AUTHORITIES OF THE GOVERNORATES UNDER THE REGIONAL ADMINISTRATIVE DECENTRALIZATION IN IRAQ

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ABSTRACT

Regional administrative decentralization, a type of decentralized system, is the transfer of authority and responsibility from the central government to local administrative units; however, these units can only make administrative decisions but not the laws, just as federalism. In Iraq, based on its constitution and the Law of the Governorates Not Incorporated into a Region No. 21 of 2008 (LGNIR), there are 15 governorates that are practising regional administrative decentralization. Yet, these governorates have been issuing laws and this contradicts the constitution as well as the LGNIR. The objective of this study is to examine the regional administrative decentralization under the Iraqi Constitution and LGNIR with the aim of finding a practical solution to the current problem. This study utilized qualitative approach whereby face-to-face interview was employed. The primary data were collected from five groups of people namely members of the Iraqi Parliament, chancellors of the State Shura Council, heads and members of the governorate councils, heads of the governorate councils' legal department and relevant university lecturers. The constitution and laws of Iraq as well as those from other countries were the other sources of primary data in this study. Most of the secondary data were obtained from academic writings in books and journals. The findings of this study indicate that the contradictory decisions from the Federal Supreme Court, the restrictions placed on the powers of the administrative court (State Shura Council) and the loopholes in the provisions regulating the governorate authorities of the LGNIR have led the governorates to go against the constitution by issuing laws. These findings have facilitated the identification of obstacles that hamper the resolution of the problem and finding of practical solutions. As such, this study recommends that the performance of the Federal Supreme Court must be improved, and the Iraqi Parliament should grant broader powers to the administrative courts and amend the LGNIR.

Keywords: Regional Administrative Decentralization, Administrative Decentralization, Decentralization, Iraqi Governorates, Iraqi Governorates Authorities.

ABSTRAK

Pentadbiran desentralisasi serantau, iaitu satu sistem desentralisasi, adalah pengagihan kuasa daripada kerajaan pusat ke pentadbiran kerajaan tempatan. Namun, kerajaan tempatan hanya boleh membuat keputusan dalam urusan berkaitan pentadbiran dan bukan undang-undang. Ini merupakan amalan federalism. Iraq, berdasarkan perlembagaannya dan Undang-Undang Daerah yang Tidak Diperbadankan ke dalam Wilayah No. 21 Tahun 2008 (LGNIR), mempunyai 15 wilayahwilayah pembahagian pentadbiran yang mengamalkan pentadbiran desentralisasi regional. Walau bagaimanapun, 15 wilayahwilayah tersebut telah melanggar perlembagaan serta LGNIR dengan membuat undang-undang. Objektif tesis ini adalah untuk mengkaji pentadbiran desentralisasi regional di bawah Perlembagaan Iraq dan LGNIR dengan matlamat mencari penyelesaian praktikal untuk masalah semasa. Tesis ini menggunakan pendekatan kualitatif di mana temu bual bersemuka dilakukan. Data primer dikumpulkan dari lima kumpulan responden iaitu anggota Parlimen Iraq, canselor Majlis Shura Negeri, ketua dan ahli majlis tempatanwilayah, ketua jabatan undang-undang tempatanwilayah dan pensyarah universiti yang berkaitan. Perlembagaan dan undang-undang Iraq serta negara luar adalah sumber data primer lain dalam tesis ini. Kebanyakan data sekunder diperolehii daripada penulisan akademik dalam buku dan jurnal. Dapatan tesis menunjukkan bahawa keputusan bercanggah oleh Mahkamah Persekutuan, sekatan yang dikenakan ke atas Majlis Shura Negeri dan kelemahan peruntukan dalam mengawal selia kerajaan tempatan telah menyebabkan kerajaan tempatan bagi wilayah tersebut melanggar perlembagaan denganwilayah-wilayah ini membuat undang-undang. Penemuan ini telah memudahkan pengenalpastian rintangan yang menghalang penyelesaian masalah dan mencari penyelesaian yang praktikal. Oleh itu, tesis ini mengesyorkan agaragar prestasi Mahkamah Persekutuan harus dipertingkatkan dan Parlimen Iraq harus memberikan kuasa yang lebih luas kepada pentadbiran kerajaan tempatan dan meminda LGNIR.

Kata kunci: Pentadbiran Desentralisasi Regional, Pentadbiran Desentralisasi, Desentralisasi, GovernoratGovernorat Iraq, Pihak Berkuasa overnoratGovernorat Iraq.

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CHAPTER ONE: INTRODUCTION

1.1 Background

States vary in the way they administer their territories. Multiple factors, which diverge from one country to another, specify how states are run. The political, historical, economic and social perspectives cast their shadow on the administrative approaches applied in every country. Some countries tend to concentrate on strengthening their central governments by allowing these governments to have control over the authorities. This approach is motivated by a political ideology or by fears of the dissolution of multi-sect countries because there are many nationalities and religions inside the country. On the other hand, some countries grant some sort of autonomy to the regional communities within the country to enable them to administer their local affairs. This approach is adopted according to political justification.[1]

The subject of both of the aforementioned approaches must be the administrative function[2] which is under the so-called "administrative regulation in administrative law". Further, under administrative law, administrative function is distributed between the central government and the local administrative unit councils.[3] Whereas, under

[1] Salhi Abdul Nasser, "Regional Groups between Independence and Dependence". (master's thesis, University of Algeria, 2009-2010):9.
[2] Said Nheely, *Administrative Law. General Principles*. (Syria: AL Baath University, 2012), 11-13.
[3] Elizabeth Linda Yulian, "Decentralization, Deconcentration and Devolution: What Do They Mean?" (paper presented at the Interlaken Workshop on Decentralization, Switzerland, 2004), 1.

constitutional law, legislative, executive and judicial authorities are shared between the central government and the regions, and in this case, the federal system is applied.[4] When a distribution of the administrative function in the decentralized administrative system, the local councils, and government institutions issue administrative decisions. While, in the federal system, the regions can issue laws because it shares the legislature with the federal government.

The distribution of administrative authority can be through the implementation of three types of systems. First is the implementation of deconcentration, which distributes administrative authority by authorization of the competence. Second is the implementation of the administrative decentralization, which is the law granting legal personality and administrative authority to a public utility. Third is the implementation of regional administrative decentralization, which is the law granting legal personality and administrative authority to a geographic area.[5] The third type is the area of this study.

The regional administrative decentralization is a politics-based type of decentralization. By analyzing this sort of decentralization, one can notice that the main aim of regional administrative decentralization is the implementation of the democracy principles, whereby local people elect their representatives in the local council for the administration of local affairs.[6]

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4 John Law, "How Can We Define Federalism?" *Perspectives on Federalism*, 5, no. 3 (2013): E-93.

5 Faris Abdul Raheem Hatem. "Administrative Decentralization in Iraq under Provincial Law Is Not Organized in a Region No. 21 of 2008" *Journal of Kufa legal and political science* 1, no. 2 (2008): 117. Nawaf Kanaan, *Administrative Law* (House of Culture for Publishing and Distribution, 2006), 137.

6 Salhi Abdul Nasser, "Regional Groups between Independence and Dependence". (master's thesis, University of Algeria, 2009-2010):12.

France is leading in the countries that have implemented administrative decentralization. They implemented the administrative decentralization in a gradual manner.[7] According to Emmanuel, "after 2003, two principles were completed in the division of labor between the local and central governments, which were proximity and national coherence".[8]

In Iraq, a new Law was passed and published in the Iraqi Gazette on 19/3/2008. The Law of Governorates Not Incorporated into a Region No. 21 of 2008 (hereinafter referred to as LGNIR)[9] espouses a decentralized administrative system in accordance with the 2005 Iraqi Constitution. This system is implemented in the governorates which do not belong to a federal region (state). Several problems have arisen between the central government and the governorates about the competence which have been given by this Law to both sides.

Before the LGNIR, there was "Governorates Law" No. 159 in 1969. This law was related to the administrative decentralization in the administration of the governorates. But administrative decentralization was only theoretically exercised. In practice, the central system in the administration of the governorates was applicable. The "Governorates law" required the election of the members of the governorate council. But in fact, it was the governorate council is composed of the heads of the local government departments who are appointed by the central government.[10]

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[7] Emmanuel Brunet-Jailly. "France between Decentralization and Multilevel Governance: Central Municipal Relations in France". *McGill University Press* (2007): 6.

[8] Ibid,10.

[9] The Law of Governorates Not Incorporated into a Region No. 21 of 2008. http://iraq-lg-law.org/en/webfm_send/765. Accessed 19 November 2016.

[10] Areej Talib Kazem, "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008", *Journal of Anbar University for Law and Political Sciences* 1, no. 3 (2011). And, Mahmood Al-Zubaidi, "Administrative Competence of the Governorate Councils, Conflict and Overlap in the Light of the Law

After the taking of Iraq in 2003 by America, The Coalition Provisional Authority issued Order No. 71 of 2004 for the management of the governorates. This law was in effect for only a brief time. Then, it was abolished after the issuance of the LGNIR, which was based on the Iraqi Constitution of 2005.[11]

The First Article of the Iraqi Constitution states that "the Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary and democratic, and this Constitution is a guarantor of the unity of Iraq".

Article 47 of the Iraqi constitution states that "the federal powers shall consist of the legislative, executive and judicial powers, and they shall exercise their competencies and tasks on the basis of the principle of the separation of powers". Therefore, according to the principle of the separation of powers, no authority can exercise the competence of other authorities as stipulated by the Constitution.[12]

However, the principle of the separation of powers does not contradict the subordination of the administrative decision to the law which is issued by the executive authority. Because, the law is issued by the legislative authority which is elected by the people. And, the legislative authority selects the prime minister who chooses the ministers and the legislative authority must approve the ministers chosen by the prime

of Governorates Not Incorporated into a Region No. 21 of 2008". *Al-Hiqouq Journal* 3, no. 10 (2010):10.

[11] Mahmood Al-Zubaidi, "Administrative Competence of the Governorate Councils, Conflict and Overlap in the Light of the Law of Governorates Not Incorporated into a Region No. 21 of 2008". *Al-Hiqouq Journal* 3, no. 10 (2010): 11.

[12] Idris Hassan Mohamed, "The Principle of Separation of Powers and Its Role in the Protection of Public Rights and Freedoms", *Journal of Tikrit University for the Humanities* 15, no. 4 (2008).

minister. The executive authority is accountable to the Council of Representatives which can dismiss it.

Therefore, based on the Iraqi Constitution, the representative council has legislative authority to issue laws,[13] as well, the states which implement the federal system have the legislative authority.[14] Building on the above, the ministries, all entities and the councils which are within the executive authority do not have the legislative authority to pass laws. They can issue administrative decisions only. So, any violation of the above mentioned is contrary to the Constitution.

On the other hand, the judicial system in Iraq consists of different types of courts. However, Iraq does not apply the Judicial precedents system[15] because Iraq applies the civil law system, and the mother country of this system is France. Most of the Arab countries apply civil law systems. And, the first Arab country which applied this system was Egypt because the Egyptian government was sending scholarships in the field of law to France. And from Egypt, the rest of the Arab countries took this system. The Egyptian jurist named Al - Senhoury had an effective role in the application of the civil law system in the Arab countries. Al - Senhoury drafted the Egyptian civil law, as well as the Iraqi, Syrian, and Libyan civil laws. Al-Senhoury also played a part in the drafting of the constitution of Kuwait, the United Arab Emirates, and Sudan.[16]

[13] See Article 61 of the Iraqi constitution. See: http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

[14] See Article 121 of the Iraqi Constitution.

[15] See, Ahmed Obeis Neama, "The Authorities, Judicial and Legislative, According to the Iraqi Constitution", *Kufa studies center journal* 1, no. 7 (2008).

[16] Tharwat Al Batawi, "Abdulrazik Al-Senhoury," Message of Islam, December 3, 2012, http://main.islammessage.com/newspage.aspx?id=15951 (accessed February 23, 2018).

According to the Iraqi constitution, there are two systems,[17] federalism and regional administrative decentralization.[18] A governorate or several governorates can form a federal state after a referendum for the people of the governorate. But, just three governorates have merged into a federal state called Kurdistan, while the rest of the governorates (15 governorates) favored the application of regional administrative decentralization, for reasons of efficiency and progress.

There are historical and political reasons leading to the stated federal and decentralized administrative systems in the Iraqi constitution. The researcher will explain it in the second chapter of this study.

1.2 Statement of the Problem

There is a gap between the Iraqi constitution and internal law regarding the legal text. As well as a gap between the legal text and the practical implementation by the governorate councils. Article 61 of the Iraqi constitution states that:

> "The Council of Representatives shall be competent in the following: First: Enacting federal laws."

This Article grants the competence issue of laws to the Council of Representatives. Also, Article 121 of the Constitution grants this right to the federal states, in which it states that:

> "The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution,

[17] See section five of the Iraqi Constitution.
[18] Therefore, the central government is called the federal government, while the law issue by this government are called federal laws.

except for those authorities stipulated in the exclusive authorities of the federal government."

Whilst paragraph 2, Article 122 of the Constitution states that the:

> "Governorates that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law."

This Article states that the "Governorates that are not incorporated in a region" have wide administrative and financial powers but under the administrative decentralization system. That means that the Constitution does not grant the governorates the authority to issue laws. This is because the governorates exercise their activities according to the principle of administrative decentralization, which does not allow the issuance of laws by local entities.[19]

The LGNIR was issued based on Article 122 of the Iraqi Constitution, and Article 2 (First) of the LGNIR states that:

> "The governorate council is a legislative and oversight authority which has the right to issue local legislation to enable it to manage its affairs in accordance with the principle of administrative decentralization, in a manner that would not contradict the Constitution and federal laws."[20] Also, Article 7 (Third) of the LGNIR states that the governorate council can: "Issue local legislations, instructions, bylaws, and regulations to organize the administrative and financial affairs so that it can conduct its affairs based on the principle of administrative decentralization in a manner

[19] See Chapter Two of this study.
[20] Article 2 (First) of The Law of Governorates Not Incorporated into a Region No. 21 of 2008. http://iraq-lg- law.org/en/webfm_send/765. Accessed 19 November 2016.

> that does not contradict the provisions of the Constitution and federal laws."[21]

The phrases of the governorate council being a "legislative authority" and that it issues "local legislation" are strange because they can be interpreted as the governorate councils are issuing laws.

The "Local legislation" term is broad, it includes the local laws and local administrative decisions. Although, the LGNIR states that issuing local legislation is under the principles of administrative decentralization, which means that the governorates do not have the right to issue local laws. But, in fact, the governorates understand that they have the right to issue local laws because the term (local legislation) is ambiguous.[22]

The Constitution stipulates a broad competence for the governorate councils. Also, paragraph 5, Article 122 of the Constitution states that:

> "The Governorate Council shall not be subject to the control or supervision of any ministry or any institution not linked to a ministry. The Governorate Council shall have independent finances."

All these texts have led the legislator in the LGNIR to attempt to grant the maximum powers as possible to the governorate councils, but within the limits of administrative decentralization. But, the text of the LGNIR came flawed in the wording.

Article 115 of the Constitution states that:

> "All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates

[21] Article 7 (Third) of The Law of Governorates Not Incorporated into a Region No. 21 of 2008. http://iraq-lg- law.org/en/webfm_send/765. Accessed 19 November 2016.
[22] See Chapter Four of this study.

> that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in the case of a dispute."[23]

The last phrase of this article "priority shall be given to the law of the regions and governorates not organized in a region in the case of a dispute" is ambiguous. Does the Constitution mean that the governorates can issue laws similar to the federal regions being able to? Or does the constitutional legislator mean something else? The governorate councils have interpreted Article 115 of the Constitution as granting the governorates the right to issue laws such as with the federal regions. The ambiguity of the interpretative decisions of the Federal Supreme Court has led to the continued ambiguity of Article 115.[24]

Building on the above, Article 115 of the Constitution and articles 7 and 2 of the LGNIR have led to the governorates misconceiving that they have the right to issue local laws to administer their own affairs under the principle of administrative decentralization. However, this is contrary to the Constitution and the LGNIR because the Constitution does not authorize the governorates to make laws. The authority available for the governorates according to the Iraqi Constitution is merely to administer the region under the principle of administrative decentralization. This is also like the LGNIR, which stipulates that the governorates must apply the principles of administrative decentralization.[25]

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[23] Article 115 of the Iraqi Constitution, 2005. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

[24] See Chapter Three of this study.

[25] Yamama Mohamed Hassan, "The Impact of Legislative Wording on the Application of the Laws (the Study of the Law of Governorates Not Incorporated into a Region No. 21 of 2008)" *Al-Hiqouq Journal* 4, no. 18 (2012): 4.

In short, as a result of the above, the governorate councils have issued several laws. For example, The Babylon[26] Governorate Council issued The Guards of Night Law in 2011 and the Law on Local Revenues in 2010,[27] the Karbala[28] Governorate Council issued The Service Fee Law in 2010 and the Basra[29] Governorate council issued the Local Public Holidays Law in 2014.[30] Also, there is the Law to Organize the Erection of Internet Towers of 2016 issued by the Dhi Qar[31] Governorate Council.[32] This behavior from the governorates has caused a disagreement between the central government and the governorates which has not been challenged before the judiciary. However, the courts have presented their advisory opinions at the requests of the parties to the issue, which are the central government in 2007, 2009, and 2011, and the governorate councils in 2008, 2009, 2014, and 2015.[33] These opinions of the courts were contradictory; sometimes they agreed with the government and at other times, they agreed with the Governorate councils.[34] The Federal Supreme Court

[26] Babylon: Iraqi Governorate.
[27] See Babylon local Gazette in 31/1/2010 and 27/4/2011.
[28] Karbala: Iraqi Governorate.
[29] Basra: Iraqi Governorate.
[30] See Alsumaria News, 2015. http://www.alsumaria.tv/mobile/news/149372/%D9%85%D8%AC%D9%84%D8%B3-%D8%A7%D9%84%D8%A8%D8%B5%D8%B1%D8%A9-%D9%8A%D8%B9%D9%84%D9%86-%D8%AA%D8%B9%D8%B7%D9%8A%D9%84-%D8%A7%D9%84%D8%AF%D9%88%D8%A7%D9%85-%D8%A7%D9%84%D8%B1%D8%B3%D9%85%D9%8A-%D9%81%D9%8A/ar. Accessed 24/9/2016.
[31] Dhi Qar: Iraqi Governorate.
[32] The Gazette of Dhi Qar, No. 10, of 2016.
[33] See the advisory opinion of Federal Supreme Court, Chapter Three. And See the advisory opinion of State Shura Council, Chapter Four.
[34] See Raed Naji Ahmed, "The Extent of the Competence of the Governorates Not Incorporated into a Region to Impose Taxes and Fees (Specialized Legal Study in Legal System in Iraq)," *Journal of college of Law for Legal and Political Sciences* 4 (2015): 392. And, Areej Talib Kazem, "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008" *Journal of Anbar University for Law and Political Sciences* 1, no. 3 (2011): 148-149. And, Mahmood Al-Zubaidi, "Administrative Competence of the Governorate Councils, Conflict and Overlap in the Light of the Law of Governorates Not Incorporated into a Region No. 21 of 2008" *Al-Hiqouq Journal* 3, no. 10 (2010):8, 21. And, Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control," *Risalat AL-huquq Journal* (2012): 32.

(Constitutional judiciary)[35] has issued several ambiguous and contradictory advisory decisions on this subject.[36] On the other hand, the State Shura Council (Administrative judiciary)[37] has issued several advisory decisions stating that the governorate councils do not have the authority to issue laws, but only to make administrative decisions.[38]

According to the Constitution, the decisions of the Federal Supreme Court are binding on all public authorities.[39] This does not violate the principle of separation of powers stipulated by the Constitution. Because the Federal Supreme Court here performs its judicial function[40] as stipulated in the Constitution. Whilst, the decisions of the State Shura Council are binding on parties requesting the legal opinion from the Council only, based on the law of the State Shura Council.[41]

According to Esmel[42] and other authors, an amendment must be made to the LGNIR to solve the problem of the issuance of laws by the governorate councils. But, this needs an amendment to the constitution regarding the regional administrative decentralization because the LGNIR is based on the constitution. However, this is not a practical solution because this is difficult in Iraq due to the procedures required to make an amendment to the constitution according to the Iraqi laws, as well as, the current political situation.[43] Therefore, this study has tried to find a practical legal solution to this problem.

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35 About the definition of the Federal Supreme Court in Iraq, see "Operational Definition" in this study.

36 See Chapter Three of this study.

37 About the definition of the State Shura Council in Iraq, see "Operational Definition" in this study.

38 See Chapter Four of this study.

39 Article 94 of the Iraqi constitution. See: http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

40 See Theoretical Framework of Judicial Interpretation, Chapter Two of this study.

41 Article 6 of the Law of the State Shura Council (Amended), No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.

42 Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control," *Risalat AL-huquq Journal* (2012): 41.

43 According to the current Iraqi constitution, the amendment of the Constitution needs to a two-thirds majority of Parliament and a popular majority in a referendum, after a proposal to amend the Constitution from the President of the Republic and the Cabinet together, or one-fifth (1/5) of the members of the House of Representatives. See Iraqi Constitution, Article 126.

1.3 Research Questions

Based on the research problem, the researcher has identified a number of research questions: -

1- Why can the governorate councils not issue laws under the regional administrative decentralization, whilst they can do it under federalism?
2- How have other countries succeeded in harmonizing between the central government and the local governments?
3- Why can the governorate councils not issue laws according to the constitution and the LGNIR.
4- How apply the standards in another country that has the same legal system as Iraq be applied with regards to the regional administrative decentralization?

1.4 Research Objectives

Based on the research questions, the researcher has identified a number of research objectives: -

1- To conceptualize federalism and regional administrative decentralization
2- To analyze the impact of harmonizing and how it can be effectively executed in Iraq.
3- To examine the Iraqi Constitution and the legal text of the LGNIR regarding regional administrative decentralization. and the issues surrounding it.
4- To analyse the implementation of administrative decentralization in Iraq by looking for examples from selected countries.

1.5 Significance of the Study

The result of this study has added knowledge to the field in both the theoretical and practical areas.

In terms of the practical significance, this study has sought to find a legal practical solution to the problem of the regional administrative decentralization in Iraq, which differs from the solutions put forward for this problem which were not practical enough to solve the problem. As well as, to conceptualize the regional administration decentralization which distinguishes it from federalism.

In terms of the theoretical significance, this study has tried to contribute to the related literature in Iraq by adding to the general body of knowledge. Specifically, this study has tried to know the obstacles which prevent the effective implementation of the LGNIR by the governorate councils from the time this law was put into force in 2008 until now. This study is an attempt to bridge the existing gap in the literature with regards to the regional administrative decentralization in Iraq.

1.6 Research Methodology

According to Rajaseker, "the research methodology is defined as the study of methods by which knowledge is gained. Its aim is to give the work plan of the research".[44] This section logically focuses on the research design, the research scope, types of data, method of data collection and the data analysis approach, as well as the corresponding justification for each of these segments of this study.

1.6.1 Research Design

Research strategy is a tactic of inquiry which moves from the underlying philosophical suppositions to the research blueprint and data collection. The selection of the research method influences the method the researcher uses to collect the data. Specific research methods also hint at different skills, suppositions, and research practices.[45]

[44] S. Rajasekar, P. Philominathan, and V. Chinnathambi, "Research Methodology," October 14, 2013, accessed September 24, 2016, https://arxiv.org/pdf/physics/0601009.

[45] Michael D. Myers, "Qualitative Research in Information Systems," Association for information systems, 1997, accessed June 19, 2016, http://www.qual.auckland.ac.nz/.

This study adopted the qualitative research method. The qualitative research involves any research that uses data that do not indicate ordinal values.[46]

The qualitative approach seeks to explore and understand the meaning that individuals or groups attribute to a social or human problem. The research process involves emerging questions and procedures, data normally collected in the participant's surroundings, data analysis inductively constructed from particular to general themes, as well as the researcher interpreting the meaning of the data.[47]

In contrast, the qualitative methods for the collection of the data range from interviews, observational methods such as the observation of the participants, and fieldwork, as well as through archival research. Written data include published and unpublished documents, letters, company reports, memoranda, email messages, reports, faxes, newspaper articles, and others. However, the researcher will usually use interviews and documentary materials.[48]

When there are many research projects, there will be many different questions that have to be answered and some of them may require the quantitative methods whilst others need the qualitative methods.[49] If it is a qualitative research, the appropriate method is the qualitative method. The qualitative method seeks to answer the what, why, and how of a phenomenon instead of the how many or how much that are carried out using the quantitative method. Generally, these methods generate words, instead of numbers, which are used as data for the analysis.[50]

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46 Parkinson & Drislane, *Qualitative Research Defining and Designing* (n.p.: publisher, 2011), 33

47 Michael D. Myers, "Qualitative Research in Information Systems", Association for information systems, 1997, accessed June 19, 2016, http://www.qual.auckland.ac.nz/.

48 Nouria Bricki and Judith Green, "A Guide to Using Qualitative Research Methodology," Medecins Sans Frontieres, February 2007, accessed June 20, 2016, http://hdl.handle.net/10144/84230:2

49 Nouria Bricki and Judith Green, "A Guide to Using Qualitative Research Methodology," Medecins Sans Frontieres, February 2007, accessed June 20, 2016, http://hdl.handle.net/10144/84230:2.

50 Natasha Mack et al., *Qualitative Research Methods: A Data Collector's Field Guide* (USA: Family Health International, 2005), 4.

The qualitative method has two advantages, the first being the use of open-ended questions to probe the participants and who in turn can respond in their own words because they are not forced to use fixed responses (as found in the quantitative method). The open-ended questions can evoke responses. The qualitative method's second advantage is that, the researcher can be flexible when probing the participant's initial responses, i.e., he/she can ask why and how. The researcher must pay full attention to what the participants say and engage with them based on their personalities and style as well as to ask probing questions to urge them to elaborate on their responses.[51]

This study was, essentially, a legal research and, as such, it has been library-based. This methodology was selected because the issues that were likely to arise in this research were legally rooted and the best way to resolve them would be through reviews, critiques, theoretical analysis, and applying the statutes.

The legislation which was analyzed by the study can be classified as follows:

A- The current Iraqi Constitution 2005.

B- The previous Iraqi constitutions.

C- Constitutions of other countries.

D- The LGNIR.

E- Relevant Iraqi Laws.

F- Laws of other countries.

Statute section A was analyzed to achieve objectives 1, 2, 3, and 4. And, section B was analyzed in order to achieve objective 3. Also, section C was analyzed in order to achieve objectives 2, 3, and 4. On the other hand, section D was analyzed in order to

[51] See Rosalind Edwards and Janet Holland, *What Is Qualitative Interviewing?* (British: Bloomsbury Academic; annotated edition (2013-10-24), 2013)

achieve objective 3. Whilst, section E was analyzed in order to achieve objective 3. And finally, section F was analyzed in order to achieve objectives 3 and 4.

The selected research design involved face-to-face interviews and analyzing the primary documentary materials. Semi-structured interviews together with open-ended questions were used to confirm as well as analyze the primary documents. This technique allowed the interviewees to contemplate and express their views within their own framework as well as introduce new perspectives. This technique also helped the researcher to obtain the interviewees' opinions, perspectives, and experiences[52] with regard to the problem of administrative decentralization in Iraq and how to resolve the problem.

The researcher conducted a face-to-face interview with Mr. Jabbar, a member of the Council of Representatives who participated in the wording of the bills in Parliament and participated in the amendment of these bills. This interview aimed to discuss the authority of the governorate councils according to the LGNIR. Thus, this interview aimed to achieve the third objective of this study which was to examine the legal text of the LGNIR in relation to the authority of the governorate councils. Mr. Jabbar told the researcher important information about how the wording of the bills in parliament was carried out and the evaluation of the work of these councils.

The researcher also conducted a face-to-face interview with Mr. Sadiq Al-Mahna (Mahna), a member of the Council of Representatives, who participated in the discussion and amendment of the bills in Parliament. Mr. Al-Mahnah was a former member of the Babylon Governorate Council, and the researcher benefited from his assessment of the members of the Governorate Councils. This interview aimed to

[52] See Rosalind Edwards and Janet Holland, *What Is Qualitative Interviewing?* (British: Bloomsbury Academic; annotated edition (2013-10-24), 2013)

discuss the authority of the governorate councils according to the LGNIR. Thus, this interview aimed to achieve the third objective of this study which was to examine the legal text of the LGNIR in relation to the authority of the governorate councils.

On the other hand, with regard to the State Shura Council, the researcher conducted a face-to-face interview with Dr. Abdul Latif, deputy head of the State Shura Council. The aim of this interview was to discuss the authority of the governorate councils according to the LGNIR from the point of view of the State Shura Council. Thus, this interview aimed to achieve the third objective of the study which was to examine the text of the LGNIR in relation to the authority of the governorates councils. The researcher benefited from the information provided by Dr. Abdul Latif on the authority of the governorate councils and the wording of the LGNIR.

The researcher also conducted a face-to-face interview with Dr. Mazen Lilo, the chancellor in the State Shura Council (Judge). He was a judge in the Administrative Court and a member of the specialized bodies in the council to provide opinions and legal advice in the State Shura Council. The interview aimed to discuss the authority of the governorate council according to the LGNIR in light of the decisions of the State Shura Council. Thus, this interview aimed to achieve the third objective of this study which was to examine the legal text of the LGNIR in relation to the authority of the governorate councils. The researcher benefited from the information provided by Dr. Mazen about the authority of the governorate councils and the wording of the LGNIR.

In addition, the researcher conducted face-to-face interviews with heads and members in the governorate councils as follows:

The researcher conducted a face-to-face interview with Mr. Hakim Al-Yasiri, head of the Muthanna[53] governorate council and another interview with Mr. Humaid Naeem,

[53] Muthanna: Iraqi governorate.

head of the Dhi Qar governorate council. The aim of these interviews was to discuss the authorities of the governorate councils from the point of view of the governorate councils according to the Constitution and the LGNIR, and the decisions of the Federal Supreme Court and the State Shura Council. Thus, these interviews aimed to achieve the third objective of this study which was to examine the constitutional and legal text regarding the authority of the governorate councils. The researcher benefited from the information provided by the interviewers on the perspective of the governorate councils about the subject of the study.

The researcher also conducted an interview with Mr. Ahmed El Marzouk, a member of the Muthanna Governorate Council and head of the Legal Committee of the Council. An interview was also held with Mr. Harith Lahmod, a member of the Muthanna Governorate Council and a member of the Legal Committee of the Council. In addition to the Muthanna Governorate Council, the researcher conducted an interview with a member of the Dhi Qar Governorate Council, Mr. Zia Ahmad, who participated in issuing laws through the Dhi Qar Governorate Council. The two governorate councils of Muthanna and Dhi Qar previously issued laws in 2014 and 2016. Therefore, the aim of these interviews was to discuss the authority of the governorate councils from the point of view of the governorate councils according to the Constitution and the LGNIR, and the decisions of the Federal Supreme Court and the State Shura Council. Therefore, these interviews aimed to achieve the third objective of this study which was to examine the constitutional and legal texts regarding the authority of the governorate councils. The researcher benefited from the information provided by the interviewers on the perspectives of the governorate councils on the subject of the study.

The researcher tried for two months to do an interview with the head and a member of the Babylon Governorate Council. But, it could not be conducted because they evaded doing the interview. And finally, the researcher was able to do the interview with the head of the legal department in the council.

The researcher conducted a face-to-face interview with Mr. Saad Abdel Wahid, Head of the Legal Department of the Babylon Governorate Council. He was a graduate of the Faculty of Law and a staff member of the Council. The researcher also interviewed Mr. Naqaa Nassif, head of the legal department of the Dhi Qar Governorate council, who was also a graduate of the Faculty of Law and one of the staff of the council. The aim of these interviews was to discuss the authorities of the governorate councils from the point of view of the governorate councils according to the Constitution and the LGNIR, and the decisions of the Federal Supreme Court and the State Shura Council. Thus, these interviews aimed to achieve the third objective of this study which was to examine the constitutional and legal texts regarding the authority of the governorate councils. The researcher benefited from the information provided by the interviewers on the perspectives of the governorate councils about the subject of the study. The head of the legal department of the Dhi Qar Governorate Council gave important information about the legal expertise of the members of the governorate council.

In addition, the researcher conducted an interview with Professor Nabeel Althabhawi, a lecturer at the University of Kufa, who got a doctorate from the University of UKM of Malaysia. The researcher interviewed Professor Nabeel for his experience and his scientific degree in law. The researcher also conducted an interview with Dr. Sadiq Mohammed Ali, a lecturer at the University of Babylon and Head of the Legal Department at the University of Babylon. The researcher interviewed Dr. Sadiq for the scientific degree he held and because he was in charge of the legal affairs at the

university, and this led to the acquisition of a good experience in the law, practically. The aim of these two interviews was to study the authority of the governorate councils in theory and how it was applied by these councils.

1.6.2 Research Scope

This study focused on the ambiguities of the LGNIR that have led to the governorates in Iraq misconceiving the LGNIR, causing these governorates to issue the laws which they have no authority to issue. As well, this study examined the Iraqi Constitution's texts regarding regional administrative decentralization.

The researcher attempted to identify the gap and find the practical solutions to the problems. On the other hand, this study covered the period from the time the Iraqi Constitution was put into force in 2005 until now

1.6.3 Types of Data

The researcher collected both primary and secondary data. The primary data, for this study, were the text of the Iraqi Constitution of 2005 and the previous Iraqi Constitutions, and the constitutions of other countries in relation to the subject of the study. As well, some data came from the LGNIR No. 21 of 2008, and Iraqi laws and laws of other countries in relation to the subject of the study. In addition, the decisions of the Federal Supreme Court in Iraq and the State Shura Council, and finally the interviews were considered.

As for the secondary data, they were sourced from previous research reports, academic journals, textbooks, newspapers, magazines, government publications, bulletins, internet sources and guidelines relevant to the area of the research which were equally consulted to supplement the primary data.

1.6.4 Method of Data Collection

Rosalind said, "in general, the use of a particular method should be derived from the research topic, the research questions to which an answer is sought and the theoretical framework within which the researcher is working". The author added, "the researcher moves from research concern and topic to research questions, to appropriate method via their underpinning philosophical stance and the theoretical approach to understanding the social world, constructing their methodology".[54]

The in-depth interview and constitutional and legal texts constituted the primary sources of the data collection. John stated in the interview, "this means that, the researcher conducts face-to-face interviews with the participants, interviews the participants via telephone, on the Internet, or engages them in a focus group".[55] The researcher conducted face-to-face interviews with the respondents in this study. "Face-to-face interviews are characterized by synchronous communication in time and place. This type of interview can take advantage of social cues, such as voice, intonation, body language etc., from the interviewee. These cues can give the interviewer a lot of extra information that can be added to the verbal answer of the interviewee on a question".[56]

With regard to the interview, Nouria stated that, "the interviews resemble everyday conversations, although they are focused (to a greater or lesser extent) on the researcher's needs for data". Moreover, "they also differ from an everyday conversation because we are concerned with conducting them in the most rigorous way, we can in order to ensure reliability and validity (i.e., 'trustworthiness')". In

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[54] Rosalind Edwards and Janet Holland, *What Is Qualitative Interviewing?* (British: Bloomsbury Academic; annotated edition (2013-10-24), 2013), 2.

[55] John W. Creswell, *Research Design*, 4th ed. (London: SAGE Publications, 2014), 294.

[56] Raymond Opdenakker, "Advantages and Disadvantages of Four Interview Techniques in Qualitative Research," FQS, 2006, accessed June 26, 2016, http://www.qualitative-research.net/index.php/fqs/article/view/175/391.

conclusion, the researcher concluded, that "this means that both the researchers and the users of the findings can be as confident as possible that the findings reflect what the research set out to answer, rather than reflecting the bias of the researcher, or a very atypical group, in practical terms".[57]

According to Cohen et al., "there are three fundamental types of research interviews, which are the structured, semi-structured and unstructured interviews".[58] This study employed the semi-structured interview because "the questions can be prepared ahead of time".[59] Moreover, Rosalind mentioned some advantages of this type of interview. The author stated that, "there is flexibility in how and when the questions are put forward and how the interviewee can respond. The interviewer can probe answers, pursuing a line of discussion opened up by the interviewee, and a dialogue can ensue". The author added, "in general, the interviewer is interested in the context and content of the interview, how the interviewee understands the topic under discussion and what they want to convey to the interviewer". The author concluded, "basically, these interviews allow much more space for the interviewees to answer on their own terms than with structured interviews".[60]

The researcher had a list of questions that covered the most important obstacles affecting the solution to the problem of regional administrative decentralization in Iraq.

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[57] Nouria Bricki and Judith Green, "A Guide to Using Qualitative Research Methodology," Medecins Sans Frontieres, February 2007, accessed June 20, 2016, http://hdl.handle.net/10144/84230: 11.

[58] Cohen D. Crabtree B., "Qualitative Research Guidelines Project.," Robert Wood Johnson Foundation, 2006, accessed June 26, 2016, http://www.qualres.org/HomeSemi-3629.html. Also, P. Gill et al., "Methods of Data Collection in Qualitative Research: Interviews and Focus Groups," British Dental Journal 204 (2008): 291-95, accessed June 26, 2016, http://www.nature.com/bdj/journal/v204/n6/full/bdj.2008.192.html.

[59] Cohen D. Crabtree B., "Qualitative Research Guidelines Project.," Robert Wood Johnson Foundation, 2006, accessed June 26, 2016, http://www.qualres.org/HomeSemi-3629.html.

[60] Rosalind Edwards and Janet Holland, *What Is Qualitative Interviewing?* (British: Bloomsbury Academic; annotated edition (2013-10-24), 2013), 29.

The major criteria used in selecting the respondents included the operational and organizational experiences. Furthermore, the researcher used the official communications and personal relationships to organize a series of interviews that was conducted for a period of three months. A total of 13 respondents were engaged in the in-depth interview sessions involving the following categories of respondents: Two members of parliament, Deputy- head of the State Shura Council and a chancellor from the Council, the head of the Muthanna Governorate Council and two members of the Council, the head of the Dhi Qar Governorate Council and a member from the Council in addition to the Head of the legal department of the Council, the head of the legal department of the Babylon Governorate Council, as well as two specialized Lecturers. This number of respondents was enough to cover the aspects that were addressed in the study and support the views put forward.

The researcher tried to interview the judges of the Federal Supreme Court. But, the court said that it is impossible to meet court judges because any opinion issued from judges could be used against the court in the future. While, the chancellors of the State Shura Council cooperated with the researcher and answered all the questions of the interview with confidence. The respondents were chosen by the researcher due to their experience in the subject of the study.

The interviews varied in length, normally from 30-45 minutes. In-depth and face-to-face interviews were conducted for a duration amounting to 10 hours. The interviews were conducted either in responders' rooms or at the main offices of the participants. Furthermore, all of the interviews were recorded, except for the interviews with the chancellors of the State Shura Council, which were written according to the request of the respondents. This study has provided the English translation of the questions which were administered in the Arabic language.

In order to compile the data of this study, the researcher depended on the available libraries such as the Sultanah Bahiyah Library in University Utara Malaysia (UUM), the library of Baghdad University and the library of Babylon University.

1.6.5 Analysis of the Data

This study adopted the Analytical Method to analyze the primary and secondary data and to determine the negatives contained in the texts, which were the organization of the regional administrative decentralization in Iraq. To get to the answer to the research question, the researcher also analyzed and explained the principles of federalism and administrative decentralization and then, determined the differences between them.

The Analytical method usually handles legal research by identifying the relevant rules and principles, by examining cases, statutes etc.[61] The qualitative data analysis analyzes a text rather than numbers. "The focus on text—on qualitative data rather than on numbers—is the most important feature of the qualitative analysis. The 'texts' that qualitative researchers analyze are most often transcripts of interviews".[62]

1.7 Limitations of the Study

This study has the following limitations:

The first limitation is the difficulty of the primary data collection in Iraq due to the unstable security situation in Iraq. The researcher faced difficulties in moving from one city to another in Iraq to conduct the face-to-face interviews with some judges and members of the governorate councils and members of the Council of Representatives. The second limitation included language barriers with the respondents, and lack of available data and adequate resources, just to name a few, were a hindrance to this

[61] Guru Dhillon, "A Legal Analysis On Money Laundering in the Football Industries of the United States of America, England and Malaysia" (PhD diss., The Ghazali Shafie Graduate School of Government, UUM, 2014), 13.

[62] Morrill et al., *Investigating the Social World* (publication place: ITTE, 2000), 321.

study. However, the researcher applied the ethical considerations and other strategies to face the above-listed limitations.

The translation of the interview questions became the third limitation. The questions were translated from English to Arabic and vice versa because the research area was Iraq where the official and spoken language of most of the population is Arabic. As a result, the translation process might have given rise to discrepancies and inaccuracies which may have negatively affected the research results. Nevertheless, the researcher was able to find a solution to this constraint by seeking the assistance of a native Arab who was fluent in both languages and was also an expert in translating.

The fourth limitation was the absence of any judgment relating to the relationship between the central government and the governorate councils. There were only the advisory decisions of the Federal Supreme Court, which were binding on all, as well as the advisory decisions of the State Shura Council, which were binding only for the party which requested the consultation. These advisory decisions had contributed to the increase in the research problem and have been discussed in this study.

1.8 Operational Definition

There are some important principles related to this study, which the researcher will also discuss here.

1- Administrative decentralization: According to Ismail, Administrative decentralization is "the method of administration which distributes the administrative competence between the central authorities that represent the ministries and the elected local councils which represent the administrative units; and to proceed, these local councils practise their authority under the control of the central authorities".[63] In another definition of administrative

[63] Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control", *Risalat AL-huquq Journal* (2012):23.

decentralization, Maher stated that, the distribution of the administrative functions is between the central government and the local entities, and then, they can make decisions concerning the administrative activities that are subject to the supervision and control of the central authority.[64] Also, Aaron said, "administrative decentralization refers to how much autonomy non-central government entities possess relative to the central control".[65] The administrative decentralization which has been discussed in this study can be defined as a distribution of the administrative functions between the central authority and the elected local councils. These councils have the authority to issue administrative decisions. Local councils are independent of the authority of the central government according to the law. And the central government only has control over the local units.

2- Federalism: According to Mohiuddin, Federalism "is the constitutional status based on the distribution of various government functions (legislative, executive, and judicial) between the federal government in the capital and the state governments or republics or cantons or other political units".[66] Also, Chery stated that federalism is "the distribution of the legislative, executive, and judicial powers, or a combination of two or more of them, between several levels of government".[67] Watts stated about Federalism that, "neither the federal nor the constituent units of government are constitutionally subordinate to the others, i.e., each has sovereign powers derived from the

[64] Maher Saleh Allawi, *Principles of Administrative Law, Comparative Study* (Baghdad: Dar books for printing and publishing, 1996), 38.
[65] Aaron Schneider, "Decentralization: Conceptualization and Measurement", *Studies in Comparative International Development* 38, no. 3 (2003): 38.
[66] Mohiuddin, referred to Abdul Jabbar Ahmed, "Federalism and Decentralization in Iraq", *Friedrich Ebert Stiftung,* (2013): 7.
[67] Cheryl Saunders, "Options for Decentralizing Power: Federalism to Decentralization", accessed November 4, 2016, http://comparativeconstitutionsproject.org/files/federalism.pdf:1.

constitution rather than another level of government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive, and taxing powers, and each is directly elected by its citizens".[68] As a result of the previous definitions, Federalism is the distribution of the public authorities between the central government and the states. Therefore, these states have the authority to issue laws and make administrative and judicial decisions. The states are independent of the central government, and any dispute between them is resolved by the Supreme Court, according to the Constitution.

3- The region (state): "The region is the geographical area, which has implemented the Federal system".[69] Also, Dave stated that, "the States have their own legislative branches, executive branches, and judicial branches. The states are empowered to pass, enforce, and interpret laws, as long as they do not violate the Constitution".[70] And Areej said, the state is an organic unity based on the historical, ethnic, linguistic, and geographical factors, and aims to set up a special independent political authority from the central authority and to manage the region[71]. Finally, according to Isra, the states are political units that give up some of their powers to the federal government.[72] The region (state) which has been mentioned in this study, is the geographical part of the country that has applied the federal system. therefore, the state

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[68] Referred to Daniel Treisman, "Defining and Measuring Decentralization: A Global Perspective." *Unpublished manuscript*, (2002): 95.

[69] See, article: 116 – 121 of the Iraqi constitution: http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

[70] Dave Ramsey, "Federalism", US Legal, accessed December 6, 2016, https://system.uslegal.com/federalism/.

[71] Areej Talib Kazem, "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008 " *Journal of Anbar University for Law and Political Sciences* 1, no. 3 (2011): 137

[72] Isra Aladdin, "Federalism in the Iraqi Constitution, the Reality and the Future After the American Withdrawal", *Risalat al-huquq Journal* (2012): 223.

shares the public authorities with the central government. So, it has legislative, executive, and judicial authorities. These authorities operate according to the federal constitution.

4- The Governorate: It "is a geographic area that is not incorporated into a region. It administers the affairs of the area in accordance with the principle of decentralized administration".[73] Mahmood said that, Administrative decentralization is based on the distribution of the administrative functions between the central authority and local entities (governorates), and some powers are granted to make decisions with regard to the administrative activities. The governorates are non-affiliated with the central authority, but are subject to the control and supervision of the central authority.[74] As well, Areej stated that, the governorate has a legal personality Independent of the central government, and exercises administrative functions on the part of the country's territories.[75] The governorates which have been mentioned in this study are the geographical parts of the country that have applied the administrative decentralization according to the constitution and thus, the governorates share the administrative function with the central authority. Therefore, they do not have the authority to issue laws, but can only issue administrative decisions have based on the Constitution and laws. These provinces have their own legal personalities and are independent of the

[73] See, article 122 of the Iraqi constitution.

[74] Mahmood Al-Zubaidi, "Administrative Competence of the Governorate Councils, Conflict and Overlap in the Light of the Law of Governorates Not Incorporated into a Region No. 21 of 2008". *Al-Hiqouq Journal* 3, no. 10 (2010):9.

[75] Areej Talib Kazem, "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008", *Journal of Anbar University for Law and Political Sciences* 1, no. 3 (2011): 143.

central authority, but are subject to the control of the central government as a source of the Constitution and the law.

5- The Federal Supreme Court is the supreme court of the country and its decisions are binding on all public authorities. It is competent for monitoring the constitutionality of the laws and decisions issued by the public authorities, as well as for interpreting the texts of the constitution and its provisions. The Court also considers the disputes between the central government and the regions and governorates.[76]

6- The State Shura Council is a specialist in administrative disputes that challenge administrative decisions; as well, it provides legal consultation for the interpretation of legal texts and clarifies the legal provisions for the legal texts when the ministries ask for it.[77] The State Shura Council is an administrative judicial council which applies the civil law and does not have a relationship with the Islamic Sharia. According to the Iraqi constitution,[78] Islam is a source of legislation, but not the only source of legislation in Iraq. Because Iraq is a multi-ethnic and religious country. Therefore, the administrative law in Iraq is a civil law. The reason for the term "Shura" is that, the State Shura Council established in 1979 was a consultant's competence only, meaning that the council interpreted the legal texts and clarified the legal provisions of the legal texts when the ministries required it. In 1989, the judicial competence was added to the State Shura Council.[79]

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[76] See Article 93 of the Iraqi constitution. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

[77] See Law of the State Shura Council 65 of 1979, chapter 2, Articles 6 and 7. And, See Qais Abdul Sattar Othman, "Scientific Importance for the Administrative Judicial," *Journal of the College of law /Al-Nahrain University* 16, no. 9 (2006).

[78] See Article 2 of the Iraqi constitution in 2005.

[79] See Qais Abdul Sattar Othman, "Scientific Importance for the Administrative Judicial," *Journal of the College of law /Al-Nahrain University* 16, no. 9 (2006).

The countries which apply administrative law own an administrative judiciary similar to the State Shura council. That means they have the judicial and consultative competence and apply the civil law. But, they use different terms for their administrative courts. For example, Egypt's administrative judicial system is called the "Council of State";[80] in Algeria, it is also called the "Council of State"[81], but in Tunisia it is called the "administrative judicial".[82] So, the terms vary from one country to another but have similar competence.

1.9 Literature Review

This study has focused on the review of a wide range of literature relevant to the current study. Firstly, it focused on the definition of administrative decentralization, secondly on the advantages of administrative decentralization and finally, on the ambiguity and poor wording of the constitution and the LGNIR.

Only a few studies provide an in-depth analysis of the problem about the constitution and the LGNIR. Therefore, this research has aimed to fill the gap in the existing literature by providing a comprehensive and in-depth analysis of this problem.

1.9.1 The Definition of Regional Administrative Decentralization

According to Aaron Schneider, in administrative decentralization, "the central government allows quasi-autonomous local units of government to exercise authority and control over the transferred policy. Administrative decentralization provides the greatest degree of autonomy for the local unit. The local unit is only accountable to

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[80] See Egyptian State Council Law No.47 of 1972. https://www.egypt.gov.eg/arabic/laws/download/newlaws/%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D9%85%D8%AC%D9%84%D8%B3%20%D8%A7%D9%84%D8%AF%D9%88%D9%84%D8%A9.pdf Accessed 7 December 2016.

[81] See Bujada Omar, *The Competence of the Administrative Judicial in Algeria* (diss., University Mouloud Mammeri Tizi-Ouzou, 2011).

[82] See Article 116 of the Tunisian Constitution. https://www.constituteproject.org/constitution/Tunisia_2014.pdf?lang=ar accessed 7 December 2016.

the central government insofar as the central government can impose its will by threatening to withhold resources or responsibility from the local unit", and "Administrative decentralization refers to how much autonomy non-central government entities possess relative to the central control" while "all share the assumption that decentralization includes the transfer of authority and resources away from the central government".[83]

There is another definition for administrative decentralization where it "contains a widely accepted definition that refers to a broad-based institutional reform aimed at improving governance through the transfer of responsibilities from the central government to other levels of governance".[84] In the same context, "decentralization is the transfer of part of the authorities of the central government to regional or local authorities".[85]

In the same concept, the definition refers to the provision of public services as well as the transfer of authority that says, "Administrative decentralization seeks to redistribute authority, responsibility and financial resources for providing public services among different levels of the government. It is the transfer of responsibility for the planning, financing and management of certain public functions from the central government and its agencies to field units of government agencies, subordinate units or levels of government, semi-autonomous public authorities or corporations, or area - wide, regional or functional authorities".[86] What is more, Elizabeth stated that, "Decentralization is usually referred to as the transfer of authorities from the central

[83] Aaron Schneider, "Decentralization: Conceptualization and Measurement", *Studies in Comparative International Development* 38, no. 3 (2003): 38.

[84] Lawrence D. Smith, *Reform and Decentralization of Agricultural Services: A Policy Framework* (n.p. Food & Agriculture Org., 2001).

[85] Jean Bonnal, "A History of Decentralization", General information, accessed July 7, 2016, http://www.ciesin.columbia.edu/decentralization/English/General/history_fao.html.

[86] The World Bank Group, "Administrative Decentralization", Decentralization and Subnational Regional Economics, 2001, accessed August 20, 2016, http://www1.worldbank.org/publicsector/decentralization/admin.htm.

government to lower levels in a political-administrative and territorial hierarchy." And the author added, "The term decentralization is used to cover a broad range of transfers of the locus of decision making from central governments to regional, municipal or local governments".[87]

Another definition of administrative decentralization is the "distribution of the administrative functions between the central government and local entities, whether they were utilities or regional and then, it can make decisions concerning administrative activities that are subject to the supervision and control of the central authority".[88] In the same context, "The method of the administration distributes the administrative competence between the central authorities that represent the ministries and local councils elected which represent the administrative units, and to proceed, these local councils practice their authority under the control of the central authorities".[89] Finally, there is definition mentioned granting legal personality to a part of the territory of the State "The recognition of the legal personality of part of the territory of the State with the consequence that grants the elected entities which represent it a degree of independence in the administration of its utilities under the control of the central authority".[90]

From a review of the above definitions, it is evident that administrative decentralization is the transfer of the administrative authority from the central government to the local entities which grants the legal personality to these entities

[87] Elizabeth Linda Yulian, "Decentralization, Deconcentration and Devolution: What Do They Mean?" (paper presented at the Interlaken Workshop on Decentralization, Switzerland, 2004), 1.

[88] Maher Saleh Allawi, *Principles of Administrative Law, Comparative Study* (Baghdad: Dar books for printing and publishing, 1996), 38.

[89] Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control", *Risalat AL-huquq Journal* (2012):23.

[90] Majid Ragheb Al- Helo, *Administrative Law* (Alexandria: Dar university publications, 1987), 113.

where its members are elected by local people. Therefore, administrative decentralization does not include the transfer of legislative authority.

Some of the definitions above indicated that local entities are subject to the control of the central authority. In some countries, such as France and Egypt, local authorities are subject to judicial control only. In Iraq, local entities are subject to parliamentary control only, while the executive authority does not have direct authority over governorate councils. If the executive authority sees that there are decisions issued by the governorate councils that are contrary to the law, the executive authority challenges them before the courts.[91]

On the other hand, the transfer of competence from the central government to local entities is usually by law and sometimes by the constitution as in Iraq. Therefore, the executive authority must abide by the law or the constitution and cannot exceed the powers of the local entities.[92]

1.9.2 The Advantages of Regional Administrative Decentralization

The literature review focused on a few aspects of the advantages of administrative decentralization. Some authors focused on the political attributes of administrative decentralization, i.e., how the principles of democracy are applied. The fact that the local administration has sought to fortify the nation's political, social, and economic construction by distributing the competence instead of allowing it to be concentrated in the nation's administrative capital.[93] Decentralization can also assist in the wider participation of the political, social, and economic activities of developing countries. If it is effective, decentralization helps to reduce the decision-making bottlenecks

[91] See chapter three of this study.

[92] Ibid.

[93] Salhi Abdul Nasser, "Regional Groups between Independence and Dependence." (master's thesis, University of Algeria, 2009-2010):12.

caused by the central government's planning and control of key economic and social activities. Decentralization also assists in the simplification of complex bureaucratic procedures and can also make the government officials more sensitive to the local conditions and needs. It also allows for a bigger political representation for the various cultural, ethnic, political, and religious groups in the decision-making process and also relieves the very senior managers in the central ministries from having to perform routine tasks, thus giving them more time to concentrate on the policies. In some countries, decentralization may shift the focus to the local level and result in more effective coordination of national, state, provincial, district, and local programmes and, at the same time, allow the local residents to participate in the decision-making process. At the same time, decentralization may also result in the creation of more creative, innovative, and responsive by permitting local experimentation. By allowing the citizens to have greater control of public programs at the local level,[94] political stability and national unity can also be enhanced.[95] Another important advantage of administrative decentralization is that the delivery of service will also improve. Administrative decentralization can assist the national government ministries to provide their services to a larger number of local areas.[96] At the same time, administrative decentralization also enhances the quantity and quality of the services and thus, makes the end-users who receive the better and more reliable services more

[94] Jennie Litvack and Jessica Seddon, Decentralization Briefing Notes (Washington: World Bank Institute Washington, 2002), 4.

[95] Cohen J. M. and Peterson S. B., Administrative Decentralization: A New Framework for Improved Governance, Accountability, and Performance (Cambridge: Harvard Institute for International Development, Harvard University, 1997), 1.

[96] Awal Hossain, "Administrative Decentralization: A Framework for Discussion and Its Practices in Bangladesh," Department of Public Administration University of Rajshahi (2004): 12.

willing to pay for it. Also, administrative decentralization enhances cost recovery and facilitates the raising of resources from providers other than the central government.[97] Also, decentralization has resulted in less poverty as the poverty was previously caused by the regional disparities. Decentralization has resulted in more attention being given to the existing socioeconomic factors, facilitated the steady increase in development efforts and promoted the collaboration between the government and non-governmental organizations, which has correspondingly increased transparency, accountability, as well as the response capacity of the government institutions.[98]

From the literature review, it is obvious that administrative decentralization produces benefits that are of a political, economic and social nature. When the locals manage their own affairs, it leads to better service delivery because they know their needs better than the central authority who is far away, and it also reduces the bottlenecks that hamper the service delivery. In addition to that, the application of the principles of democracy results in better cooperation amongst the locals which, in turn, helps them to hold their local council representatives accountable. The application of democracy not only reduces the central government's obligations, but it also gives the government more time to concentrate on matters that concern the nation as a whole.

From the above advantages of regional administrative decentralization, and definitions, it is clear that regional administrative decentralization is a distribution of administrative authorities between the central government and local entities. The local entities are granted authorities to manage their affairs and provide public services to the local population. Therefore, the local entities are granted the authority to manage

[97] The world bank group, "Administrative Decentralization," Decentralization and Subnational Regional Economics, 2001, accessed August 20, 2016, http://www1.worldbank.org/publicsector/decentralization/admin.htm.

[98] Jean Bonnal, "A History of Decentralization," General information, accessed July 7, 2016, http://www.ciesin.columbia.edu/decentralization/English/General/history_fao.html.

the public utilities, covering the province's territory, such as education, health, and municipalities, whereas, the central government is granted authority to manage the public utilities which cover the whole country's territory, such as electricity and water. Local authorities issue administrative decisions, not laws, but these decisions are binding on the local population and the central government cannot interfere in the competence of local entities. The councils that run local entities are elected by the local population, therefore they are accountable to local voters.[99]

As a representative of all the people of the country, the legislature usually distributes the competence between the central government and local entities. Therefore, the executive authority must not violate the competence of local authorities. However, in Iraq, the constitution is what distributes competence between the central authority and the governorates. The Iraqi constitution has granted the governorates the same competence of the regions, but the region can issue laws while the governorates issue administrative decisions only. As a result, the central legislative authority cannot amend the competence of the governorate councils because it is granted by the constitution.[100]

1.9.3 The Gradual Implementation of Regional Administrative Decentralization

Some authors are of the view that the decentralization process is and ought to be gradual.[101] The countries in the transition stage encounter many political and economic challenges that are frequently worsened by unrelenting corruption and internecine religious conflicts.[102] Many developing countries undergoing transition have weak central governments that are wary of losing their political or administrative powers to

[99] See chapter four of this study.
[100] See chapter three of this study.
[101] Khaldoun AbouAssi and Ann O'M. Bowman, "Special-Purpose Authorities: A Welcomed Alien to Decentralization in Lebanon?" *International Review of Administrative Sciences* (2015):16.
[102] Ibid.1

the local governments. For most of these countries, the administrative challenge is to enhance the delivery of public services and goods and, at the same time, substantively downsize the public sector mainly through increased devolution and delegation. Meeting this challenge will be especially difficult for many countries having weak centers as well as limited personnel and financial reserves.[103] The already difficult task is made more difficult in countries that are divided by ethnic, religious, and nationalist claims for greater local autonomy.[104] This is the case in Iraq. Lastly, some authors have opined that a strong central government is a requirement for a meaningful and effective administrative decentralization.[105]

Some observers have pointed out that the move to a decentralized system from a centralized one takes a fairly long time and requires political will as well as administrative and technical capacity. Experience has shown that effective decentralization strategies tend to start with Deconcentration and then, slowly devolve. More of the local units that have obtained a substantial devolution of resources and authority are in states that have undergone at least a decade-long process before attaining a more devolved form. For instance, Indonesia officially declared, in 1987, the decentralization of the urban services to the local government, but it took almost a decade before legislation was approved to formally transfer the responsibilities to the local government as well as assigning certain revenues to them. And, it took more than ten years before elections were held for local executives and legislative officials. In the case of the Philippines, it took ten years to develop the local government code and

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103 Cohen J. M. and Peterson S. B., *Administrative Decentralization: A New Framework for Improved Governance, Accountability, and Performance* (Cambridge: Harvard Institute for International Development, Harvard University, 1997),30.

104 Cohen J. M. and Peterson S. B., *Administrative Decentralization: A New Framework for Improved Governance, Accountability, and Performance* (Cambridge: Harvard Institute for International Development, Harvard University, 1997), 20.

105 Ibid. 26

assign the bulk of the income tax revenue to the local units.[106] Similarly, in France, the implementation of administrative decentralization was a gradual process[107] and this will be examined in Chapter Five of this research. Likewise, Colombia gradually changed from the system of appointing mayors and governors to the election system.[108] The World Bank Group said that the new international trend towards decentralization has triggered a lively debate about the ability of the local governments as well as communities to plan, finance, and administer their new responsibilities.[109] Small local governments without experience may lack the technical ability to implement and maintain projects and may not be trained to manage larger budgets effectively. As such, the conventional approach to decentralization is to build capacity first before transferring the responsibilities or revenues to the local units.[110] From the discussion above, it is obvious that the administrative decentralization should be implemented gradually.

Some authors have said that the disadvantages of decentralization include the loss of economies of scale and the central government losing control over scarce financial resources. The weak administrative or technical ability of the local government can result in inefficient and ineffective service delivery in some regions of the country.[111] However, it is contended that this disadvantage can be surmounted by implementing decentralization using a step by step method.

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[106] Derick W. Brinkerhoff and Ronald W. Johnson, "Decentralized Local Governance in Fragile States: Learning from Iraq", *SAGE- International Review of Administrative Sciences* 75, no. 4 (2009): 599.

[107] Emmanuel Brunet-Jailly. "France between Decentralization and Multilevel Governance: Central Municipal Relations in France". *McGill University Press* (2007): 6.

[108] Tulia G. Falleti, "A Sequential Theory of Decentralization: Latin American Cases in a Comparative Perspective", *American Political Science Association* 99, no. 3 (2005): 336.

[109] The World Bank Group, "Administrative Decentralization", Decentralization and Subnational Regional Economics, 2001, accessed August 20, 2016, http://www1.worldbank.org/publicsector/decentralization/admin.htm.

[110] Ibid.

[111] Ine Neven, "Decentralization" (national Forest Programmes in the European Context, Wageningen, The Netherland, August 26,2011), 6.

The disadvantages of migrating from the centralized system to a decentralized one that were discovered by this study during the literature review are already present in Iraq. The problem is not with the decentralized system, but it is how the system is applied. For many years, Iraq was using the centralized system where the administration was fully controlled by the central government and then, all of a sudden, the administration was transferred to the local units which had no experience in managing the political and administrative activities. This lack of experience was the cause of the weaknesses that arose when Iraq implemented the decentralized system. The weaknesses included inefficiency in the management of public utilities, inability to provide the required inputs to manage the local affairs and extensive corruption caused by the inexperience of the local community when choosing their representatives to sit in the local councils. Therefore, Iraq must take advantage and learn from what other countries, for example Indonesia, the Philippines and France, have done, i.e., they migrated gradually from the centralized system to the decentralized system. Therefore, Iraq ought to do the same.

On the other hand, with regard to the administration of the territories in the Islamic state, the authors stated that the[112] Head of State is on top of the administrative body, and he is responsible for the state and works to its advantage. Therefore, Prophet Muhammad punished Al- Wally because there is a lack in its work. Also, that the delegation of authority does not mean giving up the right to supervise and do the follow-up.[113] The Prophet supervised and did followed-up on Al-Wally's decisions. Also, Caliph Omar followed Prophet Mohammed in this approach. The delegation does not mean delegating responsibility. The Caliph remained responsible for the

[112] Mohamed Raafat Othman, "*Principles of Management Thought in Islam", In Administration in Islam* (Egypt: Islamic Institute for Research and Training, 1990), 136

[113] Mohammed bin Ali Al Ameri, "Administrative Regulation in Islam", 2013, accessed August 10, 2016, http://sst5.com/readArticle.aspx?ArtID=1259&SecID=77.

territories of the state. Caliph Omar bin Al-Khattab considered himself responsible for all the territories of the state.[114] Also, the authority can be delegated, but the responsibility is not delegated. In the current context, Abdul-Jabbar[115] stated that Caliph Omar's observation was severe and strict on Al-Wally.

Some authors said[116] clearly that the administration system in the early days of Islam was a form of administrative centralization. The concept of authority in Islam is based on the sovereignty of God Almighty, and this sovereignty is vested in the Caliph who is considered the head of the administrative system. So, according to this concept, the administration system is centralized. On the other hand, there is another opinion[117] which stated that it is not an exaggeration to say that had the authorities not been fully granted into the hands of Caliph Omar, the Muslims would not have achieved miracles in such a short time.

It is clear that the system applied in the early Islamic Period was the central system and that its justifications were ideological. But, the issue did not create real problems because the Islamic state did not expand much at the time. However, after the expansion of the Islamic state in subsequent years, there was a need to apply the decentralized system because it became practically impossible to continue to implement the central system.

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[114] Mohammed Ahmed Ismail, "Principles of Administrative Organization in Islam", Arab Forum for Human Resource Management, October 14, 2012, accessed August 10, 2016, http://www.hrdiscussion.com/hr56307.html.

[115] Abdul Jabbar Sattar Al-Bayati, "The Administration Organization, in the Era of (The Orthodox Kaliphs), Omar Bin Alkhatab (May God Be Pleased with Him) as an Exemplary", *Journal of Literature Ink* 1, no. 4 (2012): 356.

[116] Mentioned Al- Kotob Mohammed Al- Kotob, *Management System in Islam - a Comparative Study of Contemporary Systems* (Cairo: Dar Arab Thought, 1978), 66.

[117] Muhammad Kurd Ali, "Islamic Administration at the Height of the Arabs" (Cairo: Printing house Egypt, 1934), 65.

During the Abbasid Caliphate, the administration system was a decentralization system, in which Harun Al-Rasheed granted wide authorities to Al- Wally.[118] The Harun Al-Rasheed regime was between 170 and 193 AH. In his era, the Abbasid state reached the top of its authority. So, it can be concluded from all the foregoing that administrative decentralization was implemented in the Islamic state, gradually. On other hand, the implementation of regional administrative decentralization was important in administrating the Islamic state, especially after the expansion of the state and the entry of different nationalities and cultures into the state because of the conquests and the embrace of many people of the Islamic religion.[119]

1.9.4. The Ambiguity of the Constitution and Poor Wording of the LGNIR

The literature review agreed that the governorate councils do not have the right to issue laws because they apply the principle of administrative decentralization.[120] The authors have stated that the reason for the issuance of laws by the governorate councils is the LGNIR.[121] Also, that the LGNIR is not successful in its wording. It has defined the governorate council as the highest legislative and executive authority within the borders of the governorate so that it can manage its affairs according to the principle of administrative decentralization, not inconsistent with the Constitution and federal laws. A closer look at this text can find that its content to be inconsistent. On one hand, it granted to the governorate council the right to administer its affairs in accordance

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118 Al- Kotob Mohammed Al- Kotob, *Management System in Islam - a Comparative Study of Contemporary Systems* (Cairo: Dar Arab Thought, 1978), 99.

119 See Abdullah bin Hussein Assaf al-Assaf. "Central Relationship and Decentralization with Job Performance". *Naif Arab Academy for Security Sciences*, 2003. P. 52.

120 Yamama Mohamed Hassan, "The Impact of Legislative Wording on the Application of the Laws (the Study of the Law of Governorates Not Incorporated into a Region No. 21 of 2008)" Al-Hiqouq Journal 4, no. 18 (2012). And Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control", Risalat AL-huquq Journal (2012).

121 Areej Talib Kazem, "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008" Journal of Anbar University for Law and Political Sciences. And Mahmood Al-Zubaidi, "Administrative Competence of the Governorate Councils, Conflict and Overlap in the Light of the Law of Governorates Not Incorporated into a Region No. 21 of 2008", Al-Hiqouq Journal 3, no. 10 (2010).

with the principle of administrative decentralization, which is not inconsistent with the Constitution and federal laws. But on the other hand, the description of the governorate council as a legislative authority having the right to issue local legislation within the governorate violates the principle of administrative decentralization and the Constitution. It is clear that the law is inconsistent. The erroneous wording of the LGNIR has led to the erroneous application by the governorate councils and the issuance of laws.[122] Other studies have said that the law made the governorate councils apply the federal system when they were allowed to issue laws.[123]

The literature review states that the LGNIR grants to the governorate councils the authority to issue laws, which is a violation of the administrative decentralization principle. However, there is a gap between what was stated in the literature review and the legal text. Since, the LGNIR stipulates that governorate councils issue "local legislation" and the law does not provide the term "local laws". The term legislation is broad, it includes laws and decisions, as will be explained in this study. The LGNIR stipulates that the governorates apply the principle of administrative decentralization, i.e., it does not issue laws. The confusing wording of the LGNIR led to the belief that the Law grants to the governorates the authority to issue laws.

On the other hand, some studies stated that the constitution did not give governorate councils the authority to issue laws[124] and thus, it exceeded the scope of the

122 Yamama Mohamed Hassan, "The Impact of Legislative Wording on the Application of the Laws (the Study of the Law of Governorates Not Incorporated into a Region No. 21 of 2008)" Al-Hiqouq Journal 4, no. 18 (2012): 11.

123 Areej Talib Kazem, "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008" Journal of Anbar University for Law and Political Sciences 1, no. 3 (2011).

124 Yamama Mohamed Hassan, "The Impact of Legislative Wording on the Application of the Laws (the Study of the Law of Governorates Not Incorporated into a Region No. 21 of 2008)" Al-Hiqouq Journal 4, no. 18 (2012): 7. And Areej Talib Kazem, "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008" Journal of Anbar University for Law and Political Sciences 1, no. 3 (2011).

administrative and financial authorities granted to it by the Constitution.[125] Which was that the Constitution stated granting the wide administrative and financial authorities to the governorates to enable them to administer their affairs in accordance with the principle of decentralized administration. And, if the Constitution wanted to grant legislative competence to the governorates, it could explicitly provide for the legislation of laws, like the Constitution did with the states. Further, when the LGNIR states that the governorate council is the legislative authority, it has exceeded the administrative and financial authorities granted by the Constitution to the governorates. This is in spite of the agreement of the Constitution and the LGNIR about the implementation of the regional administrative decentralization.[126] Other authors mentioned that in addition to the LGNIR, the reason for the issuance of laws by the governorate councils is the broad powers granted by the Constitution in Article 122 as well as the ambiguity of Article 115 which was interpreted by the governorate councils as granting them the authority to issue laws to the governorates.[127]

Article 122 only provided for broad administrative and financial powers under the principle of administrative decentralization. Therefore, the governorates have not been granted legislative authority. And the ambiguity of Article 115 can be overcome by interpreting the Article through a professional authority competent to interpret it.

Some authors mentioned the advisory decisions of the Federal Supreme Court and the State Shura Council and criticized the decisions of the Federal Supreme Court.

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125 Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control", Risalat AL-huquq Journal (2012): 31.

126 Mohammed Jabar Taleb, "Constitutional Competence to the Provinces Not Incorporated into a Region in Iraq's 2005 Constitution", Risalat Al-Huquq Journal no. 2 (2015): 214.

127 Areej Talib Kazem, "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008" Journal of Anbar University for Law and Political Sciences 1, no. 3 (2011). And Read Naji Ahmed, "The Extent of the Competence of the Governorates Not Incorporated into a Region to Impose Taxes and Fees (Specialized Legal Study in the Legal System in Iraq)" Journal of college of Law for Legal and Political Sciences 4, (2015).

However, to overcome the result of the Court's decisions, they recommended amending article 115 to clarify its ambiguity.[128] That is, these authors focused on the text, not the performance of the court.

Finally, there is a study which mentioned that an Overlap and conflict can happen in the exercise of the authorities or prerogatives of the state or governorates which are not incorporated into a state because of the difference in the interpretation of the constitutional or legal provisions. Here, the author mentioned a problem in the regional administrative decentralization in Iraq, but he did not highlight the means of addressing the problem. The author just mentioned the amendment of the LGNIR. He did not mention how to address the differences in the interpretation. The researcher thinks that there must be a legal authority that owns the efficiency of the interpretation, and its decision is binding on all parties.[129]

All of the literature reviewed recommended the amendment of the Constitution and the LGNIR. There is a gap in these recommendations:

First, it is not easy to recommend amending the constitution if there is another way to remove the ambiguity from its texts. Where, the procedures for amending most constitutions of countries are usually more complicated than the amendment of the law. And in Iraq, an amendment to the constitution requires a two-thirds majority vote in parliament and a referendum.[130] This is difficult in light of the current political and legal situation in Iraq. Because, the system of electing members of parliament is the

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128 Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control", Risalat AL-huquq Journal (2012). And Areej Talib Kazem, "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008" Journal of Anbar University for Law and Political Sciences 1, no. 3 (2011).

129 Mahmood Al-Zubaidi, "Administrative Competence of the Governorate Councils, Conflict and Overlap in the Light of the Law of Governorates Not Incorporated into a Region No. 21 of 2008", Al-Hiqouq Journal 3, no. 10 (2010):24.

130 Article 126 of Iraqi Constitution. See: http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

proportional system.[131] Therefore, the parliament is composed of many parties that do not politically agree with each other. Although the text of Article (142) of the Constitution provides for the amendment of some articles after the implementation of the Constitution, there has been no amendment to the Constitution since it went into force in 2005 to date.

Second, why is it recommended to amend the Constitution to remove ambiguity in some of its texts, whilst the Constitution provides for a competent authority to interpret its ambiguous texts, which is the Federal Supreme Court. Why not focus on the performance of the Federal Supreme Court instead of focusing on the amendment of the vague texts of the Constitution. And, why not focus on the performance of the State Shura Council, which is the competent authority to interpret the provisions of the law.

Third, it is true that the LGNIR should be amended because there are loopholes in its wording. However, emphasis should also be placed on the performance of the competent authorities to interpret the texts of the Constitution and the law, to overcome any ambiguity in the texts regarding the application of the decentralized system even after the amendment of the law.

In the end, this study has tried to find a practical solution to the problem of issuing laws by the governorates.

1.10 Outline of the Chapters

The thesis consists of six chapters. It is organized as follows:

Chapter One: includes the background of the study, Statement of the Problem, research questions, research objectives, the significance of the study, research methodology, study limitations, related literature and the outline of the chapters.

[131] Article 16 of Election Law No. 16 of 2005. See: http://www.iraqld.iq/pdf/2005/e0054.pdf. Accessed 8 August 2018.

Chapter Two: The concept of federalism and regional administrative decentralization and analyze the impact of harmonizing and how it can be effectively executed in Iraq.

Chapter Three: Analysis of the legal text of the Iraqi Constitution regarding administrative decentralization.

Chapter Four: Examination of the loopholes in the wording of the LGNIR in Iraq. And how to address them.

Chapter Five: Analyses the implementation of administrative decentralization in Iraq by looking for examples from selected countries.

Chapter Six: Presentation of the conclusion. It also presents the results of the study, and then it presents the practical and theoretical contributions to the study, followed by suggestions for future research.

CHAPTER TWO: THE CONCEPT OF FEDERALISM AND REGIONAL ADMINISTRATION DECENTRALIZATION AND ANALYSE THE IMPACT OF HARMONIZING AND HOW IT CAN BE EFFECTIVELY EXECUTED IN IRAQ

2.1 Introduction

There are several different factors, political, economic, social, religious, historical, and ethnic, that determine how the state administers its affairs.[132] There are many ways to run the state. According to the classifications made by the United Nations Development Program and the articles of the World Bank, the methods of administration of states are the central system as well as political (Federalism), administrative, financial, and market decentralization.[133]

Despite the spread of decentralization in the world since the 1980s,[134] the centralized method cannot be ignored by any country in the world. This is because the state cannot function without the sovereign power of the central government, such as the functions of the state and Defense Ministry.[135] But, what is centralization?

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[132] See Dilip B. Gupta and Sujit G. Metre, "Decentralization and Delegation of Authority at Nagpur Municipal Corporation (Nmc) Nagpur," *International Journal of Management (IJM)* 6, no. 3 (2015): 39. And Ine Neven, "Decentralization" (national Forest Programmes in the European Context, Wageningen, The Netherland, August 26,2011),4,6.

[133] Awal Hossain, "Administrative Decentralization: A Framework for Discussion and Its Practices in Bangladesh," *Department of Public Administration University of Rajshahi* (2004): 3.

[134] Ine Neven, "Decentralization" (national Forest Programmes in the European Context, Wageningen, The Netherland, August 26,2011),4. And Centre for Financial and Management Studies. "Decentralisation and Local Governance." University of London, 2016: 3.

[135] See Cheryl Saunders, "Options for Decentralizing Power: Federalism to Decentralization,", accessed November 4, 2016, http://comparativeconstitutionsproject.org/files/federalism.pdf: 3. And Ine Neven, "Decentralization" (national Forest Programmes in the European Context, Wageningen, The Netherland, August 26,2011), 6.

According to Quashie, centralization "is a collection of competence and authorities by the public officials in the capital."[136] In the same context, Al-Zoubi stated that centralization "is a restriction of all appearances of the administrative function and administrative activity in one entity or a single authority exercised in all parts of the state in the same way or style."[137] Al-aqbilat said that the central government of the state which adopts centralized administrative regulation is administrating all the public utilities.[138] On the other hand, Andrews et al, stated that "A centralized organization will typically have a high degree of hierarchical authority and low levels of participation in decisions about policies and resources; while a decentralized organization will be characterized by low hierarchical authority and highly participative decision-making."[139]

On this matter, some studies have indicated that the centralized administration system was an option newly formed country chose as it is consistent with its then economic, social and political conditions. This system has assisted these countries to maintain the sovereignty of its territory, application of the rule of law as well as eradicating separatist conflicts that usually occur at the early stage of the emergence of a new state.[140] What these studies mentioned is the pretext which the central governments has held in the newly formed states after independence to implement the central system. Another study revealed that colonialism officially undid the traditional

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136 Quashie Attica, "Administrative Decentralization in the Maghreb - a Comparative Analysis" (master's thesis, Political Science, 2010-2011), 20.

137 Mentioned, Hadeel Kadhim Saeed and Essam Majeed Al-Allak, "The Relationship of the Central Government with Local Governments in the Light of the Centralized and Decentralized Administration - Field Research in the Baghdad Governorate Council.," *Journal of Economic and Administrative Sciences* 21, no. 85 (2015): 142.

138 Also mentioned, Hadeel Kadhim Saeed and Essam Majeed Al-Allak, "The Relationship of the Central Government with Local Governments in the Light of the Centralized and Decentralized Administration - Field Research in the Baghdad Governorate Council.," *Journal of Economic and Administrative Sciences* 21, no. 85 (2015): 142.

139 Andrews R et al., "Centralization, Organizational Strategy, and Public Service Performance," *Journal of Public Administration Research and Theory* 19, no. 1 (2009): 4.

140 Quashie Attica, "Administrative Decentralization in the Maghreb - a Comparative Analysis" (master's thesis, Political Science, 2010-2011), 20.

institutions of civil society and the Muslim community witnessed the advent of extremely centralized, despotic and often corrupt governments.[141] Corruption is one of the products of the centralized system and it arises when the government deploys employees of the ruling party to manage the local public utilities.[142] Politicizing the civil service has given birth to corruption.[143] Egypt's 2007[144] report on transparency stated that the central government's monopoly of the most basic services is one of the causes of corruption. Also, centralization has resulted in the tyranny of the central authority[145] and also poor service delivery.[146]

From the above, it can be seen that the centralized system is totally different from the decentralized system as power will be concentrated in the central government, corruption will become more widespread and public services will deteriorate. Therefore, if a country wants to be democratic and have good public services and minimal corruption it must not adopt the centralized system as the aforementioned advantages can only materialize if the decentralized system is implemented.

There are several types of decentralization in the world; but here, this chapter will study federalism (political decentralization) and regional administrative decentralization because, the Iraqi constitution adopted these systems, and the Iraqi

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141 Khaled Abou El Fadl, "Injustice in God's Name: The Corruption of Modern Islam," Religion and ethics, September 24, 2012, accessed July 22, 2017, http://www.abc.net.au/religion/articles/2012/09/24/3596547.htm.

142 Mentioned Fumihiko Saito, *Foundations for Local Governance Decentralization in Comparative Perspective* (Ryukoku University: Physica-Verlag Heidelberg, 2008), 141.

143 Ibid

144 Administrative corruption. (2007). [online] Egypt: Transparency and Integrity Committee. Available at: http://mpmar.gov.eg/ar-eg/mop/unity-government/Upload_Main_Entity_Db_AssetMedia_Filename_5ac8f3ebdb057e6c081c76019c4c4cf2.pdf [Accessed 26 Jul. 2017].

145 See Member of the Palestinian Legislative Council Azmi Shuaibi before the Council on 18/2/2004. https://www.aman-palestine.org/data/.../b9a0d0a7e8ddc106320b0311d3191493.doc. Accessed 26/7/2017.

146 See Fumihiko Saito, *Foundations for Local Governance Decentralization in Comparative Perspective* (Ryukoku University: Physica-Verlag Heidelberg, 2008), 2.

constitution divided the competence between the central government (the federal government), on the one hand, and the states and governorates (which implement the regional administrative decentralization) on the other.[147] It means that the Constitution has granted the states and governorates the same competence (but not the same authorities). In addition, the constitution has granted broad competence to the governorates.[148] All these approaches by the constitutional legislator have led to some authors saying that the constitutional legislator removed the barriers between the federal system and the decentralized administrative system and merged them. Therefore, governorate councils can issue laws like states.[149] As well, this approach to the Constitution has led the governorate councils to issue laws based on the Constitution in addition to The Law of Governorates Not Incorporated into a Region No. 21 of 2008 (LGNIR).[150] This points to the problem dealt with in this study. Therefore, this chapter will clarify the elements of the federal system and the decentralized regional administrative system, so that the two systems can be sorted out when interpreting the provisions of the constitution. This chapter will also discuss the advantages of the two systems for clarifying the benefits of adopting these two systems by the Iraqi constitution, an approach which has caused many arguments.[151]

147 See Articles (110-115) of the Iraqi constitution. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

148 Article 122 of the Iraqi constitution.

149 See Read Naji Ahmed, "The Extent of the Jurisdiction of the Provincial Non-Performing Province to Impose Taxes and Fees Specialized Legal in the Legal System in Iraq", *Journal of college of Law for Legal and Political Sciences* 4, (2015):411.

150 See Yamama Mohamed Hassan, "The Impact of Legislative Wording on the Application of the Laws (the Study of the Act of Governorates Not Incorporated into a Region No. 21 of 2008)", *Al-Hiqouq Journal* 4, no. 18 (2012): 7.

151 Read Naji Ahmed, "The Extent of the Jurisdiction of the Provincial Non-Performing Province to Impose Taxes and Fees Specialized Legal in the Legal System in Iraq" *Journal of college of Law for Legal and Political Sciences* 4, (2015):392.

2.2 Federalism

This section will explain several aspects about federalism, which are the definition, advantages, distribution of the competence, and federalism in the Iraqi constitution.

2.2.1 The Definition of Federalism (Political Decentralization)

Cheryl stated that federalism is "the distribution of legislative, executive and judicial power, or a combination of one or more of them, between several levels of government".[152] In the same context, Mohiuddin said that federalism "is the constitutional status based on the distribution of various government functions (legislative, executive and judicial) between the federal government in the capital and the state governments or republics or cantons or other political units whereby they practiced internal sovereignty and established a parliament and a government".[153]

The above definitions have clearly stated the division of the legislative, executive, and judicial authorities between the central government and local governments.

On the other hand, Watts statement about federalism is that "neither the federal nor the constituent units of government are constitutionally subordinate to the other, i.e. each has sovereign powers derived from the constitution rather than another level of government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers and each is directly elected by its citizens."[154]

In the same context, Hueglin and Fenna, said "In a federal system of government, sovereignty is shared and powers divided between two or more levels of government

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[152] Cheryl Saunders, "Options for Decentralizing Power: Federalism to Decentralization", accessed November 4, 2016, http://comparativeconstitutionsproject.org/files/federalism.pdf:1.

[153] Referred to Abdul Jabbar Ahmed, "Federalism and Decentralization in Iraq", *Friedrich Ebert Stiftung* (2013): 7.

[154] Referred to Daniel Treisman, "Defining and Measuring Decentralization: A Global Perspective." *Unpublished manuscript*, (2002): 95.

each of which enjoys a direct relationship with the people."[155] And, Chery stated that, federalism is the "division of governing authority between the center and one or more other orders of government in a way that gives each of them final autonomy in their own areas of responsibility."[156] Finally, Kelemen stated that "Federalism is an institutional arrangement in which (a) public authority is divided between state governments and a central government, (b) each level of government has some issues on which it makes final decisions, and (c) The Supreme Federal Court adjudicates disputes concerning federalism."[157]

The above definitions imply that there is no dependent relationship between the central government and state governments. It even states that they are individually answerable to their own constituency. In the event of disputes between the federal government and state governments, the Supreme Federal Court adjudicates the disputes between them. From all of the above-mentioned definitions, it can be said that federalism is the distribution of the three powers (executive, legislative and judicial) by the constitution between a central government and the regional governments. The central government does not control the state governments, but these governments are responsible to their own respective constituencies. As a result, the Supreme Federal Court is responsible for the adjudication of conflicts between the federal government and the state governments.

[155]Referred to Daniel Treisman, "Defining and Measuring Decentralization: A Global Perspective." *Unpublished manuscript*, (2002): 95.

[156] Cheryl Saunders, "Options for Decentralizing Power: Federalism to Decentralization,", accessed November 4, 2016, http://comparativeconstitutionsproject.org/files/federalism.pdf:2.

[157] Referred to Daniel Treisman, "Defining and Measuring Decentralization: A Global Perspective." *Unpublished manuscript,* (2002): 95.

2.2.2 The Advantages of Federalism

According to most authors, the roots of the federal system can be traced back to the United States as it implemented this system in 1789. In the twentieth century, especially during the last forty years,[158] the implementation of the federal system spread across the world. So, what are the reasons that have led to the application of this system?

The use of federalism comes with some advantages and this has led to its popularity all over the world. Some scholars have at contended that decentralization inspires such positive incentives by amplifying the democratic accountability of the state. The basic instinct here is that governments will be more accountable if it is closer to its citizens. For instance, the citizens will have better oversight of the public officials' behavior if they are residing in the same region as compared to them operating far away from the nation's capital.[159] In addition to that, federalism also gives the citizens and their elected representatives more authority in public decision-making. It is also frequently associated with a pluralist and representative government which supports democratization by allowing the citizens or their representatives to have a bigger say when policies are being formulated and implemented.[160]

Other than the democratic advantages of federalism, it also has advantages that help to improve the delivery of services to the residents. Federalism also improves

[158] See Sebastian Freille, M Emranul Haque and Richard Kneller. "Federalism, Decentralisation and Corruption." *SSRN*, (2007):2.
[159] Referred to Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 635.
[160] Referred to Awal Hossain, "Administrative Decentralization: A Framework for Discussion and Its Practices in Bangladesh," *Department of Public Administration University of Rajshahi* (2004): 3.

transparency in the government and this in turn results in better public services.[161] Federalism inspires the delivery of the best government service at the lowest cost.[162] Supporters of political decentralization presume that if decisions are made with greater participation it will be better informed as well as more relevant as compared to those made by the national political authorities. This concept suggests that selecting representatives from the local community permits the local people to know their political representatives better and this in turn implies that the elected political representatives will have a better understanding of the needs and desires of the local populace.[163]

However, some authors have opined that federalism can protect states that are in danger of being split.[164] A few countries have depended on decentralization with the objective of maintaining national cohesiveness. The specific impact that decentralization has on cohesiveness will probably only become an issue if the country is highly divided and will likely vary on a case-by-case basis.[165]

The researcher can conclude, that the federal system leads to the application of the principles of democracy, as the local citizens elect their representatives to manage their affairs. Federalism also leads to improvement in the delivery of public services to the people through local governments that are closer to the citizens than the central

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[161] See Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 635.
[162] See Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 636.
[163] Jennie Litvack and Jessica Seddon, *Decentralization Briefing Notes* (Washington: World Bank Institute Washington, 2002), 2.
[164] See Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 637.
[165] Referred to Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 637.

government. Besides that, federalism also protects countries that contain multiple nationalities and religions from dislocation, "such as Switzerland",[166] and grants the right to these nationalities and religions to govern themselves within a federal state. In addition, the federal system allows several states to form a federal state "like the United States".[167]

In contrast, some studies have stated that federalism has a few disadvantages. For example, decentralization can aggravate fiscal deficits and threaten the macro-economy as well as political stability, and this has happened in some Latin American countries.[168] Also, if there are more levels of government there will be more opportunities for abuse of power especially when government official at the local government units may be less qualified. Even if the local governments have enough revenue streams, they may not have the necessary administrative resources govern effectively. Many regional governments do not have enough trained civil servants to implement their policies and this conundrum becomes more acute in developing countries.[169]

The disadvantages of federalism can be overcome by the gradual application of federalism[170] in order to increase local government expertise and for the people to understand the nature of federalism, as well as, if possible, the gradual elimination of

[166] Referred to Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 637.
[167] Michael Burgess, *Comparative Federalism Theory and Practice* (USA and Canada: Routledge, 2006), 61.
[168] Jean-Paul Faguet, "Decentralization and Governance," the Economic Organization and Public Policy Programme, 2011, accessed November 8, 2016, https://core.ac.uk/download/pdf/6821109.pdf:26.
[169] Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 635.
[170] Cheryl Saunders, "Options for Decentralizing Power: Federalism to Decentralization,", accessed November 4, 2016, http://comparativeconstitutionsproject.org/files/federalism.pdf:11.

the tendencies of separation, therefore, the advantages of federalism overcome its disadvantages.

Federalism is successful when there is a harmony between the federal government and the states. For examples of successful federalism look at the United States, the home country of the federal system. Michael says, "Any comparative study of federalism and federation is compelled repeatedly to return to the American federal experience not because it is the prototype making all subsequent federations mere carbon copies but because many aspects of that experience retain a significance for contemporary federal experiments."[171] The US federal system has continued from 1789 until now. It consists of many religions and ethnicities as the American communities consist of immigrants from many different countries of the world.[172]

The Federal United States was formed by declaring the US Constitution in 1789. The United States consists of 50 states plus Washington, DC. On the other hand, the federal government consists of the Congress (the legislature) and the President of the Republic with the ministers and the judiciary. The Congress consists of two councils: the Council of Representatives and the Senate.[173]

The formation of the legislature from two councils is to achieve parity among the states and the prevention of dominance of large states over small states in legislative

[171] Michael Burgess, *Comparative Federalism Theory and Practice* (USA and Canada: Routledge, 2006), 72. Larry

[172] Mohammed Mahjoub, *Constitutional Law and the Political System in Lebanon and the Most Important Constitutional and Political Systems in the World*, 4th ed. (Beirut: Elhalabi Alhgogy Publications, 2002), 189.

[173] See Larry Elowitz, *Government in the United States of America* (Cairo: The Egyptian Society for the Dissemination of Universal Culture and Knowledge, 1996).

authority. The Council of Representatives is composed of elected members representing their states, proportional to the number of the population of each state. But, each state has two members in the Senate, regardless of the size of the state and these members are also elected. On the other hand, the duration of membership in the Council of Representatives is two years, while the duration of membership in the Senate is six years, and the renewal of one-third of the Council each two years. The duration of the Senate, which represents the states equally, makes it stronger than the Council of Representatives. As well, the long duration for the Senate, makes it more stable than the Council of Representatives, and gives it the best performance. [174]

There are rules stipulated in Article 4 of the Constitution, governing the relationship between the states, including that each state must recognize the official documents and records of other states. Also, the citizens of each state must enjoy the privileges and immunities of the citizens of other states. For example, a citizen in a state has access to the courts in any other state. As well, Article 4 of the Constitution stipulates that any citizen who did a crime in a state and escaped to another state must be extradited when the executive authority in the state concerned requests it.[175]

One of the factors that has helped support US federalism is the application of cooperative federalism, which refers to the involvement of states and the federal government in bearing administrative responsibilities in the public projects. The field of education is the best example of this issue. While the federal government provides the necessary financial assistance, the states address the curriculum and define the

[174] Zuhair Shukr, *General Theory of Constitutional Judiciary - part One* (Beirut: Dar Bilal, 2014), 170.

[175] Larry Elowitz, *Government in the United States of America* (Cairo: The Egyptian Society for the Dissemination of Universal Culture and Knowledge, 1996), 32.

qualifications of those who teach in schools. On the other hand, the federal government contributes to many projects, but the states must bear a part of the costs of these projects. Also, the federal government grants to the states the land for the establishment of universities. These grants also contribute to the construction of railway lines and the establishment of flood control centers. These grants have increased in recent decades; these huge grants are paid for with federal taxes.[176]

2.2.3 The Distribution of Competence in Federalism

In federalism, the constitution divides the competence between the central government and the states.[177]

There are several ways for the division of competence between the central government and local governments. Countries differ in the ways the competence are distributed, and the difference is due to the political and historical factors relating to each country.[178]

The most prominent way adopted by some countries to divide the competence is to list the competence of the central government, and to leave the rest to the states, such as in the United States of America.[179] Another way is to list the competence of the central government, and of the states, as well as a list of the concurrent competence, such as

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[176] Larry Elowitz, *Government in the United States of America* (Cairo: The Egyptian Society for the Dissemination of Universal Culture and Knowledge, 1996), 36.

[177] See Abdul Ghafoor Kareem Ali and Khudair Haji Rasool, "The Federalism..... Legal and Objective General Notes," *Journal of Kirkuk University Humanity Studies* 4, no. 1 (2009): 111. And Cheryl Saunders, "Options for Decentralizing Power: Federalism to Decentralization,", accessed November 4, 2016, http://comparativeconstitutionsproject.org/files/federalism.pdf: 4

[178] See Abdul Ghafoor Kareem Ali and Khudair Haji Rasool, "The Federalism..... Legal and Objective General Notes", *Journal of Kirkuk University Humanity Studies* 4, no. 1 (2009): 113. And Michael Burgess, *Comparative Federalism Theory and Practice* (USA and Canada: Routledge, 2006), 136.

[179] See Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 638.

in India.[180] In the same context, the scholars also mentioned other ways to divide the competence such as, to list the competence of the states, and leave the rest to the central government.[181]

The most prominent method for the distribution of competence is the one that determines the list of the competence of the central government and then leaves the rest of the competence to the states.[182] There are scholars who have said that this method leads to the strengthening of the central government.[183] But, other scholars have said that this method leads to the strengthening of the states.[184]

The researcher is of the opinion that this method leads to the strengthening of the states because the constitution will determine a list of the competence of the central government, which are related to the sovereign authorities, and the competence which are related to more than the state or over the entire country. in contrast, leaving the rest of the competence, which are not specific, to the states. This method is used to convince separate and independent countries to merge and form a new country.

The distribution of the competence by the constitution gives guarantees to the states, as it cannot amend the competence without amending the constitution, , and the

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[180] Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 638.

[181] See, Areej Talib Kazem. "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008 " *Journal of Anbar University for Law and Political Sciences* 1, no. 3 (2011):140. And Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 638.

[182] Abdul Ghafoor Kareem Ali and Khudair Haji Rasool, "The Federalism..... Legal and Objective General Notes", *Journal of Kirkuk University Humanity Studies* 4, no. 1 (2009): 111.

[183] See Michael Burgess, *Comparative Federalism Theory and Practice* (USA and Canada: Routledge, 2006), 136.

[184] See Abdul Ghafoor Kareem Ali and Khudair Haji Rasool, "The Federalism..... Legal and Objective General Notes", *Journal of Kirkuk University Humanity Studies* 4, no. 1 (2009): 111. And Areej Talib Kazem, "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008", *Journal of Anbar University for Law and Political Sciences* 1, no. 3 (2011):140.

procedures for amending the constitution are to be shared between the states and the federal government.[185]

2.2.4 Federalism in the Iraqi Constitution.

After knowing the elements of federalism and general principles of the distribution of competence between the federal government and the states. The research studied the federal system which adopt by the Iraqi constitution to distinguish it from the regional administrative decentralization which adopt by the constitutional legislator.

Article 116 of the Iraqi constitution of 2005 states that:

> "The federal system in the Republic of Iraq is made up of a decentralized capital, regions, and governorates, as well as local administrations."

This means that Iraq is applying two systems, which are federalism and regional administrative decentralization. The local administrations are units within the governorate.

Article 117 of the constitution states that:

> "First: This constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region. Second: This constitution shall affirm new regions established in accordance with its provisions."

This means that the Kurdistan state was created before the coming into force of the constitution. And after that, other states could be created. The following articles of the constitution can provide further clarifications.

Article 118 of the Iraqi constitution states that:

> "The Council of Representatives shall enact, in a period not to exceed six months from the date of its first session, a law that

[185] See Lorenz Blume and Stefan Voigt, "Federalism and Decentralization—a Critical Survey of Frequently Used Indicators", *Constitutional Political Economy* 22, no. 3 (2011):5.

> defines the executive procedures to form regions, by a simple majority of the members present."

Usually, for constitutions that apply the federal system, it is implemented in all of the territories of the country. However, the implementation of the federal system in one area of the country, but not in another area, and allows the other areas to choose between federalism or regional administrative decentralization. This method implemented by the Iraqi constitution and is very different from the constitutions of other countries. Historical and political factors have led the Iraqi constitution to adopt this method.

The Kurds in northern Iraq were separated from the Iraqi central government in 1991 and it was under the protection of the United States of America. Then the Kurdistan parliament announced unilaterally the implementation of the federal system in 1992. The Kurdistan state was created from three governorates in northern Iraq.[186]

The Iraqi constitution of 2005 adopts the federal system in order to accommodate the Kurdistan state, which was established in 1992. Article 117(First) stipulates that "This Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region." But, because of the disagreement of the Iraqi parties about the implementation of the federal system,[187] the constitution leaves it to the rest of the Iraqi governorates to choose either federalism or regional administrative decentralization. According to Article 119:

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[186] See Mohammed Hmaoh Nendy, *Federal and Democratic Iraq - a Political and Legal Study* (Erbil: Dar Aras for printing and publishing, 2002).

[187] See Isra Aladdin, "Federalism in the Iraqi Constitution Reality and Future After the Us Withdrawal," *Risalat al-huquq Journal* (2012): 229.

> "One or more governorates shall have the right to organize into a region based on a request to be voted on in a referendum submitted in one of the following two methods: First: A request by one-third of the council members of each governorate intending to form a region. Second: A request by one-tenth of the voters in each of the governorates intending to form a region."

Article 122(Second) states that:

> "Governorates that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law."

Since the issuance of this constitution in 2005, the federal system has not been applied by any governorates, except the three governorates which established the Kurdistan state. Thus, 15 governorates have implemented the regional administrative decentralization.

Article 121(First) of the Iraqi Constitution states that:

> "The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this constitution, except for those authorities stipulated in the exclusive authorities of the federal government."

Article 110 states that the exclusive authorities of the central authority are in areas such as foreign policy, the development of a national security policy and its implementation, the drawing up of financial and customs policy, issuing currency, setting the draft budget, and the general census of the population. On the other hand, Article 114 of the constitution deals with the shared competence between the central authority and the states such as customs administration, the organization of electric

power sources and distribution, environmental policy, health policy, and educational policy.

Clear from the constitutional articles above, the Iraqi constitution adopted the method of determining the competence of the central authority and determining the shared competence between the central authority and the provinces, and then left the rest of the competence to the states. This method leads to the strengthening of the states in front of the central government.

Although the researcher supports the decentralized system, he thinks that its implementation in stages is better for a country that has just discarded the centralized system after using it for more than eighty years.

2.3 Regional Administrative Decentralization.

This section will explain several aspects about regional administrative decentralization such as, the definition, advantages, and distribution of the competence In order to, know the elements of regional administrative decentralization, and how to distribute competencies, so as to distinguish them from the federal system.

2.3.1 The Definition of Regional Administrative Decentralization.

According to Ali Humaidy, et al, regional administrative decentralization "is a method of administrative work, which focuses on the distribution of competence of the administrative function between the central authority and the bodies or elected councils or independent of the central authority. But, these institutions exercise their

competencies under the supervision and control of the central authority."[188] In the same context, Aaron Schneider, stated that in administrative decentralization, "the central government allows quasi-autonomous local units of government to exercise authority and control over the transferred policy. The administrative decentralization provides the greatest degree of autonomy for the local unit. The local unit is only accountable to the central government insofar as the central government can impose its will by threatening to withhold resources or responsibility from the local unit."[189] In addition, Khaled stated that regional administrative decentralization "is a process for the distribution of administrative powers and competence between the government in the capital and regional units with legal personality which are represented by the elected local councils, and that these councils are subject to the control of the central authority."[190]Also, Shab stated that regional administrative decentralization "is the style that divides the territory of the country into units with a local concept with the legal personality represented by elected councils to manage their interests under the supervision and control of the central government."[191] Finally, Tulia said "Administrative decentralization comprises the set of policies that transfers the administration and delivery of social services such as education, health, social welfare, or housing to subnational governments."[192]

According to the above studies, regional administrative decentralization is the distribution of the administrative authority or administrative function between the

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[188] Ali Hady Humaidy, Ismaeel Saesaa Gheedan, and Alaa Al-Enizzy, "The Legal Regulation of the Fiscal Decentralization in a Federal State (A Comparative Study with Iraqi Law)," *AL- Mouhakiq Al-Hilly Journal for legal and political science* 5, no. 2 (2013): 152.

[189] Aaron Schneider, "Decentralization: Conceptualization and Measurement," *Studies in Comparative International Development* 38, no. 3 (2003): 38.

[190] Mentioned, Esmel Sesah, "Regional Administrative Decentralization in Iraq - a Study in Overlapping Jurisdiction and Control" *Risalat al-huquq Journal* (2012):23

[191] Mentioned, Koichi Ateeka, "Administrative Decentralization in States Almgarbah: Comparative Analysis" (master's thesis, College of Law and Political Science, 2010-2011), 30.

[192] Tulia G. Falleti, "A Sequential Theory of Decentralization: Latin American Cases in Comparative Perspective," *American Political Science Review* 99, no. 3 (2005): 329.

central government and local elected entities. These entities are not part of the central government; they have separate legal personalities but are under the control and supervision of the central government. In other words, local entities in the administrative decentralization system are part of the administrative system of the country, therefore, the activity of the local entities are part of the administrative activity of the executive authority. These entities have the legal personality to do the legal actions under the supervision of the central government. So, these local entities do not have the authority to issue laws, and that the maximum that it can do is to issue the administrative decisions, which are called the sub-legislations.[193]

In order to prevent repetition, one can review the first chapter of this study about the control of local authorities by the central authority and how the distribution of competence is carried out.[194]

2.3.2 The Advantages of Regional Administrative Decentralization

Administrative decentralization is of increasing interest in most countries, especially those that are moving towards democracy.[195]

Decentralization is currently applied in most countries[196] by varying levels.[197] Many united countries, such as France, England, Egypt and Algeria, have implemented the

[193] See Wissam Saber Abdul Rahman, *Legislative competence of administration, under normal circumstances: 'Comparative study'* (diss., Faculty of Law, University of Baghdad, 1994).

[194] See literature review, "The definition of regional administrative decentralization, the advantages of regional administrative decentralization", chapter one.

[195] Amal Shlash, Wafaa Al-Mahdawi, Hasan Lateef and Kazem. Support to Decentralization and Local Government to Enhance Service Provision in Iraq. United Nations ESCWA.

[196] Jean-Paul Faguet, "Decentralization and Governance", the Economic Organization and Public Policy Program, 2011, accessed November 8, 2016, https://core.ac.uk/download/pdf/6821109.pdf:1.

[197] Ine Neven, "Decentralization" (national Forest Programs in the European Context, Wageningen, The Netherlands, August 26,2011), 6.

regional administrative decentralization system.[198] But, what are the advantages of regional administrative decentralization?

The researcher has mentioned the advantages of the administrative decentralization in chapter One of this study.[199] So, to avoid repetition, this researcher will briefly mention only some of the advantages.

Administrative decentralization enhances democracy[200] and allows more people to participate in the developing countries' political, economic and social activities. It allows the diverse political, ethnic, religious and cultural groupings to have greater political representation in the decision-making process. It also relieves senior managers of the central ministries from having to perform mundane task, thus giving them more time to concentrate on policy-related issues. At the same time, decentralization also simplifies complex bureaucratic procedures and makes the government officials more sensitive to the local conditions as well as their needs.[201] If there is decentralization, the local residents will have better opportunities to take part in the decision-making process of the local government.[202]

198 See Jean-Paul Faguet, "Decentralization and Governance", the Economic Organization and Public Policy Program, 2011, accessed November 8, 2016, https://core.ac.uk/download/pdf/6821109.pdf:3. And Koichi Ateeka, "Administrative Decentralization in States Almgarbah: Comparative Analysis" (master's thesis, College of Law and Political Science, 2010-2011).

199 See the chapter one of this study "literature review: advantages administrative decentralization"

200 Salhi Abdul Nasser, "Regional Groups between Independence and Dependence" (master's thesis, University of Algeria, 2009-2010):12.

201 Jennie Litvack and Jessica Seddon, *Decentralization Briefing Notes* (Washington: World Bank Institute Washington, 2002), 4.

202 Awal Hossain, "Administrative Decentralization: A Framework for Discussion and Its Practices in Bangladesh", *Department of Public Administration University of Rajshahi* (2004): 12.

Other than making the decision-making process more transparent, decentralization also improves the quantity as well as quality of services to the residents.[203] Transparent decision-making will reduce the level of corruption, a problem that most of the countries in the world are suffering from.[204] Better transparency in local governance will reduce the scope for corruption, in that any dishonest conduct be easier to detect and if the culprit is punished it will deter others from doing the same. Past records of the industrialized nations show that it is likely to happen in the longer term.[205] Professional decision-makers in some countries undergoing transition and development are increasingly resorting to "administrative decentralization" as a strategy to tackle several critical government needs. Foremost among these are better governance, transparency and accountability.[206] Lastly, Raymond and Roberta from the Development Research Group of the World Bank noted that based on global indicators, decentralization is associated with lesser corruption.[207]

Some studies mentioned that the weak of the local qualification, within other factors, did decentralization useless and even not desirable in developing countries.[208] The researcher does not agree with this opinion, because all countries have a need for a decentralized system, both developed and developing countries. Therefore, researchers

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[203] The World Bank Group, "Administrative Decentralization", Decentralization and Subnational Regional Economics, 2001, accessed August 20, 2016, http://www1.worldbank.org/publicsector/decentralization/admin.htm.

[204] See indicator Transparency International organization (CPI). http://www.icgg.org/corruption.cpi_2008_data.html. Accessed 26/7/2017.

[205] The World Bank Group, "Administrative Decentralization", Decentralization and Subnational Regional Economics, 2001, accessed August 20, 2016, http://www1.worldbank.org/publicsector/decentralization/admin.htm.

[206] Cohen J. M. and Peterson S. B., *Administrative Decentralization: A New Framework for Improved Governance, Accountability, and Performance* (Cambridge: Harvard Institute for International Development, Harvard University, 1997), 1.

[207] Jean Bonnal, "A History of Decentralization", General information, accessed July 7, 2016, http://www.ciesin.columbia.edu/decentralization/English/General/history_fao.html.

[208] Mentioned the World Bank Group, "Administrative Decentralization", Decentralization and Subnational Regional Economics, 2001, accessed August 20, 2016, http://www1.worldbank.org/publicsector/decentralization/admin.htm.

must address the factors that become an obstacle for the implementation of the decentralized system. The poor performance of local entities leads to corruption. This is the same problem as in Iraq. That the lack of efficiency and integrity of the administrative staff in the governorates leads to administrative and financial corruption, which confiscates the advantages of the decentralized system.[209] On the other hand, the report which was submitted from a group of researchers to the United Nations (ESCWA) stated that, the "poor administrative abilities" is one of the reasons for corruption in the Iraqi governorates, in addition to the weak control of governorate councils and the dispersal of the powers.[210]

The recent international trend in favor of decentralization has triggered a lively debate about the ability of the local governments as well as communities to plan, finance and manage their newly acquired duties as mentioned in Chapter One.[211] Small local government will most likely lack the technical ability to execute and maintain projects and they may also not be equipped to manage larger projects effectively. That is why, under the conventional approach to decentralization, the first step is to build technical capacity before responsibilities or revenues are transferred to the local government. Since it took many decades for such efforts to be successful in the industrialized countries, it is not possible to get quick results elsewhere.[212]

[209] Zuhair Al Hassani, "Administrative Decentralization in the Legal System of Governorates Not Incorporated into a Region", Essays and Research, 2013, accessed May 7, 2017, http://www.hdf-iq.org/ar/2010-12-01-14-01-29/342-2013-01-10-13-11-41.html:34.
[210] Amal Shlash, Wafaa Al-Mahdawi, Hasan Lateef and Kazem, Supporting Decentralization and Local Government to Enhance Service Provision in Iraq United Nations (ESCWA).
[211] See 1.9.3 The Gradual implementation of regional administrative decentralization, in chapter one.
[212] The World Bank Group, "Administrative Decentralization," Decentralization and Subnational Regional Economics, 2001, accessed August 20, 2016, http://www1.worldbank.org/publicsector/decentralization/admin.htm.

Building on the above, administrative decentralization is necessary for any country because of several of its advantages, including the application of the principles of democracy and the increase in transparency and accountability, which leads to reducing the rates of corruption. As well as, the improved delivery of public services. However, the shortcomings that have appeared during the implementation of decentralization, such as corruption, have been due to the lack of efficiency of local entities. However, that is not a good enough reason to leave the decentralized system; but rather, addressing the factors that have led to the emergence of corruption by gradually applying decentralization will lead to the improvement of the efficiency of the local units, and increase the awareness of people in exercising their rights to elect and make their representatives properly accountable.

In any case, it is impossible to return to the central system because of the disadvantages of this system, which were mentioned in the introduction to this chapter.

Administrative decentralization does not mean that there will be inconsistencies between the central and local authorities. In fact, there is cooperation, coordination and understanding between the two parties as they both seek to attain the objectives of administrative decentralization. In France, an administratively decentralized country, two principles, i.e. proximity and coherence, were used in the division of labor between the central government and the local authorities. In keeping with the European principle of subsidiarity, each government makes decisions at its own level for all its responsibilities while the central government officials work together with all the local governments plan and implement nationally coherent policies.[213] On this

[213] Emmanuel Brunet-Jailly, "France between Decentralization and Multilevel Governance: Central Municipal Relations in France", *McGill University Press* (2007):10.

issue, studies in England have noted that the central and local government's relationship should be codified with the intention of enhancing the status, authorities, responsibilities as well as the local government's role within the governing structure of England. Codification will also prescribe how exactly the central and local governments can operate together.[214] Regional administrative decentralization is the most crucial administrative regulatory method found in modern states. This method is attained when the administrative units work together with the central authority to carry out the duties of the local authorities.[215] Iraqi jurisprudence deems that regional administrative decentralization is centered on the allocation of administrative functions between the central government and the local units.[216]

An example of the harmonization between the central government and the local authorities is Egypt, which has implemented the decentralized system since 1909.[217] Egypt is one of the countries whose constitution provides for the application of Islamic law. Article 2 of the Egyptian Constitution of 2014 states that "Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are the principal source of legislation".[218]

Article 5 of the System of Local Administration Law No. 43 of 1979[219] stipulates the formation of the Supreme Council of Local Administration, composed of the Prime Minister, the Minister of Local Administration, the Governors and the heads of the

[214] Colin Copus, Codifying the Relationship between Central and Local Government De Montfort University, 2010:4.
[215] Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control", *Risalat AL-huquq Journal* (2012): 20.
[216] Ibid, 23.
[217] Article 11, Law No. 22 of 1909, Egyptian Gazette, No. 104, 18 September 1909
[218] Egyptian Constitution of 2014. http://www.constitutionnet.org/sites/default/files/dustor-en001.pdf. Accessed 28/2/2018.
[219] Local Administration Law No. 43 of 1979.
Article 166, Egyptian Constitution of 1956. http://www.tibanews.com/index.php/egyptian-constitution/90-1956-constitution?tmpl=component&print=1&page=. Accessed 26/2/2018.

local councils. This council is responsible for organizing all aspects of local administration in terms of support and development, as well as proposing the necessary laws and decisions, and coordinating between the local units and the government.

According to Article 181 of the Egyptian Constitution, the decisions of the local councils are final, and the judiciary is the judge between the local councils and the central government when there is disagreement about the competence. And, the central government does not have direct authority over the decisions of the local councils except to prevent the councils from overstepping its competence, or "causing damage to the public interest or the interests of other local councils."

2.3.3 The Distribution of Competence in Regional Administrative Decentralization

The competence in regional administrative decentralization are distributed by law. So, the legislative authority can change the competence as and when it is necessary.[220]

In general, there are three methods used to distribute the competence in the regional administrative decentralization system. The first, method is to determine a list of competence for the local entities and then leave the rest to the central government, such as in England.[221] The second, method is to mention the competence of the local entities in general, and leave the rest to the central government, such as in France. Under this method, the local authorities interpret the legal texts relating to its competence, but it is carried out under the supervision and control of the central government.[222] The third and final method is to, determine a list of the competence for

[220] Esmel Sesah, "Regional Administrative Decentralization in Iraq - a Study in Overlapping Jurisdiction and Control" *Risalat al-huquq Journal* (2012):24.
[221] Quashie Attica, "Administrative Decentralization in the Maghreb - States a Comparative Analysis" (master's thesis, Political Science, 2010-2011), 32.
[222] Ibid.

the central government and a list of common competence, and then leave the rest for the local entities, such as in Iraq.[223]

The third method is a special case, and it is used by the Iraqi constitution to distribute the competence in both the federal and regional administrative decentralization systems, as explained earlier.

2.4 Comparing Federalism with Regional Administrative Decentralization

Federalism and regional administrative decentralization are two types of decentralization. Both of them apply democratic principles to enable the local people to manage their own affairs, and this leads to improved service delivery.[224]

But there are a lot of differences between federalism and regional administrative decentralization, and they are listed out in the following table.

Table 2.1

The differences between federalism and regional administrative decentralization according the Iraqi constitution.

Federalism	**Regional Administrative Decentralization**
It is regulated by the constitution. The country is divided into states.	It is regulated by the law. The country is divided into local entities (governorates).
The states have legislative authority. The states have executive authority. The states have judicial authority.	The local entities do not have legislative authority. The local entities do not have executive authority.

[223] See Articles 110,114, and 115 of the Iraqi constitution. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

[224] See, Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 635. And Jennie Litvack and Jessica Seddon, *Decentralization Briefing Notes* (Washington: World Bank Institute Washington, 2002), 4.

	The local entities do not have judicial authority. The local entities have administrative authority only.
The states can have all the ministries except the Ministry of State and Ministry of Defense.	The local entities cannot have any ministry, they just have a local council (governorate council).
The states are not subject to the control of the central government. The Federal Constitution determines the competence of both the central government and the states, and any dispute between them is adjudicated by the Supreme Court.	The local entities are subjected to the control and supervision of the central government.

The table showed the differences between federalism and regional administrative decentralization. It is clear that the constitution regulates federalism, and it includes the determination of the authorities and distribution of the competence between the central government and the states, as well as prescribes how to solve problems between the central government and the states. Building on the above, any amendment to the constitution with regards to federalism, must be agreed upon by both the central government and the states.[225]

On the other hand, the law regulates the regional administrative decentralization system, and as such the legislative authority is able to change the rules governing regional administrative decentralization at its sole discretion, if it is for the interest of the public.[226]

[225] Lorenz Blume and Stefan Voigt. "Federalism and Decentralization—a Critical Survey of Frequently Used Indicators." *Constitutional Political Economy* 22, no. 3 (2011):4.

[226] Esmel Sesah, "Regional Administrative Decentralization in Iraq - a Study in Overlapping Jurisdiction and Control" *Risalat al-huquq Journal* (2012):24.

Another difference is that under federalism the country is divided into states, while, under the regional administrative decentralization system the country is divided into local entities (governorates). The states can have their own legislative, executive and judicial authorities. So, the states can issue laws, decisions, and judgments.[227] Whereas the local entities do not have the aforementioned three authorities, these entities only have administrative authority, so, they can only issue administrative decisions.[228]
Another difference is that the states can have all the ministries except the Ministry of State and Ministry of Defense, and that is because these are sovereign ministries. Meanwhile, the local entities cannot have any ministry.[229]

Finally, the states under federalism are not subjected to the control of the central government, and any disputes between them are adjudicated by the Supreme Court according to the constitution, which determines the competence of both the central government and the states. Whereas, the local entities in regional administrative decentralization are subject to the control and supervision of the central government.[230] But this control varies in terms of the degree of rigor from one country to another, according to several economic, social and political factors. Control may be by legislative, executive or judicial authority. Or by all the authorities together.[231]

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227 See, Cheryl Saunders, "Options for Decentralizing Power: Federalism to Decentralization,", accessed November 4, 2016, http://comparativeconstitutionsproject.org/files/federalism.pdf: 3.
228 Mujahid Hashim Al-Taie, "Iraqi State between the Federal and Decentralized" Center of the Edrak for Studies and Consultation, March 2016, accessed December 4, 2016, http://idraksy.net/wp-content/uploads/2016/03/Iraqi-between-federalism-and-decentralization.pdf.
229 See, Abdul Ghafoor Kareem Ali and Khudair Haji Rasool, "The Federalism..... Legal and Objective General Notes," *Journal of Kirkuk University Humanity Studies* 4, no. 1 (2009): 98.
230 Esmel Sesah, "Regional Administrative Decentralization in Iraq - a Study in Overlapping Jurisdiction and Control", *Risalat al-huquq Journal* (2012):25.
231 See Amil Jabbar Ashoor, "The Administrative Decentralization and the Principles of the Management of the Relationship between the Central Government and Governorate Councils of Iraq", *The Ara b Gulf* 44, no. 3 (2016).

2.5 Theoretical Framework

This study adopted the theory of decentralization and the theory of judicial interpretation as a theoretical framework to obtain an in-depth understanding of the problem of study and the solutions which put forward for this problem.

2.5.1 The Theoretical Framework of the Decentralization

The second chapter of this study deals with the definition of two types of decentralized system; The political decentralization (federalism) and the decentralized administrative systems. The second chapter also deals with the advantages of these two systems. The Iraqi constitution has stipulated these two systems. Because the decentralized system is the basis of this study, the theoretical framework of the decentralized system will be discussed in this chapter; this is so that it can be used in the coming chapters to reinforce the arguments of this study and to know the degree of applicability of the theory in practice.

From the definitions mentioned earlier in this chapter about the decentralization, decentralization can be defined as the process by which functions and authorities are distributed to entities or local governments and they are prevented from being focused in the hands of the central authority.

The decentralization practice is not recent. For example, the Abbasid state exercised a decentralized system of government because of the expansion of the territory of the state and the entry of different nationalities within the borders of the state. It was, therefore, impossible to manage the state centrally.[232]

[232] See Chapter One. 1.9.3 The gradual implementation of regional administrative decentralization.

However, decentralization as a theory came from the founding fathers of the United States who signed the US Federal Constitution in 1789, especially James Madison, Alexander Hamilton and John Jay, who were intellectuals and theorists. They published articles under pseudonyms in various newspapers in New York City to explain the political system provided by the Constitution and the advantages of the Federal Constitution.[233] These articles were known as the federal papers, of which there are 85 articles.[234]

In the first model of the federal system, several states relinquished part of their authorities to a central federal government. The states and federal government shared the three authorities, legislative, executive and judicial. Therefore, each of the states and the federal government could issue laws and make administrative decisions and judicial decisions. And the Federal Constitution regulated the distribution of competence between the federal and state governments. A Supreme Court was established to ensure the application of the constitutional texts and the resolution of disputes between the federal and state governments on the basis of the federal constitution. On the other hand, there were two councils in the parliament, one council representing the states on the basis of the population of each state and the other representing the states equally, regardless of the population of each state, in order to ensure that large states did not dominate the small states in the parliament.[235]

[233] See the advantages of the federalism, Chapter Two of this study.
[234] Gordon Lloyd, "Introduction to the Federalist by Gordon Lloyd," Ratification of the Constitution, accessed August 19, 2018, http://teachingamericanhistory.org/ratification/federalist/.
[235] Fadil al-Amin and Sally Farhat, "How Does the Us Federal System Work with States and Local Governments?," accessed August 19, 2018, http://www.siironline.org/alabwab/maqalat&mohaderat(12)/599.htm.

In another federal model, such as that in Iraq, there are no states that unite in a federal state, but rather a country divide into states. The central authority relinquishes from part of its legislative, executive and judicial authorities to the states. The federal and state governments share the three authorities. The Federal Constitution regulates the distribution of competence between the federal government and the states, and the Federal Supreme Court ensures the application of the Constitution This court adjudicate in any dispute between the federal and state governments on the basis of the Constitution.[236]

The factors that lead to the application of the federal system are the will of several states of the union against the external threats of the enemies and the union in the face of economic problems with maintaining the internal sovereignty of the states, as was the case with the United States of America, which wanted the union against the threat of the British Empire and to face economic difficulties. That is, there were two contradictory factors that pushed these states to implement the federal system, one of which was their desire to unite with the rest of the states. And the other factor was the desire to maintain internal sovereignty. On the other hand, the factor that push a unified state to implement the federal system, such as in Iraq, are the fear of dividing the country's territories between different nationalities, religions and doctrines.[237]

In France, for the first time, the system of regional administrative decentralization was implemented after the French Revolution of 1789.[238] This system is another type of decentralized system. In administrative decentralization, the central government

[236] See Chapter two. 2.2.4 Federalism in the Iraqi constitution.
[237] Isra Aladdin, "Federalism in the Iraqi Constitution, the Reality and the Future After the American Withdrawal", *Risalat al-huquq Journal* (2012).
[238] See 5.2 The regional administrative decentralization in France, Chapter Five of this study,

transfers part of its administrative authority to elected local units. These local units have the authority to issue administrative decisions to manage their administrative affairs. In this system, the central authority transfers some public services to the administrative units, such as education, municipalities, water, health, social welfare and internal security.[239]

The administrative units issue their decisions based on the Constitution and laws issued by the Parliament. The law distributes competence between the central government and administrative units. The central government has the right to control the administrative units but cannot cancel the decisions of the administrative units which issue according to the constitution and the law. The courts judge disputes between the central government and local units. But in Iraq under the current Iraqi Constitution, the constitution has distributed the competence between the central government and the governorates, and the Federal Supreme Court judge disputes between them. The reasons for this constitutional legislator's approach have already been mentioned in this chapter.[240]

The local units in the decentralized system have administrative authority only. So, the most they can do is make administrative decisions.

The mother country of the decentralized administrative system is France. As mentioned earlier, this system was implemented after the French Revolution. But the

[239] Tulia G. Falleti, "Sequential Theory of Decentralization and Its Effects On the Intergovernmental Balance of Power: Latin American Cases in a Comparative Perspective" (working Paper, Pennsylvania, Philadelphia, July, 2004).

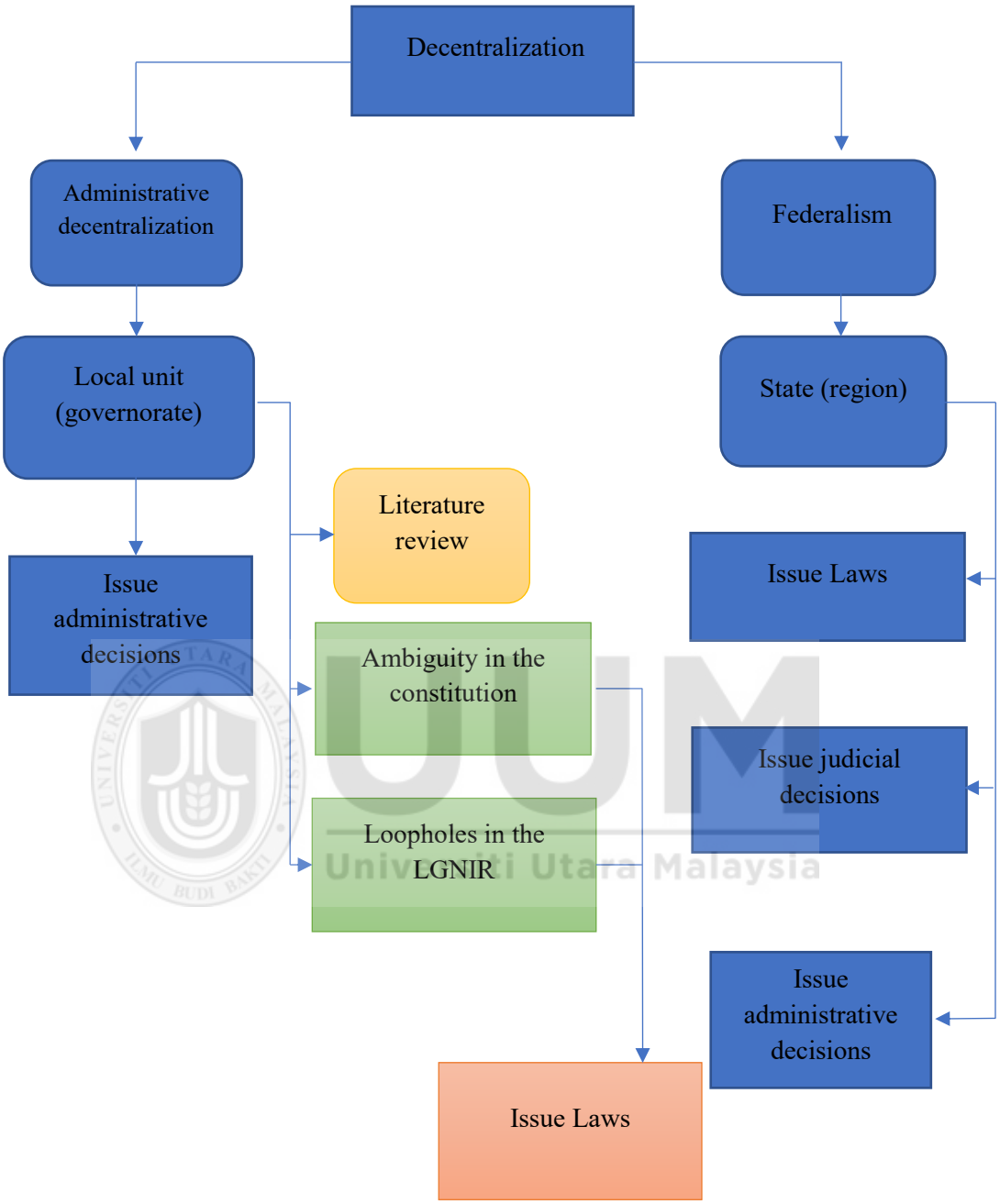
[240] See Chapter Three, An Examination of the Legal Text of the Iraqi Constotution Regarding Regional Administrative Decentralization, in this study.

French Revolutionaries gave the administrative units wide competence, which led to chaos and the attempts of the administrative units to separate from the central authority, which led to the return to the central system in 1795; and then, the decentralization system was gradually applied into the year 1982, when reforms had been carried out extensively in the decentralized administrative system.[241]

The theoretical basis for not adopting the federal system and for applying the decentralized system by the French revolutionaries is the French revolutionaries interpreted the principle of the non-division of sovereignty, which was called by the jurist Rousseau as the indivisibility of the legislative authority.[242] Therefore, the French revolutionaries rejected the federalism idea, which meant dividing the legislative authority between the central government and the states. And, the French jurist Voltaire criticized the division of the legislative power when he said, "What kind of barbarism is it that citizens must live under different laws?". So, the French Constitution of 1791 stated that "The kingdom is one and indivisible". [243] The following figure, 1.1 shows the Decentralization theory.

[241] See Chapter Five of this study, 5.2 The regional administrative decentralization in France.
[242] E.C.L., "The Indivisibility of the French Republic as a Political Theory and Constitutional Doctrine," *UK Journals and Journals* 11, no. 3 (2015): 10.
[243] E.C.L., "The Indivisibility of the French Republic as a Political Theory and Constitutional Doctrine," *UK Journals and Journals* 11, no. 3 (2015): 10.

Figure 2.1 shows the Decentralization theory



Based on the theoretical framework of the decentralized system, administrative decentralization is a sharing of the administrative function and, therefore, the limits of the authorities of the administrative units are administrative decisions only. That the overstepping by the administrative units of the limits of their authority is a contradiction with the theoretical framework of administrative decentralization.

Therefore, the laws issued by the governorates in Iraq, which apply the decentralized administrative system is a contradiction of the theoretical framework of this system and, therefore, a violation of the Constitution, which stipulates that the governorates apply the principles of the decentralized administrative system.

According to the literature review, the reason for the issuance of laws by the governorates is ambiguity in the provisions of the Constitution, especially Article 115, and loopholes of the LGNIR. The literature review stated that the solution is to amend the Constitution and then the law, but as this study mentioned earlier, this is a theoretical solution and the literature review focused on texts and did not discuss the performance of the public authorities.[244]

2.5.2 The Theoretical Framework of the Judicial Interpretation

In any dispute before the Court, it must apply the law to this dispute. Therefore, the court should interpret the provisions of the law and apply its provisions to the dispute if its provisions are not clear because of the ambiguity of the text or it is old, or to find the appropriate text for the application. The judge must interpret the text if the provisions are not proportional to the time of the case, to change the political, economic or social conditions.[245] For example, if the law stipulates a fine in a certain amount of which its value is not commensurate with the current time. Therefore, the interpretation is within the competence of the judge and does not violate the principle of the separation of powers when the judge makes law to carry out his function. [246]

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[244] See 1.9.4. The Ambiguity of the Constitution and poor wording of the LGNIR, Chapter Two of this study.

[245] See Jack G. Day, "Why Judges Must Make Law," *Case Western Reserve Law Review* 26, no. 3 (1976). And Judge Richard A. Posner, "Theories of Constitutional Interpretation," exploring constitutional conflicts, accessed August 25, 2018, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/interp.html.

[246] Adnan Awlad Obaid and Mayson Taha Hussein, "Interpretative Competence for the Constitutional Judiciary," *AL- Mouhakiq Al-Hilly Journal for legal and political science* 8, no. 4 (2016): 413

The function of the judiciary is to achieve justice. Therefore, the ambiguous or inappropriate text should not prevent the judge to achieve justice, otherwise the alternative is to fight in the streets.[247]

The famous case of Marbury v. Madison in 1803[248] was the beginning of the interpretation of the constitutional texts by the judiciary. And the president of the US Supreme Court, Judge Marshall, said in that case, that the court had the authority to interpret constitutional texts and to review the constitutionality of laws, although the US Constitution did not explicitly state that competence.

In this case, Judge Marshall stated that it is the duty of the Court to interpret the constitutional and legal texts to determine the texts which must apply to the dispute. If there is a conflict between the constitution and the law, the court must implement the constitution and neglect the law because the constitutional texts are the nominal texts in the state and everyone should apply them.

On the other hand, the Founding Fathers for the Federal Constitution, such as Alexander Hamilton and James Madison, had stipulated in the Federalist Papers the importance of the judicial review.[249]

Hamilton hinted to the constitutional provisions for subsequent generations, too; so the laws of the legislature were for a period and a specific audience. Therefore, the

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247 Jack G. Day, "Why Judges Must Make Law," *Case Western Reserve Law Review* 26, no. 3 (1976).

248 William Marbury v. James Madison, Secretary of State of the United States of America. Supreme Court of United States.

249 The Supreme Court of the United States, "The Supreme Court and Constitutional Interpretation," Book Wizard, accessed August 25, 2018, https://www.scholastic.com/teachers/articles/teaching-content/supreme-court-and-constitutional-interpretation/.

constitutional texts must be interpreted in accordance with the time of their application. And, Madison said that the most appropriate authority to review the constitutionality of laws is the judiciary because it is far from political currents, which affect neutrality. Usually, constitutional texts contain general principles and are only slightly in detail. Because these texts apply for a long time and for several generations. So, they are interpreted in proportion to the time they are applied. And take into consideration political, economic and social changes.[250]

Under the theory of judicial interpretation, when it is difficult to amend the constitution, the judicial interpretation can be used, as the Supreme Court of the United States did.[251] Especially, if the constitution provides for the authority that interprets the constitution when needed, judicial interpretation is within the judge's function. Most judges and thinkers are in favor of judicial interpretation, but differ in the ways of interpretation. Everyone agrees on the interpretation based on the text and interpretation based on the intention of the legislator. But, they disagree about other ways.[252] There are 14 ways of interpretation:[253]

The Original Intent

This opinion contends that the framers carefully chose the words so as to create broad neutral principles. The supporters of this view contend that it creates consistency and stability and prevents key rights from being ignored. However, critics contend that the

[250] Ibid.
[251] Adnan Awlad Obaid and Mayson Taha Hussein, "Interpretative Competence for the Constitutional Judiciary," *AL- Mouhakiq Al-Hilly Journal for legal and political science* 8, no. 4 (2016): 424.
[252] American Constitution Society, "Theories of Constitutional Interpretation," exploring constitutional conflicts, accessed August 25, 2018, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/interp.html.
[253] Brad Reid, "Fourteen Ways to Interpret the Constitution," Huffpost, October 31, 2016, https://www.huffingtonpost.com/brad-reid/fourteen-ways-to-interpre_b_12735744.html.

framers disagreed among themselves, the historical record is unfinished and that insisting on the "original intent" may be utilized as a cover to advocate a particular ideology. For example, the original intent reasoning can be found in Katz v. U.S. (1967)[254] where Justice Stewart, who wrote the majority opinion, held that the Fourth Amendment defends the legitimate expectations of privacy (in this particular case, a telephone booth conversation) and ought not be read literally so as to protect only against physical incursions into certain spaces. Justice Black, dissenting, held that the Fourth Amendment is associated with the seizure of things and its intention was not to protect personal privacy.

Literalism

In this method, only the literal words of the text are looked at and then their meanings are considered in such a way that it does not give rise to an absurd result. The advocators of this method assert that this results in value-free decisions and circumvents the personal predilections of judges. Critics have argued that words may be vague, textualism brings into being inconsistencies, and it also presents an out-of-date and static non-living viewpoint. In Coy v. Iowa (1988),[255] the court, in a majority opinion written by Justice Scalia, held that, after a discussion of the plain meaing of 'confront', a screen that separated a child witness and the accused violated the Sixth Amendment's right of confrontation.

[254] Katz v. the United States. No. 35. 1967, Supreme Court of United States. https://scholar.google.com/scholar_case?case=9210492700696416594&q=Katz+v.+U.S.+(1967)+&hl=en&as_sdt=2006. Accessed 25/8/2018.

[255] Coy v. Lowa, No. 86-6757. 1988, Supreme Court of United States. https://scholar.google.com/scholar_case?case=10684251272085891361&q=Coy+v.+Iowa+(1988),+&hl=en&as_sdt=2006. Accessed 25/8/2018.

Strict Constructionism

This approach is similar to textualism, but once an obvious meaning has been determined, no further analysis is required. This approach implies a narrow reading. In Bridges v. California (1941), a contempt of court conviction for an editorial was overturned by a majority decision. Justice Black, when writing for the majority, stated that the First Amendment does not speak equivocally. It forbids any law from "abridging the freedom of speech or of the press." Supporters of this method have asserted that the Constitution must be read the way it is written and that only the amendments can modify the document. However, critics have contended that this approach is too inflexible and ignores precedents and the values that motivated the statements.

Judicial Precedent

The Supreme Court should always refer to its past decisions before deciding a case. The supporters of this method find that this approach creates a clear-cut guide as it makes the interpretation predictable and stops the Court from contradicting itself. However, its critics have argued that there are contradictions in many precedents and as such support for any outcome is possible. Moreover, an erroneous precedent, for example "separate but equal" in the case of Plessy v. Ferguson (1896)[256] was rightly overturned by Brown v. Board of Education (1954). In Rush Prudential HMO v. Moran (2002) Justice Souter, when writing the majority decision, spoke of "following our precedent" in a case decided in 1982. The case was about the upholding of an Illinois state law that permitted the independent reviews of health care benefit denials.

[256] Plessy v. Ferguson. No. 210. 1896, Supreme Court of United States. https://scholar.google.com/scholar_case?case=16038751515555215717&q=Plessy+v.+Ferguson+(1896)+&hl=en&as_sdt=2006. Accessed 25/8/ 2018.

Logical

. This method utilizes formal deduction to interpret the text, usually in a syllogism that proceeds from a key premise to a minor premise and then to a conclusion. The supporters of this method have maintained that there is a kind of scientific certainty. Meanwhile, critics have asserted that the minor premises are often faulty, thus leading to erroneous conclusions. (If it is raining, it is cloudy. It is cloudy. Therefore, it is raining.) In Marbury v. Madison (1803)[257] Justice Marshall, in the most famous decision to use logical reasoning to create the power of the U.S. Supreme Court to declare a legislation unconstitutional, stated that the courts are to hold the Constitution as superior to any ordinary act of the legislature, and as such the Constitution, and not the ordinary act, must regulate the case.

Doctrinal

Judges preside over cases which in turn provide them with a forum to make wide policy pronouncements that improve the courts' prestige and power. Lengthy opinions that cover a wide range of issues are generally using this approach. In Baker v. Carr (1962)[258], Justice Brennan, not only delved into the specific issue of judicial review, but also discussed that whatever constitutes a political question is exclusively for the legislature to decide? Or can litigation by the judiciary. Critics have asserted that the doctrinal approach goes beyond the function of the judiciary to adjudicate cases and controversies, by introducing politics into the judiciary.

[257] William Marbury v. James Madison, Secretary of State of the United States of America. 1803, Supreme Court of United States. https://scholar.google.com/scholar_case?case=9834052745083343188&q=Marbury+v.+Madison+(1803)+&hl=en&as_sdt=2006. Accessed 25/8/2018.

[258] Baker ET AL. v. Carr ET AL. No. 6. 1962, Supreme Court of United States. https://scholar.google.com/scholar_case?case=6066081450900314197&q=Baker+v.+Carr+(1962)&hl=en&as_sdt=2006. Accessed 26/8/2018.

Living Document

The Constitution is a contemporary text which is more concerned with granting a specific remedy rather than creating a general rule. Usually, this method of interpretation balances the power of the government against the rights of the citizenry. Such type of cases is perceived as unique. Supporters of this method have asserted that, in order to develop the social standards of justice and rights in addition to new technologies, this approach is required. Otherwise, it is not possible to know the founders' thoughts concerning regulating electrical generating plants. However, critics opined that this method involves decision-making based upon the whims of some unelected individuals who are not accountable to the electorate and provides them with an excuse to ignore or distort the plain text. Roe v. Wade (1973)[259] which struck down state legislations that prohibited abortion by using the implied right of privacy "in the penumbras of the Bill of Rights" (applied in earlier decisions), is a classic case of this approach.

Structuralism

Structuralism looks at the overall structure of the Constitution, internal forces at work between the branches of government like the separation of powers, presumptive relationship of the central and state governments, and recognized role of the judiciary under the Constitution. In Youngstown Sheet & Tube Co. v. Sawyer (1952)[260], it was found that the President went beyond his executive powers when he ordered the seizure

[259] Roe ET AL. v Wade, district attorney of Dallas Country No. 70-18. 1973, Supreme Court of United States. https://scholar.google.com/scholar_case?case=12334123945835207673&q=Roe+v.+Wade+(1973)+&hl=en&as_sdt=2006. Accessed 26/8/2018.

[260] Youngstown Sheet & Tube Co. v. Sawyer, No. 744. 1952, Supreme Court of United States. https://scholar.google.com/scholar_case?case=14460863599772421355&q=Youngstown+Sheet+%26+Tube+Co.+v.+Sawyer+(1952)&hl=en&as_sdt=2006. Accessed 26/8/2018.

of the steel mills. The advocates of structuralism say it complies with the text of the constitution and at the same time provides flexibility, while the critics complain that it needlessly weakens the federal power by diminishing the Supremacy Clause of the Constitution (Article 6, Clause 2).

Constitution in Exile

The phrase "constitution in exile" is derived from a 1995 article. This view overturned all the Supreme Court decisions after 1937 that expanded the commerce clause of the Constitution (Article 1, Section 8, Clause 3 of the U.S. Constitution, gave Congress the power to control commerce with foreign countries and among the several states as well as with the native Indian tribes) to permit for the extensive federal regulation of the economy and society. The supporters of this belief are loosely associated with the original intent view. The U.S. Supreme Court decisions, for instance in the U.S. v. Lopez (1995)[261] the court ruled that Congress cannot imposed a ban on guns near to public schools under the power of the commerce clause, for only the states can do so. This appears to indicate a willingness to somewhat restrict the application of the commerce clause when legislating. The critics of this view contend that such an approach will socially "turn back the clock" and permit business to act without restraint. The phrase "constitution in exile" was used by the politicians to limit the powers of the judicial authority of the federal government.

[261] United States v. Lopez, No. 93-1260. United States Supreme Court. https://scholar.google.com/scholar_case?case=18310045251039502778&q=U.S.+v.+Lopez+(1995&hl=en&as_sdt=2006. Accessed 26/8/2018.

Economic

Charles Beard, a historian, stated that the way the Constitution is structured is a reflection of the personal financial interests of the people who drew it up. However, the critics of Beard declared that the Constitution was written for the unity and security of the country. The general economic approach today takes into consideration the decision's practical impact on economic activity. In Lochner v New York (1905)[262], a majority of the judges found that under the "freedom of contract" concept in the due process clause of the Fourteenth Amendment, the state shall not deprive any person of life, liberty, or property, without any due process of law. As such the court struck down a New York law that limited bakers to a sixty-hour work week. Critics as well as the dissenting judges in the original Lochner's decision asserted that the Constitution does not stand for a particular economic theory, whether it is laissez-faire or paternalism.

Ethical

The ethical approach exemplifies the concepts of justice and fairness and is often concerned with the rights of individuals. The Warren Court (1953-1969) made many decisions that embodied this idea. The critics of this approach asserted that it disregards the function of the legislative and executive authorities in creating public policy. Instead, it is like a thin veil to cover the unelected judiciary's exercise of dictatorial power over the legal system.

[262] Lochner v. New York No. 292. 1905, Supreme Court of United States. https://scholar.google.com/scholar_case?case=10760991087928264675&q=Lochner+v+New+York+(1905),+&hl=en&as_sdt=2006. Accessed 27/8/2018.

Activist

Activist here refers to the judicial decisions that are analogous to legislation that creates public policy. All sides of the political spectrum dislike all the examples of perceived judicial activism. Brown v. Board of Education (1954)[263] and Roe v. Wade (1973) made fundamental changes to the social policies that are said to be legislative in nature. Activism is to a certain degree in the eye of the beholder, but the primary criticism is that the Court is behaving as if it is an unelected nine-member super legislature.

Balancing

Balancing takes place when the judge weighs the competing interests such as privacy against public safety or freedom of speech against consumer deception. The supporters of this approach contend that this is a truthful approach to contemporary realities and concerns. But, its critics have asserted that the Constitution is silent regarding when and how a balance can be accomplished. Furthermore, the critics say that this approach gives too much weight to public opinion as well as the changing social norms. For instance, in the First Amendment the language used specifically allows for the free exercise of religion in contradiction to the weight of public policy in both social and political history which condemns polygamy. Reynolds v. U.S. (1878) upheld the criminalization of LDS polygamy and said that the First Amendment allowed for legislations that prohibit certain religious actions, such as "human sacrifices", while at the same time it protects religious "opinions". Since English history only allowed single marriages, therefore polygamy is considered to be odious. In the Reynolds case,

[263] Brown v. Board of Education, No. 1. 1954, Supreme Court of United States. https://scholar.google.com/scholar_case?case=12120372216939101759&q=Brown+v.+Board+of+Education+(1954)+&hl=en&as_sdt=2006. Accessed 27/8/2018.

it is said that the professed doctrines of religious belief is inferior to the law of the land.

Prudentialism

This approach is in favor of the court exercising judicial restraint and serving a limited role, and to only decide the present case and not to issue broad general rules for future cases. The supporters of this approach opined that the court's role is confined to deciding the actual cases and controversies. However, the critics say that the business community and society generally need broader and applicable standards to guide their conduct which the courts can provide. An example of prudentialism is case Bowers v. Hardwick, 1986[264], that was overruled in 2003 by Lawrence v. Texas[265] which applied the liberty and privacy rights.

With regard to Iraq, the Iraqi constitution explicitly states that the Federal Supreme Court is competent to interpret the Constitution.[266] In one of its decisions, the court stated that in order to interpret any article in a particular law, it must study all the articles of legislation to identify the philosophy and the aim of the legislator from that legislation, i.e., the intention of the legislator. Therefore, the Court stated in that advisory decision that the philosophy of the constitutional legislator in article 122 of the Constitution is to support administrative decentralization and grant the

[264] Bowers v. Hardwick, No. 85-140. 1986, Supreme Court of United States. https://scholar.google.com/scholar_case?case=14901730125647575103&q=Bowers+v.+Hardwick,+1986&hl=en&as_sdt=2006. Accessed 27/8/2018.

[265] Lawrence v. Texas, No. 02-102. 2003, Supreme Court of United States. https://scholar.google.com/scholar_case?case=15714610278411834284&q=Lawrence+v.+Texas+&hl=en&as_sdt=2006. Accessed 27/8/2018.

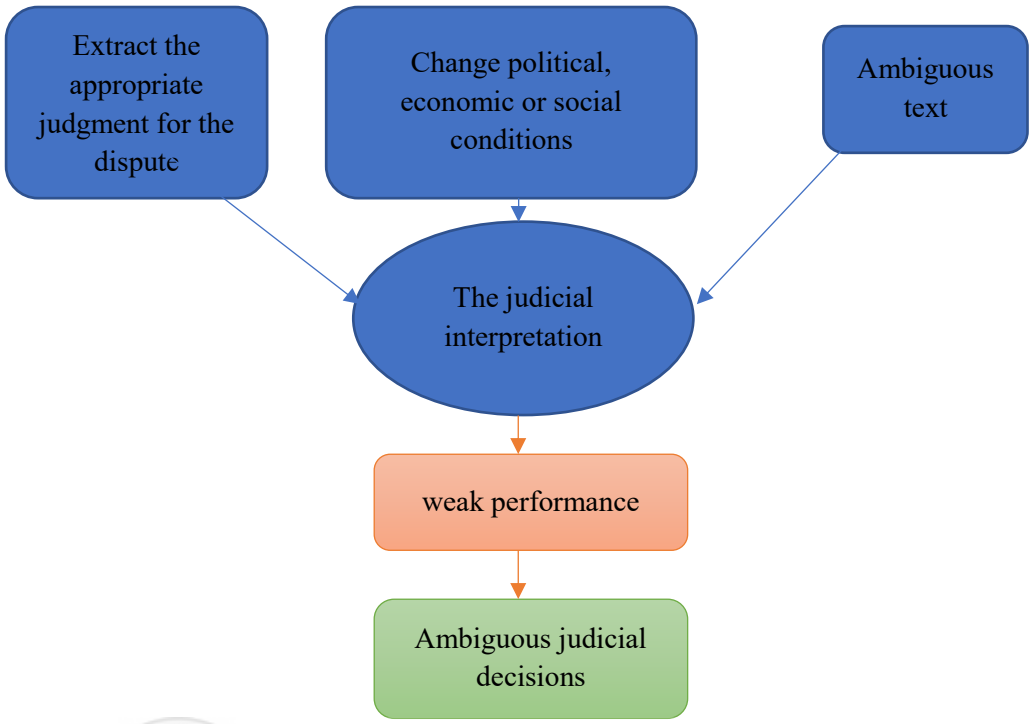
[266] Article 92 of Iraqi Constitution, 2005. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

governorates broad administrative and financial authorities.[267] That means the governorates apply decentralized administrative system, therefore, they cannot issue laws. But, the decisions of the Federal Supreme Court were ambiguous when interpreting the provisions of the Constitution related to the authorities of the governorates, especially Article 115. The court did not explicitly state that the governorate councils issue administrative decisions only. Even though the court did not explicitly state that the governorate councils issue laws, either.[268]

The interpretation function is difficult and those responsible need to have good experience in this area and be intelligent enough to achieve satisfactory results, which will, in turn, lead to achieving justice. But, the decisions of the Federal Supreme Court in Iraq, with regard to the authorities of the governorates, were ambiguous because of the lack of experience of the Court in the field of interpretation since the court was only established in 2005. The following figure, 1.2, shows the judicial interpreting theory.

[267] Federal Supreme Court, 7 / Federal / 2012. https://www.iraqfsc.iq/krarat/2/2012/7.pdf. Accessed 26/8/2018.
[268] See 3.3.3.1 Interpretation of the Federal Supreme Court, Chapter Three of this study.

Figure 2.2 Shows the judicial interpreting theory



As in the theoretical framework for judicial interpretation, if the text is ambiguous or if it is old and the political, economic or social conditions have changed, and in order for the judge to issue the appropriate judgment of the dispute, the text is to be referred to for the interpretation by the judiciary, which is the competent authority as previously studied. This competence is difficult and requires high experience. If the performance of the judiciary is weak in the area of interpretation, the decisions issued will be as ambiguous as occurred with the Federal Supreme Court in relation to the authority of the governorate councils.

2.6 Analyze the Impact of Harmonizing and Achieve It in Iraq

Countries apply the decentralized system in order to get the advantages of this system which were mentioned earlier in this study. To achieve the advantages of the decentralization, there must be cooperation, harmonization and understanding between the central authority and the local authorities. In order to achieve this, both authorities

must be committed to the distribution of the competence between them, which is according to the nature of the authority. For example, the central authority carries out the competence concerning the country's relations with other countries, such as diplomatic representation, bilateral and public treaties and the declaration of war. The central authority also exercises the activities which exceed its effect more than a state or governorate or which extends to all the country's territories, such as the distribution of electricity, regulation of water through the country's territories, issuing currency and regulation of trade among the states or governorates. On the other hand, the local authorities are responsible for all activities related to the local population. Such as providing public services, organizing activities within the state or governorate, and providing all the needs of the local population. Therefore, the members of the local authority must be from the local population and are chosen by election so that the local people can monitor the work of the members of the local government in administering their affairs. This harmony between the central government and local governments leads to the goal of decentralization, which is to provide the best services to the population in the country and to achieve the principles of democracy that allow the local people to monitor the members of the local authority.

What is the solution if there is no harmony between the central authority and the local authority, or if there is a problem between them that affects cooperation and harmonization? The absence of cooperation and harmonization between the central authority and the local authorities will lead to the failure of the goal from the applied decentralized system. So, this problem must be resolved.

When there is a problem between the central authority and the local authorities, there are two ways to solve it. The first is the legal way, which is by going to the judiciary; and the second way is fighting.[269] The logical way is the first way, therefore, the judiciary is the guarantor of cooperation, understanding and harmonization between the central authority and the local authorities.

This study, for example, will examine the harmony between the central authority and the local authorities in several countries. This study includes cases concerning the relationship between the central authority and the local authorities. These countries are the United States, Australia, the United Kingdom and Malaysia.

The reason for the choice of these countries and their relationship to Iraq is that, although they are countries that apply the common law system, while Iraq applies the civil law system, they are also applying the federal system which is applied by Iraq; that is except for the United Kingdom. The latter has a professional judiciary, so Iraq can benefit from its experience. The United States is the Home country of the federal system and Australia has applied the federal system since 1901; so far, successfully. Malaysia is also one of the few Muslim countries to have successfully implemented the federal system since 1957.

[269] Jack G. Day, "Why Judges Must Make Law," *Case Western Reserve Law Review* 26, no. 3 (1976): 565.

2.6.1 United States

The Federal United States was formed by declaring the US Constitution in 1789.[270] The US Constitution provides to list the competence of the central government and to leave the rest to the states.[271]

The US Constitution provided guarantees to the states against the federal government. For example, the inadmissibility of representation of the State in the Senate without the consent of the State concerned. Also, the constitution stipulates that no state can be divided or annexed to another state without its consent, and amendments to the Federal Constitution cannot be made without the approval of three-quarters of the states. On the other hand, the federal government guarantees for the states to keep their borders from any external aggression, and the federal government has to intervene to impose security inside the state when the state legislature asks for it[272].

The Iraqi constitution also stipulates for the states' guarantees, including that the state can amend the federal law if it is not within the exclusive competence of the federal government.[273] The Constitution also stipulates that no amendment to the Constitution may Detract from the powers of the governorates, except after the approval of the state legislature and the referendum of the people of the state.[274]

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[270] See Larry Elowitz, *Government in the United States of America* (Cairo: The Egyptian Society for the Dissemination of Universal Culture and Knowledge, 1996).
[271] See Charles R. Hankla, "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009): 638.
[272] See Mohammed Mahjoub, *Constitutional Law and the Political System in Lebanon and the Most Important Constitutional and Political Systems in the World*, 4th ed. (Beirut: Elhalabi Alhgogy Publications, 2002).
[273] Article 121 of Iraqi Constitution 2005.
[274] Article 126 of Iraqi Constitution 2005.

The Constitution provides for general principles related to the relationship between federal and state governments. Therefore, the judiciary (the Supreme Court) is responsible for balancing between the central government and the state and preventing the exceeding of any party over the other's power. The founding fathers of the federal constitution stated in the federal papers, which were published before the vote on the constitution, that the judicial review has the important role in the interpretation and application of the Constitution.[275]

For example, there are Four case laws related to the relationship between the federal government and the states in the United States of America:

I- "GIBBONS v. OGDEN"[276]

Legal Principle

"The New York law was found invalid because the Commerce Clause of the Constitution designated power to Congress to regulate the trade among the states and that the broad definition of commerce included navigation."

Issue

In 1808 the legislative authority of the New York State granted exclusive navigation privileges of all the waters within the territories of that State to Robert R. Livingston and Robert Fulton, for twenty years. Subsequently, Livingston and Fulton also requested from other states similar monopolies in order to promote a national network of steamboat lines, but only the Orleans State accepted their request and granted them

[275] The Supreme Court of the United States, "The Supreme Court and Constitutional Interpretation," Book Wizard, accessed August 25, 2018, https://www.scholastic.com/teachers/articles/teaching-content/supreme-court-and-constitutional-interpretation/.
[276] Gibbons v. Ogden, 22 US 1 - Supreme Court 1824.

a monopoly on the lower Mississippi. The competitors objected to granting privileges to Livingston and Fulton by "arguing that the commerce power of the federal government was exclusive and superseded state laws." After problems arose about the monopoly of navigation among the states, Gibbons, who was granted the right of navigation based on the federal law in 1793 governing the coastal trade, challenged the matter before a court in New York. The plaintiff argued that the Federal Congress had the right to regulate interstate commerce. Granting the right of navigation is a form of trade. The defendant argued that the states had the authority to grant navigation in the rivers within their territory, which was outside the scope of regulating the trade among the states. The court decided to dismiss the case. The plaintiff appealed the decision before the New York Court of Appeal, but the court upheld the decision. Hence, the plaintiff proceeded to challenge the decision before the Supreme Court.

Case Law

"The United States Supreme Court judged in favor of Gibbons."

> "Congress had the right to regulate interstate commerce. The sole determining source of Congress's power to promulgate the law at issue was the Commerce Clause." "With respect to 'commerce,' the Court held that commerce was more than mere traffic—that it was the trade of commodities. This broader definition included navigation." The Court also stated that "any license granted under the Federal Coasting Act of 1793 took precedence over any similar license granted by a state."[277]

[277] Gibbons v. Ogden, 22 US 1 - Supreme Court 1824.

Analysis

According to the federal constitution, the federal government has the competence of the regulation of interstate commerce. The state of New York violated federal competence when it granted a license for navigation within state waters, on based that navigation was not included in interstate commerce. The New York state did not want to breach the competence of the federal government, but it made a mistake in describing the nature of its decision. There has been a dispute over the decision to grant a navigation license whether the decision was within the concept of interstate commerce and thus within the competence of the federal government. Or was it not within this concept and thus within the competence of the local government. Local courts supported the second interpretation, while the Supreme Court upheld the first interpretation, therefore granting the license to navigation was within the competence of the federal government.

In this case, the Supreme Court is an appeals court and must issue a judicial decision to resolve the dispute presented to it. Therefore, in order to issue a judicial decision, the Court interpreted the constitutional clause about the trade broadly, as it included navigation, in order to restrict the competence of interstate navigation in the hands of the federal government, thus preventing interstate disputes about navigation, which would threaten the coordination and harmonization between the states as well as between the states and the federal government.

The Supreme Court here did its judicial function in protecting the harmonization between the states, and the federal government and the states, which is similar to the function of the Federal Supreme Court in Iraq.

II-KANSAS v. COLORADO[278]

Legal Principle

Colorado, which had been taking too much of the Arkansas River, had to pay interest on the judgment going back more than 20 years.

Issue

Kansas State claimed that the Colorado State was "taking too much of the water of the Arkansas River, making the land along the river in Kansas much less valuable due to reduced water flow." The state of Kansas stated that the dispute was within the competence of the federal government and sought the application of federal law. The Supreme Court of the USA "affirmed its authority to settle the dispute between the states."

Case Law

The Supreme Court had "affirmed its authority to settle the dispute between the states", but this did not mean that the federal law applied in this dispute. The Constitution of the USA had limited the competence of the federal government and left the rest of the competence to the states. The Supreme Court refused the request from the Kansas State to implement the federal law. The Court held that the competence which was granted to the Congress in the eighth section of the First Article of the Constitution did not include the reclamation of arid lands. On the other hand, the second paragraph, Section 3 of Article 4, states that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice

[278] Kansas v. Colorado, 206 US 46 - Supreme Court 1907.

any claims of the United States, or of any particular State." This provision refers to the lands that are accredited from the federal government.

The Court referred to Law 17 of 1902, which stated that "appropriated the receipts from the sale and disposal of the public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands". The court concluded that state laws are applied to the dispute before the Supreme Court, according to the opinion of this Court. The Court decided to divide the waters between the states of Kansas and Colorado, and order compensation for the damage to Kansas.

Analysis

The State of Kansas claimed that the Colorado State had used its right in the Arkansas River, and challenged this before the Supreme Court. Kansas sought for the application of federal law as it said that the dispute was within the competence of the federal government. The Supreme Court however, opined that the dispute was not under the exclusive competence of the federal government, as stipulated in the Constitution. The Supreme Court accepted the lawsuit which involved the two states and decided to divide the water with compensation.

Kansas State had wanted support from the federal government in its conflict with Colorado state. But the Supreme Court rejected the application of the federal law and after its interpretation of the Constitution, the court mentioned that the state laws applied. The court wanted to limit the authority of the federal government in the face of the state authorities. Because, this would lead to imbalances between the federal and state authorities and that would lead to the violation of the harmonization.

III- Printz v. The United States[279]

Legal Principle

"The Brady Handgun Violence Prevention Law's interim provision" which commands the officers in the states by the federal government is unconstitutional.

Issue

The federal government issued the Brady Handgun Violence Prevention Act 1993 (the Act), which amended the Gun Control Act of 1968. The Act required the United States Attorney General to set up an electronic or phone-based background check to prevent the sale of firearms to people who are prohibited from possessing firearms under the Gun Control Act of 1968. This test is called "the National Instant Criminal Background Check System". The Law also immediately put forth interim provisions until the system came fully into force. According to the interim provisions, there were procedures that the weaponry dealer had to follow to ensure that the buyer was not included in the weapons embargo list.

Several officers in Arizona state challenged the constitutionality of the Act's interim provision before a local court, whereby they objected to the use of congressional action to compel state officers to execute the federal law. The plaintiffs argued that it was contrary to the tenth amendment of the Constitution, which states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." The local court agreed that the interim provision was contrary to the Tenth Amendment to the United States Constitution (the Constitution), but it could be optionally applied so that the officers

[279] United States Supreme Court. Printz, Sheriff/Coroner, Ravalli County, Montana v. The United States. 521 U.S. 898 (1997).

of the states were not forced by the federal government. The Court of Appeal subsequently overturned the lower court's judgment on the unconstitutionality of the interim provision. The case then reached the United States Supreme Court.

Case Law

The United States Supreme Court held that:

> "Federalism in the United States is based upon 'dual sovereignty' and that states retain 'a residual and inviolable sovereignty'." The Court also stated that "the Framers designed the Constitution to allow federal regulation of international and interstate matters, not internal matters reserved to the State Legislatures." The Court concluded by holding "that allowing the federal government to recruit the police officers of the 50 states into its service would increase its powers far beyond what the Constitution intends." The court decided that "the interim provisions for the Brady Handgun Violence Prevention Act 1993 violated the Tenth Amendment to the Constitution."[280]

Analysis

The US federal government passed the Brady Handgun Violence Prevention Act 1993, which amended the Gun Control Act of 1968 and provided for interim provisions until the law came into force. The interim provisions provided for procedures to be followed by the officers in the States. Several officers in the Arizona state challenged these provisions. The plaintiffs contended that the interim provisions were in violation of the Tenth Amendment to the Constitution. The Constitution defined the competence of the federal government, and these provisions went beyond the competence of the

[280] United States Supreme Court. Printz, Sheriff/Coroner, Ravalli County, Montana v. The United States. 521 U.S. 898 (1997).

federal government. The Supreme Court supported the plaintiff's contention that the interim provisions were unconstitutional.

In this case, the Supreme Court strongly opposed the Congressional law and stated that the law was unconstitutional. It further stated that the issue order to the Police of the States by the central government was undermining state sovereignty, which threatened the federal system, not just the cooperation between the federal and state governments. The court acted firmly here to preserve the principles of the federal system and to provide harmonization between the central government and the states.

IIII- The United States v. Lopez[281]

Legal Principle

"Possession of a handgun near school premises is not an economic activity that has a substantial effect on interstate commerce. A law prohibiting guns near schools is a criminal statute that does not relate to commerce or any sort of economic activity."

Issue

The administration of Edison High School discovered that one of their students, Alfonso Lopez, carried a weapon inside the school. The student said that he was going to hand over the weapon to another person and that he would receive $44 from the deal. The school administration charged Lopez with violating the Gun-Free School Zones Act of 1990, Section 922 which states that "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects

[281] United States Supreme Court, the United State v. Lopez, 514 U.S. 549 (1995).

interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."

Lopez was judged and convicted, and he challenged the conviction before the Court of Appeals. Lopez argued that Section 922 was unconstitutional because the firearms embargo in schools did not relate to commerce between the states, which was a matter that the Congress can regulate according to the Constitution. The Court of Appeals stated that Section 922 (q) was unconstitutional. Finally, the case reached the Supreme Court.

Case Law

The Supreme Court confirmed the decision of the Court of Appeals and stated that:

> "While Congress had broad law-making authority under the Commerce Clause, the power was limited, and did not extend so far from 'commerce' as to authorize the regulation of the carrying of handguns, especially when there was no evidence that carrying them affected the economy on a massive scale." The Court stated also "that in no way was the carrying of handguns a commercial activity or even related to any sort of economic enterprise, even under the most extravagant definitions." The Court concluded that "if Congress could regulate something so far removed from commerce, then it could regulate anything, and since the Constitution clearly creates Congress as a body with enumerated powers, this could not be so."

In addition to the above, one of the judges of the Supreme Court stated that "the Court had the duty to prevent the legislative branch from usurping state powers over policing the conduct of their citizens."

On the other hand, the government's main argument was that the possession of a firearm in an educational environment would most likely lead to a violent crime, which in turn would affect the general economic condition in two ways. First, because violent crime causes harm and creates expense, and it raises insurance costs, which are spread throughout the economy; and second, by limiting the willingness to travel in the area perceived to be unsafe. The government also said that the presence of firearms within a school would be seen as dangerous, resulting in students being scared and disturbed which in turn would inhibit learning and lead to a weaker national economy since education is clearly a crucial element of the nation's financial health. The Supreme Court replied that:

> "Those arguments create a dangerous slippery slope which would grant authority to the federal government for regulating any activity that might lead to violent crime, regardless of its connection to interstate commerce. What would prevent Congress from regulating any activity that might bear on a person's economic productivity?" The Supreme Court decided that "the federal Gun-Free School Zones Act of 1990, which banned possession of handguns near schools, was unconstitutional because it did not have a substantial impact on interstate commerce."[282]

Analysis

The administration of Edison High School claimed that their student, Alfonso Lopez (Lopez) was in possession of a weapon inside the school, based on the Gun-Free School Zones Act of 1990. This act was issued by the US Congress on the basis of constitutional competence for the Congress to regulate interstate commerce. Lopez argued that Section 922 of the Gun-Free School Zones Act of 1990 was

[282] United States Supreme Court, United State v. Lopez, 514 U.S. 549 (1995).

unconstitutional because possession of weapons inside schools had nothing to do with trade. On the other hand, the Court stated that the congressional powers are broad in trade, but they are limited in other areas. And one of the high court's judges said the federal government cannot replace local governments to monitor their citizens. The court decided that Section 922 of the Gun-Free School Zones Act of 1990 was unconstitutional because it had nothing to do with trade and was beyond the authorities of the state.

In this case, the Supreme Court warned against extending the authority of the federal government in the face of the state authority. And the court put a limit on exceeding the federal government's authorities which was stipulated by the Constitution after the interpretation of the constitutional text by the court. The court judged as unconstitutional the law passed by the Congress.

It further stated that, exceeding the federal government's authorities threatened the cooperation and harmonization between the states and the central government, which was prevented by the Supreme Court.

It is clear from the above cases that, the role of the Supreme Court in maintaining a balance between the federal government and the states achieves the harmonious and coordinated relationship between them. One study reported that the judge is a balancing judge in the relationship between the federal government and the states.[283] The US Constitution contains general principles and the Federal Court has been

[283] Maitham Handal Sharif and Sabih Wuhawh Hussein, "Means of Interpreting the Texts of the Constitution, a Comparative Study," *AL- Mouhakiq Al-Hilly Journal for legal and political science* 4, no. 9 (2017): 526.

interpreting the Constitution to resolve disputes between the federal and state governments, thus maintaining the balance of the relationship between the central government and the states and achieving cooperation and harmony between them.

The United States is the home country of the federal system which is applied by Iraq and, therefore, the Federal Supreme Court should follow the example of the US Supreme Court in balancing between the federal government and the states as well as the governorates; because, the Iraqi constitution has provided that the Federal Supreme Court is competent to resolve disputes between the federal government and the regions as well as the governorates.[284]

2.6.2 Australia

The Australian Constitution of 1901 provides for the competence of the central government and left the rest of the competences to the states.[285] The constitution states that the central government must defend states against any external attack and maintain internal state security against any internal violence at the request of states.[286] The constitution stipulates that the central government should not impose any taxes on state property.[287] The Constitution has established a Supreme Court, within its competence, to consider disputes between states as well as between states and the central government.[288] Iraq, which implements the federal system, must have the benefit of the experience of the Australian federal system.

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[284] Article 93 of Iraqi Constitution, http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

[285] See part V. - Parliament powers of the Australian constitution. https://www.legislation.gov.au/Details/C2004C00469/Download. Accessed 2/9/2018.

[286] Article 119 of the Australian constitution. https://www.legislation.gov.au/Details/C2004C00469/Download. Accessed 2/9/2018.

[287] Article 114 of the Australian constitution. https://www.legislation.gov.au/Details/C2004C00469/Download. Accessed 2/9/2018.

[288] Articles 75 and 76 of the Australian constitution. https://www.legislation.gov.au/Details/C2004C00469/Download. Accessed 2/9/2018.

For example, there are Two case laws related to the relationship between the central government and the states in Australia:

I-**Cole v. Whitfield**[289]

Legal Principle

Since the goal of the Tasmanian state laws is conservational in nature, therefore, it does not violate the Australian Constitution.

Issue

Whitfield was a crayfish trader charged with the illegal possession of undersized crayfish. He resided in Tasmania, but the fish were purchased in South Australia and shipped to Tasmania. Under the South Australian state law, the fish that he purchased was of a legal size, but under Tasmanian laws, they were undersized according to The Fisheries Act 1959. The Governor of Tasmania issued regulations about the classification of undersized fish. The Sea Fisheries Regulations 1962 prevented catching male crayfish of less than 11 cm and female crayfish of less than 10.5 cm in length. The Fisheries Inspector charged Whitfield with a breach of the regulations. Whitfield did not plead guilty on the basis that Article 92 of the Australian Constitution (the Constitution) protected the freedom of his interstate trade. Upon dismissal of the complaint by the magistrate, the Fisheries Inspector made an appeal before the Supreme Court of Tasmania. However, the case was removed to the High Court for a decision on the constitutionality of the Sea Fisheries Regulations 1962.

[289] High court of Australia, Cole v. Whitfield, (1988) 165 CLR 360, 2 May 1988. https://ipfs.io/ipfs/QmXoypizjW3WknFiJnKLwHCnL72vedxjQkDDP1mXWo6uco/wiki/Cole_v_Whitfield.html. Accessed 19/12/2017.

Case Law

The Court decided that:

> "The clause (absolutely free) in Article 92 was not a guarantee of absolute freedom from restrictions. The Court concluded it was to create a free trade zone among the Australian states, and the words (absolutely free) referred to freedom in the economic sense. Thus, laws of a protectionist kind interfering with interstate trade and commerce would be invalid."[290]

The Court looked to the purpose of the Tasmanian laws and found that their objectives were of a conservational nature. As the laws applied to all crayfish, they were not of a protectionist nature and hence not in breach of Article 92 of the Constitution.

Analysis

Whitfield is a crayfish trader. The Tasmanian state charged him with illegal possession of crayfish. Whitfield bought them from South Australia state and shipped them to Tasmania. The purchase of crayfish from South Australia was legal, but it was illegal according to Tasmanian laws. The case was raised to the Supreme Court in order to seek judgement about the constitutionality of the Sea Fisheries Regulations 1962.

The court found that the objectives of Tasmanian laws were of a conservational nature. As the laws applied to all crayfish, they were not of a protectionist nature. Therefore, these laws were not in breach of Article 92 of the Constitution.

[290] High court of Australia, Cole v. Whitfield, (1988) 165 CLR 360, 2 May 1988. https://ipfs.io/ipfs/QmXoypizjW3WknFiJnKLwHCnL72vedxjQkDDP1mXWo6uco/wiki/Cole_v_Whitfield.html. Accessed 19/12/2017.

The Supreme Court here interpreted the Constitution and the Tasmanian State Law to make its decision, and the court likely applied the state law to the central government law. Though the plaintiff asked for it to apply the federal law. Each state has the right to issue laws related to its own affairs, and the federal law cannot be imposed on them in this field. The cooperation and coordination among the States are not incompatible with respect to the privacy of each state.

II-Austin v Commonwealth[291]

Legal Principle

There are limits to the powers of the Commonwealth towards its control over the states. The laws of the Commonwealth cannot bear a burden on the structure of the states, and their ability to do basic functions.

Issue

The judge in the Supreme Court of the State of New South Wales, Austin, challenged the law passed by the Commonwealth Parliament which imposed an additional tax on judges in the states within the tax on the high earners. The plaintiff argued that this law violated the Australian Constitution (Constitution), which prohibits discrimination against the states and also prohibits the Australian Parliament from imposing a state property tax under Articles 55 and 114. It is worth mentioning that the state judges receive their salaries from the state governments. The plaintiff said that the law increased the burden on judges, which affected their neutrality.

Case Law

[291] High Court of Australia, Austin v The Commonwealth of Australia [2003] HCA 3 (5 February 2003). http://eresources.hcourt.gov.au/downloadPdf/2003/HCA/3. Accessed 25/12/2017.

The High Court of Australia mentioned that:

> "The imposed tax by the Commonwealth government was directed towards leading governments to increase judges' salaries to maintain their high salaries in order to maintain their neutrality and independence. As a consequence of the above, the states would increase their spending which would lead to an increase in the load on the operations and activities of the states, and their ability to exercise basic functions. This would lead to overtaking the Commonwealth authorities according to the Constitution. Also, the law of the Commonwealth legislature involved discrimination against the states."[292]

Building from the argument above, the High Court decided to judge in favor of the plaintiff.

Analysis

The Australian Parliament had passed a law on tax, which increased the tax imposed on state judges. This law would lead to an increased burden on the states as they would have to improve the salaries of judges so as not to decrease their income, which could threaten their neutrality and independence. Austin, a judge in the Supreme Court of New South Wales challenged this law before the Australian High Court on the ground that it was contrary to the Constitution, which prohibited taxes from the Australian government in relation to the states and also prohibited discrimination against the states. The Australian High Court upheld the plaintiff's argument that the law increased the financial burden on the states as well as discriminated against the states which were beyond the powers of the Australian parliament.

[292] High Court of Australia, Austin v The Commonwealth of Australia [2003] HCA 3 (5 February 2003). http://eresources.hcourt.gov.au/downloadPdf/2003/HCA/3. Accessed 25/12/2017.

The harmony between the states and the federal government did not mean that the federal government was able to issue laws that would increase the financial burden of the states. This was a trespass by the federal government on the states, against the spirit of working in harmony. Therefore, the Supreme Court decided as unconstitutional the law issued by the federal government.

2.6.3 Malaysia

There are Four Islamic country apply the federal system, that are Pakistan, Malaysia, United Arab Emirates, and Iraq. After research into the provisions of the constitutions of the Islamic countries that apply the federal system, the researcher did not find texts apply the Islamic Law when regulating the relationship between the federal government and the states, except for in the Malaysian Constitution of 1957.[293] The Constitution in Malaysia stipulate on federal list and states list as well as concurrent list. And Article 77 states "The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has the power to make laws."

The Malaysian Constitution provides for the Federal Court,[294] which is the guarantee for the application of constitutional provisions that divide the legislative function between the federal government and the states.[295]

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[293] Malaysian Constitution of 1957, http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf. Accessed 18/3/2018.

[294] Article 121(2). Malaysian Constitution of 1957, http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf. Accessed 18/3/2018.

[295] Article 128. Malaysian Constitution of 1957, http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf. Accessed 18/3/2018.

Following is a case for the Federal Court:

Zi Publications Sdn. Bhd. & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Interveners)[296]

Legal Principle

"A Muslim in Malaysia is not only subjected to the general laws enacted by Parliament but also to the State laws of religious nature enacted by the Legislature of a State."

Issue

In May 2012, ZI Publications Sdn. Bhd. published a book titled "Allah, Love and Liberty" written by a Canadian author, Irshad Manji. The Enforcement Division of the Selangor Islamic Affairs Department raided ZI Publications Sdn. Bhd.'s office on 29 May in 2012 and confiscated 180 copies of the book on suspicion of commission of offences under "section 16 of the Syariah Criminal Offences (Selangor) Enactment 1995" (the impugned section) which was issued by the Selangor State Legislative Assembly (SSLA). Consequently, on 7 March 2013, Mohd Ezra bin Mohd Zaid who was the majority shareholder and also the Director of the company, was charged before the Syariah Court Selangor with offences under the impugned section. Hence, this petition was deposited by the petitioners seeking a declaration that the impugned section is unconstitutional on the basis that the SSLA has no power to enact such a law. This is because the provision has the effect of restricting and/or has the potential to restrict freedom of expression, a matter upon which the SSLA has no power to

[296] Federal Court, Putrajaya, Zi Publications Sdn. Bhd. & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Interveners), 28 September 2015. http://malaysianlawreview.com/sample/MLRA_2015_5_690.pdf. Accessed 20/12/2017.

legislate. It is a matter which only Parliament has the power to legislate according to Article 10(2)(a) of the Federal Constitution.

Case Law

The Federal Court, state:

> "The purpose of Section 53 was to protect the integrity of 'aqidah', 'syariah' and 'akhlak' which constitute the precepts of Islam. The requirement for the tauliah is necessary to ensure that only a person who is qualified to teach the religion is allowed to do so. This is a measure to stop the spread of deviant teachings among Muslims. It is commonly accepted that deviant teachings among Muslims is an offence against the precept of Islam."

Therefore, the Legislative Council of the State of Selangor was working within its function. The purpose of enacting the Contested legislation was to prevent Religious publications contrary to Islam, thus spreading any beliefs contrary to Islam. The court rejected the arguments of the plaintiffs. And the court decided that Article 53 agreed with the Constitution and it was within the competence of the states.

Analysis

In the area of religious laws, a Muslim in Malaysia is subject to federal and state laws, based on the Constitution, and there are coordination and harmonization between the federal government and the states in this respect, therefore, there is no contradiction between them. This is what was confirmed by the Federal Court, which is the guarantee against any violation of the Constitution.

The Federal Court's decision that the Selangor state law was correct is evidence of the harmonization between the federal and state laws in the field of Islamic law, whereby a Malaysian citizen is subject to the federal law and the law of his mandate, and there

is no inconsistency between them. In particular, the application of the function of hisbah, which was provided for in this case.

This case was stipulated on the principle of hisbah in the relationship between the federal government and the states, as stipulated by the Malaysian constitution.

The Malaysian Constitution is unique from the rest of the federal Islamic constitutions by stipulating the application of the principle of hisbah in the relationship between the federal government and the states. What is the term (hisbah)?

Abou AL Hassan Al-Mawardi said, "The term (hisbah) refers to commanding what is good when it is being neglected, and to forbidding what is bad if it is being practiced."[297]

According to Mawardi "the commanding to the good may be classed in three ways: that which concerns the rights of Allah, that which concerns the rights of individuals, and that which is common to both."[298] An example of God's rights is about prayer, either not doing it or performing it incorrectly. Also, an example of individuals' rights is about drinking alcohol in public places. While an example of the rights of Allah and individuals together is the practice of magic.[299]

The function of hisbah is important in controlling the behavior of Muslims and preventing them from doing acts contrary to Islam. The function of hisbah protects Muslims from infringing on their rights and protects Muslims from strange ideas and

[297] Abou AL Hassan Al-Mawardi, *Al - Ahkam As - Sultaniyyah, the Law of Islamic Governance* (London: Ta-Ha Publishers Ltd., n.d.), 337.
[298] Abou AL Hassan Al-Mawardi, *Al - Ahkam As - Sultaniyyah, the Law of Islamic Governance* (London: Ta-Ha Publishers Ltd., n.d.), 341.
[299] Mohammed Ibrahim Abdul-Janabi, "The Hisbah System in the Islamic State," *Tikrit University Journal of Science* 3, no. 20 (2013): 243-44.

practices that violate the Islamic religion. Hisbah is the moral control of the Muslim people.[300]

Al-hisbah started in the markets in terms of preventing cheating, controlling prices, and how traders dealt with people. Then, hisbah extended to other areas, such as monitoring the performance of prayer and the Friday prayers. Also, hisbah extended to social areas, such as preserving the public morality and control of religious publications. in general, everything related to society and ethics.[301]

Hisbah was, at the beginning of the Islamic state, a voluntary work that could be performed by any Muslim. Even the Al Rashideen Caliphs were practicing the hisbah personally, such as Caliph Omar ibn al-Khattab (may Allah be pleased with him) who would walk in the markets with his whip and punish the violators.[302] Musayyib bin Dar said: "I saw Omar ibn al-Khattab (may Allah be pleased with him) hit a man and say: You are making your camel carry what it cannot bear"[303]

In the Umayyad era, hisbah became a function. Where the caliph or Alwally was appointed Muhtasib to exercise the hisbah function. For example, Ziyad ibn Abi, the

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300 See, Ragheb Al Sarjani, "Al-hisbah in the Islamic system. History and importance," Civilization, May 16, 2010, https://islamstory.com/ar/artical/23507/%D8%A7%D9%84%D8%AD%D8%B3%D8%A8%D8%A9-%D9%81%D9%8A-%D8%A7%D9%84%D9%86%D8%B8%D8%A7%D9%85-%D8%A7%D9%84%D8%A5%D8%B3%D9%84%D8%A7%D9%85%D9%8A-%D8%AA%D8%A7%D8%B1%D9%8A%D8%AE%D9%87%D8%A7-%D9%88%D8%A (accessed March 31, 2018).

301 Ibid.

302 Abdul Halim Aweys, "The System of Hisbah in Islam," Aalukah Network, July 10, 2017, http://www.alukah.net/web/aweys/0/121272/ (accessed March 31, 2018).

303 Meryhan Majdi Mahmoud, "Hisbah in the Era of the Al Rashideen Caliphs," Almuhtasib, 2015, http://almohtasb.com/main/Articles/18680 (accessed March 31, 2018).

Alwally of Basra, was appointed as Muhtasib for the market. This function evolved until the Muhtasib became his assistants to do his work.

In the Abbasid era, Al-hisbah became an institution, such as the institution of the judiciary and the police.[304] The caliph al-Mansour al-Abbasi established this institution and it continued to develop afterwards.[305] The Muhtasib was appointed by the caliph and the Muhtasib appointed his deputies in the regions of the Abbasid state.[306] With the development of this institution, the Muhtasib became a specialist, for example, there are Muhtasib for heretics, and Muhtasib for the market, etc.[307] The reason for this interest in hisbah and its evolution in the Abbasid era was the expansion of the country and the economic development, which led to the emergence of misconduct. As well as the emergence of many deviant religious movements. The Abbasid Caliphs used the hisbah function to control the country.[308]

It can be noted that the Abbasid state resorted to the function of hisbah to maintain stability in the sprawling state. This proves the importance of this function in the stability of the state. The hisbah function was supervised by the highest authority in the state, that was, the caliph. There is an application similar to the approach of the Abbasid state's interest in the function of hisbah, which is in Malaysia. Where the

304 Abdul Halim Aweys, "The System of Hisbah in Islam," Alukah Network, July 10, 2017, http://www.alukah.net/web/aweys/0/121272/ (accessed March 31, 2018).
305 Abdul Rahman Nasser Hashem Altter, "Al-Hisbah in the Abbasid era and its Role in Preserving Economic Life and Public Life" (master's thesis, Faculty of Arts, Islamic University - Gaza, 2015), 33.
306 Abdul Halim Aweys, "The System of Hisbah in Islam," Alukah Network, July 10, 2017, http://www.alukah.net/web/aweys/0/121272/ (accessed March 31, 2018).
307 Abdul Rahman Nasser Hashem Altter, "Al-Hisbah in the Abbasid era and its Role in Preserving Economic Life and Public Life" (master's thesis, Faculty of Arts, Islamic University - Gaza, 2015), 33
308 Ibid.

Malaysian Constitution, the highest legal text in the country, regulates the function of hisbah as presented below.

According to the Article 11(4) of the Malaysian constitution, the federal government exercises the function of hisbah in the states of Kuala Lumpur, Labuan, and Putrajaya, regarding "the control of propagating doctrines and beliefs among persons professing the religion of Islam". While in the rest of the states, the local government exercises the hisbah function in its territories, regarding "creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion" and "the control of propagating doctrines and beliefs among persons professing the religion of Islam".

The mention of the hisbah function in the Constitution is binding on all public authorities. Therefore, the organization of hisbah in Malaysia came from the highest legal text. Which helps to stabilize the country, as a result of the knowledge of both of the federal government and the states, their competence in the hisbah, which leads to the application in all Malaysian territories in a consistent manner.

The existence of the Federal Supreme Court ensures that the application of the system of hisbah in all Malaysian territory based on the Constitution. As was noted in the case (Zi Publications Sdn. Bhd. & Anor v. Kerajaan Negeri Selangor). Which ensures that the performance of the federal government and local governments are in accordance with the spirit of Islamic law.

In Malaysia, the existence of the Federal Supreme Court is the guarantee for the implementation of all the provisions of the Constitution related to Islamic law and works in harmony between the federal government and the states to implement the provisions of the Constitution.

Iraq can benefit from the Malaysian experience, especially the Iraqi Supreme Federal Court, which must interpret the constitution in accordance with the provisions of Islamic law, especially that the Iraqi constitution provides that Islamic law is an important source of legislation. This can be achieved with the support of the Supreme Court by the Jurists of the Islamic law being members of the Court on the basis of Article 92 of the Constitution.

2.6.4 United Kingdom

The United Kingdom is a country made up of four countries; they are England, Scotland, Wales and Northern Ireland.[309] The United Kingdom was formed by the laws of 1807 and 1881.[310]

Scotland, Wales and Northern Ireland each has legislative and executive authorities, but the Parliament and the Executive authority in England are the Parliament and the Executive authority of the whole of the United Kingdom. In other words, England does

[309] The official site of the Prime Minister's Office, "Countries Within a Country," The national archive, January 10, 2003, http://webarchive.nationalarchives.gov.uk/20080909013512/http://www.number10.gov.uk/Page823.

[310] "United Kingdom," Wikipedia, accessed September 4, 2018, https://en.wikipedia.org/wiki/United_Kingdom#cite_note-page823-29.

not have an independent parliament and executive authority, as in the rest of the UK. The UK system is a special system.[311]

England is divided into administrative units, which own elected councils. The law determines the competences of the administrative units exclusively. And the rest of the competences for the central government.[312]

That is, the Parliament has the authority to determine the competence of the administrative units and there is no constitution binding Parliament because the English Constitution is an unwritten constitution consisting of a set of laws and principles, and the English Parliament can amend it.[313]

Therefore, guarantees must be provided to local units in the face of the central government. The best available warranty is the judiciary. The English judiciary is characterized by the efficiency necessary to achieve the balance between the central government and the local councils, thus achieving cooperation and harmonization. There are Two cases following:

311 Charlie Jeffery, "Devolution and Local Government," *Oxford Journals* 36, no. 1 (2006).
312 Quashie Attica, "Administrative Decentralization in the Maghreb - States a Comparative Analysis" (master's thesis, Political Science, 2010-2011), 32.

313 Albert Weale, *Brexit and Beyond* (n.p.: UCL Press., 2018), 28-36.

I-R. (on the application of Shirley) v the Secretary of State for Communities and Local Government, 2017 WL 04099802[314]

Legal Principle

The Secretary of State for Communities and Local Government does not have the authority to interfere in a matter within the competence of local governments.

Issue

A company wanted to build 400 housing units with some facilities like hospitals. The company sought permission from the local government in Canterbury for approval to do an analysis to check the air quality. After discussions with specialists on air quality, the local government agreed on the results of the examination, which upheld the conclusion that the NO2 threshold would not be exceeded. A number of individuals objected to the decision of the local government and asked the Secretary of State for Communities and Local Government to intervene in the test results. The Secretary of State for Communities and Local Government refused to intervene because the decision was within the competence and appreciation of the local government.

Case Law

> "Although the Secretary of State for Communities and Local Government was the designated competent authority obliged by the law to achieve the specified threshold air quality values, he did not have a wider duty or freestanding responsibility to take any specific

[314] Royal Courts of Justice, Strand, London, WC2A 2LL, Date: 15/09/2017, Case No: CO/690/2017. http://login.westlaw.com.my.eserv.uum.edu.my/maf/wlmy/app/document?&suppsrguid=i0ad832f1000001608d3b8f3599cce7a1&docguid=I90AD55909C8D11E785D7E24257F39151&hitguid=IB0DC1E709C7211E78E5DC6F3C6A4E3D3&rank=5&spos=5&epos=5&td=141&crumb-action=append&context=9&resolvein=true. Accessed 25/12/2017.

actions in relation to permits concerning Local Governments." Therefore, the court "rejected the request of the plaintiffs."[315]

Analysis

The local government of Canterbury granted a license to build 400 housing units with some facilities, following approval of the results of the air quality examination. However, a number of individuals objected to the examination results and asked the Secretary of State for Communities and Local Government to intervene on the basis of his powers. The Secretary of State refused to interfere in the work of the local government because it was within the scope of the local government's competence. The Court upheld the Secretary's decision.

The harmonization between the central government and local governments was achieved when the central government gave due respect to the competence of the local governments. Therefore, the Minister's decision, in this case, was appropriate, and his goal achieves the harmonization between the central government and the local government. And the court agreed with this approach.

[315] Royal Courts of Justice, Strand, London, WC2A 2LL, Date: 15/09/2017, Case No: CO/690/2017. http://login.westlaw.com.my.eserv.uum.edu.my/maf/wlmy/app/document?&suppsrguid=i0ad832f1000001608d3b8f3599cce7a1&docguid=I90AD55909C8D11E785D7E24257F39151&hitguid=IB0DC1E709C7211E78E5DC6F3C6A4E3D3&rank=5&spos=5&epos=5&td=141&crumb-action=append&context=9&resolvein=true. Accessed 25/12/2017.

II-The Queen (on the application of Peter Gaskin) v Richmond Upon Thames London Borough Council, Lavender Hill & Wimbledon Magistrates' Court[316]

Legal Principle

The law grants the local authorities the right to determine the fees for granting and renewing the license, taking into account all costs. This is provided for as long as the authority's actions are not aimed towards making profit.

Issue

The claimant owned a house in multiple occupation which had seven units of accommodation that he rented out. "In 2014, the claimant appealed to renew the 5-year license he had obtained in 2009. The local authority charged a fee of £257 per lettable unit, which applied to new applications and renewals alike, and its renewal forms required applicants to list all the occupiers of the household. The claimant deemed the total fee of £1,799 too expensive and was prepared to pay only £850." The claimant also "refused to list the occupants as he had not been required to do so in his 2009 application and the household had not materially changed. He then failed to comply with the local authority's notice served under the Local Government (Miscellaneous Provisions) Act 1976 (Section16) requiring him to state the nature of his interest in the property and the names and addresses of any other person who had an interest as lessee or otherwise. Consequently, the local authority began prosecution proceedings." The claimant had argued that the local authority had been mistaken in

[316] High Court of Justice Queen's Bench Division Administrative Court Divisional Court11 December 2017, Case No: CO/2448/2016. http://login.westlaw.com.my.eserv.uum.edu.my/maf/wlmy/app/document?src=doc&linktype=ref&&context=8&crum. Accessed 27/12/2017.

that, it should characterize between fees for new requests and renewals, as renewals should take less time and cost substantially less to process.

Case Law

The court stated:

> "In respect of fees charged by local housing authorities to parties applying for a license to run a house in multiple occupation, the Housing Act 2004 (Section 63) expressly allowed authorities to fix fees to take into account all costs incurred in carrying out their functions under Part 2 of the Act." The court added "Therefore, they could charge the same fee for a renewal as for a first application, notwithstanding that renewals might have been expected to cost less to process, as long as they did not make a profit from the fee."[317]

Analysis

The claimant owned a house in multiple occupation. He wanted to renew the license for this house in 2014, however, he refused to pay the fee set by the local authority as it was equal to the license fee at first request, although the procedures for the renewal were less than the first request. The local authority requested for information of the other occupants in the house, which was also rejected by the claimant. This led the local authority to bring forth a lawsuit against the claimant, therefore, the claimant challenged the procedures of the local authority.

The court stated that Section 63 of Housing Act 2004 "allowed authorities to fix fees to take into account all costs incurred in carrying out their functions." The court added,

[317] High Court of Justice Queen's Bench Division Administrative Court Divisional Court11 December 2017, Case No: CO/2448/2016. http://login.westlaw.com.my.eserv.uum.edu.my/maf/wlmy/app/document?src=doc&linktype=ref&&context=8&crum. Accessed 27/12/2017.

“Therefore, they could charge the same fee for a renewal as for a first application, notwithstanding that renewals might have been expected to cost less to process, as long as they did not make a profit from the fee.”

Leaving fees to local authorities as long as they are not for profit demonstrates the application of harmonious cooperation between the central government and local governments in the exercise of their work. And the court agreed with this approach.

The judiciary in the two cases above supported the local governments and rejected the arguments of the plaintiffs. It is clear that the judicial approach is to support local governments in local affairs. This approach leads to harmonization between the central government and the local governments because they will work within their own areas. In other words, the area of local governments' work is local affairs, while the area of the central government is for the whole country or related to more than one administrative unit.

The guarantor of homogeneity between the central government and the local governments in England is the judiciary. And its judicial expertise can achieve harmonization. The Iraqi judiciary should benefit from the experience of the English judiciary and the relationships of the central authority with the local governments.

From the cases in the United States, Australia, Malaysia and the United Kingdom mentioned above, it can be noticed that the role of the judiciary is in ensuring that the central and local governments are committed to the distribution of the competence between them. Thus, achieving harmony between the central government and the local governments.

Achieving harmony is very important in the relationship between the central government and the local governments. It leads to the achievement of the advantages of decentralization, as well as the reduction in the opportunities for violence and internal fighting. Therefore, the role of the judiciary is very important in this area. This is achieved by the professional performance of the judiciary as in the cases previously studied, which aimed to maintain a balance between the central government and local governments and prevent the central government from infringing on the independence of the local governments in the exercise of their competencies.

The Iraqi constitution distributes the competence between the central government and the states and governorates. The Constitution determines the competence of the Central Government, exclusively, and then determine the common competence and then leave the rest of the competence to the states and governorates. The constitution grants broad competence to the states and the governorates to run their own affairs and to elect the members of the local authorities. The Constitution provides for the establishment of the Federal Supreme Court, which guarantees the application of the provisions of the Constitution. The expertise of the judiciary in other countries, such as Britain, Australia, Malaysia and the United Kingdom, can be used in order for the Federal Supreme Court to improve its performance. Thus, achieving homogeneity between the central government and the states and the governorates.

2.6.5 France and Egypt

France is the home country of the decentralized administrative system that is applied by the civil law countries. And one of these countries is Iraq.

The first attempt at administrative decentralization in France after the revolution was a failure due to the tendency of territorial communities to break away from the central authority. These communities issued legislative decrees which were the competence of the legislative authority in France. So, the French National Assembly issued a decree stating that the term "decree" is devoted to the legislative authority, and the territorial communities had to use the term "decision". Therefore, France had to return to the administrative centralization system, which was then tightened by Napoleon. The legislative authority began to gradually grant competence and independence to the territorial communities until 1982 when the legislative authority began to grant full administrative decentralization to the territorial communities. It continued until 2004 when a constitutional amendment was introduced in 2003 to promote reforms in the decentralized administrative system.[318]

It is noted that administrative decentralization in France was gradual, after the Napoleon era until 2004. Thus, the French legislature benefited from the failure of the first experiment at the beginning of the revolution and gradually applied it to avoid another failure. So, the gradual application is guaranteed to succeed.

After reforms in France, there is a harmony between the central authority and local units. There are Two principles use in France, that are proximity and coherence, were used in the division of labor between the central government and the local authorities. Each government makes decisions at its own level for all its responsibilities while the central government officials work together with all the local governments plan and

[318] See chapter Five of this study.

implement nationally coherent policies.[319] i.e. The commitment of each party in its field of work determined by the constitutional and legal texts.

The problem which was faced France in the implementation of the regional administrative decentralization is the same problem in Iraq. Large authorities were granted to local administrative units after the French Revolution; so, the local units understood that they had the authority to issue laws. Therefore, the legislature canceled the decentralized system and re-applied the central system, and then the authorities were gradually granted to the local administrative units until it reached an advanced level in cooperation and harmonization with the central government. This solution cannot be applied in Iraq due to the current legal and political situation in Iraq. Therefore, the Federal Supreme Court of Iraq must be supported to achieve harmony and coordination between the federal government and the local governments.

Administrative decentralization in France succeeded when there was awareness among the central government and the local units that cooperation and harmonization could achieve the objectives of administrative decentralization, and the cooperation and harmonization was achieved when both the central government and the local units were committed to its field of work.[320]

[319] Emmanuel Brunet-Jailly, "France between Decentralization and Multilevel Governance: Central Municipal Relations in France", *McGill University Press* (2007):10.
[320] Alistair Cole, "Decentralization in France: Central Steering, Capacity Building and Identity Construction," *French politics* 4, no. 1 (2006): 14.

Regarding Egypt, it was the first Islamic Arabic country to apply the civil law,[321] which is now being applied in Iraq. Also, Egypt has implemented the decentralized administrative system since 1909 until now.[322]

This means that despite the reforms of the 2014 Constitution in the field of administrative decentralization, the central executive authority has remained in control of the local councils, unlike with the 2005 Iraqi constitution, which has prevented the executive from controlling the local councils. The appointment of the governor by the central authority has continued under the 2014 constitution in Egypt.

From the above, it can be concluded that cooperation and harmonization between the central government and the local units are weak due to the imbalance between them in favor of the central authority. Although Article 5 of the System of Local Administration Law of 1979 provides for the formation of a coordinating committee between the central government and local units, the imbalance between the central authority and the local authorities affects the efficiency of the work of the Coordination Committee.

The reason for the above approach in Egypt is political instability, army officers took over the authority and there is an absence of true democratic governance. On the other hand, in Iraq, despite the democratic governance philosophy of the 2005 constitution, political instability affects the balance, cooperation, and harmonization between the central government and the local governments. Therefore, a strong professional judiciary is the guarantee to achieve balance, cooperation and harmonization between

[321] See Omar Al - Shalqani, *The boom and collapse of the legal elite in Egypt 1905-2005* (Cairo: Dar Al Shorouk, 2013).

[322] Article 11, Law No. 22 of 1909, Egyptian Gazette, No. 104, 18 September 1909.

the central government and the local governments, by preventing any party from overtaking the authorities of the other party.

2.7 Confederal

Professor Colliard says the terms that used to indicate a federal system are sometimes inaccurate. Professor Colliard mentions, for example, that, Switzerland is a federal country but is often called a confederation country.[323] What is Confederal?

2.7.1 Definition of Confederation

Mohamed Al Shafei defines the Confederate system as being an "agreement of two or more countries to coordinate between themselves in specific matters, and each of them retains its full sovereignty and independence".[324] Oppenheim also defines Confederacy as being "a number of fully sovereign countries associated with an international treaty to preserve its external and internal independence. The Confederacy has its own bodies that exercise its authority over member countries but not their citizens".[325] Another author defines Confederation as being "a treaty union between two or more countries. The Union has a common body that oversees the governments of the Union countries without having direct authority over these governments. Each country also maintains full sovereignty at home and abroad, except for limited powers voluntarily waived by the common body whose decisions are taken by consensus".[326] Also, David stated about Confederal, " the states are entering into a firm league of friendship with each

[323] Samer Hamid Sefer, "General Theory of the Federation", *Journal of Babylon University* 24, no. 2 (2016): 1034.
[324] Ibid, 1045.
[325] Samer Hamid Sefer, "General Theory of the Federation", *Journal of Babylon University* 24, no. 2 (2016): 1044.
[326] Ayad Yassin Hussein, "The Confederation and Its Application in Iraq", *Faculty of Law and Political Science / Salahuddin University* 21, no. 3 (2017): 234.

other, their common defense, the security of their liberties, and their mutual general welfare" and more "each state retains its sovereignty, freedom, and independence, and every power and jurisdiction".[327] Hamid also said that the Confederation is "established between two or more countries based on a convention among the governments of the Confederation. And the founder countries of this Confederation retain their internal and external independence. The Confederation's affairs shall be administered by an entity called the assembly or the congress, which shall include representatives of the Member countries".[328] And Essam[329] stated that the confederation is "established by an international treaty among a number of countries under which it is committed to working towards the achievement of certain goals. The treaty also establishes common bodies to achieve these goals". The author added that "each member country of the Confederacy retains its external and internal sovereignty". In the same context, Munther said that "in the Confederacy, there is no one country known as federalism, but there are many countries that are linked with each other in order to achieve their common interests".[330] On the other hand, it was stated (Keith)[331] that "the confederation promotes common state interests while preserving state sovereignty". The author added about the American confederal system (1777-1787) "Securing independence and mutual protection were the primary reasons for confederating". Also, the author said, "the framers of the American republic created a confederation based on the sovereignty of thirteen separate states". And

[327] David Golove, "The New Confederalism: Treaty Delegations of Legislative, Executive and Judicial Authority", *Stanford Law Review* 55, no. 5 (2003): 1707.
[328] Hamid Hanoun Khaled, *Principles of Constitutional Law and Development of the Political System in Iraq*, 2nd ed. (Baghdad: Noor Al Ain Printing Office, 2010), 50.
[329] Essam Al - Attiyah, *Public international law*, 7th ed. (Cairo: Al- Aatek for the book industry, 2008), 405.
[330] Munther Al- Shawi, *The Constitutional law*, 2nd ed. (Cairo: Al- Aatek for the book industry, 2007), 250.
[331] Keith L. Dougherty, *Collective Action under the Articles of Confederation* (New York: Cambridge University Press, 2001), 17.

further, the author David stated the "several sovereign and independent states may unite themselves together through a perpetual confederacy, without ceasing to be, each individually, a perfect state".[332]

It is clear from the above definitions that, the Confederacy is a treaty between two or several independent countries to form an alliance among themselves to achieve common goals; and often, the Confederacy's treaty is to defend from a common danger which could threaten the member countries of the Confederation. As a result of the Confederation treaty, a common body is formed to manage the affairs of the member countries. This body can be called a Congress, a Government, a Parliament or a council. In any case, this body can only make its decisions with the consensus of the member countries. These decisions are not directly applied on the citizens of the member countries, but rather through the governments of the member countries.[333] The member states of the Confederation are linked to each other by an international convention, so the area of study of Confederation is international law. While the area of study of the federal system is constitutional law[334].

The Confederation is usually formed by an agreement of independent countries in a Union. But the Confederation may be formed by dividing a unified country. For example, the Serbia and Montenegro Confederation formed after the breakup of the

[332] David Golove, "The New Confederalism: Treaty Delegations of Legislative, Executive and Judicial Authority", *Stanford Law Review* 55, no. 5 (2003): 1704.
[333] David Golove, "The New Confederalism: Treaty Delegations of Legislative, Executive and Judicial Authority", *Stanford Law Review* 55, no. 5 (2003): 1735.
[334] Ayad Yassin Hussein, "The Confederation and Its Application in Iraq," *Faculty of Law and Political Science / Salahuddin University* 21, no. 3 (2017): 235.

Yugoslavia Republic, but this confederation continued for only three years (2003-2006), and then these countries separated from each other.[335]

Some countries are moving from a confederation to the federal system to strengthen the relationship between their member states in the confederation and solve the problems resulting from the weakness of this relationship, such as with America, where Larry said that some of the reasons for the transformation of America from a confederation into a federal system were the weakness of the common entity (the Congress) and the economic war that was between the states in the confederation, as each state had its own currency.[336]

2.7.2 Examples of a Confederation Application

There are several examples of the implementation of Confederations, such as the United States Confederacy (1777-1787). After the independence of the British colonies in North America from the British Crown, these colonies formed a Confederation in 1777 to unite their political and military activities, with each state maintaining its independence and full sovereignty over its own territory. This confederation continued until 1787 when the member states agreed to the union in a federal country called the U.S.A.[337]

Another example of a Confederacy is the Confederation of Germany (1815-1866), where it formed a Confederation from several states, which was called the Vienna

[335] Ayad Yassin Hussein, "The Confederation and Its Application in Iraq", *Faculty of Law and Political Science / Salahuddin University* 21, no. 3 (2017): 239.
[336] Larry Elowitz, *Government in the United States of America* (Cairo: The Egyptian Society for the Dissemination of Universal Culture and Knowledge, 1996), 12.
[337] See David Golove, "The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority," *Stanford Law Review* 55, no. 5 (2003).

Confederation in 1815 and this Confederacy continued until 1866 when it separated into several countries after the victory of Prussia over Austria. [338]

The Switzerland Confederation is the oldest confederation, where it was established in 1291 by the agreement of three cantons (Uri, Unterwald and Schwyz) to form a Confederation. The members of the confederation gradually increased to 22 members. In 1848, the member states of the Confederacy decided to unite in a federal country, therefore, Federal Switzerland was established.[339] But Switzerland remains to be called the Switzerland Confederation although it has been a federal country since 1848.[340] On the other hand, the European Union is another example of a confederation, which consists of 28 European countries and was established in 1957.[341]

As mentioned earlier, after the breakup of the Yugoslav country in 2003, the Union of the Republics of Serbia and Montenegro, was established, which continued for only three years. The same ethnic reasons for the dissolution of the Yugoslavia Republic also led to the breakup of the Confederacy into the republics of Serbia and Montenegro

in 2006. It is worth mentioning that, the Confederate treaties are not permanent, they either end with disintegration or a transition to a federal system.[342]

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[338] Ayad Yassin Hussein, "The Confederation and Its Application in Iraq," *Faculty of Law and Political Science / Salahuddin University* 21, no. 3 (2017): 238.
[339] Ayad Yassin Hussein, "The Confederation and Its Application in Iraq," *Faculty of Law and Political Science / Salahuddin University* 21, no. 3 (2017): 237.
[340] Jawad Kazem Al Badri, "The Foundations of Wealth Distribution in Federal Systems", Faculty of Business Administration, University of Babylon, Iraq, May 25, 2011, accessed August 28, 2017, http://www.uobabylon.edu.iq/uobColeges/service_showarticle.aspx?fid=9&pubid=1015.
[341] See Abdul Hamid Musallam Al Majali, "The Confederation as a Political Concept", Al-Rai Newspaper, January 30, 2013, accessed August 29, 2017, http://alrai.com/article/565601.html.
[342] Ayad Yassin Hussein, "The Confederation and Its Application in Iraq", *Faculty of Law and Political Science / Salahuddin University* 21, no. 3 (2017): 237.

2.7.3 Confusing the Terms Confederation and Federalism.

The author Samer says “some authors confuse the two terms”. The author means the terms confederation and federalism. For example, the authors Shamsul Khana and Sherko Kirmanj[343] suggested the application of confederate not federalism in Iraq in order to the resolve the problem of Iraq and maintain its unity. But the authors here did not explain the difference between the federal system and a confederation. Besides that, when they mentioned the Confederacy, they explained the elements of the federal system, which were studied earlier in this chapter, i.e., they were referring to the federal system which is stipulated in the Iraqi constitution.

Before discusses the authors' opinion, will do a comparison between the with confederation system and the federal system.

2.7.4 The Comparison Between Confederacy and the Federal System

The Confederacy is made up of independent countries that form a Confederation among themselves to protect their interests. And the confederate countries make their decisions unanimously. While a federal country is one country despite the distribution of competence vertically and horizontally.[344]

This section will compare Confederalism and Federalism as follows:

[343] Shamsul Khan and Sherko Kirmanj, “Engineering Confederalism for Iraq”, *National Identities* 17, no. 4 (2015).

[344] Jawad Kazem Al Badri, “The Foundations of Wealth Distribution in Federal Systems”, Faculty of Business Administration, University of Babylon, Iraq, May 25, 2011, accessed August 28, 2017, http://www.uobabylon.edu.iq/uobColeges/service_showarticle.aspx?fid=9&pubid=1015.

Table 2.2

The comparison between Confederation and Federalism.

Confederalism	**Federalism**
-Confederalism is organized by international treaties.	- Federalism is organized by the constitution.
-The area of study of the Confederation is the international law.	-The area of study of the Federation is the constitutional law.
-The relationship between the member countries of the Confederation is a diplomatic one.	- The relationship between states is governed by the federal constitution.
-The citizens of each country are foreigners to the other countries in the Confederation	-Citizens of all the states have one nationality, which is the nationality of the federal country
-If there is a war between the member countries, it is an international war.	-If there is a war between the states, it is a civil war.
-The Convention establishing the Confederation provides for how the resolution of disputes between member countries is to be made.	-The Federal Constitution provides that the Supreme Court shall hear disputes between the states in the Federal Union.
-In Confederalism, the decisions are made unanimously.	-In federalism, the decisions are made based on the federal constitution
-The decisions of the common body shall not be implemented directly against the citizens of the member states, but by the governments of the member states	-Federal government decisions are directly implemented on citizens of the states, according to the constitution

The table above compared Confederalism and Federalism. The table showed that the international convention regulates the relationship between the member countries of the confederation. While the federal constitution regulates the relationship between states in the federal country. Therefore, the area of study of Confederalism is international law, while the area of study of federalism is constitutional law. As a result

of the above, the relationship between the member countries of the Confederacy are diplomatic and are governed by the international convention between them. While the relationship between states in the federal country is governed by the federal constitution. Also, the citizens of each of the member countries of the Confederacy are foreigners to the citizens of the other countries of the Confederation. While citizens of all the states in the federal country have the nationality of the federal country. On the other hand, for example, if there is a war between the member countries of the Confederacy, it is an international war, while if the war is between the states in the federal union it is a civil war.[345]

With regard to the conflict that may happen between the member countries of the Confederation, the international convention establishing the Confederacy usually provides for how to resolve these disputes. While in the federal system, the Constitution provides that the Supreme Court considers disputes between states.[346] Finally, the decisions in the Confederacy are made unanimously by the member countries and are not directly implemented on the citizens of the member countries, but by their governments. While, in Federalism, the federal government implements its decisions directly on the citizens of the states based on the federal constitution.[347]

After each of the above will be commented on the opinion of the authors Shamsul Khana and Sherko Kirmanj about suggested the application of confederate not federalism in Iraq in order to the resolve the problem of Iraq and maintain its unity.

[345] See Samer Hamid Sefer, "General Theory of the Federation", *Journal of Babylon University* 24, no. 2 (2016): 1046.
[346] See Ayad Yassin Hussein, "The Confederation and Its Application in Iraq," *Faculty of Law and Political Science / Salahuddin University* 21, no. 3 (2017): 236.
[347] See David Golove, "The New Confederalism: Treaty Delegations of Legislative, Executive and Judicial Authority", *Stanford Law Review* 55, no. 5 (2003): 1723.

First: The authors stated that "We also argue that power-sharing and consensus must be intertwined directly into the constitutional fabric of the political structure". A confederation has no sharing of authority because it is a convention between two or several independent countries to form a confederation and these countries retain their full authorities, as mentioned earlier. And, the sharing of legislative, executive and judicial authorities between the states and the central authority is one of the elements of the federal system. Paragraph 1 of Article 122 of the Iraqi Constitution of 2005 stipulates that "The regional powers shall have the right to exercise executive, legislative and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government".

Second: The authors stated that "the Kurdistan Region's relation to the central government in Baghdad is not organized on a federal…" while paragraph 1 of Article 117 of the Iraqi Constitution states that "this Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region".

Third: The authors stated that "Lijphart's proposal includes these provisions: (1) a parliamentary rather than a presidential system and (2) a legislative electoral system for the lower house based on proportional representation, to yield minority representation". The first Article of the Iraqi Constitution states that "The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary and democratic, and this Constitution is a guarantor of the unity of Iraq". So, the Iraqi Constitution states that the government in Iraqi is parliamentary. Also, the First paragraph of Article 49 states that the "The Council of Representatives shall consist of a number of members, at a ratio of one seat per 100,000 Iraqi persons representing the entire Iraqi people. They

shall be elected through a direct secret general ballot. The representation of all components of the people shall be upheld in it". Therefore, the Iraqi Constitution states that the Council of Representatives must represent all the components of the Iraqi people.

Fourth: The authors said that "decentralization is in the framework of Confederalism rather than federalism". The authors here referred to federalism and confederalism being decentralized systems, whereas a confederation is an international convention not a decentralized system, as discussed earlier in this chapter.

Fifth: The authors suggested that the legal status of the Iraqi capital, Baghdad, was as with Washington, the capital of the U.S.A. The United States of America is the home country of the federal system. On the other hand, the Iraqi constitution provides for the suggestion which is mentioned by the authors, where Article 124 of the Constitution states that "First: Baghdad in its municipal borders is the capital of the Republic of Iraq and shall constitute, in its administrative borders, the governorate of Baghdad. Second: This shall be regulated by a law. Third: The capital may not merge with a region."

Sixth: The authors stated that "the Republic of Iraq will have bicameral legislative structures with two houses: the upper house (the National Confederation Council; the current Iraqi Constitution allows for a Federation Council) and the lower house (elected parliament as per the 2005 constitution – the Council of Representatives)". The authors proposed two legislative councils and they mentioned that the system of the two councils is stipulated in the Iraqi constitution 2005. It is worth mentioning that the two-council system is applied by federal countries, for example, The U.S.A. On the other hand, Article 48 of the current Iraqi constitution 2005 states that "The federal legislative power shall consist of the Council of Representatives and the Federation

Council." But the Federation Council has not been formed yet. Maybe because it has not formed a federal region, except for the Kurdistan state, until now.

Seventh: The authors mentioned that there must be a Supreme Court and that the name of the Federal Supreme Court, which already exists in Iraq be changed to the "National Confederation Supreme Court". The Supreme Court is a feature of the federal system. The authors said that the choice of members of the court should take into consideration the representation of the three confederations, which make up Iraq, in addition to the capital, Baghdad. In the opinion of the researcher, the criteria for the selection of judges must be efficiency and integrity, and not to be a quotas system, this affects the efficiency of the work of the Court.

Eighth: The authors mentioned a number of practical examples of Confederacy to support their idea. These examples were Malaysia, Germany, India, South Africa and the U.S.A. These countries apply the federal system which is the same system stipulated in the current Iraqi Constitution. And the U.S.A. is the home country of the federal system.

It is clear from the above remarks that the authors, Shamsul Khan & Sherko Kirmanj, proposed the application of the federal system which is stipulated by the current Iraqi constitution, but the difference between their approach and the approach of the Iraqi constitution is that they want to apply the federal system in all Iraqi territories, while the Iraqi constitution provides for its application in the Kurdistan region and has left the rest of the Iraqi governorates the free choice between the application of the federal system or regional administrative decentralization system for political and historical reasons as previously mentioned in this chapter. Where Article 119 of the Constitution states that "One or more governorates shall have the right to organize into a region

based on a request to be voted on in a referendum submitted in one of the following two methods: First: A request by one-third of the council members of each governorate intending to form a region. Second: A request by one-tenth of the voters in each of the governorates intending to form a region". Also, Article 120 states that "Each region shall adopt a constitution of its own that defines the structure of the powers of the region, its authorities and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution."

Perhaps, the adoption of the term Confederation by the authors was made in order to indicate the federal system, because the area of the authors is international studies, while the area of this study is the law. The application of the Confederacy in Iraq means dividing it into several countries, and no Iraqi person wants to do this to his country. But, the application of the federal system in Iraq, where every state is granted legislative, executive and judicial powers, is good, such as in Malaysia and America.

2.8 Conclusion

Federalism is the distribution of the executive, legislative, and judicial authorities, by the constitution between a central government and the regional governments. The central government does not control the state governments, but the latter are responsible to their own respective constituencies, and the Federal Supreme Court is responsible for the adjudication of conflicts between the federal government and the state governments according to the Federal Constitution. Regional administrative decentralization is the distribution of the administrative authority or administrative function between the central government and locally elected entities. These entities are not part of the central government, they have separate legal personalities, but are under

the control and supervision of the central government. In other words, the local entities in the administrative decentralization system are part of the administrative system of the country, therefore, the activities of the local entities are part of the administrative activity of the executive authority.

The Iraqi Constitution (the Constitution) provides for the federal regions have the legislative, executive and judicial authorities. The Constitution states in Article 122 that the governorates that have not implemented the federal system can apply the regional administrative decentralization system.

Usually, the constitutions that apply the federal system implement it in all the territories of the country. The implementation of the federal system in one area of the country, but not in another area, while allowing the other area to choose between federalism or regional administrative decentralization is very rare. The aforementioned method has been implemented by the Iraqi Constitution and it is very different from the constitutions of other countries. Historical and political factors have led the writers of the Iraqi Constitution to adopt this method, which was the application of three Iraqi Kurdish governorates in the federal system in 1992 during Saddam Hussein's regime, under the protection of the U.S.A. Therefore, the Iraqi Constitution of 2005 approved the Kurdish state, which is called Kurdistan. However, as a result of strong opposition from several Iraqi parties, the federal system was not implemented in the rest of the Iraqi territories. The Iraqi Constitution gave the governorates the freedom to choose between the application of the federal system or the regional administrative decentralization system. Since the issuance of the Constitution in 2005, the federal system has not been applied by any governorates, except for the three governorates

which make up the Kurdistan state. Therefore, 15 governorates have implemented the regional administrative decentralization system.

The Iraqi Constitution (the Constitution) treats the states and governorates as equal in terms of the distribution of competence with the central government. This means that the competence granted by the Constitution to the states are the same as the competence granted to the governorates. This is a strange method, but there are historical and political factors that have led the constitutional legislator to use this approach, as well as the fact that both systems have advantages which encourage their adoption. There are specific elements for federalism and regional administrative decentralization. Therefore, granting competence to the states and the governorates according to the Iraqi constitution does not lead to the integration of the two systems because of their different elements. Thus, the exercise of the same competence by the states and governorates does not mean that they have similar authorities.

It has been noted in this chapter that the central system has several flaws that make implementation of it impossible, particularly in countries wanting to apply the principles of democracy, eliminate corruption and improve the public services. Therefore, the decentralized system cannot be given up, whether it is a decentralized administration or federal. Hence, each country, depending on its circumstances, can apply either one. Although there have been lapses in the application of the decentralized system, such as corruption due to the lack of expertise of the local entities and the lack of awareness among people with regards to the selection of the members of the local councils, this is not a strong enough reason to leave the decentralized system. Instead, the factors that lead to the emergence of corruption must

be addressed through the gradual implementation of decentralization, which can improve the efficiency of the local units and increase the people's awareness of exercising their rights to elect their representatives correctly, and also to be responsible for their actions. However, the country cannot return to the implementation of the central system.

This chapter examines the theoretical framework of decentralization and judicial interpretation to support the arguments in this study about the authorities of governorate councils and the function of the Federal Supreme Court.

This chapter discussed the harmonization that should occur between the central government and the governorates or states, which can lead to achieving the goal of the decentralized system and to spread peace in the relationship among them. It also cited the case laws related to it.

The harmonization between the central and local authority can be achieved by their commitment to the distribution of competence between them, which is according to the nature of the authority. For example, the central authority carries out the competence concerning the country's relations with other countries, such as diplomatic representation, bilateral and public treaties, and the declaration of war. The central authority also exercises the activity which exceeds its effect more than a state or governorate or which extends to all the country's territories, such as the distribution of electricity, regulation of water throughout the country's territories, issuing currency and regulation of trade between states or provinces. On the other hand, the local authorities are responsible for all activities related to the local population, such as providing public services, organizing activities within the state or governorate, and

providing for all the needs of the local population. Therefore, the members of the local authority must be from the local population and chosen by election. This is so that local people can monitor the work of the members of the local government. This harmony between the central and local governments will realize the goal of decentralization, which is to provide the best service to the population in the country and to achieve the principles of democracy that allow the local people to monitor the members of the local authority.

To ensure the achievement of this goal, this harmony between the central and local authorities must be stipulated in the Constitution to ensure that the public authorities do not breach it. The Constitution provides for competence between the central authority and local authorities, as in the Iraqi Constitution, in order to ensure respect for the distribution of competence between the central and local authorities. The Constitution provides for a protector to ensure both parties respect the provisions, which is the judiciary. The protector in Iraq is the Federal Supreme Court, therefore, the performance of the Federal Supreme Court reveals whether there is respect for the Constitution or not by the public authorities.

In the cases which were mentioned in this chapter, the court monitored the respect of the central authority towards the local authority's competence, as well as the prevention of the local authority from infringing upon the powers of the central authority. This will ensure harmonious cooperation between the central and local governments without breaching each other's area of competence.

The application of Islamic law on the relationship between the central government and local governments leads to justice. The application of Islamic law encourages harmony

in the work between the central and local governments, each exercising its competence as stipulated by the Constitution and the law.

Chapter Two also discussed the meaning of the term confederation. This is because some authors used this term to mean the federal system, as explained in this chapter. In fact, confederation is an international convention, not a decentralized system. There are also countries which are called confederations, such as Switzerland, but in fact, they implement the federal system.

The discussions in this chapter have achieved the first research objective, which was to determine the concept of federalism and regional administrative decentralization. And this chapter achieved the second research objective, which was to analyze the impact of harmonizing and how it can be effectively executed in Iraq.

CHAPTER THREE: AN EXAMINATION OF THE LEGAL TEXT OF THE IRAQI CONSTITUTION REGARDING REGIONAL ADMINISTRATIVE DECENTRALIZATION

3.1 Introduction

Since the first constitution of the modern Iraqi state in 1925 until 2004, the central administrative system had been applied in practice, regardless of whether the legal texts provided for a central or decentralized administrative system.

The Kingdom of Iraq was established in 1921 after England's victory over the Ottoman Empire in the First World War and the occupation of Iraq.[348] The constitution of the Kingdom of Iraq was issued on March 21, 1925, which was called the (Basic Law of Iraq).[349]

The 1925 constitution did not provide for the administrative system, but it was stated in general phrases. Article 111 of the constitution stated that the "Municipal affairs in Iraq shall be administered by means of municipal councils in accordance with a special law. In the administrative divisions, administrative councils shall perform such duties as may be prescribed for them by law". Based on the 1925 Constitution, the government issued the Provincials Administration Law in 1927, which stated in Article 49 that "Formed in the center of each provincial area is an administrative council, headed by the governor, comprising both officially and non-officially elected

[348] Taher Mohammed Al Janabi, *Regional Administrative Decentralization, a Two-Edged Weapon* (Beirut: Dar Al-Senhoury, 2017), 58.
[349] See the Iraqi constitution of 1925. http://iraqja.iq/view.86/. Accessed 29/4/2017.

members".[350] But, this council was a consultative body, so it could not issue enforceable legal decisions, and the province also did not have a legal personality.[351]

The 1927 law was a temporary stage for the Iraqi government, with regards to decentralized administration. The government took another step towards administrative decentralization by issuing the Provincials Administration Law of 1945, which abolished the 1927 Law.[352]

The 1945 law granted legal personality to the province[353] and it stipulated that the provincial council shall consist of permanent members (appointed) and elected members.[354] The permanent members were the heads of some official departments in the province, while the elected members represented the administrative units that comprised the province. They were elected by a body formed in each administrative unit. The governor headed the provincial council.[355] In addition to the above, the provincial council did not have real authority. The governor had the actual authority to implement the decisions of the council, as well as, the authority to implement laws and decisions issued by the central government in the province.[356]

In May 1958, the government amended the Provincials Administration Law of 1945. Under this amendment, the voting process became similar to those for parliamentary

[350] See Governorates Administration Law of 1927. http://109.224.24.124/pdf/1927/z0358.pdf. Accessed 1/5/2017.
[351] Taher Mohammed Al Janabi, *Regional Administrative Decentralization, a Two-Edged Weapon* (Beirut: Dar Al-Senhoury, 2017), 59.
[352] See Provincials Administration Law of 1945. http://109.224.24.124/pdf/1945/m0855.pdf. Accessed 1/5/2017.
[353] Article 60 of the Governorates Administration Law of 1945. http://109.224.24.124/pdf/1945/m0855.pdf. Accessed 1/5/2017.
[354] Article 45 of the Governorates Administration Law of 1945. http://109.224.24.124/pdf/1945/m0855.pdf. Accessed 1/5/2017.
[355] Article 77 of the Governorates Administration Law of 1945. http://109.224.24.124/pdf/1945/m0855.pdf. Accessed 1/5/2017.
[356] See Provincials Administration Law of 1945. http://109.224.24.124/pdf/1945/m0855.pdf. Accessed 1/5/2017.

elections.[357] From the foregoing, it can be concluded that the Iraqi government, during the era of the monarchy, began the program for the implementation of the administrative decentralization by steps. Therefore, it was the first step in that direction in 1945, then the second step was taken in 1958. But, the fall of the monarchy in the July 1958 revolution put a stop to the program.[358]

After the Iraqi army's revolution of July 14, 1958, a republican system was set up. Iraq was in a state of flux until 1968 because this period was distinguished by military coups; and in fact during that short, period two constitutions were issued (Constitution of 1958 and Constitution of 1964).[359] The constitution of 1958 did not mention anything about the administrative system, while the constitution of 1964 stated in Article 83 that the Iraqi Republic was divided into administrative units and managed in accordance with the law.[360]

The political situation that Iraq went through between 1958 and 1968 cast its shadow on the administrative system. After the attempt by the monarchy in Iraq to implement administrative decentralization in stages, the Republican regime brought the administrative system back to the beginning. The Provincial Administration Law of 1945 was amended by a law issued in 1959, of which Article 2 stated that "disbanded all the provincial councils that were formed in accordance with the Provincials Administration Law, 1945, and its amendments". Then, the next article provided for

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357 See Ahmed Kazem Al - Fatawi, "Governorate Council in the Governorates That Are Not Incorporated in a Region under Law No. 21 of 2008" (master's thesis, College of Political, Administrative and Diplomatic Sciences, 2010), 56.

358 See Taha Hamid Al - Anbuge, "Iraq between Administrative Decentralization and Federalism," *Strategic studies* (2010): 42.

359 See Ibid, and Taher Mohammed Al Janabi, *Regional Administrative Decentralization, a Two-Edged Weapon* (Beirut: Dar Al-Senhoury, 2017).

360 See the Iraqi Constitution of 1964. http://wiki.dorar-aliraq.net/iraqilaws/law/2967.html. Accessed 3/5/2017.

the creation of provincial councils consisting of permanent members who were the heads of the official departments in the province".[361]

In 1968, the Arabic Baath Socialist Party dominated the governance in Iraq.[362] Under Article 77 of the Iraqi Constitution of 1968, the Iraqi Republic was divided into administrative units, regulated and managed in accordance with the law.[363] This was similar to Article 83 of the 1964 constitution, but this constitution was temporary, in 1970 a new constitution was issued which continued until 2003.[364]

The 1970 Constitution differed from the rest of the previous constitutions of Iraq regarding the Administrative regulation. The Iraqi Constitution of 1970 mentioned that the administrative units in Iraq would apply the administrative decentralization, and Article (8-B) of the 1970 Constitution stated that "The Iraqi Republic is divided into administrative units and organized on the basis of administrative decentralization". This phrase was mentioned in the constitution for the first time since the Iraqi Constitution of 1925. According to this Article of the Constitution, the Governorates Law of 1969 was issued. This law provided that the governorate councils would consist of permanent members, who were heads of official departments in the governorate; and in addition to that, there would be elected members, whose number would be double the number of permanent members.[365] Although the law explained how to vote by direct elections,[366]there were no such governorate council elections, and this law

361 See Law number 36 of 1959. http://109.224.24.124/pdf/1959/t0036.pdf. Accessed 2/5/2017.
362 See Kamal Deeb, *Summary of the History of Iraq* (Beirut: Dar Al-Farabi, 2013).
363 See Iraqi Constitution of 1968. http://www.iraqja.iq/view.82/. Accessed 4/5/2017.
364 Iraqi Constitution of 1970. http://www.iraqja.iq/view.81/. Accessed 7/6/2017.
365 Article 54 of Governorates Law in 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.
366 Articles 61,62 of Governorates Law in 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.

was finally abolished in 2004.[367] Also, according to the Governorates Law of 1969, the governor was appointed by the central government and he represented the central government in the governorate, and as the governor, he had wide powers which were beyond the powers of the provincial council.[368]

At the end of the introduction, it can be concluded that from the Iraqi constitution of 1925 until the constitution of 1970, they did not provide for administrative regulation. Although the Royal Government attempted to gradually implement administrative decentralization under the 1925 constitution, the revolution of 1958 stopped these attempts, and it returned to the central administrative system. On the other hand, the 1970 Constitution stated for the first time the implementation of the regional administrative decentralization in Iraq. However, the constitution did not contain sufficient details and left it to the government to enact laws to regulate the administrative decentralization. So, the legislative authority issued the Governorate Councils Law, but the law provided for strict control of the governorates by the central authority, in addition, the law was not properly applied, as will be examined in chapter four of this paper.

It is not easy for the central authority to give up its competence to the administrative units. The central authority has taken advantage of the lack of seriousness of the constitutional legislator in applying the principles of administrative decentralization. Clearly, the constitutional legislator has not been serious about administrative decentralization, because the details of the implementation of regional administrative

[367] Mahmood Al-Zubaidi, "Administrative Competence of the Governorate Councils, Conflict and Overlap in the Light of the Law of Governorates Not Incorporated into a Region No. 21 of 2008." *Al-Hiqouq Journal* 3, no. 10 (2010):11.

[368] See Governorates Law in 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.

decentralization have not been stated. As well as that, the constitutional legislator has not stated the guarantees of the application of the constitutional texts. This is one of the problems of developing countries in general and of Islamic countries in particular, of which it is the wish of the central authority to retain all authorities, which leads to dictatorship and corruption.[369]

3.2 Administrative Regulation in the Temporary Iraqi Constitution of 2004

In 2003, the United States and its allies occupied Iraq and toppled Saddam Hussein's government. Thus, the 1970 constitution was abolished, and the temporary constitution of 2004 called the "Law for the Administration of the State of Iraq for the Transitional Period"[370] was issued, which continued until the issuance of the permanent constitution of 2005 and the formation of the new government based on it. In fact, after ten months the new Iraqi government was formed, according to the 2005 Iraqi constitution.[371]

The constitutional legislator adopted the principle of democracy as a philosophy of governance when it enacted the Iraqi Constitution of 2004. And Article 4 of the 2004 Constitution stated that:

> "The system of government in Iraq shall be republican, federal, democratic, and pluralistic, and the powers shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations"

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369 See Khaled Abou El Fadl, "Injustice in God's Name: The Corruption of Modern Islam", Religion and ethics, September 24, 2012, accessed July 22, 2017, http://www.abc.net.au/religion/articles/2012/09/24/3596547.htm.

370 See the Iraqi constitution of 2004. http://www.refworld.org/docid/45263d612.html. Accessed 7/5/2017.

371 See Ahmed Kazem Al - Fatawi, "Governorate Council in the Governorates That Are Not Incorporated in a Region under Law No. 21 of 2008" (master's thesis, College of Political, Administrative and Diplomatic Sciences, 2010), 56. And Taha Hamid Al - Anbuge, "Iraq between Administrative Decentralization and Federalism", *Strategic studies* (2010).

In this Article, the constitutional legislator provided for the philosophy of governance in Iraq, which was democracy, pluralism and federalism, and then directly stated that the most important manifestations of the philosophy of governance was the distribution of authorities between the center and the regions, governorates and other administrative units. It is true that the democratic principle was stipulated in the previous Iraqi constitutions, but the 2004 constitution was different from all the previous Iraqi constitutions because it provided the details of the manifestations of democracy and the guarantees for the implementation of the constitution. "Decentralization is part of democratic governance. It is intended to give local authorities their own resources and responsibilities separate from those of the central government, to have their authorities elected by local communities and to ensure a better balance of power throughout the territory. Decentralization brings the decision-making process closer to the citizens, encouraging the emergence of local-level democracy".[372]

Article 55-A of the Constitution of 2004 stated that each governorate had the right to form a governorate council and name a governor. Article 55-A also stipulated that no governor or member of the governorate council would be sacked from any of the governorate councils by the federal government or by any of its officials unless he was convicted by a court of competent jurisdiction in accordance with the law. Article 55-A also stated that the governor or the members of the governorate council would not be subject to the central authority unless it concerned the exclusive powers of the central authority provided for in the constitution or by a court order.

[372] Clara Molera, *Decentralization and Local Governance*, 4th ed. (London: Centre for Financial and Management Studies, SOAS University of London, 2016), 14.

With regards to the competence of the governorate councils, Article 57-A of the Iraqi Constitution of 2004 stated that

> "All authorities not exclusively reserved for the Iraqi Transitional Government may be exercised by the regional governments and governorates as soon as possible following the establishment of the appropriate governmental institutions."

It is clear from the text of this article that the constitutional legislator had set the competence of the central government, exclusively, and left the rest of the competence to the regions and governorates. This was the same approach followed later by the 2005 Iraqi Constitution in the distribution of the competence and the inclusion of this method for the federal and decentralized administrative system. On the other hand, Article 56-C stated that the governorate councils would apply the decentralized system.

Article 57-B of the 2004 Constitution stated that "Elections for the governorate councils throughout Iraq and for the Kurdistan National Assembly shall be held at the same time as the elections for the National Assembly, and no later than January 31, 2005." The elections were held on December 15, 2005.[373]

The fact that the constitution provided the details regarding administrative decentralization means that it was binding on the three authorities (legislative, executive and judicial authorities) and it was not permissible to violate the provisions

[373] Zuhair Ziauddin, "Parliamentary Elections and Governorate Councils," Iraqi Communist Party, December 18, 2016, accessed May 5, 2017, http://www.iraqicp.com/index.php/sections/platform/52138-2016-12-18-20-16-17?tmpl=component&print=1&page=.

of the constitution because it was the supreme law of the state. Article 3 of the 2004 Constitution stated that "this law is the supreme law of the country and shall be binding in all parts of Iraq without exception".

To guarantee the application of the provisions of the constitution and that they were not violated by the public authorities, Article 44 of the Constitution of 2004 provided for the establishment of the Federal Supreme Court, which was competent to adjudicate the constitutionality of laws and administrative decisions if it was challenged by a plaintiff or by a court to consider the constitutionality of a law or decision. The court was also competent to hear disputes between the central government and the regions, governorates and municipalities on the basis of a lawsuit before it.

The Constitution of 1925 provided for the formation of a Supreme Court. Among its competence was the constitutionality of the laws, but it was not independent. Four of its members were Members of Parliament, four were judges and the head of the court was the head from one of the two councils of Parliament. The Supreme Court was formed in every case by royal decree after approval by the Council of Ministers. The Supreme Court was not permanent, and consisted, on each occasion it was formed, of different members.[374] While the Iraqi Constitution of 1968 also provided for the establishment of a Supreme Federal Court to consider the constitutionality of laws,[375] but, this court was never formed.[376]

[374] Articles 81- 87 of the Iraqi Constitution of 1925. http://iraqja.iq/view.86/. Accessed 29/4/2017.
[375] Article 87 of the Iraqi Constitution of 1968. http://www.iraqja.iq/view.82/. Accessed 4/5/2017.
[376] Saad Abdul Jabbar Alaloush, "Looks into the Subject of Judicial Observation on the Constitutionality of Laws in Iraq and Its Future in the Protection of Public Rights and Freedoms", *Journal of the College of law /Al-Nahrain University* 14, no. 8 (2005).

The Federal Supreme Court Law was passed and published in the Iraqi Gazette on March 17, 2005.[377] The Federal Supreme Court consists of nine judges, one of whom is the head of the court and they are appointed for life by the President of the Republic after being nominated by the Supreme Judicial Council.[378]

The Iraqi Constitution of 2004 was revolutionary when it came to administrative regulation as compared to the previous Iraqi constitutions.[379] But, why this approach? Zuhair stated that "The adoption of federalism and administrative decentralization in the constitutional and legal system of Iraq after 2003 is, in essence, a reaction to the nature of the legal and constitutional system that existed before 2003, which was the concentration of power, and not to adopt flexible legal mechanisms to manage diversity in the different governorates".[380] The same conclusion was stated in the report submitted by a group of researchers to the United Nations (ESCWA), that the administrative centralization applied before 2003 led to this approach by the constitutional legislator.[381]

The central administrative system has been applied since the first constitution of the Iraqi state in 1925. In spite of the fact that the Iraqi Constitution of 1970 stipulated the application of the decentralized system, but the phrases used in the constitution with regards to the subject were very short and general. As such, the regulation of

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377 Federal Supreme Court Law. http://109.224.24.124/pdf/2005/j3691.pdf. Accessed 7/5/2017.

378 Articles 3,6 of Federal Supreme Court Law. http://109.224.24.124/pdf/2005/j3691.pdf. Accessed 7/5/2017.

379 See Idris Hassan Mohamed and Fawaz Khalaf Zaher, "Control of Decentralized Administrative Entities in Iraq, an Analytical Study", *Tikrit University Journal of Legal and Political Sciences* 4, no. 14 (2012): 181.

380 Zuhair Al Hassani, "Administrative Decentralization in the Legal System of Governorates Not Incorporated into a Region", Essays and Research, 2013, accessed May 7, 2017, http://www.hdf-iq.org/ar/2010-12-01-14-01-29/342-2013-01-10-13-11-41.html.

381 Amal Shlash, Wafaa Al-Mahdawi, Hasan Lateef and Kazem. Support to Decentralization and Local Government to Enhance Service Provision in Iraq United Nations ESCWA.

administrative decentralization was just made by the legislative authority, without any constitutional guarantees. Therefore, the administrative system was more central than decentralized.[382]

In accordance with the 2004 Constitution, the government issued a law to regulate the administrative decentralization of the governorates which was known as "Order 71: Local Governmental Powers" in 2004.[383] This law stipulated that the governorate councils were to be elected[384] and that the governor was to be selected by a majority of the members of the council.[385] The governor was accountable to the governorate council[386]. The governorate councils exercised their competence according to the laws in force at the time.[387]

3.3 Administrative Regulation in the Iraqi Constitution of 2005

Article 144 of the Iraqi Constitution of 2005 states that:

> "This Constitution shall come into force after the approval of the people thereon in a general referendum, its publication in the Official Gazette, and the seating of the government that is formed pursuant to this Constitution."[388]

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[382] Areej Talib Kazem, "Terms of Reference for Local Authorities in the Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008", *Journal of Anbar University for Law and Political Sciences* 1, no. 3 (2011): 134.

[383] See "Order 71: Local Governmental Powers" of 2004. http://www.iraq-lg-law.org/ar/webfm_send/940. Accessed 8/5/2017.

[384] Section (2/4) of the "Order 71: Local Governmental Powers" of 2004. http://www.iraq-lg-law.org/ar/webfm_send/940. Accessed 8/5/2017.

[385] Section (2/5) of the "Order 71: Local Governmental Powers" of 2004. http://www.iraq-lg-law.org/ar/webfm_send/940. Accessed 8/5/2017.

[386] Section (3/1) of the "Order 71: Local Governmental Powers" of 2004. http://www.iraq-lg-law.org/ar/webfm_send/940. Accessed 8/5/2017.

[387] Section (4/1) of the "Order 71: Local Governmental Powers" of 2004.

[388] Iraqi constitution in 2005. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

In accordance with Article 144, the Iraqi Constitution of 2005 came into force on May 20, 2006, After the approval of the Constitution by 78.40% of the vote in the referendum on 15 October 2005,[389] which was then published in the Iraqi Gazette on December 28, 2005, and finally, came the formation of the Iraqi government under this Constitution on May 20, 2006.[390]

The first Article of the Iraqi Constitution of 2005 states that:

> "The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq."

This means that the constitutional legislator in 2005 adopted the same philosophy of governance as the constitution of 2004. Also, the constitution of 2005 adopted the same approach as the constitution of 2004 by having the details about the decentralized administrative system. In addition to that, the constitution of 2005 had increased the details to ensure the application of the public authorities of the decentralized system.[391] As well, the constitution also provided for the establishment of the Federal Supreme Court to observe the constitutionality of laws and administrative decisions[392] in order to guarantee the implementation of the constitution by the public authorities.

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389 Munther Al Fadl, "When Did the 2005 Iraqi Constitution Become in Force?," Al Nour Foundation for Culture and Information, April 26, 2010, accessed September 4, 2017, http://www.alnoor.se/article.asp?id=75502.

390 See Munther Al Fadl, "When Did the Iraqi Constitution Come into Force?" Middle east, October 42,2010, archive.aawsat.com/leader.asp? article=566692&issueno=11470#. WRAmP-WGPIU. Accessed 8/5/2017.

391 See contribution of the competence between the central government and governorates according to the Iraqi constitution in 2005.

392 See Articles (92-94) of the Iraqi constitution in 2005. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

The constitution did not refer to the formation of the governorate council, but rather transferred it to the law and provided for the election of the governorate council indirectly in accordance with Article 122 (Fourth) which states that "A law shall regulate the election of the Governorate Council, the governor, and their powers." However, the constitution has regulated some aspects of administrative decentralization to bind the legislator when it legislates the governorates law, such as, Article 122(Third) which states that "The governor, who is elected by the Governorate Council, is deemed the highest executive official in the governorate to practice his powers authorized by the Council." According to this article, the governor is elected by the governorate council and is accountable to the council.[393] This is the same approach as the temporary constitution of 2004, which differs from the approach taken by the modern Iraqi state since the first constitution in 1925 until 2004, and that is, that the governor was appointed by the central authority.[394] In addition, the other details that have been stipulated in the constitution are as follows.

3.3.1 The Distribution of Competence Between the Central Government and the Governorates

Article 110 of the Iraqi Constitution of 2005 (the Constitution) states that the exclusive authorities of the central authority are in areas such as foreign policy, development of a national security policy and its implementation, the drawing up of a financial and customs policy, issuing currency, setting the draft budget, and the general census of the population. This sovereign competence cannot be exercised by any other authority in the country. On the other hand, Article 114 of the Constitution deals with the shared competence between the central authority with the states and the governorates such as

393 Lamar Cravens, Analyzing Decentralization in Iraq. Amman, Jordan: UN Habitat, 2011, 2.
394 See the introduction of this Chapter.

customs administration, organization of electric power sources and distribution, environmental, health, and educational policies. Article 115 of the Constitution states that:

> "All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regards to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute."

It is clear from the above that the constitutional legislator determines only the competence of the federal government and the rest have been left to both states and governorates. The common competence shared between the federal government and the states and governorates are also stipulated. Article 115 further states that when there is a dispute between the federal government and the states or governorates, priority is given to the law of the states and governorates.

Some authors, such as Read, criticized this constitutional approach, and he said that the Iraqi constitution "Has worked to expand the competence of the governorates in an unprecedented manner in all the constitutional systems that have adopted the decentralized administrative system".[395] The author added "This Constitution, which has determined the common competence between the federal authorities and the authorities of the regions, does not stop this determination with these two parties, but

[395] Read Naji Ahmed, "The Extent of the Competence of the Governorates Not Incorporated into a Region to Impose Taxes and Fees (Specialized Legal Study in Legal System in Iraq)", *Journal of college of Law for Legal and Political Sciences* 4, (2015):389.

also includes the governorates that are not incorporated into a region in all the matters entrusted to the region".[396] Another author stated that "It is not accurate to regulate a decentralized system for governorates that are not incorporated in a region by a constitutional text like the federal system, because federalism is a form of state, while administrative decentralization is a form of administration and regulated by law".[397] In the same context, Areej said that the constitutional legislator is mixing the federal system, which runs the states with the administrative decentralization system that governs the governorates that are not incorporated in a region.[398] Also, Ghazi stated that "The inclusion of the governorates that are not incorporated into a region in the same competence of the states is mixing the federal and administrative decentralization systems".[399]

On the other hand, Dr. Sadiq Mohammed Ali, head of the legal department at the University of Babylon, said, in an interview with the researcher, that the approach of the constitutional legislator in the distribution of competence granted very broad competence to the governorates.[400] And Professor Nabeel went in the same direction.[401] Also, Mr. Mahnah, a member of the Iraqi Parliament, said, in an interview by the researcher with him, that the constitution gave the governorate councils very broad powers.[402] And Mr. Ahmed Al-Marzouk, a member of the Muthanna

396 Ibid, 390.

397 Zuhair Al Hassani, "Administrative Decentralization in the Legal System of Governorates Not Incorporated into a Region", Essays and Research, 2013, accessed May 7, 2017, http://www.hdf-iq.org/ar/2010-12-01-14-01-29/342-2013-01-10-13-11-41.html.

398 Areej Talib Kazem, "Terms of Reference for Local Authorities in the Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008", *Journal of Anbar University for Law and Political Sciences* 1, no. 3 (2011):146.

399 Ghazi Faisal Mahdi, "Federal and Administrative Decentralization Systems in the Constitution of the Republic of Iraq, 2005", *Journal of Legislation and Judiciary* (2009).

400 Dr. Sadiq Mohammed Ali, (February15, 2017). Iraq: personal interview.

401 Prof. Dr. Nabeel Althabhawi (Abril 15, 2017). Iraq: personal interview.

402 Sadiq al – Mahnah (Mahnah), (February 17, 2017). Iraq: personal interview.

Governorate Council and Chairman of the Legal Committee of the Council, said the constitution grants to the governorate councils a wide range of powers.[403]

The researcher would like to highlight the following five points.

Firstly, the constitutions which regulate the competence of local units in a decentralized administrative system, normally state the general principles and leave the details to the law.[404] For example, Article 134 of the Tunisian Constitution of 2014 states that:

> "Local authorities possess their own powers, powers shared with the central authority, and powers delegated to them from the central government. The joint and delegated powers shall be distributed in accordance with the principle of subsidiarity. The local authorities shall enjoy regulatory powers in exercising their mandates. The regulatory decisions of the local authorities shall be published in an official gazette of the local authorities".[405]

Also, Article 180 of the Egyptian Constitution of 2014 states that:

> "Local councils shall be competent to follow up the implementation of the development plan, monitor the different activities, the exercise of oversight over the executive authorities using tools such as providing proposals, and submitting questions, briefing motions, interrogations and others, and to withdraw confidence from the heads of local units, as regulated by Law."[406]

Finally, Article 72 of the French Constitution states that:

> "Territorial communities may make decisions in all matters arising under the powers that can best be exercised at their level. In the conditions provided for by statute, these communities shall be self-governing through elected councils and shall have the power to

[403] Ahmed El Marzouk, (March 20, 2017). Iraq: Personal interview.

[404] See Amal Shlash, Wafaa Al-Mahdawi, Hasan Lateef and Kazem. Support to Decentralization and Local Government to Enhance Service Provision in Iraq. United Nations ESCWA.

[405] Tunisian constitution in 2014. https://www.constituteproject.org/constitution/Tunisia_2014.pdf. Accessed 12/5/2017.

[406] Constitution of The Arab Republic of Egypt 2014. http://www.sis.gov.eg/Newvr/Dustor-en001.pdf. Accessed 12/5/2017.

make regulations for matters coming within the conditions of the law".[407]

It is clear from the texts of these constitutions that they transferred the details of the competence of local councils to the law and that they were limited to the general principles.

Secondly, the researcher has mentioned in the second chapter of this research that the Iraqi constitution was unique in the method of mixing two different systems, which was criticized by some authors as mentioned above. In fact, the reason for this approach is due to the historical reasons that are related to the establishment of the Kurdistan region in 1992 during the rule of Saddam Hussein. That is, the Kurdistan region already existed when the Iraqi Constitution of 2005 was written, and this has been explained in the second chapter of this research. On top of that, there was the American wish to apply the federal system to Iraq. And this idea was supported by a number of Iraqi parties[408], while other parties wanted a decentralized administrative system, and further, there was a third group that did not want to give broad powers to the governorates. So, that is why the Iraqi Constitution came out this way.[409] Professor Nabeel Althabhawi, a, lecturer at the University of Kufa in his interview with the researcher, pointed out that the multiple political trends were what formulated this constitutional approach.[410] Also, Mr. Ahmed Al-Marzouk, a member of the Muthanna

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407 French Constitution of 1958. http://www.wipo.int/edocs/lexdocs/laws/en/fr/fr076en.pdf. Accessed 12/5/2017.

408 See Isra Aladdin, "Federalism in the Iraqi Constitution Reality and Future After the Us Withdrawal", *Risalat al-huquq Journal* (2012): 229.

409 See trends of the Iraqi parties. Isra Aladdin, "Federalism in the Iraqi Constitution Reality and Future After the Us Withdrawal", *Risalat al-huquq Journal* (2012): 229.

410 Prof. Dr. Nabeel Althabhawi (Abril 15, 2017). Iraq: personal interview.

Governorate Council and Chairman of the Legal Committee of the Council, went in the same direction.[411]

Thirdly, there was a real desire of the constitutional legislator to implement decentralization, whether administrative or federal decentralization. As well, the constitutional legislator wanted to overcome the mistakes of past attempts about the implementation of the regional administrative decentralization by stating the important details about the decentralized administrative system in the Constitution, which is the nominal law in the country and all public authorities must respect its provisions.

Fourthly, as mentioned in the second chapter of this research, both the decentralized administrative system and the federal system have their own elements. Therefore, each has its own scope. That is, that the governorates that implement regional administrative decentralization, no matter how expanded the competence are, they cannot issue laws or Judicial judgments; because, this is outside the scope of the decentralized administrative system. And the maximum that the governorates can issue are administrative decisions. While a federal region can issue laws and Judicial judgments because they within its scope.

Fifth, it is true that the Constitution grants broad competence to the governorates, but the law can control the common competence, which is stipulated in the Constitution, by granting this competence to the governorates gradually, and the central authority remains to supervise the governorates in common competence. This helps to overcome the disadvantages of the implementation of the decentralized system, especially in developing countries, which is mentioned in the second chapter of this research.

[411] Ahmed El Marzouk, (March 20, 2017). Iraq: Personal interview.

3.3.2 Analysis of Article 122 of the Iraqi Constitution of 2005

Article 122 is about the organization of the decentralized administrative system in Iraq. The first paragraph of this article states that:

> "The governorates shall be made up of a number of districts, sub-districts, and villages."

This article provides for the local units which are grouped together to form the governorate. Also, Article 122 provides for the election of the governorate council and the governor, as mentioned earlier.[412] On the other hand, the second and fifth paragraphs of Article 122 will be analyzed below. These two paragraphs are important because they determine the general principles of the decentralized administrative system adopted by the Iraqi Constitution, and they have given rise to many discussions as will be seen later in this study.

3.3.2.1 Second Paragraph of Article 122

The second paragraph of Article 122 states that the:

> "Governorates that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law."

It is clear from this article that the governorates that are not incorporated in a region are outside the federal system. Therefore, the provisions of this article include governorates that do not implement the federal system. The constitution "granted broad administrative and financial authorities". It is evident, that the constitution granted broad authorities for the governorates, but these authorities are merely

[412] See introduction of "Administrative regulation in the Iraqi Constitution of 2005" in this Chapter.

"administrative". The administrative authorities are an administrative activity which is issued from the executive authority.[413] On the other hand, the broad financial authorities are consistent with the broad administrative authorities, as the authorities will not be able to function without financial powers. Therefore, if the governorates do not have wide financial authority, they will be "handcuffed". The granting broad powers through the law is useless as long as financial allocations are identified and attached with instructions and controls that forbid the good use of the available resources.[414]

In the second paragraph of Article 122, the constitutional legislator stated that the broad administrative and financial authorities of the governorates are under the principles of administrative decentralization. Thus, the principles of administrative decentralization are applied to the wide authorities of the governorates. The expanding local administrative and financial powers does not contradict the administrative decentralization principle so long as such expansion does not cover the legislative areas.[415] The expansion of administrative and financial powers does not interfere with administrative decentralization.[416] In short, in accordance with the principles of administrative decentralization, the administrative activities are being distributed between the central government and administrative units only, in other words, there is no such distribution for the legislative and judicial authorities. That means the administrative units do not have the authority to issue laws, the most they can do is to

413 See Wissam Saber Abdul Rahman, *Legislative competence of administration, under normal circumstances: 'Comparative study'* (diss., Faculty of Law, University of Baghdad, 1994).
414 See Amal Shlash, Wafaa Al-Mahdawi, Hasan Lateef and Kazem, Support to Decentralization and Local Government to Enhance Service Provision in Iraq United Nations ESCWA.
415 Ibid.
416 Zuhair Al Hassani, "Administrative Decentralization in the Legal System of Governorates Not Incorporated into a Region", Essays and Research, 2013, accessed May 7, 2017, http://www.hdf-iq.org/ar/2010-12-01-14-01-29/342-2013-01-10-13-11-41.html.

issue administrative decisions. In the decentralized administrative system, there is only one legislative authority, that is, Parliament. Under administrative decentralization, the governorates can run their affairs by the decisions that are issued according to the laws enacted by Parliament.[417] Most studies stated that the Article 122 of Constitution provides for the governorates apply the principle of administrative decentralization.[418]

3.3.2.2 Fifth Paragraph of Article 122

The Fifth Paragraph of Article 122 states that:

> "The Governorate Council shall not be subject to the control or supervision of any ministry or any institution not linked to a ministry. The Governorate Council shall have independent finances."

This article is a reaction to the strict control exercised by the central authority over the governorates from 1925 to 2003.[419] Therefore, sharp phrases can be noticed for this article. The control exercised by the central authority over the local entities is to ensure the legitimacy of its decisions, but in Iraq, we find that the legislator deepened so much on that before 2003.[420]

[417] See Chapter Two from this study.
[418] See Lamar Cravens, Analyzing Decentralization in Iraq. Amman, Jordan: UN Habitat, 2011, 6. And Zuhair Al Hassani, "Administrative Decentralization in the Legal System of Governorates Not Incorporated into a Region," Essays and Research, 2013, accessed May 7, 2017, http://www.hdf-iq.org/ar/2010-12-01-14-01-29/342-2013-01-10-13-11-41.html. And Ghazi Faisal Mahdi, "Federal and Administrative Decentralization Systems in the Constitution of the Republic of Iraq, 2005," Journal of Legislation and Judiciary (2009).
[419] Amal Shlash, Wafaa Al-Mahdawi, Hasan Lateef and Kazem, Support to Decentralization and Local Government to Enhance Service Provision in Iraq. The United Nations ESCWA. .
[420] Ahmed Kazem Al - Fatawi, "Governorate Council in the Governorates That Are Not Incorporated in a Region under Law No. 21 of 2008" (master's thesis, College of Political, Administrative and Diplomatic Sciences, 2010), 67.

Some authors criticized preventing the control of ministries on governorate councils, such as Ismail, who said that observation is the safety valve for the country's unity.[421] Also, Ghazi stated that granting broad competence to the governorate councils with the prevention of administrative control by ministries and institutions not linked to a ministry, with the lack of experience for governorate councils and corruption leads to the fragmentation of the country and its division. [422] And the author went further than that and considered administrative control by the ministries to be an element of the decentralized administrative system. Therefore, dropping this element will lead to the fall of the administrative decentralization and accordingly, we cannot talk about the existence of administrative decentralization.[423] The researcher does not agree with the author because there are countries that have adopted the decentralized administrative system and prevented the administrative control of the governorates and replaced it with the control by the judiciary such as Article 181 of the Egyptian Constitution which provides for: "Local council decisions that are issued within the council's mandate are final. They are not subject to interference from the executive authority, except to prevent the council from overstepping these limits, or causing damage to the public interest or the interests of other local councils".[424] In France, the Rights of Municipalities, Governorate and Regions Law of 1982, provides for the control of the local units activity by the judiciary.[425] Also, in Iraq, the governorates can be controlled

[421] Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control", *Risalat AL-huquq Journal* (2012): 38.
[422] Ghazi Faisal Mahdi, "Federal and Administrative Decentralization Systems in the Constitution of the Republic of Iraq, 2005", *Journal of Legislation and Judiciary* (2009).
[423] Ghazi Faisal Mahdi, "Federal and Administrative Decentralization Systems in the Constitution of the Republic of Iraq, 2005", *Journal of Legislation and Judiciary* (2009).
[424] Constitution of The Arab Republic of Egypt 2014. http://www.sis.gov.eg/Newvr/Dustor-en001.pdf. Accessed 12/5/2017.
[425] See George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing and Distribution, 2001), 323.

by the judiciary.[426] In addition, the fifth paragraph of Article 122 does not prevent independent commissions, such as the Board of Supreme Audit and Commission on Public Integrity, to observe the government councils. Article 47 of the Law of Governorates Not Incorporated into a Region, No. 21 of 2008 (LGNIR) states that "The governorate offices and councils shall together be subject to monitoring by the Board of Supreme Audit and branches of the independent commissions formed in accordance with the constitutional provisions", But, this control is not administrative control. Also, the Second paragraph of Article 2 of the LGNIR stipulates that "The governorate council and the local councils are subject to monitoring by the Council of Representatives", The administrative control by the ministries or the Council of Ministers is different from the control by Parliament, the former is professional in nature while the latter's control is political.[427]

The researcher thinks that Administrative control by the Council of Ministers is necessary at the beginning of the implementation of the administrative decentralization when the local entities are weak in experience and lack efficiency, which helps to increase the corruption, but not strict control as before the 2004 Constitution. And, after passing enough time to get experience and efficiency, the administrative control can be replaced by the judicial control.

In conclusion, it is clear that Article 122 regulates the regional administrative decentralization, and although the governorates are granted wide competence, the

[426] Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control", *Risalat AL-huquq Journal* (2012): 20.

[427] See, in this meaning, Idris Hassan Mohamed and Fawaz Khalaf Zaher, "Control of Decentralized Administrative Entities in Iraq, an Analytical Study", *Tikrit University Journal of Legal and Political Sciences* 4, no. 14 (2012): 187.

ministries are prevented from observing the governorate councils. However, the Council of Ministries has the right to monitor the governorate councils. This is because Article 122 specifically forbids the ministries, but not the Council of Ministries. But, the LGNIR did not take that position and interpreted this article very broadly, and this will be discussed later.

3.3.3 Analysis of Article 115 of the Iraqi Constitution

Article 155 of the Iraqi Constitution states that:

> "All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regards to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute."

The phrase "priority shall be given to the law of the regions and governorates not organized in a region in case of dispute." in Article 115 is ambiguous. The ambiguities of this phrase have caused problems in the implementation of administrative decentralization by the governorates. Some governorates have relied upon Articles 115 and 122 of the constitution and the LGNIR to issue laws. Examples, the Night Guards Law, No. 2 of 2011 issued by the Babylon Governorate Council[428] and the law regulating the appointment of senior positions, No. 4 of 2014 issued by the Muthanna Governorate Council.[429]

[428] Official Gazette of the Babel Governorate Council, Number 6, 2011.
[429] Decision of the Council of the Muthanna Governorate Council, according to the Council's letter No. 2/14/4927 dated 7/12/2014 (unpublished)

The head of the legal committee in the Muthanna Governorate Council, in an interview with the researcher, said that the Muthanna Governorate Council issues laws based on the constitution and of course, this is based on the LGNIR as well.[430] Mr. Harith Lahmod, a member of the Muthanna Governorate Council, had the same idea.[431] On the other hand, in another interview with the head of the Muthanna Governorate Council, Mr. Hakem Muslim Al- Yasiri, the respondent, said that the constitution and the Federal Supreme Court granted the right to the governorates to legislate laws.[432] In addition to the above, a member of the Dhi Qar Governorate Council, Mr. Dia Ahmed, said that the governorate council relies upon Articles 115 and 122 for the issuance of laws. And, the Federal Supreme Court has issued decisions in favor of the governorates in this regard.[433] In general, all members of the governorate councils have the same opinion, as well as the head of the Dhi Qar provincial council, Mr. Hamid Naeem.[434] There is no problem with the states because they can issue laws, according to the constitution, but the term "law" in this text is ambiguous in relation to the governorates. Does it mean the laws issued by the governorates? Does it mean that it is the same meaning as the law issues by parliament? Or is it a term for another legal activity that differs from the law issued by parliament, but the constitution did not successful in naming this legal activity? Anyway, there are ambiguities in this article. Some authors have opined that the constitutional legislator's intention in Article 115 was to allow the governorate councils to issue laws explicitly.[435] Other authors went on to say that Article 115 implicitly grants the governorate councils legislative

[430] Ahmed El Marzouk, (March 20, 2017). Iraq: Personal interview.
[431] Harith Lahmod, (March 20, 2017). Iraq: Personal interview.
[432] Hakem Muslim Al- Yasiri, (March 20, 2017). Iraq: Personal interview.
[433] Mr. Dia Ahmed, (March28,2017). Iraq: Personal interview.
[434] Hamid Naeem, (March 28, 2017). Iraq: Personal interview.
[435] Read Naji Ahmed, "The Extent of the Competence of the Governorates Not Incorporated into a Region to Impose Taxes and Fees (Specialized Legal Study in Legal System in Iraq)", *Journal of college of Law for Legal and Political Sciences* 4, (2015):390.

authority.[436] While a third group opined that the governorate councils exercise administrative activity similar to the practice of government ministries to deliver services.[437]

The main reason for the practical problems caused by Article 115 of the Iraqi Constitution is the Federal Supreme Court. This will be explained below.

3.3.3.1 Interpretation of the Federal Supreme Court

Article 93 of the Iraqi Constitution states that:

> "The Federal Supreme Court shall have jurisdiction over the following: ..... Second: Interpreting the provisions of the Constitution."

Also, Article 94 provides that:

> "Decisions of the Federal Supreme Court are final and binding for all authorities."

In accordance with article 93 of the Constitution and the theoretical framework of judicial interpretation, the Federal Supreme Court of Iraq (the Court) is supposed to interpret Article 115 and all the other articles of the Iraqi Constitution so that it can be applied properly by the public authorities.

There are five advisory decisions of The Federal Supreme Court on the subject of the issuance of laws by the governorate councils. Has been reviewed from the oldest to the latest to track the evolution of the Court's opinion on this subject.

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[436] Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control", *Risalat AL-huquq Journal* (2012): 41.

[437] Lamar Cravens, Analyzing Decentralization in Iraq. Amman, Jordan: UN Habitat, 2011, 4.

The First Advisory Opinion[438]

During the drafting of the bill for the governorates not incorporated into a region, by Parliament on June 26, 2007, Parliament sought the legal opinion of the Court on the issue of whether "the governorate councils have legislative authority to enact local laws in accordance with Article 115 or any other articles of the Constitution."

The Federal Supreme Court replied:

> "The court finds that this subject is governed by Articles 61 paragraph 1, and Articles 110, 111, 115 and 122 paragraph 2 of the Constitution". The court added "the extrapolation of the contents of these articles refers to the authority of the governorate council to enact local legislation to regulate administrative and financial affairs so as to enable it to manage its affairs in accordance with the principle of administrative decentralization, for which Article 115 of the Constitution has granted priority in the implementation". The court also stated, "Parliament is exclusively specialized with the enactment of federal laws and does not have to issue local legislation for the governorate, based on the provisions of Article 61 paragraph 1 of the Constitution".[439]

It is clear that the Parliament had ambiguity about the authorities of the governorate councils due to the ambiguity of Article 115 in addition to the broad powers granted by the Constitution to the governorate councils, and the way of distributing competence between the central government and governorate councils. Hence, Parliament adopted the opinion of the Court before the completion of the draft bill of the governorates.

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[438] Decision of the Federal Supreme Court 13 / T / 2007 on 31/7/2007. http://www.iraqja.iq/krarat/2/2007/13_fed_2007.pdf. Accessed 20/5/2017.

[439] Decision of the Federal Supreme Court 13 / T / 2007 on 31/7/2007. http://www.iraqja.iq/krarat/2/2007/13_fed_2007.pdf. Accessed 20/5/2017.

Parliament had explicitly asked whether the governorate councils have the authority to issue local laws based on Article 115 and other articles of the Constitution. The Court referred to Article 115 and the other articles in the Constitution, namely, Article 122 Paragraph 2 concerning the regional decentralized administrative system in Iraq, and Articles 110 and 111 which are also related to the distribution of competence, and held that "These articles refer to the authority of the governorate council to enact local legislation to regulate administrative and financial affairs so as to enable it to manage its affairs in accordance with the principle of administrative decentralization". This means that local legislation is for administrative decisions and not laws because according to the principle of administrative decentralization, the governorate councils cannot issue laws, as discussed earlier.[440] The court has explicitly stated that what is issued by Parliament are laws, not local legislation. It means that the court distinguishes between the term 'law' and the term 'legislation'.

Some authors supported the decision of the Federal Supreme Court and stated that the decision is right and in accordance with the provisions of the Constitution. These governorates operate according to the principle of administrative decentralization, which distributes executive competence between them and the authority of the Center, and not the legislative competence.[441]

The opinion of the Court seems to have been sufficient to convince Parliament that the governorate councils do not issue local laws. As evidence of that, the LGNIR which

[440] See 3.2.1 Paragraph (two) of the Article 122 in this Chapter.

[441] Mohammed Jabbar Taleb, "Constitutional Competence s of the Governorates Not Incorporated into Region in the Iraqi Constitution of 2005," *Risalat Al-huquq Journal* no. 2 (2015): 214. And See Theoretical Framework of decentralization

was issued after that did not provide the governorate councils with the competence to issue local laws, as will be examined further in Chapter 4 of this research.

In the interviews conducted by the researcher with two members of the Council of Representatives, both members of Parliament said that based on the LGNIR, the governorate councils do not have the authority to issue laws. However, the authority of the provincial councils is confined to the issuance of administrative decisions.[442] Parliament however, adopted the term which was provided by the Court, i.e., 'local legislation'[443] which caused practical problems, as previously discussed.[444] Also, the opinion of the Court was not clear for the governorate councils, especially after the issuance of the LGNIR, and this will also be examined later.

The Second Advisory Opinion[445]

The first consultative opinion of the Court was not clear enough for the governorate councils. In addition, the LGNIR was issued on March 19, 2008, and it stipulates that the governorate council has legislative authority and that it can issue local legislation, and this has caused confusion in some of the governorate councils. The Najaf Governorate Council requested the legal opinion of the Court on the following issue: "Do the governorate councils which are not organized into a region have the authority to enact laws with regards to the imposition, collection, and disbursement of taxes in

[442] Jabbar Abdul Khaliq Abadi, (February 13, 2017). Iraq: Personal interview. Sadeq Al Mahna, (February 17, 2017). Iraq: Personal interview.
[443] Taher Mohammed Al Janabi, *Regional Administrative Decentralization, a Two-Edged Weapon* (Beirut: Dar Al-Senhoury, 2017), 111.
[444] See Statement of the Problem, Chapter one.
[445] Federal Supreme Court. 16 / Federal / 2008 on 21/4/2008. http://www.iraqja.iq/krarat/2/2008/16_fed_2008+31.pdf. Accessed 21/5/2017.

accordance with Article 115 and Article 122 Paragraph 2 of the Constitution or any other articles or in accordance with any current Iraqi laws?"

The Court replied on April 21, 2008. In the beginning, the Court mentioned that:

> "The text of Article 122 Paragraph 2 which is (Governorates that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law.) Then, the Court stated that the text of Article 7 Paragraph 3 of the LGNIR, which is (Issue local legislations, instructions, bylaws, and regulations to organize the administrative and financial affairs so that it can conduct its affairs based on the principle of administrative decentralization in a manner that does not contradict the provisions of the Constitution and federal laws.)" Then the Court added: "Based on the above, because the imposition, collection, spending, taxation. and the imposition of fees, and fines were financial matters referred to in Article 122 paragraph 2 of the Constitution of the Republic of Iraq, therefore, the governorate councils which are not incorporated into a region, have the right to enact laws on the imposition and collection and spending of fees and fines so as to enable them to manage their affairs in accordance with the principle of administrative decentralization, for which it grants Article 115 of the Constitution the priority in the application".[446]

Here, the Court, based on Articles 115 and 122 of the Constitution and Article 7 of the LGNIR, said that the governorate councils according to their competence, have the authority to issue local laws in accordance with the principle of administrative decentralization. This is a rather strange finding as how would it be possible for a local authority to issue a law based on a decentralized administrative system?

[446] Federal Supreme Court. 16 / Federal / 2008 on 21/4/2008. http://www.iraqja.iq/krarat/2/2008/16_fed_2008+31.pdf. Accessed 21/5/2017.

Some studies, commenting on the decision of the Federal Supreme Court stated, we find a contradiction of the Court as the constitution granted to the governorates that are not incorporated into a region, broad administrative and financial authorities, and did not provide for legislative authority for a simple reason that is, they operate according to the principle of administrative decentralization.[447] Other studies stated that the court's decision is baseless in the constitution.[448] The Court's first decision was contradicted by its second decision.[449] The researcher agrees with this view as in the Court's first decision, it said that the governorate councils issue local legislation and the term 'legislations' under administrative decentralization can be interpreted as administrative decisions, but in the second decision, the Court mentioned that the governorate councils can issue laws. Both decisions were issued based on the Iraqi Constitution of 2005, and the only change in the period between the first and second decision was the issuance of the LGNIR. In the second decision, the Court took into account Article 7 of the LGNIR as well as Article 122 of the Constitution. However, the Court is competent in constitutional texts, not laws.[450] The Court, in a decision, has said that "The Federal Supreme Court found that its competence was set forth in Article 93 of the 2005 Constitution of the Republic of Iraq and Article 4 of the Federal Supreme Court Law, No. 30 of 2005. None of these competences are the interpretation of laws. This is within the competence of the State Shura Council, according to Article 6 of the State Shura Council Law, No. 65 of 1979".[451] The court repeated this text

[447] Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control," *Risalat AL-huquq Journal* (2012): 32.

[448] Mohammed Jabbar Taleb, "Constitutional Competence of the Governorates Not Incorporated into Region in the Iraqi Constitution of 2005," *Risalat Al-huquq Journal* no. 2 (2015): 215.

[449] Ibid.

[450] See, Article 93 of the Iraqi Constitution. See: http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

[451] Federal Supreme Court, 52 / Federal / 2009. http://www.iraqja.iq/krarat/2/2009/52_fed_2009.pdf. Accessed 22/5/2017.

many times.[452] On the other hand, changing the constitutional interpretation by issuing a law, means that this law amended the Constitution. This is contrary to the principle of supremacy of the Constitution.[453]

The Third Advisory Opinion[454]

The Basra Provincial Council on May 13, 2008, requested the Court to clarify its competence in the imposition of local taxes and fees, which qualifies it to increase its revenues independently, according to Order No. 71, Local Governmental Powers of 2004 (this law was abrogated by the LGNIR).

The Court replied on June 23, 2008, two months after the issuance of the second advisory opinion of the court.

The court stated that:

> "The competence of the governorate council in the enactment of local laws are governed by Articles 61 paragraph 1, and articles 110, 111, 114, 115 and 122 paragraph 2 of the Constitution. The extrapolation of the contents of these articles indicates to the authority of the provincial council to enact local legislations and regulate administrative and financial affairs so that it can manage its affairs in accordance with the principle of administrative decentralization, for which Article 115 of the Constitution gives priority in the implementation. That the Council of Representatives is exclusively competent (in the legislation of federal laws and has no competence to issue local legislation for the governorate, based on the provisions of Article 61 paragraph 1 of the Constitution)". The Federal Supreme Court added "As related to the competence of

452 See, decisions of the Federal Supreme Court on 26/5/2009, 7/9/2009, 3/12/2009.

453 Zuhair Al Hassani, "Administrative Decentralization in the Legal System of Governorates Not Incorporated into a Region", Essays and Research, 2013, accessed May 7, 2017, http://www.hdf-iq.org/ar/2010-12-01-14-01-29/342-2013-01-10-13-11-41.html.

454 Federal Supreme Court, 25 / Federal / 2008. http://www.iraqja.iq/krarat/2/2008/25_fed_2008+25.pdf. Accessed 22/5/2017.

> the governorate council in the imposition of local taxes and fees, it is based on Order No. 71. The Federal Supreme Court found that Article 93 of the Constitution of the Republic of Iraq of 2005 and Article 4 of the Federal Supreme Court Law No. 30 of 2005 determined the competence of the Federal Supreme Court and nothing among them is the interpretation of laws and orders and the views or opinion about it. Its competence is to interpret the provisions of the Constitution according to Article 93. Therefore, the request of the Basra Governorate Council in this regard was outside the competence of the Court".[455]

In this opinion, the Court mentioned the term 'local laws' and then stated that based on Articles 110, 111, 122 Paragraph 2 and 115 of the Iraqi Constitution, the governorates that are not incorporated into a region, can issue local legislation to manage their local affairs under the principle of administrative decentralization. The Court also said that Parliament issues federal laws and does not issue local legislation. Here, the Court, which accepted using the term 'local laws' in the beginning of the opinion, had returned to its first opinion. But, what does the Court mean? Did the Court intend for the term 'local laws' to mean local legislation? In fact, the Court's opinion here is ambiguous, and urgently needs clarification. On the other hand, the Court based its opinion on the constitutional texts only and refused to interpret the legal text on the basis that its competence is to interpret the constitutional texts only. Thus, its opinion came close to the first opinion, which was only based on the Constitution. This leaves us with the question of "What is the effect of the second opinion which was based on the LGNIR in addition to the Constitution?"

[455] Federal Supreme Court, 25 / Federal / 2008. http://www.iraqja.iq/krarat/2/2008/25_fed_2008+25.pdf. Accessed 22/5/2017.

The Federal Supreme Court did not answer the Basra Governorate Council's request to impose taxes and fees on the basis of Order No. 71 of 2004, under the pretext that its competence is determined by Article 93 Paragraph 2 of the Constitution to interpret the articles of the Constitution without laws, orders, or its opinions about it.[456]

The Fourth Advisory Opinion[457]

On January 18, 2009, the Babylon Governorate Council requested for a legal opinion about Article 115. This means that the previous legal opinions of the Federal Supreme Court (the Court) were ambiguous, and as such Article 115 remains ambiguous, especially for the governorate councils, whose members lack legal expertise, as will be explained later in this research. The Babylon Governorate Council said that "The inquiry is about what is meant in Article 115, in the event that is a disagreement between federal law and the law of the regions and governorates not incorporated into a region. Is the law enacted by the governorate council or the regional council supposed to be amended or does it nullify the federal laws that violate it?"

The Court replied on February 4, 2009 that:

> "from the extrapolation of the text of Article 115 of the Constitution, the court finds that the priority in the application shall be to the law of the regions and governorates not organized in a region in case of conflict between them (federal law and the law of regions and governorates not incorporated into a region)." The court added "Unless it is the law of the region and the governorate not organized into a region that is contrary to the Constitution regarding the common competence between the federal government and the regions or governorates that are not organized in a region." The

[456] Read Naji Ahmed, "The Extent of the Competence of the Governorates Not Incorporated into a Region to Impose Taxes and Fees (Specialized Legal Study in Legal System in Iraq)" *Journal of college of Law for Legal and Political Sciences* 4, (2015):401.

[457] Federal Supreme Court, 6 / Federal / 2009, http://www.iraqja.iq/krarat/2/2009/6_fed_2009.pdf. Accessed 22/5/2017.

> Court concluded its opinion by stating that it "The law will enact by the governorate council is not considered to be amended or nullified the federal law."[458]

The Court in this legal opinion stated that the law issued by the governorate council cannot amend or repeal the federal law, i.e. laws passed by Parliament. This means that the local law is inferior to the law passed by Parliament and that it is subject to it.[459]

This means that a local law which is issued by a governorate council is lower than Parliamentary law. According to the principle of the legal rules gradation, the legal rules that are inferior to the Parliamentary law are administrative decisions.[460]

The result of the interpretation of the legal opinion of the Court is that what is issued by the governorate council is an administrative decision. Even if it is called 'local law', but its nature is administrative.[461]

The Fifth Advisory Opinion[462]

On May 20, 2014, the Wasit Governorate Council requested the Federal Supreme Court (the Court) to interpret the following articles:

1. Article 122 Paragraph 5 of the Iraqi Constitution (the Constitution), which states that "The Governorate Council shall not be subject to the control or supervision of any

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458 Federal Supreme Court, 6 / Federal / 2009, http://www.iraqja.iq/krarat/2/2009/6_fed_2009.pdf. Accessed 22/5/2017.

459 See Zuhair Al Hassani, "Administrative Decentralization in the Legal System of Governorates Not Incorporated into a Region," Essays and Research, 2013, accessed May 7, 2017, http://www.hdf-iq.org/ar/2010-12-01-14-01-29/342-2013-01-10-13-11-41.html:16.

460 Ibid.7

461 See in same meaning. Mahmood Al-Zubaidi, "Administrative Competence of the Governorate Councils, Conflict and Overlap in the Light of the Law of Governorates Not Incorporated into a Region No. 21 of 2008." *Al-Hiqouq Journal* 3, no. 10 (2010):27.

462 Federal Supreme Court, 64/ Federal / 2014. http://www.iraqja.iq/krarat/1/2014/64_fed_2014.pdf. Accessed 23/5/2017.

ministry or any institution not linked to a ministry. The Governorate Council shall have independent finances."

2. Article 2 Paragraph 1 of the Second Amendment Law to the LGNIR, No. 19 of 2013, which says that "The governorate council is a legislative and oversight authority which has the right to issue local legislation to enable it to manage its affairs in accordance with the principle of administrative decentralization, in a manner that would not contradict the Constitution and federal laws, which fall within the exclusive competence of the federal authorities".

3. Statement of competence of the governorate councils in the imposition and collection and spending of taxes and fees.

The Court replied that:

> "When checking, deliberating and examining the request which includes the interpretation of Article 122 paragraph 5 of the Constitution, it was found that the Second Amendment Law of the LGNIR has confirmed that the governorate council is a legislative and oversight authority in the governorate and it has the right to issue local legislation to enable it to manage its affairs in accordance with the principle of administrative decentralization, in a manner that would not contradict the Constitution and federal laws that fall within the exclusive competence of the federal authorities, which means the independence of the governorate councils to manage the affairs of the governorate in relation to the competence granted to them under the Constitution and federal laws in its local affairs. Except for the exclusive competence of the federal authorities". The Court added, "with regards to items 2 and 3 of the request by the Wasit Governorate Council regarding the interpretation of Article 2 paragraph 1 of the amended LGNIR, as well as the statement of the powers of the governorate councils, the answer is that it is beyond

the competence of the Court to interpret the constitutional texts, without any other".[463]

The researcher has several comments related to the advisory opinion of the Court, and they are as follows:

1. The Wasit Governorate Council requested for an interpretation of an article in the Constitution and another article in the LGNIR and also sought to clarify the competence of the governorate council to impose, collect and spend taxes and fees.

The Court refused to answer the second and third question because it would have required the Court to interpret the text of the LGNIR, which it is not competent to do. The Court has mentioned in many of its decisions since 2009 that only the State Shura Council has the competence to interpret the text of the law.[464]

2. With regards to the interpretation of Article 122 Paragraph 5 of the Constitution, which relates to the governorate council not being subject to the control or supervision of any ministry or any institution not linked to a ministry, the Court responded by referring to the text of Article 2 Paragraph 1 of the LGNIR. The aforesaid paragraph has a description of the governorate council and its authorities which means that the Court agreed with what was stated in the paragraph.

3.

According to Article 2 Paragraph 1 of the LGNIR, which the Court pointed out, the governorate council is the legislative and control authority within the borders of the governorate and has the right to issue local legislation to manage the affairs of the province in accordance with the principle of administrative decentralization. The

[463] Federal Supreme Court, 64/ Federal / 2014. http://www.iraqja.iq/krarat/1/2014/64_fed_2014.pdf. Accessed 23/5/2017.

[464] See the Second Advisory Opinion of Federal Supreme Court.

researcher has mentioned earlier that the local legislation within the principle of administrative decentralization means that the governorate council issues administrative decisions, not laws.[465]

The Court added that the governorate councils manage the affairs of the governorate in relation to the competence granted to them under the Constitution and federal laws. That means the governorate councils are subject to federal laws. It also means that whatever is issued by the governorate council is an administrative decision that is subject to federal laws. It has been noticed that the Court has abandoned its former opinion that the local laws issued by the governorate councils have priority over federal laws according to Article 115 of the Iraqi Constitution.[466] In this advisory opinion, the Court also did not mention the term 'local law' and the third point (mentioned below) supports this opinion.

4. In 2013, the Second Amendment Law for the LGNIR, Law No. 19 of 2013 was issued. The law stipulates in Article 2 Paragraph 6 that "Administer the shared competence provided for in Articles 112, 113 and 114 of the Constitution by coordinating between the federal government and local governments and priority shall be to the law of the governorates not incorporated into a region, in a case of disagreement between them in accordance with the provisions of Article 115 of the Constitution." It seems that this aforementioned article has interpreted Article 115 of the Constitution, because at the end of the article, the legislator stipulates that "priority shall be to the law of the governorates not incorporated into a region, in a case of disagreement between them in accordance with the provisions of Article 115 of the

[465] See 3.2.1 Paragraph (two) of the Article 122 in this Chapter.
[466] See the Second advisory opinion of Federal Supreme Court.

Constitution." This means that the word 'law' at the end of Article 115 of the Constitution is not intended to be laws issued by the governorate councils, but it is intended for the Law of Governorates Not Incorporated into a Region, No. 21 of 2008. Therefore, the Court after the issuance of the second amendment to the LGNIR did not mention the term 'local laws', which is clear from its recent decision in 2014. However, this article of the law is not clear in its intent and wording. This article has ambiguity, and the same can be said of the rest of the articles of the LGNIR, which has led to the continued wrong implementation of the law by the governorate councils.

5. The deputy head of the State Shura Council, Dr. Abdul Latif, said in an interview with the researcher that the recent advisory decision of the Federal Supreme Court was an indirect retreat of its previous opinion that the governorate councils issue laws.[467]

3.3.3.2 Explanation of the Advisory Opinions of the Federal Supreme Court

Article 115 of the Constitution is not about the organization of regional administrative decentralization, but it came in the context of the distribution of competence between the central authority on the one hand and the states and the governorates on the other. However, the ambiguity of this article has led to practical problems. The Court was supposed to interpret Article 115 in order to clear its ambiguity in accordance with the Iraqi Constitution, but the vagueness of the decisions of the Federal Supreme Court and its contradictions have led to the continuation of the problem.

The decisions of the Federal Supreme Court to interpret Article 115 of the Constitution should have been clear and decisive. But the court's decisions needed an explanation. Also, these decisions are contradictory, for the court initially said that the governorate

[467] Dr. Abdul Latif Nayef, (March 1, 2017). Iraq: Personal interview.

councils issue local legislation under administrative decentralization, then it said that the governorate councils issue local laws under administrative decentralization, then it said that local laws should not violate the constitution and federal laws, and after that it went back to what it had said before, that is, the governorate councils issue local legislation. Although the court in its last decision in 2014 has indirectly stated that the governorate councils issue local legislation under the decentralized administrative system after issued an amendment to the LGNIR, which interpreted Article 115. However, the ambiguity of the recent decision of the Court and the previous decisions of it, in addition to the vagueness of the legal text of the LGNIR, as will be explained later, as well as, the conflict between the central government and the governorates about the competences and weakness the legal background of the governorate councils' members, has led to the continued wrong implementation of administrative decentralization by governorate councils.

All members of the governorate councils who were met by the researcher, Mr. Ahmed El Marzouk,[468] Mr. Harith Lahmod,[469] and Mr. Dia Ahmed,[470] agreed that there was a conflict between the governorate councils and the central government about the authorities. And this was also stated by the heads of the governorate councils, Mr. Hakem Muslim Al- Yasiri, the head of the Muthanna Governorate Council,[471] and Mr. Hamid Naeem, the head of the Dhi Qar Governorate Council.[472] Even the heads of the legal departments in the governorate councils, Mr. Saad Abdul Wahid, the head of the legal department in the Babylon Governorate Council,[473] and Mr. Naqaa Nassif, the

468 Ahmed El Marzouk, (March 20, 2017). Iraq: Personal interview.
469 Harith Lahmod, (March 20, 2017). Iraq: Personal interview.
470 Dia Ahmed, (March 28, 2017). Iraq: Personal interview.
471 Hakem Muslim Al- Yasiri, (March 20, 2017). Iraq: Personal interview.
472 Hamid Naeem, (March 28, 2017). Iraq: Personal interview.
473 Saad Abdul Wahid, (April 6, 2017). Iraq: Personal interview.

head of the legal department in Dhi Qar Governorate Council,[474] said there was a conflict between the governorate councils and the central government.

On the other hand, Mr. Jabbar, a Member of Parliament, during an interview with the researcher, said that, the members of the governorate councils did not have enough experience to manage the affairs of the governorate.[475] Another Member of Parliament, Mr. Mahnah, in a separate interview, stated that, the members of the governorate councils did not have enough experience to exercise their competence.[476]

After the Court responded to the Parliament's inquiry about Article 115, Parliament was convinced that the governorate councils do not have the authority to issue local laws, so the LGNIR did not provide authority to the governorate councils to explicitly issue laws, but the law adopted other words that led to increasing practical problems, as will be studied in the next chapter.

3.4 Explain Amending the Iraqi Constitution of 2005

Most of the authors have stated that to solve the problem of issuing local laws by the governorates, the constitution and then the LGNIR must be amended in order to overcome the ambiguities in some of the constitutional texts. As mentioned in the literature review in the first chapter of this research, the researcher has stated that the proposed solution is theoretical, and this is because of the political situation in Iraq and in order to amend the Iraqi Constitution a majority in Parliament is required which

474 Naqaa Nassif, (March 28, 2017). Iraq: Personal interview.
475 Jabbar Abdul Khaliq Abadi, (February 13, 2017). Iraq: Personal interview.
476 Sadeq Al Mahna, (February 17, 2017). Iraq: Personal interview.

is difficult in the current political situation in Iraq. Article 126 of the Iraqi Constitution states:

> "First: The President of the Republic and the Council of Ministers collectively, or one-fifth of the Council of Representatives members, may propose to amend the Constitution. Second: The fundamental principles mentioned in Section One and the rights and liberties mentioned in Section Two of the Constitution may not be amended except after two successive electoral terms, with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum, and the ratification by the President of the Republic within seven days. Third: Other articles not stipulated in clause 'Second' of this Article may not be amended, except with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum, and the ratification by the President of the Republic within seven days……. Fifth: A. An amendment is considered ratified by the President of the Republic after the expiration of the period stipulated in clauses 'Second' and 'Third' of this Article, in case he does not ratify it. B. An amendment shall enter into force on the date of its publication in the Official Gazette."

It is clear from the text of Article 126 of the Constitution that the Iraqi constitution is inflexible. The amendment of the Iraqi Constitution requires a two-thirds majority vote in parliament and a referendum. This is difficult in light of the current political and legal situation in Iraq. Because, the system of electing members of the parliament is the proportional system.[477] Therefore, the parliament is composed of many parties that are not in political agreement. The researcher thinks that amending the constitution is possible if there is an almost political consensus. But, this is difficult in Iraq now, and

[477] Article 16 of Election Law No. 16 of 2005. See: http://www.iraqld.iq/pdf/2005/e0054.pdf. Accessed 8 August 2018.

so attempts to amend the constitution have failed since the issuance of the Constitution until now. Article 142 of the Iraqi Constitution stipulates that "First: The Council of Representatives shall form, at the beginning of its work, a committee from its members representing the principal components of the Iraqi society with the mission of presenting to the Council of Representatives, within a period not to exceed four months, a report that contains recommendations of the necessary amendments that could be made to the Constitution, and the committee shall be dissolved after a decision is made regarding its proposals". But, this article has not been applied since the commencement of this constitution because there has been no political consensus. Mr. Mahnah, a member of the Council of Representatives, said that the constitution could not be amended in the current political situation. [478]

The procedures for amending the constitution in Iraq are no different from those in most other countries. That is, the constitutional amendment procedures are more complex from the procedure of amending the law. Because of the importance of the constitutional texts that establish public authorities and regulate their work. For example, the Egyptian constitution stipulates that the amendment of the constitution requires the approval of a majority of two-thirds of the members of parliament and then, a referendum.[479] These are the same procedures for amending the Iraqi Constitution. But, the formation of the Iraqi parliament makes the amendment of the constitution difficult in the absence of political consensus. In France, for example, the constitution provides for the approval of the draft amendment by both councils of Parliament (the National Assembly and the Senate) and then, submits the draft to the

[478] Sadiq al – Mahnah (Mahnah), (February 17, 2017). Iraq: personal interview.
[479] Article 226 of the Constitution of The Arab Republic of Egypt 2014. http://www.sis.gov.eg/Newvr/Dustor-en001.pdf. Accessed 12/5/2017.

referendum. Or, it needs the approval of both councils of Parliament in a session that includes the National Assembly and the Senate, and a three-fifths majority vote.[480] These procedures are also complex, but achievable if there is political will. The French Constitution of 1958 has been amended several times, most recently in 2008.

Building on the above, the amendment of the Iraqi Constitution is a theoretical solution at present and is difficult to achieve in practice. However, the problem of wrong implementation of the regional administrative decentralization does not require amendment of the constitution, because the provisions of the constitution relating to regional administrative decentralization which is ambiguous can be addressed by interpretation. According to the Iraqi Constitution,[481] and based on the theoretical framework of judicial interpretation, the Federal Supreme Court has the authority to interpret the constitutional provisions.[482] But, the problem continues because the decisions of the court are also ambiguous and need to be explained.

3.5 Conclusion

This chapter examined the Iraqi Constitution of 2005 regarding the regional administrative decentralization and analyzed the constitutional articles that are concerned with regional administrative decentralization. This chapter began to shed light on the constitutions of Iraq prior to the current constitution starting from the first constitution of the modern Iraqi state, and this has done in order to know the approach of these constitutions in relation to administrative regulation in Iraq.

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480 Article89 of French Constitution of 1958. http://www.wipo.int/edocs/lexdocs/laws/en/fr/fr076en.pdf. Accessed 12/5/2017.

481 Article 93 of the Iraqi constitution. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

482 Article 93 of the Iraqi constitution. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

The central system had been the system applied in Iraq from the first constitution of the modern Iraqi state until 2004 even if the constitution does provide for administrative decentralization, as in the 1970 Constitution; in practice, the system applied is the central system.

The philosophy of governance in the Iraqi Constitution of 2004 and the Constitution of 2005 is different from previous constitutions. The Constitutions of 2004 and 2005 provided for democratic governance. It is true that previous constitutions in Iraq provided for democratic governance, but the difference in the 2005 Constitution and the 2004 Constitution is mentioned in detail. For example, the 2005 Constitution stipulates the application of administrative decentralization and then provides further details on how the governorate councils and local governors are to be elected. In addition, the Constitution of 2005, as well as 2004's Constitution, states of the establishment of the Federal Supreme Court as a guarantee to apply the constitutional rules, which is the highest legal rules in the State.

The Iraqi Constitution of 2005 provides for the distribution of competence between the central government, on the one hand, and the states and governorates, on the other. The Iraqi Constitution is unique in this way for historical and political reasons as mentioned earlier. Some authors have criticized the constitutional legislator's approach to the distribution of competence and they have said that the constitution is blending the federal and decentralized administrative systems. But, the constitution sets the limits of the state authorities in Article 121,[483] and defines the limits of the governorate authorities in Article 122, and states that the governorates apply the decentralized

[483] About Article 121 of the Iraqi constitution, see Chapter two of this study.

administrative system. Therefore, the broad powers granted to the governorates based on the constitution do not exceed the limits of administrative decentralization. As a result, the maximum that the governorates can issue are administrative decisions. according to the decentralization theoretical framework.[484] The governorates do not have the authority to issue laws because it would go beyond the limits of administrative decentralization which is provided for in the constitution.

On the other hand, Article 122 states that "The governorate council shall not be subject to the control or supervision of any ministry or any institution not linked to a ministry". This text came in response to the strict administrative control exercised by the central government on local entities before 2004. Some authors have criticized this approach to the Constitution, and others have said that preventing the ministries from control over the governorate councils, which is administrative control, will lead to the exiting of the governorate councils from the decentralized administrative system. The researcher disagrees with this opinion because preventing the administrative control does not mean the governorate councils will exit from the decentralized administrative system. There are examples of countries that have made oversight of local entities a judicial control and this control is possible in Iraq. In addition, there are other types of control that can be exercised on the governorate councils, such as parliamentary and independent commission oversight, as mentioned earlier.

The researcher thinks that administrative control can be exercised on the governorate councils by the Council of Ministers at the beginning of the implementation of regional administrative decentralization, but not strict control as it was before the Constitution

[484] See decentralization theoretical framework, Chapter Two of this study.

of 2004. This is needed to address the weakness of experience and lack of efficiency of members of the governorate councils, which leads to corruption and failure to provide public services. And then, the transition to judicial control as in Egypt and France after the members of the governorate councils have the experience and efficiency enough to administrate the affairs of the governorate can take place.

With regards to Article 115 of the constitution, it is concerned with the distribution of competence between the states and governorates, on the one hand, and the central government, on the other. The constitutional legislator in Article 122 regulates regional administrative decentralization, although it provides for the broad competence of the governorates and prevents ministries and bodies not affiliated with the ministry from exercising control over the governorate councils as well as the election of the governorate council and the governor; but, Article 122 does not allow the governorate council to issue laws. However, the governorates can apply the decentralized administrative system. But, the ambiguity of Article 115 has led to the belief that the governorate council can issue local laws. The ambiguity of the decisions of the Federal Supreme Court in the interpretation of this article has reinforced this belief, especially by the governorate councils.

The decisions of the Federal Supreme Court relating to Article 115 are ambiguous and need to be reinterpreted, Also, these decisions are contradictory, for the court initially said that the governorate councils issue local legislation under administrative decentralization, then it said that the governorate councils issue local laws under administrative decentralization, then it said that local laws should not violate the

constitution and federal laws, and after that it went back to what it had said before, that is, the governorate councils issue local legislation.

The Council of Representatives was convinced by the first decision of the Federal Supreme Court that the governorate councils do not issue local laws on the basis of Article 115, and this is evident in the text of the LGNIR which was issued later. And the members of the Council of Representatives who met with the researcher confirmed that governorate councils do not have the right to issue laws. The drafting of this law has caused practical problems, and this research will be examining it in the next chapter. The second amendment to the LGNIR includes an interpretation of Article 115. According to Article 2 paragraph 6 of the LGNIR the amended, the word (law) in Article 115 of the Iraqi constitution is meaning the LGNIR No. 21 of 2008. That is, it means that the word "law" in Article 115 is not intended to mean laws issued by the governorate councils. As mentioned earlier in this chapter, the Federal Supreme Court upheld the text of the law indirectly in its last decision in 2014.

But the governorate councils, despite all the above, have remained committed to their opinion, which is, the governorate councils have the authority to issue laws, for several reasons, including political reasons which are the conflict between the governorate councils and the central government to get more powers. It is also because the members of the governorate councils have a weak legal background. In addition to that, the ambiguity of the advisory decisions of the Federal Supreme Court and the loopholes in the LGNIR play a significant role as well, and it will be examined in the next chapter.

The amendment of the constitution as a solution put forward by many researchers for the problem is impractical because the current political situation in Iraq makes it difficult. On the other hand, according to the theoretical framework of judicial interpretation, the judiciary has the authority to make an interpretation of ambiguous texts. Therefore, there is no need to amend the constitution with the existence of the judiciary, especially if the amendment is difficult. Here the judiciary does its judicial function, especially when there is an explicit text for interpretation, as is the case in the Iraqi Constitution, which explicitly states that the competent authority for interpretation is the Federal Supreme Court. However, the problem is not the constitution, but the performance of the court.

Finally, when the governorates issue laws, it violates the Constitution as they were not granted this authority, because the governorates only implement regional administrative decentralization. While issuing laws make the governorates apply the federal system, based on the theoretical framework of decentralization. But, in order to implement this system, the residents of the governorates must agree to implement the federal system. However, this has not been successful when some governorates have tried to implement the federal system.[485]

Anyway, one of the decentralization systems must be applied either regional administrative decentralization or federalism, but there must be no return to the centralization system. And the governorate councils must take on the will of the residents of the governorates in the type of the system they want.

[485] See Zuhair Al Hassani, "Administrative Decentralization in the Legal System of Governorates Not Incorporated into a Region", Essays and Research, 2013, accessed May 7, 2017, http://www.hdf-iq.org/ar/2010-12-01-14-01-29/342-2013-01-10-13-11-41.html

Part of the third research objective has been achieved in this chapter as this researcher has fully examined the Iraqi Constitution regarding regional administrative decentralization.

CHAPTER FOUR: AN EXAMINATION OF THE LEGAL TEXT OF THE LAW OF THE GOVERNORATES NOT INCORPORATED INTO A REGION NO.21 OF 2008 AND THE ISSUES SURROUNDING IT

4.1 Introduction

According to the Iraqi Constitution of 2005, the Law of the Governorates Not Incorporated into a Region No. 21 of 2008 (referred to as the LGNIR) was issued in order to apply the philosophy of the 2005 Constitution which grants the governorates that are not incorporated in a region, a wide administrative and financial competence under the principles of administrative decentralization.

Order 71, the Local Governmental Powers of 2004[486] was issued before the LGNIR, and it was based on the Iraqi Constitution for the transitional period in 2004. Order 71 was brief for it was meant to just fill the gap between the abolition of the Governorate Law of 1969 and the issuance of a law for the governorates based on a permanent constitution for Iraq.

Before 2004, the Governorates Law of 1969[487] was issued according to the Iraqi Constitution of 1970. [488] This constitution was the first Iraqi constitution that touched on administrative decentralization, as mentioned in Chapter Three of this research, but this Constitution provided that "The Iraqi Republic is to be divided into administrative

[486] Order 71: "Local Governmental Powers" of 2004. http://www.iraq-lg-law.org/ar/webfm_send/940. Accessed 8/5/2017.
[487] Governorates Law of 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.
[488] Iraqi Constitution of 1970. http://www.iraqja.iq/view.81/. Accessed 7/6/2017.

units and organized on the basis of decentralized administration"[489] only, without any details. So, the constitution left out all the details for the law, including the basic principles. Therefore, the Governorates Law of 1969, had full powers to determine the limits of the decentralized administrative system to be applied in Iraq. The Governorates Law of 1969 provided for the granting of a legal personality to the governorates,[490] as well as stipulating that the governorate council consisted of permanent members who were the heads of the official departments in the governorate in addition to the elected members.[491] Although the law stipulated that the election was by direct ballot and also regulated the process of the election,[492] but there were no elections until this law was repealed.[493] This means that the governorate councils were composed of the heads of official departments in the governorate appointed by the central government. In addition, the governorate councils could have been dissolved by the Council of Ministers at the request of the Minister of the Interior if the councils violated their duties or whose survival had become damaging to the public interest [494].

The legislator mentioned in this law that a worthwhile reason for the dissolution of the governorate councils was the loss of the council's majority to the elected members.[495] As mentioned above, no elections were held, and the governorate councils continued to be filled by permanent members until the repeal of the 1969 Law. This means that

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489 Paragraph B, Article 8 of the Iraqi Constitution of 1970. http://www.iraqja.iq/view.81/. Accessed 7/6/2017.

490 Article 2 of the Governorates Council, 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.

491 Article 54 of the Governorates Council, 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.

492 Chapter Two of the Governorates Council, 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.

493 Mahmood Al-Zubaidi, "Administrative Competence of the Governorate Councils, Conflict and Overlap in the Light of the Law of Governorates Not Incorporated into a Region No. 21 of 2008." *Al-Hiqouq Journal* 3, no. 10 (2010):11.

494 Article 129 of the Governorates Council, 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.

495 Ibid.

the governorate councils for a period of 34 years, the age of the 1969 law, were deserving of cancellation! So, there is a suspicion about the legitimacy of governorate councils during that period.

The governor was the head of the governorate council,[496] who was appointed by the central government[497] and had wide competence. [498] Article 20 of the Governorates Law of 1969 stated that "The governor is the highest executive officer in the governorate and he must implement the laws, regulations, instructions, and orders issued by the ministers." The real power in the governorate was in the hands of the governor, who was overseeing the official departments in the governorate and inspected them, except the judiciary, army and universities.[499] Meanwhile, the ministries were taking into consideration the opinion of the governor before doing any work in the governorate. The ministries also were taking the opinion of the governor into consideration before the appointment, transfer or promotion of heads of official departments in the governorate. [500]

It should be noted that the law did not mention the term "decentralized administrative system" except in the paragraph to justify the reasons for the law, at the end of the law which stipulated, "In order to develop administrative systems in line with the modern methods used in developed countries, the government of the revolution saw the need

496 Article 54 of the Governorates Council, 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.
497 Article 13 of the Governorates Council, 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.
498 See the Governorates Council, 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.
499 Article 25 of the Governorates Council, 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.
500 Article 24 of the Governorates Council, 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.

to legislate a new law that adopts the principles of administrative decentralization to achieve the ambitions of the citizens".[501] This may be explained by the fact that the legislator considered that there was no need to mention the term in the text of the law because the law was based on a constitution that provided for a decentralized administrative system. As such, the provisions of the law in the context of this system did not have any strange provisions.

In a comparison between the Governorates Law of 1969 and the LGNIR, it can be noted that the LGNIR is bound by the details stipulated in the 2005 Iraqi Constitution, while the Governorates Law of 1969 was granted broad powers to regulate administrative decentralization by the 1970 Constitution. Therefore, the 1969 Law strengthened the authority of the central government against the administrative units. And this was a normal matter because the 1970 Constitution granted wide authorities to the central government to regulate the relationship between it and the administrative units without any restrictions.

After this introduction, Chapter Four will examine the LGNIR related to the authorities of the governorate councils. But, before that, the researcher will shed light on the temporary Order 71, 2004.

4.2 Order 71, Local Government Powers of 2004

The Coalition Provisional Authority (CPA), which occupied Iraq in 2003, issued "Order No. 71, Local Governmental Powers" in 2004 to regulate the activities of the

[501] See the Governorates Council, 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.

governorates in Iraq.[502] This order was a law, in which the State Shura Council, in its advisory opinion, stated that "the term 'law' applies to Order 71 of 2004 and its provisions shall be applied and are not contrary to the Constitution".[503] The CPA exercised the powers of the three authorities, i.e., legislative, executive and judicial[504] until June 30, 2004.[505]

Order No. 71 of 2004 was issued based on the 2004 Constitution for the transitional period and adopted its philosophy related to regional administrative decentralization. This Order suspended the Governorates Law of 1969. [506]On the other hand, Order 71 was merely a temporary measure until the formation of an Iraqi government,[507] which could then issue governorates law and it did so in the form of the LGNIR in 2008. Order No. 71 stated that the governorates:

> "Implements the principle of decentralization"[508]and added that "the Order is designed to improve the delivery of public services to the Iraqi people and make the Iraqi government more responsive to their needs".[509] The Order then provided that "Each Governorate may

[502] Order 71: "Local Governmental Powers" of 2004. http://www.iraq-lg-law.org/ar/webfm_send/940. Accessed 8/5/2017.
[503] Decision No. 39/2008 on 11 March 2008. Decisions and Fatwas of the State Shura Council for 2008. 114
[504] Organization No. 1, "Coalition Provisional Authority" of 2003. http://govinfo.library.unt.edu/cpa-iraq/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf. Accessed on 11/6/2017.
[505] Order 100: "Transfer of laws, regulations, orders and directives issued by the Coalition Provisional Authority" of 2004. http://govinfo.library.unt.edu/cpa-iraq/regulations/20040628_CPAORD_100_Transition_of_Laws__Regulations__Orders__and_Directives.pdfAccessed 11/6/2017
[506] Section 8 of Order 71: "Local Governmental Powers" of 2004. http://www.servat.unibe.ch/icl/iz00000_.html. Accessed 11/6/2017.
[507] About this subject see the preamble of the Iraqi Constitution of 2004. http://www.servat.unibe.ch/icl/iz00000_.html. Accessed 11/6/2017.
[508] Section 1, Order 71: "Local Governmental Powers" of 2004. http://www.servat.unibe.ch/icl/iz00000_.html. Accessed 11/6/2017. http://www.servat.unibe.ch/icl/iz00000_.html. Accessed 11/6/2017.
[509] Section 1, Order 71: "Local Governmental Powers" of 2004. http://www.servat.unibe.ch/icl/iz00000_.html. Accessed 11/6/2017.

> form a Governorate Council, which shall be funded from national budget allocations that are separate from the budgets of the ministries and other national institutions."[510] It also stated that "Elections for the Governorate Councils will take place at the same time as elections for the National Assembly (the parliament), no later than 31 January 2005."[511]

The elections were held on December 15, 2005. [512] On the other hand, Order 71 granted wide powers to the governorates as it stipulated that:

> "Governorate Councils shall perform their responsibilities independently from the control or supervision of any ministry. Governorate Councils may, by majority vote, and within two weeks following the appointment, approve or veto the appointment by the ministries for director generals and local ministerial officials for positions designated as (senior positions)"[513]

According to this text, only the judicial authority had the right to control the governorate councils based on its general authority. The granting of wide powers to the governorate councils, with preventing any kind of control by the central authority except judicial control, was not appropriate for administrative units that implement

[510] Paragraph 1, Section 2, Order 71: "Local Governmental Powers" of 2004. http://www.servat.unibe.ch/icl/iz00000_.html. Accessed 11/6/2017.
[511] Paragraph 4, Section 2 Order 71: "Local Governmental Powers" of 2004. http://www.servat.unibe.ch/icl/iz00000_.html. Accessed 11/6/2017.
[512] Zuhair Ziauddin, "Parliamentary Elections and Governorate Councils," Iraqi Communist Party, December 18, 2016, accessed May 5, 2017, http://www.iraqicp.com/index.php/sections/platform/52138-2016-12-18-20-16-17?tmpl=component&print=1&page=.
[513] Paragraph 3, Section 2 Order 71: "Local Governmental Powers" of 2004. http://www.servat.unibe.ch/icl/iz00000_.html. Accessed 11/6/2017.

administrative decentralization for the first time. Therefore, the LGNIR has bridged the gap by stipulating the control of Parliament and the independent commissions, although there are notes on the approach of the legislator in the LGNIR about this subject, which was previously mentioned.[514] Also, the researcher mentioned in Chapter Three[515] that it is better to have administrative control in addition to judicial control at the beginning of implementation of the decentralized system, and then it is possible to have judicial control only when members of the provincial councils have sufficient experience to administrate the affairs of the governorate. On the matter of the appointment of the governors, Order 71 stipulated that:

> "The Governorate Councils are hereby authorized to select and appoint the Governors and Deputy Governors. The Governors and Deputy Governors selected by the Governorate Councils prior to the date of this Order are hereby appointed. The Governorate Councils may remove Governors and Deputy Governors for cause as specified in this Order, upon a two-thirds vote. Should vacancies in the positions of Governor or Deputy Governor occur, the Governorate Councils may elect a new Governor or Deputy Governor through a majority vote of the Council."[516] It states that "the Governor is the head civil official of a governorate and is accountable to the Governorate Council. The Governor shall direct, coordinate and oversee actions in the implementation of the Governorate Council's decisions." [517]

514 See, 3.2.2 Fifth paragraph of Article 122, Chapter Three of this study.
515 Ibid.
516 Paragraph 4, Section 2 Order 71: "Local Governmental Powers" of 2004. http://www.servat.unibe.ch/icl/iz00000_.html. Accessed 11/6/2017.
517 Paragraph 1, Section 3 Order 71: "Local Governmental Powers" of 2004. http://www.servat.unibe.ch/icl/iz00000_.html. Accessed 11/6/2017.

The Council of Ministers tried to limit the authority of the governorate councils by issuing a decision about the dismissal of officials occupying designated "senior positions" which stated that "the provincial council shall notify the concerned ministry by a written statement of any vote concerning the dismissal at least two weeks before the date specified for the vote ... in order to give the concerned ministry the opportunity to consult with the governor and the governorate council regarding the dismissal." The decision also stipulated that it "does not allow the governorate council to submit the decision of the dismiss for the vote until after the end of the two-week period ."[518]

The author Amil, said that this limitation set by the Council of Ministers had no basis in law because the competence granted to the governorate councils were based on the Governorates Law (Order 71), so the decision could not restrict the law.[519] The researcher agrees with the author. This decision of the Council of Ministers is a manifestation of the conflicts between the central authority and local entities about the powers.

Despite the broad powers stipulated in Order 71, it did not provide for the governorate councils to issue local legislation or local laws, as the law was silent on this subject. Therefore, according to the general principles of regional administrative decentralization, the governorate councils can only issue administrative decisions. [520]

The Karbala Governorate Council had issued, under Order 71, a decision that included preventing any investment or signing of a government contract using the public funds

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518 Mahmood Al-Zubaidi, "Administrative Competence of Governorate Councils, Conflict and Overlap in the Light of the Law of Governorates Not Incorporated into a Region No. 21 of 2008." *Al-Hiqouq Journal* 3, no. 10 (2010):12.

519 Amil Jabbar Ashoor, "The Administrative Decentralization and Principles of the Management of the Relationship between the Central Government and the Governorate Councils of Iraq," *The Arab Gulf* 44, no. 3 (2016): 111.

520 See Chapter 2 of this study.

of the state within the boundaries of the governorate without the approval of the Council. The Karbala Governorate Council called this decision "legislation". When the Ministry of Municipalities asked the State Shura Council for their legal opinion about the legality of what was issued by the Karbala Governorate Council, the State Shura Council's response was that it had no basis in law. The Council also mentioned that naming the Karbala Governorate Council as the issuer of the legislation was not true.[521] In another advisory opinion in 2007, the State Shura Council mentioned that the governorate councils could impose taxes and fees only based on a law.[522] This means that what is issued by the governorate councils is not a law.

The wording of Order 71 was ambiguous and confusing because it was issued by the CPA and the law was divided into sections rather than articles as is customary in Iraqi legislation. So, the way to divide this law was strange to the Iraqi legal system.

4.3 Articles 2 and 7 of the LGNIR

When the Iraqi Parliament passed the LGNIR of 2008,[523] it abolished Order 71, as well as the Governorates Law of 1969[524] which was suspended by Order 71. [525] The LGNIR as stated in the justifying reasons of the law was:

> "Because of the wide competence and powers granted by the Constitution of the Republic of Iraq to the governorates and their administrations and for the purpose of organizing these competence and powers in a manner that is in harmony with the new state that is

[521] Decision No. 111/2006 on 26 December 2006. Decisions and Fatwas of the State Shura Council for 2008. 230

[522] Decision No. 54/2007 on 19 July 2007. Decisions and Fatwas of the State Shura Council for 2007. 162

[523] See the Iraqi Gazette No. 4070, on 31/3/2008.

[524] Article 53, the LGNIR. http://iraq-lg- law.org/en/webfm_send/765. Accessed 19 November 2016.

[525] Section 8 of Order 71: "Local Governmental Powers" of 2004. http://www.servat.unibe.ch/icl/iz00000_.html. Accessed 11/6/2017.

based on the federal and decentralized system and taking into account the fact that the existing legislation is inadequate."[526]

From here, the legislator launched to the organization of the regional administrative decentralization in Iraq.

Paragraph 1, Article 2 of the LGNIR states that:

> "The governorate council is a legislative and oversight authority, and it has the right to issue local legislation to enable it to manage its affairs in accordance the principle of administrative decentralization in a manner that does not contradict with the constitution and federal laws, which fall within the exclusive competence of the federal authorities".

Article 7 of the LGNIR complemented the above text by stipulating that:

> "The governorate council shall assume the following functions:" …… Third: "Issue local legislations, instructions, bylaws and regulations to organize the administrative and financial affairs so that it can conduct its affairs based on the principle of administrative decentralization in a manner that does not contradict the provisions of the constitution and federal laws."

The legislator's approach is that the governorate council is a legislative authority and issues local legislation which is alien to the Iraqi legal system and to the legal systems of the countries that have adopted the decentralized regional administrative system. In France, after the revolution in 1789, one of the French governorates called its decision

[526] See the justifying reasons of the law, the LGNIR. http://iraq-lg- law.org/en/webfm_send/765. Accessed 19 November 2016.

a decree. The French National Assembly objected and issued a decree stating that "no administrative entity shall be able to use as a title for its decisions the term 'decree', which is dedicated to the legislature's authority ... and it shall use the term 'decision'."[527]

Traditionally, the laws to organize regional administrative decentralization do not focus on the type of activities of the local councils because one of the principles of administrative decentralization is that local councils issue administrative decisions. For example, the Algerian "regional groups' law" in 2012 did not explicitly specify the type of activities of the provincial councils, but stipulated that the provincial council exercises its specific competence under the laws and regulations.[528] Since the regulations are administrative decisions issued by the executive authority,[529] therefore, what is issued by the provincial council are administrative decisions because it is under the regulations, which are issued by the executive authority, as well as the laws. The law also stipulates that the governor may object to the decisions of the provincial council before the administrative court.[530] This means that what is issued by the provincial council is an administrative decision because the administrative court is competent to make decisions without laws.[531] On the other hand, the French law of 1982, which deals with the administrative regulations of the French territory, states that the governor can object to the decisions of the governorate council before the

[527] Jean Paul Pastorel, "The Regional Cohort and General Competence Condition," *Journal of Public Law* (2007): 59.
[528] Article 76 of Algerian "regional groups" law in 2012 http://www.elmouwatin.dz/IMG/pdf/code_des_collectivites_territoriales._ar_.pdf. Accessed 14/6/2017
[529] See, Wissam Sabar Abdel Rahman, "The Competence of Management in Normal Circumstances: A Comparative Study" (master's thesis, Faculty of Law, University of Baghdad, 1994),21.
[530] Article 53 of Algerian "regional groups" law in 2012.
[531] Qais Abdul Sattar Othman, "The Scientific Importance of the Administrative Judiciary," *Journal of the College of Law /Al-Nahrain University* 16, no. 9 (2006).

administrative judiciary,[532] which means that the governorate councils issue administrative decisions. Finally, in Egypt the "Local Government Law" of 1979 explicitly states that governorate councils issue decisions.[533] This law also stipulates that the prime minister will issue an administrative decision to facilitate the implementation of the law. [534] That means, the governorate councils issue their decisions based on the law and administrative decisions, which means that the decisions of the governorate council are inferior to the administrative decisions of the executive authority, and this is the same approach of the Algerian legislator.

The approach of the Iraqi legislator is that the governorate council is a legislative authority and that it issues local legislation based on the principle of administrative decentralization, this has led to confusion among the authors and governorate councils. Studies that dealt with this subject stipulated that the text of Article 2 of the LGNIR is contradictory when noted that on the one hand, it has been recognized that the governorate council has the right to manage its affairs in accordance with the principle of administrative decentralization in a manner that would not contradict the constitution and federal laws, and this is a sound principle. But, on the other hand, it has violated the principle of decentralization and the constitution by describing the council as a legislative authority which has the right to issue local legislations within

[532] George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 323.
[533] Article 2 of the Egyptian "Local Government Law" of 1979, https://www.egypt.gov.eg/arabic/laws/download/newlaws/%D9%82%D8%B1%D8%A7%D8%B1%20%D8%B1%D8%A6%D9%8A%D8%B3%20%D8%AC%D9%85%D9%87%D9%88%D8%B1%D9%8A%D8%A9%20%D9%85%D8%B5%D8%B1%20%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A%D8%A9%20%D8%A8%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D8%B1%D9%82%D9%85%2043%20%D9%84%D8%B3%D9%86%D8%A9%201979.pdf.
[534] Article 5 of Egyptian "Local Government Law" in 1979.

the governorate.[535] This law granted legislative competence to the governorate councils, thus exceeding the administrative and financial competences, which are granted to the governorate councils by the constitution.[536] On the other hand, another study said that the Iraqi legislator, in the LGNIR, has mixed administrative and political decentralization.[537] Also, the granting of legislative authority to the governorate councils contradicts the general rules prevailing in the system of administrative decentralization which is to grant the local authorities the power to make decisions related to the exercise of administrative activities within its competences without exceeding the legislative authority. Therefore, the governorate councils remain as administrative bodies and their main function is the administration of the governorate in accordance with the principles of administrative decentralization.[538]

Some authors believe that granting the governorate councils legislative authority does not mean the issuing of laws and the governorates continue to issue decisions. That the governorate councils that are not incorporated into a region do not have the authority to issue laws because they are governed by the principle of administrative decentralization in accordance with Article 122 of the constitution, which does not grant it the authority to legislate and what is issued by the governorate councils is no

535 Yamama Mohamed Hassan, "The Impact of Legislative Wording on the Application of the Laws (the Study of the Law of the Governorates Not Incorporated into a Region No. 21 of 2008)" *Al-Hiqouq Journal* 4, no. 18 (2012): 4.

536 Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study ~~in~~ on the Overlap of Competence and Control," *Risalat AL-huquq Journal* (2012):12.

537 Mahmood Al-Zubaidi, "Administrative Competences of Governorate Councils, Conflict and Overlap in the Light of the Law of the Governorates Not Incorporated into a Region No. 21 of 2008." *Al-Hiqouq Journal* 3, no. 10 (2010):27.

538 Areej Talib Kazem. "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008" *Journal of Anbar University for Law and Political Sciences* 1, no. 3 (2011):149.

more than regional regulatory decisions.[539] This legislative authority falls within the system of administrative decentralization and does not change the description to the political decentralization.[540] This study is of the view that the governorate council issues administrative decisions according to the LGNIR, as will be explained later.

In addition, the authors opined that the governorate councils were also confused with the wording of the LGNIR, and it has led these councils to believe that the law grants them legislative authority to issue local laws.[541] Mr. Harith, a member of the Muthanna Governorate Council, during an interview with the researcher, said that, the council was based on the law as well as the constitution in issuing laws.[542] Also, Mr. Saad, the head of the legal department in the Governorate of Babylon, said that, the council was based on the LGNIR in the issuance of laws.[543] This opinion was supported by all members of the governorate councils that the researcher met, Mr. Ahmed El Marzouk, a member of the Muthanna Governorate Council and the head of the legal committee in the Council.[544] Also, Mr. Dia Ahmed, a member of the Dhi Qar Governorate Council.[545] As well as, Mr. Hakem Muslim Al- Yasiri, the head of Muthanna Governorate Council, [546] and Mr. Hamid Naeem, the head of Dhi Qar Governorate Council,[547] in addition to Mr. Naqaa Nassif, the head of the legal department in the

[539] Mohammed Jabar Taleb, "Constitutional Competence to the Provinces Not Incorporated into a Region in Iraq's 2005 Constitution," *Risalat Al-Huquq Journal* no. 2 (2015): 215.
[540] Taher Mohammed Al Janabi, *Regional Administrative Decentralization, a Two-Edged Weapon* (Beirut: Dar Al-Senhoury, 2017), 190.
[541] See Yamama Mohamed Hassan, "The Impact of Legislative Wording on the Application of the Laws (the Study of the Law of the Governorates Not Incorporated into a Region No. 21 of 2008)" *Al-Hiqouq Journal* 4, no. 18 (2012): 11.
[542] Harith Lahmod, (March 20, 2017). Iraq: Personal interview.
[543] Saad Abdul Wahid, (April 6, 2017). Iraq: Personal interview.
[544] Ahmed El Marzouk, (March 20, 2017). Iraq: Personal interview.
[545] Mr. Dia Ahmed, (March28,2017). Iraq: Personal interview.
[546] Mr. Hakem Muslim Al- Yasiri, (March 20, 2017). Iraq: Personal interview.
[547] Hamid Naeem, (March 28, 2017). Iraq: Personal interview.

governorate of Dhi Qar.[548] On the other hand, the laws issued by the governorate councils were based on Articles 2 and 7 of the LGNIR.[549]

The report was submitted by a number of researchers to the United Nations (ESCWA) stated that the members of the governorate councils lack of legal knowledge[550] has led them to seek the opinion of the Federal Supreme Court and State Shura Council on the extent of their powers under the Constitution and the law. [551] In the interview with Mr. Naqaa Nassif, the head of the legal department in the governorate of Dhi Qar, he said that the majority of the members of the governorate councils did not have the legal expertise that would enable them to manage the provinces.[552] In addition, Mr. Jabbar, a member of the Council of Representatives, said, in another interview, that the members of the governorate councils did not have the experience to manage the governorates. [553]

The loopholes in the wording of the LGNIR were reflected in the application of the law by the governorate councils, which has led to the issuance of a lot of laws by these councils such as the Law for the Regulation of Local Revenues of 2010 issued by the Babel Governorate Council,[554] the Law for the Organization of Holders of Senior Positions of 2014 issued by the Al-Muthanna Governorate Council,[555] and the Law to

[548] Naqaa Nassif, (March 28, 2017). Iraq: Personal interview
[549] See the Gazette of Babel dated 31/1/2010, and The Gazette of Dhi Qar, No. 10, of 2016. Also, the letter issued by the Muthanna Governorate Council on 7/12/2014.
[550] See Amal Shlash, Wafaa Al-Mahdawi, Hasan Lateef and Kazem. Support Given to Decentralization and Local Government to Enhance Provision of Services in Iraq. United Nations ESCWA.
[551] Amil Jabbar Ashoor, "The Administrative Decentralization and Principles of the Management of the Relationship between the Central Government and Governorate Councils of Iraq," *The Arab Gulf* 44, no. 3 (2016): 114.
[552] Naqaa Nassif, (March 28, 2017). Iraq: Personal interview.
[553] Jabbar Abdul Khaliq, (February 13, 2017). Iraq: Personal interview.
[554] The Gazette of Babel. No.3 of 31/1/2010.
[555] The letter issued by the Muthanna Governorate Council on 7/12/2014.

Organize the Erection of Internet Towers of 2016 issued by the Dhi Qar Governorate Council.[556] These laws have rights and obligations, which are contrary to the constitution, and even the LGNIR.

Normally, the judiciary is resorted to in the event of any ambiguity or defect of the legal text in order to solve the problem. Therefore, what is the position of the Iraqi judiciary on the provisions of Articles 2 and 7 of the LGNIR? This will be explained in the following section.

4.3.1 The Advisory Opinions of the State Shura Council

No cases have ever been brought before the courts about the competence of governorate councils to issue local legislations,[557] But there are five advisory decisions of The State Shura Council about this subject. Has been reviewed from the oldest to the latest to track the evolution of the council's opinion on this subject.

The Federal Supreme Court in its advisory decision in 2009 stated that:

> "The Federal Supreme Court found that its competence was set forth in Article 93 of the 2005 Constitution of the Republic of Iraq and Article 4 of the Federal Supreme Court Law, No. 30 of 2005. None of this competence involve the interpretation of laws. This is within the competence of the State Shura Council, according to Article 6 of the State Shura Council Law, No. 65 of 1979." [558]

Also, there have been several decisions of the court with basically the same contents.[559]

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[556] The Gazette of Dhi Qar, No. 10, of 2016.

[557] See Read Naji Ahmed, "The Extent of the Competence of the Governorates Not Incorporated into a Region to Impose Taxes and Fees (Specialized Legal Study in the Legal System of Iraq)" *Journal of the College of Law for Legal and Political Sciences* 4, (2015):402.

[558] Federal Supreme Court, 52 / Federal / 2009. http://www.iraqja.iq/krarat/2/2009/52_fed_2009.pdf. Accessed 22/5/2017.

[559] See, decisions of the Federal Supreme Court on 26/5/2009, 7/9/2009, 3/12/2009.

Article 7 (4) of the Law of the State Shura Council (Amended) No. 65 of 1979[560] states that:

> "The State Consultative Council in the field of opinion and legal advice shall exercise its powers as follows: To give the opinion in legal matters if there is any hesitation in one of the ministries or institutions not linked to a ministry, and must attach the opinion of the legal department together with the points that require an opinion on it and the reasons for their submission to the Council and the opinion shall be binding on the Ministry or the applicant."

Therefore, the State Shura Council is the official entity responsible for the interpretation of the laws in Iraq.

There are several advisory opinions of the State Shura Council about the authority of the governorate councils to issue local legislations based on the LGNIR.

The First Advisory Opinion[561]

The Council of Ministers has asked the State Shura Council for its advisory opinion about the Generators Law, which was issued by the Babel Governorate Council based on Article 7 of the LGNIR. [562]

The State Shura Council replied that:

> "The constitution determined the provisions related to the legislation, ratification and issuance of laws, and that the laws are issued only based on the constitutional text." The council added that "Article 121 of the constitution empowered the regional authorities

[560] The Law of the State Shura Council (Amended), No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017

[561] It was mentioned by Read Naji Ahmed in "The Extent of the Competence of the Governorates Not Incorporated into a Region to Impose Taxes and Fees (Specialized Legal Study ~~in~~ of the Legal System in Iraq)" *Journal of ~~e~~ the College of Law for Legal and Political Sciences* 4, (2015):394.

[562] The Gazette of Babel. No.1 on 1/10/2009.

to exercise legislative, executive and judicial authorities, and issue laws in accordance with the provisions of the constitution. And, it did not authorize the governorate not incorporated into a region of this authority." The council also stated "that the law is not based on another law and no law has been issued based on the text in another law since the formation of the Iraqi government. Therefore, this trend is a violation of the provisions of the constitution and is contrary to what has been settled by jurists and the countries of the world in the legislation of laws." The Council added that "paragraph 12 of Article 7 of the LGNIR, stipulates that the governorate council shall issue a gazette wherein the council's decisions and orders shall be published and there was no mention of the laws". The council also mentioned that "the term 'legislation' mentioned in the law means the rules governing the administrative and financial affairs of the governorate so that it can manage its affairs according to the principle of administrative decentralization, in order to serve the people of the governorate and provide services to them in all fields. It does not mean issuing laws." The Council concluded its opinion by stating that "for the above, the council confirms that the governorate councils are not entitled to issue laws for any purpose"[563]

The State Shura Council was very clear in its opinion that the LGNIR does not grant the governorate councils the authority to issue laws. The law cannot grant another law

[563] Read Naji Ahmed in "The Extent of the Competence of the Governorates Not Incorporated into a Region to Impose Taxes and Fees (Specialized Legal Study of the Legal System in Iraq)" *Journal of the College of Law for Legal and Political Sciences* 4, (2015):394.

the authority to issue laws, as this is contrary to the general rules of law in Iraq and the world. Therefore, that which grants this authority is only the constitution. Since the Iraqi constitution granted the authority to issue laws to the regions and did not grant it to the governorate not incorporated into a region, so the issuance of the laws by the governorate councils is contrary to the constitution. The State Shura Council referred to Article 7 paragraph 12 of the LGNIR to prove that the law did not grant the governorate councils the authority to issue laws. This article stipulates that the governorate councils must issue a Gazette to publish the decisions and orders issued by it. This means that what is issued by the governorate councils are decisions and orders and there is no mention of the term law. As a result of this, the publication of laws issued by the governorate councils in the Gazette issued by it is contrary to the law.

The State Shura Council concluded that the governorate councils cannot issue laws for any purpose.

The Second Advisory Opinion[564]

The Board of Supreme Audit asked the State Shura Council for a legal opinion about the competence of the governorate councils to impose, collect and spend taxes, fees, and local fines.

The State Shura Council replied that:

> "Because Article 28 paragraph 1 of the constitution states that (No taxes or fees shall be levied, amended, collected, or exempted, except by law) and Article 7 paragraph 3 of the LGNIR, which determines the competence of the Governorate Council, states that (Issue local legislations, instructions, bylaws, and regulations to

[564] Decision No. 40/2011, on 20/4/2011. Decisions and advisory opinions of the State Shura Council 2011.

> organize the administrative and financial affairs so that it can conduct its affairs based on the principle of administrative decentralization in a manner that does not contradict the provisions of the Constitution and federal laws.) Also, the Supreme Court's Decision No. 16/2008 said that (the practice of the governorate councils not incorporated into a region to enact laws related to taxation, collection and spending of local taxes, fees and fines is so that they can manage their affairs in accordance with the principle of administrative decentralization is not within the competence provided for in paragraph 1 of Article 61 of the constitution). The opinion of the Federal Supreme Court is binding and the application of the principle of administrative decentralization must also be in a manner that is not inconsistent with the provisions of the constitution and federal laws."[565]

After taking into consideration all the above, the State Shura Council concluded that:

> "Based on the above reasons, the issuance of the provincial council's legislation on the imposition, collection and spending of local taxes, fees and fines must be in accordance with the principle of administrative decentralization and not inconsistent with the provisions of the constitution and federal laws."

The State Shura Council's advisory opinion was based on four reasons. Firstly, according to Article 28 of the constitution, all taxes and fees are the competence of the law. Secondly, according to Article 7 of the LGNIR, the governorate councils issue local legislation and regulations, and instructions to manage their affairs in accordance

[565] Decision No. 40/2011, on 20/4/2011. Decisions and advisory opinions of the State Shura Council 2011.

with the principle of administrative decentralization that is not inconsistent with the constitution and federal laws. Thirdly, according to the opinion of the Federal Supreme Court in 2009, the governorate councils, when issuing the laws relating to taxes and fees, are required to do so under the principle of administrative decentralization and it is not within the competence provided for in the first paragraph of Article 61 of the constitution which provides that "The Council of Representatives shall be competent in the following: First: Enacting federal laws". The State Shura Council emphasizes that the local laws (according to the court's decision) must be under the principle of administrative decentralization and should not be within the authorities granted to the central authority to issue laws under Article 61 of the constitution. This means that the term of the laws in Article 28 of the constitution is intended to be the federal laws issued by the central authority. The State Shura Council interpreted the term "laws", which was stipulated in the decision of the Federal Supreme Court, as administrative decisions because the council's focus was that these laws are according to the principle of administrative decentralization and it should not violate the text of Article 61 of the constitution which grants the authority to issue laws to the Council of Representatives. The fourth reason is that administrative decentralization should not violate the constitution and federal laws. Since a previous opinion of the State Shura Council stated that the constitution and the law did not grant the governorate councils the authority to issue laws in its application of administrative decentralization[566]. Therefore, it means that these councils do not have the right to issue laws, but they can issue decisions that do not violate the constitution and federal laws, as long as the governorates implement administrative decentralization.

[566] See, 3.1.1 The first advisory opinion, of this chapter.

Of all the above reasons, one can understand the result which the State Shura Council reached at the end of its advisory opinion, which is that, the governorate councils' issuance of local legislation in all matters concerning taxes and fees is within the principle of administrative decentralization according to the constitution and the federal laws, and this means that the local legislations are administrative decisions and not laws.

The Third Advisory Opinion[567]

The Ministry of Health asked the State Shura Council for its legal opinion about an issue in the Special Medical Clinics Law No. 1 of 2011 issued by the Babylon Governorate Council, based on Article 7 of the LGNIR.

The State Shura Council mentioned the text of paragraph 3 of Article 7 of the LGNIR, then it stated that: "The meaning of local legislation is not the laws issued according to the Constitution" and then the council reminded that the subject to be addressed by the law issued by the Council of the Babylon Governorate Council was already addressed in the Doctors Law No. 81 of 1984 issued by the Central Authority. After that, the State Shura Council stated that:

> "The mechanism for the legislation of the laws is limited by the provisions of Article 61 of the constitution, which grants the authority to legislate the federal laws exclusively to the Council of Representatives and does not grant the governorate council any authority to legislate laws". The State Shura Council concluded that "the enactment of the Private Medical Clinics Law No. 1 of 2011 by the Babylon Governorate Council is baseless in the law."[568]

[567] Decision No. 102/2011, on 31/10/2011. Decisions and advisory opinions of the State Shura Council 2011

[568] Decision No. 102/2011, on 31/10/2011. Decisions and advisory opinions of the State Shura Council 2011.

The opinion of the State Shura Council here is very clear and does not need to be explained further. Unfortunately, this is only binding on the Ministry of Health, but not on the Babylon Governorate Council, based on the Law of the State Consultative Council of 1979. [569]

The Fourth Advisory Opinion[570]

The Ministry of State for Governorate Affairs asked the State Shura Council for its legal opinion about the authorities of the governorate councils to impose fines on those who intentionally damage electric cables.

The State Shura Council replied:

> "That a financial fine is a penalty imposed when the law is violated." The Council then mentioned the text of Articles 2 and 7 of the LGNIR about the governorate council being a legislative authority to issue local legislation. Then the State Shura Council mentioned the text of Article 19, paragraph 2, of the constitution, which states that "There is no crime or punishment except by law. The punishment shall only be for an act that the law considers a crime when perpetrated..." The council concluded that "the first paragraph of Article 61 of the constitution only restrained the authority to issue laws by the Council of Representatives. Therefore, the governorate council does not have the competence to impose fines for causing damage to public facilities."[571]

[569] Paragraph 4, Article 6 of the State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017

[570] Decision No. 73/2014, on 25/6/2014. Decisions and advisory opinions of the State Shura Council 2011.

[571] Decision No. 73/2014, on 25/6/2014. Decisions and advisory opinions of the State Shura Council 2011.

This opinion of the State Shura Council is also a clear indication that the governorate councils do not have the right to issue laws. The council stated in its opinion that the imposition of a fine is by a law, according to the constitution. After mentioning Articles 2 and 7 of the LGNIR, the State Shura Council said that the law is issued by the Council of Representatives exclusively and the governorate councils do not have the right to impose fines. That means governorate councils do not issue laws and that the provisions of Articles 2 and 7 of the LGNIR do not mean the issuance of laws.

The Fifth Advisory Opinion[572]

The Baghdad Governorate Council asked the State Shura Council for its legal opinion on the competent authority to consider objections to regulatory administrative decisions issued by the governorate council.

But, here it is not possible to know the intention of the Baghdad Governorate Council from the phrase regulatory administrative decisions which is issued by the executive branch, which is lower than the law and is subjected to the law.[573] Does the council mean that all the decisions issued by the Governorate Council are regulatory administrative decisions? Or are these decisions a kind of legal activity of the Council, based on Article 7 of the LGNIR which stipulates that the governorate council issues local legislation, regulations, and instructions? Generally, the most important issue is the response of the State Consultative Council.

In response to the request of the Baghdad Governorate Council, the State Shura Council referred to Article 122 of the constitution, which grants broad administrative and financial authorities to the governorate councils in accordance with the principle

[572] Decision No. 124/2015, on 24/11/2015. Decisions and advisory opinions of the State Shura Council 2015.

[573] See Wissam Sabar Abdel Rahman, "The Competence of Management in Normal Circumstances: Comparative Study" (master's thesis, Faculty of Law, University of Baghdad, 1994),15.

of administrative decentralization. The State Shura Council also referred to Articles 2 and 7 of the LGNIR. Then the council mentioned Article 4, paragraph 4, of the Law of the State Shura Council, which states that:

> "The Administrative Court is competent to adjudicate the validity of orders, and Individual and regulatory administrative decisions, issued by employees and entities in the ministries and institutions not linked to a ministry and the public sector, which did not appoint a reference to challenge it ..." The council further stated that "decisions which were issued according to the principle of administrative decentralization is either individual administrative decisions or regulatory administrative decisions." The council concluded by stating that "the Administrative Court shall be competent to hear objections to the regulatory decisions issued by the governorate council, which has not appointed a reference to challenge it"[574]

The State Shura Council in this opinion did not depart from the trend that it followed in its previous opinions. The council here mentioned the provisions of the constitution and the LGNIR regarding the competence of the governorate councils, all of which state that the governorate councils exercise their activities in accordance with the principle of administrative decentralization. The State Shura Council then stated that all decisions issued according to the principle of administrative decentralization are individual or regulatory administrative decisions. i.e., all decisions issued by the governorate councils are administrative decisions because they exercise their activities

[574] Decision No. 124/2015, on 24/11/2015. Decisions and advisory opinions of the State Shura Council 2015.

in accordance with administrative decentralization. Therefore, the State Shura Council is the competent authority to monitor all the decisions issued by the governorate councils because according to the law, the State Shura Council is competent to hear challenges against administrative decisions.

4.3.1.1 Explanation of the Advisory Opinions of the State Shura Council

According to the Law of the State Shura Council of 1979[575] and the opinion of the Federal Supreme Court,[576] the State Shura Council is competent to interpret the laws. From all the legal opinions of the State Shura Council, it can be observed that the line taken by the council in all its legal opinions is that it has refused to recognize the decisions issued by the governorate councils as laws, and this is evident in all its views. It is noted that the State Shura Council focused on the governorate councils' application of the decentralized administrative system as stipulated in Article 122 of the constitution and Articles 2 and 7 of the LGNIR. However, it seems that the governorate councils did not care about it when applying the above articles.

The approach of the State Shura Council in its legal opinions is to focus on the fact that the governorate councils implement the principle of administrative decentralization. Consequently, according to this principle, the local entities cannot issue laws because under the principle of administrative decentralization there is only one legislative authority, that is the central authority, and that local entities only issue administrative decisions. This is what the State Shura Council mentioned, for example, in the fourth opinion it stated that the "first paragraph of Article 61 of the constitution

[575] Article 6 of the Law of the State Shura Council, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017

[576] Federal Supreme Court, 52 / Federal / 2009. http://www.iraqja.iq/krarat/2/2009/52_fed_2009.pdf. Accessed 22/5/2017.

restrained the authority to issue laws other than by the Council of Representatives. Therefore, the governorate council does not have the competence to impose fines for causing damage to public facilities." Also, the State Consultative Council in its fifth opinion states that the "decisions which are issued according to the principle of administrative decentralization are either individual administrative decisions or regulatory administrative decisions." Therefore, it is necessary to interpret the legal texts dealing with the competence of the governorate councils on this basis.

4.3.2 The Interpretation of the Term local legislation

The State Shura Council stated in an advisory decision that:

> "The legislation in its broad sense includes laws, instructions (administrative decisions) and internal regulations".[577] In another opinion, the State Shura Council said that "jurisprudence points to the fact that legislation is divided into ordinary legislation and sub-legislation, and ordinary legislation means the laws are issued by the legislative authority in accordance with the provisions of the constitution, while sub-legislation refers to the regulations and instructions issued by the executive authority"[578]

Two authors, Ghazi and Adnan, stated that the ordinary legislation is issued by parliament, and it is not permissible to challenge its illegality before the administrative

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577 Decision No. 99/2009, on 6/12/2009. Decisions and advisory opinions of the State Shura Council 2009.

578 Decision of the State Shura Council No. 101 of 2006. http://www.iraq-lg-law.org/ar/content/%D9%82%D8%B1%D8%A7%D8%B1-%D9%85%D8%AC%D9%84%D8%B3-%D8%B4%D9%88%D8%B1%D9%89-%D8%A7%D9%84%D8%AF%D9%88%D9%84%D8%A9-%D8%B1%D9%82%D9%85-101-%D9%84%D8%B3%D9%86%D8%A9-2006-%D8%AD%D9%88%D9%84-%D8%AA%D8%B9%D8%A8%D9%8A%D8%B1-%D8%A7%D9%84%D8%AA%D8%B4%D8%B1%D9%8A%D8%B9%D8%A7%D8%AA-%D8%A7%D9%84%D9%88%D8%A7%D8%B1%D8%AF-%D9%81%D9%8A-%D9%82%D8%A7%D9%86%D9%88%D9%86-%D9%85%D8%AC%D9%84%D8%B3-%D8%B4%D9%88%D8%B1%D9%89-%D8%A7%D9%84%D8%AF%D9%88%D9%84%D8%A9. Accessed 23/6/2017.

court, but its unconstitutionality can be challenged before the Constitutional Court. Administrative decisions (sub-legislation), on the other hand, are issued by the administration and may be challenged before the administrative courts.[579] In the same context, the author, Khalid, stated that regulatory decisions are sub-legislations issued by the administration. They are subordinate laws, so that the regulatory decisions can not violate, amend or repeal the law.[580] Another author, Abdul Ghani, stated that the Legislation is a set of legal rules issued by a competent public authority. If this public authority is the foundation authority, the legislation is constitutional legislation (Constitution). If the public authority is the legislative authority (Parliament), then the legislation is ordinary legislation (laws). But, if the public authority that issues the legislation is the executive authority, the legislation is a sub-legislation (decisions).[581] Building on the above, the term legislation shall be constitutional legislation (constitution), ordinary legislation (law) or subsidiary legislation (administrative decisions). Since the local legislations issued by governorate councils are not constitutional legislation and the State Consultative Council has stipulated that the governorate councils do not issue laws under the principle of administrative decentralization, therefore only administrative decisions remain for the term legislations, that is, the term "local legislation" means administrative decisions.

The legislator has, in the Constitution and LGNIR, repeatedly stated that the activities of the governorate councils are according to the principle of administrative

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579 Ghazi Faisal Mahdi and Adnan Ajel Obaid, *Administrative Judiciary*, 2nd ed. (Baghdad: Al - Nabras Printing, Publishing & Distribution Est, 2013), 33.

580 Khaled Samara Al Zoghbi, *Administrative Decision between Theory and Practice "A Comparative Study,"* 2nd ed. (Amman: Dar Al - Thaqafa Library for Publishing and Distribution, 1999), 112.

581 Abdul Ghani Bassiouni Abdullah, *General Theory in Administrative Law* (Alexandria: Knowledge Facility in Alexandria, 2003), 62.

decentralization whenever the competence of the governorate councils are mentioned.[582] Nonetheless, the governorate councils have implemented the LGNIR wrongly because of its bad wording.

The report which was submitted by a group of researchers to the United Nations (ESCWA) provides that the governorates not incorporated into a region are governed by the administrative decentralization system in accordance with Article 122(2) despite the legal text entitling their councils to issue (local legislations) to regulate administrative and financial decentralization. We may name such (legislations) as (sub-legislations.).[583] On the other hand, the governorate councils that are not incorporated into a region do not have the authority to issue laws, because it is governed by the principle of administrative decentralization in accordance with Article 122 of the constitution, which did not grant the authority to legislate. What is issued by the governorate councils is no more than regional regulatory decisions. [584] Also, the implementation of regional administrative decentralization relates to the administrative function in the country, so the nature of the decisions issued by the governorate councils are administrative decisions.[585]

In interviews conducted by the researcher with the deputy head of the State Shura Council, Dr. Abdul Latif; [586] the chancellor in the State Shura Council, (Judge) Dr.

[582] See Lamar Cravens, Analyzing Decentralization in Iraq. Amman, Jordan: UN Habitat, 2013, 7.
[583] Amal Shlash, Wafaa Al-Mahdawi, Hasan Lateef and Kazem. Support Decentralization and Local Government to Enhance Service Provision in Iraq. United Nations ESCWA.
[584] Mohammed Jabar Taleb, "Constitutional Competence in the Provinces Not Incorporated into a Region in Iraq's 2005 Constitution," *Risalat Al-Huquq Journal* no. 2 (2015): 215.
[585] Ismail Sasaa Ghidan, "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control," *Risalat AL-huquq Journal* (2012):42
[586] Dr. Abdul Latif Nayef, (March 1, 2017). Iraq: Personal interview.

Mazen;[587] members of the Council of Representatives, Mr. Mahnah[588] and Mr. Jabbar Abdul Khaliq Abadi;[589] as well as Professor Nabeel, a lecturer at the University of Kufa,[590]the head of the Legal Department, and lecturer at the University of Babylon, Dr. Sadiq Mohammed Ali,[591] all of them agreed that the governorate councils issued administrative decisions.

Likewise, members of the Council of Representatives Mr. Jabbar[592] and Mr. Mahnah[593] said, during an interview with them, that the governorate councils issue administrative decisions, not laws.

4.4 How the Laws in Iraq are Worded

The LGNIR includes a defective text applied by the governorate councils, minutely, which grants rights to the governorate councils, but cannot get them under the conditions of sound legality.[594] The flawed wording of the LGNIR is the reason for the misapplication of the principles of administrative decentralization by the governorate councils. But, how was the law drafted?

Article 5 of the Law of the State Shura Council No. 65 of 1979 stipulates that the Council shall exercise in the field of rationing:

> "First: To prepare and draft legislation related to ministries or institutions not linked to a ministry... Second: Auditing all bills prepared by the ministries or institutions not linked to a ministry...

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587 Dr. Mazen Lilo, (March 1, 2017). Iraq: Personal interview.
588 Sadiq al – Mahnah (Mahnah), (February 17, 2017). Iraq: personal interview.
589 Jabbar Abdul Khaliq Abadi, (February 13, 2017). Iraq: Personal interview.
590 Prof. Dr. Nabeel Althabhawi (Abril 15, 2017). Iraq: personal interview.
591 Dr. Sadiq Mohammed Ali, (February 15, 2017). Iraq: personal interview.
592 Jabbar Abdul Khaliq, (February 13, 2017). Iraq: Personal interview.
593 Sadiq al – Mahnah (Mahnah), (February 17, 2017). Iraq: personal interview.
594 Yamama Mohamed Hassan, "The Impact of Legislative Wordings on the Application of the Laws (the Study of the Law of Governorates Not Incorporated into a Region No. 21 of 2008)" *Al-Hiqouq Journal* 4, no. 18 (2012): 11.

> Thirdly: To contribute and ensure the unity of the legislation, unification of the foundations of the legislative drafting and unification of the legal terms and expressions."

The Federal Supreme Court stated in a judgment that:

> "The court has found from the extrapolation of the constitution that it has adopted the principle of the separation of powers according to Article 47, and the submission of the bills are within the competence of the executive authority and it must also be submitted by competent authorities within the executive authority"[595]

This means that the bills are submitted by the ministries and departments of the executive authority to the Council of Representatives. According to Article 5 of the Law of the State Shura Council, the State Shura Council prepares the bills for the ministries and departments or checks the bills which are sent by the ministries and departments to the council. Dr. Mazen, the chancellor in the State Shura Council said, in an interview with him, that the State Shura Council is the competent authority to prepare the wording of the legislation in Iraq.[596] Means that it is the only competent authority, and this is an application for Article 5 of the law, which indicated that the Council responsible for the unification of legal terms and maintains the unity of legislation. The head of the State Shura Council[597] and his deputy[598] share on the same opinion.

[595] Federal Supreme Court, 44 / Federal / 2010. http://www.iraqja.iq/krarat/1/2010/44_fed_2010.pdf. Accessed 27/6/2017.
[596] Dr. Mazen Lilo, (March 1, 2017). Iraq: Personal interview.
[597] Head of the State Shura Council, *Decisions and Fatwa of the State Shura Council* (Baghdad: Alans Printing & Publishing Co, 2014), 1.
[598] Dr. Abdul Latif Nayef, (March 1, 2017). Iraq: Personal interview.

The State Shura Council is competent "to contribute and ensure the unity of legislation, unification of the foundations of legislative drafting and unification of the legal terms and expressions." This is very important because it means the State Shura Council should take into account all the wording of the Iraqi laws. The State Shura Council's head said that one of the council's functions is to fill the gaps in the law, clarify all ambiguity, unify legal terminology and preserve the unity of legislation.[599] Therefore, the Council is the competent authority to unify terminology and maintain the unity of the legislation.

Article 90 of the Rules of Procedure of the Council of Representatives states that the legal committee of the council shall have the following competence:

> "...Third: To assist the council and its committees in the wording of the legislative texts... Fifth: To study the proposals of the bills presented to it by the council and the government and the preparation and wording of its texts, in accordance with what was entrusted to it by the Presidency of the Council."[600]

The legal committee of the Council of Representatives when exercising its competence in the wording of the laws, should consult the State Shura Council because it is legally competent to unify the legal terms and preserve the unity of the legislation. But, is this applied in practice?

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[599] Head of the State Shura Council, Decisions and Fatwa of the State Shura Council (Baghdad: Alans Printing & Publishing Co, 2014), 1.

[600] Rules of procedure of the Council of Representatives. http://parliament.iq/wp-content/uploads/2017/01/%D8%A7%D9%84%D9%86%D8%B8%D8%A7%D9%85-%D8%A7%D9%84%D8%AF%D8%A7%D8%AE%D9%84%D9%8A-%D9%84%D9%85%D8%AC%D9%84%D8%B3-%D8%A7%D9%84%D9%86%D9%88%D8%A7%D8%A8-%D8%A7%D9%84%D8%B9%D8%B1%D8%A7%D9%82%D9%8A-.pdf. Accessed 27/6/2017

In an interview with Mr. Jabbar, a member of the Council of Representatives,[601] he said, sometimes some bills were amended more than the text which came from the government, sometimes the bill would come in 12 Articles, but would be voted on in more than 30 Articles, and even paragraphs which came from the government would also amended. Mr. Jabbar also said that the wording of the amendments to the bills was carried out with the assistance of (sometimes) the legal committee, experts (without the members of the State Shura Council) or the ministry that sent the bill. All this would be carried out without going back to the State Shura Council again. Dr. Abdul Latif, deputy head of the State Shura Council,[602] and Dr. Mazen, a counselor in the State Shura Council,[603] agreed with Mr. Jabbar's opinion.

Regarding the LGNIR, the head of the State Shura Council[604] said the LGNIR was drafted using terms, phrases and words that have many interpretations because the amendment of a lot of the texts was carried out by deleting and adding words and terms that have several meanings after the State Shura Council had already scrutinized these texts, and this is far from a new reality. The head of the State Shura Council added that, that was the cause for the incorrect impression of the administration of those provinces. Also, Dr. Abdul Latif the deputy head of the State Shura Council[605] said, in an interview with him, that the Council of Representatives did not return the LGNIR to the State Shura Council before issuing it. Therefore, there was ambiguity in its texts and contradictions with other texts. This has led to confusion in its application. In an

601 Jabbar Abdul Khaliq, (February 13, 2017). Iraq: Personal interview.
602 Dr. Abdul Latif Nayef, (March 1, 2017). Iraq: Personal interview.
603 Dr. Mazen Lilo, (March 1, 2017). Iraq: Personal interview.
604 Head of the State Shura Council, *Decisions of the State Shura Council issued in the light of the Law of Governorates not incorporated into a Region No. 21 of 2008* (Baghdad: State Shura Council, 2010),4.
605 Dr. Abdul Latif Nayef, (March 1, 2017). Iraq: Personal interview.

interview with Dr. Mazen, a chancellor of the State Shura Council,[606] he said that the Parliamentary committees are frequently working on issuing legislations that lack quality.

As a result of the above, there is no cooperation between the legislature and the State Shura Council. This cooperation improves the performance of the legislature. And helps the legislature to avoid issuing flawed laws in its wording. Therefore, the loopholes in wording the LGNIR is the result of the lack of cooperation between the parliament and the State Shura Council. And the Parliament is responsible for that.

4.5 Comparing the Performance of the Federal Supreme Court and the State Shura Council

In this chapter and the third chapter of this research, the performance of the Iraqi Federal Supreme and the Court State Shura Council was evaluated. The decisions of the Federal Supreme Court were ambiguous and conflicting,[607] while the decisions of the State Shura Council were set in one direction and clear. [608] How can this difference in performance be explained?

The researcher will shed light on the history of the State Shura Council and Federal Supreme Court to interpret the differing performance of each.

4.5.1 The History of the State Shura Council

On November 7, 1933, the Law of the Diwan of Legal Blogging was issued, which provided for the establishment of a (Diwan of Legal Blogging) consisting of at least

606 Dr. Mazen Lilo, (March 1, 2017). Iraq: Personal interview.
607 See 3. 3.3.2 Evaluation of the advisory opinions of the Federal Supreme Court, Chapter Three.
608 See 4.3.1.1 An evaluation of the advisory opinions of the State Shura Council, this Chapter.

four legal bloggers. [609] The legal bloggers had to be a graduate of the Faculty of Law and have at least five years of legal experience.[610]

The Diwan of Legal Codification's function was to provide legal advice to the official departments and to check the wording, bills as well as administrative decisions in addition to exercising its competence related to the administrative judiciary.[611]

On July 12, 1979, the Law of the State Shura Council was issued, and the State Shura Council was established to replace the Diwan of Legal Blogging.[612] The members of the Diwan became members of the State Shura Council with the title of chancellor and assistant chancellor. [613]

According to the Law of the State Shura Council, the State Shura Council only exercises consultative competence. It is to express legal opinions as well as wording and the examination of bills and administrative decisions. Therefore, this council is called the State Shura Council because it only exercises consultative competence.[614] However, in 1989, the Law of the State Shura Council was amended, and the Council became an administrative court in addition to the consultative competence.[615] But its name did not change.

609 Article 1, the Law of Diwan of Legal Blogging, NO.49 OF 1933. http://www.iraqld.iq/LoadLawBook.aspx?SC=210920054657799. Accessed 28/6/2017.
610 Article 2, the Law of Diwan of Legal Blogging, NO.49 OF 1933.
611 Article 3, the Law of Diwan of Legal Blogging, NO.49 OF 1933.
612 Article 31, the State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.
613 Article 29, the State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.
614 Articles 5,6 of the State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.
615 Article 7, the State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.

According to the Law of the State Shura Council, the council consists of the head, two deputy heads, at least 50 chancellors and 25 assistant chancellors but not more than half the number of chancellors.[616] The Chancellor is required to have at least 18 years of legal experience if he holds a bachelor's degree, 16 years if he holds a master's degree, and 14 years if he holds a Ph.D.[617] The law stipulates that the head of the State Shura Council and his deputies, chancellors and assistant chancellors shall be judges when the council exercises the function of the administrative judiciary.[618]

The legal opinion issued by the State Shura Council can be binding on the authority requesting the opinion only.[619] Therefore, the Council of Ministers circulated the legal opinion issued by the State Shura Council in 2009,[620] about the illegality of issuing laws by the governorate councils, at the request of the Council of Ministers to the governorate councils to implement it. However, the Council of Ministers cannot oblige the governorate councils to implement this decision because the law does not grant direct authority to the Council of Ministers over the governorate councils.[621] The decision of the State Shura Council is binding only on the authority that requested the opinion.[622]

616 Paragraph 1, Article 1 of the State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.
617 Article 20, the State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.
618 Paragraph 3, Article 1 of the State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.
619 Paragraph 4, Article 6 of the State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.
620 Read Naji Ahmed, "The Extent of the Competence of the Governorates Not Incorporated into a Region to Impose Taxes and Fees (Specialized Legal Study of Legal System in Iraq)" *Journal of the College of Law for Legal and Political Sciences* 4, (2015):394.
621 See Article 2, the Law of the Governorates Not Incorporated into a Region. http://iraq-lg-law.org/en/webfm_send/765. Accessed 19 November 2016.
622 Paragraph 4, Article 6 of the State Shura Council Law, No. 65 of 1979.

The State Shura Council is a judicial authority that seeks to protect the rights of persons in the face of public authorities. The Council canceled decisions for ministers.[623]

4.5.2 The History of the Federal Supreme Court

In 2005, the first permanent constitutional court in Iraq was formed, and it is known as the Federal Supreme Court. According to the Iraqi Constitution of 1925, there was a constitutional court, the Supreme Court. But, this court was not permanent, and on each occasion that it was formed it consisted of different members. In addition, this court was not independent as it was composed of four of the Members of the Parliament, four judges, and the head of the court was the head of one of the two councils of Parliament.[624]

On March 17, 2005, the Federal Supreme Court Law No. 30 of 2005, was issued, and hence the permanent court was formed. [625] The court consists of a head judge and eight judges and they are chosen by the Supreme Judicial Council.[626] These judges are not specialists in the constitutional judiciary because there was no constitutional court in Iraq before this law was enacted, so they are from the ordinary courts.

The 2005 Constitution also provides for the Federal Supreme Court. And the paragraph 2, Article 92 of the Constitution stipulates that:

> "The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose

[623] See the State Shura Council, *Decisions and Advisory Opinions of the State Shura Council for 2007* (Baghdad: State Shura Council, 2008), 302. The State Shura Council, Decisions and Advisory Opinions of the State Shura Council for 2011 (Baghdad: State Shura Council, 2012), 333. The State Shura Council, Decisions and Advisory Opinions of the State Shura Council for 2008 (Baghdad: State Shura Council, 2009), 541.

[624] Articles 81- 87 of the Iraqi Constitution of 1925. http://iraqja.iq/view.86/. Accessed 29/4/2017.

[625] The Federal Supreme Court Law No. 30 of 2005. http://www.iraqld.iq/LoadLawBook.aspx?SC=280220068162081. Accessed 29/6/2017.

[626] Article 3, the Federal Supreme Court Law No. 30 of 2005.

number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives."

The law provided for in this article has not yet been issued. Therefore, the Federal Court now consists of nine judges, under the 2005 Law of the Court. The legislation of the Council of Representatives of this law will enhance the performance of the Supreme Federal Court from the side of Islamic jurisprudence and the legal side.

The decisions of the Federal Supreme Court are binding on all and are related to their interpretation of the constitutional texts.[627]

A clarification of a brief comparison between the Federal Supreme Court and the State Shura Council is found in the following table:

Table 4.1

The comparison between the Federal Supreme Court and the State Shura Council.

The Federal Supreme Court	**The State Shura Council**
In 2005, The Federal Supreme Court was formed in Iraq.	In 1933 the Diwan of Legal Blogging was formed, which was replaced by the State Shura Council in 1979, which performs the same function as the Diwan of Legal Blogging. And, the members of the Diwan of Legal Blogging have been transformed to the State Shura Council.
The Federal Supreme Court consists of a head judge and eight judges and they are chosen by the Supreme Judicial Council. And these judges are not specialists in the constitutional	The State Shura Council consists of the head, two deputy heads, at least 50 chancellors and 25 assistant chancellors but not more than half the number of chancellors. The Chancellor is required

[627] Article 94, Iraqi constitution in 2005. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

judiciary because there was no constitutional court in Iraq before this law was enacted, so they are from the ordinary courts.	to have at least 18 years of legal experience if he holds a bachelor's degree, 16 years if he holds a master's degree, and 14 years if he holds a Ph.D.
The Federal Supreme Court exercises advisory and judicial functions in the constitutional area.	Before 1989, the State Shura Council exercised an advisory function only. But after 1989, the State Shura Council began to exercise advisory and judicial functions in the administrative area.
The legal opinions issued by the Federal Supreme Court are binding on all.	The legal opinion issued by the State Shura Council can be binding on the authority requesting the opinion only.

From the history of the State Shura Council, it is clear that it has experience starting from 1933, while the Federal Supreme Court was only established in 2005 and began to express its legal opinion about the governorate councils in 2007.[628] The judges of the Federal Supreme Court are ordinary judges because there was no constitutional court in Iraq before 2005. They were nominated by the Supreme Judicial Council,[629] which is the council that presides over the ordinary courts.[630]

Despite the long experience of the State Shura Council in consultative competence, the Council of Representatives and the law do not support it. The law provides that the advisory opinions of the State Shura Council are binding on the authority that

[628] Decision of the Federal Supreme Court 13 / T / 2007 on 31/7/2007. http://www.iraqja.iq/krarat/2/2007/13_fed_2007.pdf. Accessed 20/5/2017.
[629] Article 3, Federal Supreme Court Law No. 30 of 2005.
[630] See Law of the Supreme Judicial Council. No. 45 of 2017. http://ar.parliament.iq/2017/01/12/%D9%82%D8%A7%D9%86%D9%88%D9%86-%D9%85%D8%AC%D9%80%D9%84%D9%80%D8%B3-%D8%A7%D9%84%D9%82%D8%B6%D9%80%D8%A7%D8%A1-%D8%A7%D9%84%D8%A3%D8%B9%D9%80%D9%84%D9%80%D9%89/. Accessed 29/6/2017.

requested the opinion only,[631] while the advisory opinions of the Federal Supreme Court are binding on all,[632] Moreover, the Council of Ministers objected to the Babylon Governorate Council imposing fees on the farmers. It raised its objection to the Council of Representatives to cancel the decision of the Babylon Governorate Council and did not submit it to the State Shura Council, which is the administrative court, to cancel the decision. The Council of Ministers had its reason for acting this way because the LGNIR states in the first paragraph of Article 20 that "the Council of Representatives may object to the decisions issued by the council (the governorate council) if they are contrary to the constitution and the laws in force and, in the case of non-removal of the violation, for the Council of Representatives to cancel the decision by a simple majority".[633] Here too, the law restricts the competence of the State Shura Council. The best is to leave this competence to the administrative judiciary represented by the State Shura Council. This control is a legal control while the control of the Council of Representatives is a political control. In fact, the Council of Representatives did not cancel the decision of the governorate of Babylon. Therefore, it is clear that its action was due to political reasons.

On the other hand, as mentioned earlier, the Council of Representatives issued the bill after having amended it without returning it to the State Shura Council for review.[634]

631 Article 6, State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017

632 Article 94, Iraqi constitution in 2005. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

633 Read Naji Ahmed, "The Extent of the Competence of the Governorates Not Incorporated into a Region to Impose Taxes and Fees (Specialized Legal Study of the Legal System in Iraq)" *Journal of the College of Law for Legal and Political Sciences* 4, (2015):403.

634 See, 4.4 How the laws in Iraq are worded, in this Chapter.

This is clearly wrong as the State Shura Council is the competent authority to maintain the unity of terminology and legislation in the Iraqi legal system.[635]

According to the Constitution,[636] the Federal Supreme Court is the competent authority in Iraq to interpret and clarify the provisions of the Constitution. While the State Shura Council is the competent authority in Iraq to interpret and clarify the provisions of the legal texts, according the Law.[637]

The Constitution and the Federal Supreme Court Law of 2005 did not provide who has the right to request the legal opinion. However, in decisions of the Federal Supreme Court in 2009 and 2012, the Court stated for the President of the Republic, the head of the Council of Representatives, one of his deputies, or the Primary Ministers to submit a request asking about the legal opinion on the provisions of the Constitution.[638] Also, the Federal Court accepted the requests of the governorate councils for the interpretation of the Constitution.[639]

At the request of the parties mentioned above, the Federal Supreme Court shall issue an advisory decision concerning the interpretation and clarification of the provisions of the Constitution according to the request which has been submitted to the Court. This advisory decision is binding on all public authorities in the country, i.e., it is

635 Article 5, State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.
636 Article 93, Iraqi Constitution 2005. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.
637 State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.
638 See Federal Supreme Court/ 29 / Federal / 2012.
639 See advisory decisions of the Federal Supreme Court, Chapter Three.

binding on the party who requested the legal opinion as well as for everyone in the country.[640]

With regard to the State Shura Council, according the Law of the State Shura Council of 1979, for the ministers and heads of bodies not affiliated with the Ministry, ask the Council about the legal opinion of the texts and the provisions of the laws.[641]

Upon request by one of the above mentioned parties, the State Shura Council shall issue an advisory decision clarifying the legal opinion of a certain legal text according to the request which has been submitted to the Council. The advisory decision issued by the council is binding just on the party requesting the legal opinion.[642]

The judgment is issued as a result of a case, while the legal opinion is issued as a result of the request of the legal opinion of one of the parties in the central or local authorities.

4.6 Conclusion

The introduction to this chapter dealt with the Governorate Law of 1969, which was delegated by the 1970 Constitution to regulate administrative decentralization in Iraq without restrictions. While the LGNIR was restricted by the 2005 Constitution, such as the elected governorate council which elects the governor who is accountable to the governorate council and also the governorate councils are not subject to the supervision of ministries and bodies not affiliated with the ministry. The 2005 Constitution also provides a broad administrative and financial competence to the governorate councils, but within the limits of administrative decentralization. Therefore, the LGNIR is constrained by these restrictions.

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640 Article 94, Iraqi constitution in 2005. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

641 Article 7, State Shura Council Law, No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.

642 Ibid.

The legislator wanted to grant the governorate councils very broad powers, but within the limits of administrative decentralization as defined by the constitution, which means that the governorate councils are only administrative units, exercising administrative functions and not allowed it to perform legislative or judicial functions, based on the decentralization theoretical framework.

To implement this approach, the legislator, in the LGNIR, stipulates that the governorate councils have legislative authority to issue local legislation within the limits of the principle of administrative decentralization. This approach is alien to the Iraqi legal system, since the terms 'legislative authority' as well as 'local legislation' according to the Iraqi legal system mean that the governorate councils can issue laws, which is not intended by the legislator in the LGNIR as mentioned earlier.[643] Because under the regional administrative decentralization, decisions are issued, not law, based on decentralization theoretical frameworks. The State Shura Council in its legal opinions, as mentioned earlier in this chapter,[135] stated that the term 'local legislation' in the LGNIR does not mean laws but administrative decisions. But, the governorate councils took advantage of the defective wording in the LGNIR to expand their authorities to issue the local laws. The weak legal background of the members of the governorate councils also helped it to take this approach.

The studies and some interviewee indicated that the LGNIR is the result of political conflicts. And the LGNIR is a settlement between political parties in Iraq. And the lack of legal experience of the governorate councils led to the continuation of the controversy about the LGNIR.

643 See 4.3.2 The interpretation of the term local legislation. In this chapter.

This chapter focused on the performance of the State Shura Council, which is characterized by professionalism and clarity, because of the long experience of this council since its inception in 1933. It differs from the performance of the Federal Supreme Court, which is characterized by ambiguities and contradictions, perhaps due to the short experience of this court since 2005, as well as, the court was formed for the first time from judges that lack experience in the constitutional judiciary as mentioned in this chapter.[644]

But, the State Shura Council, unlike the Federal Supreme Court, does not have broad authorities. The decisions of the State Shura Council are binding only on the party requesting it, while the decisions of the Federal Supreme Court are binding on all. The State Shura Council is competent to interpret the laws, based on the State Shura Council Law, and the Federal Supreme Court has stated about this matter in many of its decisions. Also, the Federal Supreme Court is competent to interpret the provisions of the constitution and so each must be given the same powers in its own area of competence.

As a result of the above, it is noted that the governorate councils sought the legal opinion of the Federal Supreme Court and avoided the State Shura Council so that they did not have to apply the State Shura Council's opinion on themselves, i.e. the governorate councils do not have the authority to issue laws. The governorate councils have been able to do this because the text of the law restricted the authorities of the State Shura Council. Therefore, it can be noted that the five advisory decisions of the

644 See 4.5.2 The history of the Federal Supreme Court. In this chapter.

State Shura Council, except one, were at the request of the central authority, and the exception was at the request of the Baghdad Governorate Council.[645]

In addition to the foregoing, the State Shura Council was bypassed by the Council of Representatives when the amendment of the bills and the issuance of laws were made without sending them back to the State Shura Council, which is the competent authority to unify the legal terminology and legislation in Iraq, as mentioned earlier.[646] All these have led to the loopholes in the LGNIR, which was mentioned by the head of the State Shura Council as well as his deputy and a chancellor in the council.[647] Therefore, the gaps in the wording of the provincial law could have been avoided if the State Shura Council had been given the opportunity to exercise its drafting competence. Even after the law was passed in its flawed form, it would have been possible to exceed the effects of the defective wording during the implementation stage if the State Shura Council had been given the opportunity to exercise its advisory competence. The head of the State Shura Council said, "the council's function is not only the legal advice, wording and administrative judicial, but also its function of filling the gaps in the law, clarifying all ambiguity, unifying legal terminology and preserving the unity of the legislation."[648] This is according to the competence of the State Shura Council, which is stipulated by the law. And the Council has enough experience to exercise this competence.

[645] See 4.3.1 The advisory opinions of the State Shura Council. In this chapter.
[646] See 4.4 How the laws in Iraq are worded. In this chapter.
[647] Ibid.
[648] The State Shura Council, *Decisions and Advisory Opinions of the State Shura Council for 2014.* Baghdad: State Shura Council. 1

Finally, the criticisms made by the researcher to issue the laws by the governorate councils, should not be understood as meaning that the researcher calls for strengthening the powers of the central government against of the governorates, which would then cause us to approach the central system.

The implementation of the central system leads to many problems, including poor services and lack of democracy as well as increased corruption, as mentioned in the second chapter of this research. While, the decentralized system, whether the federal system or administrative decentralization, is a necessity for the modern state, which cannot be dispensed with.[649]

After the British occupation of Iraq after the First World War, the Iraqi government, which was formed at that time, implemented the central administrative system and continued this system until 2004. Even when the laws provided for administrative decentralization, the practice was to apply the central system.[650] In 2003, the United States of America occupied Iraq and wanted to apply the federal system in Iraq. But the project has faced fierce opposition from many Iraqi parties, which have said that federalism in Iraq would lead to division.[651]

As a result of the political and historical reasons mentioned earlier in this study,[652] the federal system and the decentralized administrative system are stipulated in the current

649 See chapter two of this study.
650 See the introduction of this chapter and chapter three.
651 See Isra Aladdin, "Federalism in the Iraqi Constitution Reality and Future After the Us Withdrawal," *Risalat al-huquq Journal* (2012): 229
652 See chapter two of this research.

Iraqi Constitution of 2005. The Iraqi Constitution opened the way for the governorates to implement the federal system in Article 119.

Some authors believe that the implementation of the federal system will solve Iraq's problems,[653] but that requires a request from a "one-third of the council members of each governorate intending to form a region"[654] or "one-tenth of the voters in each of the governorates intending to form a region"[655] for a referendum on the creation of a federal region. But since the issuance of the constitution in 2005 and until today, the federal system in Iraq has not been implemented other than in the governorates of Kurdistan, as explained previously.[656] There are some provinces that have tried to apply the federal system, but they have not succeeded.[657] Anyway, whether the reasons for failure to implement the federal system is to prevent a central government or for other reasons, the party which has been damaged from the failure of these attempts can resort to the Federal Supreme Court to overcome the obstacles to the application of the federal system, where Article 93 of the Constitution states that "The Federal Supreme Court shall have jurisdiction over the following:…… Fourth: Settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities and local administrations. Fifth: Settling disputes that arise between the governments of the regions and governments of the governorates". But, the performance of the Federal Supreme Court must improve because it is the legal way to resolve disputes between the central authority and the states and

653 Shamsul Khan and Sherko Kirmanj, "Engineering Confederalism for Iraq," *National Identities* 17, no. 4 (2015).
654 Article 119 of Iraqi Constitution.
655 Ibid.
656 See chapters two and three of this research.
657 Isra Aladdin, "Federalism in the Iraqi Constitution Reality and Future After the Us Withdrawal," Risalat al-huquq Journal (2012). And Zuhair Al Hassani, "Administrative Decentralization in the Legal System of Governorates Not Incorporated into a Region," Essays and Research, 2013, accessed May 7, 2017, http://www.hdf-iq.org/ar/2010-12-01-14-01-29/342-2013-01-10-13-11-41.html.

governorates. The imbalance in the court's performance has led to increased legal problems. This issue was discussed in this study.

Building on the above, the issuance of laws by the governorate councils is contrary to the theoretical framework of decentralization, which is applied by the governorates, and this is contrary to the Constitution, which provides for the procedures of the implementation of the federal system and the issuance of laws. But not following these procedures is a violation of the Constitution. On the other hand, issuing laws by the governorate councils leads to the public financial obligations, which is a violation of the Constitution too. Also, the issuance of laws means that they are subject to the control of the Federal Supreme Court and this is contrary to the law, as mentioned in this chapter, as the State Shura Council is competent in what is issued by the governorate councils.

Part of the third research objective has been achieved in this chapter as the researcher has fully examined the legal text of the LGNIR and all the issues surrounding it.

CHAPTER FIVE: AN ANALYSIS OF THE IMPLEMENTATION OF REGIONAL ADMINISTRATIVE DECENTRALIZATION IN FRANCE AND EGYPT

5.1 Introduction

Iraq has applied the regional administrative decentralization system since the 2004 Constitution as mentioned earlier in this research.[658] There were attempts to implement it before 2004, especially under the 1970 Constitution which stipulated the principle of regional administrative decentralization. Despite the issuance of the Governorate Law of 1969, Iraq continued to apply the administrative centralization system in practice.[659]

In this chapter, the implementation of regional administrative decentralization in France and Egypt will be analyzed as an example of selected countries applying the same decentralized system in Iraq.

5.2 The Regional Administrative Decentralization in France

France is the home country of civil law, which is applied in many countries, such as Egypt, Algeria, Tunisia, Syria and Jordan.[660] The administrative law was established in France in the eighteenth century and is applied by civil law countries.[661]

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658 See Chapter Three of this study.
659 See Chapter Four of this study.
660 See Munther Al Fadl, *Origins of French and British Law* (Erbil: Dar Aaras for Printing and Publishing, 2004).
661 See Saad Nahili, *Administrative Law, General Principles, Part 1* (Damascus: Al-Baath University, Faculty of Law, 2012).

After the French Revolution of 1789, the revolutionaries applied the decentralized administrative system but failed miserably, as will be explained later. Then the central administrative system was restored.[662] In the 1980s, they started to implement a wide regional administrative decentralization system, as will be discussed later in this chapter.

Although the implementation of the administrative decentralization system in France failed at the beginning of its revolution, many countries applied it in the 20th century, especially in the second half of the century. This system was needed for political, social and economic reasons.[663] One of these countries was France, and this time the application of the regional administrative decentralized system succeeded.[664] Like as in France, the regional administrative decentralization system has also been applied, for example, in Egypt, Algeria, Tunisia, Syria, Lebanon, Jordan and Iraq.[665]

The administrative units in France are divided into municipalities, governorates and regions.[666] The regions in France are not federal regions, they are administrative units.[667] France does not adopt the federal system at all, as will be discussed later.

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662 See Jean Paul Pastorel, "The Regional Cohort and General Competence Condition," *Journal of Public Law* (2007): 60.

663 See Amal Shlash, Wafaa Al-Mahdawi, Hasan Lateef and Kazem. Support Decentralization and Local Government to Enhance Service Provision in Iraq. ESCWA.

664 Emmanuel Brunet-Jailly. "France between Decentralization and Multilevel Governance: Central Municipal Relations in France". *McGill University Press* (2007).

665 See Chapter Three of this study and Decentralization Law No. 49 of 2015 of Jordan. https://www.iec.jo/sites/default/files/1451818790-pm-1.pdf. Accessed 15/ 7/2017. And Local Administration Law No. 107 of 2011 of Syria. https://groups.google.com/forum/#!msg/syrianlaw/4hAOhhylkIA/q6AyW-ZklQcJ. Accessed 15/7/2017

666 Article 72 of the French Constitution of 1958. http://www.wipo.int/edocs/lexdocs/laws/en/fr/fr076en.pdf. Accessed 12/5/2017.

667 See George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 393.

The most important administrative units and the oldest in France are the municipalities, which was the only administrative unit of France at the time of the French Revolution. Then, the governorates were established in 1789, and the regions in 1959. The municipalities in France do not exercise administrative functions only, but rather, they also exercise social and political functions. [668]

In Iraq, the administrative units are the governorates, districts, sub-districts as well as the villages.[669] The current Iraqi constitution do not mention municipalities. The municipalities in Iraq exercise administrative functions only, which are organizing the city and caring for its cleanliness.[670] The important unit in Iraq is the governorate, which the constitution interests in regulating its legal status alongside the states.[671]

In this chapter, the researcher will explain the administrative regulations in France regarding the subject of this research and compare them with Iraq.

5.2.1 The Approach of the French Legal System in Administrative Regulation

The French revolutionaries were influenced by the ideas of western thinkers such as Rousseau.

The French revolutionaries interpreted the principle of the non-division of sovereignty which called by Rousseau as the indivisibility of legislative authority.[672] Therefore, the French revolutionaries rejected the federalism idea, which meant dividing the

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668 See George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001).

669 Paragraph 1, Article 122 of the Iraqi Constitution of 2005. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

670 See Municipal Administration Law No. 165 of 1964 of Iraq. http://www.iraqld.iq/LoadLawBook.aspx?SC=120120018123689. Accessed 15/7/2017.

671 See Chapter Two of this study.

672 E.C.L., "The Indivisibility of the French Republic as a Political Theory and Constitutional Doctrine," *UK Journals and Journals* 11, no. 3 (2015): 10.

legislative authority between the central government and the states.[673] And French jurist Voltaire criticized the division of legislative power.[674] As a result of the above, the French Constitution of 1791 stated that "The kingdom is one and indivisible". [675] The French have continued to uphold this principle up to this day. Therefore, the current French Constitution of 1958 states in the first article:

> "France shall be an indivisible, secular, democratic and social republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis."[676]

The decentralization provided for in this article is administrative decentralization. The evidence on that is the organizing of the constitution into territorial communities in Article 72, which will be studied later in this chapter. On the other hand, French jurisprudence believes decentralization If it is established as a public legal personalities Non-state, these public figures are of a purely administrative nature and do not have any part of the legislative authority or the judiciary authority.[677]

The French revolutionaries firmly resisted attempts to violate the principle of the unity of the legislative authority. At the beginning of the French Revolution, the municipalities were granted broad competence and were subjected to the control of newly formed governorate councils by elections, after the municipalities were under

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673 See Maroon Kesrouani, et al, Administrative Decentralization in Lebanon (Beirut: Lebanese Center for Studies, 1996), 141.

674 Ibid.

675 Ibid,5

676 French Constitution of 1958. http://www.wipo.int/edocs/lexdocs/laws/en/fr/fr076en.pdf. Accessed 12/5/2017.

677 George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 302.

the control of the central authority. These privileges led the municipalities in the governorates of Le and Laura to think of independence from the central authority and issued decrees that organized matters outside the competence of the municipalities and governorates. As a result of these decrees, the French National Assembly issued a decree stating that:

> "No administrative body shall be able to use as a title for its decisions the term 'decree', which is devoted to the legislature. It must use the term 'decision'".[678]

The change was sudden and violent, leading to its complete failure. This change led to administrative disintegration, which caused people to call for the implementation of the central system. As a result, France returned to the application of the central system in the third year of the revolution and then Napoleon stressed that system in the eighth year of the revolution.[679] The local authorities continued to be heavily controlled by the central authority until 1982.[680] But that does not mean that the central system continued until 1982. The French legislature granted competence to the local entities gradually and reduced the administrative control also gradually. But, since 1982 the administrative decentralization has been fully implemented, as will be discussed later in this chapter.

Building on the above, France does not adopt the federal system, which means the division of the legislative authority, which is contrary to the philosophy of the French

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678 Jean Paul Pastorel, "The Regional Cohort and General Competence Condition," *Journal of Public Law* (2007): 59.

679 James T. Young, "Administrative Centralization and Decentralization in France," *Sage Publications, American Academy of Political and Social Science* 11 (1898): 30.

680 Jean Paul Pastorel, "The Regional Cohort and General Competence Condition," *Journal of Public Law* (2007): 60.

revolutionaries. France has continued to apply this philosophy for 200 years, despite political, social and economic changes. In order to face the political, social and economic changes, France has adopted the regional administrative decentralized system, which provides for the distribution of the administrative function only, without legislative or judicial authority. The implementation of this system in France improved gradually.

The French criticism of the federal system, which sometimes seems violent, is because that the federal system is not suitable for French people who fear the division of their country. But this does not mean that the federal system is bad, due to it is applied in many countries of the world. However, the choice between this system and the regional administrative decentralization system depends on the circumstances of each country. Iraq has adopted the indivisibility principle since its first constitution of 1925, whereby Article 2 stipulates that:

> "Iraq is a sovereign State, independent and free. Its king is indivisible, and no portion thereof may be given up. Iraq is a constitutional hereditary monarchy with a representative Government."[681] Also, paragraph A of Article 3 of the Iraqi Constitution of 1970 stipulated that "The sovereignty of Iraq is indivisible."[682]

But, the philosophy of governance changed with the 2004 Constitution as discussed earlier in this research. Therefore, Iraq did not adopt the federal system until the 2004 Constitution.

[681] The Iraqi Constitution of 1925. http://iraqja.iq/view.86/. Accessed 29/4/2017.
[682] The Iraqi Constitution of 1970. http://www.iraqja.iq/view.81/. Accessed 7/6/2017.

5.2.2 The Territorial Communities in France

Article 72 of the French Constitution states that:

> "The territorial communities of the Republic shall be the communes (municipalities),[683]departments (governorates),[684] regions, special-status communities and the overseas territorial communities to which Article 74 applies".[685]

The municipalities, governorates, and regions will be studied in this chapter as they are related to the research subject and application of the general principles of regional administrative decentralization.

On the other hand, paragraph 1 of Article 122 of the Iraqi Constitution of 2005 states that "The governorates shall be made up of a number of districts, sub-districts, and villages."[686]

5.2.2.1 The Municipalities (Communes)

The municipalities in France are called communes.[687] The municipalities in France are the most important local entities in the country. It was the only local entity at the outbreak of the French Revolution in 1789. The French author Jean Paul, said that the French Revolution was launched from the municipalities.[688]

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683 Jean Paul Pastorel, "The Regional Cohort and General Competence Condition," *Journal of Public Law* (2007): 57.
684 Maroon Kesrouani, et al, *Administrative Decentralization in Lebanon* (Beirut: Lebanese Center for Studies, 1996), 143.
685 The French Constitution of 1958. http://www.wipo.int/edocs/lexdocs/laws/en/fr/fr076en.pdf. Accessed 12/5/2017.
686 Iraqi Constitution of 2005. http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.
687 Jean Paul Pastorel, "The Regional Cohort and General Competence Condition," *Journal of Public Law* (2007): 57.
688 Ibid,58

The mayors of important cities are often national political figures and some of them have become ministers and even the president of France like the former president, Sarcozy.[689] Therefore, the governor must deal cautiously with the mayors of important cities. Even with the mayors of small towns, the governor exercises his control function in the form of advice.[690]

Municipalities have commercial and industrial competence as well as the competence to provide services to the population. In addition, they also have competence of a political nature, such as a referendum on issues related to the competence of the municipality as stipulated in the 1992 Law, which is one of the reformative laws that began in 1982.[691]

Due to the importance of the municipalities, especially during the French Revolution, the municipalities were granted wide powers after the revolution. It led to the municipalities trying to be independent from the central government within the governorate. But, the central authority dealt with these attempts strictly and in 1795 imposed strict control on local entities, and the strict control was also increased by Napoleon in the eighth year of the revolution in 1799.[692]

The results of the strict control of the local entities were that the municipal councilors and mayors were appointed by the governor, and the governor, in turn, was appointed

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689 See Emmanuel Brunet-Jailly. "France between Decentralization and Multilevel Governance: Central Municipal Relations in France". *McGill University Press* (2007):16.

690 See George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 317.

691 George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 317.

692 Jean Paul Pastorel, "The Regional Cohort and General Competence Condition," *Journal of Public Law* (2007): 60.

by the central government. Subsequently, gradual independence was granted to the municipalities. In 1831, the municipal councilors were elected and by 1848, the elections were made by general suffrage. Then in 1882, the heads of the municipal councils were elected by the councilors. Then, the municipal councils were granted competence in 1884 and subsequently in 1926 and then again in 1980 more competence were granted. [693]

During the reformation of the administrative decentralized system, which began in 1982, the administrative control of the municipal councils and the mayor, which was exercised by the governor, was canceled and replaced by judicial control.[694]

In Iraq, the municipalities are not as important as the municipalities in France, as mentioned earlier. The 1925 Iraqi Constitution stipulated that municipal affairs were administered by the municipal councils and regulated by the law.[695] After the 1925 Constitution, the municipalities were mentioned in the 2004 Constitution, and it stipulated that the governorates would establish municipal councils and these councils were not subject to the control of the central government and, it was granted competence.[696] But, the constitution did not specify the details of the competence; therefore, leaving it to the law. While the current Constitution of 2005 does not even mention municipalities when it lists out the types of local entities in Article 122.[697]

[693] George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 366.
[694] George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001),323
[695] Article 111 of Iraqi constitution of 1925. http://iraqja.iq/view.86/. Accessed 29/4/2017
[696] Article 55 of Iraqi constitution of 2004. http://www.refworld.org/docid/45263d612.html. Accessed 7/5/2017.
[697] See Introduction of this chapter.

5.2.2.2 The Governorates

The governorates of France are called departments[698] and were established in 1790 by the Constituent Assembly of France.[699] The reason for the establishment of the governorates is to achieve two goals: firstly, ensuring national unity and secondly, strengthening local democracies.[700] But these governorates did not have legal personality and their competence is limited in addition; they are subjected to strict control by the central authority. The central authority appoints the governor and the members of the governorate council, which is called the General Council. [701]

In 1833, the members of the governorate councils were elected. In 1838, the governorates were granted a legal personality and the authority to issue administrative decisions for the governorate councils. From 1838, the competence of the governorate councils had gradually increased, and so had the independence of the governorates until 1959. Finally, the reforms of the local administration in 1982 strengthened the independence of the governorate councils.[702]

According to the reforms of 1982 and beyond, the head of the governorate council who is elected by the governorate council becomes the executive authority in the governorate[703] and the administrative control which was exercised by the governor

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698 Maroon Kesrouani, et al, *Administrative Decentralization in Lebanon* (Beirut: Lebanese Center for Studies, 1996), 143.

699 George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 385.

700 Maroon Kesrouani, et al, *Administrative Decentralization in Lebanon* (Beirut: Lebanese Center for Studies, 1996), 143.

701 George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 385.

702 George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 385.

703 George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001),391

was abolished. The governor's authority is to challenge the decisions of the governorate council and the head of the governorate before the administrative court. On the other hand, the governor appointed by the central authority continues to exercise administrative control over the facilities of the central authority.[704]

When studying the governorates in France, it can be seen that the French legislator has applied the same policy that was applied to the municipalities, which is granting competence to the governorates and independence gradually. The kind of legal activity exercised by governorate councils is not mentioned here. It has been resolved since the reign of Napoleon which applied the philosophy of governing in France, that is the legislative authority is one and does not divide.[705] That the governorate councils are subjected to the administrative court's control, according to the reforms of the Local Administration in France, is evidence that the governorate councils issue administrative decisions.[706] As mentioned above, this matter has been resolved since the reign of Napoleon. Therefore, the problem of the authorities of the governorate councils in Iraq was solved in France 200 years ago.

5.2.2.3 The Regions

The regions were established in 1959. Each region has several governorates, but the number is not specified.[707] The establishment of these regions faced wide-ranging objections, which led to the limitation of their competence[708] and it became economic

[704] Ibid, 123
[705] See 5.2.1 The approach of the French legal system in administrative regulation, in this chapter.
[706] See chapter four of this study.
[707] George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 321.
[708] Maroon Kesrouani, et al, *Administrative Decentralization in Lebanon* (Beirut: Lebanese Center for Studies, 1996), 143.

in nature, which is the development of the economy.[709] The opposition to the establishment of these regions prompted the central authority to appoint the governors and councilors of the regions.[710]

The opposition to the establishment of the regions was because of the fear of the gradual transformation of these regions into federal regions. So, when President Charles de Gaulle put forward a bill for a referendum about the reforms related to the regions in 1969, the majority voted against the bill and as a result Charles de Gaulle resigned. The reason for the failure of the bill was because of its political nature, such as the right of the region to elect its council and governor.[711]

The regions were given a legal personality in 1964. After de Gaulle, came President George Pompidou, who submitted to Parliament a bill to make the region a public institution covering some territories of the country rather than a territorial community. It proposed that the region's council should be elected, but it would have consultative competence in the economic field, while the governor would be appointed by the central authority and represent the central authority and the region. The bill was approved on July 5, 1972.[712]

According to the local administration reforms that began in 1982, the regions were transformed from public institutions into territorial Communities and were granted

[709] Areej Talib Kazem. "Terms of Reference for Local Authorities in the Iraqi Legislation in Light of the Current Constitution and the Law of the Governorates Not Organized into a Region / No. 21 of 2008" *Journal of Anbar University for Law and Political Sciences* 1, no. 3 (2011):137.

[710] George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 321.

[711] George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 322

[712] George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 321.

some economic, social and educational competence.[713] And, the head of the region council who was elected by the council became the executive authority in the region. And, the governor was the representative of the central authority.[714] But, the competence of the regions remained less than the competence of the municipalities and governorates since the fear from the regions about the unity of the country and the turning of the regions into federal regions remained. The French believe that the regions have an administrative and developmental role, but they will become mini parliaments that destroy the national unity that distinguishes French society and affects its unity and cohesion at the core.[715]

Using the same approach as the municipalities and governorates, the regions were gradually granted competence and independence. However, the competence of the regions is smaller than those of the municipalities and governorates.[716]

On the other hand, the system that has been implemented in Iraq is the decentralized regional administrative system as in France, except for in the Kurdistan state. Although the Iraqi Constitution of 2005 allows for the governorates to apply the federal system, since the Iraqi constitution was issued until now, the federal system has not been implemented in the rest of the governorates.

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713 George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001),123

714 Maroon Kesrouani, et al, *Administrative Decentralization in Lebanon* (Beirut: Lebanese Center for Studies, 1996), 145.

715 Mentioned Maroon Kesrouani, et al, *Administrative Decentralization in Lebanon* (Beirut: Lebanese Center for Studies, 1996), 146.

716 Mentioned Maroon Kesrouani, et al, *Administrative Decentralization in Lebanon* (Beirut: Lebanese Center for Studies, 1996),143.

5.2.3 The Reforms of the Local Administration

After Napoleon returned to the central administration system in 1793 and 1799, the central authority began to grant competence to the local communities in France gradually as well as independence, as previously discussed in this chapter. With the arrival of the socialist government in 1981, it was believed in France that the time had come for broad regional administrative decentralization.[717] Because the territorial units have gained a lot of experience in administrative action and management of local affairs. The territorial units have benefited from past mistakes.[718] Therefore, the reforms of the local administration in France began in 1982 and continued until 2004.[719]

In general, the main issues included in the reforms are, first, the replacement of administrative control with the control of the administrative judiciary and specialized account courts. Second, replacing the role of the governor as an executive authority in the governorate and the region with the head of the governorate council and the head of the region council. Thirdly, the transformation of regions from a public institution into a territorial community.[720]

In 2003, an amendment was made to the French Constitution of 1958 with regards to the reform of the local administration to support the reforms that began in 1982.[721]

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[717] Maroon Kesrouani, et al, *Administrative Decentralization in Lebanon* (Beirut: Lebanese Center for Studies, 1996), 143.

[718] Alistair Cole, "Decentralization in France: Central Steering, Capacity Building and Identity Construction," *French politics* 4, no. 1 (2006): 14.

[719] See Emmanuel Brunet-Jailly. "France between Decentralization and Multilevel Governance: Central Municipal Relations in France". *McGill University Press* (2007).

[720] George Fudel and Pierre Delphoeve, *Administrative Law, the Second Part* (Beirut: University Foundation for Studies, Publishing, and Distribution, 2001), 323.

[721] French Constitution of 1958. http://www.wipo.int/edocs/lexdocs/laws/en/fr/fr076en.pdf. Accessed 12/5/2017.

Article 72 of the constitution states that the:

> "Territorial communities may make decisions in all matters arising under the powers that can best be exercised at their level."

It is clear that the constitution here maintains that local communities issue administrative decisions. This is to emphasize to the local communities that they have been granted more competence and independence, but it does not mean they can issue legislative decrees or laws. This is a result of fears that emerged after 1982 that local communities would be able to issue laws.

Article 72 of the French Constitution also states that the:

> "Territorial communities may, on the basis of experiment and on a particular subject, for a limited period of time change the provisions of laws or regulations if the law or regulation stipulates it."

The constitution here provides for legislative delegation, which according to the law or regulation issued by the legislative authority may authorize a territorial community to issue decisions within the competence of the legislature. These decisions can amend or repeal the provisions of the law. However, the authorization to issue these decisions is specific on the subject and time, and after the expiration of the mandate the legislative authority shall review these decisions. The legislative authority can then approve it or if it does not approve cancel it retroactively.[722] The legislative delegation does not change the legal description of decisions made as a result of this delegation.[723]

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[722] See Faris Abdul Raheem Hatem, "The Limits of the Administrative Judiciary's Control Over Decisions That Have the Force of Law: A Comparative Study" (master's thesis, University of Babylon, Faculty of Law, 2003).

[723] Jean Paul Pastorel, "The Regional Cohort and General Competence Condition," *Journal of Public Law* (2007): 69.

The decisions mentioned above are subject to the control of the administrative courts because they are administrative decisions. To allow the territorial communities to amend the provisions of the law and its cancellation for a specified period does not change its legal nature.[724]

The legislative amendment regulates the relationship between the territorial communities and between them and the central authority,[725] as well as stipulating that the amendment is based on the right of experimentation (legislative delegation). In addition, the amendment strengthens the financial independence of the territorial communities,[726] which enhances the independence of these communities.

The reforms of the local administration in France do not mean that the central authority has no authority over the territorial communities. Indeed, it is the legislative authority that controls the competence of the territorial communities. The communities exercise their competence that commensurate with their field of work but under the control of the legislative authority, which can at any time add competence or delete them. The pivotal role of the legislative authority remains the philosophy of the French law.[727]

5.3 The Regional Administrative Decentralization in Egypt

This study will also discuss the regional administrative decentralization in Egypt as an example. This is because Egypt is the first Islamic Arabic country to apply the civil

[724] See Emmanuel Brunet-Jailly. "France between Decentralization and Multilevel Governance: Central Municipal Relations in France". *McGill University Press* (2007): 9.
[725] See Emmanuel Brunet-Jailly. "France between Decentralization and Multilevel Governance: Central Municipal Relations in France". *McGill University Press* (2007): 8
[726] Maroon Kesrouani, et al, *Administrative Decentralization in Lebanon* (Beirut: Lebanese Center for Studies, 1996), 144.
[727] See Jean Paul Pastorel, "The Regional Cohort and General Competence Condition," *Journal of Public Law* (2007): 73.

law,[728] which is now being applied in Iraq. Also, the Egyptian jurist, Al - Senhoury, drafted the Egyptian civil law, as well as the Iraqi, Syrian and Libyan civil laws. Al-Senhoury also played a part in the drafting of the constitution of Kuwait, the United Arab Emirates, and Sudan.[729] In addition, Egypt also tried to implement regional administrative decentralization in the early twentieth century. This will be discussed later.

Egypt is divided into five administrative units, i.e. governorates, centers, cities, neighborhoods and villages.[730] It is clear that the governorate is the most important administrative unit in Egypt, as is the case in Iraq.[731] Meanwhile, Iraq is divided into governorates, districts, sub-districts, and villages.[732]

5.3.1 The Regional Administrative Decentralization in Egypt Before the Revolution of 1952

In 1883, the first local councils were formed in Egypt, and they were called the directorate councils. These councils had consultative competence and were not granted a legal personality.[733] Then, Law No. 122 of 1909 was issued, which was the real beginning of the regional administrative decentralization in Egypt; albeit, this was a

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728 See Omar Al - Shalqani, *The boom and collapse of the legal elite in Egypt 1905-2005* (Cairo: Dar Al Shorouk, 2013).

729 Tharwat Al Batawi, "Abdulrazik Al-Senhoury," Message of Islam, December 3, 2012, http://main.islammessage.com/newspage.aspx?id=15951 (accessed February 23, 2018).

730 Article 1, Local Administration Law No. 43 of 1979. https://www.egypt.gov.eg/arabic/laws/download/newlaws/%D9%82%D8%B1%D8%A7%D8%B1%20%D8%B1%D8%A6%D9%8A%D8%B3%20%D8%AC%D9%85%D9%87%D9%88%D8%B1%D9%8A%D8%A9%20%D9%85%D8%B5%D8%B1%20%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A%D8%A9%20%D8%A8%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D8%B1%D9%82%D9%85%2043%20%D9%84%D8%B3%D9%86%D8%A9%201979.pdf. Accessed 27/2/2018.

731 See Iraqi Constitution of 2005.

732 Article 122 (First), Iraqi constitution of 2005. See: http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

733 Abdul Ghani Bassiouni Abdullah, *General Theory in Administrative Law* (Alexandria: Knowledge Facility in Alexandria, 2003), 164.

modest beginning. The 1909 law granted a legal personality to the directorate councils,[734] and these councils were granted the authority to impose temporary fees which were used for spending on public utilities, including education and running their own affairs.[735] The directorate council was composed of the president, his assistant and two representatives from each center of the directorates (governorates), which were elected by voters in the centers.[736] The membership in the directorate council was for a period of six years and it was partially renewed every three years.[737]

The head of the directorate council was the governor of the directorate, and he and his assistant were appointed by the central government. On the other hand, the council was under the strict control of the central government and the Egyptian governor could dissolve the council.[738]

In 1923, the first constitution of the Egyptian Kingdom was issued after the abolition of the British protection system for Egypt, which came about as a result of the 1919 revolution in Egypt.[739] Article 132 of the Egyptian Constitution of 1923[740] stated that the:

> "Directorates, cities, and villages shall, with respect to exercising the rights thereof, be considered legal persons as per the public law

[734] Article 11, Law No. 22 of 1909, Egyptian Gazette, No. 104, 18 September 1909.
[735] See, Article 2, Law No. 22 of 1909, Egyptian Gazette, No. 104, 18 September 1909.
[736] Article 11, Law No. 22 of 1909, Egyptian Gazette, No. 104, 18 September 1909.
[737] Article 13, Law No. 22 of 1909, Egyptian Gazette, No. 104, 18 September 1909.
[738] See, Law No. 22 of 1909, Egyptian Gazette, No. 104, 18 September 1909.
[739] Mohammed Hammad, "The Constitution of 1923... The first constitutions of Egyptian liberalism," Civilizations... Al Ahram Location for Arts, Literature, and Heritage, February 24, 2018, http://hadarat.ahram.org.eg/Articles/%D8%A3%D9%81%D9%83%D8%A7%D8%B1/%D8%AF%D8%B3%D8%AA%D9%88%D8%B1-1923-%D8%A3%D9%88%D9%84-%D8%AF%D8%B3%D8%A7%D8%AA%D9%8A%D8%B1-%D8%A7%D9%84%D9%84%D9%8A%D8%A8%D8%B1%D8%A7%D9%84%D9%8A%D8%A9-%D8%A7%D9 (accessed February 24, 2018).
[740] Egyptian Constitution of 1923. http://constitutionnet.org/sites/default/files/1923_-_egyptian_constitution_english_1.pdf. Accessed 24/2/2018.

in pursuance of the requirements stated by the law and shall be represented by different directorates and municipal councils of which the competencies shall be stipulated by law." Also, Article 133 of the constitution stated that "The regulation and competence of the different types of directorates and municipal councils and their relationships thereof with government bodies shall be determined by law which shall observe the following principles: First: The selection of the members of such councils by election unless in exceptional conditions where the law provides for the appointment of some unelected members. Second: The competency of such councils to uphold the interests of the local directorate, municipal council or other concerned people without prejudice to the undertaking of the functions thereof in the conditions and by the means stipulated by law. Third: Publishing the budgets and accounts thereof. Fourth: Holding sessions in public within the limits stated by the law. Fifth: The intervention of the legislative or executive authority to prevent such councils from overstepping the bounds of the competence thereof or from compromising public interest and to stop any such actions from happening."

Articles 132 and 133 contained provisions that were related to the administrative units that were binding on the legislative authority when they issued any law to regulate administrative decentralization in Egypt. The constitution stipulated that the directorates, cities, and villages were public legal persons. It also stated that the members of the councils of the directorates, cities and villages were chosen by

election, and in exceptional cases, their appointment was provided by law. The constitution also provided for transparency in the work of the local councils and it administered its own affairs. It is clear that the constitution of 1923 provided for the general issues and left to the legislature broad powers in the details. The constitution of 1923 was the first constitutional protection of regional administrative decentralization in Egypt. However, this protection was incomplete because the constitution did not provide for the formation of a Supreme Constitutional Court to supervise the implementation of the constitution.

The legislature enacted Law No. 24 of 1934, amended by Law No. 68 of 1936 which was related the election of members of the directorate councils.[741] In these laws, the legislature continued to provide for the appointment of a governor who had broad powers. And, the governor, since the law of 1883, has been appointed from a pool of police officers.[742]

5.3.2 The Regional Administrative Decentralization in Egypt After the 1952 Revolution Until Law No. 43 of 1979

In 1952, a group of army officers seized power, overthrew the monarchy and turned Egypt into a republic.[743]

In 1956, the first constitution was issued[744] and its Articles 157 to 166 were used to regulate the regional administrative decentralization. Article 157 stipulated that:

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741 See Nasser Abdul Mawla Rashwan, *Integration Between Local People 's and Executive Councils in the Face of Environmental Problems* (Cairo: Dar Al-Elm and El-Eman for Publishing and Distribution, n.d.).

742 See Abdul Hamid Kamal, "The Conservative Between Appointment and Election," Al Ahram, January 22, 2017, http://www.ahram.org.eg/NewsQ/575329.aspx (accessed February 25, 2018).

743 See Tarek Al-Bishri, *Democracy and the regime of 23 July 1952-1970* (n.p.: Arab Research Foundation, 1987).

744 Egyptian Constitution of 1956. http://www.tibanews.com/index.php/egyptian-constitution/90-1956-constitution?tmpl=component&print=1&page=. Accessed 26/2/2018.

> "The Republic of Egypt shall be divided into administrative units, and some of them may have a legal personality in accordance with the law. The law defines the scope of these units and regulates them." Also, Article 158 stated that "An administrative unit with a legal personality shall be represented by a council whose members shall be elected. However, its membership may include members appointed in the manner prescribed by law."

According to Articles 156 and 157, there were administrative units which implemented the decentralized administrative system and there were also units that implemented the centralized administrative system. The administrative units were the governorates, cities, and villages. Thus, the administrative units with a legal personality had a local council to manage their affairs based on the decentralized administrative system. The administrative units that did not have a legal personality implemented the centralized administrative system and they were run by the administrative units that possessed the legal personality. For example, the villages were run by the city councils or governorate councils. The constitution gave the legislature the power to determine the administrative unit that enjoyed the legal personality and to form a local council for them.

Other articles in the Constitution of 1956 provided for the running of the councils in the administrative units for local affairs.[745] Also, the constitution provided for local taxes[746] and the support of the central government for local unit councils[747] as well as cooperation between the administrative units and between them and the central

[745] Article 159, Egyptian Constitution of 1956. http://www.tibanews.com/index.php/egyptian-constitution/90-1956-constitution?tmpl=component&print=1&page=. Accessed 26/2/2018.
[746] Article 161, Egyptian Constitution of 1956. http://www.tibanews.com/index.php/egyptian-constitution/90-1956-constitution?tmpl=component&print=1&page=. Accessed 26/2/2018.
[747] Article 162, Egyptian Constitution of 1956. http://www.tibanews.com/index.php/egyptian-constitution/90-1956-constitution?tmpl=component&print=1&page=. Accessed 26/2/2018.

government.[748] In addition, Article 165 stipulated that the law regulates the control of the local councils.

Article 164 of the constitution stated that:

> "The law shall specify the competence of the councils representing the administrative units and the conditions in which their decisions are final and those that must be ratified by the competent minister."

This article also stipulated that the legislature determines the competence of the local councils. The constitution also explicitly stated that the decisions issued by these councils are decisions and some of them are subject to the approval of the competent minister.

Finally, Article 166 of the constitution stated that:

> "The councils representing the administrative units may be dissolved by a decision of the President of the Republic. The law regulates the formation of a temporary body to replace the council during the period of dissolution."

This article gave very broad authority to the President of the Republic to dissolve the local council elected by the local population. This article did not refer to another authority which shares the power the dissolve a council with the President of the Republic. The most dangerous part of this article was that it did not specify the reasons for the dissolution of the council. This detracts from the independence of the local council, whose members were elected by the local population.

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[748] Article 163, Egyptian Constitution of 1956. http://www.tibanews.com/index.php/egyptian-constitution/90-1956-constitution?tmpl=component&print=1&page=. Accessed 26/2/2018.

The 1956 Constitution differed from the 1923 Constitution in that it contained more details about the local administrative units, while the 1923 Constitution provided for the general issues and left the details to the legislature. But, the 1956 Constitution also granted the legislature broad authorities to regulate the regional administrative decentralization, the same as in the 1923 Constitution. The Constitution of 1956 also provided for the strict control of the central government over the elected local councils; such as, some the decisions of the local councils had to be ratified by the competent minister, and the President of the Republic could dissolve the local council without having to give any reasons for the dissolution.

Although the 1956 Constitution contained some details about the regulation of the local administrative units, however, it did not provide any details to ensure the implementation of its provisions by stipulating the formation of a supreme constitutional court. [749]

According to the Constitution of 1956, Law No. 124 of 1960 was passed and provided for the division of the Egyptian territories into governorates, cities and villages.[750] The law also created a new ministry known as the Ministry of Local Administration.[751] On the other hand, the law provided for the establishment of local councils composed of elected members, and appointed members representing the government departments in the governorate.[752] The law also provided for the establishment of a council of

[749] See Egyptian Constitution of 1956. http://www.tibanews.com/index.php/egyptian-constitution/90-1956-constitution?tmpl=component&print=1&page=. Accessed 26/2/2018.
[750] Abdul Ghani Bassiouni Abdullah, *General Theory in Administrative Law* (Alexandria: Knowledge Facility in Alexandria, 2003), 164.
[751] Ibid.
[752] Mohammed Reza Rajab, "Local administration system in Egypt," Partners in Development, http://www.pidegypt.org/download/Local-election/dr%20reda%20ragab.pdf (accessed February 25, 2018).

governors that was made up of the Prime Minister and the governors in Egypt.[753] In addition to the above, the law also provided for the selection of the governor from the army, judiciary, university or police department, as compared to post-1883 where the governor was chosen from among the police officers.

Articles 150 and 151 of the temporary Constitution of 1964, passed on 24 March 1964, provided for the organization of local administrative units, but they were brief, and there were no new provisions in this Constitution. [754]

In 1971, Egypt's permanent constitution was issued,[755] and it lasted until the 2011 revolution. The constitution had only three articles with regards to local administrative units, namely Articles 161, 162 and 163. Article 161 stipulated that:

> "The Arab Republic of Egypt shall be divided into administrative units, enjoying a legal personality among which shall be governorates, cities, and villages. Other administrative units may be established having legal personality when it is required by common interest."

Article 161 provided for the division of the Egyptian territories into governorates, which were further divided into towns and villages. It was the same division as the 1956 Constitution. Also, this article stated that these local administrative units had legal personality, which was a development of the 1971 Constitution after the 1956 Constitution granted a legal personality to some of the local administrative units. The

753 Soraya M. El Hag, "A Review of Decentralization and Local Development Initiatives in Egypt between the years of 1994 and 2011" (master's thesis, School of Global Affairs and Public Policy, American University in Cairo, 2014), 22.

754 Temporary Egyptian Constitution of 1964, Gazette No. 69 on 24 March 1964.

755 Egyptian Constitution of 1971. http://www.wipo.int/wipolex/en/text.jsp?file_id=189854. Accessed 26/ 2/2018.

approach of the 1971 Constitution was a return to the approach of the Royal Constitution of 1923 which granted the legal personality to all the administrative units. Article 162 of the Constitution of 1971 stated that the:

> "Local people's councils shall be gradually formed, at the level of administrative units by direct election of which half the members must be farmers or workers. The law shall provide for the gradual transfer of authority to the local people's councils. The presidents and vice-presidents of the councils shall be elected from among their members."

Article 162 of the constitution stipulated a new provision related to administrative unit councils. These councils became called "local people's councils", and all the members of these councils were chosen by election. Then, the presidents and vice-presidents of the councils were chosen from among its members. Also, the constitution stipulated that half of the members of the "local people's councils" had to be farmers or workers, and by doing so, the constitution ensured that these social classes were represented in the local councils in order to defend their interests. On the other hand, Article 162 of the constitution stipulated that the formation of the "local people's councils" would be gradual and that the transfer of authority to the local councils would also be gradual. Article 163 of the Egyptian Constitution of 1971 stated that:

> "The law shall determine the way to form the local people's councils, their competence and financial resources, the guarantees for their members in their relations with the People's Assembly and to the Government as well as their role in preparing and implementing the development plan in their control over the various activities"

The constitution provided for the administrative division of the Egyptian territories and some important issues in the formation of the local councils of units, which were called the "local people's councils" and the gradual formation and transfer of competence to them. It then left the rest of the powers to the legislative authority. Thus, the constitution granted broad competence in the organization of the local administrative units to the legislature.

The Constitution of 1971 was different from the previous Egyptian constitutions because it stipulated the formation of the Supreme Constitutional Court. This court was to ensure the implementation of the provisions of the constitution by the public authorities.[756]

Under the 1971 Constitution, the Local Administration Law No. 57 of 1971 was issued, but it was short-lived. Then in 1975 Law No. 52 was issued, and this also did not last long. In 1979 another law was issued, it was known as Law No. 43 of 1979. The legal instability during this period reflected the political instability in Egypt. The October War broke out in 1973 against the Zionist entity and subsequently the Camp David Treaty between Egypt and the Zionist entity was signed in 1977. This had a serious effect on the internal situation in Egypt.

5.3.3 Local Administration Law No. 43 of 1979

In accordance with the 1971 Constitution, the Local Administration Law No. 43 of 1979 was issued. This law divided the Egyptian territories into five administrative units Governorates, centers, cities, neighborhoods, and villages. The law states that

[756] See Articles from 174 to 178 of Egyptian Constitution of 1971. http://www.wipo.int/wipolex/en/text.jsp?file_id=189854. Accessed 26/ 2/2018

each local unit has a local council[757] with a legal personality.[758] This is an expansion of administrative decentralization. However, in Iraq the local councils are for the governorates, districts, and sub-districts.[759] Also, the 1979 law stipulates that all members of the local people's councils are elected,[760] including the president and his assistant.[761] The law also stipulates that half the members of the local councils are farmers and workers.[762] While in Iraq, the Law of Elections in Governorates, Districts, and Sub-districts No. 46 of 2008 stipulates there is must be one seat for the woman in the governorate council after three seats for the men.[763] On the other hand, the 1979 law provided a set of competence for the governorate councils concerning the administration of local affairs. [764]

With regards to the control by the central government over the governorates, it is strict,[765] although it is not as strict as the control under the Constitution of 1956. The Council of Ministers can dissolve the governorate council upon the request of the Minister of Local Administration for reasons related to public interest, which is

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757 Article 2, Local Administration Law No. 43 of 1979. https://www.egypt.gov.eg/arabic/laws/download/newlaws/%D9%82%D8%B1%D8%A7%D8%B1%20%D8%B1%D8%A6%D9%8A%D8%B3%20%D8%AC%D9%85%D9%87%D9%88%D8%B1%D9%8A%D8%A9%20%D9%85%D8%B5%D8%B1%20%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A%D8%A9%20%D8%A8%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D8%B1%D9%82%D9%85%2043%20%D9%84%D8%B3%D9%86%D8%A9%201979.pdf. Accessed 27/2/2018.

758 Article 1, Local Administration Law No. 43 of 1979.

759 Article 122 (First), Iraqi constitution. See: http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

760 Article 3, Local Administration Law No. 43 of 1979.

761 Article 11, Local Administration Law No. 43 of 1979.

762 Article 3, Local Administration Law No. 43 of 1979.

763 Article 13, Law of elections of governorates, districts, and sub-districts No. 46 of 2008. http://www.iraq-lg-law.org/ar/content/%D9%82%D8%A7%D9%86%D9%88%D9%86-%D8%A7%D9%86%D8%AA%D8%AE%D8%A7%D8%A8-%D9%85%D8%AC%D8%A7%D9%84%D8%B3-%D8%A7%D9%84%D9%85%D8%AD%D8%A7%D9%81%D8%B8%D8%A7%D8%AA-%D9%88%D8%A7%D9%84%D8%A3%D9%82%D8%B6%D9%8A%D8%A9-%D9%88%D8%A7%D9%84%D9%86%D9%88%D8%A7%D8%AD%D9%8A. Accessed 27/2/2018.

764 See Articles 12 to 18, Local Administration Law No. 43 of 1979.

765 See Article 131 to 137 and Articles 144,145,146. Local Administration Law No. 43 of 1979.

appreciated by the Council of Ministers. However, all local councils may not be dissolved by a single procedure or a local council cannot be dissolved twice for the same reason. In the 1956 Constitution the authority to dissolve the local council was in the hands of the President of the Republic alone and he did not have to give any reasons.[766] On the other hand, the governorate councils in Iraq can be dissolved by the Council of Representatives only, after being requested by the governor or members of the governorate council. Also, the governorate council can dissolve itself.[767]

As for the control of the governorate, the 1979 law stipulates that the governor is appointed by the President of the Republic[768] and the governor represents the central government in the governorate.[769] In addition, the governorate council cannot dismiss the governor. The governorate council can only question the governor.[770] On the other hand, the governor can object to the decisions of the governorate council and if the governorate council insists on sticking to its decision, the Minister of Local Administration will refer the issue to the Council of Ministers, whose decision is final.[771] While in Iraq, the governor is elected by the governorate council[772] and the council can dismiss him for reasons stipulated by law.[773] Also, the Council of Representatives can dismiss the governor on the proposal of the Prime Minister for reasons stipulated by the law as well.[774]

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[766] Article 166, Egyptian Constitution of 1956. http://www.tibanews.com/index.php/egyptian-constitution/90-1956-constitution?tmpl=component&print=1&page=. Accessed 26/2/2018.
[767] Article 20, the Law of Governorates Not Incorporated into a Region. http://iraq-lg-law.org/en/webfm_send/765. Accessed 19 November 2016.
[768] Article 25, Local Administration Law No. 43 of 1979.
[769] Article 26, Local Administration Law No. 43 of 1979.
[770] Article 19, Local Administration Law No. 43 of 1979.
[771] Article 132, Local Administration Law No. 43 of 1979.
[772] Article 7 (seven), the Law of Governorates Not Incorporated into a Region. http://iraq-lg-law.org/en/webfm_send/765. Accessed 19 November 2016.
[773] Article 7 (eight), the Law of Governorates Not Incorporated into a Region. http://iraq-lg-law.org/en/webfm_send/765. Accessed 19 November 2016.
[774] Article 7 (eight), the Law of Governorates Not Incorporated into a Region. http://iraq-lg-law.org/en/webfm_send/765. Accessed 19 November 2016.

Also, with regards to the authorities of the governorate councils, Article 12 of the 1979 law stipulates that:

> "The local people's councils may issue the necessary decisions to support the exercise of the competence provided for in this Article." And Article 132 states that "The decisions of the local people's councils shall be in force as long as it is within the limits of the competence prescribed for it in this law and within the framework of the general plan of the state and approved budget and also taking into account the laws and regulations."

The text of these two articles makes it clear that what is issued by the governorate council is administrative decisions. It is contrary to the text of Article 2 and 7 of the LGNIR in Iraq, which contained the phrase "local legislation", and as previously discussed it has resulted in a lot of argument.

Article 7 of the Local Administration Law of 1979 provides for the establishment of economic regions, and each may consist of several governorates. These regions are similar to the French regions, which includes several governorates and their main objective is economic.[775]

This law was amended 7 times, namely in 1981, 1987, 1988, 1996, 2003, 2005 and 2013. This was due to the political and economic instability in Egypt.[776]

[775] See the study about France in this chapter.

[776] See Soraya M. El Hag, "A Review of Decentralization and Local Development Initiatives in Egypt between the years of 1994 and 2011" (master's thesis, School of Global Affairs and Public Policy, American University in Cairo, 2014).

5.3.4 The Egyptian Constitution of 2014

After the revolution of January 25, 2011, the Constitution of 2012 was promulgated,[777] and after the events of 30 June 2013, the Constitution of 2014 came into force.[778]

Article 175 of the Egyptian Constitution of 2014 states that:

> "The state is divided into local administrative units that have legal personality. They include governorates, cities and villages. Other administrative units that have legal personality may be established, if the public interest requires such. When establishing or abolishing the local units or amending their boundaries, the economic and social conditions shall be taken into account. The foregoing is organized by law."

The text of this article is similar to that of the 1971 constitution on the administrative division of local units.[779] The Local Administration Law of 1979 also corresponds with this constitutional provision.[780]

Article 176 states that:

> "The state supports administrative, financial, and economic decentralization. The law regulates the means of empowering the administrative units in the proper provision, improvement and

[777] Egyptian Constitution of 2012. http://www.wipo.int/wipolex/ar/text.jsp?file_id=297102. Accessed 28/2/2018.
[778] Egyptian Constitution of 2014. http://www.constitutionnet.org/sites/default/files/dustor-en001.pdf. Accessed 28/2/2018.
[779] See Article 161 of Egyptian Constitution,1971. http://www.wipo.int/wipolex/en/text.jsp?file_id=189854. Accessed 26/ 2/2018.
[780] See Article 1, Local Administration Law No. 43 of 1979. https://www.egypt.gov.eg/arabic/laws/download/newlaws/%D9%82%D8%B1%D8%A7%D8%B1%20%D8%B1%D8%A6%D9%8A%D8%B3%20%D8%AC%D9%85%D9%87%D9%88%D8%B1%D9%8A%D8%A9%20%D9%85%D8%B5%D8%B1%20%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A%D8%A9%20%D8%A8%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D8%B1%D9%82%D9%85%2043%20%D9%84%D8%B3%D9%86%D8%A9%201979.pdf. Accessed 27/2/2018.

> management of public utilities, and defines the timeline for the transfer of powers and budgets to the local administration units."

The Constitution of 2014 differs from the Egyptian constitutions before 2011 by explicitly stipulating the term "administrative decentralization". Although previous constitutions provided for the elements of administrative decentralization, they did not explicitly mention the term "administrative decentralization".

The 2014 Constitution provides scientific, technical, administrative and financial support to the local units.[781] On the other hand, Article 180 provides for the direct election of members of local councils. The Article 180 also states that:

> "One quarter of the seats are allocated to youth under 35 years old, one quarter is allocated for women, and workers and farmers are represented by no less than 50 percent of the total number of seats. These percentages include a proper representation of Christians and people with disability."

Article 181 of the Egyptian Constitution states that the:

> "Local council decisions that are issued within the council's mandate are final. They are not subject to interference from the executive authority, except if it is to prevent the council from overstepping these limits or causing damage to public interest or the interests of other local councils. Any dispute over the jurisdiction of the local councils in villages, centers or towns is settled by the governorate-level local council. Disputes over the jurisdiction of governorate-level local councils are dealt with as a matter of urgency by the General Assembly of the Legal Opinion and

[781] See Articles 177 and 178, Egyptian Constitution of 2014. http://www.constitutionnet.org/sites/default/files/dustor-en001.pdf. Accessed 28/2/2018.

Legislation Departments of the State Council. The foregoing is prescribed by law."

This article supports the administrative decisions issued by the local councils and stipulates that they are final and may not be objected to by the executive authority except for the specific reasons stipulated in this article. The article states that in case of disagreement with the governorate council on the competence, the State Council (administrative judiciary) will judge the dispute. According to Article 181 of the 2014 Constitution, the Local Administration Act of 1979 must be amended with regards to the objection to the decisions of the local councils, which have already been explained in this chapter.[782] As for Iraq, the decisions of the governorate councils can be canceled by the Council of Representatives only, at the request of the Prime Minister or by the administrative judiciary when the decisions of the governorate council is adjudicated by the judiciary. [783]

With regards to the governor, Article 179 states that "The law shall regulate the conditions and manner of appointment or election of governors and heads of other local administrative units and determine their competence." The constitution authorizes the legislature to regulate everything related to the governor. But, the difference between the 2014 Constitution and the rest of the Egyptian constitutions before 2011 is that it gives the legislature the authority to choose between the appointment or election of the governor. In line with the 2014 Constitution's approach to expanding administrative decentralization, the legislature should have provided for the election of the governor. However, it seems that the legislature considers the

[782] See Local Administration Law No. 43 of 1979, in this chapter.
[783] Article 20 of the Law of Governorates Not Incorporated into a Region. http://www.iraqld.iq/LoadArticle.aspx?SC=081120155031214. Accessed 28/2/2018

governor as a representative of the central authority in the governorate and it has not reached the stage of granting the governorates a fully decentralized administrative authority, such as in the case of France and Iraq.

Article 180 of the Constitution provides the local councils with the right to withdraw confidence from the heads of the administrative units. But, if the governor is appointed by the central authority, how does the governorate council withdraw confidence from the governor, who is not selected by the council? This is a contradiction that has been created by the constitution.

The constitution stipulates the Supreme Constitutional Court, which has already been formed under the provisions of the 1971 Constitution. This guarantees judicial control over the implementation of the provisions of the Constitution.[784]

5.3.5 Evaluation of the Regional Administrative Decentralization in Egypt

The regional administrative decentralization in Egypt has been marked by the tendency to strengthen the central authority over the local units. Since 1909, all Egyptian constitutions and laws have adopted two matters in regulating administrative decentralization. The first has been to harden the central government's control over the local units and support the governor's powers, who is always appointed by the central authority. The second has been to give the legislature broad powers to regulate administrative decentralization. This can be explained by the unstable political situation in Egypt so far. However, the political situation in France has stabilized since

[784] See Articles 191 to 195, Egyptian Constitution of 2014. http://www.constitutionnet.org/sites/default/files/dustor-en001.pdf. Accessed 28/2/2018.

1958, the year General Charles de Gaulle founded the Fifth Republic and the French people approved the new French Constitution. On the other hand, in Iraq, the problem is due to political instability since 2003 until now.

The Egyptian Constitution of 2014 tries to expand the scope of the regional administrative decentralization. While, the Iraqi Constitution grants very broad powers to the governorates and prevents the executive authority from having any control over the governorates.[785] On the other hand, the Egyptian Constitution does not prevent the executive authority from having control over the governorates.[786] The Egyptian Constitution also gives the legislative authority broad powers to regulate administrative decentralization.[787] In addition to that, the Egyptian Constitution also gives the legislature the freedom to choose between appointing or electing the governor.[788] While the Iraqi Constitution explicitly states that the governor is to be elected.[789]

Although the Egyptian Constitution was issued in 2014, until now the legislative authority has not issued a new law to regulate the administrative decentralization based on this constitution, and it is now 2018. There is a bill on local administration, but it is highly controversial and as a result it has been delayed.

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[785] See Article 122 (First), Iraqi constitution of 2005. See: http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

[786] See Articles 179 and 181, Egyptian Constitution of 2014. http://www.constitutionnet.org/sites/default/files/dustor-en001.pdf. Accessed 28/2/2018.

[787] See Articles 179,180,183. Egyptian Constitution of 2014. http://www.constitutionnet.org/sites/default/files/dustor-en001.pdf. Accessed 28/2/2018.

[788] Article 179, Egyptian Constitution of 2014. http://www.constitutionnet.org/sites/default/files/dustor-en001.pdf. Accessed 28/2/2018.

[789] Article 122 (fourthly), Iraqi constitution of 2005. See: http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

5.4 Conclusion

In this chapter, the administrative decentralization in France was selected as an example. It has been noted that the administrative entities in France are called territorial communities and are composed of municipalities, governorates, and regions, and all these are administrative units. The importance of these communities is inversely proportional to their size. Municipalities are the most important of these communities, then the governorates followed by the regions. In Iraq, it consists of the governorates and these are divided into districts, then into sub-districts. This is for the territories that do not apply federalism. The most important administrative unit is the governorate that supervises the rest of the administrative units, and the least important are the municipalities that are not mentioned in the current constitution.

The first attempt at administrative decentralization in France after the revolution was a failure due to the tendency of territorial communities to break away from the central authority. These communities issued legislative decrees which were the competence of the legislative authority in France. So, the French National Assembly issued a decree stating that the term “decree” is devoted to the legislative authority, and the territorial communities had to use the term “decision”. Therefore, France had to return to the administrative centralization system, which was then tightened by Napoleon. The legislative authority began to gradually grant competence and independence to the territorial communities until 1982 when the legislative authority began to grant full administrative decentralization to the territorial communities. It continued until 2004 when a constitutional amendment was introduced in 2003 to promote reforms in the decentralized administrative system.

It is noted that administrative decentralization in France was gradual, after the Napoleon era until 2004. Thus, the French legislature benefited from the failure of the first experiment at the beginning of the revolution and gradually applied it to avoid another failure. So, the gradual application is guaranteed to succeed. But, France was not the first to reach this result, the Islamic governments had reached this result centuries ago. In the early stage of the Islamic state, the administrative system was centralized and then transformed into a decentralized system with the expansion of the Islamic state until the administrative organization of the Islamic state in the era of Harun al-Rashid became a decentralized administrative system, as was studied in the first chapter of this research.[790]

Building on the above, Iraq is implementing the civil law, and it has taken the legal system from France. On the other hand, the Iraqi Constitution states that the Islamic law is one of the sources of the law. It is clear here that there are contradictions in the Iraqi legal system and the legal systems of Islamic countries. So, Iraq must implement the administrative decentralization system gradually and both legal systems have implemented this approach in order to avoid the problems that have arisen in the implementation of this system. The gradual application method was also implemented by the Islamic law before the civil law many centuries ago. In general, the Iraqi legislature should be more inclined to its Islamic identity than to the civil law.

The French adopted the principle of indivisibility, which has been provided for by the French Constitutions. The French have interpreted it as, it is not possible to divide the

[790] See 1.9.3 The Gradual implementation of regional administrative decentralization, chapter one of this study.

legislative authority, as it represents the will of the people. France has vigorously opposed the federal system because it includes the distribution of legislative authority. Although the federal system may be inappropriate for France, it is appropriate for other countries because of several political, economic, historical and social factors. The federal system is applied by many countries such as the U.S., Malaysia, and Russia. On the other hand, although the Iraqi Constitution has provided for the possibility of implementing the federal system by the governorates that wish to do it, since the issuance of the Iraqi constitution in 2005 until now it has not been applied it by any governorate.

With regards to the type of legal activity issued by the local unit, it may be noted that the French territorial communities issued administrative decisions even when granted broad competence in the reforms of the local administration which began in 1982. On the other hand, the 2003 constitutional amendment explicitly states that the territorial communities can only issue administrative decisions. The French legislators have been firm when they faced the attempts to issue legislative decrees by some municipalities at the beginning of the French Revolution. The legislative authority has issued a legislative decree that this action is unconstitutional, and the territorial communities can only issue administrative decisions. This is because France applies the regional administrative decentralization system, which is a distribution of the administrative function, not the legislative authority.

The problem which was faced France in the implementation of regional administrative decentralization is the same problem in Iraq. Large authorities were granted to local administrative units after the French Revolution, so, local units understood that they

had the authority to issue laws. Therefore, the legislature canceled the decentralized system and re-applied the central system, and then the authorities were gradually granted to the local administrative units. This solution cannot be applied in Iraq because of the current legal situation in Iraq, which was explained earlier.[791]

The implementation of the administrative decentralization in France at the beginning of the French Revolution violated the theoretical framework of decentralization. France then returned to the application of the central system and then, applied the decentralized system gradually until the reforms of 1982 and beyond. France's application of the decentralized system is now in line with the theoretical framework of decentralization. While, the application of the governorates in Iraq of the decentralized system is contrary to the theoretical framework of decentralization.

For a brief comparison of the main points of the regional administrative decentralization system between France and Iraq see the table below.

Table 5.1

The comparison between France and Iraq in regard to the administrative decentralization system.

France	**Iraq**
French territory is divided into regions and these are divided into governorates, then into municipalities. And, all of these are called territorial communities, and all of these units apply the regional administrative decentralization.	Iraqi territory is divided into governorates and these are divided into districts, then into sub-districts, as well as the Kurdistan state. And all of the governorates apply the regional administrative decentralization system, while Kurdistan applies the federal system.

[791] See Chapter Three of this study.

The importance of the territorial communities in France is inversely proportional to their size. The municipalities are the most important of these communities, then the governorates followed by the regions.	The most important administrative unit in Iraq is the governorate that supervises the rest of the administrative units, and the least important are the municipalities that are not mentioned in the current constitution.
The first attempt to an implementation of the regional administrative decentralization with broad powers in France was after the French revolution in 1789, which failed due to the tendency of territorial communities to break away from the central authority. Then The legislative authority began to gradually grant competence and independence to the territorial communities until 1982 when the legislative authority began to grant full administrative decentralization to the territorial communities.	After the application of the regional administrative decentralization system in Iraq theoretically in 1969, this system was implemented in 2005 with wide powers for the governorates.
The French Constitution provided for the implementation of the decentralized administrative system only and stipulated the French territory “shall be indivisible”.	The Iraqi Constitution provides for the federal system and decentralized administrative system. And the Constitution stipulates the possibility of implementing any system according to certain procedures.

In this chapter also, the administrative decentralization in Egypt was discussed as example. Egypt is divided into five administrative units governorates, centers, cities, neighborhoods, and villages, and the governorate is the most important administrative unit.

Egypt has implemented the decentralized administrative system since 1909 until now and all subsequent Egyptian constitutions and laws have stipulated the decentralized regional administrative system. The theoretical framework which has been agreed upon in Egypt is the decentralized system with strengthening of the control of the central government over the local councils and appointment of the governors. The law also grants wide powers to the legislative authority to regulate the decentralized system. It is noted that there are many amendments to the laws regulating the administrative decentralization, which is a result of the political instability in the country. And under the 2014 Constitution, the central government has the right to control local councils if they exceed their competence or cause harm to the public interest or damage to the interests of other local councils. In other cases, it can make a challenge before the judiciary.

After the 2011 Egyptian revolution, the Egyptian legislature wanted to expand the administrative decentralization system, but it remained within the general framework of the decentralized system implemented by its previous constitutions and laws. The Constitution of 2014 has expanded the administrative decentralization, but it does not give up the executive authority's control over the local councils. The constitution does not give up the principle of appointing the governor, and has also granted wide powers

to the legislature to regulate the administrative decentralization. The constitution also deals more with the details of the decentralized system than the previous constitutions. On the other hand, in Iraq the regional administrative decentralization was actually only implemented in 2004. The 2005 Constitution gives wide powers to the governorate councils and prevents the central authority from exercising control over the governorate councils and it has also included many details related to the governorates.

For a brief comparison of the main points of the regional administrative decentralization system between Egypt and Iraq see the table below.

Table 5.2

The comparison between Egypt and Iraq in regard to the regional administrative decentralization system.

Egypt	**Iraq**
Egypt is divided into five administrative units which are the governorates, centers, cities, neighborhoods and villages.	Iraq is divided into governorates, districts, sub-districts and villages
The governorate is the most important administrative unit in Egypt.	The governorate is the most important administrative unit in Iraq.
All the local administrative units have councils.	The governorates, districts and sub-districts have councils.
Administrative decentralization has been implemented since 1909. The 2014 Constitution has given the local councils more power.	Administrative decentralization was effectively implemented in Iraq in 2004. And the 2005 Constitution has given wide powers to the governorate councils.

The Egyptian constitutions have strengthened the control of the executive authority over the councils of the local administrative units.	The executive authority is not allowed to exercise any control over the governorates.
Egyptian constitutions have granted broad powers to the legislative authority to regulate regional administrative decentralization.	The 2005 Constitution provides for a lot of details regarding regional administrative decentralization, which has restricted the legislative authority.
The governor is appointed by the central authority.	The governor is chosen by the elected governorate council.
Egyptian constitutions have stipulated that the local councils issue decisions. The 2014 Constitution explicitly stipulates administrative decentralization and that the local councils issue decisions.	The 2005 Constitution explicitly states that the governorates implement the principle of administrative decentralization.

Finally, it was mentioned earlier in this research about the importance of the different kinds of decentralized systems, whether it is a decentralized administrative system or a decentralized political system (federalism) and that the application of either system takes into consideration the political, social, historical and economic factors of the country. In France, the decentralized system is indispensable, so France has not been able to apply the central system for a long time after Napoleon. Therefore, France has chosen a system that is proportional to its legal philosophy, which is the decentralized administrative system. Egypt has also applied the decentralized regional administrative system since 1909 until now through various systems of government in Egypt. On the other hand, the Iraqi Constitution has left it to the governorates to choose between the decentralized administrative system and the federal system, and most of the governorates have implemented the decentralized administrative system. So, the

principles of this system must be respected, which do not give the governorates the authority to issue laws.

Based on the theoretical framework of decentralization, France and Egypt apply the same system as in Iraq, which is regional administrative decentralization. France is the home country of this system and Egypt is the first Arab Islamic country to implement this system. But there are political and historical factors that have led to the different applications in terms of legal texts and practice. These factors are mentioned in chapter Five. Further, there is also the legal factor that differs among Iraq, Egypt and France. The French believe in the principle of the non-division of sovereignty, which means, according to the French, the indivisibility of the legislative authority. So France does not apply the federal system that divides the legislative authority between the federal government and the states. While Iraq left this principle in the 2004 Interim Constitution. Therefore, the current Iraqi Constitution of 2005 provides for the federal system in addition to the decentralized administrative system. In Egypt, the Egyptian legal system is like the central authority over the local authority in the relationship between the two authorities as discussed in chapter Five. In Iraq, the 2005 Constitution provides for balance and independence in the relationship between the central authority and local authorities.

The success of the federal system in Iraq needs to a federal government able to distribute revenues between states equitably and achievement of the Justice. The Kurdistan state has been selling oil from the oil fields in the state and taking all the revenues for itself alone. The central government has been silent because it is weak and does not want to create problems with the Kurdistan state. Therefore, there must

be a federal government capable of applying Article 121 of the Iraqi constitution about the fair distribution of revenues, as well as the application of the first and second paragraphs of Article Two of the Constitution which states that “Islam is the official religion of the State and is a foundation source of legislation: A. No law may be enacted that contradicts the established provisions of Islam” The application of the principles of Islamic law will lead to achieving justice among the components of the Iraqi people. And to guarantee the implementation of the constitution there must be a supreme court which has the capability to implement the constitution. As well, it must apply paragraph 2 Article 92 of the Iraqi constitution, which states that the “The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence and legal scholars, whose number, the method of their selection and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives” in order to improve the performance of the Federal Supreme Court in the legal and Islamic scope, with the implementation of the Iraqi constitution.

The fourth research objective has been achieved in this chapter as the researcher has analyses the implementation of administrative decentralization in Iraq by looking at for example from select countries.

CHAPTER SIX: CONCLUSION

In this chapter, the researcher will first discuss the findings of the study and then present the recommendations to solve the study problem. Finally, the researcher will discuss the theoretical and practical contributions of this study to the body of knowledge.

6.1 Discussion of the Findings

In the second chapter of this study, the concepts of the federal system and regional administrative decentralization system were discussed, which are stipulated by the current Iraqi Constitution of 2005 (the Constitution), and a comparison between them was made.

Federalism is the distribution of the three authorities (executive, legislative and judicial) by the Constitution between a central government and the regional governments. The central government does not control the state governments, but the latter are responsible to their own respective constituencies. As a result, the Federal Supreme Court is responsible for the adjudication of conflicts between the federal government and the state governments according to the Constitution. Regional administrative Decentralization is the distribution of the administrative authority or administrative function between the central government and local elected entities. These entities are not part of the central government, they have separate legal personalities but are under the control and supervision of the central government. In

other words, local entities in the administrative decentralization system are part of the administrative system of the country, therefore, the activity of the local entities are part of the administrative activity of the executive authority.

Building on the above, the states in the federal system have legislative, executive and judicial authorities, therefore the states can issue laws, administrative decisions and judicial decisions that do not violate the federal constitution. These are the elements of the federal principle, whereas, the regional administrative decentralization has administrative authority only, whereby the local entities do not have the authority to issue laws or judicial decisions. The local entities can issue administrative decisions only. These are the elements of the administrative decentralization principle.

The second chapter of the study mentioned the disadvantages of the central system, which is the tyranny of the central authority and the increase in corruption rates in addition to poor public services. Therefore, a country that wants to reduce the rate of corruption and avoid dictatorship as well as improve public services must apply the decentralized system. Here, the choice can be made based on several historical, political, economic and social factors, and it can be the federal system or regional decentralized administrative system.

Some authors have mentioned that during the implementation of the decentralized system there were flaws, such as corruption due to the lack of experience of the local entities and the people's lack of awareness on the selection of their local council members. Nevertheless, this is not a strong enough reason to leave the decentralized system, but rather to address the factors that led to the emergence of corruption by

gradually applying the decentralization system, which can lead to the improvement of the local units' efficiency and increase the awareness of the people in exercising their rights to elect their representatives properly and also make them accountable for their actions. However, cannot revert to the central system.

The Iraqi Constitution provides for the federal system and the federal regions have legislative, executive and judicial authorities. The Constitution states in Article 122 that the governorates that have not implemented the federal system can apply the regional administrative decentralization system.

Usually, the constitutions that apply the federal system, implement it in all the territories of the country. The implementation of the federal system in one area of the country, but not in another area, while allowing the other areas to choose between federalism or regional administrative decentralization is very rare. The aforementioned method has been implemented by the Iraqi Constitution and it is very different from the constitutions of other countries. Historical and political factors have led the Iraqi Constitution to adopt this method, which was the application of three Iraqi Kurdish governorates in the federal system in 1992 during Saddam Hussein's regime, under the protection of the U.S.A. Therefore, the Iraqi Constitution of 2005 approved the Kurdish state, which is called Kurdistan but, as a result of strong opposition from several Iraqi parties, the federal system was not implemented in the rest of the Iraqi territories. The Iraqi Constitution gave the governorates the freedom to choose between the application of the federal system or the regional administrative decentralization system. However, since the issuance of the Constitution in 2005, the federal system has not been applied by any governorates, except for the three

governorates which make up the Kurdistan state. Therefore, 15 governorates have implemented the regional administrative decentralization system.

The Constitution treats both the states and governorates as equal in terms of the distribution of competence with the central government, that is, the competence granted by the Constitution to the states are the same as the competence granted to the governorates. This is a rather peculiar approach, but there are historical and political factors that have led to the constitutional legislator taking this approach, as explained in Chapter Three. However, the merging of competence for both systems according to the Constitution does not lead to the integration of the two systems because of their different elements as mentioned earlier. Thus, the exercise of the same competence by the states and governorates does not mean that they have the same authority.

This chapter examines the theoretical framework of decentralization and judicial interpretation to support the arguments in this study about the authorities of governorate councils and the function of the Federal Supreme Court.

This chapter discussed the harmonization that should occur between the central government and the governorates or states, which can lead to achieving the goal of the decentralized system and to spread peace in the relationship among the central government and the governorates or states. It also cited the case laws related to it.

The harmonization between the central and local authority can be achieved by their commitment to the distribution of competence between them, which is according to the nature of the authority. For example, the central authority carries out the competence concerning the country's relations with other countries. The central

authority also exercises the activity which exceeds its effect more than a state or governorate or which extends to all the country's territories. On the other hand, the local authorities are responsible for all activities related to the local population, Therefore, the members of the local authority must be from the local population and chosen by election. This is so that local people can monitor the work of the members of the local government. This harmony between the central and local governments will realize the goal of decentralization, which is to provide the best service to the population in the country and to achieve the principles of democracy that allow the local people to monitor the members of the local authority. As well as, achieving the stability in the country.

To ensure the achievement of this goal, this harmony between the central and local authorities must be stipulated in the Constitution to ensure that the public authorities do not breach it. The Constitution provides for competence between the central authority and local authorities, as in the Iraqi Constitution, in order to ensure respect for the distribution of competence between the central and local authorities. The Constitution provides for a protector to ensure both parties respect the provisions, which is the judiciary. The protector in Iraq is the Federal Supreme Court, therefore, the performance of the Federal Supreme Court reveals whether there is respect for the Constitution or not by the public authorities.

Chapter Two also explored the meaning of the term confederation and compared it with the federal system as some authors use this term and mean the federal system as explained in this chapter. In fact, the confederation is an international convention, not

a decentralized system. There are also countries such as Switzerland, which are called confederations, but in fact, they implement the federal system.

The discussions in this chapter have achieved the first research objective, which was to determine the concept of federalism and regional administrative decentralization. And this chapter achieved the second research objective, which was to analyze the impact of harmonizing and how it can be effectively executed in Iraq.

In Chapter Three, the researcher examined the Iraqi Constitution of 2005 with regards to regional administrative decentralization and analyzed the constitutional articles that are concerned with regional administrative decentralization. This chapter discussed the position of administrative regulation in previous Iraqi constitutions starting from the first constitution of the modern Iraqi state, and this was done in order to understand the approach of these constitutions in relation to the administrative regulation of Iraq. The centralized system was implemented in Iraq since the first constitution of the modern Iraqi state until 2004. Although the constitution provided for administrative decentralization, as in the 1970 Constitution, in practice, the system implemented remained to be the centralized system.

After USA's occupation of Iraq in 2003, the 2004 temporary constitution, called the "Law for the Administration of the State of Iraq for the Transitional Period" was passed and it remained in force until the permanent constitution of 2005 was issued and the formation of the new government was based on it.

The philosophy of governance in the Iraqi Constitutions of 2004 and 2005 is different from the philosophies of the previous constitutions from 1925 until 1970. The 2004

and 2005 Constitutions stipulate and are based on democratic governance. It may be that the previous constitutions of Iraq also provided for democratic governance, but the difference in the 2004 and 2005 Constitutions is that democratic governance is mentioned in detail. For example, the 2005 Constitution stipulates the application of administrative decentralization and then provided further details on how the governorate councils and the governors are to be elected. In addition, the 2005 Constitution as well as the 2004 Constitution, provided for the establishment of the Federal Supreme Court as a guarantee for the application of the constitutional rules.

The Iraqi Constitution of 2005 (the Constitution) provided for the distribution of competence between the central government on the one hand, and the states and provinces, on the other. The Constitution is unique in this way for historical and political reasons, in that the constitutional legislator sought to overcome the mistakes of past attempts to implement the regional administrative decentralization by stating the important details about the decentralized administrative system in the Constitution, which is the supreme law in the country and all public authorities must respect its provisions. Some authors have criticized the constitutional legislator's approach to the distribution of competence and they have said that the Constitution merges the federal and decentralized administrative system. However, both the decentralized administrative system and the federal system have their own respective elements, based on the decentralization theoretical framework. Therefore, each has its own scope. i.e. the governorates that implement regional administrative decentralization according to the Constitution cannot issue laws or judicial decisions, no matter how extended its competence. This is because it is beyond the scope of the decentralized administrative system. The most that the governorates can issue are administrative

decisions while the federal region can issue laws and judicial decisions because it is within its scope. Article 121 of the Constitution grants legislative, executive and judicial authorities to the federal regions.

On the other hand, the Constitution also states that the governorate councils cannot be subject to the supervision or control of any ministry or any institution not linked to a ministry. This approach is a reaction to the strict administrative control exercised by the central government on the local entities prior to the 2004 Constitution. Therefore, some authors have criticized this approach of the Constitution, and others have said that preventing the ministries from controlling the governorate councils, which is administrative control, will lead to the exit of the governorate councils from the decentralized administrative system. The researcher disagrees with this opinion because having administrative control over the governorate councils does not mean the governorate councils will exit from the decentralized administrative system. There are examples from other countries that have made oversight of local entities in the form of judicial control and this control is possible in Iraq. In addition, there are other types of control as provided for by the Law of the Governorates Not Incorporated into a Region No. 21 of 2008 (LGNIR), such as control by parliament and independent commissions.

Although the constitutional legislator in Article 122, which regulates regional administrative decentralization, provided for the broad competence of the governorates and prevented ministries and institutions not linked to a ministry from exercising control over the governorate councils as well as the election of the governorate council and the governor, Article 122 does not allow the governorate

council to issue laws because the governorates are applying the decentralized administrative system, so, they can only issue administrative decisions. However, the ambiguity of Article 115 has led to the belief that the governorate councils can issue local laws. This article includes the distribution of competence between the states and governorates on the one hand, and the central government on the other. Furthermore, the ambiguity of the advisory decisions of the Federal Supreme Court in the interpretation of this article has reinforced this belief, especially by the governorate councils.

The Council of Representatives was convinced by the first decision of the Federal Supreme Court that the governorate councils do not issue local laws on the basis of Article 115, and this is evident in the text of the LGNIR which was issued on March 31, 2008. The second amendment to the LGNIR in 2013 includes an interpretation of Article 115. According to Article 2 Paragraph 6 of the amended LGNIR, the word 'law' in Article 115 of the Iraqi Constitution is meaning the LGNIR No. 21 of 2008. So, the word 'law' in Article 115 is not intended for laws issued by the governorate councils. The Federal Supreme Court upheld the text of the law indirectly in its last decision in 2014 but the text of the amended law is not clear enough, and the advisory opinion of the Federal Supreme Court was ambiguous.

The decisions of the Federal Supreme Court relating to Article 115 are ambiguous and need to be re-interpreted. These decisions are also contradictory; for the court initially said that the governorate councils issue local legislation under administrative decentralization, then said that the governorate councils issue local laws under administrative decentralization, then again the said that the local laws should not

violate the constitution and federal laws, and after that it went back to what it had said before, that is, the governorate councils issue local legislation.

The governorate councils remain committed to their opinion, which is, the governorate councils have the authority to issue laws for several reasons, including political reasons which are conflicts between the governorate councils and the central government to get more competence. It is also because the members of the governorate councils lack the necessary experience. In addition to that, the ambiguity of the advisory decisions of the Federal Supreme Court and the loopholes in the LGNIR play significant roles as well.

The third chapter of this study discussed the procedures for amending the current Constitution. The study reached the conclusion that the amendment of the Constitution as a solution to the problem is impractical because, the amendment of the Constitution in the current political situation in Iraq is very difficult. Since, the amendment of the Iraqi Constitution requires a two-thirds majority vote in parliament and a referendum. This is difficult in light of the current political and legal situation in Iraq. Because, the system of electing members of parliament is the proportional system. Therefore, the parliament is composed of many parties that are Politically inconsistent.[792] On the other hand, the solution does not require the amendment of the Constitution, but only requires a reinterpretation. Because, the Constitution has provided for the judicial interpretation of constitutional texts by the Federal Supreme Court. According to the theoretical framework of judicial interpretation, one of the reasons for resorting to judicial interpretation is the ambiguity of the Constitution.[793] Therefore, the

[792] See explanation of the Amending the Iraqi Constitution of 2005, Chapter Three of this study.
[793] See theoretical framework of judicial interpretation, Chapter Two of this study.

constitutional legislator's desire, when there is ambiguity in the text, is to resort to interpretation rather than to amend ambiguous texts. On the other hand, Article 122 of the Constitution explicitly states that the governorates shall apply the decentralized administrative system. So, according to the theoretical framework of the decentralized system,[794] the governorates issue administrative decisions only. Therefore, the problem is not in the Constitution, but rather, it is in the performance of the Federal Supreme Court.

Part of the Third research objective was achieved in Chapter Three as this researcher has fully examined the Iraqi Constitution regarding regional administrative decentralization.

Chapter Four of this study examined the legal text of the LGNIR and all the issues surrounding it.

The LGNIR of 2008 has been restricted by the provisions of the 2005 Constitution, such as, the elected governorate council elects the governor who is accountable to the governorate council; and also, the governorate councils are not subject to the supervision of the ministries and bodies not affiliated with the ministry. The 2005 Constitution also provides that broad administrative and financial competences be given to the governorate councils, but within the limits of administrative decentralization. Therefore, the LGNIR is constrained by these restrictions. Because, the Iraqi constitution is the nominal law in the country and cannot be violated by any authority as provided for in Article 13 of the Constitution, which states that "First: This Constitution is the preeminent and supreme law in Iraq and shall be binding in all

[794] See the theoretical framework of the decentralized system, Chapter Two of this study.

parts of Iraq without exception. Second: No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void".

On the other hand, the constitution grants broad powers to the governorates within the limits of administrative decentralization. and based on the theoretical framework of decentralization, the governorates have administrative units that do not have the authority to issue laws, but only administrative decisions.

To apply this approach, the LGNIR stipulates that the governorate councils have legislative authority to issue local legislations within the limits of the principle of administrative decentralization. This approach is strange to the Iraqi legal system since the terms 'legislative authority' as well as 'local legislation' according to the Iraqi legal system mean that the governorate councils can issue laws, which is not meant by the legislature in the LGNIR. This is because according to the regional administrative decentralization system, the governorate councils issue decisions and not laws. The State Shura Council in its legal opinions, has stated that the term 'local legislation' in the LGNIR does not mean laws, but rather administrative decisions. However, the governorate councils benefited from the poor wordings in the LGNIR to expand their authorities to issue local laws. The lack of a legal background among the members of the governorate councils also contributed to them taking this approach. The political conflicts between the parties within the Iraqi Parliament have led to this flawed text of the law. This is as mentioned by the authors as well as members of the parliament and governorate councils in interviews with the researcher.

There are no judicial decisions related to the issuance of laws by the governorate councils, but there are advisory opinions on this subject from the Federal Supreme Court and the State Consultative Council.

Chapter Four focused on the performance of the State Shura Council, which is characterized by professionalism and clarity due to the long experience of this council since its establishment in 1933. This is different from the performance of the Federal Supreme Court, which is ambiguous and contradictory, perhaps because of the shorter amount of experience it has as the Federal Supreme Court was only formed in 2005. In addition, when the Federal Supreme Court was first formed, the judges lacked experience in constitutional law.

The State Shura Council, unlike the Federal Supreme Court, does not have broad authority. The decisions of the State Shura Council are only binding on the party who requested it, while the decisions of the Federal Supreme Court are binding on all. The State Shura Council is competent to interpret the laws, based on the State Shura Council Law of 1979, and the Federal Supreme Court has said this in many of its decisions. On the other hand, the Federal Supreme Court is competent to interpret the provisions of the Constitution, therefore each must be given the same authority in its area of competence.

Building on the above, the governorate councils took advantage of the loophole in the law of the State Shura Council which is that the advisory opinion of the Council is only binding on the entity requesting the opinion but does not bind others. Thus, the governorate councils avoided the State Shura Council and went to the Federal Supreme

Court instead. This is in view of the previous opinions of the State Shura Council which stated that the governorate councils do not have the authority to issue laws. The ambiguity of the advisory decisions of the Federal Supreme Court has helps the governorates to continue to issue laws.

The State Shura Council specializes in writing bills before sending them to Parliament. Parliament will be in charge of amending the bills and sending them to the President of the Republic of Iraq to issue the laws. The bills are sent to the President without first returning them to the State Shura Council to re-examine the wording of the bills after amendments are made, for it is the competent authority to unify the legal terminology and legislation in Iraq. All these have led to the loopholes in the LGNIR. Therefore, the gaps in the wording of the LGNIR could have been avoided if the State Shura Council had been given the opportunity to exercise its drafting competence. Even after the law was passed in its flawed form, it would have been possible to reduce the effects of the defective wording during the implementation stage if the State Shura Council had been given the opportunity to exercise its advisory competence.

The function of the State Shura Council is not only confined to providing legal advice, drafting bills and administrative judicial function, but its functions also include filling the gaps in the law, clarifying all ambiguity, unifying legal terminology and preserving the unity of the legislation, as stated by the head of the State Shura Council.

Building on the above, the reasons for the issuance of laws by the governorate councils is the weak performance of the Federal Supreme Court and the loopholes in the wording of the LGNIR, in addition to the limitations of the authorities of the State Shura Council.

The recommendation to amend the Constitution as a solution to the problem of the governorate councils' issuance of laws because the Constitution is ambiguous, is incorrect. The problem is not the ambiguity in the Constitution, but rather the problem lies in the failure of the Federal Supreme Court to clarify the ambiguity. Because, the Constitution has provided that the Federal Supreme Court is competent to interpret the Constitution.[795] And based on the theoretical framework of judicial interpretation, one of the reasons for resorting to interpretation is the ambiguity of the text.[796] Also, the Constitution expressly states that the governorates shall implement the principle of administrative decentralization, as the researcher pointed out earlier.

The ambiguous advisory decisions provided by the Federal Supreme Court is one of the main reasons for the problem of this study; because, according to the authors and the interviews with members of the governorate councils, governorate councils have relied upon the decisions of the Federal Supreme Court and the provisions of the LGNIR to issue laws.

The other important reason for the problem of this study is the limit placed upon the authority of the State Shura Council, whereby the Parliament did not return the amended LGNIR bill to the State Shura Council following its discussion in Parliament. Even with a flawed legal text, the State Shura Council can interpret it and fill the gaps in the law, as the head of the council had stated, if it is granted enough authority to do so.

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795 Article 93 of Iraqi constitution, http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

796 See Theoretical framework, Chapter Two of this study.

Finally, criticizing the governorate councils on the matter of issuing laws should not be understood as an invitation to strengthen the central authority vis-a-vis the governorates and therefore approaching towards centralization. There are two types of decentralization under the Iraqi Constitution. Each governorate has the right to choose either federal or regional administrative decentralization, but when applying decentralization, it must be committed to its elements.

As a result of political and historical reasons, the federal and decentralized administrative systems are stipulated in the current Iraqi Constitution of 2005. The Iraqi Constitution opened the way for the governorates to implement the federal system by virtue of Article 119. Some authors believe that the implementation of the federal system will solve Iraq's problems, but that requires a request from a “one-third of the council members of each governorate intending to form a region” or “one-tenth of the voters in each of the governorates intending to form a region” for a referendum on the creation of a federal region. However, it can be seen that since the issuance of the 2005 Constitution and until today, the federal system in Iraq has not been implemented other than in the governorates of Kurdistan.

Building on the above points, the issuance of laws by the governorate councils is contrary to the principle of administrative decentralization as applied by the governorates (this is the problem statement of this study), and this is contrary to the Constitution, which provides for the procedure of the implementation of the federal system and thus the issuance of laws. Not following these procedures is a violation of the Constitution. On the other hand, issuing laws from governorate councils leads to the public financial obligations, which is a violation of the Constitution. Also, the

issuance of laws means that it is subject to the control of the Federal Supreme Court and this is contrary to the law, as mentioned in Chapter Four, as the State Shura Council is competent in what is issued by the governorate councils.

In order to, application of the federal system and thus conversion of the governorates into federal regions which can issue laws, must the legal procedures provided for in Article 119 of the Iraqi Constitution must be followed, and this is the application for the principles of democracy stipulated in the Iraqi Constitution in its first article. Therefore, the governorates must adhere to the elements of the decentralized administrative system, which does not allow the issuance of laws, as long as the governorates have not been able to achieve the requirements of the application of the federal system according to the Constitution until now. If there are obstacles to the application of Article 119, the governorates must refer to the Federal Supreme Court, hence, the court's performance must also be improved to resolve the legal problems that arise between the governorates and the central authority.

Part of the third research objective was achieved in Chapter Four as the study has fully examined the legal text of the LGNIR and all the issues surrounding it.
Chapter Five of this study selected as an example, France and Egypt about regional administrative decentralization.

The local entities in France are called territorial communities which are municipalities, governorates, and regions, and all these are administrative units. The municipalities are the most important of these communities, followed by the governorates, and then by regions. While in Iraq, it consists of the governorates and these are divided into

districts, then into sub-districts. This is for the territories that do not implement federalism. The most important administrative unit is the governorate that supervises the rest of the administrative units, and the least important is the municipalities which are not mentioned in the current Constitution.

After the French Revolution, the first attempt to apply administrative decentralization failed due to the tendency of the territorial communities to separate from the central authority, where issuance of these communities' legislative decrees was, in fact, the competence of the legislative authority in France. The French National Assembly issued a decree which stated that the term 'decree' can only be used by the legislative authority, and the territorial communities must use the term 'decision'. Therefore, France returned to the administrative centralization system, which was then tightened by Napoleon.

After Napoleon, the French legislature started to gradually grant competence and independence to the territorial communities until 1982 when the legislative authority began to grant full administrative decentralization to territorial communities. This continued until 2004 when a constitutional amendment was presented in 2003 to support reforms in the decentralized administrative system.

After the failure of the first experiment of administrative decentralization in France, the French legislature gradually implemented administrative decentralization to avoid another failure. France was however, not the first to arrive at this result, the Islamic state had reached this result many centuries ago. In the early stages of the Islamic state, the administrative system was centralized and then transformed into a decentralized

system with the expansion of the Islamic state until the period of Harun al-Rashid when the Islamic state administrative system became a decentralized administrative system.

Iraq applies civil law, which it took from France, and at the same time, Islamic law is also an important source of legislation in Iraq. Here clearly lies a contradiction in the Iraqi legal system as well as the legal systems of Islamic countries. The Islamic state has gradually implemented decentralization as has France, therefore, Iraq must benefit from both experiences, but in general, the Iraqi legislator should be more inclined towards its Islamic identity than to the civil law.

The French adopted the principle of indivisibility, which was stated in the French Constitution. The French interpreted it to mean that it is not possible to divide the legislative authority, as it represents the will of the people. France firmly opposed the federal system because it involves the distribution of legislative authority. Perhaps the federal system is inappropriate for France, but it is appropriate for other countries due to several political, economic, historical, and social factors. The federal system is implemented by many countries such as the United States of America, Malaysia and Russia. On the other hand, the Iraqi Constitution has stipulated the possibility of implementing the federal system by the governorates if they wish to do so, but since its issuance in 2005 until now, it has not been applied by any governorate. There were attempts to implement the federal system by some governorates, but they failed.

The French territorial communities issued administrative decisions even when they were granted wide competence in the reforms of the local administration which started

in 1982. On the other hand, the 2003 constitutional amendment explicitly states that the territorial communities can only issue administrative decisions. Because territorial communities implement administrative decentralization, and according to the theoretical framework of decentralization, the territorial communities have the authority to issue administrative decisions only.

The French legislature has acted firmly against the attempts by some municipalities to issue legislative decrees after the French Revolution by issuing a legislative decree that states that the action is unconstitutional and territorial communities can only issue administrative decisions. This approach by the French legislator is applicable because France applies the regional administrative decentralization system, which is a distribution of administrative functions, not legislative authority, according to the decentralization theoretical framework.

The problem which was faced France in the implementation of regional administrative decentralization is the same problem in Iraq. Large authorities were granted to local administrative units after the French Revolution, so, local units understood that they had the authority to issue laws. Therefore, the legislature canceled the decentralized system and re-applied the central system, and then the authorities were gradually granted to the local administrative units. This solution cannot be applied in Iraq because of the current legal situation in Iraq, which has been explained in this study.

In chapter Five also, the administrative decentralization in Egypt was select as example. Egypt is divided into five administrative units governorates, centers, cities, neighborhoods, and villages, and the governorate is the most important administrative unit.

Egypt has applied the decentralized administrative system since 1909 and all subsequent Egyptian constitutions and laws have provided for the decentralized regional administrative system. The theoretical framework agreed upon in Egypt was the decentralized system with strengthening the control of the central authority over the local councils and appoint the governors. The law also grants broad powers to the legislature to regulate the decentralized system. It is noted that there are many amendments to the laws regulating the decentralized system, which is a result of political instability in the country. And under the 2014 Constitution, the central government has the right to control local councils if they exceed their competence or cause harm to the public interest or damage to the interests of other local councils. In other cases, can challenge before the judiciary.

After the 2011 Egyptian revolution, the Egyptian legislative authority wanted to expand the regional administrative decentralization, but it remained within the general framework of the decentralized system applied by its previous constitutions and laws. The Constitution of 2014 expanded the administrative decentralization, but it did not give up the executive authority's control over the local councils. The constitution did not give up the principle of appointing the governor, and it also granted wide powers to the legislature to regulate the administrative decentralization. The constitution also dealt more with the details of the decentralized system than the previous constitutions. While in Iraq the regional administrative decentralization was actually only implemented in 2004. The 2005 Constitution gave wide powers to the governorate councils and prevented the central authority from exercising control over the governorate councils and it has also included many details related to the governorates.

Finally, it was mentioned earlier in this study about the importance of the different kinds of decentralized systems, whether it is a decentralized administrative system or a decentralized political system (federalism), and that the application of either system takes into consideration the political, social, historical, and economic factors of the country. In France, the decentralized system is indispensable, so France has not been able to apply the central system for a long time after Napoleon. Therefore, France has chosen a system that is proportional to its legal philosophy, which is the decentralized administrative system. Egypt has also applied the decentralized regional administrative system since 1909 until now through various systems of government in Egypt. On the other hand, the Iraqi Constitution has left it to the governorates to choose between the decentralized administrative system and the federal system, and most of the governorates have implemented the decentralized administrative system. Hence, the principles of this system must be respected, which does not give the governorates the authority to issue laws.

The fourth research objective has been achieved in this chapter as the researcher has analyses the implementation of administrative decentralization in Iraq by looking at for example from select countries.

6.2 Recommendations

Article 47 of the Iraqi Constitution 2005 stipulates that “The federal powers shall consist of the legislative, executive and judicial powers, and they shall exercise their competencies and tasks on the basis of the principle of separation of powers”. Also, Article 13 stipulates that the constitution is the nominal law of Iraq and is binding on

all without exception. Therefore, the constitution establishes public authorities, and the public authorities must respect the principle of the separation of powers.

The Iraqi Constitution provides for the application of the federal system and regional administrative decentralization system. And Article 121 of the Constitution gives legislative authority to the regions. While, Article 122 grants wide administrative and financial authority to the governorates not organized in a region and which have applied the decentralized administrative system. That is, Article 122 does not grant legislative power to the provinces.

After the issuance of the Law of the Governorates Not Incorporated into a Region in 2008 (LGNIR)[797], some governorates have issued laws, although they are applying administrative decentralization. For example, the Babylon Governorate Council issued The Guards of Night Law in 2011 and the Law on Local Revenues in 2010, the Karbala Governorate Council issued The Service Fee Law in 2010 and the Basra Governorate council issued the Local Public Holidays Law in 2014. Also, the Law to Organize the Erection of Internet Towers of 2016 was issued by the Dhi Qar Governorate Council.[798]

The issuance of the laws by the governorate councils is a violation of the Constitution, which does not give these councils the authority to issue laws. And, it is a breach of the principle of the separation of authorities. It is also a breach of the theoretical framework of decentralization[799] which was examined earlier in this study. These laws

797 The Law of Governorates Not Incorporated into a Region No. 21 of 2008.
798 See problem of the statement of this study.
799 See the theoretical framework of decentralization, Chapter Two of this study.

have led to the imposition of public obligations and the granting of rights on the citizens contrary to the Constitution.

The literature review mentioned that the issuance of the laws by the governorate councils is because of the loopholes in the wording of the LGNIR, as well as the ambiguity and contradictions of the advisory decisions of the Federal Supreme Court, which interpreted Article 115 of the Constitution. And, the literature review mentioned that the governorate councils do not have the authority to issue laws because they apply administrative decentralization.

The literature review has put forward a solution to this problem, namely, amending the constitution to overcome the ambiguity in its texts and then, amending the LGNIR. But this solution is not practical because it is difficult to amend the Iraqi constitution in light of its current political situation.

According to Article 126 of the Iraqi Constitution, it stipulates that the president of the Republic with the Prime Minister together or one-fifth of the Permanent members can submit a request to the Parliament to amend the Constitution. And after the approval by two-thirds of the Permanent members, the draft amendment is presented to the referendum. After the approval of the people, the President approves the amendment. It is difficult to get a two-thirds majority in parliament because Iraq is applying a proportional representation system in parliament.[800] Therefore, the parliament is composed of many parties that are not in political agreement. So, the Constitution has not been amended since its promulgation in 2005.

[800] Article 16 of Election Law No. 16 of 2005. See: http://www.iraqld.iq/pdf/2005/e0054.pdf. Accessed 8 August 2018.

Article 93 of the Iraqi Constitution stipulates that one of the Federal Supreme Court's competence is to interpret the provisions of the Constitution and resolve disputes between the federal government, the states and the governorates. And according to the theoretical framework of judicial interpretation, one of the reasons for resorting to judicial interpretation is the ambiguity of the text.[801] Therefore, when there is a ambiguous text, the parties involved can resort to the judiciary instead of the amendment, especially when the amendment is difficult. Therefore, the constitutional legislator wants to resort to the interpretation of the Constitution when there is ambiguity in its texts. Thus, with regard to this study, the amendment of the Constitution can be replaced by its interpretation.

The literature review focused on the texts and put forward solutions to amend the texts, which were not practical solutions as mentioned above. This study attempted to focus on the performance of the judiciary and the legislature. Because, the main reason for the problem of the study is the performance of the Federal Supreme Court, of which its decisions were ambiguous and contradictory, and this is clear from its decisions, which were mentioned in the third chapter of this study. The literature review did not address the performance of the State Shura Council (Administrative Court), which is a court with long experience,[802] and this court is competent to interpret the laws based on the law of the State Shura Council. Furthermore, the Federal Supreme Court has stated in many of its decisions that the State Shura Council is competent to interpret laws.[803] And according to the theoretical framework of judicial interpretation, the State Shura Council can interpret the provisions of the law. Therefore, the State Shura

801 See theoretical framework of the judicial interpretation.
802 See The history of the State Shura Council, Chapter Four of this study.
803 See The advisory opinions of the State Shura Council, Chapter Four of this study.

Council is competent to interpret the LGNIR. The decisions of the State Shura Council, which were mentioned in Chapter Four, agreed that the LGNIR does not give the governorates the authority to issue laws. But the problem is that, the decisions of this council are binding on the party requesting the advisory opinion only. Unlike the decisions of the Supreme Federal Court which are binding for all. On the other hand, the legislature does not cooperate with the State Shura Council, since the Council is competent to evaluate the wording of the bills before sending them to Parliament. However, after discussing the bills and making amendments, they are not returned to the State Shura Council to re-examine the wording. Therefore, there are many gaps in the wording of the laws, including the LGNIR. This was stated by the head of the State Shura Council, his deputy, and the chancellor, as well as the members of parliament with whom the researcher met.

Based on the results of this study, the recommendations focused on the performance of the public authorities (the judiciary and the legislature). The researcher of this study thinks that a strong and professional constitutional judiciary will contribute to solving the problem of this study. And, the existence of a judiciary with enough powers to perform its function will also contribute to solving the problem of this study, such as the State Shura Council, which is a professional and highly experienced judiciary but does not, at this time, have enough authority to do its function. The legislature must also cooperate with the judiciary, as in the wording of the laws. Also, laws should be passed to improve the functioning of the judiciary. The good performance of the judiciary can contribute to solving the problem of this study and most other legal problems because the judiciary is the authority that is being resorted to in order to solve legal problems.

The judiciary is also the guarantee for the harmonization among the central government and the states and the governorates as demonstrated by the issues mentioned in Chapter Two of this study. This will lead to the achievement of balance and justice in the exercise of competence. Thus, achieving the stability in the country and the decentralization goals, as mentioned earlier in this study.[804]

Therefore, the recommendations of this study are:

6.2.1 Improving the Performance of the Federal Supreme Court

Building on the above, the researcher recommends improving the performance of the Federal Supreme Court to address the problem of this study. This can be achieved in two ways. Firstly is through the implementation of Article 92 Paragraph 2 of the current Iraqi Constitution which stipulates that "The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives". The researcher contends that the presence of experts in Islamic jurisprudence and legal scholars will improve the performance of the Federal Supreme Court. Especially since the Iraqi constitution stipulates that Islamic law is a major source of legislation.[805] Therefore, that the application of the provisions of the Islamic law will contribute to achieving the justice in the relationship between the central government and the states and governorates. Secondly, to improve the performance of the Federal Supreme Court, its judges must be sent to countries that have expertise in constitutional justice, such as Malaysia, a Muslim country that has applied the federal

[804] See 6.2 Analyze the impact of harmonizing and achieve it in Iraq, Chapter Two of this study.
[805] Article 2 of Iraqi Constitution 2005.

system since 1957. The Malaysian Federal Court has been established since 1957.[806] So, this court has long experience in its field and the judges of the Iraqi Supreme Federal Court can benefit from its experience. Also, they can benefit from the experience of the US Supreme Court.

6.2.2 Expand the Authorities of the State Shura Council

Regarding the State Shura Council, the area of work of the Federal Supreme Court is the Constitution while that of the State Shura Council is the law. Therefore, it is not fair that the decisions of the Federal Supreme Court in interpreting the texts of the Constitution are binding on all, whereas the decisions of the State Shura Council in interpreting the texts of the law are only binding on the entity that requested the interpretation. If the texts of the Constitution are binding on all, the texts of the law are also binding on all.

In this regard, this study recommends amending the Law of the State Shura Council No. 65 of 1979 to make the advisory decisions of the State Shura Council binding on all, in order to make it obligatory for all the governorate councils to abide by the decisions of the State Shura Council. This recommendation will help to solve the problem of this study.

6.2.3 Filling of the Gaps in the Legal System by the Legislative Authority

This study recommends that the Iraqi legislative authority fill the gaps in the legal system with regards to regional administrative decentralization. To achieve this, it

[806] Article 122 Malaysian Constitution 1957. http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf. Accessed 18/3/2018.

must firstly, apply the second paragraph of Article 92 of the Iraqi Constitution, which states that the Federal Supreme Court shall be composed of experts in Islamic jurisprudence and legal scholars as well as judges. This will help to improve the performance of the Federal Supreme Court. Therefore, the failure to implement this constitutional provision since 2005 until now is a violation of the constitution by Parliament. Secondly, the authority of the State Shura Council should be extended by making its decisions binding on all, i.e., giving them a similar effect as the decisions of the Federal Supreme Court, by amending the Law of the State Shura Council No. 65 of 1979. Thirdly, Articles 2 and 7 of the LGNIR should be amended, and the terms 'legislative authority' and 'local legislations' relating to the governorate councils should be removed. The governorate councils are local administrative authorities; therefore, they issue administrative decisions. Parliament must cooperate with the State Shura Council in the legal wording of the laws in order to avoid defective wording which leads to problems in the interpretation and application of the legal texts. The researcher is of the opinion that improving the performance of the judicature and granting it sufficient powers to do its function is more important than amending the LGNIR because a professional judiciary which has enough authority can overcome the flawed texts. This would also lead to solutions for most of the legal problems in the legal system; whereas, the continued poor performance of the court, and restricting its authorities would only lead to the emergence of further legal problems, such as the problem in this study.

The judiciary is the standard of application of the law in the country. It can be said that a country which has a strong and professional judiciary is a country that applies the law, while a country with a weak judiciary is a country that does not apply the law

even with existing constitutional and legal texts that stipulate the rights and freedoms of the people.

The importance of the judiciary in comparison with other public authorities is that the judiciary is less affected by politics, and that the judiciary applies the law on everyone in the country, whether they be public authorities or individuals.

6.3 The Contributions of This Study

The contributions of this study can be classified into two aspects, i.e., theoretical and practical contributions. The theoretical contributions are intended for the academic domain and the body of knowledge, whereas the practical contribution is to the legislative and judicial authorities.

6.3.1 The Theoretical Contributions

This study attempted to identify the obstacles that stand in the way of solving the problem of issuing laws by the governorate councils that implement the regional administrative decentralization system, which has not been resolved since the implementation of the LGNIR of 2008 until now. The literature review has put forward the suggestions to solve the problem, but they are theoretical and not practical, which are the amendment of the Iraqi Constitution and LGNIR.

This study attempted to find out the reasons for the problem in order to find a practical solution to it. This study found that the performance of the Federal Court and the restriction of the powers of the State Shura Council are two of the main reasons for the problem of the study, in addition to the loopholes of the LGNIR, as explained previously. Therefore, this study has tried to open a new angle or perspective for the next studies, which is looking at the problem of issuing laws by the governorate councils, by examining the performance of the judicial and legislative authorities. This

study has presented solutions that the researcher believes are practical to solve the problem.

6.3.2 Practical Contributions

In practice, this study is highly relevant to the following categories:

Firstly, Members of Parliament: Members of Parliament can benefit from this study and its findings to focus on filling the gaps in the legal system with regards to the implementation of regional administrative decentralization by strengthening the Federal Supreme Court and the State Shura Council by issuing laws that help the judicial authority to do its functions satisfactorily.

Secondly, the Judges of the Federal Supreme Court: The study can help the judges of the Federal Supreme Court to seek to improve their performance in the interpretation of the texts of the constitution as well as to the request from the legislature to apply Article 92 of the Constitution with regards to the formation of the court.

Third, Chancellors of the State Shura Council: This study can be useful for the chancellors of the State Shura Council to ask the legislative authority to amend the State Council Law of 1979 regarding the expansion of the authority of the Council and make its advisory decisions binding for all, the same as that of the Federal Supreme Court.

BIBLIOGRAPHY

A letter issued by the Muthanna Governorate Council on 7/12/2014.

Abd, Ibtisam Mohammad. "Federal and Problematic Relationship Between the Center and the Region in Iraq." *Journal of Political Sciences* no. 51 (2016): 149-81.

Abdel Rahman, Wissam Sabar. "The Competence of Management in Normal Circumstances: Comparative Study." Master's Thesis, Faculty of Law, University of Baghdad, 1994.

Abdul Hamid Musallam Al Majali, "The Confederation as a Political Concept," Al-Rai Newspaper, January 30, 2013, Accessed August 29, 2017, http://alrai.com/article/565601.html.

Abdul Nasser, Salhi. "Regional Groups between Independence and Dependence." Master's thesis, University of Algeria, 2009-2010**.**

Abdul Rahman, Wissam Saber. *Legislative Competence of Administration, Under Normal Circumstances: 'Comparative Study'*. diss., Faculty of Law, University of Baghdad, 1994.

Abdul-Janabi, Mohammed Ibrahim. "The Hisbah System in the Islamic State." *Tikrit University Journal of Science* 3, no. 20 (2013).

Abdullah, Abdul Ghani Bassiouni. *General Theory in Administrative Law*. Alexandria: Knowledge Facility in Alexandria, 2003.

Abdulsattar, Husham Hikmat, and Ahmed Adnan Kadhim. "The Intergovernmental Relations in Federative Iraq an (Assessment Vision to the Relationship between Baghdad and Erbil)." *Journal of International Studies* no. 61 (2015): 123-41.

Abomasa, Khaldoun, and Ann O'M. Bowman. "Special-Purpose Authorities: A Welcomed Alien to Decentralization in Lebanon?" International Review of Administrative Sciences (2015).

Abou El Fadl, Khaled. "Injustice in God's Name: The Corruption of Modern Islam." Religion and Ethics. September 24, 2012. Accessed July 22, 2017. http://www.abc.net.au/religion/articles/2012/09/24/3596547.htm.

Administrative Corruption. (2007). [Online] Egypt: Transparency and Integrity Committee. Available at: http://mpmar.gov.eg/ar-eg/mop/unity-Government/Upload_Main_Entity_Db_AssetMedia_Filename_5ac8f3ebdb057e6c081c76019c4c4cf2.pdf [Accessed 26 Jul. 2017].

Ahmed, Abdul Jabbar. "Federalism and Decentralization in Iraq", *Friedrich Ebert Stiftung,* (2013).

Ahmed, Raed Naji. "The Extent of the Competence of the Governorates Not Incorporated into a Region to Impose Taxes and Fees (Specialized Legal Study

in Legal System in Iraq).” *Journal of College of Law for Legal and Political Sciences* 4 (2015): 370-427.

Al - Anbuge, Taha Hamid. “Iraq Between Administrative Decentralization and Federalism.” *Strategic Studies* (2010).

Al - Attiyah, Essam. *Public International Law*. 7th ed. Cairo: Al- Aatek for the Book Industry, 2008.

Al - Fatawi, Ahmed Kazem. “Governorate Council in the Governorates That Are Not Incorporated in a Region Under Law No. 21 of 2008.” Master's Thesis, College of Political, Administrative and Diplomatic Sciences, 2010.

Al - Shalqani, Omar. *The Boom and Collapse of the Legal Elite in Egypt 1905-2005*. Cairo: Dar Al Shorouk, 2013.

Al Ameri, Mohammed bin Ali Al Ameri. “Administrative Regulation in Islam.” 2013. Accessed August 10, 2016. http://sst5.com/readArticle.aspx?ArtID=1259&SecID=77.

Al Badri, Jawad Kazem. “The Foundations of Wealth Distribution in Federal Systems.” Faculty of Business Administration, University of Babylon, Iraq. May 25, 2011. Accessed August 28, 2017. http://www.uobabylon.edu.iq/uobColeges/service_showarticle.aspx?fid=9&pubid=1015.

Al Batawi, Tharwat. “Abdulrazik Al-Senhoury.” Message of Islam. December 3, 2012. http://main.islammessage.com/newspage.aspx?id=15951 (accessed February 23, 2018).

Al Fadl, Munther. “When Did the 2005 Iraqi Constitution Become in Force?” Al Nour Foundation for Culture and Information. April 26, 2010. Accessed September 4, 2017. http://www.alnoor.se/article.asp?id=75502.

Al Fadl, Munther. “When the Iraqi Constitution Came into Force?” Middle east, October 42, 2010, Archive.aawsat.com/leader.asp?article=566692&issueno=11470#. WRAmP-WGPIU. Accessed 8/5/2017.

Al Fadl, Munther. *Origins of French and British Law*. Erbil: Dar Aaras for Printing and Publishing, 2004.

Al Hassani, Zuhair. “Administrative Decentralization in the Legal System of Governorates Not Incorporated into a Region.” Essays and Research. 2013. Accessed May 7, 2017. http://www.hdf-iq.org/ar/2010-12-01-14-01-29/342-2013-01-10-13-11-41.html.

Al- Helo, Majid Ragheb. *Administrative Law*. Alexandria: Dar University Publications, 1987.

Al Janabi, Taher Mohammed. *Regional Administrative Decentralization, a Two-Edged Weapon*. Beirut: Dar Al-Senhoury, 2017.

Al- kotob, Al- kotob Mohammed. *Management System in Islam - a Comparative Study of Contemporary Systems*. Cairo: Dar Arab Thought, 1978.

Al Nuaimi, Hazem Abdul Hamid. "The Future of the Kurdistan State of Iraq: a Vision Within the Current Data and Variables." *AL-Mostansiriyah Journal for Arab and International Studies* no. 31 (2010): 21-30.

Al Sarjani, Ragheb. "Al-hisbah in the Islamic System. History and Importance." Civilization. May 16, 2010. https://islamstory.com/ar/artical/23507/%D8%A7%D9%84%D8%AD%D8%B3%D8%A8%D8%A9-%D9%81%D9%8A-%D8%A7%D9%84%D9%86%D8%B8%D8%A7%D9%85-%D8%A7%D9%84%D8%A5%D8%B3%D9%84%D8%A7%D9%85%D9%8A-%D8%AA%D8%A7%D8%B1%D9%8A%D8%AE%D9%87%D8%A7-%D9%88%D8%A (accessed March 31, 2018).

Al- Shawi, Munther. *The Constitutional Law*. 2nd ed. Cairo: Al- Aatek for the Book Industry, 2007.

Al Zoghbi, Khaled Samara. *Administrative Decision between Theory and Practice "Comparative Study."* 2nd ed. Amman: Dar Al - Thaqafa Library for Publishing and Distribution, 1999.

Aladdin, Isra. "Federalism in the Iraqi Constitution Reality and Future After the Us Withdrawal," *Risalat al-huquq Journal* (2012).

Alaloush, Saad Abdul Jabbar. "Looks in the Subject of Judicial Observation on the Constitutionality of Laws in Iraq and Its Future in the Protection of Public Rights and Freedoms." *Journal of the College of law /Al-Nahrain University* 14, no. 8 (2005): 1-20.

Al-Amin, Fadil, and Sally Farhat. "How Does the Us Federal System Work with States and Local Governments?" Accessed August 19, 2018. http://www.siironline.org/alabwab/maqalat&mohaderat(12)/599.htm.

Al-Assaf, Abdullah Bin Hussein Assaf. "Central Relationship and Decentralization With Job Performance." *Naif Arab Academy for Security Sciences*, 2003.

Al-Bawi, Sabah. "Influences of Ambiguity of Constitutional Provisions on the Administrative System of Iraq Special Issue: Rule of Law Reform in Iraq and Afghanistan." *University of Pennsylvania Journal of Law and Social Change* 14, no. 4 (2011).

Al-Bayati, Abdul Jabbar Sattar. "The Administration Organization, in the Era Of, (The Orthodox Kaliphs), Omar Bin Alkhatab (May God Be Pleased with Him) as an Exemplary." *Journal of Literature Ink* 1, no. 4 (2012).

Al-Bishri, Tarek. *Democracy and the Regime of 23 July 1952-1970*. N.p.: Arab Research Foundation, 1987.

Algerian "Regional Groups" Law in 2012 http://www.elmouwatin.dz/IMG/pdf/code_des_collectivites_territoriales._ar_.pdf. Accessed 14/6/2017.

Ali, Abdul Ghafoor Kareem and, Khudair Haji Rasool. "The Federalism..... Legal and Objective General Notes," *Journal of Kirkuk University Humanity Studies* 4, no. 1 (2009).

Ali, Muhammad Kurd. *Islamic Administration at the Height of the Arabs*. Cairo: Printing house Egypt, 1934.

Allawi, Maher Saleh. *Principles of Administrative Law, Comparative Study*. Baghdad: Dar books for printing and publishing, 1996.

Al-Mawardi, Abou AL Hassan. *Al - Ahkam As - Sultaniyyah, the Law of Islamic Governance*. London: Ta-Ha Publishers Ltd., n.d.

Alsumaria News. "Economy and Business." Alsumaria News. May 21, 2016. Accessed September 5, 2017. http://www.alsumaria.tv/mobile/news/168992/%D8%A7%D9%84%D9%86%D9%81%D8%B7-%D9%8A%D8%B4%D9%83%D9%84-%D8%A3%D9%83%D8%AB%D8%B1-%D9%85%D9%86-99-%D9%85%D9%86-%D8%B5%D8%A7%D8%AF%D8%B1%D8%A7%D8%AA-%D8%A7%D9%84%D8%B9%D8%B1%D8%A7%D9%82-%D9.

Al-Taie, Mujahid Hashim. "Iraqi State Between the Federal and Decentralized" Center of the Edrak for Studies and Consultation, March 2016, Accessed December 4, 2016, http://idraksy.net/wp-content/uploads/2016/03/Iraqi-between-federalism-and-decentralization.pdf.

Altter, Abdul Rahman Nasser Hashem. "Al-Hisbah in the Abbasid Era and its Role in Preserving Economic Life and Public Life." Master's Thesis, Faculty of Arts, Islamic University - Gaza, 2015.

Al-Zubaidi, Mahmood. "Administrative Competence of the Governorate Councils, Conflict and Overlap in the Light of the Law of Governorates Not Incorporated into a Region No. 21 of 2008." *Al-Hiqouq Journal* 3, no. 10 (2010).

Amal Shlash, Wafaa Al-Mahdawi, Hasan Lateef and Kazem. Support to Decentralization and Local Government to Enhance Service Provision in Iraq. United Nations ESCWA Shukr, Zuhair. *General Theory of Constitutional Judiciary - Part One*. Beirut: Dar Bilal, 2014.

American Constitution Society. “Theories of Constitutional Interpretation.” Exploring Constitutional Conflicts. Accessed August 25, 2018. http://law2.umkc.edu/faculty/projects/ftrials/conlaw/interp.html.

Ashoor, Amil Jabbar. “The Administrative Decentralization and the Principles of the Management of the Relationship Between the Central Government and Governorate Councils of Iraq.” *The Arab Gulf* 44, no. 3 (2016): 111.

Ateeka, Koichi. “Administrative Decentralization in States Almgarbah: Comparative Analysis” (Master's Thesis, College of Law and Political Science, 2010-2011).

Australian constitution. https://www.legislation.gov.au/Details/C2004C00469/Download. Accessed 2/9/2018.

Aweys, Abdul Halim. “The System of Hisbah in Islam.” Alukah Network. July 10, 2017. http://www.alukah.net/web/aweys/0/121272/ (accessed March 31, 2018).

Baker ET AL. v. Carr ET AL. No. 6. 1962, Supreme Court of United States. https://scholar.google.com/scholar_case?case=6066081450900314197&q=Baker+v.+Carr+(1962)&hl=en&as_sdt=2006. Accessed 26/8/2018.

Blume, Lorenz and, Stefan Voigt. "Federalism and Decentralization—a Critical Survey of Frequently Used Indicators." *Constitutional Political Economy* 22, no. 3 (2011).

Bonnal, Jean. “A History of Decentralization.” General Information. Accessed July 7, 2016. http://www.ciesin.columbia.edu/decentralization/English/General/history_fao.html.

Bowers v. Hardwick, No. 85-140. 1986, Supreme Court of United States. https://scholar.google.com/scholar_case?case=14901730125647575103&q=Bowers+v.+Hardwick,+1986&hl=en&as_sdt=2006. Accessed 27/8/2018.

Bricki, Nouria, and Judith Green. “A Guide to Using Qualitative Research Methodology.” Medecins Sans Frontieres. February, 2007. Accessed June 20, 2016.

Brinkerhoff, Derick W., and Ronald W. Johnson. “Decentralized Local Governance in Fragile States: Learning from Iraq.” *SAGE- International Review of Administrative Sciences* 75, no. 4 (2009).

Brown v. Board of Education, No. 1. 1954, Supreme Court of United States. https://scholar.google.com/scholar_case?case=12120372216939101759&q=Brown+v.+Board+of+Education+(1954)+&hl=en&as_sdt=2006. Accessed 27/8/2018.

Brunet-Jailly, Emmanuel. “France Between Decentralization and Multilevel Governance: Central Municipal Relations in France.” *McGill University Press*, 2007.

Burgess, Michael. *Comparative Federalism Theory and Practice*. USA and Canada: Routledge, 2006.

Citizenship Law No. 26 of 2006 http://wiki.dorar-aliraq.net/iraqilaws/law/20761.html Accessed 13/12/2016

Cole, Alistair. “Decentralization in France: Central Steering, Capacity Building and Identity Construction.” *French Politics* 4, no. 1 (2006): 31-57.

Constitution of The Arab Republic of Egypt 2014. http://www.sis.gov.eg/Newvr/Dustor-en001.pdf. Accessed 12/5/2017.

Copus, Colin. Codifying the Relationship Between Central and Local Government. De Montfort University, 2010.

Coy v. Lowa, No. 86-6757. 1988, Supreme Court of United States. https://scholar.google.com/scholar_case?case=10684251272085891361&q=Coy+v.+Iowa+(1988),+&hl=en&as_sdt=2006. Accessed 25/8/2018.

Crabtree B, Cohen D. “Qualitative Research Guidelines Project.” Robert Wood Johnson Foundation. 2006. Accessed June 26, 2016. http://www.qualres.org/HomeSemi-3629.html.

Cravens, Lamar and Derick W. Brinkerhoff. *Provincial Governance in Iraq: Councils, Contestation, and Capacity Building*. Research Triangle Institute, 2013.

Cravens, Lamar. Analyzing Decentralization in Iraq. Amman, Jordan: UN Habitat, 2011.

Creswell, John w. *Research Design*. 4th ed. London: SAGE Publications, Inc., 2014.

Day, Jack G. “Why Judges Must Make Law.” *Case Western Reserve Law Review* 26, no. 3 (1976).

Decentralization Law No. 49 of 2015 of Jordan. https://www.iec.jo/sites/default/files/1451818790-pm-1.pdf. Accessed 15/7/2017.

Decision No. 102/2011, on 31/10/2011. Decisions and Advisory Opinions of the State Shura Council 2011

Decision No. 111/2006 on 26 December 2006. Decisions and Fatwas of the State Shura Council for 2008. 230

Decision No. 124/2015, on 24/11/2015. Decisions and Advisory Opinions of the State Shura Council 2015.

Decision No. 39/2008 on 11 March 2008. Decisions and Fatwas of the State Shura Council for 2008. 114

Decision No. 40/2011, on 20/4/2011. Decisions and Advisory Opinions of the State Shura Council 2011.

Decision No. 54/2007 on 19 July 2007. Decisions and Fatwas of the State Shura Council for 2007. 162

Decision No. 73/2014, on 25/6/2014. Decisions and Advisory Opinions of the State Shura Council 2011.

Decision No. 99/2009, on 6/12/2009. Decisions and Advisory Opinions of the State Shura Council 2009.

Decision of the Council of the Muthanna Governorate Council, According to the Council's Letter No. 2/14/4927 Dated 7/12/2014 (Unpublished).

Decision of the Federal Supreme Court 13 / T / 2007 on 31/7/2007. http://www.iraqja.iq/krarat/2/2007/13_fed_2007.pdf. Accessed 20/5/2017.

Decision of the State Shura Council No. 101 of 2006. http://www.iraq-lg-law.org/ar/content/%D9%82%D8%B1%D8%A7%D8%B1-%D9%85%D8%AC%D9%84%D8%B3-%D8%B4%D9%88%D8%B1%D9%89-%D8%A7%D9%84%D8%AF%D9%88%D9%84%D8%A9-%D8%B1%D9%82%D9%85-101-%D9%84%D8%B3%D9%86%D8%A9-2006-%D8%AD%D9%88%D9%84-%D8%AA%D8%B9%D8%A8%D9%8A%D8%B1-%D8%A7%D9%84%D8%AA%D8%B4%D8%B1%D9%8A%D8%B9%D8%A7%D8%AA-%D8%A7%D9%84%D9%88%D8%A7%D8%B1%D8%AF-%D9%81%D9%8A-%D9%82%D8%A7%D9%86%D9%88%D9%86-%D9%85%D8%AC%D9%84%D8%B3-%D8%B4%D9%88%D8%B1%D9%89-%D8%A7%D9%84%D8%AF%D9%88%D9%84%D8%A9. Accessed 23/6/2017.

Decisions and Advisory Opinions of the State Shura Council 2014.

Decisions of the Federal Supreme Court on 26/5/2009, 7/9/2009, 3/12/2009.

Deeb, Kamal. *Summary of the History of Iraq*. Beirut: Dar Al-Farabi, 2013.

Dhillon, Guru. “A Legal Analysis on Money Laundering in the Football Industries of the United States of America, England and Malaysia.” PhD diss., The Ghazali Shafie Graduate School of Government, 2014.

Dougherty, Keith L. *Collective Action Under the Articles of Confederation*. New York: Cambridge University Press, 2001.

E.C.L., "The Indivisibility of the French Republic as a Political Theory and Constitutional Doctrine," *UK Journals and Journals* 11, no. 3 (2015).

Edwards, Rosalind, and Janet Holland. *What Is Qualitative Interviewing?* British: Bloomsbury Academic; Annotated Edition (2013-10-24), 2013.

Election Law No. 16 of 2005. See: http://www.iraqld.iq/pdf/2005/e0054.pdf. Accessed 8 August 2018.

Egyptian "Local Government Law" of 1979, https://www.egypt.gov.eg/arabic/laws/download/newlaws/%D9%82%D8%B1%D8%A7%D8%B1%20%D8%B1%D8%A6%D9%8A%D8%B3%20%D8%AC%D9%85%D9%87%D9%88%D8%B1%D9%8A%D8%A9%20%D9%85%D8%B5%D8%B1%20%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A%D8%A9%20%D8%A8%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D8%B1%D9%82%D9%85%2043%20%D9%84%D8%B3%D9%86%D8%A9%201979.pdf

Egyptian Constitution of 1923. http://Constitutionnet.org/sites/default/files/1923_-_egyptian_constitution_english_1.pdf. Accessed 24/2/2018.

Egyptian Constitution of 1956. http://www.tibanews.com/index.php/egyptian-Constitution/90-1956-constitution?tmpl=component&print=1&page=. Accessed 26/2/2018.

Egyptian Constitution of 1971. http://www.wipo.int/wipolex/en/text.jsp?file_id=189854. Accessed 26/ 2/2018.

Egyptian Constitution of 2012. http://www.wipo.int/wipolex/ar/text.jsp?file_id=297102. Accessed 28/2/2018.

Egyptian Constitution of 2014. http://www.constitutionnet.org/sites/default/files/dustor-en001.pdf. Accessed 28/2/2018.

Egyptian State Council Law No.47 of 1972. https://www.egypt.gov.eg/arabic/laws/download/newlaws/%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D9%85%D8%AC%D9%84%D8%B3%20%D8%A7%D9%84%D8%AF%D9%88%D9%84%D8%A9.pdf Accessed 7 December 2016.

El Hag, Soraya M. "A Review of Decentralization and Local Development Initiatives in Egypt Between the Years of 1994 and 2011." Master's Thesis, School of Global Affairs and Public Policy, American University in Cairo, 2014.

Elowitz, Larry. *Government in the United States of America*. Cairo: The Egyptian Society for the Dissemination of Universal Culture and Knowledge, 1996.

Faguet, Jean-Paul. “Decentralization and Governance,” the Economic Organization and Public Policy Programme, 2011, Accessed November 8, 2016, https://core.ac.uk/download/pdf/6821109.pdf.

Falleti, Tulia G. “Sequential Theory of Decentralization and Its Effects On the Intergovernmental Balance of Power: Latin American Cases in a Comparative Perspective.” Working Paper, Pennsylvania, Philadelphia, July 2004.

Falleti, Tulia G. “A Sequential Theory of Decentralization: Latin American Cases in Comparative Perspective.” *American Political Science Association* 99, no. 3 (2005): 327-64.

Federal Court, Putrajaya, Zi Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Interveners), 28 September 2015.

Federal Supreme Court http://www.iraqja.iq/krarat/1/2016/6_fed_2016.pdf. Accessed 10/12/2016.

Federal Supreme Court http://www.iraqja.iq/krarat/2/2016/4_fed_2016.pdf. Accessed 10 /12/2016.

Federal Supreme Court https://www.iraqja.iq/krarat/1/2010/11_fed_2010.pdf. Accessed 3 /11/2017.

Federal Supreme Court Law No. 30 of 2005. http://www.iraqld.iq/LoadLawBook.aspx?SC=280220068162081. Accessed 29/6/2017.

Federal Supreme Court, 7 / Federal / 2012. ttps://www.iraqfsc.iq/krarat/2/2012/7.pdf. Accessed 26/8/2018.

Federal Supreme Court, “The Provisions and Decisions of the Federal Supreme Court for 2012,” *Journal of Legislation and Judiciary* no. 5 (2013).

Federal Supreme Court, 25 / Federal / 2008. http://www.iraqja.iq/krarat/2/2008/25_fed_2008+25.pdf. Accessed 22/5/2017.

Federal Supreme Court, 44 / Federal / 2010. http://www.iraqja.iq/krarat/1/2010/44_fed_2010.pdf. Accessed 27/6/2017.

Federal Supreme Court, 52 / Federal / 2009. http://www.iraqja.iq/krarat/2/2009/52_fed_2009.pdf. Accessed 22/5/2017.

Federal Supreme Court, 54 / Federal / media / 2016. https://iraqja.iq/krarat/1/2016/54_fed_2016.pdf. Accessed 4/1/2018.

Federal Supreme Court, 54 / Federal / media / 2016. https://iraqja.iq/krarat/1/2016/54_fed_2016.pdf. Accessed 4/1/2018.

Federal Supreme Court, 6 / Federal / 2009, http://www.iraqja.iq/krarat/2/2009/6_fed_2009.pdf. Accessed 22/5/2017.

Federal Supreme Court, 64/ Federal / 2014. http://www.iraqja.iq/krarat/1/2014/64_fed_2014.pdf. Accessed 23/5/2017.

Federal Supreme Court. "The Provisions and Decisions of the Federal Supreme Court for 2012." *Journal of Legislation and Judiciary* no. 5 (2013).

Federal Supreme Court. 16 / Federal / 2008 on 21/4/2008. http://www.iraqja.iq/krarat/2/2008/16_fed_2008+31.pdf. Accessed 21/5/2017.

Federal Supreme Court. http://www.iraqja.iq/krarat/1/2006/15_fed_2006.pdf. Accessed 10/12/2016.

Federal Supreme Court. https://www.iraqja.iq/krarat/1/2010/11_fed_2010.pdf. Accessed 3 /11/2017.

Federal Supreme Court/ 29 / Federal / 2012.

Fisman, Raymond, and Roberta Gatti. "Decentralization and Corruption: Evidence Across Countries." *Journal of Public Economics* 83 (2002): 325-45.

Freille, Sebastian. Haque, M Emranul and Kneller, Richard. "Federalism, Decentralisation and Corruption." *SSRN*, (2007).

French Constitution of 1958. http://www.wipo.int/edocs/lexdocs/laws/en/fr/fr076en.pdf. Accessed 12/5/2017.

Fudel, George, and Pierre Delphoeve. *Administrative Law, the Second Part*. Beirut: University Foundation for Studies, Publishing, and Distribution, 2001.

Gazette of Babel Dated 31/1/2010.

Gazette of Babel. No.1 on 1/10/2009.

Gazette of Babel. No.3 of 31/1/2010.

Gazette of Dhi Qar, No. 10, of 2016.

Gazette of Iraq No. 4010 in 23/11/2015.

Gazette of Iraq No. 4383 in 12/10/2015.

Ghidan, Ismail Sasaa. "Regional Administrative Decentralization in Iraq - a Study in the Overlap of Competence and Control." *Risalat AL-huquq Journal* (2012).

Gibbons v. Ogden, 22 US 1 – American Supreme Court 1824.

Gill, P., K. Stewart, E. Treasure, and B. Chadwick. "Methods of Data Collection in Qualitative Research: Interviews and Focus Groups." British Dental Journal 204

(2008): 291-95. Accessed June 26, 2016. http://www.nature.com/bdj/journal/v204/n6/full/bdj.2008.192.html.

Golove, David. "The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority." *Stanford Law Review* 55, no. 5 (2003): 1697-48.

Governorates Administration Law of 1927. http://109.224.24.124/pdf/1927/z0358.pdf. Accessed 1/5/2017.

Governorates Administration Law of 1945. http://109.224.24.124/pdf/1945/m0855.pdf. Accessed 1/5/2017.

Governorates Law in 1969. http://109.224.24.124/pdf/1969/m5695.pdf. Accessed 4/5/2017.

Gupta, Dilip B., and Sujit G. Metre. "Decentralization and Delegation of Authority at Nagpur Municipal Corporation (NMC) Nagpur." *International Journal of Management (IJM)* 6, no. 3 (2015).

Hadi, Mitham Rabee, and Ali Kareem Radi Al Araji. "Foreign Direct Investment and Its Role in the Development and Development of the Iraqi Oil Sector." *The Magazine of Economics and Administration* no. 91 (2012): 37-59.

Hammad, Mohammed. "The Constitution of 1923... The first constitutions of Egyptian liberalism." Civilizations... Al Ahram Location for Arts, Literature, and Heritage. February 24, 2018. http://hadarat.ahram.org.eg/Articles/%D8%A3%D9%81%D9%83%D8%A7%D8%B1/%D8%AF%D8%B3%D8%AA%D9%88%D8%B1-1923-%D8%A3%D9%88%D9%84-%D8%AF%D8%B3%D8%A7%D8%AA%D9%8A%D8%B1-%D8%A7%D9%84%D9%84%D9%8A%D8%A8%D8%B1%D8%A7%D9%84%D9%8A%D8%A9-%D8%A7%D9 (accessed February 24, 2018).

Hankla, Charles R. "When Is Fiscal Decentralization Good for Governance?" *Oxford University Press* 39, no. 4 (2009).

Hassan, Yamama mohamed. "The Impact of Legislative Wording on the Application of the Laws (the Study of the Law of Governorates Not Incorporated into a Region No. 21 of 2008)." *Al-Hiqouq Journal* 4, no. 18 (2012).

Hatem, Faris Abdul Raheem. "Administrative Decentralization in Iraq under Governorate Law Is Not Organized in a Region No. 21 of 2008." *Journal of Kufa Legal and Political Science* 1, no. 2 (2008).

Hatem, Faris Abdul Raheem. "The Limits of Administrative Judiciary Control Over Decisions That Have the Force of Law: Comparative Study." Master's Thesis, University of Babylon, Faculty of Law, 2003.

Head of the State Shura Council, *Decisions and Fatwa of the State Shura Council*. Baghdad: Alans Printing & Publishing Co, 2014.

Head of the State Shura Council, *Decisions of the State Shura Council Issued in the Light of the Law of Governorates not Incorporated into a Region No. 21 of 2008.* Baghdad: State Shura Council, 2010.

High Court of Australia, Austin v The Commonwealth of Australia [2003] HCA 3 (5 February 2003). http://eresources.hcourt.gov.au/downloadPdf/2003/HCA/3. Accessed 25/12/2017.

High Court of Australia, Cole v. Whitfield, (1988) 165 CLR 360, 2 May 1988. https://ipfs.io/ipfs/QmXoypizjW3WknFiJnKLwHCnL72vedxjQkDDP1mXWo6uco/wiki/Cole_v_Whitfield.html. Accessed 19/12/2017.

High Court of Justice Queen's Bench Division Administrative Court Divisional Court 11 December 2017, Case No: CO/2448/2016. High Court of Justice Queen's Bench Division Administrative Court Divisional Court11 December 2017, Case No: CO/2448/2016. http://login.westlaw.com.my.eserv.uum.edu.my/maf/wlmy/app/document?src=doc&linktype=ref&&context=8&crum. Accessed 27/12/2017.

Hossain, Awal. "Administrative Decentralization: A Framework for Discussion and Its Practices in Bangladesh." *Department of Public Administration University of Rajshahi* (2004). http://malaysianlawreview.com/sample/MLRA_2015_5_690.pdf. Accessed 20/12/2017.

Humaidy, Ali Hady, Ismaeel Saesaa Gheedan, and Alaa Al-Enizzy. "The Legal Regulation of the Fiscal Decentralization in a Federal State (A Comparative Study with Iraqi Law)," *AL- Mouhakiq Al-Hilly Journal for legal and political science* 5, no. 2 (2013).

Hussein, Ayad Yassin. "The Confederation and Its Application in Iraq." *Faculty of Law and Political Science / Salahuddin University* 21, no. 3 (2017): 232-57.

Indicator Transparency International organization (CPI). http://www.icgg.org/corruption.cpi_2008_data.html. Accessed 26/7/2017.

Iraqi Constitution of 1925. http://iraqja.iq/view.86/. Accessed 29/4/2017.

Iraqi Constitution of 1964. http://wiki.dorar-aliraq.net/iraqilaws/law/2967.html. Accessed 3/5/2017.

Iraqi Constitution of 1968. http://www.iraqja.iq/view.82/. Accessed 4/5/2017.

Iraqi Constitution of 1970. http://www.iraqja.iq/view.81/. Accessed 7/6/2017.

Iraqi Constitution of 2004. http://www.refworld.org/docid/45263d612.html. Accessed 7/5/2017.

Iraqi Constitution of 2005: http://mofamission.gov.iq/en/Malaysia. Accessed 13 November 2016.

Iraqi Gazette No. 4070, on 31/3/2008.

Ismail, Mohammed Ahmed. "Principles of Administrative Organization in Islam." Arab Forum for Human Resource Management. October 14, 2012. Accessed August 10, 2016. http://www.hrdiscussion.com/hr56307.html

J. M., Cohen, and Peterson S. B. *Administrative Decentralization: A New Framework for Improved Governance, Accountability, and Performance*. Cambridge: Harvard Institute for International Development, Harvard University, 1997.

Jeffery, Charlie. "Devolution and Local Government." *Oxford Journals* 36, no. 1 (2006): 57-73.

Kamal, Abdul Hamid. "The Conservative Between Appointment and Election." Al Ahram. January 22, 2017. http://www.ahram.org.eg/NewsQ/575329.aspx (accessed February 25, 2018).

Kanaan, Nawaf. *Administrative Law*. House of Culture for Publishing and Distribution, 2006.

Kansas v. Colorado, 206 US 46 - Supreme Court 1907.

Katz v. the United States. No. 35. 1967, Supreme Court of United States. https://scholar.google.com/scholar_case?case=9210492700696416594&q=Katz+v.+U.S.+(1967)+&hl=en&as_sdt=2006. Accessed 25/8/2018.

Kazem, Areej Talib. "Terms of Reference for Local Authorities in Iraqi Legislation in Light of the Current Constitution and the Law of Governorates Not Organized in a Region / No. 21 of 2008." *Journal of Anbar University for Law and Political Sciences* 1, no. 3 (2011).

Kesrouani, Maroon, et al. *Administrative Decentralization in Lebanon*. Beirut: Lebanese Center for Studies, 1996.

Khaled, Hamid Hanoun. *Principles of Constitutional Law and Development of the Political System in Iraq*. 2nd ed. Baghdad: Noor Al Ain Printing Office, 2010.

Khan, Shamsul, and Sherko Kirmanj. "Engineering Confederalism for Iraq." *National Identities*17, no. 4 (2015): 371-85.

Law No. 22 of 1909, Egyptian Gazette, No. 104, 18 September 1909.

Law Number 36 of 1959. http://109.224.24.124/pdf/1959/t0036.pdf. Accessed 2/5/2017.

Law of Diwan of Legal Blogging, NO.49 OF 1933. http://www.iraqld.iq/LoadLawBook.aspx?SC=210920054657799. Accessed 28/6/2017.

Law of Elections of Governorates, Districts, and Sub-districts No. 46 of 2008. http://www.iraq-lg-law.org/ar/content/%D9%82%D8%A7%D9%86%D9%88%D9%86-%D8%A7%D9%86%D8%AA%D8%AE%D8%A7%D8%A8-%D9%85%D8%AC%D8%A7%D9%84%D8%B3-%D8%A7%D9%84%D9%85%D8%AD%D8%A7%D9%81%D8%B8%D8%A7%D8%AA-%D9%88%D8%A7%D9%84%D8%A3%D9%82%D8%B6%D9%8A%D8%A9-%D9%88%D8%A7%D9%84%D9%86%D9%88%D8%A7%D8%AD%D9%8A. Accessed 27/2/2018.

Law of Governorates Not Incorporated into a Region No. 21 of 2008. http://iraq-lg-law.org/en/webfm_send/765. Accessed 19 November 2016.

Law of the Public Entity to Guarantee the Rights of the States and Governorates Not Incorporated into a State No. 26 in 2016. See the Iraqi Gazette No. 4416 in 19/9/2016. http://moj.gov.iq/uploaded/4416.pdf. Accessed 29/9/2016.

Law of the State Shura Council (Amended), No. 65 of 1979. http://www.iraqld.iq/LoadLawBook.aspx?page=1&SC=120120069553036. Accessed 19/6/2017.

Law of the Supreme Judicial Council. No. 45 of 2017. http://ar.parliament.iq/2017/01/12/%D9%82%D8%A7%D9%86%D9%88%D9%86-%D9%85%D8%AC%D9%80%D9%84%D9%80%D8%B3-%D8%A7%D9%84%D9%82%D8%B6%D9%80%D8%A7%D8%A1-%D8%A7%D9%84%D8%A3%D8%B9%D9%80%D9%84%D9%80%D9%89/. Accessed 29/6/2017.

Law, John. “How Can We Define Federalism.” Perspectives on Federalism 5, no. 3 (2013).

Litvack, Jennie, and Jessica Seddon. *Decentralization Briefing Notes*. Washington: World Bank Institute Washington, 2002.

Lloyd, Gordon. “Introduction to the Federalist by Gordon Lloyd.” Ratification of the Constitution. Accessed August 19, 2018. http://teachingamericanhistory.org/ratification/federalist/.

Lochner v. New York No. 292. 1905, Supreme Court of United States. https://scholar.google.com/scholar_case?case=10760991087928264675&q=Lochner+v+New+York+(1905),+&hl=en&as_sdt=2006. Accessed 27/8/2018.

Local Administration Law No. 107 of 2011 of Syria. https://groups.google.com/forum/#!msg/syrianlaw/4hAOhhylkIA/q6AyW-ZklQcJ. Accessed 15/7/2017

Local Administration Law No. 43 of 1979. https://www.egypt.gov.eg/arabic/laws/download/newlaws/%D9%82%D8%B1%D8%A7%D8%B1%20%D8%B1%D8%A6%D9%8A%D8%B3%20%D8%AC%D9%85%D9%87%D9%88%D8%B1%D9%8A%D8%A9%20%D9%85%D8%B5%D8%B1%20%D8%A7%D9%84%D8%B9%D8%B1%D8%A8%D9%8A%D8%A9%20%D8%A8%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88%D9%86%20%D8%B1%D9%82%D9%85%2043%20%D9%84%D8%B3%D9%86%D8%A9%201979.pdf. Accessed 27/2/2018.

Mack, Natasha, Cynthia Woodsong, Kathleen M. Macqueen, Greg Guest, and Emily Namey. Qualitative Research Methods: A Data Collector's Field Guide. USA: Family Health International, 2005.

Mack, Natasha. et al., *Qualitative Research Methods: A Data Collector's Field Guide*. USA: Family Health International, 2005.

Mahdi, Ghazi Faisal, and Adnan Ajel Obaid. *Administrative Judiciary*. 2nd ed. Baghdad: Al - Nabras Printing, Publishing & Distribution Est, 2013.

Mahdi, Ghazi Faisal. "Systems Federal and Administrative Decentralization in the Constitution of the Republic of Iraq, 2005." *Journal of Legislation and Judiciary* (2009).

Mahjoub, Mohammed. *Constitutional Law and the Political System in Lebanon and the Most Important Constitutional and Political Systems in the World*. 4th ed. Beirut: Elhalabi Alhgogy Publications, 2002.

Mahmoud, Meryhan Majdi. "Hisbah in the Era of the Al Rashideen Caliphs." Almuhtasib. 2015. http://almohtasb.com/main/Articles/18680 (accessed March 31, 2018).

Malaysian Constitution of 1957, http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf. Accessed 18/3/2018.

Member of the Palestinian Legislative Council Azmi Shuaib before the Council on 18/2/2004. https://www.aman-palestine.org/data/.../b9a0d0a7e8ddc106320b0311d3191493.doc. Accessed 26/7/2017.

Ministry of Justice - the State Shura Council. Decisions and Advisory Opinions of the State Shura Council for 2007. Baghdad: State Shura Council, 2008.

Mistretta v. United States, 488 US 361 Supreme Court 1989. 370. https://scholar.google.com/scholar_case?case=10855858816503634838&q=488+U.S.+361+(1989)+MISTRETTA+v.+UNITED+STATES&hl=en&as_sdt=2006. Accessed 26/12/2016.

Mohamed, Idris Hassan and Fawaz Khalaf Zaher. "Control of Decentralized Administrative Entities in Iraq, an Analytical Study," *Tikrit University Journal of Legal and Political Sciences* 4, no. 14 (2012).

Mohamed, Idris Hassan. "The Principle of Separation of Powers and Its Role in the Protection of Public Rights and Freedoms." *Journal of Tikrit University for the Humanities* 15, no. 4 (2008): 243-64.

Molera, Clara. *Decentralization and Local Governance*. 4th ed. London: Centre for Financial and Management Studies, SOAS University of London, 2016.

Morrill et al. Investigating the Social World. publication place: ITTE, 2000.

Municipal Administration Law No. 165 of 1964 of Iraq. http://www.iraqld.iq/LoadLawBook.aspx?SC=120120018123689. Accessed 15/7/2017.

Myers, Michael, D. "Qualitative Research in Information Systems," Association for information system, 1997, Accessed June 19, 2016, http://www.qual.auckland.ac.nz/.

Nahili, Saad. *Administrative Law, General Principles, Part 1*. Damascus: Al-Baath University, Faculty of Law, 2012.

Neama, Ahmed Obeis. "The Authorities, Judicial and Legislative, According to the Iraqi Constitution", *Kufa studies Center Journal* 1, no. 7 (2008).

Nendy, Mohammed Hmaoh. *Federal and Democratic Iraq - a Political and Legal Study*. Erbil: Dar Aras for Printing and Publishing, 2002.

Neven, Ine. "Decentralization." National Forest Programme in the European Context, Wageningen, The Netherland, August 26,2011.

Nheely, Said. *Administrative Law, General Principles*. Syria: AL Baath University, 2012.

Obaid, Adnan Awlad, and Mayson Taha Hussein. "Interpretative Competence for the Constitutional Judiciary." *AL- Mouhakiq Al-Hilly Journal for Legal and Political Science* 8, no. 4 (2016).

Official Gazette of the Babel Governorate Council, Number 6, 2011.

Omar, Bujada. *The Competence of the Administrative Judicial in Algeria*. diss., University Mouloud Mammeri Tizi-Ouzou, 2011.

Opdenakker, Raymond. "Advantages and Disadvantages of Four Interview Techniques in Qualitative Research." FQS. 2006. Accessed June 26, 2016. http://www.qualitative- research.net/index. php/fqs/article/view/175/391.

Order 100: “Transfer of laws, regulations, orders and directives issued by the Coalition Provisional Authority” of 2004. http://govinfo.library.unt.edu/cpa-iraq/regulations/20040628_CPAORD_100_Transition_of_Laws__Regulations__Orders__and_Directives.pdfAccessed 11/6/2017.

Order 71: “Local Governmental Powers” of 2004. http://www.iraq-lg-law.org/ar/webfm_send/940. Accessed 8/5/2017.

Organization No. 1, “Coalition Provisional Authority” of 2003. http://govinfo.library.unt.edu/cpa-iraq/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf. Accessed on 11/6/2017.

Othman, Mohamed Raafat. *“Principles of Management Thought in Islam.” In Administration in Islam*. Egypt: Islamic Institute for Research and Training, 1990.

Othman, Qais Abdul Sattar. “The Scientific Importance of the Administrative Judiciary.” *Journal of the College of law /Al-Nahrain University* 16, no. 9 (2006).

Parkinson, and Drislane. Qualitative Research Defining and Designing. n.p.: publisher, 2011.

Pastorel, Jean Paul. “The Regional Cohort and General Competence Condition.” *Journal of Public Law* (2007).

Plessy v. Ferguson. No. 210. 1896, Supreme Court of United States. https://scholar.google.com/scholar_case?case=16038751515555215717&q=Plessy+v.+Ferguson+(1896)+&hl=en&as_sdt=2006. Accessed 25/8/ 2018.

Posner, Judge Richard A. “Theories of Constitutional Interpretation.” exploring constitutional conflicts. Accessed August 25, 2018. http://law2.umkc.edu/faculty/projects/ftrials/conlaw/interp.html.

Provincials Administration Law of 1945. http://109.224.24.124/pdf/1945/m0855.pdf. Accessed 1/5/2017.

Quashie Attica, “Administrative Decentralization in the Maghreb - a Comparative Analysis” (master's thesis, Political Science, 2010-2011).

R, Andrews. et al., “Centralization, Organizational Strategy, and Public Service Performance,” *Journal of Public Administration Research and Theory* 19, no. 1 (2009): 4.

R. v Devon CC, ex p. Baker [1995] 1 All ER 73, 85. Mentioned Kalimba Charles Aguma, “The Principle of Ultra Vires and the Local Authorities’ Decisions in England” (master's thesis, School of Advanced Study- University of London, 2011-2012), 16.

Rajab, Mohammed Reza. “Local administration system in Egypt.” Partners in Development. http://www.pidegypt.org/download/Local-election/dr%20reda%20ragab.pdf (accessed February 25, 2018).

Rajasekar, S., P. Philominathan, and V. Chinnathambi. “Research Methodology.” October 14, 2013. Accessed September 24, 2016. https://arxiv.org/pdf/physics/0601009.

Rashwan, Nasser Abdul Mawla. *Integration Between Local People 's and Executive Councils in the Face of Environmental Problems*. Cairo: Dar Al-Elm and El-Eman for Publishing and Distribution, n.d.

Rasol, kther Haji, and Abdul Ghafoor Karim. “Federalism... General Legal and Objective Observations.” *University of Kirkuk Journal* 1, no. 4 (2009).

Reid, Brad. “Fourteen Ways to Interpret the Constitution.” Huffpost. October 31, 2016. https://www.huffingtonpost.com/brad-reid/fourteen-ways-to-interpre_b_12735744.html.

Reynolds v. Sims, 377 US 533 Supreme Court 1964. 548. https://scholar.google.com/scholar_case?case=3707795010433249200&q=REYNOLDS,+JUDGE,+ET+AL.+v.+SIMS+ET+AL.&hl=en&as_sdt=2006. Accessed 26/12/2016.

Roe ET AL. v Wade, district attorney of Dallas Country No. 70-18. 1973, Supreme Court of United States. https://scholar.google.com/scholar_case?case=12334123945835207673&q=Roe+v.+Wade+(1973)+&hl=en&as_sdt=2006. Accessed 26/8/2018.

Rogers v. Bellei, 401 US 815 Supreme Court. 827 1971https://scholar.google.com/scholar_case?case=3117430109405641226&q=Rogers+v.+Bellei,+401+US+815+Supreme+Court+1971&hl=en&as_sdt=2006. Accessed 27/12/2016.

Royal Courts of Justice, Strand, London, WC2A 2LL, Date: 15/09/2017, Case No: CO/690/2017. http://login.westlaw.com.my.eserv.uum.edu.my/maf/wlmy/app/document?&suppsrguid=i0ad832f1000001608d3b8f3599cce7a1&docguid=I90AD55909C8D11E785D7E24257F39151&hitguid=IB0DC1E709C7211E78E5DC6F3C6A4E3D3&rank=5&spos=5&epos=5&td=141&crumb-action=append&context=9&resolvein=true. Accessed 25/12/2017.

Rules of procedure of the Council of Representatives. http://parliament.iq/wp-content/uploads/2017/01/%D8%A7%D9%84%D9%86%D8%B8%D8%A7%D9%85-%D8%A7%D9%84%D8%AF%D8%A7%D8%AE%D9%84%D9%8A-%D9%84%D9%85%D8%AC%D9%84%D8%B3-%D8%A7%D9%84%D9%86%D9%88%D8%A7%D8%A8-%D8%A7%D9%84%D8%B9%D8%B1%D8%A7%D9%82%D9%8A-.pdf. Accessed 27/6/2017.

Saeed, Hadeel Kadhim and Essam Majeed Al-Allak. "The Relationship of the Central Government with Local Governments in the Light of the Centralized and Decentralized Administration - Field Research in the Baghdad Governorate Council.," *Journal of Economic and Administrative Sciences* 21, no. 85 (2015).

Saito, Fumihiko. *Foundations for Local Governance Decentralization in Comparative Perspective*. Ryukoku University: Physica-Verlag Heidelberg, 2008.

Saunders, Cheryl. "Options for Decentralizing Power: Federalism to Decentralization", accessed November 4, 2016, http://comparativeconstitutionsproject.org/files/federalism.pdf:1.

Schneider, Aaron. "Decentralization: Conceptualization and Measurement." *Studies in Comparative International Development* 38, no. 3 (2003): 32-56.

Sefer, Samer Hamid. "General Theory of the Federation." *Journal of Babylon University* 24, no. 2 (2016): 1033-53.

Sesah, Esmel. "Regional Administrative Decentralization in Iraq - a Study in Overlapping Jurisdiction and Control" *Risalat al-huquq Journal* (2012).

Sharif, Maitham Handal, and Sabih Wuhawh Hussein. "Means of Interpreting the Texts of the Constitution, a Comparative Study." *AL- Mouhakiq Al-Hilly Journal for legal and political science* 4, no. 9 (2017).

Smith, Lawrence D. *Reform and Decentralization of Agricultural Services: A Policy Framework.* Food & Agriculture Org., 2001.

State Shura Council Law No. 65 of 1979. www.moj.gov.iq/uploaded/4283.pdf. Accessed 22 November 2016.

State Shura Council, *Decisions and Advisory Opinions of the State Shura Council for 2007.* Baghdad: State Shura Council, 2008.

State Shura Council, *Decisions and Advisory Opinions of the State Shura Council for 2011*. Baghdad: State Shura Council, 2012.

State Shura Council, *Decisions and Advisory Opinions of the State Shura Council for 2008*. Baghdad: State Shura Council, 2009.

State Shura Council, *Decisions and Advisory Opinions of the State Shura Council for 2014.* Baghdad: State Shura Council.

Taleb, Mohammed Jabbar. "Constitutional Competence of the Governorates Not Incorporated into Region in the Iraqi Constitution of 2005." *Risalat Al-huquq Journal* no. 2 (2015): 210-35.

Temporary Egyptian Constitution of 1964, Gazette No. 69 on 24 March 1964.

The Electoral Commission. http://www.electoralcommission.org.uk/i-am-a/electoral-administrator/national-assembly-for-wales-elections. Accessed 25/12/2016.

The official site of the Prime Minister's Office. “Countries Within a Country.” The national archive. January 10, 2003. http://webarchive.nationalarchives.gov.uk/20080909013512/http://www.number10.gov.uk/Page823.

The Supreme Court of the United States. “The Supreme Court and Constitutional Interpretation.” Book Wizard. Accessed August 25, 2018. https://www.scholastic.com/teachers/articles/teaching-content/supreme-court-and-constitutional-interpretation/.

The world bank group. “Administrative Decentralization.” Decentralization and Subnational Regional Economics. 2001. Accessed August 20, 2016. http://www1.worldbank.org/publicsector/decentralization/admin.htm.

Treisman, Daniel, "Defining and Measuring Decentralization: A Global Perspective." *Unpublished manuscript,* (2002).

Tunisian constitution of 2014. https://www.constituteproject.org/constitution/Tunisia_2014.pdf. Accessed 12/5/2017.

United States v. Lopez, No. 93-1260. United States Supreme Court. https://scholar.google.com/scholar_case?case=18310045251039502778&q=U.S.+v.+Lopez+(1995&hl=en&as_sdt=2006. Accessed 26/8/2018.

United States Supreme Court, United State v. Lopez, 514 U.S. 549 (1995).

United States Supreme Court. Printz, Sheriff/Coroner, Ravalli County, Montana v. United States. 521 U.S. 898 (1997).

West's Encyclopedia of American Law. “Confederation.” Confederalism legal definition of Confederalism. 2008. Accessed August 28, 2017. http://legal-dictionary.thefreedictionary.com/Confederalism.

Weale, Albert. *Brexit and Beyond*. N.p.: UCL Press., 2018.

Wikipedia. “Economy of Iraq.” Accessed September 5, 2017. https://ar.wikipedia.org/wiki/%D8%A7%D9%82%D8%AA%D8%B5%D8%A7%D8%AF_%D8%A7%D9%84%D8%B9%D8%B1%D8%A7%D9%82.

Wikipedia. “United Kingdom.” Accessed September 4, 2018. https://en.wikipedia.org/wiki/United_Kingdom#cite_note-page823-29.

William Marbury v. James Madison, Secretary of State of the United States of America. 1803, Supreme Court of United States.

https://scholar.google.com/scholar_case?case=9834052745083343188&q=Marbury+v.+Madison+(1803)+&hl=en&as_sdt=2006. Accessed 25/8/2018.

Young, James T. "Administrative Centralization and Decentralization in France." *Sage Publications, American Academy of Political and Social Science* 11 (1898).

Youngstown Sheet & Tube Co. v. Sawyer, No. 744. 1952, Supreme Court of United States. https://scholar.google.com/scholar_case?case=14460863599772421355&q=Youngstown+Sheet+%26+Tube+Co.+v.+Sawyer+(1952)&hl=en&as_sdt=2006. Accessed 26/8/2018.

Yulian, Elizabeth Linda. "Decentralization, Deconcentration and Devolution: What Do They Mean?" Paper presented at the Interlaken Workshop on Decentralization, Switzerland, 2004.

Ziauddin, Zuhair. "Parliamentary Elections and Governorate Councils." Iraqi Communist Party. December 18, 2016. Accessed May 5, 2017. http://www.iraqicp.com/index.php/sections/platform/52138-2016-12-18-20-16-17?tmpl=component&print=1&page=.

APPENDICES

APPENDIX (A) Interview Questions

Questions for the Representative Council members

1- Is there ambiguity in the wording of the Iraqi constitution and The Law of Governorates Not Incorporated into a Region with regard to the decentralized administrative system?

2 - Are there loopholes in The Law of Governorates Not Incorporated into a Region?

3- How is the wording of the law before the legislation?

4 - Do the governorates have the authority of Issuing laws?

Questions for the chancellor of the State Shura Council

1 - Do the governorates have the authority of Issuing laws?

2 - Does the Constitution grant legislative authority to the governorate councils?

3 - Does the Law of Governorates Not Incorporated into a Region grant legislative authority to the governorate councils?

4- Is the administrative judicial can control the decisions of the governorate councils?

5 - Are the opinions of the Federal Supreme Court about the authority's issuing law by the governorate councils is consistent or not?

Questions for the members of the governorate councils and the heads of the legal departments in the governorate councils:

1- Is there ambiguity in the wording of the Iraqi constitution and The Law of Governorates Not Incorporated into a Region with regard to the decentralized administrative system?

2 - Are there loopholes in The Law of Governorates Not Incorporated into a Region?

3 - What is the system applied by the governorate councils?

4 - Do the governorates have the authority of Issuing laws?

Questions for the Lecturers:

1- Is there ambiguity in the wording of the Iraqi constitution and The Law of Governorates Not Incorporated into a Region with regard to the decentralized administrative system?

2 - Are there loopholes in The Law of Governorates Not Incorporated into a Region compatible with the Constitution with regard to administrative decentralization.

4 - Does the Law of Governorates Not Incorporated into a Region is implementing the regional administrative decentralization or the federalism?

5 - Do the governorates have the authority of Issuing laws?

APPENDIX (B) List of Elite Interviews

NAME	AREA OF EXPERTISE	DEPARTMENT	DATE
The members of the Council of Representatives			
Jabbar Abdul Khaliq Abadi	Member of the Council of Representative	The Council of Representative	February 13, 2017
Sadiq al Mahnah (Mahnah)	Member of the Council of Representative	The Council of Representative	February 17, 2017
The chancellor of the State Shura Council			
Abdul Latif Nayef	The State Shura Council	The deputy head of the State Shura Council	March 1, 2017
Mazen Lilo	The State Shura Council	duin the State Shura Council	March 1, 2017
The members of the Governorates			
Hakem Muslim Al- Yasiri	Muthanna Governorate Council	The head of the Governorate Council	March 20, 2017
Ahmed El Marzouk	Muthanna Governorate Council	The head of the legal committee	March 20, 2017
Harith Lahmod	Muthanna Governorate Council	Member of the Governorate Council	March 20, 2017
Hamid Naeem	Dhi Qar Governorate Council	The head of the Governorate Council	March 28,2017
Dia Ahmed	Dhi Qar Governorate Council	The member of the Dhi Qar Governorate Council	March 28,2017
Heads of the legal department of the Governorate Councils			
Saad Abdul Wahid	Babylon Governorate Council.	The head of the legal department in the Governorate.	April 6, 2017
Naqaa Nassif	Dhi Qar Governorate Council.	the head of the legal department in the Governorate	March 28, 2017
Lecturers at universities			
Sadiq Mohammed Ali	Lecturers at a faculty of law and head of the legal department at the University	University of Babylon	February15, 2017
Nabeel Althabhawi	Lecturers at a faculty of law	University of Kufa	Abril 15, 2017