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REVIVING CONSTITUTIONALISM IN IRAQ:
KEY PROVISIONS OF THE
TRANSITIONAL ADMINISTRATIVE LAW

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Iraq has had a troubled constitutional history. Its only legitimate, permanent constitution came into effect in 1925, having been drafted during the British mandate established at the end of the First World War.¹ On October 3, 1932, Iraq was admitted to the League of Nations as an independent state, the first predominantly Arab state to gain its independence, thus ending the British Mandate.² The Constitution of 1925, as amended, remained in full force and effect until 1958.

On July 14, 1958, a *coup d'état* overthrew the monarchy, after which Iraq was ruled under a series of so-called provisional constitutions. The new military government decreed the Provisional Constitution of 1958, which was followed by the Provisional Constitution of 1964, itself decreed after yet another coup. The coup of 1968 brought the previous regime to power, and it decreed two provisional constitutions, that of 1968, followed by the Provisional Constitution of 1970. This last “provisional” constitution was in effect (at least theoretically) for thirty-three years, until April 2003, matching exactly the amount of time Iraq’s only permanent (and legitimate) constitution was in effect.

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1. The 1925 Constitution was debated and ratified by an elected Constituent Assembly. PHILIP W. IRELAND, *IRAQ: A STUDY IN POLITICAL DEVELOPMENT* 393 (1938). It was thus a genuinely legitimate document. Its ratification, however, was by no means assured. Despite British pressure, the final vote for ratification was thirty-seven to twenty-four with eight abstentions. *Id.* at 404. This author’s grandfather, Mahmoud al-Istrabadi, was a member of the Constituent Assembly.

2. SYDNEY NETTLETON FISHER & WILLIAM OCHSENWALD, *THE MIDDLE EAST: A HISTORY* 425 (4th ed. 1990).

From 1958, then, until 2003, Iraq was governed at any given time by the caprice of a single man. Constitutionalism had so receded during this time that the concept of constitutionalism itself had entirely disappeared. Forty-five years of tinkering with successive constitutions — whether directly through the promulgation of new constitutions or through amendments — had thoroughly undermined any commitment to constitutionalism or the rule of law. For instance, a former professor of constitutional law at the University of Baghdad proposed a constitution for Iraq (immediately prior to the fall of the previous regime) in which a typical passage stated: “The trial of an accused shall be public unless a judge orders otherwise.” Laws, statutes, and judicial discretion could each supersede even constitutional “guarantees.”

The foregoing history provides a backdrop not only to Iraq’s constitutional history, but also to the decision of the Iraqi Governing Council (IGC) not to call the Law of Administration for the State of Iraq for the Transitional Period³ (TAL) an interim or provisional constitution. Too many provisional constitutions had been promulgated in recent memory and “provisional” constitutions had a tendency to become permanent in Iraq. Furthermore, under Security Council Resolution 1483, nothing became law in Iraq unless it was signed by U.S. Ambassador L. Paul Bremer, the civil administrator of Iraq.⁴ It was the Civil Administrator, not the IGC, who had the power to legislate.⁵ No Iraqi wanted the American Civil Administrator to sign a document called an Iraqi constitution. Thus the rather cumbersome title for what in fact is Iraq’s interim constitution.

As some commentators have noted, a principle in international humanitarian law is that an occupier may not tinker with an occupied country’s legal system except to the extent necessary to defend

3. Law of Administration for the State of Iraq for the Transitional Period (Mar. 8, 2004) [hereinafter TAL], available at <http://www.iraqcoalition.org/government/TAL.html>.

4. The grant of power by the Security Council to the civil administrator was sweeping. The author remembers one of Bremer’s deputies very early on, in June of 2003, in Baghdad saying to him, “The powers the Security Council gave us are mind-boggling.”

5. See S.C. Res. 1483, U.N. SCOR, 54th Sess., 4761st mtg., at 8, U.N. Doc. S/RES/1483 (2003).

the occupier's troops.⁶ Resolution 1483 derogated this principle by giving sweeping powers to the Civil Administrator,⁷ though doing so had the effect of turning the liberation of Iraq into a *de jure* occupation. A sovereign Iraqi government should have been announced immediately after the liberation of Baghdad, but that is not what happened. In any event, the IGC had to deal practically with the legal posture in which it found itself.

There was early agreement by the IGC members that the TAL would be promulgated by consensus. In order to achieve consensus political compromises were required of all IGC Members, but none of the twenty-five members of the Governing Council was asked to make a compromise on principle. On March 8, 2004, all twenty-five members of the Governing Council, representing parties ranging from the Communist Party to the Supreme Council for the Islamic Revolution in Iraq, signed the TAL, which had been previously approved by consensus.⁸

Generally speaking, the TAL is a very liberal, forward-looking document.⁹ It is in many respects an exhortatory document, rather

6. See, e.g., Jamal Benomar, *Constitution-Making after Conflict: Lessons for Iraq*, 15 J. DEMOCRACY 81, 93 (2004) (in playing a major role in drafting an Iraqi interim constitution "the CPA went beyond its obligations as an occupying authority under international humanitarian law"); Peter W. Galbraith, *Iraq: The Bungled Transition*, N.Y. REV. BOOKS, Sept. 23, 2004, at 71 ("Occupying powers cannot . . . make permanent law. Thus all law made by the [CPA] expired when the occupation ended on June 28 [2004]."), available at http://www.nybooks.com/articles/article-preview?article_id=17406. One year later, Galbraith was singing a different tune, taking the provisions of the TAL quite seriously, particularly those provisions dealing with ratification of the permanent constitution. See Peter W. Galbraith, *Iraq: Bush's Islamic Republic*, N.Y. REV. BOOKS, Aug. 11, 2005, at 6-9, available at <http://www.nybooks.com/articles/18150>. See also M. Cherif Bassiouni, *Prosecuting Saddam Hussein*, FOREIGN POLICY, July 2005, available at http://www.foreignpolicy.com/story/cms.php?story_id=3120.

7. See S.C. Res. 1483, *supra* note 5, ¶ 8 (granting the civil administrator, in consultation with Iraqi and UN representatives, the power "to restore and establish national and local institutions" of government, and to facilitate re-construction of key infrastructure; promote human rights and economic reconstruction, through "coordination with national and regional organizations . . . civil society, donors, and international financial institutions," and encourage basic civil administration, legal and judicial reform, and rebuilding police capacity).

8. See S.C. Res. 1483, *supra* note 5, at 9. Ambassador Bremmer also had to consent to the agreement as required by the Security Council's resolution. *Id.*

9. Cf. Statement by President, George W. Bush (Mar. 8, 2004), available at http://www.cpa-iraq.org/transcripts/20040308_Bush_TAL.html. President Bush described it

than a descriptive one,¹⁰ as the current situation in Iraq is far from the idyllic place described in the TAL. This fact is clear even from the Preamble,¹¹ one of the last sections written. The Preamble is aspirational in its rejection of violence, its reassertion of the sovereignty of the people of Iraq, its determination to commit Iraq to adherence to international law, and its attempt to reclaim Iraq's rightful place amongst the family of civilized nations. Chapter One,¹² Fundamental Principles, Article 1(C) specifically incorporated the Preamble as an integral part of the TAL.¹³ Interestingly,

as a "historic milestone in the Iraqi people's long journey from tyranny and violence to liberty and peace." *Id.*

10. See LARRY DIAMOND, *SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ* 177 (2005). Dr. Adnan Pachachi, in many ways the true father of, and driving force behind the TAL certainly in its liberal outlook, stated in the press conference held to unveil the TAL:

Some may say that the Bill of Rights is copied from the West. My answer: These rights and values are not exclusively the property of the West; they are universal and should be respected and implemented everywhere. This law is aspirational in character. We have not legislated for the present, but we have put up a high standard so that the people in the future will always try to reach [it]. It is thus a beacon of light and hope for future generations.

Dr. Adnan Pachachi, Remarks by Members of the Iraqi Governing Council at Signing Ceremony for the Interim Constitution, Baghdad, Iraq (Mar. 8, 2004), available at http://www.iraqcoalition.org/transcripts/20040308_signing_transcript.html.

11. TAL, *supra* note 3, preamble, declaring that:

The people of Iraq, striving to reclaim their freedom, which was usurped by the previous tyrannical regime, rejecting violence and coercion in all their forms, and particularly when used as instruments of governance, have determined that they shall hereafter remain a free people governed under the rule of law.

These people, affirming today their respect for international law, especially having been amongst the founders of the United Nations, working to reclaim their legitimate place among nations, have endeavored at the same time to preserve the unity of their homeland in a spirit of fraternity and solidarity in order to draw the features of the future new Iraq, and to establish the mechanisms aiming, amongst other aims, to erase the effects of racist and sectarian policies and practices.

This Law is now established to govern the affairs of Iraq during the transitional period until a duly elected government, operating under a permanent and legitimate constitution achieving full democracy, shall come into being.

12. TAL, *supra* note 3, arts. 1-9.

13. *Id.* at art. 1(C) (stating that "[t]he Preamble to this Law is an integral part of this Law.").

it was the Shi'a religious parties, who subsequently achieved an impressive win in the elections,¹⁴ which insisted on Article 1(C).

The issue of gender was front and center during the negotiation of the TAL. Article 1(B) states that gender-specific language shall apply equally to men and women.¹⁵ Of course, there is a well-known principle of legal writing that the use of a masculine pronoun includes the female. Nevertheless, the Governing Council wanted to make it clear from the beginning that there could not be any basis for gender discrimination with respect to the use of the male pronoun. Given that religious parties now have a solid majority in the National Assembly, it remains to be seen whether this provision will survive without exceptions.

In Article 2 the transitional period was divided into two phases.¹⁶ In phase one, authority was vested in a sovereign Interim

14. See Jason Keyser, *Shiites Dominate Iraq Elections; Kurds 2nd* (Feb. 13, 2005), available at: <http://abcnews.go.com/International/wireStory?id=495492>. The January 2005 elections resulted in a coalition of Shiite religious parties controlling more than half the seats of the National Assembly, while a coalition of Kurdish parties controlled slightly more than one-quarter of the seats. The outgoing interim prime minister's party controlled some 13% of the seats.

15. TAL, *supra* note 3, art. 1(B).

16. See *id.* at art. 2, providing that:

(A) The term "transitional period" shall refer to the period beginning on 30 June 2004 and lasting until the formation of an elected Iraqi government pursuant to a permanent constitution as set forth in this Law, which in any case shall be no later than 31 December 2005, unless the provisions of Article 61 are applied.

(B) The transitional period shall consist of two phases.

(1) The first phase shall begin with the formation of a fully sovereign Iraqi Interim Government that takes power on 30 June 2004. This government shall be constituted in accordance with a process of extensive deliberations and consultations with cross-sections of the Iraqi people conducted by the Governing Council and the Coalition Provisional Authority and possibly in consultation with the United Nations. This government shall exercise authority in accordance with this Law, including the fundamental principles and rights specified herein, and with an annex that shall be agreed upon and issued before the beginning of the transitional period and that shall be an integral part of this Law.

(2) The second phase shall begin after the formation of the Iraqi Transitional Government, which will take place after elections for the National Assembly have been held as stipulated in this Law, provided that, if possible, these elections are not delayed beyond 31 December 2004, and, in any event, beyond 31 January 2005. This second phase shall end upon the formation of an Iraqi government pursuant to a permanent constitution.

Government appointed by the CPA in consultation with the U.N. Secretary-General's Special Representative. In phase two, authority was vested in a Transitional Government for which elections were to be held in January 2005.¹⁷ When discussing the transfer of power to the Interim Government created by the TAL, the media generally, but mistakenly, referred to a transfer of sovereignty. The United States and the CPA were never sovereign in Iraq. Admittedly, Iraq's sovereignty was dormant for a time, but Ambassador Bremmer could not transfer sovereignty back to the Iraqis. It was a transfer of authority.

Article 3 makes clear that, regardless of nomenclature, the TAL is in fact an interim constitution in all but name.¹⁸ Article 3(A) makes the TAL the supreme law of Iraq, superseding any legislation. Underscoring that the document is truly provisional in nature, Article 3(C) provides that the TAL "shall cease to have effect upon the formation of an elected government pursuant to a permanent constitution." Other provisions also underscore that the TAL, despite its name, operates as a constitution. The TAL, for instance, establishes the relationship between legislation passed by the Federal Legislature and legislation from other governmental units, mandating that federal legislation supersede any legislation from other governmental units.¹⁹ There is one notable exception. The Kurdistan Regional Government may "amend the application" of

17. See Keyser, *supra* note 14 (discussing the election results).

18. See TAL, *supra* note 3, art. 3.

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

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

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

19. *Id.* at art. 26(B) (providing that "[l]egislation issued by the federal legislative authority shall supersede any other legislation issued by any other legislative authority in the event that they contradict each other, except as provided in Article 54(B)").

federal legislation when the National Assembly legislates in matters outside its exclusive competence.²⁰

The IGC broke new ground with Article 4, truly making history.²¹ Iraq was declared a federal, democratic,²² and pluralistic republic. It was relatively rare for a centralized state, which had always existed as such, to devolve to a federal governmental system.²³ By contrast, when the United States was formed, thirteen sovereign states (which had previously been thirteen separate Crown colonies) voluntarily coalesced to form a federal governmental structure with a strong central government, but with State governments that also had a tremendous residuum of power. There is a similar example of this phenomenon in the Arab world: Six — later joined by the seventh — independent Trucial States formed the federal United Arab Emirates in 1971.²⁴

Iraq is now in the process of doing precisely the opposite; it is taking a highly centralized state and creating a federated, multi-tiered structure. Iraq's extremely centralized governmental system

20. *See id.* at art. 54(B), stating that:

With regard to the application of federal laws in the Kurdistan region, the Kurdistan National Assembly shall be permitted to amend the application of any such law within the Kurdistan region, but only to the extent that this relates to matters that are not within the provisions of Articles 25 and 43(D) of this Law and that fall within the exclusive competence of the federal government.

21. *See id.* at art. 4, stating that:

The system of government in Iraq shall be republican, federal, democratic, and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations. The federal system shall be based upon geographic and historical realities and the separation of powers, and not upon origin, race, ethnicity, nationality, or confession.

22. There was one objection to the use of the word "democratic." A representative of a religious party wanted to say instead "democratic methods," rather than "democratic," believing democracy as such implied western secularism. No other IGC representative took up the objection, and the objection was effectively withdrawn.

23. Belgium is certainly an exception, as its current Constitution creates a federated monarchy, perhaps an example for Iraqi royalists. (1994) BELG. CONST. art. 1, available at http://www.oefre.unibe.ch/law/icl/be00000_.html#A001.

24. *See* U.A.E. CONST. art. 1 (amended 1996), available at <http://www.uae.gov.ae/moca/dostur/1/1.htm>; United Nations Development Program, Program on Governance in the Arab Region: Constitution: United Arab Emirates, available at <http://www.pogar.org/countries/constitution.asp?cid=21> (stating that the Provisional Constitution of 1971 became permanent in 1996).

is probably due to the strong historical influence of France prevalent throughout the Middle East. For instance, every custodian in every elementary school, in every village, was appointed by the order of the Ministry of Education in Baghdad. The adoption of the TAL represents a break from this centralized system to an aspiration to genuine federalism. The success or failure of Iraq as a state will hinge, to a considerable extent, on the ability of Iraq to flourish as a federation.

One of the most contentious issues encountered in drafting the TAL was the role of religion in Iraq's constitutional and legal life. Article 7(A) dealt with the issue, but it will undoubtedly be revisited when a permanent constitution is drafted. The final text of Article 7(A) states that "Islam is the official religion of the State and is to be considered *a source* of legislation."²⁵ The Governing Council spent weeks considering whether Islam was "the source of legislation," "the principal source of legislation," "a principal source amongst other principal sources," or "a source amongst other sources of legislation." Each of these views was offered and found a sponsor.²⁶

Late in the negotiations, after the IGC had agreed that Islam would be a principle source of legislation amongst other principle sources, some of the religious parties reneged on the agreement, re-opening negotiations by demanding the excision of the phrase "amongst other principle sources," so that Islam would be the only principle source. At this juncture, an opposing view emerged from the liberal side that, consistent with Iraq's prior constitutional history, Article 7(A) should end upon declaring Islam the official state religion. In each of Iraq's prior constitutions,²⁷ the texts typically

25. TAL, *supra* note 3, art. 7(A) (emphasis added). Note that it is Islam that is a source of law, not the Shari'ah (Islamic) law, which is a much narrower concept.

26. These details, and those which follow, about the negotiations on the issue of the role of Islam, are within the author's direct knowledge, as he became one of the principal interlocutors on behalf of the liberal parties on the issue.

27. Translations of the text of Iraq's previous constitutions used in this article are those of the author based on the Arabic text as printed in INT'L HUMAN RIGHTS LAW INST., DEPAUL UNIV. COLL. OF LAW IN COOPERATION WITH THE NAT'L DEMOCRATIC INST., *Al-Dasâtir al-Iraqiyyah wa Muqâranah bi Ma'âyir al-Distûriyyah al-Dawlîyyah* [The Iraqi Constitutions and Comparative Studies with Int'l Human Rights Standards] (Boyd Printing 2005) [hereinafter THE IRAQI CONSTITUTIONS], available at http://www.law.depaul.edu/institutes_centers/ihrli/publications/iraqi_constitutions_2/.

stated no more than that Islam was the official religion of the state.²⁸ Proponents of this view argued that, since it was not an elected body, the Governing Council had insufficient legitimacy to overturn nearly eighty years of Iraqi constitutional precedent. It appeared that the IGC would deadlock on this point, with each of the two sides telling the other that any compromise would be a “deal breaker.”

As time went on, the religious parties dropped their demand that Islam should be the principle source, and agreed that it would be “a source of legislation,” the language now in the TAL. But their agreement was hinged on other language prohibiting laws which contradicted Islam, the spirit of Islam, the universally agreed tenets of Islam, or some other similar formulary. This demand tied the Council up for hours on the night the TAL was being passed. Finally, Dr. Pachachi, chairman of the drafting committee, fashioned the compromise formula that broke the deadlock: “No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period.”²⁹

Without doubt, Article 9 is an extremely important constitutional development, not only in Iraq and the Arab world, but throughout the Middle East. Iraq may well be the first Middle Eastern country to recognize more than one language as an official language throughout the country. The Kurds represent between fifteen and twenty percent of Iraq’s population and Kurdish has always been an official language in the Kurdish regions of Iraq.³⁰

28. See BASIC LAW OF THE KINGDOM OF IRAQ art 13 (1925), *reprinted in* THE IRAQI CONSTITUTIONS, *supra* note 27, at 10; IRAQ PROVISIONAL CONST. art. 4 (1958), *reprinted in* THE IRAQI CONSTITUTIONS, *supra* note 27, at 57; IRAQ PROVISIONAL CONST. art. 3 (1964), *reprinted in* THE IRAQI CONSTITUTIONS, *supra* note 27, at 65 (adding that Islam formed the principle basis of the Constitution); IRAQ PROVISIONAL CONST. 1968 art. 4, *reprinted in* THE IRAQI CONSTITUTIONS, *supra* note 27, at 82 (adding same language as the IRAQ PROVISIONAL CONST of 1964, though Article 27(B) also added that the Islamic Shari’ah would govern inheritance law); IRAQ PROVISIONAL CONST. art. 4 (1970), *reprinted in* THE IRAQI CONSTITUTIONS, *supra* note 27, at 101 (restoring language of 1925 and 1958); IRAQ PROPOSED CONSTITUTION art. 5 (1990), *reprinted in* THE IRAQI CONSTITUTIONS, *supra* note 27, at 124 (this was a proposed permanent constitution, but it was never *promulgated*).

29. TAL, *supra* note 3, art. 7(A). See *supra* note 27.

30. TAL, *supra* note 3, art. 9, providing that:

The Arabic language and the Kurdish language are the two official languages of Iraq. The right of Iraqis to educate their children in their

Now, thanks to Article 9, it is an official language throughout Iraq. It is interesting to note that, shortly after the governing council enacted this law, some Kurds in neighboring states began to demand their linguistic and other human rights.³¹ Kurdish members of the Iraqi Government, particularly in the National Assembly, have already spoken in Kurdish.³² It is likely that placing the Kurdish and Arabic languages on an equal footing throughout Iraq will be an essential component of making Iraq into a re-integrated whole.

Chapter Two of the TAL contains the Bill of Fundamental Rights.³³ Recalling that, prior to the passage of the Fourteenth Amendment of the U.S. Constitution, the Bill of Rights applied only to the federal government of the United States, the drafters of the TAL felt it was important that the rights enumerated in Chapter Two clearly apply to all governmental entities. Accordingly, Article 10 expressly applied the protections of Chapter Two not only to the Transitional Government, but to regional governments, governorates, municipalities, and localities.³⁴ Although the plural was used,

mother tongue, such as Turcoman, Syriac, or Armenian, in government educational institutions in accordance with educational guidelines, or in any other language in private educational institutions, shall be guaranteed. The scope of the term "official language" and the means of applying the provisions of this Article shall be defined by law and shall include:

- (1) Publication of the official gazette, in the two languages;
- (2) Speech and expression in official settings, such as the National Assembly, the Council of Ministers, courts, and official conferences, in either of the two languages;
- (3) Recognition and publication of official documents and correspondence in the two languages;
- (4) Opening schools that teach in the two languages, in accordance with educational guidelines;
- (5) Use of both languages in any other settings enjoined by the principle of equality (such as bank notes, passports, and stamps);
- (6) Use of both languages in the federal institutions and agencies in the Kurdistan region.

31. See Neil MacFarquhar, *Gains by Kin in Iraq Inflammes Kurds' Anger at Syria*, N.Y. TIMES, Mar. 24, 2004, at A3.

32. DIAMOND, *supra* note 10, at 177. The leader of the Kurdish Democratic Party and IGC Member Masoud Barzani wasted no time in doing so, speaking in Kurdish at the press conference announcing the TAL, he stated, "This is the first time we Kurds feel that we are citizens of Iraq."

33. TAL, *supra* note 3, arts. 10-23.

34. See *id.* at art. 10, stating that:

As an expression of the free will and sovereignty of the Iraqi people, their representatives shall form the governmental structures of the State of Iraq.

the Kurdistan Regional Government was, at the time of drafting, the only regional government in Iraq. However unlikely, it was possible that other regional governments could be formed during the transitional period,³⁵ and the drafters wanted no ambiguity regarding the universal applicability of the Bill of Fundamental Rights. In any event, all governmental units and officials are included within the ambit of the civil rights protections contained in Chapter Two.

Article 11 was the most widely debated, hotly contested, and rewritten article in Chapter Two. It is different in its essence from the text originally proposed by this author. Its fundamental purpose was universally agreed upon: to ensure that Iraqis who had been stripped of their citizenship on a capricious or arbitrary basis by the previous regime — based on their nationality, their religion, or their political views, for instance — would have their status as nationals restored.³⁶ While the original text submitted by this author to accomplish this goal was much broader, the issue of the

The Iraqi Transitional Government and the governments of the regions, governorates, municipalities, and local administrations shall respect the rights of the Iraqi people, including those rights cited in this Chapter.

35. *See id.* at art. 53(C), providing that:

Any group of no more than three governorates outside the Kurdistan region, with the exception of Baghdad and Kirkuk, shall have the right to form regions from amongst themselves. The mechanisms for forming such regions may be proposed by the Iraqi Interim Government, and shall be presented and considered by the elected National Assembly for enactment into law. In addition to being approved by the National Assembly, any legislation proposing the formation of a particular region must be approved in a referendum of the people of the relevant governorates.

36. *Id.* at art. 11, stating that:

- (A) Anyone who carries Iraqi nationality shall be deemed an Iraqi citizen. His citizenship shall grant him all the rights and duties stipulated in this Law and shall be the basis of his relation to the homeland and the State.
- (B) No Iraqi may have his Iraqi citizenship withdrawn or be exiled unless he is a naturalized citizen who, in his application for citizenship, as established in a court of law, made material falsifications on the basis of which citizenship was granted.
- (C) Each Iraqi shall have the right to carry more than one citizenship. Any Iraqi whose citizenship was withdrawn because he acquired another citizenship shall be deemed an Iraqi.
- (D) Any Iraqi whose Iraqi citizenship was withdrawn for political, religious, racial, or sectarian reasons has the right to reclaim his Iraqi citizenship.
- (E) Decision Number 666 (1980) of the dissolved Revolutionary Command Council is annulled, and anyone whose citizenship was withdrawn on the basis of this decree shall be deemed an Iraqi.

treatment of Iraq's expatriate Jews who had Israeli citizenship caused the IGC to make the changes which ultimately resulted in Article 11 as it now stands.

Yet for all the flaws in its final version, Article 11 remains a hopeful illustration of the IGC's attempt to revive constitutionalism in Iraq. The first sentence of Article 11(A) and the last sentence of Article 11(C) each contain the phrase "shall be deemed an Iraqi citizen."³⁷ The issue arose as to how a person could establish that he should be "deemed" a citizen. Some IGC members argued that individuals should have to obtain an order from a minister of competent jurisdiction, e.g., the Minister of Interior, in order to be "deemed" citizens, and wanted Article 11 to so state. The majority understood that, citizenship being a fundamental right, no bureaucratic order was needed to establish a person's "Iraqiness." No Iraqi, after all, had to apply to a minister to establish that he had the right of free speech. By the same token, no Iraqi should need to present to a functionary to establish his citizenship: *It is the law which deems him a citizen, not some bureaucrat.* Albeit perhaps a small one, debating this issue — and its ultimate resolution — was an important step on Iraq's recovery of constitutionalism and the rule of law.

The provisions in Article 11(B) barring withdrawal of citizenship and exile of a natural-born Iraqi were also in response to Iraq's history dating from the early days of independence. Article 7 of the Constitution of 1925 also forbade deportation of Iraqi citizens, coming as it did in response to the British practice of exile during the Mandate. In 1933, to evade the problem of the prohibition, Parliament passed a law withdrawing the citizenship of members of Iraq's Assyrian community, allowing the government to deport them, as they were no longer "citizens."³⁸ Thus Article 11(B) forbids both withdrawal of citizenship and exile.

Whether the civil rights protections of the TAL can be regarded as significant by a Western audience has been debated, and

(F) The National Assembly must issue laws pertaining to citizenship and naturalization consistent with the provisions of this Law

(G) The Courts shall examine all disputes arising from the application of the provisions relating to citizenship.

37. *Id.* at art. 11.

38. IRELAND, *supra* note 1, at 383.

this author has been asked whether Chapter Two is “ordinary” or “significant.”³⁹ But the TAL is more than a copy of Western constitutions. One way of establishing the significance of the document is to contrast gender rights as they are treated by the TAL with their treatment in the text of the U.S. Constitution. The American Constitution does not contain a clear statement that male and female citizens are equal. The TAL does so in Article 12.⁴⁰ Thus, all Iraqis are equal before the law without regard to gender, sect, opinion, belief, nationality, religion, or origin, and discrimination against an Iraqi based upon these characteristics is prohibited.⁴¹ It is important to contrast this language with the remaining clauses of Article 12, which state, respectively, “[e]very one” enjoys the rights to life, liberty, and security of person; “[n]o one” can be deprived of such rights without legal procedures; and “[a]ll” are equal before the courts. The general applicability of these principles beyond the limiting word “Iraqis” was intentional.

Article 13 is fairly comprehensive, guaranteeing the rights to free expression, association, including the right to unionize, and free movement within Iraq and abroad.⁴² Section D of Article 13,

39. See, e.g., *The News Hour with Jim Lehrer: Iraq Interim Constitution Signed* (PBS television broadcast Mar. 8, 2004), http://www.pbs.org/newshour/bb/middle_east/jan-june04/iraq_3-8.html (transcript of interview with Feisal Istrabadi.).

40. TAL, *supra* note 3, art. 12, stating that:

All Iraqis are equal in their rights without regard to gender, sect, opinion, belief, nationality, religion, or origin, and they are equal before the law. Discrimination against an Iraqi citizen on the basis of his gender, nationality, religion, or origin is prohibited. Everyone has the right to life, liberty, and the security of his person. No one may be deprived of his life or liberty, except in accordance with legal procedures. All are equal before the courts.

41. *Id.*

42. See *id.* at art. 13, stating:

- (A) Public and private freedoms shall be protected.
- (B) The right of free expression shall be protected.
- (C) The right of free peaceable assembly and the right to join associations freely, as well as the right to form and join unions and political parties freely, in accordance with the law, shall be guaranteed.
- (D) Each Iraqi has the right of free movement in all parts of Iraq and the right to travel abroad and return freely.
- (E) Each Iraqi has the right to demonstrate and strike peaceably in accordance with the law.
- (F) Each Iraqi has the right to freedom of thought, conscience, and religious belief and practice. Coercion in such matters shall be prohibited.

guaranteeing the right of Iraqis to return to Iraq when traveling abroad, was made in light of the practices of the previous regime. Article 13(H) guarantees each Iraqi his right to privacy.⁴³ It is interesting to note that the one source of opposition to this right did not come from any Iraqi party. It came from the representatives of Ambassador Bremmer. They argued that guaranteeing this right would open the door to the controversy caused in America by *Roe v. Wade*.⁴⁴ This author responded that it would be a happy day, indeed, when abortion rights became *the* burning issue debated by Iraqis.

Article 14 contains an interesting provision. It states that the individual, not the Iraqi, but the *individual*, has the right to security, education, healthcare, and social security.⁴⁵ The author was discussing this provision with the man who would later serve as Minister of Construction and Housing, Dr. Omar al-Damluji. This author expressed his skepticism about maintaining a nationalized healthcare system, appearing as it did to be socialist in thought. Dr. al-Damluji replied: How can the system now be dismantled, in light of the large number of war widows, orphans, and amputees in Iraq, some the victims of wars and some the victims of a barbaric system of punishments for political crimes? Further, free healthcare had been enjoyed by Iraqi citizens for eighty years. It made no sense to try to chip away at these rights at precisely the moment of the people's greatest need given the economic situation in Iraq, and given their anxiety about the transitional period.

(G) Slavery, the slave trade, forced labor, and involuntary servitude with or without pay, shall be forbidden.

(H) Each Iraqi has the right to privacy.

43. *Id.* at art. 13(H)

44. *See* *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the state of Texas's anti-abortion statutes violated personal liberty rights under the Due Process Clause of the U.S. Constitution, thereby causing significant political debate throughout the United States).

45. TAL, *supra* note 3, art. 14, stating that:

The individual has the right to security, education, health care, and social security. The Iraqi State and its governmental units, including the federal government, the regions, governorates, municipalities, and local administrations, within the limits of their resources and with due regard to other vital needs, shall strive to provide prosperity and employment opportunities to the people.

In light of Iraq's history, the drafters believed it essential to deal extensively with the issue of the rights of the accused. Article 15⁴⁶ provides for various rights, mostly (though not exclusively) in

46. *Id.* at art. 15, providing that:

(A) No civil law shall have retroactive effect unless the law so stipulates. There shall be neither a crime, nor punishment, except by law in effect at the time the crime is committed.

(B) Police, investigators, or other governmental authorities may not violate the sanctity of private residences, whether these authorities belong to the federal or regional governments, governorates, municipalities, or local administrations, unless a judge or investigating magistrate has issued a search warrant in accordance with applicable law on the basis of information provided by a sworn individual who knew that bearing false witness would render him liable to punishment. Extreme exigent circumstances, as determined by a court of competent jurisdiction, may justify a warrantless search, but such exigencies shall be narrowly construed. In the event that a warrantless search is carried out in the absence of an extreme exigent circumstance, the evidence so seized, and any other evidence found derivatively from such search, shall be inadmissible in connection with a criminal charge, unless the court determines that the person who carried out the warrantless search believed reasonably and in good faith that the search was in accordance with the law.

(C) No one may be unlawfully arrested or detained, and no one may be detained by reason of political or religious beliefs.

(D) All persons shall be guaranteed the right to a fair and public hearing by an independent and impartial tribunal, regardless of whether the proceeding is civil or criminal. Notice of the proceeding and its legal basis must be provided to the accused without delay.

(E) The accused is innocent until proven guilty pursuant to law, and he likewise has the right to engage independent and competent counsel, to remain silent in response to questions addressed to him with no compulsion to testify for any reason, to participate in preparing his defense, and to summon and examine witnesses or to ask the judge to do so. At the time a person is arrested, he must be notified of these rights.

(F) The right to a fair, speedy, and open trial shall be guaranteed.

(G) Every person deprived of his liberty by arrest or detention shall have the right of recourse to a court to determine the legality of his arrest or detention without delay and to order his release if this occurred in an illegal manner.

(H) After being found innocent of a charge, an accused may not be tried once again on the same charge.

(I) Civilians may not be tried before a military tribunal. Special or exceptional courts may not be established.

(J) Torture in all its forms, physical or mental, shall be prohibited under all circumstances, as shall be cruel, inhuman, or degrading treatment. No confession made under compulsion, torture, or threat thereof shall be relied upon or admitted into evidence for any reason in any proceeding, whether criminal or otherwise.

the criminal justice context, and most of its provisions sailed through the IGC without any opposition. Article 15(A) forbade *ex post facto* laws. The U.S. law of unreasonable search and seizure — for all its flaws — informed the drafters in Article 15(B), requiring a search warrant issued by a judge based on sworn evidence in all but “extreme exigent circumstances,” and providing for an exclusionary rule. Article 15(C) barred arrest based solely on religious or political belief. While the International Covenant on Political and Civil Rights requires that “a competent, independent and impartial tribunal” try an accused charged of a criminal violation,⁴⁷ Article 15(D) of the TAL provides for a fair and impartial tribunal in both criminal and civil proceedings. It also requires adequate notice of the proceedings as an indispensable element of due process.⁴⁸ Article 15(F) guarantees the rights to a speedy, open and fair trial.⁴⁹

Article 15(E) provides a comprehensive, fairly standard set of rights for the accused. For the first time in Iraq, and in a significant departure from the inquisitorial format Iraq borrowed from

47. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14, U.N. GAOR, 21st Sess. Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, Art. 14(1) [hereinafter *CCPR*], stating:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement [sic] rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

48. TAL, *supra* note 3, art. 15(D) (providing that “[a]ll persons shall be guaranteed the right to a fair and public hearing by an independent and impartial tribunal, regardless of whether the proceedings is civil or criminal. Notice of the proceeding and its legal basis must be provided to the accused without delay”). See *CCPR*, *supra* note 47, art. 14(3)(a) (providing that everyone has the right to be informed in a language he understands of the nature of the cause and charges against him). R

49. TAL, *supra* note 3, art. 15(F) (providing that “[t]he right to a fair, speedy, and open trial shall be guaranteed.”). See *CCPR*, *supra* note 47, art. 14(3)(c) (reserving the right to be tried without undue delay when faced with a criminal charge). R

France, a defendant now has the right to confront witnesses, and to call or cause a judge to call witnesses.⁵⁰ This Article now allows a defense lawyer to call or require the judge to call defense witnesses during the investigation. Under the Iraqi Code of Criminal Procedure, a “trial” in the Anglo-American sense of the word *may*, but need not, take place, as it is the investigative phase which is crucial. If the prosecutor elects not to call witnesses at the trial itself, the trial judge may rely exclusively on the findings of the investigative judge, hence the significance of the right to require an investigative judge to call witnesses. Pursuant to Article 15(E), in the event that the prosecution does call for witnesses during a trial, then the defense may also call witnesses.

Article 15(G) guarantees the right of *habeas corpus*. There is no single, pithy phrase in Arabic to render the legal significance of “*habeas corpus*” (nor, strictly speaking, is there one in English). That being the case, the drafters quoted verbatim the Arabic text of the International Covenant on Civil and Political Rights⁵¹ on the subject.

Article 15(H) was extremely controversial. Historically in Iraq, a finding of not guilty by a judge did not bar further prosecution if evidence was subsequently discovered. Under the TAL, however, once there has been an adjudication of innocence, a defendant can expect that he will not be subject to repeated prosecution. The bar contained in Article 15(I) against trying civilians in military tribunals was an innovation in Iraq, given Iraq’s experience with military tribunals since 1958. Recalling General Comment 13 to the CCPR,⁵² 15(I) also barred the establishment of other special or exceptional courts. The previous regime had established a plethora of special and exceptional courts, such as revolutionary courts, in which proceedings were secret.

50. TAL, *supra* note 3, art. 15(E) (providing that “[t]he accused . . . has the right to . . . summon and examine witnesses or to ask the judge to do so”). See CCPR, *supra* note 47, art. 14(3)(e).

51. See CCPR, *supra* note 47, art. 9(4).

52. See U.N. High Comm’n on Human Rights, *General Comment No. 13: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14)*, at 4, CCPR General Comment No. 13 (Apr. 13, 1984), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/bb722416a295f264c12563ed0049dfbd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument).

The last major provision in Article 15 is 15(J). This Article contained an absolute prohibition on torture.⁵³ Here the American interlocutors wanted an exception: a confession would still be admissible if it could be shown that the evidence extracted by torture could have been obtained without the tortured confession. The Iraqi drafters absolutely refused to include such an exception in the TAL.

Iraq has a huge supply of small weapons — Iraqis are armed to the teeth and a process of demobilization and disarmament is essential when circumstances permit. Hence, there is no second amendment in the TAL, as there is to the U.S. Constitution. In fact, Article 17 explicitly prohibits anyone from possessing, bearing, buying, or selling arms without licensure from the state.⁵⁴ Given the current state of affairs, this is an example of one of the TAL's aspirational articles. It will likely take many years to control the quantity of arms in Iraq.

Iraqis can be proud of Article 19. It protects those granted political asylum in Iraq.⁵⁵ No political refugee may be surrendered or returned forcibly to the country from which he fled, providing he has obtained asylum in Iraq through legal proceedings.⁵⁶ The IGC did insist — quite reasonably — that, to qualify for the protections of this Article, the concerned individual should have obtained asylum through legal proceedings.

The TAL contains an innovation in Article 20,⁵⁷ at least as compared to the U.S. Constitution. Article 20(A) contain an express, constitutional right to vote in Iraq, a right to stand for election, and

53. TAL, *supra* note 3, art. 15(J) (stating that “[t]orture in all its forms, physical or mental, shall be prohibited under all circumstances”).

54. TAL, *supra* note 3, art. 17 (providing that “[i]t shall not be permitted to possess, bear, buy, or sell arms except on licensure issued in accordance with the law”).

55. *Id.* at art. 19 (providing that “no political refugee who has been granted asylum pursuant to applicable law may be surrendered or returned forcibly to the country from which he fled”).

56. *Id.*

57. *Id.* at art. 20, providing:

(A) Every Iraqi who fulfills the conditions stipulated in the electoral law has the right to stand for election and cast his ballot secretly in free, open, fair, competitive, and periodic elections.

(B) No Iraqi may be discriminated against for purposes of voting in elections on the basis of gender, religion, sect, race, belief, ethnic origin, language, wealth, or literacy.

to cast a ballot secretly in free, open, fair, competitive, and periodic elections.⁵⁸ Article 20(B) explicitly prohibits any discrimination in the voting process based upon gender, religion, creed, and the like.⁵⁹ Literacy tests for voting are likewise prohibited.⁶⁰

Article 21 operates to bar governmental interference with the right of non-governmental organizations to develop civil society.⁶¹ But the background of this Article is interesting. As originally drafted, it prohibited governmental interference with development of Iraqi NGO's "whether in cooperation with *foreign* civil society organizations or otherwise."⁶² A tremendous debate was engendered in the IGC about this Article, and this author was truly shocked by the negativity toward it.

Later, after contemplating the matter, Dr. Pachachi asked the author to take out the word "foreign" and replace it with the word "international." This author protested that the IGC was not having a syntactical debate, but was consternated by the *principle* of foreign NGO's operating freely. After something of a mildly heated discussion, Dr. Pachachi finally stated, using the imperative mood, "Take out 'foreign' and replace it with 'international'!" The author complied. The next day, the phrase "international civil society organizations" was approved without debate. The debate had been over syntax after all.

Article 22 allows an individual — not necessarily a citizen — to sue governmental officials, at all levels of government, for damages arising out of a deprivation of constitutional or statutory rights.⁶³

58. *Id.* at art. 20(A).

59. *Id.* at art. 20(B).

60. *Id.* at art. 20(B).

61. *Id.* at art. 21 (providing that "[n]either the Iraqi Transitional Government nor the governments and administrations of the regions, governorates, and municipalities, nor local administrations may interfere with the right of the Iraqi people to develop the institutions of civil society, whether in cooperation with international civil society organizations or otherwise").

62. The original draft of Article 21 is on file with the author (emphasis added).

63. TAL, *supra* note 3, art. 22, stating that:

If in the course of his work, an official of any government office, whether in the federal government, the regional governments, the governorate and municipal administrations, or the local administrations, deprives an individual or a group of the rights guaranteed by this Law or any other Iraqi laws in force, this individual or group shall have the right to maintain a cause of action against that employee to seek compensation for the damages caused

Clearly, this Article borrowed from American law, enshrining 42 U.S.C. § 1983⁶⁴ into the TAL. From the perspective of one steeped in U.S. law, it may not sound terribly interesting to say that a person may sue for damages in the event that his or her rights are withdrawn or withheld wrongfully by a government official; however, for a civil code country such as Iraq, this provision is innovative. While a person in a civil-code jurisdiction could always sue for injunctive relief, damages are not typically recoverable against government officials. Again the Americans proposed a good faith exception, a suggestion which the Iraqi drafters rejected, preferring that the matter be resolved by Iraqi courts.

The final Article of the Bill of Fundamental Rights was also inspired by American law, specifically the Ninth Amendment to the U.S. Constitution.⁶⁵ Article 23 makes clear that the enumeration of rights in Chapter Two is not an all-inclusive laundry list of the rights inherent in the citizens of Iraq.⁶⁶ Rather, Iraqis “enjoy all the rights that befit a free people possessed of their human dignity,” includ-

by such deprivation, to vindicate his rights, and to seek any other legal measure. If the court decides that the official had acted with a sufficient degree of good faith and in the belief that his actions were consistent with the law, then he is not required to pay compensation.

64. 42 U.S.C. § 1983 (2000), provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

65. U.S. CONST. amend. IX (providing that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people”).

66. See TAL, *supra* note 3, art. 23, providing that:

The enumeration of the foregoing rights must not be interpreted to mean that they are the only rights enjoyed by the Iraqi people. They enjoy all the rights that befit a free people possessed of their human dignity, including 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 upon it, and in the law of nations.

ing the rights existing in international human rights treaties and the law of nations which binds Iraq.⁶⁷ Non-Iraqi citizens, while obviously not enjoying all the rights reserved for Iraqis (e.g., the right to vote), are guaranteed, nonetheless, protections of all “human rights not inconsistent with their status as non-citizens.”⁶⁸

The unambiguous intent of Article 23 was, obviously, to expand the scope of human rights protections in Iraq by encompassing all the human rights treaties ratified by Iraq — and Iraq has ratified virtually all — but without mentioning any of them by name. This author feared that the mention of specific treaties, particularly treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁶⁹ would cause endless debate and ultimately result in the Article failing to gain approval. Silence in this case was indeed golden. Only one individual, representing one of the religious parties, objected that such treaties had been ratified by the previous regime and should not be binding. No other IGC representative took up that cause, and the objection died.

Chapter Three of the TAL, entitled “The Iraqi Transitional Government,” contained general provisions relating to the newly-created Federal Government in Baghdad.⁷⁰ Article 24(C) denied immunity to officials and employees of the Federal Government for crimes committed while in office.⁷¹ This provision was an important derogation and rejection of the Provisional Constitution of 1970, which contained an immunity provision for members of the Revolutionary Command Council.⁷² The drafters wanted to make

Non-Iraqis within Iraq shall enjoy all human rights not inconsistent with their status as non-citizens.

67. *Id.*

68. *Id.*

69. *See infra* note 91.

70. *See id.* at arts. 24-34.

71. *Id.* at art. 24(C) (providing that “[n]o official or employee of the Iraqi Transitional Government shall enjoy immunity for criminal acts committed while in office”).

72. *See IRAQ PROVISIONAL CONST.* (1970), art. 40 (providing that “[t]he president, vice-president and members of the Revolutionary Command Council shall enjoy complete immunity, and it is prohibited to undertake any process in respect to the right of any of them without the prior permission of the Council”). *THE IRAQI CONSTITUTIONS*, *supra* note 27, at 108.

it clear that there would be no constitutional bar to the prosecution of officials for crimes they committed while in office.⁷³

There is an exception to this otherwise absolute bar to immunity from prosecution. Article 34 prohibits any judicial process, criminal or civil, for statements made by Members of the National Assembly while the Assembly is in session.⁷⁴ It also bars the arrest or trial of a Member of the Assembly while the Assembly is in session, except where a charge is actually pending and the Assembly waives the immunity, or where the Member is caught *in flagrante delicto*.⁷⁵ It was recognized by the drafters that the immunity, particularly with respect to statements, was extremely broad. The intent of this provision, however, was to provide a wide berth for the National Assembly, and to ensure that the courts would not be used to chill free and open debate. This exception also existed in the Constitution of 1925.⁷⁶

The IGC listed the exclusive competencies of the Federal Government in Article 25.⁷⁷ This Article contained one of the most

73. See CONSTITUTION OF THE KINGDOM OF IRAQ art. 81 (1925), reprinted in THE IRAQI CONSTITUTIONS, *supra* note 27, at 24. It is noteworthy that there was no official immunity provision in the Constitution of 1925. Quite the contrary, it contained a provision that expressly set forth how and by whom officials could be tried for crimes they committed when they were in office. *Id.*

74. TAL, *supra* note 3, art. 34, providing that:

Each member of the National Assembly shall enjoy immunity for statements made while the Assembly is in session, and the member may not be sued before the courts for such. A member may not be placed under arrest during a session of the National Assembly, unless the member is accused of a crime and the National Assembly agrees to lift his immunity or if he is caught in flagrante delicto in the commission of a felony.

75. *Id.*

76. See CONSTITUTION OF THE KINGDOM OF IRAQ art. 60 (1925), reprinted in THE IRAQI CONSTITUTIONS, *supra* note 27, at 19.

77. TAL, *supra* note 3, art. 25, providing that:

The Iraqi Transitional Government shall have exclusive competence in the following matters:

- (A) Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; formulating foreign economic and trade policy and sovereign debt policies;
- (B) Formulating and executing national security policy, including creating and maintaining armed forces to secure, protect, and guarantee the security of the country's borders and to defend Iraq;
- (C) Formulating fiscal policy, issuing currency, regulating customs, regulating commercial policy across regional and governorate boundaries in Iraq,

controversial provisions of the TAL, though most other provisions were not in dispute. Clearly, the Federal Government should have exclusive competence in areas such as foreign policy, defense, fiscal and monetary policy, customs, commercial policy, establishing and administrating a central bank, and so on. But who would control Iraq's natural resources?

Though it has others, Iraq's principal natural resources are oil and water. Some members of the IGC believed, probably quite rightly, that the central government had used oil as a carrot or as a stick, as circumstances dictated. For favored governorates, such as that from which Saddam Hussein hailed, oil revenues flowed far above demographic needs. In contrast, development funds dripped one drop at a time to less-favored governorates, such as those in the south. Some members of the IGC, particularly some Kurdish leaders, in a variation of John Marshall's adage that the power to tax was the power to destroy,⁷⁸ believed that the power to control oil revenues was the power to destroy. Having had de facto independence from Baghdad for twelve years under international protection, and about to gain constitutional protections for a federated state, the Kurdish leadership wanted to ensure that Baghdad could not strangle this new-found arrangement. They insisted that Iraq's regional governments or governorates must own the natural resources found within their territories, though they agreed that revenues had to be shared.

drawing up the national budget of the State, formulating monetary policy, and establishing and administering a central bank;

(D) Regulating weights and measures and formulating a general policy on wages;

(E) Managing the natural resources of Iraq, which belongs to all the people of all the regions and governorates of Iraq, in consultation with the governments of the regions and the administrations of the governorates, and distributing the revenues resulting from their sale through the national budget in an equitable manner proportional to the distribution of population throughout the country, and with due regard for areas that were unjustly deprived of these revenues by the previous regime, for dealing with their situations in a positive way, for their needs, and for the degree of development of the different areas of the country;

(F) Regulating Iraqi citizenship, immigration, and asylum; and

(G) Regulating telecommunications policy.

78. See *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

Dr. Pachachi was adamant that control of natural resources be within the competence of the Federal Government only. He feared the potential for civil war if it were otherwise. Central Iraq has no oil. If northern regions and/or governorates controlled their oil reserves, and if the south did the same, what incentive would the central region have to cooperate in national re-building? He also wondered who would control the water. Could upstream governorates claim they had “ownership” of Iraq’s water resources? For their part, the Shia religious parties were agnostic on the subject. A representative of one of the more prominent of these groups stated that it was in essence of no moment to him how the issue was resolved, but that he would insist “whatever the Kurds get, the Shia must get.”⁷⁹

In the end, Dr. Pachachi’s view prevailed,⁸⁰ and Article 25(E) was the result. Ownership of Iraq’s natural resources was vested in all the people, but the Federal Government would control distribution of the funds derived from sale of those resources.⁸¹ The distribution of such funds would not be at the unfettered discretion of the Federal Government, however. The Government had to take into account demography, need, and past discriminatory practices resulting in underdevelopment.

In some of the provisions of Article 25, very fine distinctions were inevitably drawn. For example, Article 25(G), originally drafted by Salem Chalabi, makes regulation of telecommunications *policy* the exclusive function of the federal government, but not necessarily regulation of telecommunications as such.⁸² This distinction was important because the Kurdistan Regional Government had regulated its own telecommunications for twelve years.

79. On this issue of the control of natural resources, see DIAMOND, *supra* note 10, at 169. During the negotiations, IGC Member Ahmad Chalabi, through his representative and nephew, Salem Chalabi, proposed to create a corporation that would own the natural resources in Iraq. Under this plan, majority shares in the corporation would be owned by the Federal Government, while Regional Governments and municipalities would own the balance. The author of this article, representing Pachachi’s view, argued strongly against the proposal.

80. *See id.*

81. TAL, *supra* note 3, art. 25(E).

82. *See id.* at art. 25(G).

Article 27 deals broadly with military matters. Article 27(B) is meant to outlaw militias.⁸³ One of the most hotly contested provisions in this section was Article 27(E) relating to the non-proliferation, non-development, non-production, and non-use of nuclear, chemical, and biological weapons.⁸⁴ This section was very important to the CPA, which kept proposing a version in which Iraq would forever renounce these weapons. This was a problem because of the unelected nature of the Governing Council, and because this unelected body was engaged in drafting a *transitional* constitution. A clause forever denouncing these weapons would be perfectly appropriate — perhaps desirable — in a permanent constitution, if the people's elected representatives wished to include one, but Iraq was not yet at this stage. The final language contained a strong rejection of the proliferation of weapons of mass destruction, but couched that renunciation in terms of the limited duration of the transitional period.⁸⁵

Chapter Four, entitled the Transitional Legislative Authority, dealt with the broad parameters of the internal functioning of the National Assembly.⁸⁶ One failing of the TAL was that it did not specify who must call on the members of the National Assembly to convene for the first time, or what the mechanism for doing so should be. Regardless, upon the convening of the Assembly, and until a presiding officer and two deputies could be elected, the TAL dictated that the oldest member of the National Assembly would serve as the *pro tempore* presiding officer.⁸⁷ This provision was based upon the practice in the British House of Commons, where the longest-serving member, the Father of the House, presides over the

83. *See id.* at art. 27(B) (providing that “[a]rmed forces and militias not under the command structure of the Iraqi Transitional Government are prohibited, except as provided by federal law”).

84. *Id.* at art. 27(E) (providing that “[t]he Iraqi Transitional Government shall respect and implement Iraq’s international obligations regarding the non-proliferation, non-development, non-production, and non-use of nuclear, chemical, and biological weapons, and associated equipment, materiel, technologies, and delivery systems for use in the development, manufacture, production, and use of such weapons”).

85. *Id.*

86. *Id.* at arts. 30-33.

87. *Id.* at art. 32(A) (stating that “[t]he National Assembly shall draw up its own internal procedures, and it shall sit in public session unless circumstances require otherwise, consistent with its internal procedures. The first session of the Assembly shall be chaired by its oldest member”).

body until a speaker is elected.⁸⁸ The TAL provided that the National Assembly elect its president and two deputies, with the president being the “individual who receives the greatest number of votes for that office; the first deputy president the next highest; and the second deputy president the next.”⁸⁹ Once the National Assembly organized itself, one of its first tasks was appointing a Presidency Council consisting of a president of Iraq and two deputy presidents.⁹⁰

The second clause of Article 30(C) was noteworthy because it required the electoral law to attempt to achieve female representation equal to one-quarter of the seats in the National Assembly.⁹¹ Dr. Pachachi, who was the first IGC member to propose reserving seats for women, originally proposed a set-aside of forty percent.⁹² There were, of course, objections to this from other IGC members. During a meeting of experts, including this author, one representative of a religious party objected to this set-aside, asserting, “There are not a hundred women in Iraq who are qualified to sit in the National Assembly.” This author responded, “If there are not a

88. House of Commons Info. Office, *The Father of the House* (2003), available at <http://www.parliament.uk/documents/upload/m03.pdf>.

89. TAL, *supra* note 3, art. 32(B), providing that:

The National Assembly shall elect, from its own members, a president and two deputy presidents of the National Assembly. The president of the National Assembly shall be the individual who receives the greatest number of votes for that office; the first deputy president the next highest; and the second deputy president the next. The president of the National Assembly may vote on an issue, but may not participate in the debates, unless he temporarily steps out of the chair immediately prior to addressing the issue.

90. *Id.* at art. 36(A) (providing in part, “[t]he National Assembly shall elect a President of the State and two Deputies. They shall form the Presidency Council[.]”)

91. *See id.* at art. 30(C), providing that:

The National Assembly shall be elected in accordance with an electoral law and a political parties law. The electoral law shall aim to achieve the goal of having women constitute no less than one-quarter of the members of the National Assembly and of having fair representation for all communities in Iraq, including the Turcomans, ChaldoAssyrians, and others.

92. *See* U.N. Comm’n on the Elimination of Discrimination against Women [CEDAW], *General Recommendation 23 on Article 7 (Political and Public Life)*, U.N. GAOR, 52nd Sess., Supp. No. 38, U.N. Doc. A/52/38 (1997) (“Research demonstrates that if women’s participation reaches 30 to 35 per cent (generally termed a ‘critical mass’), there is a real impact on political style and the content of decisions, and political life is revitalized.”).

hundred qualified women, there certainly are not a hundred and fifty qualified men.”⁹³

When a similar objection was made during a regular meeting of the full IGC, one IGC Member responded, “Given what men have done to Iraq in the last eighty years, maybe we should turn the whole government over to women and see what they would do.”⁹⁴ The percentage was changed from forty to twenty-five in order to reach a compromise. In fact, women achieved a presence of thirty-one percent in the National Assembly.⁹⁵ By contrast, fourteen percent of the members of the U.S. Congress are women.⁹⁶

Article 33(C) dealt with initiation of the budgetary process.⁹⁷ Many parliamentary systems are bicameral and generally legislation dealing with finance must originate in the lower of the two houses. Because Iraq, for the time at least, has a unicameral system, Article 33(C) reversed this situation and required all finance bills to originate from the Council of Ministers. Presumably there will be only one budget during this transitional period. The National Assembly had the right to reallocate proposed spending and reduce the total amount in the general budget, but it could not unilaterally increase the budget. Only the Council of Ministers was empowered to propose increases in spending, because of a concern about what in Iraq

93. The placeholder for the size of the Assembly was initially 250 members.

94. The author was present at the IGC meeting when this exchange took place.

95. Dep’t. State Fact Sheet, Office of the Senior Coordinator for International Women’s Issues, Int’l Information Programs, United States Committed to Helping Women in Iraq, (June 22, 2005), available at <http://usinfo.state.gov/mena/Archive/2005/Jun/24-979928.html> (This was a significant step toward reaching CEDAW’s goal of “50/50 gender distribution.”). See U.N. Comm’n on the Elimination of Discrimination against Women, *General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on temporary special measures*, U.N. GAOR, 59th Sess., Supp. No. 38, U.N. Doc. A/58/38 (1997) at 1113 (2004), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>.

96. Madeleine Kunin, Op-Ed., *US Women Lag in Elected Office*, THE BOSTON GLOBE, May 31, 2004, at A11.

97. See TAL, *supra* note 3, art. 33(C), providing that:

Only the Council of Ministers shall have the right to present a proposed national budget. The National Assembly has the right to reallocate proposed spending and to reduce the total amounts in the general budget. It also has the right to propose an increase in the overall amount of expenditures to the Council of Ministers if necessary.

would have to be called “lamb barrel,” rather than “pork barrel” politics.

Chapter Five, the Transitional Executive Authority, outlines the responsibilities of the Presidency Council, the Prime Minister, and the Council of Ministers.⁹⁸ After the National Assembly appoints the Presidency Council, the Council has two weeks in which to unanimously appoint a Prime Minister. If it fails to do so, then the right to appoint the Prime Minister reverts to the National Assembly, which must do so by a two-thirds vote. The Prime Minister then recommends candidates for appointment to a Council of Ministers over which he is to preside, though the ministers are formally appointed by the Presidency Council.⁹⁹

In order to start their work as a government, the Prime Minister and the Council of Ministers must receive a majority vote of confidence from the National Assembly.¹⁰⁰ The National Assembly has the right to withdraw its confidence in the Prime Minister, the Council of Ministers as a whole, or any particular minister.¹⁰¹ In this sense the Transitional Government appears, at first blush, to be

98. *See id.* at arts. 35-42.

99. *Id.* at art. 38, providing that:

(A) The Presidency Council shall name a Prime Minister unanimously, as well as the members of the Council of Ministers upon the recommendation of the Prime Minister. The Prime Minister and Council of Ministers shall then seek to obtain a vote of confidence by simple majority from the National Assembly prior to commencing their work as a government. The Presidency Council must agree on a candidate for the post of Prime Minister within two weeks. In the event that it fails to do so, the responsibility of naming the Prime Minister reverts to the National Assembly. In that event, the National Assembly must confirm the nomination by a two-thirds majority. If the Prime Minister is unable to nominate his Council of Ministers within one month, the Presidency Council shall name another Prime Minister.

(B) The qualifications for Prime Minister must be the same as for the members of the Presidency Council except that his age must not be less than 35 years upon his taking office.

100. *Id.* at art. 38(A) & 40(A).

101. *Id.* at art. 40(A), stating that:

The Prime Minister and the ministers shall be responsible before the National Assembly, and this Assembly shall have the right to withdraw its confidence either in the Prime Minister or in the ministers collectively or individually. In the event that confidence in the Prime Minister is withdrawn, the entire Council of Ministers shall be dissolved, and Article 40(B), below, shall become operative.

a parliamentary system; however, there is an important distinction between Iraq's system and a true parliamentary system. If any member of the National Assembly is appointed to the Council of Ministers, he must resign from the Assembly.¹⁰² Thus, the TAL does not create a true parliamentary system, but a semi-parliamentary one. While ministers and the entire government serve at the pleasure of parliament, there is complete separation of powers between the Legislature and the Executive authorities. Members of the military are barred from serving in any political office unless the individual has resigned or retired from duty eighteen months prior to serving.¹⁰³

There was very little debate in the IGC about the principle of judicial independence enshrined in Chapter Six, entitled The Federal Judicial Authority.¹⁰⁴ For the first time in Iraq's history, the independence of the judiciary is constitutionally protected. In the last days of the monarchy, Parliament passed a statute that established the independence of the judiciary in Iraq, but this protection did not rise to the level of constitutional protection. Great Britain had been the mandatory power in Iraq, and it did not have a tradition of independence of the judiciary, in a theoretical sense at least. After all, the House of Lords continues to be the court of last resort in Britain.

As a result of that history, Iraq did not have a constitutionally independent judiciary. In fact, until the TAL was promulgated, all regular judges were employed by the Ministry of Justice. Beginning with the overthrow of the monarchy, over the next forty-five years, Iraqis became inured to a system of "courts," including military courts, trying civilians, as well as other exceptional courts, such as

102. *Id.* at art. 28(A), providing that:

Members of the National Assembly; the Presidency Council; the Council of Ministers, including the Prime Minister; and judges and justices of the courts may not be appointed to any other position in or out of government. Any member of the National Assembly who becomes a member of the Presidency Council or Council of Ministers shall be deemed to have resigned his membership in the National Assembly.

103. *Id.* at art. 28(B) (stating that, "[i]n no event may a member of the armed forces be a member of the National Assembly, minister, Prime Minister, or member of the Presidency Council unless the individual has resigned his commission or rank, or retired from duty at least eighteen months prior to serving").

104. *See id.* at arts. 43-47.

“revolutionary” courts. All of this judicial (or extra-judicial) activity occurred without the power of judicial review. Accordingly, Article 44 established a constitutional court, the Supreme Federal Court, which has the right of judicial review.¹⁰⁵ It is an interesting historical fact that objections to judicial review were expressed by a representative of the CPA, who, closely mirroring the liberal/conservative divide in the United States, feared that the courts would begin to exercise too much power in Iraq.

Chapter Nine sets forth the procedures for drafting a permanent constitution.¹⁰⁶ Once the Transitional Government is in place, the TAL requires the National Assembly draft a permanent

105. *Id.* at art. 44, stating that:

(A) A court called the Federal Supreme Court shall be constituted by law in Iraq.

(B) The jurisdiction of the Federal Supreme Court shall be as follows:

(1) Original and exclusive jurisdiction in legal proceedings between the Iraqi Transitional Government and the regional governments, governorate and municipal administrations, and local administrations.

(2) Original and exclusive jurisdiction, on the basis of a complaint from a claimant or a referral from another court, to review claims that a law, regulation, or directive issued by the federal or regional governments, the governorate or municipal administrations, or local administrations is inconsistent with this Law.

(3) Ordinary appellate jurisdiction of the Federal Supreme Court shall be defined by federal law.

(C) Should the Federal Supreme Court rule that a challenged law, regulation, directive, or measure is inconsistent with this Law, it shall be deemed null and void.

(D) The Federal Supreme Court shall create and publish regulations regarding the procedures required to bring claims and to permit attorneys to practice before it. It shall take its decisions by simple majority, except decisions with regard to the proceedings stipulated in Article 44(B)(1), which must be by a two-thirds majority. Decisions shall be binding. The Court shall have full powers to enforce its decisions, including the power to issue citations for contempt of court and the measures that flow from this.

(E) The Federal Supreme Court shall consist of nine members. The Higher Juridical Council shall, in consultation with the regional judicial councils, initially nominate no less than eighteen and up to twenty-seven individuals to fill the initial vacancies in the aforementioned Court. It will follow the same procedure thereafter, nominating three members for each subsequent vacancy that occurs by reason of death, resignation, or removal. The Presidency Council shall appoint the members of this Court and name one of them as its Presiding Judge. In the event an appointment is rejected, the Higher Juridical Council shall nominate a new group of three candidates.

106. *See id.* at arts. 50-62.

constitution.¹⁰⁷ While the CPA had intended to appoint an assembly to draft the constitution through a caucus system, the Grand Ayatollah Ali al-Sistani, the leading Shiite cleric in Iraq, issued a *fatwa*, or judgment under Islamic law, holding that only an elected body could draft a permanent constitution.¹⁰⁸ Agreement with this position was widespread, for more than just religious grounds. Given that an elected assembly passed Iraq's constitution eighty years earlier,¹⁰⁹ it was hard to justify an unelected assembly writing the new constitution. It was an interesting confluence of a religious scholar's *fatwa* and the views of many liberals that helped ensure that an elected assembly would be the body to draft the permanent constitution.

The necessity of having the permanent constitution drafted only by an elected body raised a question of why the TAL should bind the National Assembly. After all, the TAL is a transitional document, drafted by an unelected body, and is thus of limited legitimacy. The National Assembly would have much greater legitimacy by virtue of it being elected. Why is the Transitional Government not free, then, to disregard the TAL?

The answer is probably more political than legal. The TAL was drafted by a group of responsible men and women who all agreed that Iraq had been lawless for too long and needed to develop the institutions of the rule of law. These individuals consisted largely of the same men and women now in the National Assembly, representing the same parties. Most of these individuals understood very well that they would impair their own credibility if on March 8, 2004, they bound themselves to a document and then on March 1, 2005, they refused to abide by it. Most, if not all of the parties, understood that to renounce this document would return Iraqis to the days of Saddam Hussein and his well-known saying, "what, after all,

107. *See id.* at art. 60, providing:

The National Assembly shall write a draft of the permanent constitution of Iraq. This Assembly shall carry out this responsibility in part by encouraging debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq as it writes the constitution.

108. DAVID L. PHILLIPS, *LOSING IRAQ: INSIDE THE POSTWAR RECONSTRUCTION FIASCO* 178 (2005).

109. *See IRELAND, supra* note 1, at 393.

is the law? I can change it with a stroke of the pen.”¹¹⁰ Iraq’s politicians understood that Iraqis want to leave those days behind. The ultimate goal was to emerge from the transitional period with a fully legitimate government. The TAL was simply a vehicle to get Iraq to that goal on a sound legal footing.¹¹¹

Assuming the National Assembly decided to continue to operate under the auspices of the TAL (it has done so to date), it has complete discretion in how to draft the permanent constitution. If it had chosen to do so, all 275 members could have participated in the drafting. Because the members of the National Assembly were elected, it was entirely within their discretion to decide how to proceed, and this provision was left deliberately vague. It was left to them, for instance, to decide whether to form a constitutional committee consisting of people within as well as outside the assembly, operating under the supervision of the National Assembly.¹¹²

In the process of supervising and producing a draft constitution, the National Assembly is obligated to consult with and engage the people of Iraq in a dialogue about the document.¹¹³ By August 15, 2005, there must be a complete text.¹¹⁴ The TAL permits a one-time extension of six months to produce the document.¹¹⁵ The

110. This was a statement Saddam Hussein once made on national television. It is widely known amongst Iraqis.

111. See TAL, *supra* note 3, art. 3(A). If the National Assembly is sufficiently dissatisfied with a provision of the TAL, it has the option of passing an amendment. As with any constitution, amending the TAL would be difficult. An amendment would require a three fourths vote of the National Assembly plus the unanimous support of the Presidency Council. *Id.*

112. See Perry, et al., *Talabani hopes to beat Iraq constitution deadline: Draft document due by Monday*, CNN.com, (Aug. 13, 2005), <http://www.cnn.com/2005/WORLD/meast/08/13/iraq.main/index.html>. As it turned out, this was precisely how the National Assembly proceeded. A Constitutional Committee consisting of Assembly Members and individuals outside the Assembly was tasked with drafting the document. It was then to report the proposed draft to the National Assembly for debate.

113. See TAL, *supra* note 3, art. 60 (providing that “[t]his Assembly shall carry out this responsibility in part by encouraging debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq as it writes the constitution”).

114. *Id.* at art. 61(A) (providing that “[t]he National Assembly shall write the draft of the permanent constitution by no later than 15 August 2005”).

115. *Id.* at art. 61(F), stating that:

If necessary, the president of the National Assembly, with the agreement of a majority of the members’ votes, may certify to the Presidency Council no later than 1 August 2005 that there is a need for additional time to com-

president of the Assembly may certify the need for an extension to produce a text, but he must do so to the Presidency Council no later than August 1, 2005.¹¹⁶ In the absence of an extension, a referendum on the proposed draft must be held by October 15, 2005.¹¹⁷ If the proposed constitution is rejected by a two-thirds vote in any three governorates, the text is rejected.¹¹⁸

If the proposed constitution is passed by the referendum, the next elections are to be held no later than December 15, 2005, for a government pursuant to the permanent constitution. That government is to take office by December 31, 2005.¹¹⁹ In the event that the text is rejected by the October 15th referendum, elections for a new National Assembly must be held no later than December 15th and the new National Assembly will then be charged with producing another draft permanent constitution.¹²⁰

In the debates over the permanent constitution, all issues are open. Debates on the nature of federalism, the role of religion, and the rights of women, are all likely to recur. Aside from proce-

plete the writing of the draft constitution. The Presidency Council shall then extend the deadline for writing the draft constitution for only six months. This deadline may not be extended again.

116. *Id.*

117. *Id.* at art. 61(B), providing that:

The draft permanent constitution shall be presented to the Iraqi people for approval in a general referendum to be held no later than 15 October 2005. In the period leading up to the referendum, the draft constitution shall be published and widely distributed to encourage a public debate about it among the people.

118. *Id.* at art. 61(C) (stating that “[t]he general referendum will be successful and the draft constitution ratified if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it”).

119. *Id.* at art. 61(D) (providing that “[i]f the permanent constitution is approved in the referendum, elections for a permanent government shall be held no later than 15 December 2005 and the new government shall assume office no later than 31 December 2005”).

120. *Id.* at art. 61(E), stating that:

If the referendum rejects the draft permanent constitution, the National Assembly shall be dissolved. Elections for a new National Assembly shall be held no later than 15 December 2005. The new National Assembly and new Iraqi Transitional Government shall then assume office no later than 31 December 2005, and shall continue to operate under this Law, except that the final deadlines for preparing a new draft may be changed to make it possible to draft a permanent constitution within a period not to exceed one year. The new National Assembly shall be entrusted with writing another draft permanent constitution.

dural requirements, no substantive provision of the TAL binds the National Assembly in its drafting of the permanent constitution, though many of the framers of the TAL hope that it will be the template for the permanent constitution. There are others who hope the TAL will be ignored entirely in the drafting of the permanent constitution. How things will transpire is unclear, but however they do, it will have been the people's elected representatives who steer the course.

In the months leading up to the January 30th elections, issues often debated included: Whether the elections would be regarded as legitimate; whether and how many people were going to participate in the elections and formation of the government; who the personalities constituting the government would be; and what would the new Iraqi constitution look like. Given Iraq's history over the past thirty-five years, it was no small feat that a reasonably free election took place, one whose results were not known until *after* the votes were counted. There have been many positive developments in the country, though there have also been profound problems. Despite these ongoing problems, this remains a truly hopeful moment for Iraq, a moment in which the people have reclaimed the rule of law in the land whence the concept itself originated.