Introduction to the Laws of Kurdistan, Iraq
Working Paper Series

Rights

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

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

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

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

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

The faculty and administration of American University of Iraq in Sulaimani provided invaluable guidance and support throughout the writing process. Asos Askari and Paul Craft in particular...
played a leadership role in getting the program off the ground and instituting an introductory law class at AUIS. Ms. Askari taught the first law class in the 2014 spring semester. Former and current presidents of AUIS, Dr. Athanasios Moulakis and Dr. Dawn Dekle, have provided unwavering support to the project. And finally, a special thanks to Dr. Barham Salih, founder and Chair of AUIS, without whose foresight and vision this project would not have been possible.

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

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

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

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FUNDAMENTAL RIGHTS OF CITIZENS UNDER THE IRAQI CONSTITUTION

No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.

I. INTRODUCTION

A. Overview

This chapter provides an introductory discussion of rights granted to individuals in Iraq’s constitution. After a brief overview of the development of rights in the 2005 constitution, this chapter discusses some of the important framework to understand before discussing the rights themselves in more detail. (Part I). After this framework, the Chapter begins a substantive discussion of various rights granted in the Constitution, beginning with Civil Rights (Part II), continuing to discuss Political Rights (Part III) and concluding by discussing some of the Economic, Social and Cultural Rights outlined in the Constitution. (Part IV).

Rights outlined in the current Constitution are cited throughout the chapter as the foundational law for discussion. Make sure to familiarize yourself with the general layout of the Constitution, and particularly Section Two of the Constitution (Rights and Liberties), that discusses the rights granted to all Iraqis.

B. The Evolution of Rights in the Iraqi Constitution: An Overview

The Iraqi Constitution has an entire section devoted to rights. Section Two of the Iraqi Constitution is entitled “Rights and Liberties” and is further separated into chapter one on “Rights,” and chapter two on “Liberties.” This section details almost all of the individual rights guaranteed to the citizens of Iraq. The Constitution contains much more detailed provisions of individual rights than previous Iraqi constitutions. Though many of these provisions do appear in the 1970 Constitution, the current Constitution contains many more guaranteed rights and collects them all into one section specifically devoted to the rights of citizens, as opposed to scattered throughout the text. Compare, for example, the following two provisions – one from 1970, and one from 2005 – both dealing with equality before the law:
Article 19 [Equality]

(a) Citizens are equal before the law, without discrimination because of sex, blood, language, social origin, or religion.

Constitution of Iraq (2005)

Article 14:

Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.

Discussion Question

Does the 2005 Constitution expand the freedom from discrimination to new groups? The 2005 Constitution adds race, ethnicity, nationality, color, sect, belief or opinion, and economic or social status to the provision. Does this addition change anything about the right or were those groups already included in the broader categories of “blood, language, social origin or religion?”

By including these provisions in the Constitution, the drafters demonstrated a commitment to individual rights. In this respect, the Constitution of Iraq is following a pattern in the development of constitutions more generally. With the development of human rights law internationally, constitutions have begun to include more and more specific provisions guaranteeing individual rights to citizens.¹

The Constitution of Iraq contains three primary types of rights: (a) civil rights that ensure personal security and integrity, (b) democratic and political rights that allow individuals to participate in the political system and civil society, and (c) economic, social and cultural rights that grant affirmative privileges to citizens. We will discuss each of these in more detail below. An additional category of rights applies to people accused of a crime and protects them from prejudice until they are freely and fairly found guilty of the crime they are accused of. We will not cover this area in this chapter, though some of the rights here (Art. 17 and Art. 40 Right to Privacy, for example) are relevant to criminal defendants.

Discussion Questions

1. Why do you think the Constitution includes individual rights that are specifically written into the text?

2. Do you think that it is a meaningful way of protecting the rights of the people of Iraq? Why or why not? What limitations can you identify?

3. Do you think one type of rights – civil rights, political rights, or economic/social/cultural rights – is more important than the other? On one hand, civil rights protect your livelihood and safety so seem more fundamental, but on the other hand, political rights ensure access to the policy-making system that can then also secure livelihood and safety, and economic/social/cultural rights can guarantee the comfort and .

Generally, the rights and liberties section of the Constitution was not a source of major controversy during the Constitutional negotiations. Most of the rights were adopted without much debate or problem. The economic and cultural rights – the right to education, to health care, to work, etc. – received very little comment at all. Three areas were controversial to the drafters, however. These were the individual’s right to freedom of religion, the scope of women’s rights, and recognition of Iraq’s obligations under international law. In each of these areas, Islamist politics played a role in shaping the debate. The debate generally broke down along similar lines with Shi’i’s seeking to limit the rights with strong opposition from Kurds and secular Arabs with United States backing. We will discuss each of these controversies briefly before beginning our discussion of each of the enumerated rights. The controversies illuminate valuable points about the process of creating these rights that will be helpful to think about when trying to interpret them.

1. Individual’s Right to Freedom of Religion

All parties to the constitutional drafting process seemed to agree that some form of religious freedom was necessary. The Ba’thist dictatorship had ruthlessly persecuted various religious communities, especially the Shi’i community. All groups agreed that the Constitution should provide some protection to groups to worship freely, to prevent another persecution. At issue to the drafters, however, was whether this should be an individual or a group right. An individual right to practice religion also implies the right to not practice religion, or to be an Atheist. It also allows conversion from Islam to another faith. Shi’i’s wanted to scale back this right and change the provision to protect the right of “all…religions” to freedom of belief and practice. This would make it a group right that does not extend to the individual. These efforts ultimately failed. U.S. President George Bush personally intervened, calling a Shi’i leader to advocate for a provision
that would not restrict religious freedom.\textsuperscript{2} This was President Bush’s one personal interjection into the drafting of the Constitution. The final provision, supported by Kurds and secular Arabs, protected the individual “freedom of thought, conscience and belief.” (Art. 40).

2. **The Scope of Women’s Rights**

Similarly, the role of women in the new Constitution was a matter of some debate. The Transitional Administrative Law (TAL) had set a goal to have no less than one quarter of the National Assembly filled with women.\textsuperscript{3} Shi’i groups objected to this quota and also wanted to soften the language on women’s rights more generally by ensuring that the Constitution provided a way to reconcile a woman’s role with “the fundamental principles of this constitution,” which in this context meant with Islamic principles. Both of these changes were objected to and the final Constitution included the parliamentary quota (Art. 49(4)) and removed the additional qualifying language about a woman’s role.

3. **Recognition of Iraq’s Obligations Under International Law**

The one major victory in the rights section for the more conservative Islamic factions was in limiting the application of international human rights conventions to Iraq. The TAL had committed Iraq to following international treaties and conventions saying, Iraqis enjoy “the rights stipulated in international treaties and agreements, other instruments of international law that Iraq has signed and to which it has acceded, and others that are deemed binding on it.”\textsuperscript{4} The conservative faction wanted to insert a provision that ensured that all international obligations could not “contradict the principles and rulings of this constitution.”\textsuperscript{5} This would subject all international obligations to the Article 2 requirement that “[n]o law may be enacted that contradicts the established provisions of Islam.” The proposed provision was dropped at the last minute for a formulation that states “Iraq shall…respect its international obligations.” (Art. 8). This seems to apply to international treaties that Iraq has signed, but does not extend to international conventions or international law more generally.

We will cover some other rights in more detail below, but keep in mind that all of these rights reflect the negotiation and agreement of various parties. Like with all Constitutional provisions, there can be and often is much disagreement about what the provision might mean in practice.

\textsuperscript{3} TAL, Art. 30(C)
\textsuperscript{4} TAL, Art. 23.
\textsuperscript{5} Hummam al-Hammudi, et. al., Draft Constitution (Aug. 7, 2005) at 56,
C. Entitlement, Legal Personality, & Citizen Rights

Under international human rights norms, all human beings are entitled to basic human rights under the law of whichever country they live in. In order for an individual to demand that he or she be granted the rights to which he or she is entitled, he or she must have legal personality, or the right to be recognized as a person with legal rights before the law. Some rights are granted to all people – regardless of where they are from – under international law. Other rights are reserved for citizens of a particular nation. These are called citizen rights. In this chapter, we will be covering citizen rights.

Political rights are the most obvious form of citizen rights. Political rights include the right to vote, the right to run for election, and the right to public participation. Such acts, which work to define a sovereign nation, are reserved for those people who are part of the nation. It would not make much sense, for example, if Italian citizens had the right to run for election or vote in Iraq, because Italians are not part of the nation of Iraq.

You may be wondering how countries are able to grant certain rights only to their citizens if they are also required to grant rights to all human beings under international law. According to international law, nations may distinguish between citizens and foreigners so long as two conditions are met. First, the country must provide the opportunity for people with valid claims to citizenship to become citizens. In other words, states cannot arbitrarily deny citizenship to people who qualify under the state’s domestic laws. Second, all citizens must have the right to participate in the political system without discrimination. As you will notice while reading this chapter, the Constitution of Iraq grants most political, civil, and cultural rights solely to Iraqi citizens.

D. Obligations of the State & State Action

When individuals are entitled to certain rights, the State has an obligation to grant those rights to those individuals. This means that the State is bound to uphold the Constitutional rights of individuals. For example, Article 38(A) grants citizens the “freedom of expression using all

7 Universal Declaration of Human Rights, art. 15, available at http://www.un.org/en/documents/udhr/ (“(1) Everyone has the right to a nationality; (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”).
8 International Covenant on Civil & Political Rights art. 25, available at http://www2.ohchr.org/english/law/ccpr.htm (“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.”) (emphasis added).
means.” This means that the State is prohibited from stopping citizen expression (subject to several exceptions, discussed in more detail in Section III, B.). This is called a **vertical effect** because it regulates the relationship between the State and individuals.

On the other hand, Constitutional rights do not regulate horizontal effects, or the relationship between private citizens. In other words, individuals are not obligated to uphold the rights of other individuals to hold unarmed demonstrations because that is the job of the government. If Haroon and his friends were holding a demonstration it would not be a constitutional violation—though it might be some other sort of violation—for Hamid to disrupt the demonstration if he were acting in a private capacity. If, however, Hamid worked for the government and was disrupting the demonstration on behalf of the government, then it would be a constitutional violation for him to disrupt the demonstration. In fact, all persons acting on behalf of the State, including the executive, the legislature, and the judiciary, are bound to uphold Constitutional rights.

Another way to think about the State’s obligation to uphold rights is to keep in mind that there must be **state action** in order for a constitutional violation to occur. Because only the State is obligated to uphold constitutional rights, a constitutional violation requires state involvement.

This is why Hamid would not commit a constitutional violation by disrupting an unarmed demonstration, but the State would commit a violation by disrupting the same demonstration. As you will learn below, State action can also occur when a State *fails to prevent* something that it should. For example, there could be state action if the State allowed Hamid and his friends to prevent Haroon’s demonstration.

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9 [http://icon.oxfordjournals.org/content/1/1/79.abstract](http://icon.oxfordjournals.org/content/1/1/79.abstract)
Hypotheticals: Vertical Effects & State Action

Hypothetical 1: Burglary
Suppose that Amed breaks into Raman’s house and steals some of his property. Article 23 of the Constitution of Iraq states: “Private property is protected.” Has Amed violated one of Raman’s Constitutional Rights?

While at first you may want to answer yes because Amed has clearly done something wrong and has stolen from Raman, Amed himself has not committed a constitutional violation. Remember that constitutional rights regulate only the relationship between the government and individuals, not between two individuals. As a private actor, Amed is not bound by constitutional rights. This does not mean that Amed has not done something wrong, or even criminal. What he did almost certainly violates the Iraqi Penal Code, and he could be prosecuted for that. But, Amed himself did not commit a constitutional violation.

Hypothetical 2: Mail Inspection
Suppose that the Government of Iraq hired a private company called Mail Services Inc. to run the national postal service. Employees of that private company start opening people’s private packages and letters while transporting them. Sometimes they remove portions of packages and keep those portions for themselves. Article 40 of the Constitution of Iraq states: “Freedom of communication and correspondence…shall be guaranteed and may not be monitored, wiretapped, or disclosed except for legal and security necessity and by a judicial decision.” Is the situation described above a constitutional violation?

Even though Mail Services Inc. is a private company, this would likely be a constitutional violation because Mail Services Inc. is working on behalf of the government. The government hired the company to perform a public duty, and Mail Services Inc. is being paid to carry out a public function. Therefore, there is likely a state action.

Hypothetical 3:
Simin works for the government. She decides that she wants to hire someone as a housekeeper and gardener at her home. She decides that she only wants to hire a woman for the job, so she tells men not to apply and refuses to review applications from men. She knows that some of the men who applied might actually be better at doing the job than the women, but she still only considers women for the job. Article 14 of the Constitution of Iraq states: “Iraqis are equal before the law without discrimination based on gender…” Has Simin committed a constitutional violation?

Even though Simin works for the government, she has not committed a constitutional violation
because she was acting in her capacity as a private actor in this instance. If Simin had engaged in
gender discrimination when hiring someone to work in her government office, she would be
violating the Constitution because she would be acting on behalf of the State. In this instance,
however, Simin is acting as a private individual, hiring someone to work in her home.

As you may have noticed in the burglary hypothetical above, even though Amed himself isn’t
bound by constitutional rights, Raman’s constitutional rights have been violated. For this reason,
some judicial bodies have ruled that while there are no direct horizontal effects that regulate the
relationship between two private citizens, the State can be obligated to protect the constitutional
rights of citizens from violation by third party actors. This is called an indirect horizontal
effect.¹⁰

E. Civil & Political Rights vs. Economic, Social, & Cultural Rights

Human rights theorists and legal philosophers have traditionally distinguished between negative
rights, which dictate what the State cannot do, and positive rights, which dictate what the State
must do.

Civil and political rights protect individuals from certain actions by the state or government.¹¹ In
other words, an individual has the right to freedom of expression precisely because the
government cannot restrict the expression of individuals. Likewise, an individual has the right to
privacy because the government is not permitted to intrude on her home or personal
correspondence. Civil and political rights are sometimes called negative rights because they
place restrictions on the government by dictating what the government is not allowed to do. Civil
and political rights are also called “traditional” or “first generation” human rights because they
are the first types of rights that the international community made into international law.¹² In
addition, the term “civil and political rights” encompasses two different types of rights. As
human rights scholars Alex Conte and Richard Burchill state, “While civil rights are those rights
which are calculated to protect an individual’s physical and mental integrity, to ensure that they
are not victims of discrimination, and to preserve their right to a fair trial, political rights are
those which ensure that individuals are able to participate fully in civil society. Such rights
include rights of democratic participation, such as the right to participate in the public life of the
State, freedom of expression and assembly, and freedom of thought, conscience and religion.”¹³

¹⁰ Alex Conte & Richard Burchill, Introduction to Defining Civil & Political Rights: The Jurisprudence of the
United Nations Human Rights Committee 6 (Alex Conte & Richard Burchill, eds. 2009).
¹¹ Alex Conte & Richard Burchill, Introduction to Defining Civil & Political Rights: The Jurisprudence of the
United Nations Human Rights Committee 2 (Alex Conte & Richard Burchill, eds. 2009).
¹² Id.
¹³ Id. at 3-4.
Definitions: Civil & Political Rights

Civil Rights: Rights that ensure people’s physical and mental integrity, life, and safety.

Examples of Civil Rights:
- Right to nondiscrimination
- Right to privacy
- Right to life
- Right to freedom of thought, conscience, speech, expression, and religion, in the sense that these rights preserve people’s mental integrity

Political Rights: Rights that ensure the ability to participate in civil society and politics.

Examples of Political Rights:
- Freedom of association & assembly
- Right to vote
- Right to petition the government
- Right to freedom of thought, conscience, speech, expression, and religion, in the sense that these rights allow people to participate in civil society and politics

You may have noticed that some rights can qualify as both civil and political rights. For example, freedom of expression qualifies as a civil right because the right to express one’s thoughts helps to preserve their mental integrity. At the same time, freedom of expression qualifies as a political right because when people express their thoughts and opinions on politics and political figures, it allows them to participate in civil society.

Economic, social, and cultural (“ESC”) rights, by contrast, are affirmative rights granted to people, also called positive rights, as mentioned above. ESC rights are sometimes referred to as “second generation” human rights because the international community addressed them later than civil and political rights. For example, the right to education and the right to healthcare are both ESC rights because they affirmatively grant people the right to pursue an education or access healthcare. They are sometimes called positive rights because they grant people the right to do something through the State. Because of this, ESC rights are often aspirational in nature, meaning that they are something that a State can only aspire to because they are very difficult to implement and enforce. For example, for a government to establish an effective healthcare system that all citizens can access, it must implement training systems for doctors, build health infrastructure throughout the country, and ensure that medical supplies are consistently available.

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14 Id. at 2.
15 Id.
transported to these health facilities. Establishing a universal educational system is similarly complicated and expensive. Even a well-meaning government may find such rights difficult to implement and enforce.

In addition, enforcement of ESC rights is more difficult than civil and political rights. For example, suppose that an individual brings a case against the government for violating his freedom of expression by imprisoning him for publishing a particular story. If the judge decides that the individual should win the case, she can rule that the government must release him. Suppose, on the other hand, that an individual brings a case against the government alleging that the government has not established adequate education in his province and is thus violating the right to education (an ESC right). Even if the judge rules that the individual should win the case, it is much more difficult for the government to establish an adequate educational system in that province. This would require actions such as building schools and training teachers, as well as resources to take these steps.

While civil and political rights can generally be categorized as negative and ESC rights can generally be categorized as positive, there is overlap between the two categories. For example, the right to vote (a negative right) requires not only that the State refrain from restricting access to polls, but also that the State provide polling stations and ballots. Similarly, the right to health (a positive right) requires both that the State affirmatively establish a health infrastructure system, and also that the State refrain from restricting access to that healthcare system.

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<td><strong>Civil &amp; Political Rights</strong></td>
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<tr>
<td>--Negative or Defensive Rights</td>
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<td>--Freedom from the State</td>
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<td>--Set limits on State action</td>
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<td>--Impose a duty on the State not to interfere with the basic rights of citizens</td>
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<td>--“Traditional” or “first generation” human rights</td>
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<td>Examples: Freedom of expression, freedom from discrimination, freedom of association, privacy rights, property rights, electoral rights</td>
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<tr>
<td><strong>Economic, Social, &amp; Cultural Rights</strong></td>
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<tr>
<td>--Positive Rights</td>
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<td>--Freedom through the State</td>
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<td>--Requires the State to take affirmative action</td>
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<td>--“Second generation” human rights</td>
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<tr>
<td>Examples: Right to education, right to healthcare, right to work, right to an adequate standard of living</td>
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Civil & Political Rights vs. Economic, Social, & Cultural Rights: An International Debate

When the UN adopted the non-binding Universal Declaration of Human Rights (UDHR), the international community initially intended to enshrine the rights expressed in the UDHR in a legally binding agreement. However, states disagreed on whether civil and political rights or ESC rights should be prioritized. In addition, each category of rights requires a different method of implementation. Because civil and political rights are restraints on government action, they can be implemented and enforced relatively quickly. ESC rights, on the other hand, require states to establish comprehensive social and economic programs, so depend heavily on resource availability and cannot be implemented immediately.

As a result, the international community separated the rights enumerated in the UDHR into two categories of rights: (1) civil and political rights, and (2) ESC rights. States then passed two separate binding legal instruments, one to protect each category of rights: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). There is more international consensus over the applicability of civil and political rights as opposed to ESC rights. For example, the ICCPR has a few more signatories than the ICESCR: while there are 167 state parties to the ICCPR, there are only 160 state parties to the ICESCR.

While civil and political rights are less controversial within the international community, many countries have acknowledged the value of the ESC rights, but have chosen different ways to achieve them. The United States, which has signed but not ratified the treaty, explains that adopting the ESC makes little sense, given its free-market system of allocating resources. People sympathetic to this position might argue that decisions about resource allocation are best left in the hands of legislatures and the executive. On the other hand, many opponents of this view argue that without a treaty obligation akin to the ICESR, societies will fail to ensure adequate

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17 Id.
18 Id.
19 Id. at 2-3.
20 Id. at 3.
21 Id.
resources for all people. On this view, ratifying the ICESR is a necessary first step in the struggle to ensure equality for all.

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<td>Right to Life</td>
<td>The State may</td>
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**F. The Duty to Respect, Protect, & Fulfill**

More recently, scholars have categorized rights according to the state duty. Keep in mind that categorizing rights as positive vs negative or according to types of duties are merely different ways of conceptualizing rights. The categories may therefore overlap. Three such duties are widely recognized: the duty to respect, the duty to protect, and the duty to fulfill.

The duty to respect aligns with the traditional notion of negative rights. Under the duty to respect, the State must respect the basic rights of individuals such that it refrains from acting in any way that denies individuals those rights. For example, under the right to vote, the State must respect individuals’ right to vote by not denying people access to polling stations.

The duty to protect obliges the State to prevent third party actors from violating an individual’s rights. For example, under the right to vote, the State must pass and enforce laws that prohibit people from preventing others from voting. The duty to protect is similar to the concept of indirect horizontal effects that you read about above.

The duty to fulfill is similar to the traditional notion of positive rights. Under the duty to fulfill, the State must establish economic and social systems that allow all people to access rights. For example, under the right to vote, the State must ensure that polling places are established throughout the country, print ballots, and that people are present to run the polling stations.

The following table demonstrates how several different civil and political rights contain the duty to respect, the duty to protect, and the duty to fulfill.

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**Discussion Question**

1. Do you think that a citizen should be able to bring a case against his or her government for violating ESC rights?
It is important to keep in mind that, as explained above in the box on the international debate over economic, social, and cultural rights vs. civil and political rights, nearly all countries recognize the importance of the duty to respect. The duty to protect is somewhat more controversial, though international bodies such as the Human Rights Committee (an independent body that monitors the implementation of the ICCPR) have recognized the importance of the duty to protect and indirect horizontal effects. The duty to fulfill is even more controversial—some countries strongly support it but others believe that the duty to fulfill is not properly framed as a universal human right or a constitutional right.

**Discussion Question**

Do you think that States should be *constitutionally* required to uphold positive rights and the duty to fulfill? Where in the legal framework should a State’s responsibility to create social, economic, and political structures that benefit citizens fit? In the Constitution? In statutory laws? Through the incorporation of international human rights norms into domestic law? Why?

**Reviewing claimed violations of constitutional rights as a legal practitioner**

23 “Due process of law” generally means a decision by a court after all parties have been heard. There are many formal obligations for “due process,” but for our purposes, it suffices to mention that the “right to life,” like many rights, is not absolute.

24 See UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant para. 8, adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add. 13.
You may want to consider using the following three-step process for determining whether an individual can properly bring a claim for violation of a constitutional right:

1. **Identify** the **scope** of **protection** of the right claimed. Then determine whether it covers the behavior, situation, or interest **alleged**, and whether the individual asserting the claim is entitled to the right.

2. If the claimed right covers the behavior, situation, object, or interest alleged and the person bringing the claim, there is a right at issue. Then we next examine whether that right has been **infringed**.

3. If the right has been infringed, determine whether the infringement is **justified**.

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**G. The Relationship Between Constitutional Rights and Statutory Law**

As you read through the Constitutional rights guaranteed to Iraqis below, you might be surprised to see some things in the Constitution that don’t seem to be carried out in real life. For example, did you know that all Iraqis have the right to government provided health care under Article 31 of the Constitution? Do you think this right is being enjoyed by all Iraqis? What about those living in rural areas? Does the government have to build a hospital in every town? These questions boil down to how the government **enacts** these rights. Enacting legislation are the laws that define exactly how the government satisfies its constitutional obligations, this is closely linked to the state’s duty to fulfill, discussed above. Though this chapter only covers rights granted in the Constitution, it is important to realize that this is simply the first step towards actually enjoying those rights. Many rights in the constitution are **aspirational**, or rights that the drafters of the Constitution hope will come to fruition over time through later legislation and the

Let’s look at one example to get a better sense of how this might operate in practice. Article 32 requires the State to care for people with disabilities. The Constitution does not specify how the State will care for its handicapped population, or what exactly is included in the term “handicapped.” Many other countries have a similar constitutional provision, but have used further legislation to empower the rights enshrined in the Constitution. This seems to be imagined by the drafters of the Iraqi Constitution who allowed that “this [provision] shall be regulated by law.” This last sentence is an indication that the drafters imagined that the specifics would be left to the legislature. So, while the Constitution grants the broad right, the legislature must enact **statutes** that explain exactly how that right might work. Why might the drafters have left this important task up to the legislature? Why wouldn’t they simply explain exactly what they meant by “care for the handicapped?” There are a few possible reasons, and here are two examples:
1. Efficiency: It is not timely to spell out exactly what is meant by different words in the Constitution. The drafters were operating under a timeline to ensure stability of the country, to spell out every detail would have delayed the drafting of the Constitution by too long.

2. Technical Expertise: The drafters were not in a position to determine exactly how disability rights should be implemented. The legislature, which responds to voter will, and administrative agencies are better equipped to determine the specifics of what might be in a disability rights framework.

Can you think of other possible reasons why the drafters would not include all details of the right in the Constitution?

Like Iraq, in Kenya, the Constitution also requires the State to care for people with disabilities by ensuring they are “treated with dignity and respect,” have “access [to] educational institutions” and are generally well taken care of and integrated into society. These Constitutional protections are more substantive than those in Iraq’s Constitution, but in both, much is left to the Assembly to implement. In Kenya, the Assembly passed a comprehensive Persons with Disabilities Act that outlines specifically how the State will satisfy its Constitutional requirement including defining disability, outlining the rights enjoyed by people with disabilities and outlining the remedies people with disabilities have if there is a breach of their rights.

Discussion Question

Imagine you are a member of parliament. How would you enact Article 32, mentioned above? What rights would you give to people with disabilities? What responsibilities would you give the government to “care” for the handicapped population?

Though the Constitutional provision grants the right, the statutes do the work of defining the scope of the right and explaining how it works. As you go through the rights listed below, it is important to remember that rarely will the Constitutional provision be the final word on the issue. Statutes, court cases and executive pronouncements will all shape the way the provisions are implemented.

II. CIVIL RIGHTS IN IRAQ

Civil Rights are generally about individual protections. While Political Rights encourage participation with the government process and Economic, Social, and Cultural Rights obligate

the government to provide certain services to the people, Civil Rights are primarily about protecting individuals from government intrusion. The right to privacy, the right to freedom, and the right to property are quintessential Civil Rights. Below we discuss those and more.

A. The Right to Life, Security & Liberty

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<thead>
<tr>
<th>Constitution of Iraq</th>
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<tbody>
<tr>
<td>Article 15</td>
</tr>
<tr>
<td>Every individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority.</td>
</tr>
</tbody>
</table>

The right to life is among the most fundamental rights guaranteed by any constitution. The United Nations Human Rights Committee has described the right to life as the “supreme right.” Without the right to life, other rights are irrelevant. It is important that this right is guaranteed to the individual and is protected from government revocation without a competent judicial decision.

Similarly, the Constitution of Iraq allows every individual the right to security and liberty. Liberty has generally been narrowly interpreted to mean freedom from imprisonment, slavery or other bodily restraint. This right can be suspended upon a criminal conviction by a competent judicial authority – or, a judge that is authorized to hear and determine such a case. With both the loss of freedom and the loss of life the standard for judicial suppression should be quite high. Though empowered by the Constitution, judges should rarely deprive an Iraqi of their life or liberty and only after the process guaranteed by law.

B. Freedom from Discrimination

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<tr>
<th>Constitution of Iraq</th>
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<tbody>
<tr>
<td>Article 14</td>
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<tr>
<td>Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.</td>
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</table>

When many people think about civil rights, the freedom from discrimination is often the first thing that comes to mind. If the goal of civil rights is to ensure equality among all the people of Iraq, then the freedom from discrimination is central to that. Article 14 covers this area of civil rights by prohibiting the discrimination of any Iraqi based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief, or economic or social status. Discrimination occurs when similarly situated people are treated differently. For example, if one person is allowed to vote while another is not simply because they are a Sunni, the Constitution clearly prohibits such distinctions.

This provision has two components: (1) equality before the law, and (2) freedom from discrimination. Equality before the law means that all individuals have legal personality, or the right to be recognized as a person before the law. This is the bedrock principle of individual rights, that each person is treated the same by the legal system, regardless of creed or class. Freedom from discrimination means that the law must treat all people equally without consideration to such things as race, gender, religion, language, political affiliation, etc. This can be summed up as the right to equal treatment in the law. The right to equal treatment does not mean the government must treat all individuals and groups identically. Sometimes disparate treatment can be justified. For example, since only women give birth to children, it makes sense for the government to provide prenatal healthcare during pregnancy to women, but not to men. Generally, only distinctions that are considered unreasonable or subjective are forbidden. Another example of an allowable form of discrimination is in hiring. For example, when hiring judges or lawyers who will have to read the law, it would be reasonable to require that applicants are literate and have attended law school, even though this requirement would discriminate against applicants who are illiterate or who have not attended law school. Such discrimination is not unreasonable under the law and is thus permitted.

The prohibition on discrimination covers both direct and indirect discrimination. Direct discrimination occurs when a law explicitly distinguishes between different types of people. This would occur, for example, if a law stated that children from Kurdistan could attend a particular school in Baghdad, while children from Basra could not attend the same school. Indirect discrimination occurs when a law doesn’t explicitly discriminate against one group, but the law has a disparate impact on one group of people versus another. For example, a law mandating that employees could not take family-related leave of more than two weeks might have a disparate impact on women, who frequently have to take longer leave to recover from childbirth, even though the text of the law applies to all people equally.

The list of protected characteristics (race, class, religion, etc.) seems comprehensive. Can you think of anything that might be missing? What about people with disabilities? Article 32
provides that the State shall provide for the “care” of people with disabilities, but does that also prohibit them from being discriminated against? Who do you think people with disabilities were not included along with the other groups protected in Article 14? Can you make an argument that Article 14 applies to this group as well?

C. Iraqi Citizenship

The Constitution grants citizenship to every Iraqi as a right. As part of that right, Iraqis are also entitled to the other rights outlined in this Constitution that apply to “Iraqis.”

Note that the Iraqi citizenship focuses on citizenship through lineage. In other words, Iraqi mothers and fathers pass on their citizenship to their children. This is common in predominantly Muslim countries. By contrast, some western countries, such as the United States, define citizenship by place of birth as well. For example, anyone born on U.S. soil is an American citizen, regardless of his or her parents’ citizenship. Can you think of any problems with this method of determining citizenship? Consider the following story:

“Baghdad Revokes Iraqi Citizenship of 160 Families, Citing their Syrian Origins,” Al

27 Many constitutions that cover people with disabilities include provisions that specifically prohibit discrimination on the basis of that disability. For example, see The Constitution of Kenya, Article 27(4), discussed earlier.
Arabiya News:

One-hundred and sixty families from al-Anbar Province have their Iraqi citizenship revoked. Some are government employees, police personnel and army officers. They have their nationality certificates, citizenship and any other benefits annulled by the Iraqi government. The reason given is that these families are of “Syrian origin.” The families are from Qa’im, about 380 kilometers from al-Ramadi, but right next to the Syrian town of Abu Kamal. Most of these families have been Iraqi citizens for years, despite their Syrian origin and the fact that they share tribal chiefs with their Syrian counterparts of the same tribe. Despite this, many work for the Iraqi government, they have lived in Iraq for many years and their children were born in Iraq.\textsuperscript{28}

Does the state action involved in this case – stripping these families of their citizenship - violate Article 18? What about Article 14? Is this an example of \textit{discrimination} on the basis of tribe, nationality, or sect? As you read on, also consider whether the state action in this story violates Article 24, Second below.

D. Freedom of Movement

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<th>Constitution of Iraq</th>
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<tbody>
<tr>
<td>\textbf{Article 24}</td>
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<tr>
<td>The State shall guarantee freedom of movement of Iraqi manpower, goods, and capital between regions and governorates, and this shall be regulated by law.</td>
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<tr>
<td>\textbf{Article 44}</td>
</tr>
<tr>
<td>\textbf{First}</td>
</tr>
<tr>
<td>Each Iraqi has freedom of movement, travel, and residence inside and outside of Iraq.</td>
</tr>
<tr>
<td>\textbf{Second}</td>
</tr>
<tr>
<td>No Iraqi may be exiled, displaced, or deprived from returning to the homeland.</td>
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Freedom of movement is closely linked to the right to citizenship. A part of citizenship is the right to move around the country and live wherever one chooses within the country, as well as to travel outside the country and return. Iraq may, on the other hand, limit the freedom of movement and entry to Iraq of foreigners. One way countries frequently do this is by requiring

\textsuperscript{28} http://www.alarabiya.net/articles/2011/09/13/166664.html
visas for entry. Article 44 covers the movement of Iraqi citizens in and out of Iraq and throughout its provinces. How does Article 44 relate to Article 24, which guarantees the freedom of movement for Iraqi “manpower?” One possible explanation is that Article 44 guarantees freedom of movement for Iraqi citizens, while Article 24 is an economic right, in effect guaranteeing the right of interstate commerce.

As we discuss in another section on oil and gas law, oil and gas belong to all people of Iraq and to the provinces. The Kurdish region claims ownership over the unexplored oil resources within their territory. Does Article 24 give an enterprising young businessman from Baghdad the right to drill for oil in Kurdistan, pipe it down to the South and sell it since oil is a “good” which is guaranteed free movement? If not, is there some other provision that prohibits this? Does the freedom of movement extend only to the transportation of the oil from one part of Iraq to another, but not the drilling and extraction of the oil? As with many of these rights, the exact parameters will get fleshed out over time through statutes (discussed in Part I, Section G) and through court decisions. What Articles 24 and 44 make clear, however, is that the drafters viewed Iraq as one country populated by Iraqis. They could have enforced stricter border controls for autonomous regions, such as Kurdistan, but the Iraqi Constitution imagines a country where people from the North can travel and do business freely with the South and vice versa.

E. The Right to Privacy

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<tr>
<th>Constitution of Iraq</th>
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<tr>
<td><strong>Article 17</strong></td>
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<tr>
<td>First</td>
</tr>
<tr>
<td>Every individual shall have the right to personal privacy so long as it does not contradict the rights of others and public morals.</td>
</tr>
<tr>
<td>Second</td>
</tr>
<tr>
<td>The sanctity of the homes shall be protected. Homes may not be entered, searched, or violated, except by a judicial decision in accordance with the law.</td>
</tr>
<tr>
<td><strong>Article 40</strong></td>
</tr>
<tr>
<td>The freedom of communication and correspondence, postal, telegraphic, electronic, and telephonic, shall be guaranteed and may not be monitored, wiretapped, or disclosed except for legal and security necessity and by judicial decision.</td>
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</table>

The right to privacy is a quintessential individual right. Combined, Article 17 and Article 40 provide of a sphere of privacy to an individual, free from intrusion by the State. The right has
often been described as the right to be “left alone.” Others see it as a more robust right to be in control of ones living and working environment. How you think about this right may determine what you think are permissible invasions. Some countries, such as the United States do not have an explicit right to privacy, such as that in Article 17. Instead, a right must be inferred from other rights granting protections in certain categories. Here, the drafters outlined an explicit right. Both Article 17 and Article 40 allow for some breaches of privacy out of “security necessity,” (Art. 40) and by “judicial decision” (Arts. 17 and 40). The right to privacy raises delicate questions about varied interests. On one hand, the Constitution recognizes the value of individual privacy; on the other hand, the Constitution recognizes that privacy might have to be invaded to account for security interests. What type of “security necessity” should justify government intrusion? What grounds should a court use to make a “judicial decision?”

Notice this right is granted to “every individual” as opposed to “Iraqis.” What could be the reason for this? Why would the drafters want all people’s privacy to be protected?

Consider one possible reason: As Iraq and other Middle Eastern countries continue to do business with the European Union and other Western countries, businesses are wary to communicate with offices, partners, or subsidiaries in a country where they believe their communications can be monitored or captured by state authorities. Article 40 provides important business protections for international businesses that wish to operate in Iraq.

The right to privacy is a dynamic right. As technology evolves, so too must the right to privacy. With more personal, private data being stored online the right to privacy will remain important and hotly debated for the foreseeable future. The law rarely changes fast enough to keep up with technology.

F. The Right to Property

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<tbody>
<tr>
<td>Article 23</td>
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<tr>
<td>First</td>
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<tr>
<td>Private property is protected. The owner shall have the right to benefit, exploit, and dispose of private property within the limits of the law.</td>
</tr>
<tr>
<td>Second</td>
</tr>
<tr>
<td>Expropriation is not permissible except for the purposes of public benefit in return for just compensation, and this shall be regulated by law.</td>
</tr>
<tr>
<td>Third</td>
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</table>

25
A. Every Iraqi shall have the right to own property anywhere in Iraq. No others may possess immovable assets, except as exempted by law.

B. Ownership of property for the purposes of demographic change is prohibited.

Property and privacy rights are closely linked. Both require the State to respect individual liberty by respecting peoples’ rights to maintain private aspects of their lives. The right to own property is considered to be a fundamental element of capitalism. Many Communist or Socialist countries have much less clear private property provisions in their constitutions. Most Iraqi privacy rights are written in the Iraqi Property Code, but the Constitution does outline a few specific provisions relating to property.

Property rights cover three different types of property: (1) real estate or land, (2) personal property or possessions, and (3) intellectual property, which includes the rights over inventions and artistic creations. Though not explicitly spelled out, these three are what is commonly considered property. Statutory law might treat each differently, but the Constitution grants all Iraqis the basic right. Property owners enjoy free use, enjoyment, and disposal of their property. The right to own property includes the right to exclude others from the use of one’s property and the right to freely dispense of one’s property.

Articles 23, Second protects people against takings, or when the government confiscates someone’s personal property to put it to another use. Article 23, Second provides that the government cannot take someone’s private property without “just compensation” and without a public purpose. This means that the government may only take someone’s private property to use it for the public good. For example, the government may be able to take part of a farmer’s land if that piece of land is necessary to build a railroad that will benefit the entire country. The government may not, however, take a farmer’s land so that a government official can build himself a nice house on it. Also, the government must provide “just compensation” for the property subject to the taking. Usually, “just compensation” is measured by fair market value. This means that the government must pay the farmer the amount that his land would sell for on the open market before it takes the property. Takings are a frequent subject of litigation around the world and are especially prevalent in a country recently at war. For an example of a well-known takings case in the United States, read the box on Kelo v. City of New London below.

Kelo v. City of New London

The city of New London wanted to develop a piece of land so that businesses could establish themselves there offer employment to the city’s residents. Susette Kelo owned a house on this

piece of land, and she refused to sell her house for the development project, even though the city was offering to pay her for the value of her house. The U.S. Constitution provides that the government may not take private property unless it is for “public use,” and unless the government provides “just compensation” to the property owner. Ms. Kelo took the city to court, alleging that her property rights were violated because the city would not be using the land for a permissible “public use.” The court held that the economic development project was a permissible “public use,” so the city had not violated Ms. Kelo’s property rights. Eventually, the city agreed to move Ms. Kelo’s house to a new location and to provide substantial additional compensation to her and other homeowners.

Article 23, Third is very specific to Iraq. It allows all Iraqis—regardless of race or religion—to own property anywhere in Iraq. This means that an Arab has a right to own property in Kurdistan and a Kurd has a right to own property in Mosul. When taken together with Article 23, Third(B), this seems to be a sort of expansion of the freedom of movement provided in Articles 24 and 44. The Constitution makes clear that though there are ethnic borders and barriers in the country, people and commerce should flow freely throughout Iraq without regard for ethnicity. How might a judge determine whether a person owns property for the “purpose” of demographic change? If an Arab moved to Erbil, how would you determine whether they did so for a legitimate reason, say, to be near family or for a job, or for the purpose of increasing the number of Arabs in the majority-Kurd city? The Constitution clearly outlaws the latter, but does leave it up to the judge to determine the facts of the particular case and whether the property ownership is unconstitutional.

III. POLITICAL AND DEMOCRATIC RIGHTS

The overarching goal of Political and Democratic Rights is to increase, improve and ensure the participation of Iraqis in the political process. Political rights are often seen as the protector of other rights because they enable Iraqis to petition for the protection of their rights and protest the suppression of their rights. Though we discuss each right separately, as you read through them consider how they all interact to ensure the overarching purpose.

A. The Right to Vote

**Constitution of Iraq**

**Article 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.

The right to vote and participate in public affairs is often seen as the most fundamental of political rights. By engaging in the political process, the theory goes, a person can ensure the
protection of all of their rights by running for office or electing representatives that can advocate for issues they care about.

Unlike many of the other rights in the Iraqi Constitution, Article 20 contains no provision allowing for the government to withhold this right upon a “judicial decision.” Can you imagine a situation in which the right might be abridged anyway? What about a prisoner? In many countries, including parts of the United States, prisoners cannot vote. Should any Iraqi citizen be allowed to run for office? What if they belong to a party that advocates violence? The Constitution does not answer these questions, but the political process might. The purpose of leaving the political process as open as possible is that the people who should not represent Iraqis will not be able to get enough votes.

Do you think the right to vote should be such a fundamental right? Does voting really equate to active political participation? Are voters the best positioned to enact political change? Consider the following thoughts by Professor Jane Schacter from Stanford Law School. Professor Schacter is writing about U.S. elections, but her comments could also apply to Iraqi elections.

Ely and the Idea of Democracy

Jane Schacter

It is true, of course, that elections do give voters a way to fire legislators and other elected officials, and that fact must be reckoned with in any serious understanding of democratic theory. Nevertheless, there are grounds for substantial skepticism about any robust dynamic of retrospective political accountability.

First, accountability requires transparency, which we don't always have. Much significant legislative action is invisible to the public, such as killing a bill or a nomination. There are also many issues that are not politically salient or likely to draw press coverage. Issues like these are technically, but not meaningfully, visible. More generally, news coverage of legislators and legislative activity is often absent, uninformative, misleading, or uneven at best. That which is visible to voters is often both arcane and strategically spun by contending interests…

Second, in any event, transparency is not the same thing as accountability. It is a predicate for accountability, but it does not guarantee it. The theoretical availability of information about government does not tell us who will (or will not) use it and to what end. One need not demean the broad public to say that research has overwhelmingly indicated that many voters simply don't know very much about legislative policy or politics.

1) Do you agree with Professor Schacter? Do her observations of the American political process relate to Iraq?

2) Do voters need to be knowledgeable about particular issues in order to be informed voters? Can you think of other legitimate reasons you might vote for a particular candidate?

B. The Freedom of Expression

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<th>The Constitution of Iraq</th>
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<tbody>
<tr>
<td>Article 38</td>
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<tr>
<td>The State shall guarantee in a way that does not violate public order and morality:</td>
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<tr>
<td>A. Freedom of expression using all means</td>
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<tr>
<td>B. Freedom of press, printing, advertisement, media and publication.</td>
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Freedom of expression has traditionally been a core value of democracies. The right of the individual to hold her own opinions and to express them freely is an important aspect of the State respecting individual dignity and autonomy. Freedom of expression often protects the rights of individuals and the press to openly criticize their government, thus allowing people to participate in the political process by openly expressing how they would like it to function.

As you can see above in Article 38, the Constitution of Iraq protects individual freedom of opinion and expression, but not absolutely. The freedom of expression is protected as long as it does not “violate public order and morality.”

Many constitutions have more protection for individual expression or private expression than for the media or public displays. In the Iraqi Constitution, both forms of communication are treated the same and subject to the same limitations for order and morality.

This constitution has no explicit protection against prior restraints and prior censorship. A prior restraint is when the government prevents certain items from being published prior to publication, thus preventing given material from being heard or distributed at all. Governments may do this by requiring publishers to acquire a government license before they publish anything. A government could also discover that a particular item was going to be published and then prevent publication. In eighteenth century England, the government controlled the press primarily by using prior restraints, so the prohibition of prior restraints became the cornerstone
of a free press in the Anglo-American legal tradition. Here, however, the government may be allowed to create a licensing board that screens public pronouncements for statements that might upset the public order or morality.

### Discussion Questions: Freedom of Expression

1) Imagine that Adar, the editor of a newspaper called *Erbil Daily*, published an editorial critical of a recent government policy. As a result of the article, hundreds of protesters march in the central square. Many people are injured in the demonstrations. Can Adar be fired for publishing the editorial? Would it make a difference if the editorial advocated for the demonstration? Think about what the drafters meant when they added the “public order” provision.

2) Think back to the previous section when we discussed Article 40 and the right to privacy. Do you think the “public order” and “morality” provisions apply to private communications as well?

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### The Tension between Freedom of Expression & Blasphemy

When analyzing situations in which legal norms seem to conflict, it is always important to think about the legal tradition and history that produced those norms. In this case, both the freedom to criticize religious establishments and individual rights were key motivating factors in the development of Western European legal and political systems. Because of this, the liberal legal tradition deems it important to protect individual rights such as privacy and expression but to allow criticism of religion. On the other hand, the Islamic legal tradition has generally deemed it more important to protect the sacred values of religion by outlawing apostasy and blasphemy.

In most liberal societies, certain forms of expression may be restricted under specific circumstances. For example, in 2012 the British Royal Family sued magazines around the world that sought to publish topless images of the Duchess of Cambridge Kate Middleton on the grounds that the pictures violated her right to privacy. This lawsuit is an example of how, according to liberal Western norms, freedom of expression may be limited to protect individuals such as in the case of personal privacy. Because the freedom to criticize religious establishments (in this case, the Christian Church) played such an important role in the historical development of Western European legal traditions, most liberal Western legal systems do not allow an exception to the freedom of expression for blasphemy.

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Around the same time that the British Royal Family was attempting to use the legal system to prevent magazines from publishing the above-mentioned photographs, certain Muslim groups were protesting a film entitled the *Innocence of Muslims*, which they claimed depicted the Prophet Muhammad very negatively. Because most liberal legal systems do not allow an exception to the freedom of expression for blasphemy, many Western governments such as the United States denounced the film but said that no legal action could be taken against the creators of the film because while extremely offensive, the film does not violate any laws of those countries. This frustrated some Muslim groups who viewed blasphemy as a serious offense in their legal traditions. By contrast, some countries that have incorporated Islamic principles into their legal systems may create an exception to the freedom of expression for blasphemy but may not have an exception to the freedom of expression to protect the right to privacy.

**Discussion Questions**

1. Given these differences in how Western and Islamic legal traditions approach exceptions to freedom of expression, how should Iraq law address criticisms of Islam?

2. Would it be alright to suppress the *Innocence of Muslims* under the “morality clause” of Article 38? Are there non-religious uses for the clause? In other words, are other things deemed immoral for non-religious reasons or does the “morality clause” only deal with religion?

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C. The Freedom of Assembly & Association

**The Constitution of Iraq**

**Article 38**

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

C. Freedom of assembly and peaceful demonstration, and this shall be regulated by law.

The freedoms of association and assembly are essential to the functioning of a democratic society because they allow people to organize themselves into groups in order to participate in government and make their voices heard. Imagine what would happen if individuals were not allowed to organize to participate in the political process. One individual would not have very much effect on who was elected. People would not be able to form political parties or interest

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32 Note that it is estimated that only 0.001 percent of the Muslim-majority areas of the world protested the film. See http://www.aljazeera.com/indepth/opinion/2012/09/20129168313878423.html.
groups that allow them to mobilize support for a certain cause or a certain candidate for office. Because each individual has a limited ability to influence government and society, coming together to form interest groups and to support common goals allows individual citizens to have a significant voice in and influence on the political process. While the freedom of association allows people to form organized groups, the freedom of assembly allows those groups to express themselves publically by holding demonstrations. People may choose to do this to show either support or dissatisfaction with government policies, allowing them to participate in the political system.

Article 38 enshrines the freedom of association in the Constitution of Iraq. Like the freedom of expression, this right is limited to assemblies that do not “violate public order and morality” and the right is subsequently regulated by statutory law. Can you think of a reason why the freedom of assembly would be so limited? Political demonstrations gain their power from causing disorder. By definition, an effective demonstration will disrupt the normal course of business, even if just for a moment, and bring attention to a particular cause or idea. Is there any sense, then, in limiting assemblies that “violate public order?” What if the assembly threatened the safety of people not involved? Are there any demonstrations that the government could not prevent under Article 38? The difficult job of judges and policymakers is to determine when a legitimate assembly has “violated public order” such that it should be stopped. We can certainly think of some demonstrations that should be stopped – violent or destructive ones for example - but it is more complicated for cases that are not clearly violent or destructive, but might still be disruptive.

Freedom of Assembly & Association in Practice: The Arab Spring

The Arab Spring that began in 2010 put the freedom and assembly and association at the center of the world stage. A recurring theme throughout the Middle East has been protestors claiming a right to hold demonstrations against their governments, while governments assert a need to suppress demonstrations for safety reasons. Starting in January 2011, demonstrators filled Cairo’s Tahrir Square to protest the rule of then-President Hosni Mubarak. While demonstrations started as nonviolent, protestors later engaged in looting, violence, destruction of property, and clashes with state security forces. For example, looters broke into the Egyptian museum in Cairo and destroyed Pharaonic mummies and other ancient antiquities, and several female journalists

reported brutal sexual assaults. President Mubarak directed state security forces to suppress the demonstrations, and security forces followed those orders by using brutal force against the protestors. An April 2011 fact-finding mission found that at least 846 people were killed and more than 6,400 injured during the uprising, during which state security forces fired live ammunition into the crowd, located snipers on rooftops, and drive tanks into the crowds.

In July 2011, five months after former President Hosni Mubarak stepped down on February 11, protestors again filled Tahrir Square. Now they were protesting the slow pace of reform under the ruling Supreme Council of the Armed Forces (SCAF). Protests again devolved into violence, looting, and property destruction. This time, SCAF dispatched security forces to control the protests. In defense of this decision, SCAF member Major General Abdel Emara asked at a press conference, “What are we supposed to do when protesters break the law? Should we invite people from abroad to govern our nation?”

The 1971 Constitution of Egypt provides the following. Remember, however, that Egypt had been under an official state of emergency for decades, which allowed for certain constitutional provisions to be suspended.

**1971 Constitution of Egypt Article 54**
Citizens shall have the right to peaceful and unarmed private assembly, without the need for prior notice. Such private meetings should not be attended by security men. Public meetings, processions and gatherings shall be allowed within the limits of the law.

The 2011 Provisional Constitution of Egypt, written after the revolution forced Mubarak out of office, provides the following. Note that minor language differences may be the result of translation to English.

**2011 Provisional Constitution of Egypt Article 16**
Citizens have the right or private assembly in peace without bearing arms or need for prior notice. It is not permitted for security forces to attend these private meetings. Public meetings, processions and gatherings are permitted within confines of the law.

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**Discussion Questions**

1. If you were a judge at the trial of protestors charged with assault and the destruction of property, would you rule that their actions were protect by Egypt’s constitutional right to assembly? Why or why not?

2. If you were a judge at the trial of security officers charged with assault against protestors, would you rule that their actions were justified because the demonstrations were not completely unarmed, peaceful, or “within the confines of the law” as required by the Constitution of Egypt?

3. How should the law deal with situations such as the Egyptian revolution described above, where unarmed and peaceful demonstrators are intermixed with violent protestors and looters? Should state security forces refrain from all interference so that protestors can exercise their right to assembly? What if protestors within the crowds are sexually assaulting women and destroying ancient artifacts? Doesn’t the government have an obligation to protect those women and artifacts? If the government does intervene, how can it protect the peaceful protestors right to assembly while at the same time controlling violence and ensuring that demonstrations remain peaceful and otherwise “within the confines of the law”?

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**IV. ECONOMIC, SOCIAL, & CULTURAL RIGHTS**

As mentioned in Part I, Section E, Economic, Social and Cultural (“ESC”) Rights are among the most difficult to enforce. They generally require affirmative action by the state in order to realize the full right. Fulfilling these rights often costs money and requires bureaucracies and huge amounts of resources. Still, it is often these rights – the right to education, the right to health care, the right to work – that people consider as holding the most promise in their new constitution. The Iraqi Constitution contains several of these rights, including the right to health care (Article 31), the right to practice sports (Article 36), and the right to “safe environmental conditions.” (Article 33). Here we will only deal with two of the major ESC rights in the Iraqi Constitution – the Right to Education and the Right to Work.

**D. The Right to Education**

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<th>The Constitution of Iraq</th>
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<td><strong>Article 34</strong></td>
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Education is a fundamental factor for the progress of society and is a right guaranteed by the state. Primary education is mandatory and the state guarantees that it shall combat illiteracy.

Second
Free education in all its stages is a right for all Iraqis.

Third
The State shall encourage scientific research for peaceful purposes that serve humanity and shall support excellence, creativity, invention, and different aspects of ingenuity.

Fourth
Private and public education shall be guaranteed, and this shall be regulated by law.

Article 34 of the Constitution guarantees every citizen of Iraq a free education through the university level. By providing the citizens of Iraq with a right to education, the government is demonstrating its belief in the importance of education. There are many benefits to making education a right rather than a privilege. Promoting an educated population enables people to work in a wide variety of fields and supports economic growth. Augmenting the number of college-educated students leads to an increase in the number of people in highly specialized fields that can be beneficial for economic development. Fostering education and increasing literacy is also a way to fight poverty and raise the quality of life for the people of Iraq.

But there are a number of difficulties with actually ensuring that people can exercise their right to education. There are many areas in rural Iraq with a limited number of schools and teachers to educate children. Continued violence in some regions also makes it significantly more difficult for children to regularly attend school. Additionally, the government of Iraq struggles with limited resources, and ensuring that all children have access to schools with well-trained teachers and sufficient resources may not be possible in the short term. Iraq has historically had a world-class education system. By 2003, the Iraqi education system had deteriorated considerably. Schools had been destroyed and children’s education was disrupted in war. By 2005, it is estimated that 84% of the higher education buildings in Iraq had been destroyed. After the 2003 invasion, aid groups, the U.N. and the Iraqi government have prioritized education as a means of jumpstarting the rebuilding of Iraq.

A. The Right to Work

The Constitution of Iraq

Article 22

First
Work is a right for all Iraqis in a way that guarantees a dignified life for them.

Second
The law shall regulate the relationship between employees and employers on economic bases and while observing the rules of social justice.

Third
The State shall guarantee the right to form and join unions and professional associations, and this shall be regulated by law.

Article 22 guarantees every Iraqi the right to work and states that the government will develop a body of employment law to regulate working hours and wages, and to ensure that employees have rights to prevent abuse and exploitation by their employers by “observing the rules of social justice.”

The right to work is generally not interpreted to mean that the government is required to provide every citizen with a job. Rather, it means that the government will develop labor laws and policies to remove barriers to employment and to ensure decent working conditions and wages. It also implies that the government has an obligation to develop policies and programs that will generate employment.

Despite the international resistance to guaranteeing economic rights more generally, the right to work gained support rather rapidly, largely because States recognize that they have an interest in adequate employment for their citizens, as a strong workforce spurs economic growth. The right to work was also a major force behind labor movements in the United States and many other

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countries across the world in the early 1900s.\textsuperscript{42} To advance the right to work and develop international labor standards, the International Labour Organization (ILO) was founded in 1919 and became the first specialized agency of the United Nations in 1946.\textsuperscript{43} Iraq has ratified seven of the ILO’s eight core conventions: the Forced Labour Convention, Right to Organize and Collective Bargaining, Convention on Equal Remuneration, the Convention on the Abolition of Forced Labour, the Convention on Discrimination in Employment and Occupation, the Minimum Age Convention and the Worst Forms of Child Labour Convention.\textsuperscript{44} Collectively, these conventions underscore Iraq’s commitment to providing a safe and equal environment for workers, guaranteed in the Constitution.

Since the 2003 invasion, unemployment in Iraq has spiked and steadily dropped. Throughout 2003 and 2004 unemployment was as high as 50 or 60 percent. It is estimated that in 2012, unemployment was at approximately 16 percent.\textsuperscript{45} The economy has been boosted by abundant jobs in the oil and gas sector as well as rebuilding efforts in agriculture and other industries. The U.S. Agency for International Development has also invested $1 Billion in a worker training program. The improvement in the employment prospects over the past few years reflects the Constitutional commitment to providing employment opportunities for Iraqis.

\section*{V. CONCLUSION}

In this chapter we began to explore the fundamental rights enshrined in the Iraqi Constitution and granted to every Iraqi. We started by examining how the “Rights” section of the Iraqi Constitution was drafted and the impact the drafting process had on the substantive rights granted. This included covering some of the controversies the drafters discussed when writing the Constitution. We then discussed the legal rights attaching to Iraqi citizens with a “legal personality” and the distinction between state action and private action. We learned several frameworks to view rights. We discussed positive and negative rights as well as different ways the state might enforce constitutional rights.

The bulk of our discussion focused on the actual substantive rights granted by the Iraqi Constitution. This paper examined the differences between Civil Rights, Political Rights, and


Economic, Social and Cultural Rights. Though each of these rights discussed above are written specifically into the Constitution, they are implemented differently.

Rights are meant to be critically analyzed, thought about, and debated. The work of ensuring the actualization of these rights is left to citizens, legislatures, and the government. As we mentioned in Part I, constitutional rights are simply the first step in a long process towards actually enjoying those rights. It is incumbent upon Iraqi leaders – political, civic, and cultural leaders – to fight for the realization and protection of these rights.