases of *the Largest Parliamentary Blok* (2010) or in *Parliamentary Seats' Distribution* (2006).⁸⁷⁵

2. Pragmatism and Novelty in Deciding Cases

The FSC, an innovation of the post-2003 Constitution, applies some of the new constitutional principles, several of which have been greatly contested. The Court acts in the absence of judicial precedents using what might be described as a novelty in establishing new, unprecedented rulings. This novelty is often combined with pragmatism. On the one hand, it seems to understand the context within which it operates and the growing demands it faces to become involved in contested constitutional questions and the risks this poses. It may prefer to set out different priorities when it interacts with other governmental and political actors and its rulings will affect these. Thus, the FSC's approach

⁸⁷³ See Chapter Five (5.2.3.2) and Chapter Five (5.1.1.2 and 5.1.1.3) respectively.

⁸⁷⁴ See *e.g.* Chapter Five (5.2 and 5.4) respectively.

⁸⁷⁵ See Chapter Five (5.3.3 and 5.3.1.1) respectively.

of avoiding decision-making or resolving the substance of constitutional disputes may preserve this institution from government disobedience, challenges or counter-reactions. Arguably, this can be attributed to the Court's self-preservation policy.

Apart from that, in certain areas the Court has taken into account the practical implications of its decisions upholding legal and political continuity and stability. For instance, the absence of Islamic jurists in the composition of the current FSC has not prevented petitioners from bringing cases that question the conformity of legislation with Islamic law. The Court has developed the most self-restrained, deferential, and selective approach in response to this issue. As in the case of the *Contract Law* (2010), it very rarely develops its interpretation of Islamic law, upholding contested laws as constitutional and compatible with Islamic law when the issue is far less controversial or contradicted by Islamic jurisprudence.⁸⁷⁶ This approach is anticipated to continue until the new legislation of the FSC incorporates Islamic jurists and determines the extent of their decision-making powers within the Court. Furthermore, the current FSC judges are not expected to challenge powerful religious institutions by developing their own interpretations of Islamic law or choosing between somewhat contradictory Islamic jurisprudence and interpretations. The Court has not contributed to or facilitated an Islamic legal system, as most scholars and observers of constitutional developments in post-2003 Iraq might have anticipated. Instead, the Court has protected secular legislation, albeit temporarily, by preventing more religiously oriented legislation unless the Parliament decides otherwise.

Election-related conflicts also indicate the practical approach of the FSC in its explicit acknowledgment of the non-retrospective effects of its remedies when annulling election law provisions or addressing the implementation of the ethno-religious minorities quota. For example, it took into consideration the impact of nullifying the election legislation and criteria on the stability of the state as a whole, the need for a functioning government and the dangers posed by a power vacuum in the transitional phase of democratization. Thus, its judgments were limited in their implications and insisted on the non-retroactive

⁸⁷⁶ See Chapter Five (5.4).

effect of the rulings.⁸⁷⁷ Moreover, the pragmatism of the Court's decision-making might be evident in its reassessments and attempts at overriding or limiting the consequences of its previous decisions. It often establishes principles in a broad sense and then stands back, and it only starts to limit, gradually, the implications of this general rule or principle when it comes under severe criticism. In cases involving the formal questioning of ministers and *the Second Proposal and Draft Law* (21/2015), the FSC seems to have shifted from imposing direct restrictions on the Parliament that expanded the executive's powers, instead reassessing and minimising the implications of its initial conclusion in the infamous ruling on the *Proposal and Draft Law* (43/2010) case by introducing exceptions instead of a general rule.⁸⁷⁸

Furthermore, the disputes involving the federal government and the KRG illustrate the FSC's practical outlook when dealing with politically sensitive and contentious questions. It often opted not to answer questions directly involving federal-KRG powers and the relationship between them, despite the fact that they were often clearly related to the application and interpretation of legal and constitutional principles and rules, a task which is central to the Court's jurisdiction. It did not explicitly uphold federal authority policies, and frequently avoided having to deal with such legal questions, tending instead to support legal continuity. It implicitly confirmed the pre-2003 legislation on issues of the oil and gas sector, even though this contradicts the Constitution.⁸⁷⁹

The inconsistent approach of the FSC, previously discussed, might be seen to serve the Court's pragmatism. Although in the civil law tradition, this might be considered to be a sign of activism on the part of the judiciary, at times, it can also be a means of contributing to the development of constitutional jurisprudence. There were cases in which the Court extraordinarily reached abstract and general constitutional principles, by citing the principle of democracy, suggesting that some specific practical matters are more compatible with democracy. In doing so, this triggered and supported legal reform of the

⁸⁷⁷ Whilst the criteria and rules established by the Election Law 2005 by which the parliament and the government were elected were consistent with TAL (2004) according to which the Election Law was enacted, these clearly contradicted the terms of Constitution of Iraq (2005). See e.g. Chapter Five (5.3.1.2).

⁸⁷⁸ See Chapter Five (5.1.1.2)

⁸⁷⁹ See Chapter Five (5.2.3.2).

election laws by consistently striking down legal rules and obliging the Parliament to amend the law.⁸⁸⁰ Similarly, in other cases, despite considerable inconsistency in its handling of similar cases and questions, it developed, adopted, and added new criteria that reflected reforms in certain aspects of the specific legislation concerning the replacement of MPs.⁸⁸¹ In the case of *MPs' Replacement* (133/2014), the FSC even went beyond the original submission made explicit reference to another ordinary legislation which was not addressed in the petition. Thus, it recognised the personal vote criteria essential to the replacement cases on which there was no explicit legal provision.⁸⁸² Accordingly, the FSC established broad, abstract constitutional principles to develop a rather detailed aspect of the 'Replacement Law'.

3. Decision-making under Political Pressure and the Potential Politicisation of the Court

The inconsistency, arbitrariness, pragmatism and novelty in the decision making of the FSC might strongly correlate to a third and more general observation on the newly established counterpart courts operating within similar contexts. As an institution, the FSC is arguably vulnerable to external interference: it has a broad jurisdiction, in particular, in relation to abstract constitutional interpretation. The Court has been involved in particularly challenging institutional, structural and political questions, which it has been called upon to answer. Its rulings were applied to the specific context of the Iraqi transition with significant implications for the entire country and society.

The FSC is relatively respected as a court of law, and political actors and government have often implemented its decisions although they might have taken considerable time. However, at times when its decisions departed noticeably from the expectations of powerful political actors, its independence or even existence came under threat. One example is the Court's significant involvement in the 2010 crisis concerning government formation. Thus, following its decision in *the Largest Parliamentary Block* (25/2010), the disputed parties formally challenged FSC's jurisdiction to provide abstract

⁸⁸⁰ See Chapter Five (5.3.1.2).

⁸⁸¹ See Chapter Five (5.3.2).

⁸⁸² Chapter Five (5.3.2).

binding interpretation of the Constitution. It argued that the Constitution gives such authority to the new court; the current FSC which is a pre-constitutional institution has no such interpretive power.⁸⁸³ Another factor that might explain similar responses to the FSC's judgments is the Court's position as a pre-constitutional, transitional, and 'caretaker' institution which means it lacks a firm and detailed constitutional and legal framework. In fact, its current composition infringes the 2005 Constitution. The ongoing debates on the FSC Law that are intended to detail the constitutional provisions regarding the power and the independence of the new FSC made this piece of legislation the most controversial one thus far to be delayed by the Parliament and the most urgently needed one.

Political pressure and at times concern over broader reactions to the FSC's decisions is manifested in the case law discussed here and the events surrounding some of its most controversial and decisive rulings. The FSC judges were faced with professional and sometimes even physical threats, potential pressure from powerful political and religious actors, and the transitional justice policies including the de-Baathification laws. Some cases might suggest political interference in the judiciary and the complex position of the FSC as an emerging institution. The Chief Justice, Madhat, who was also a senior judge under the executive-dominated Baath regime before 2003, has played a leading role in judicial authority. He is the Chief Justice of the FSC, the head of the Higher Judicial Council, and up to 2012 served as the head of the highest appellate court: the Federal Court of Cassation. The events preceding his temporary removal in 2012 and subsequent political and legal reactions to this may well indicate the political pressure on the judiciary. Before that removal, many had reservations about the Court's handling of the controversial cases concerning the 2010 electoral candidates or the FSC's involvement in the post-2010 election crisis. The Federal Court of Cassation final decisions regarding candidate cases came only after the Prime Minister, the Chief Justice, who at that time was the head of the Federal Court of Cassation, and some other representatives of political parties became involved, indeed as reported following a meeting between them.⁸⁸⁴

⁸⁸³ See Chapter Four (4.2).

⁸⁸⁴ See Chapter Four (4.2.2.1).

Another example that might suggest political pressures on the Court is those cases that concern the KRG's powers. The controversies or legal conflicts relating to this are part of an ongoing and much more challenging political crisis involving the federal government and the KRG. In practice, resolving the ongoing disputes between the two parties on many aspects of the Constitution, including the most contentious issue of oil and gas resources, has proved to be extremely difficult.⁸⁸⁵ Therefore, the Court has plainly taken into account this broader deep-seated political discontent and the implications of its judgments, not only with respect to relations between the federal government and the KRG but also among the other actors and institutions in post-2003 Iraq. The KRG-related cases serve to illustrate the key role which politics can play in shaping the conditions of the law. The rhetoric of the rule of law is one thing, but the political reality of the constitution is another, and resolving such contested issues cannot be based purely on legal texts and their interpretation. Indeed, one could argue that the complex interactions between politics, law and judicialisation play a substantive role in establishing the rule of law system during the transition to democracy.

*4. Centralisation of Powers in the Federal Executive Authority:
Legitimising the Government's Exercise of Power*

Despite the inconsistency, pragmatism and novelty of its decision-making, and the FSC's awareness of its jurisdictional and institutional limitations, one can argue that it has remained largely consistent in maintaining one particular agenda and in identifying reasonable ways of strengthening the federal executive's authority. The division of power in the 2005 Constitution is based horizontally on the principle of separation of powers among the three federal government branches. Vertically, the power is distributed between the federal and sub-federal governments. The principles and structure which govern Iraq's federal system are the most contested and vague areas of the Constitution.

Constitutionally, both the Parliament and the sub-federal authorities have significant powers. The Parliament has the principal responsibility for policy making, law-making and holding to account the executive authority. A

⁸⁸⁵ See cases involving powers over oil and gas resources (5.2.3.2).

range of factors may explain the impediments which the Parliament or the sub-federal authorities face in exercising their powers. Many may consider that the FSC's approach to questions involving the boundaries and the constitutional balance of powers represents one such factor. There has been a noticeable trend towards the executive branch attempting to consolidate its powers. The conflicts involving this balance of powers, in particular between the executive and the legislature, have constantly been brought before the Court. FSC case law suggests that it has often legitimised the government's exercise of powers and policies changing the constitutional balance of competences. This interference seems to have weakened the Parliament, further strengthened the government, and affected the development of the federal structure of the state.

FSC case law illustrates that the Court started its federalism jurisprudence with a very passive view which involved developing the federal structure of the state. Indeed, during the first five years of its existence, only a handful of federalism-related cases were brought before the Court. Following the enactment of the Governorates Law 2008, the number of cases increased significantly, mainly because this piece of legislation details the competence of the governorates outside the Kurdistan Region, their mutual relations and their relationship with the federal authorities. It contains principles and rules that either introduce limitations on the extent of the devolution of powers established in the 2005 Constitution or are vague about its nature. Faced with this lack of clarity concerning constitutional balance and an ambiguous hierarchy of relations between federal and sub-federal entities, the federal Parliament detailed these constitutionally allocated powers in the Governorates Law 2008. Many would argue that this has expanded the federal authorities' powers at the expense of the sub-federal powers. Most of the litigation involving this piece of legislation initiated by the governorate authorities sought clarification of rules which many considered to contradict the Constitution.⁸⁸⁶ Their petitions mostly present constitutional questions inadequately and fail to address the right question regarding the constitutionality of the Governorates Law 2008 in itself, whether deliberately or due to their inability to do so.

⁸⁸⁶ See Chapter Five (5.2.1).

However, in a handful of cases the Court struck down federal government policies and decisions that would have limited the extent of the sub-federal authorities.⁸⁸⁷ The FSC's decisions might be seen to have upheld and served the federal authorities' policies and decisions that comply with the Governorates Law 2008. Thus, many observers would argue that the Court's decisions serve to protect or recognise the role of the federal Parliament in defining and modifying constitutional principles and balance regarding the division of powers and relations between the federal government and the governorates.⁸⁸⁸ Perhaps, in doing so, the Court would frequently dismiss cases involving this piece of legislation on procedural grounds; avoid decision-making on substantive issues; and uphold the federal authorities' broad interpretation of the exclusive list of federal competencies.

Any number of factors might explain such approach. First, following a series of compromises in the constitutional drafting negotiations, federalism was finally integrated into the Constitution as a system of governance but remains one of the most contentious issues in post-2003 Iraq. Therefore, implementing the relevant constitutional principles and provisions would certainly result in bitter constitutional disputes and would heighten political tensions. Second, the FSC judges might not be ready to jeopardize the institutional autonomy of their Court by triggering or supporting developments upon which politicians and the public are yet to agree. Instead, the Court opted to uphold laws and policies which might be considered to do a disservice to federalism since they are often supportive of the centralisation of powers in federal authorities which is arguably inconsistent with what the Constitution establishes. These factors might serve to explain the FSC's response when the federal government amended the Governorates Law in 2013 and expanded the powers of the governorates. It supported these policies and still often avoids challenging their constitutionality and triggering reforms in this regard. The 2013 amendments came after a series of national protests and wider demands from within communities, including those that once had strongly opposed federalism, which involved taking practical steps to establish their federal

⁸⁸⁷ See e.g. the case of *Removal of the Governor of Salah al Din* (58/2009), Chapter Five (5.2.1.2).

⁸⁸⁸ See Chapter Five (5.1.1 and 5.2.1) respectively.

regions. They also demanded broader powers that would enable them to gain control over local policies and resources. Interestingly, a closer reading of the FSC's case law suggests that this might not be a question of the Court's weakness and whether or not it is capable of resolving questions related to federalism. Indeed, the Court has the means and the interpretive powers to rule on more contentious constitutional issues and disputes namely concerning the legislative-executive relations and has frequently done so.

The FSC has had a similar agenda regarding cases involving legislative-executive power struggles at the federal level of governance. In general, these are the most controversial cases brought before the Court and the most frequent. The majority of the FSC's decisions in such cases can be seen as contributing to the concentration of powers in the executive branch. It can be argued that the pro-executive approach of the FSC was evidence in cases that had severely weakened the accountability function of the Parliament and its oversight powers on the government. The case law suggests that the Court's decisions have served to weaken and at times more marginalise the Parliament by severely restricting its legislative and oversight powers. For example, in the first *Proposal and Draft Law* (43/2010) ruling, the Court subverted the legislative powers of the Parliament to the government. The FSC's interpretation of and the distinction it made between two phrases in the constitutional text (proposal and draft legislation), denied Parliament any right to direct legislative initiative. During the five years since this ruling, the Court annulled virtually all laws that were challenged on these procedural grounds, according to which it would invalidate proposed legislation from Parliament bypassing the executive's approval.⁸⁸⁹

The most recent *Proposal and Draft Law* (21/2015) ruling suggests something of a shift in the Court's approach to Parliament's legislative powers. The Court tried to limit the impact of its previous decision which had put an absolute ban on its legislative initiative right. However, it is still too soon to assess the impact of this, especially given that there have not been any new cases on this issue. A series of judgments have restricted the Parliament from questioning the Prime Minister and Ministers.⁸⁹⁰ Moreover, its infamous

⁸⁸⁹ The cases involving legislations that were annulled on these grounds e.g. *Term Limit Law* (64/2013) ruling, See Chapter Five (5.1.1.2) and cases involving salaries of high ranking state officials (5.1.2).

⁸⁹⁰ See Chapter Five (5.1.1.3).

decision to submit the independent commissions, even those linked with the Parliament, to the Council of Ministers was considered eventually overruling the Constitution itself.⁸⁹¹

This research was conducted and set to analyse the case law of the FSC: an institution formed prior to the adoption of the 2005 Constitution and has been exercising jurisdictions that are stipulated in the 2005 Constitution. Crucially, over the last decade, the Court has developed an expanded body of case law. Thus, it covers some of the most significant constitutional issues and question which seem typical to occur under newly established constitutions in the immediate of transition to democracy in post-authoritarian regimes. However, so far the FSC's case law has not been thoroughly analysed from a constitutional perspective with a crucial aim: to cover comprehensive variety of subjects and questions; most important, a study that set to locate these analyses in a broader perspective of theoretical debate. Therefore, the following discussion brings together judicialisation and the rule of law, which are the two main theoretical debates of this thesis, and in line with the main arguments regarding the case law of the FSC of Iraq.

6.1.3 Judicialisation and the Rule of Law

This thesis assesses original and detailed analyses of the key case law of the Federal Supreme Court of Iraq, in the context of universal constitutional principles, such as the rule of law, and modern phenomena, such as the trend towards the judicialisation of politics, in the specific circumstances of transitional democratic states. The following synthesis illustrates the main arguments presented in this thesis. First, it deals with the legitimacy problem of courts in transitional democracies. Secondly, it considers whether there is a complementary relationship between the rule of law and judicialisation. Thirdly, in contrast, it looks at whether in fact there are challenges to the rule of law posed by judicialisation. Finally, it reflects on some implications of the rule of law in transitional democracies.

⁸⁹¹ See Chapter Five (5.1.1.1).

1. *The Legitimacy of Courts in Transitional Democracies*

Scholars interested in the role of the courts in developed democracies often focus on evaluating the expansion of judicial powers and its implications for democracy, and whether unelected institutions can overrule the acts of elected bodies.⁸⁹² In addition to this counter-majoritarian argument, these studies concern themselves with the challenges posed by constitutional judicial review to the principle of separation of powers. At times, under the rubric of constitutional review, the courts not only decide on the constitutionality of legislation or intrude into policy areas that by and large might be seen to lie outside their jurisdiction, but arguably play the role of constitutional drafters or a constitutional assembly, setting up new rules or amending existing ones. As a result, by implication or design, judicial rulings may modify the constitutional balance of power, expanding the powers of one or more institutions whilst limiting those of others.⁸⁹³ This raises the question as to whether the courts should expand their jurisdiction and intrude into those policy areas which are arguably reserved for the other two political branches.

Given the nature of the constitutional judiciaries, their jurisdiction, the questions they deal with and in some cases their membership, they will always be involved in some decisions that are affected by or touch upon the realm of politics. Actually, some would argue that what differentiates the constitutional judiciary from the ordinary courts is that it is not ‘detached from the gravitation field of contention for gaining, exercising and preserving political power’,⁸⁹⁴ since virtually every decision which it takes may carry implications for both the legal and the political system. For example, in legal terms an annulment decision overturns an unconstitutional law but at the same time this can be viewed politically as a retrospective defeat of the majority in parliament that passed this law.⁸⁹⁵ In general, the impact of judicialisation is often addressed in terms of how it infringes on the constitutional balance and separation of powers, as well

⁸⁹² Klarman, ‘Majoritarian Judicial Review’; Waldron, ‘The Core of the Case against Judicial Review’.

⁸⁹³ See e.g. Chapter Five (5.1.1.1 and 5.1.1.2).

⁸⁹⁴ Böckenförde, E.-W. (1999). *Verfassungsgerichtsbarkeit. Strukturfragen, Organisation, Legitimation* [Constitutional Review. Structural Issues, Organization, Legitimacy], *Neue Juristische Wochenschrift* 44(1): 10-11, (as quoted in Hein, ‘Constitutional Conflicts between Politics and Law in Transition Societies’ 17).

⁸⁹⁵ Hein, ‘Constitutional Conflicts between Politics and Law in Transition Societies’ 17.

as the core of democracy, by allowing an unelected institution to invalidate or check the policy and actions of elected branches of the government.

Some might argue that in analysing the behaviour of the courts from a democratic perspective one should also take into consideration the circumstances and context within which they operate. As discussed previously, some scholars have argued that judicial review might be considered successful under certain conditions that might only be fulfilled in a highly developed democracy, including a fully functioning and independent judiciary and political system. Certainly, this state of affair is an ideal for any transitional or emerging democracy. In other words, given that in developed democracies the judiciary is a reasonably independent and respected body, concerns over the impact of judicialisation on the independence of the judiciary might not be as serious as they are in emerging democracies.

Moreover, judicialisation that is supported or triggered by an independent judiciary that enforces the provisions of the constitution might effectively be seen to be acting to preserve the essence of the rule of law by preventing or limiting the arbitrary exercise of public power. Conversely, in transitional democracies where the political system is often seen to have been shaped by the inability of state institutions to function sufficiently, the legal system is also shaped by uncertainty and the gap between law in theory and in practice is growing ever greater. Thus, there are mounting concerns about the independence of the judiciary in situations where their intrusion into politically sensitive disputes could endanger them.

Problems regarding legitimacy may seem irrelevant in the period immediately following the transition, for various reasons including those mentioned above. The legitimacy issue has been discussed from two points of view in the relevant literature. One interpretation focuses on the moment of transition, arguing that the legitimacy problems of constitutional judicial review often seem irrelevant to the constitution making processes that occur during the transition from an authoritarian regime to a constitutional democratic rule. Thus, debates largely tend to focus on the extent of and mechanisms for limiting parliamentary sovereignty or political powers. Almost all legal systems have introduced some form of constitutional judicial review of legislation, but there

seems an implicit denial of the legitimacy problem, that suggests ‘constitutional courts enjoyed their legitimacy largely by default.’⁸⁹⁶

One of the explanations might be that there are somewhat exceptional circumstances in countries emerging from authoritarianism that create differences between them and the established democracies. These would make it plausible to introduce rules, institutions, and practices that might be frequently criticised in developed democracies, including judicial review. However, these exceptions may serve to hold those in power accountable to the law and to the constitutional boundaries of powers.⁸⁹⁷ In other words, under the rubric of constitutional review, these courts are intended to help protect the new constitutional order, the transition from formal to substantive rule of law and from an illiberal to a more liberal system.⁸⁹⁸

Another point of view posits that the arguable ‘exceptionalism’ of the circumstances of transitional states should not be seen ‘as a means of side-stepping the objections that we might raise elsewhere to the institutional anomalies of strong judicial review.’⁸⁹⁹ Of course, there are also serious concerns about ‘overemphasising’ the role of the constitutional judiciary and the implications of a rapid and substantial judicialisation of constitutional issues. As politics becomes increasingly judicialised, the judiciary is inevitably at risk of exercising more political influence or even interference as well as possibly endangering its independence. Thus, judicialisation might create conflicts between strengthening the rule of law and enhancing democracy. This is said to have some controversial implications; there are constant concerns that legislatures are becoming weaker and more marginalised, so the ‘overemphasis’ on the judiciary might ‘help discredit the nascent idea of representation through periodic elections.’⁹⁰⁰ In other words, it can be assumed that, even if initially the problem of legitimacy of the courts is largely irrelevant, it may gradually

⁸⁹⁶ Sadurski, ‘Judicial Review in Central and Eastern Europe’ 507.

⁸⁹⁷ Polavarapu, ‘Expanding Standing to Develop Democracy’. See also Issacharoff, ‘Constitutional Courts and Consolidated Power’; Scheppele, ‘Constitutional Negotiations Political Contexts of Judicial Activism in Post-Soviet Europe’.

⁸⁹⁸ Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ 2031-2032.

⁸⁹⁹ Sadurski, ‘Judicial Review in Central and Eastern Europe’ 513.

⁹⁰⁰ Stephen Holmes, ‘Conceptions of Democracy in the Draft Constitutions of Post-Communist Countries’ 71, 76, (as quoted in Bugaric, ‘Courts as Policy-Makers: Lessons from Transition’ 270).

become relevant at a later stage in emerging democracies once the institutions of democracy are functioning.

2. A Complementary Relationship Between the Rule of Law and Judicialisation

The transition from an authoritarian regime to a constitutional democracy often underlines a set of new constitutional principles and rules that are intended to put an end to authoritarian rule and set the foundations for a new democratic constitutional order. Such a constitution can be said to be largely transformative and of crucial importance for empowering the government and also the governed, and more importantly for restraining the government. This transformative nature requires careful constitutional balance, between legal and political continuity and change. Thus, striking such a balance is also relevant in resolving the potential conflicts concerning legal continuity and legitimacy of the pre-transition laws. Constitutional drafters, who often lack mutual trust and are faced with the formidable challenges of the transition would, by implication, produce incomplete structures for state institution and ambiguous texts, leaving many crucial questions of constitutional importance to be dealt with by implementing legislation. Furthermore, often there are some unclear distinctions between constitutional and ordinary politics, which could increase instances whereby ordinary politics and implementing legislations might introduce rules and institutions bypassing the constitution itself.

Thus, one could challenge the conformity of the constitution itself to the basic tenets of the rule of law, and ultimately its ability to guide politicians, government and judges, and to strengthen the state of the rule of law and democracy. Thus, taken all together these might actually delay or/and obstruct the making or enforcing of some crucial state policies and laws. It would certainly make it more challenging and time-consuming for politicians and other actors who need to compromise and reach agreements on highly contentious issues related to the transition.

This assumes that one of the problematic issues with the former authoritarian regime was that the constitution was almost irrelevant. In transitional democracies, newly elected or appointed government officials,

political actors and individuals would want to make, or least wish to pretend to make, the constitution relevant. However, it might seem challenging to evaluate any state action against a set of uncompleted, unstable and unclear constitutional rules. Thus, they may view the constitutional judiciary as a relatively capable authority (with binding and final decisions) able to dispense quicker ‘case by case’ settlements of such disputes.⁹⁰¹ It is therefore not surprising that in the initial periods following the transition, questions with potentially significant implications for the entire constitutional order and for society are increasingly taken to the courts. It is highly probably that in a context that is shaped by the inability or unwillingness of politicians to enforce the constitution, courts will be called upon to preserve and enforce the newly established democratic constitutional order and enhance the rule of law. Implementing such a constitutional text within the challenging context of transitional democracies will inevitably test the basic principles of the separation of powers, the rule of law, and the constitutional judiciary. It can be inferred from the aforementioned observation that constitutional judiciaries seem to be gaining increasing relevance within such unstable and changing political and legal systems.

Thus, it makes sense to consider judicialisation and the rule of law as having a complementary relationship since the court may have to judicialise certain issues to ensure that the basic rule of law is upheld. It is almost inevitable then that the court’s role is of crucial importance in defining and redefining the constitutional boundaries of powers, relations and competences of the governmental branches and federal entities especially in cases concerning inter-institutional or inter-governmental relations. Thus, the majority of the cases brought before and decided by courts in the early years of transitional democracy concern structural constitutional issues that are central to the separation of powers and the substance of the specific authorities of the newly established state institutions. The Iraqi experience might suggest that questions or conflicts regarding rights tend to be less frequent and controversial issues. It should be noticed that even making decisions about the formal aspects of the rule of law can become a contested issue with implications for the entire legal and political system. Therefore, when called upon courts have a crucial role to

⁹⁰¹ Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ 2033.

firstly resolve the conflicts by interpreting the respective constitutional norm; secondly, it is anticipated that courts would hold the government and its exercise of power accountable to the law once the court has determined its meaning as applied to the case in question and in future cases.

Therefore, it is maintained that judicialisation and the expansion of judicial powers may enhance the rule of law regarding the role of the judiciary in the arbitration of disputes and in clarifying general rules that guide government officials and institutions in exercising their powers. It might serve to limit 'the scope of arbitrariness, ensuring that those who exercise public powers respect the boundaries of those powers',⁹⁰² thus limiting tyranny and attempts to concentrate powers in one branch of government. Submission to the jurisdiction of the court, particularly when this could be the final reliable alternative to the use of violence, would contribute to the creation of a culture which seeks peaceful resolution of conflicts through legal means. Literature has shown the challenges and dangers involved following elections if the parties to the electoral disputes do not submit to the jurisdiction of the court. For example, although there were serious concerns about the FSC's involvement in the constitutional crises following the 2010 election, in particular, the case of *the Largest Parliamentary Bloc (25/2010)*, the judiciary was certainly successful in resolving the disputes and served to prevent recourse to the use of violence.

Furthermore, the insights from comparative literature and the FSC case law suggest that courts often assume that transition means that the whole legal system, both pre- and post- transition legal norms, must conform to the new constitution based on the rule of law. Transitional democracies often rely on the role of the judiciary, and the legislature initially, to harmonise the entire legal system of the previous regime with the post-transition one. It is also said that courts often make no distinction between legality and legitimacy, frequently supporting the principle of legality and continuity of law, even when the legitimacy of the law itself is in question.⁹⁰³ This may occur when judicialisation involves the formal elements of the rule of law, where questions with significant potential implications brought before the court. Here, the court raises the formal rule of law reasoning to try to solve the issue instead of engaging in the

⁹⁰² Feldman, 'Democracy, The Rule of Law and Judicial Review' 13.

⁹⁰³ Solyom, Brunner (eds), *Constitutional Judiciary in a New Democracy* 39-40.

substance of the controversy. It is checking that the government observes legal certainty, clarity, stability, and formality when implementing general constitutional norms to enact particular laws. Legal continuity in transitional states might also prevent 'lawlessness', especially in those cases when replacing an overruled pre-transition legislation would require an implementing legislation that often proves to be extremely difficult to enact. Hence, the court's upholding of the formal rule of law might serve the functions of legal continuity and certainty. For example, the FSC's decision to uphold existing pre-transitional legislation in cases concerning Islamic law, or in those that are oil- and gas-related, suggests that it supported legal continuity and protected the existing legal relations without considering the legitimacy of the laws involved. These and other similarly highly contested constitutional questions have proven to be a difficult task for the legislature to regulate in a way that conforms to the new constitution, but until the legislature is in a position to do so, the Court seems to continue to uphold the principle of legal continuity.

3. Some Challenges to The Rule of Law Posed by Judicialisation

The rule of law and judicialisation can also, however, come in conflict with each other. Examining judicialisation through the lens of the rule of law may raise substantial concerns that it may threaten or cause violations of the rule of law. It can be argued that in states in transition the '[mis]use' of the rule of law, especially when combined with ignorance or elimination of its substantive values, might enable a government to claim it is conforming to the rule of law as a mean of minimising the contestation of its excessive powers. On the other hand, in the case study explored here, although the judiciary often refrained from intervening in the content of government policies, on those occasions when it did engage in such controversial constitutional questions, the immediate outcomes and long-term implications were of substantial concern. Therefore, addressing or resolving the substance of government policies or laws might provoke political interference, undermine judicial independence, and bring about counter measures that could infringe on its institutional autonomy. Thus, the potential for political pressure and even interference in constitutional adjudication should be of great concern. Governments in emerging democracies trying to legitimise the arbitrary exercise of power may even attempt to remove

safeguards, including constitutional judicial review, that try to limit this abuse of power. This is partially because the independence of the constitutional judiciary operating in the early years of transitional democracy is a much more complicated and controversial issue.

Moreover, it can often be seen that political disputes are transferred into constitutional questions and decisions on these would have far reaching political and legal implications; thus judges intervening significantly in politically sensitive issues might provoke an obvious threat to the court's independence. This might encourage particular institutions or powerful actors to use the support of the judiciary to legitimise, institutionalise and hold onto power, using it specifically to consolidate their powers. Both the comparative literature and this case study suggest that in transitional democracies one government body, often the executive branch, and particularly the office of the prime minister or the presidency, can become overly powerful, and its relations with and uses of the judiciary can raise serious concerns. Furthermore, such judicial involvement may present a challenge to a weak parliament trying to establish itself and may cause further difficulties, particularly if this results in limiting the legislative power.

One view concerning constitutional adjudication in transitional democracies is that courts may overstretch themselves, and start making political decisions or enforcing these rather than reviewing the constitutionality of political decisions. The threat that the response in such cases might have more to do with politics than law might serve to undermine confidence in the rule of law system and constitutional litigation. Having said that, it could be argued that the rhetoric of the rule of law is one thing, whilst the political reality of the constitution is another and resolving constitutionally contested issues cannot be based purely on legal texts and their interpretation. Thus, constitutions as well as constitutional courts are said by definition to be both political and legal, in that courts are often considered the final arbitrator of how constitutions are enforced with the possibility that only constitutional amendments, often requiring specific procedures, and judges themselves, can change judicial interpretations and decisions.

On the other hand, constitutional judiciaries may also respond to political pressure or may attempt to further their powers and influence on a

political system by developing controversial methods available to any court, including inconsistency in deciding similar cases; applying admissibility, standing and jurisdictional rules; deciding or declaring jurisdiction on the substance of the constitutional questions brought before them, and overruling its own precedents or previous decisions. Equally problematically, it could employ inadequate reasoning, or ambiguous and confused wording to suggest that it is conscious of its institutional limitations and does not want to allow itself to be drawn deeper into highly-charged political disputes or to avoid being accused of favouring any particular state institution.⁹⁰⁴

In the experience of emerging courts in transitional democracies, the implications of each of the above methods might prove controversial. An inconsistent approach in deciding similar cases and overruling precedents may be part of what is expected from the judiciary when applying legal norms in rapidly changing conditions; at times, it might serve to develop constitutional jurisprudence and novelty in decision-making. For example, despite a considerable degree of inconsistency in handling similar cases and questions, the FSC's decisions served to trigger and support reforms in electoral law by consistently striking down unconstitutional legal rules. It can be said that in cases concerning the replacement of MPs, the Court did not wait for the legislators compromises, but developed, adopted, and added new criteria that resulted in further reforms regarding this specific aspect of electoral law.⁹⁰⁵

These and similar approaches may or may not serve the independence of the court, but they question the supremacy of the law and basic tenets of the rule of law on the part of the court itself. It remains unclear in such cases whether or not the court is itself guided by rule of law principles in defining the meaning of the law in the cases before it, in the relevant sense of independence, equality before the law and preservation of the formal criteria of the rules including stability, clarity and certainty of its decisions which are essential components of the rule of law. A constitution might not be successful in creating a stable framework for producing a particular form of legal order, or may be insufficient to impose 'limits on unpredictability'.⁹⁰⁶ Whenever the court is asked to rule on

⁹⁰⁴ See Chapter Five (5.1.2).

⁹⁰⁵ See Chapter Five (5.3.2); Chapter Five (5.3.1.2).

⁹⁰⁶ Raz, *The Authority of Law* 216.

conflicts of interpretations of (unclear) constitutional norms, litigants expect a clear and conclusive interpretation of the contested law that will provide the necessary guidance.⁹⁰⁷ An ambiguous judgment only adds to this uncertainty. Similarly, ‘inadequate reasoning’ containing significant gaps and contradictions might itself become a source of uncertainty and unpredictability as to what the court should do in the future, perhaps creating even greater potential for striking down laws on unpredictable grounds.⁹⁰⁸ Therefore, judgments with overly vague and open-ended conclusions raise concerns regarding the legal certainty component of the rule of law.

Another view concerning constitutional courts in transitional states might be that courts should be thought of as survivors rather than challengers, and may prefer to set out different priorities when interacting with and affecting other governmental and political actors. In other words, constitutional courts that are seen to be interfering too much in the politics might also increase the probability that politicians, by implication, might wish to affect the outcomes of constitutional adjudication. These may seem to be somewhat controversial arguments but this was evident to a certain extent in the Iraq case study. In this case study, FSC’s judges seem to become self-restraint and in response to increasing demands on constitutional adjudication, mainly by the government, some of the judgments they issued have provoked criticism that the Court interferes too much in politics. This has by implication created political and government interference in the judiciary, endangering the rule of law. It was reported that immediately following the FSC’s interpretation of the largest parliamentary bloc, and also considering its general approach in checking parliamentary powers, the Court found itself in a very challenging position. As a result, the Parliament rushed to have the second reading of the draft of the implementing legislation for the new FSC. More crucially, the leader of the winning electoral list, whose party was seen to have lost the opportunity to form a new government as a result of the FSC’s interpretation in this case, challenged the existence and constitutionality of the FSC itself and the interpretative jurisdiction that it exercises.

⁹⁰⁷Raz, *The Authority of Law* 217.

⁹⁰⁸ Greg Taylor, ‘Conceived in Sin, Shaped in Iniquity: the Keble Principle as Breach of the rule of law’ (2015) 34(2) *University of Queensland Law Journal* 266.

4. *Implications of the Rule of Law in Transitional Democracies*

It is generally agreed in the literature that the rule of law is a complex and contested concept concerning the supremacy of the law on both governors and governed, limiting and preventing the arbitrary exercise of public power. Beyond that, scholarship is divided regarding what qualities the law must have to limit arbitrary power and how the rule of law should approach that. It can be argued that some of the theoretical aspects and questions associated with the role of the rule of law and its institutions that have been analysed largely in the context of the more established and developed democracies, have not yet emerged in transitional settings. Arguably, analyses of the role and implications of the increasing rise in judicialisation of constitutional questions in relation to the functioning of the rule of law and democracy, especially the problem of the legitimacy of courts, might be of relevance here.

It is also generally agreed that the realisation of the various principles and practices associated with the rule of law might vary considerably from a reasonably well-developed democracy to that of an emerging transitional democracy. It can be said that where the political and legal system are broadly functioning, the rule of law often refers to a broader and more substantive understanding in which the formal principles and practices have largely been established and the focus then would mainly be on recognising the implications of the substantive attributes of the rule of law. However, in a transitional or emerging democracy with a legacy of authoritarian rule, might the rule of law be understood and approached differently? The literature on and the wider experiences of transitional states illustrate that the transition from an authoritarian to a constitutional democratic system is increasingly understood also as ‘a transition’ from the rule by law system to a state based on the rule of law. Thus, in such a transitional setting not only is it anticipated that power is exercised on the basis of democratic principles and practices, but that it is also crucially important that such exercises of public power and broader political system need to ‘be implemented lawfully and within the framework of the constitution not vice versa’.⁹⁰⁹ Thus, it is generally observed that a transition and the establishment of new constitutional and legal bases coincides with both

⁹⁰⁹ Sólyom, Brunner(eds), *Constitutional Judiciary in a New Democracy* 38.

aiming to empower and more crucially restrain new elected and appointed government institutions.

There may generally be two perspectives to 'the rule of law in transition': the formalistic one that emphasises legal continuity and certainty, the other much more broadly based aspect concerns 'substantive justice'. Thus, most post-transition constitutions include, at least in theory, the substantive understanding of the rule of law. But for many reasons including the incomplete and uncertain nature of the political and legal systems, combined with a set of incompetent state institutions, formal guarantees and the demand for substantive attributes are necessarily in conflict. It can be generally observed that the societies in post-conflict transition, and to some extent the international actors that support and assist the rule of law reforms in those societies, primarily work toward establishing and strengthening the basic, often formal, tenets of the rule of law before considering more substantive accounts. With a constant demand for clarifying the functioning of the newly established structure for the distribution of powers, the formal rule of law may also become the central focus of constitutional judiciaries in transitional democracies.

Courts often refrain from deciding on substantive issues and the content of government policies and laws, checking instead how these were made. This might be because there are still concerns regarding the basic tenets of the rule of law, the supremacy of the law and the equality, certainty, stability and clarity of the general principles and rules according to which particular laws are enacted. It may also be that introducing and institutionalising substantive matters, such as rights, for instance, might not serve its purpose of restraining the substance of the government policies if these are not going to be respected.

Of course, one cannot underestimate the importance of such accounts of the rule of law. But there is also a risk that reformers, the government, and the constitutional judiciary have a tendency to overestimate the use of the formal rule of law. Thus, it can be argued that in fragile, transitional democracies, the government's use of the formal rule of law in the absence or ignorance of its substantive values might enable it to claim conformity with the rule of law or it might be seen as such. It seems controversial to undermine or ignore the relevance and importance of the substantive rule of law in transitional states, since the persistent focus on the formal rule of law by a government might

threaten the rule of law and the democratic transition itself. This is an important point given that the executive branch is often powerful and tends to consolidate its own power by bypassing the constitutional balance and principle of separation of powers. In doing so, the executive may violate or threaten to violate the rule of law, and may also frequently have recourse to constitutional adjudication to legitimise such exercises, arguing on the basis of conformity to the (formal) rule of law in order to hold onto power and avoid this being contested.

One possible explanation is that constitutional courts often have substantial powers, enjoy significant (formal) independence and the political system within which they operate is often shaped by the inability of state institutions to solve internal power-struggles and conflict or some of them may take counter measures against the judiciary; under such circumstances the courts might be increasingly willing to interfere in political conflicts. Another view might be that the constitutions empower courts with substantial jurisdictions and fundamental guarantees that protect their independence from the government and broader political actors; however, in practice there are serious allegations of government or politicians interfering with and even influencing them. This would be even more likely in cases where there is widespread corruption and constitutional culture is also seen, by and large, to be weak.

Overall, one could choose to reconsider the current scholarly debates on the role of the rule of law since these suggest that constitutional lawyers and practitioners seem to have taken the formal rule of law for granted and focused on controversial questions of substantive understandings of the rule of law. Furthermore, it is increasingly becoming evident that when the rule of law is not considered to be integral or to have great relevance in a transition from an authoritarian regime toward a constitutional democracy this often poses great challenges to the transition itself. It leads to the creation of states of (un)rule of law in which some aspects of electoral democracy are seen to develop, but emerging powerful actors are often accused of bypassing constitutional balance of powers and the rule of law.

Another concluding view might be that constitutions in transitional democracies are largely transformative, and the law and the political system are largely unstable and changing. Thus, constitutional adjudication and decisions

may often reflect that transformative situation. Furthermore, some would be of the opinion that the interaction between politics, law and judicialisation plays a substantive role in establishing the rule of law system during the transition to democracy. A constitutional judiciary operating in a transitional state often faces increasing demands and is increasingly willing to continue to influence state policy. On the other hand, there is a risk that the more the court becomes involved in addressing and resolving sensitive political areas, the greater the potential for counter measures that might infringe upon its institutional autonomy. When this tension is combined with severe indictments that a court is siding with a powerful state institution or a particular political branch, putting in question its relation with the other political branches, a court may lose its ability to check government excesses, posing a threat to the rule of law. This might require courts to reconsider the nature of their role in emerging constitutional democracies and the problem of legitimacy of the courts might gradually gain importance in emerging democracies once the institutions of democracy are reasonably functioning.

6.2 A Prospective View on the FSC and Future Studies

Any thoughts about how the FSC's functions might transform over the long term remain largely hypothetical. What challenges is the Court likely to face and how will it operate in the future? How long will it be before a new constitutional court is established? Will the Court continue to be largely self-restrained and selective regarding the cases which it decides to rule on? What contribution will it make to transitional democracy?

6.2.1 A Prospective View on the Future of the FSC

As an institution and in terms of its functions the FSC is in transition. A decade after it came into operation, the institutional structure and identity of the constitutional judiciary as established in the 2005 Constitution remain an unresolved challenge. Indications suggest that the current pre-constitutional court is not going to be replaced by a new court any time soon. The latest reading, in May 2015, of the draft new Law of the FSC by the Iraqi Parliament has left significant questions unresolved due to deep divisions and

disagreements regarding the composition of FSC, and the nature of its powers. The issue is more political than legal, and there seems no hope of compromise concerning this crucial and controversial piece of legislation at this stage.

The most controversial issue likely to pose a challenge for the new FSC is the inclusion of non-judges within the Court's membership and their powers. If the power of veto is granted to non-judge members of the FSC, namely Islamic jurists, this would hinder the Court's functioning and open it up to external interference. Different religious institutions would participate in the nomination process and would later be involved in or influence the approach of such jurists and their constitutional interpretations. This would also open up a largely secular legal system to the dominance of religious rules. There are still strong calls from some legislators to secure 'consensus' as the basis for decision-making within the court which some might see as undermining the judicial nature of the FSC, hindering its operation, and politicising the Court. It might also endanger the independence and impartiality of the Court given the context within which it operates, and knowing that the Court would need to be staffed in accordance with the ethno-sectarian division within Iraqi society.

Furthermore, determining the powers of the Chief Justice, who is the head of the highest judicial institutions (namely, the Higher Judicial Council and the Federal Supreme Court) would pose another challenge. Critics might argue that whilst having one person as the head of these key judicial institutions helps to maintain coherence within the higher institutions of the judiciary, it may also personalise the federal judiciary as a result of one person monopolizing judicial powers, in particular given that many have reservations about his relationship with the executive authority.

The Court lacks the power to review the constitutionality of contested laws *per se*, or in an *ex-officio* capacity to initiate proceedings against a seemingly unconstitutional law, instead being bound by the content and questions addressed in the petition. In practical terms, the FSC lacks the competence to invalidate a contested law which is clearly unconstitutional even when it expresses that indirectly within the judgment. Having the initiative to review the constitutionality of an act or legislation in a case brought before the FSC, even when it is not explicitly asked to review this, could overcome that problem.

On the other hand, the current pre-constitutional FSC has been operating in the extraordinary context of the transition to democracy. Iraq's post-2003 political system remains fragmented and political branches still experience challenges in exercising their constitutional powers. These are the result of the difficulties associated with the transition and consociational democracy and reflect division, instability and the uncertainty of the political system. All of these may limit the government's court-curbing policies and provide greater opportunities for contestation and dispute, and, therefore, may facilitate a greater degree of judicialisation. Although its performance and involvement in constitutional contestations has increased considerably over the period covered by this study, the Court is yet to develop a strong accountability function. There is potential for it to continue as a self-restrained and deferential court in matters that are deeply contested among political parties and groups. It is likely to continue taking a similar approach to handling questions of Islamic law.

As an institution of horizontal accountability, it can be argued that the FSC is expected to possess the ability and competence to hold government officials and institutional actors to account; however actually doing so might endanger the Court's independence and draw it further into political conflicts. There are indications that the Court might further minimise the implications of some of its most controversial and widely criticized decisions. For example, the FSC has over time limited the implications of its earlier decisions in cases involving the legislative powers of the Parliament from almost disregarding any legislative right to that of preventing, in certain matters, legislative initiatives from Parliament.

6.2.2 Future Studies

In light of the literature reviewed during this research and building on the conclusions of this study, future research could usefully examine the following issues.

First, studies may investigate the conditions and factors under which judicialisation serve the rule of law and democratization. The courts in such contexts have been asked to deal with large quantities of diverse issues decisive for transition, beyond the usual call placed on their counterparts in more established democracies. Research into the expansion of judicial powers could

focus more on questions of legitimacy in relation to court independence, accepting constitutional judicial review as it is, and acknowledging that it has been integral part of emerging democracies. This research does not address the point at which judicialisation in transitional contexts becomes a threat to a representative democracy, and therefore future research could address legitimacy questions concerning whether and how unelected judges are better placed than elected legislators in identifying and making decision about constitutional issues.

Second, the present analysis of the experience of emerging constitutional adjudication in Iraq found less evidence of a rights-oriented court and there is a clear lack of rights-related litigation, despite the fact that legal and judicial institutions, intended to protect and challenge human rights violation, are well established by the constitution. There is increasingly frequent allegation of violations of constitutional rights as a result of past and present legislation and state actions; this might provide an opportunity structure for constitutional adjudication in the form of disputes. Further studies could look at the potential for and obstacles to rights litigation and judicial creation of individual rights and empowerment of marginalised minorities. New research could also further develop the support structure arguments, by exploring the interaction between FSC and existing civil society organisations or broader support structures in protecting constitutional rights; their use of litigation and legal means to support democratic transition and hold government to account for violating the constitution and, for example, in corruption cases.

Third, individual judges as decision makers and their preferences were not the primary concern of this study for reasons explained previously. Future studies could look at this aspect of the FSC and its impact on the accountability function of the Court. Special focus could be placed on the role of the Chief Justice, and the fact that changes of regime, constitutional and legal rules, and institutions did not parallel changes in the judges sitting on the court. This could include judges' role regarding legal and political continuity, the impact of transitional justice mechanisms with particular focus on how the Court has used and been affected by de-Baathification laws.

Fourth, this research has provided significant insights into the role of the courts in legislative–executive power struggles, and also highlighted various

problems that merit further consideration. From a comparative perspective, research could focus more specifically on the role courts play in executive-legislative power struggles from both procedural and substantive perspectives, and their impact on the development of the constitutional order at the initial stages of democratization.

Fifth, although this thesis addresses some key issues regarding the FSC's jurisprudence in issues involving Islamic law, this research indicates that there is a need for future comparative studies to analyse the role and position of the constitutional judiciary in reviewing the conformity of legislation and government acts with Islamic law in countries that entrust courts with such a task. This could entail addressing the different developments with respect to courts with a mixed membership of Islamic jurists and judges, and others consisting of judges only. It is still unclear to what extent non-judge members of the FSC may affect this issue. Comparative research of this kind therefore is important, in particular given the recent trend in majority Islamic countries where their transitions from authoritarian regimes to democratic systems have been accompanied by greater interest in incorporating Islamic law into their constitutions.

To conclude, studying the factors that account for the expansion of judicial power and influence, and its potential implications, by bringing together both theory and practice regarding judicialisation and the rule of law system in transitional democracies (whether focusing on a single case study or taking a comparative approach), would make a significant contribution to a greater understanding of the interplay of politics and law in general, and the role and position of courts in the democratization process in particular.

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