Analyzing Decentralization in Iraq

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Abstract: The Iraqi Constitution of 2005 states that the regions and provinces shall be 'decentralized.' Its conception of decentralization is far more nuanced, however, than that assertion implies, entailing issues of jurisdiction and a hierarchy of the laws. Following a brief review of this more complicated view of decentralization, the paper offers a 'process map' for resolving issues of decentralization in what remains fundamentally a ministerial system.

The Iraqi System of Government

Constitutionally, Iraq's system of government is parliamentary. Its 'government' therefore is a collection of national ministries, led by a Prime Minister. Those ministries are presently responsible for all government services, delivered in administrative units defined as regions, governorates, districts and sub-districts or in the special case of Baghdad, the Amanat. Each of these levels of governments is comprised of difference governmental bodies with differing authority. It is the failure to understand these differences, and the absence of a way of analyzing them that is slowing Iraq's progress towards achieving the promise of decentralization in its Constitution of 2005 and its *Law of Governorates not Incorporated into a Region*, aka Law 21 of 2008, as amended by Law 15 of 2010.

National, Regional and Provincial Government

The Iraqi system of government described by the Iraqi Constitution is parliamentary or ministerial; it is not presidential. This means that 1) the executive branch is lead by a Prime Minister, who forms 'the government' by choosing ministers with the consent of parliament, and that 2) the Prime Minister is himself selected from the national parliament, rather than through direct elections in which both MPs and the premier are chosen by voters, Article 76, *First*. The 'government' in a parliamentary system is therefore two steps removed from 'the people'.

Law 21 describes a system for selecting governors that is almost identical; and Article 1 of that document declares Iraq to be democratic and federal, but Iraq is federal with regard to the power and authority of regional government, and unitary with regard to the governorates not incorporated in regions. Article 117 recognizes the Kurdish Regional Government (KRG) as autonomous and therefore entitled to have all of the hallmarks of a government: its own constitution, its own parliament and its own ministries. Its relationship to the central government in Baghdad is federal in nature, and as befits federal relationships is defined constitutionally. For instance, other than a few exclusive powers retained by the central government in Article 110 (like national security and foreign policy), the KRG is expected to share policy making authority with Baghdad with respect to water, education and health, but enjoys decentralized decision making with respect to all other public services.

In contrast, the relationship of the provinces not incorporated in a region to the central government is unitary. Although Article 115 reserves powers to the provinces, nowhere does the constitution equate a Provincial Council to 'provincial government.' Indeed, unlike either the central government or the KRG, no province has its own constitution or its own ministries or even directorates and departments. Instead, a province is, in the words of the constitution, an administrative unit of the central government, and as such is governed by law, as stated in Article 122.

While leaving the details to a separate election law, Law 21 specifies that the governor, like the Prime Minister, is to be elected indirectly. Elections to the governorate council are 'at large,' meaning that candidates do not run to represent a geographical constituency but to represent the interests of the entire population of the province.

As the law suggests, perhaps the principal responsibility of a governorate council is to select and then monitor a governor, but as that governor is elected by and can be removed by the council, he is accountable to them, rather than to a less-well-defined (as well as more numerous) 'people.' So far identical to the indirect election of Prime Minister by a parliament, the election of the governor by a governorate council comes with one opportunity that election of a Prime Minister does not.

Article 26, *Second* of Law 21 provides that a governor may be chosen from outside the membership of the council. In contrast, the Prime Minister is chosen from the membership of parliament, having been elected as an MP before being elected by other MPs to form a government. In practice, Prime Ministers have been the de facto leaders of the party that won the most number of seats in the last national election (Allawi, Ja'afari, Maliki's first term) or, the leader of a coalition of several parties, whose combined strength gives them a majority of the seats in parliament (Maliki's second term). Article 76, *First* of the Constitution leaves open either possibility in obliging the President of the Republic to choose as Prime Minister the leader of the "largest bloc" in parliament, whether that bloc consists of a single or several parties.

With regard to governorates, most governors were elected because they led either the party with the most seats on their governorate council, or a coalition that controlled the most seats. Of the 14 governors chosen in the summer of 2009, twelve were themselves first-elected council members, before being elected governor, which suggests that party identity is a necessary attribute of an effective governor. It is useful to note that neither of the governors chosen from outside of their councils served a full term. Each resigned.

Although governors are chosen by the same criteria as the Prime Minister, the analogy to a parliamentary system ends there. Article 76, *Second* of the Constitution requires the Prime Minister to form a 'government' by selecting a cabinet of ministers acceptable to the parliament within 30 days of being confirmed in office. In stark contrast, the governor does not form a 'government' at the provincial level. Unlike the Prime Minister who chooses the Minister of Health, for instance, the governor does not choose the Director of the Department of Health in his province. All provincial department heads are instead appointed by their ministers. So, in spite of the fact that the governor holds the rank of a deputy minister, according to Article 24 of Law 21, and outranks department heads, and in spite of any residual power associated with the office from before the American invasion, the governor still does not lead a 'provincial government' the way the Prime Minister leads the national 'government.'

Since a governor does not lead a provincial government, a Provincial Council is not the same as a provincial government. The Constitution's many references to provinces

(governorates) may create the impression that councils are governments. In particular, Article 114, listing powers to be shared between the national, regional and provincial governments, and Article 115, mentioning powers reserved to provincial governments are often interpreted that way. But Article 122 states categorically that governance of the provinces shall be determined by law. And the law in question is not a single item of legislation – namely Law 21 which had not even been passed at the time of the Constitution's ratification, , but of many items. This recognition is critical to understanding the opportunities for decentralization in Iraq, because of the distinction it suggests between provincial 'government' and 'governance' in the provinces.

Provincial 'government' is not merely the provincial council or governor but rather it consists of a number of governmental entities at the provincial level – appointed as well as elected – each of them regulated by their own relevant 'law,' differing in their subject matter jurisdiction while sharing the same territorial jurisdiction.

Jurisdiction

Jurisdiction, or government power, can be understood to refer to either *territorial* or *subject matter*.. Territorial jurisdiction is the power that a governing body has over a discrete geographical area. Subject matter jurisdiction, on the other hand, is the power of a governing body over a particular responsibility of government or over another governmental department. The Constitution plainly gives to the national government, in Article 122, power over the territories that are designated as provinces and are not otherwise incorporated into a region. The national government likewise enjoys jurisdiction over the provinces incorporated into the Kurdish Regional Government, but that territorial jurisdiction is limited.

The exclusive jurisdiction of the central government includes foreign affairs, defense, currency, weights and measures, citizenship and residency, the mail, the general and investment budgets, water resources and the census – all explicitly declared exclusive in the paragraphs of Article 110. Other authorities, including health, education and basic services such as water, waste water and garbage collection are under the control of the regional government. That is, the KRG enjoys subject matter jurisdiction over these basic functions of government. The central government might control the conditions for citizenship or residency but the regional government controls the conditions of those citizens' or residents' quality of life, at least on the territory of the provinces incorporated into the KRG. In very stark contrast, neither the Constitution nor Law 21 gives to governorate councils any comparable subject matter jurisdiction.

This distinction between territorial and subject matter jurisdiction is critical to understanding the relationship of the elected bodies at the provincial level and the appointed ones. And because the central government creates those relationships in law, it is critical to understanding the subordination of provincial bodies to central ones, which explains the qualification throughout Law 21 that provincial councils are not allowed to do anything that violates either the constitution or other federal law.

A Hierarchy of Laws

Article 7, *Third* of Law 21 enjoins a governorate council against taking any action that contravenes the Constitution or other national law. The enforcement of this limitation is given both to the national parliament and the governor. In Article 2, *Second*, the national parliament (or Council of Representatives) is given an oversight role, and by amendment that role has been strengthened to prevent governorate councils from violating the Constitution and other national law. And the governor, though obligated by Article 31, *Second* to enforce the decisions of his council is also obliged to object to any action of the council that he deems violative of the Constitution, applicable law or central government policy in Article 31, *Eleventh*. If the council disputes his judgment, it can appeal to the Supreme Court for a resolution as provided for in Article 31, *Eleventh*, 3.

Although the primacy of the Constitution and national law might be presumed in any legal system, this expression of a hierarchy among the laws in Iraq has been the source of some discussion. In Article 13, *First* the Constitution declares itself to be: "the preeminent and supreme law in Iraq" and *Second*: [n]o law that contradicts this Constitution shall be enacted." If that settles the primacy of the Constitution in the Iraqi hierarchy of laws, it does not, for some establish any priority between national and provincial law. Article 114 of the Constitution has been read broadly to mean that the powers enumerated there are shared by the central and provincial governments, and Article 115 has been repeatedly cited as an excuse for the disregard of central government rules.

In the first place, these interpretations of Articles 114 and 115 notwithstanding, Article 122 states that provinces shall be granted their authorities and shall be regulated by law. That grant of authorities, coming from the central government refutes in practice whatever inherent authority a province might have, as suggested by Article 115: although Law 21 is specifically the Law of Governorates, it is not the only central government law binding on the provinces. In addition to legislation issued by the national parliament, opinions of the Supreme Court, opinions of the Council of Ministers, decrees by the Prime Minister, all have the force of law and are therefore binding on (and superior to) decisions, opinions or legislation of governorate councils.

In the second place, proponents of a broad reading of Article 115, erroneously conclude that a provincial council is a provincial government. In fact, the council is one government body among many with shared territorial jurisdiction but separate subject matter jurisdiction. The distinction is a critical one because provincial councils, at the present time, bear no responsibility for any public service. Instead, separate departments do, and all of the departments of central government ministries share the territorial jurisdiction of the governorate council. They differ only in the subject matter they have jurisdiction over. That subject matter jurisdiction is given to the departments by law, in the form of ministerial regulation, just as the authorities of the council are

given to it by Law 21. The subject matter over which they can exercise jurisdiction differs even though the territory where they each exercise their separate jurisdiction is the same, and Law 21 is careful to remind the councils not to tread on the jurisdiction of the ministries by monitoring their departments, as "offices under federal jurisdiction" in Article 7 Sixth. For the subject matter jurisdiction of the councils to be changed to include that of a department, a change in national law would therefore be required. It could not be done on the basis of an asserted 'reserved power' from Article 115 of the Constitution.

Dispute Resolution Forums

Although the relationships between these bodies are defined by law (understood broadly), there are currently no Iraqi institutions of government empowered to clarify these relationships, remove these inconsistencies or resolve these contradictions. There is a nominal presence, but a practical absence of institutions that can focus the interests of the provinces or resolve disputes between the various government bodies at the provincial level, the 'upper house' of parliament has never been formed, the Minister of State for Provincial Affairs has no rulemaking authority; and neither the Federal Supreme Court nor the Shura Council are authorized by their statutes of jurisdiction to hear cases from provincial councils.

Legislative Branch

Note that Article 65 of the Iraqi Constitution calls for the formation of a second chamber of the national legislature. Ratified in 2005, that constitution has been ignored in numerous particulars, but by ignoring this article, calling for an 'upper house,' successive governments have denied the voice of the provinces in national decisions. Also, although the 'lower house' of parliament, the Council of Representatives has a standing Committee on Regions & Governorates and has recently begun to open constituency outreach offices, neither the committee nor the outreach offices are empowered to resolve conflicts between departments and provincial councils.

Executive Branch

No single executive branch government body can hear or resolve issues from the provinces. For example in all the other Arab countries in the region, there is a Minister for Local Government who has jurisdiction over provincial councils (or their equivalent) and who has the ability to make rules or regulations that determine how those councils work and how they interact with other government counterparts at the provincial level. In Iraq, in contrast, the Minister of State for Provincial Affairs lacks that authority. In any other parliamentary system, Iraq's Ministers of State would be regarded as ministers 'without portfolio' because of their absence of staff and rule making authority.

The High Commission for Coordination Among the Provinces (HCCP), an executive, the High Commission for Coordination Among the Provinces (HCCP), called for by Article 45

of Law 21 seems nominally authorized to resolve disputes as part of its charge to coordinate the provinces,, yet to date, the Commission only met only once in 2009 and two more times since and has yet to form a secretariat or establish any independence from the Prime Minister, who chairs it. Thus, there is no executive body in Iraq's fundamentally ministerial system that can resolve contradictions in Law 21 or issue clarifying regulations, administrative orders, or instructions.

Judicial Branch

Law 30 of 2005, the statute of jurisdiction of the Iraqi Federal Supreme Court permits the court to resolve disputes "between the federal government, regional government, [and/or] provincial governments," but in cases 39, 54, 57, 58, 61 and 63 in 2010 , , the court has refused to adjudicate cases submitted by Provincial Councils, for reasons of its own. . Of interest, the statute of jurisdiction of the quasi-judicial Shura Council is not inclusive of the Provincial Councils, leaving provincial 'governance' without a conflict resolution forum in any of the three branches of government.

Decentralization

Article 116 of the Constitution describes the regions and provinces as being "decentralized," but Article 122, *Second* qualifies the kind of decentralization in Iraq as "administrative." The concept of 'administrative decentralization' is not new to the 2005 Constitution. In fact its antecedent in Iraqi law is Law 159 of 1969 which likewise states that provinces shall be organized and governed in accordance with the principle of administrative decentralization.

When the drafters of Law 21 used the same language in Article 2, *First* and Article 7, *Third*, it should be concluded that they understood what they were doing. Rather than aver that provinces should be decentralized, they qualified the authorities of the governorate council by requiring them to be exercised in accordance with the principles of administrative decentralization, thereby denying for the time being at least, any accompanying political or fiscal decentralization (which would have been implicit had the word 'decentralization' not been limited by the word 'administrative.')

Decentralization theory distinguishes three types of decentralization:

Political decentralization

is characterized by local decision making by locally elected officials. A major conceptual shift occurred when the character of governorate councils changed from a body composed of department heads, presided over by the governor, to an elected body, which itself chose the governor. Further reform in this direction could include direct election of the governor and constituent-based election of council members. Although the councils have obtained some legitimacy by virtue of being elected, elections themselves do not convey decision making authority. Changes in national law will be required for that, and until such time as those

changes occur, provincial councils are still very weak as the majority of government decisions remain in the hands of appointed officials in departments, not elected ones.

Fiscal decentralization:

is characterized by local revenue generation by those same officials, plus the collection, budgeting and expenditure of locally-sourced funds. Although Article 44 of Law 21 makes sweeping gestures towards local revenue generation – naming taxes, fees, fines, leases and income from capital projects – in practice, almost all monies coming into a province come from central government coffers. This is true of the Operations & Maintenance (O&M) budget of a council or governor's office, capital projects prioritized and overseen by them, any federal supplemental monies as well as so-called 'petro-dollars.' All of these monies are transfers from the Ministry of Finance to the provinces. Moreover, elected officials at the provincial level have absolutely no control over the budgets or expenditures of provincial level departments of central government ministries. As for local revenue generation, the Ministry of Finance has consistently denied them the power to tax, and the Council of Ministers was specific in July of 2010 when it challenged a surcharge imposed by Basrah provincial council on the issuance of passports, reminding them that the Constitution declared that no new taxes shall be imposed, except by law – implying again that only the national parliament had the authority to pass tax legislation.

Administrative decentralization:

is characterized by local implementation. This type of decentralization is already in place, as when a provincial level department executes the directives or policy of its ministry. The obligation of the governor to enforce federal policy is also explicit in Article 31, *Third* of Law 21 as is the governor's responsibility in Article 31, *Ninth* to follow the guidelines established by the Ministry of Interior and keep the peace just like governors were expected to do before the 2003 invasion.

Because they qualified the type of decentralization, it can be concluded that the drafters of Law 21 knew what they were doing when they used the word "administrative" before the word "decentralization." Especially considering that each of the two references to it in the law occur before a reiteration of the supremacy of 1) the Constitution and 2) federal law, 'administrative' decentralization would be correctly understood as subordination of governmental bodies in the provinces to the central government.

Yet subordination is a starting point because since Article 122, *Second* of the Constitution states that the provinces shall be regulated by law, the national government could alter or expand the authorities of the provincial councils, change their jurisdiction and ultimately change the character of the decentralization they enjoy by changing the law. Just such changes appeared to be happening in 2010.

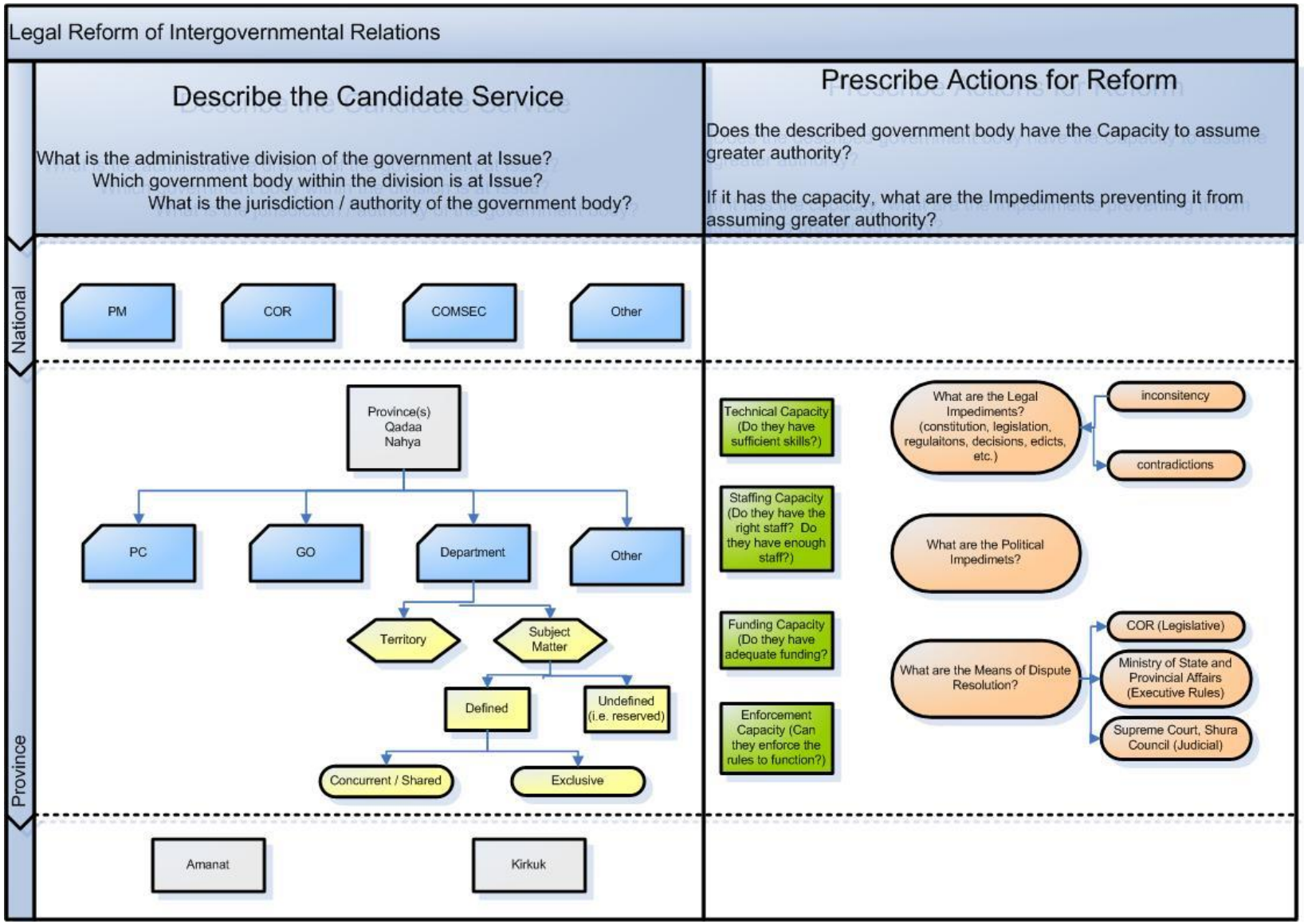
On January 25, the Presidency Council approved Law 20 of 2010 that purported to devolve the Ministry of Municipalities & Public Works (MMPW) and transfer its staff, property, budget and responsibilities to provincial governors. Then on February 16, the Presidency Council likewise approved Law 18 of 2010 which purported to dissociate the social affairs responsibilities of the Ministry of Labor & Social Affairs (MOLSA) and transfer them to the governors as well. Those laws were identical, in that each obligated provincial councils to write local ordinances re-organizing the staff of the dissociated and devolved departments under the governor. On May 25, Kerbala province succeeded in completing a new, provincial structure for its department of Public Works, but on June 14, the Supreme Court 'froze' further implementation of Laws 18 & 20 and on July 15 declared both to be unconstitutional.

In holdings Nos. 43 & 44 of 2010, the Court concluded that the laws were unconstitutional because they originated in the parliament itself and not with the Council of Ministers. In reaching his conclusion, Chief Justice Medhat al Mahmood repeated a distinction the Constitution makes between "draft" and "proposed" laws in Article 60. On his reading, the national parliament may 'propose' but may not 'draft' laws, and therefore because Laws 18 and 20 had been drafted by the Council of Representatives, rather than drafted by the Council of Ministers, they were void. Although his opinion left open the possibility that, once formed, a new government (i.e. a new Council of Ministers) could draft new 'decentralization' legislation and introduce it to the parliament for passage, the ruling ended expansion of the jurisdiction of provincial elected officials for the time being.

A Process for Thinking about Decentralization

Beginning in February 2011 and continuing to the present day Iraqi citizens, like those of an increasing number other Arab countries, have been demanding more from their respective governments than ever before.. Unlike protests outside of Iraq against long-standing regimes, however, the protests in Iraq have been not been about changing the government. They have been about the quality of governance. For governance to improve, however, the authorities pertaining to appointed and elected bodies, at the provincial level, need to be clarified, and in theory at least, some services need to be devolved.

The following outline is therefore offered as a process for thinking about how the relationship between appointed and elected bodies of government could be adjusted.


Legal Reform of Intergovernmental Relations
Describe the Candidate Service
What is the administrative division of the government at Issue?
Which government body within the division is at Issue?
What is the jurisdiction / authority of the government body?
Prescribe Actions for Reform
Does the described government body have the Capacity to assume greater authority?
If it has the capacity, what are the Impediments preventing it from assuming greater authority?
National
PM
COR
COMSEC
Other
Province
Province(s) Qadaa Nahya
PC
GO
Department
Other
Territory
Subject Matter
Defined
Undefined (i.e. reserved)
Concurrent / Shared
Exclusive
Amanat
Kirkuk
Technical Capacity (Do they have sufficient skills?)
Staffing Capacity (Do they have the right staff? Do they have enough staff?)
Funding Capacity (Do they have adequate funding?
Enforcement Capacity (Can they enforce the rules to function?)
What are the Legal Impediments? (constitution, legislation, regulaitons, decisions, edicts, etc.)
inconsitency
contradictions
What are the Political Impediments?
What are the Means of Dispute Resolution?
COR (Legislative)
Ministry of State and Provincial Affairs (Executive Rules)
Supreme Court, Shura Council (Judicial)