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Middle East
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The Iraqi Constitution: Structural Flaws and Political Implications

Professor Saad N. Jawad



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ABSTRACT

Ten years after the US invasion, and following three rounds of elections, Iraq is one of the most dangerous, unstable and corrupt countries in the world. It is clear that the ill-conceived US experiment to remake Iraq has failed. The deep structural, legal and political failings of the Iraqi Constitution, for which both US officials and Iraqi politicians bear responsibility, have contributed greatly to this failure. In 2005, Iraqis approved the Constitution in a referendum, but they voted on an incomplete and badly written draft, not realising that the document would deepen Iraq's misery. The hasty way the Constitution was drafted, the many unhelpful external interventions, the absence of Iraqi constitutional expertise and the side-lining of Sunni Arab representation have all contributed to the precarious situation in Iraq in the subsequent eight years. Considering the myriad confusions and divisions underlying the Constitution's drafting process, it is not surprising that the document has created more problems than it has solved. The Constitution's vagueness and ambiguity has hindered its application. The excessive concessions granted to the Kurds on the issues of federal government, natural resources and Kirkuk (and their subsequent refusal to renegotiate) have been a major factor in maintaining the chaotic situation that pervades most of Iraq.

INTRODUCTION

The main aim of any constitution is to introduce a new social contract between the state and its citizens, to ensure the rights and liberties of the latter, and to make sure that the former will not encroach on them. Its other role is as the guarantor of the unity and sovereignty of the state. Consequently any constitution should arise from the needs and demands of the people and it should contain what they desire. The other axioms of drafting a constitution are that it should not be imposed by an outside power, and it should be drafted, discussed and approved by the people concerned.

All international agreements, including the Hague and Geneva Conventions, do not give a foreign power the right to impose a constitution on an occupied country. By implication, the agents who cooperate with the occupier also do not hold the right to impose a constitution.¹ Despite this, the US occupying power in Iraq after 2003 annulled the existing Iraqi constitution, laws and regulations and issued its own code. Paul Bremer, the Civil Ruler of Iraq, issued 100 laws, and introduced to the Iraqi Governing Council, which he had established in July 2003, the Transitional Administrative Law (TAL), which was approved as the new transitional constitution of the country. The TAL was written and imposed without the proper involvement of Iraqis.

The US experiment in Iraq was not their first. It was preceded by other similar forays, notably in Germany and Japan following the Second World War.² In Germany and Japan the US successfully changed the governments from dictatorships to democracies. Several elements of these two experiences stand out: the constitutions were drafted by indigenous people under the supervision of the US forces; the constitutional heritage, experience, and history of the two nations were not totally neglected; and the social fabrics of the two societies were not disregarded.³

In Iraq the practice was different. As Noah Feldman, who was instrumental in drafting the TAL, explained, the difference between the Iraqi case and that of Germany and Japan was that the US aimed to transform those two countries (Germany and Japan) into rich capitalist allies.

¹ Andrew Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq*, Columbia University Press, 2009, p. 54. See also Article 43 of the 1907 Hague Convention which states, "...[the occupant power] shall take all steps in his power to establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Ibid. p. 24.

² The US was involved in other direct and indirect political experiments in South America but most of these attempts were rejected by the peoples of these countries.

³ In Japan for example the new constitution preserved the Emperor's spiritual position as well as regarding him as the symbol of national unity. In fact Arato argues that the new Japanese constitution was in reality an amendment of the Meiji Constitution of 1889. See Arato, p. 33. In Germany the new constitution depended in parts on the Weimar constitutions that were written in 1919, and followed German constitutional tradition since the foundation of the Reich in 1871. See: http://en.wikipedia.org/wiki/Basic_Law_for_the_Federal_Republic_of_Germany#Drafting_process.

The aim was not to build democratic states.⁴ In Iraq, the US aimed to create not a nation state but a ‘civic nation’ with ‘a viable identity of the centrifugal main elements of Arab Shia, Arab Sunni, and Kurdish religious and secular populations hitherto held together by a succession of authoritarian states’.⁵

The US ignored the history of the Iraqi state and Iraqi identity, reducing the Iraqi state to a collection of Shias, Sunnis, Kurds and other minorities. This vision of the Iraqi state was quickly adopted by the parties and groups that accompanied the invasion and who would be made the new rulers of Iraq.⁶ Therefore the new constitution emphasised differences and divisive issues rather than focusing on the uniting elements of Iraqi society. The drafters of the constitution overlooked the fact that ‘the main purpose of any constitution is to serve as a covenant that stitches diverse communities into something resembling a unified state. Such documents, when they are useful, serve as important symbols worthy of reverence by disparate groups’.⁷ The United States Constitution, for example, concentrated on unity and liberty despite the differences that existed between the different elements of US society.

The swift success of the invasion of Iraq gave the US a false sense of confidence that its control of the country would not be challenged. The equally swift and effective Iraqi resistance to the occupation was a surprise for US leaders. The resistance inflicted heavy casualties on the US forces – over 4,500 soldiers were killed in Iraq between 2003 and 2012.⁸ Deaths of contractors and soldiers from other coalition forces increase the number killed to over 6,000.⁹ These unexpected losses pushed US policymakers to adopt an early exit strategy. To justify this exit, the US planned a hasty timetable for Iraq to draft and approve a new permanent constitution, so it would be able to claim that democracy had been established in Iraq. Ignoring the failure of other rushed constitutions (such as in Bosnia, Cambodia, East Timor, and Afghanistan) the US hurried through the drafting of the Iraqi permanent constitution in only two months.¹⁰ This is the main reason for the constitution’s many shortcomings and the numerous problems that have arisen afterwards.

⁴ Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building*, Princeton University Press, 2004, p. 7.

⁵ Arato, p. 3.

⁶ See Majid Khadduri, *Independent Iraq: A Study in Iraqi Politics from 1932 to 1958*, Oxford University Press, 1960; and Reidar Visser, Historical Myths of a Divided Iraq, *Survival*, Vol. 50, no.2, April-May 2008.

⁷ Zackary Elkins and Tom Ginsburg, ‘The Iraqi Draft Constitution in Comparative Perspective’, Centre for the Study of Democratic Governance, University of Illinois, no date. Accessed at www.comparativeconstitutionsproject.org.

⁸ See the following: <http://icasualties.org/>; <http://antiwar.com/casualties/>; <http://www.bbc.co.uk/news/world-middle-east-11107739>.

⁹ <http://antiwar.com/casualties/>

¹⁰ Arato, op.cit, p. viii.

This paper will examine how the new Iraqi constitution was drafted and approved. It will analyse the constitution's influence in solving, or adding to, Iraq's problems. It will explore whether the constitution is workable or in need of amendments, leading to the pressing concern of whether such amendments can solve the many problems created by the introduction of this document. Is there even a need for Iraqis to write a new Constitution to give them more time to think and discuss these issues between themselves? And ultimately, is such a bold step possible?

HISTORICAL CONTEXT

Iraq has an ancient legal tradition. The Code of Hammurabi, completed in 1790 BC, is one of the oldest deciphered legal writings of significant length. From the ninth century, Iraq was governed by an Islamic code of law, which continued until it came under Ottoman occupation. In 1876 the Ottoman Empire introduced the first constitution for Iraq, dividing the country into the Vilayets of Baghdad, Mosul and Basra. This constitution, which only lasted for two years, addressed relations between the state and the citizen as well as the duties of the state towards different ethnic groups.

Following the occupation of Iraq by the British Army (1914 - 1918), the country was put under British mandate. The British High Commissioner became the only legislative and executive authority in Iraq. In 1921 a committee of British political officers was selected to draw up a new constitution for Iraq. The committee adapted constitutional models from New Zealand, Australia and elsewhere into a constitution for Iraq.¹¹ In 1923 they completed a draft which was given to an Iraqi committee to study. The Iraqi committee took almost two years to review the draft before approving it in 1925. This constitution, which was titled *al-Qanoon al-Asasi al-Iraqi* (The Basic Law of the Iraqi State), contained 123 articles, and continued to be effective until the Iraqi monarchy was overthrown in 1958. The constitution was amended twice, in 1925 and 1943.

The establishment of a republican regime in 1958 marked the end of a permanent constitution and the introduction of transitional (provisional) constitutions which lasted until the invasion of Iraq in 2003. The first provisional constitution was promulgated on 27 July 1958. It contained only 30 articles and the main innovations, apart from stressing the republican nature of the state, were the claims that Iraq was part of the Arab nation, that Islam was the official religion of the state, and that Arabs and Kurds were partners in the state.

In 1963 the first republican regime was toppled. The new regime introduced a new provisional constitution in 1964, which again was replaced in 1968 and 1970 by other provisional constitutions following coups. All three constitutions contained almost the same ideas and principles included in the first provisional constitution of 1958, but the 1964 and 1968 constitutions were prejudicial to the rights of the Kurds. In 1970, the Iraqi government signed a peace agreement with the Kurds, allowing them to enjoy autonomy, which necessitated an amendment to the constitution. In each of these constitutional iterations, parallel to their proclamation, each republican regime stated its intention to draft a permanent constitution, and hold elections for a parliament and president of

¹¹ The committee members had all lived in Iraq since 1914 and knew the country well.

the republic, but none of these promises were kept. In 1990 the Ba'th Party government of Saddam Hussein formed a committee of specialists to draft a permanent constitution which was designed to maintain its rule. The draft was never approved, and thus the 1970 constitution remained in force until the regime was removed in 2003.

All the provisional constitutions were generally progressive and secular, in the sense that they each contained basic political rights and liberties and avoided religious issues. Although all provisional constitutions mentioned Islam as the religion of the state they also mentioned the freedom of religion. In addition to granting Kurdish autonomy, the constitution of 1970 established Kurdish as an official language in the Kurdish areas, spelled out the fundamental rights of citizens and provided for a general election for a national assembly. An election was held in 1980, the first in the republican era, and again in 1984, 1988 and 1992. The principle of equality, the right to free education and a fair trial and freedom were all clearly stated in the 1970 constitution.¹²

But Iraqis felt indifferent. They knew very well that constitutions were mere pieces of paper that ultimately had little power to bind their leaders. The government was free to cancel or amend the constitution while the people did not have any say in the process. Apart from the short period between 1961 and 1963 in which other political parties worked openly, during the first republican regime and under Ba'th party rule (1968-2003) there were no effective opposition parties in Iraq. Under Ba'th rule, the Iraqi Communist Party (which operated openly between 1969 and 1978), and the Kurdistan Democratic Party (1970-1974) were allowed to act freely after years of underground activities, but were not allowed to challenge the Ba'th Party. The few civil society organisations that were allowed to work openly were controlled by the party. Iraqis understood that their rights were denied by the regime, regardless of the wording of the constitution. The judiciary was not free and for the most part the country was living in a state of emergency, which meant the suspension of normal laws.

THE TRANSITIONAL ADMINISTRATIVE LAW (TAL)

Following the 9/11 terrorist attacks, US neoconservative leaders decided to activate an old law, the Iraq Liberation Act of 1998, which had been passed by Congress, as a step towards an invasion. In April 2003 US forces, with the support of international allies, removed the regime of Saddam Hussein. Among the reasons given to justify the invasion was that Iraq lacked democracy. This issue necessitated the drafting of a constitution to establish democracy in Iraq. Although the occupying power had no right to change the constitution, and was only obliged to issue rules to protect the occupied territories, the US administration cancelled the Iraqi constitution and issued a new provisional document.

¹² For the differences between the content and application of the constitutions, see Sabah al-Mukhtar, 'The Rule of Law in Iraq', in Eugene Cotran and Mai Yamani (eds.), *The Rule of Law in the Middle East and the Islamic World*, IB Tauris, 2000, pp. 76-80.

Between 2003 and 2005 Iraq was ruled by two sets of laws: the laws issued by the first US civil administrator in Iraq, Paul Bremer, who arrived in Baghdad in May 2003; and the Transitional Administrative Law for Iraq (TAL), which was issued by the Coalition Provisional Authority (CPA) that Bremer led. Bremer had no previous knowledge of Iraqi politics, but immediately started to issue orders and regulations (ultimately around 100 in total), which were regarded as laws, and some of which are still effective in Iraq today.¹³ These included banning the Iraqi courts from considering claims against US soldiers or security contractors, appointing a national security adviser, appointing a US adviser for each ministry, and regulating the media. Bremer took control of Iraq's financial resources, dissolved the Iraqi armed forces, and disbanded the Ba'th Party, resulting in the disenfranchisement of hundreds of thousands of Iraqis.

Bremer also formed the Governing Council (GC) which included 25 people selected according to their sect, ethnic background, and, most importantly, their loyalty to the US. This was the first time in the history of Iraq that appointments were made on sectarian and ethnic bases. If the leaders of the Kurdish parties are excluded, only five members of the GC were living in Iraq before 2003. Sixty-five per cent of the GC also held other nationalities. In most cases, merit and qualifications were not taken into consideration. The GC was asked to approve the TAL, and did so with only minor modifications. The Council's main objection was that the new law did not refer to Islam as the official religion of the state and on their insistence, Article 7 was included.¹⁴

'Sect' is mentioned in the TAL a number of times (Articles 12 and 20 for example). This divisive word had not been used in previous Iraqi constitutions and its use was rejected by a large number of Iraqis. The only Iraqis who were happy to use the term were those taking part in the political process. It is important to add here that constitutions drafted for disunited countries tend to concentrate on points of unity rather than division. For example, the US constitution, in an attempt to create a united country, stressed the importance of unity. The fact that 'sect' was mentioned in Iraq's constitution became a strong argument for those demanding an expansion of the quota system.

The TAL did contain some positive elements. Article 11 recognised the Kurdish language and declared Iraq to be a bilingual state. Article 4 declared Iraq to be a federal state and Article 27b prohibited militias. Article 30 also established that 30% of the Iraqi parliament must be women (68 of 275 deputies).

The TAL also set out a detailed and binding timetable for the GC to issue a permanent constitution. Clauses 60 and 61 stated that the new National Assembly, which was not elected but was appointed by Bremer, should draft a permanent constitution before 15 August 2005, and that the draft of the

¹³ L. Paul Bremer & Malcolm McConnell, *My Year in Iraq: The Struggle to Build a Future of Hope*, Simon & Schuster, 2006.

¹⁴ Article 7 states, 'Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period. This Law respects the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice.' Coalition Provisional Authority, *Law of Administration for the State of Iraq for the Transitional Period*, 8 March 2004, p. 3. Accessed at <http://www.refworld.org/docid/45263d612.html>

permanent constitution should be presented to the Iraqi people for approval in a general referendum no later than 15 October 2005. It also stated that if the permanent constitution was approved in the referendum, elections for a permanent government would be held no later than 15 December 2005 and the new government should assume office no later than 31 December 2005.

It was clear that the occupying power was determined to show the world as well as the growing Iraqi resistance that it intended to establish democracy in Iraq by the end of 2005. It was also obvious that the US was planning an early exit. Some Iraqi politicians regarded this timetable as too quick, fearing it would result in an ill-considered constitution. But calls to delay any phase of this plan were rejected by the GC and the CPA, as the latter was made a partner in conducting the consultations. The special committee to draft a permanent constitution was only formed in mid-June 2005, meaning that such a vital document had to be completed in only two months.

The drafters of the TAL, and later the permanent constitution, were determined to weaken the central government and strengthen the provinces, or the regional entities (Article 52). There was also clear favouritism towards the Kurdish parties. For example, Articles 53, 54, and 58 acceded to Kurdish demands and further weakened central government. Further, the authority of the Kurdish regional administration was extended de facto though not de jure to provinces of 'disputed areas', such as Kirkuk, Diyala and Nineveh (Mosul), in addition to the three recognised Kurdish provinces; Dohuk, Erbil and Sulaimaniya. Other Iraqi provinces were given the right to establish their own federal status, but Baghdad and Kirkuk were barred from doing so.

The oil rich Kirkuk province became a very difficult issue. Historically, Kirkuk was not predominantly Kurdish. Although successive Iraqi governments since 1964 tried to change the demographic composition of the province by settling some Arab tribes in it, other Arabs had long inhabited this area. Together with the Turkomans, the Kurds make up the majority of inhabitants in this province. Both the Arabs and the Turkomans of Kirkuk have troubled historical relations with the Kurds. Some northern parts of the province are predominantly Kurdish, southern areas are Arab, and the centre is Turkoman.¹⁵ Yet following the 2003 invasion and the domination of the Kurdish parties of Kirkuk, the Kurdish regional government moved Kurdish families into Kirkuk, claiming that they had previously been living there. These moves have been consistently opposed by the Turkoman and Arab inhabitants of Kirkuk.

¹⁵ This is a strikingly mixed region. The Kurdish national movement wishes to use the census of 1957 to determine Kirkuk's future. This census did not consider nationality (or race), but only determined the language of the inhabitants. Through this criterion the percentages of those who spoke Kurdish, Turkish and Arabic were given. The census showed that the percentage of the Kurdish speakers in Kirkuk City was 33.53%, while that of Turkish speakers was 37.62%, and Arabic speakers was 22.53%. In the whole of Kirkuk province the figures were 48.24%, 21.44%, and, 28.19% respectively. In 1970, according to the agreement which granted autonomy to the Kurdish region, the northern sub-districts of Kirkuk province which had a Kurdish majority were taken out of Kirkuk and attached to the Kurdish autonomous area, hence reducing the Kurdish percentage in the province.

In short, as Jonathan Morrow observes, ‘the TAL process... was notoriously, if unintentionally, hasty and secretive, and was heavily influenced by US political interests’.¹⁶ The TAL was written by US nationals assisted by two expatriate Iraqis holding US and British nationalities, and who had not lived in Iraq since they were young children.¹⁷ None of the drafters was an expert in constitutional law. The document itself was written in English and was poorly translated into Arabic.¹⁸ It was passed (or in the words of Andrew Arato, ‘imposed’)¹⁹ on to the appointed GC for approval. However, the CPA, and most of the advisers who took part in the process insisted that the constitution was Iraqi-made.²⁰ There was considerable pressure within Iraq for Iraqi involvement in the process. Most notable among the calls was a fatwa issued by Ayatollah Ali Sistani in June 2003, in which he said, ‘Those forces [the coalition or the CPA] had no authority to write a constitution for Iraq.’²¹ He added that ‘these forces [or authorities] do not have the authority to appoint the members of the constitution writing council. There is no guarantee that this council will produce a constitution that responds to the paramount interests of the Iraqi people.’²² The CPA’s plan to use US advisors to write the Iraqi constitution was foiled by Iraqi opposition and Bremer adopted a new plan: he wanted to make the TAL look as if it was an interim constitution written by Iraqis and approved by them. He handed the translated copy of the TAL to the GC and the appointed national assembly and a committee was selected to write and approve a permanent constitution.

DRAFTING AND APPROVING THE PERMANENT CONSTITUTION

US advisors, notably Noah Feldman, played a major role in drafting a TAL. He and Peter Galbraith acted as ‘advisers’ in the drafting of the constitution.²³ The Iraqi government, however, claimed that it carried out the work alone. The General Council appointed a committee of 55 people to write the draft, and it started work on 13 June 2005. The members were divided according to the quota system: 28 from the Shia coalition list; 15 from the Kurdish lists; and eight from Iyad Alawi’s al-Iraqia list, which mostly consisted of Shias; a Christian, a Turkoman, a Communist and a Sunni were also added. One month later, after strong objections from the Sunni community, the GC added 14 Sunni members to the committee.

¹⁶ Jonathan Morrow, *Iraq’s Constitutional Process II: An Opportunity Lost*. USIP, No. 155, November 2005.

¹⁷ Arato, op. cit., p. 140. See also Peter Galbraith, *The End of Iraq: How American Incompetence Created a War Without End*, Simon & Schuster, 2006, p. 139.

¹⁸ Ali Allawi, *The Occupation of Iraq*, Yale University Press, 2007, p. 222.

¹⁹ Arato, p. 140.

²⁰ See for example Feldman, *What We Owe Iraq* and Larry Diamond, *Squandered Victory*, Owl Books, 2005.

²¹ Feldman, p. 40.

²² Arato, p.99.

²³ Noah Feldman was a lecturer at New York University. He then served as senior constitutional advisor to the Coalition Provisional Authority in Iraq, and advised members of the Iraqi Governing Council on the drafting of the TAL. See Feldman, *What We Owe Iraq*. Peter Galbraith was a US career diplomat who advised the Kurdish parties and later earned lucrative commissions for his role in oil deals. (See Michael Rubin, ‘Norway exposes Peter Galbraith Scandal’, *The Corner*, 10 October 2009: <http://www.nationalreview.com/corner/188530/norway-exposes-peter-galbraith-scandal/michael-rubin>. See also Galbraith, *The End of Iraq*, Chapter 8.

The committee lacked any constitutional law experts or representatives of civil society organisations (especially women's groups) and the committee's discussions were held in secret, thus ignoring public opinion.²⁴ To counter criticism of the lack of legal expertise, the committee nominated a board of law advisers, comprising mostly of foreigners whose names were never disclosed. A few days after their appointment, two Sunni members of the drafting committee and one adviser, who were well known for their strong objection to the proposed draft, were assassinated.²⁵ A few days later another Sunni committee member was kidnapped and assassinated.²⁶ As a result, only a few days later, the Sunni representatives suspended their participation in the committee, demanding action against the killing of their colleagues. Although they all returned to the committee ten days later, they were greatly intimidated. On 8 August, this committee was suspended and the discussion was continued largely by Shia and Kurdish groups, with no real Sunni representation.²⁷ Altogether, the Sunni members of the committee were involved for only three to four weeks.

It was clear from the discussions inside the committee that each group was concentrating on its own limited objectives, and the broad outline drafted in the TAL was not discussed. The Shia religious members were mainly concerned to establish Islam as the state religion and to secure the right to perform Shia ceremonies. It seems that they regarded the insertion of these issues as an official recognition of their existence and their majority. The Kurdish members had clearer ideas about what they wanted, and had a team of US and European experts supporting them.²⁸ They succeeded in preventing any discussion of the TAL; hence maintaining the broad sense of federalism, their rights to control their federal entity, to claim Kirkuk in their federal region and to confirm their share of the wealth of the state. On the other hand, the Sunni members were concerned about the Arab identity of a united state.

It seemed that neither the Shias nor the Sunnis were aware of the divisive nature of most clauses, and those who were aware were too weak to impose their point of view. Hence there was no discussion of the provisions that would later become highly contentious, such as the broad federal system, the exploitation of oil and gas, and the weakness of the centre of the country in dealing with the regions. Iraqis were unaware of the document's detail as no version was issued publicly. Some Iraqi constitutional law experts and academics, based on the very few press reports that were issued, dared to speak about the dangers of the divisive clauses, but these critics were hounded by the police and unknown militias. Others were detained for much less covert reasons, simply because of their opposition.²⁹

²⁴ Morrow, p. 3 and p. 8.

²⁵ Dr Mijbil Issa, Aziz Ibrahim and Dhamin al-Obaidi.

²⁶ Dr Hasib al-Obaidi, a political scientist.

²⁷ Morrow, p. 9 and p. 12.

²⁸ Arato, p. 142.

²⁹ In one case Dr Mundher al-Shawi, a constitutional law professor and a former minister of justice, was imprisoned and released later on the condition that he leaves Iraq and never again interferes in matters concerning the constitution. The author worked with him and a small group of law experts to create some awareness of the problematic issues in the draft. The group's members felt intimidated following Dr al-Shawi's arrest and the work was stopped.

After several meetings of the constitutional committee, the main points of difference were as follows:

1. The nature of the state and the extent of the federal system

Kurdish members of the committee insisted that Iraq should be a federal state and demanded that the official name of the state should include the word 'federal'. The Sunni Arab members refused to accept this terminology and insisted that Iraq was not made up of a collection of different entities as the legal term 'federal' indicates. They wanted to use the word 'united' instead of 'federal'. The Shia members did not object to 'federal,' as the clause that gives the Kurds the right to a federal entity is also extended to other provinces. They hoped that this would allow them to establish a Shia southern federal region.

2. The role of Islam

This matter was the main concern of the Shia members who were mostly religious and members of religious parties. Their aim was to write a clear clause into the constitution that declared Islam as the state religion and the source of all legislation. They also wanted it to mention their religious-sectarian practices and authority, *al-Marja' iya al-Diniya*, the Shia Higher Religious Authority in Najaf and elsewhere, as an independent and revered body that had a significant role in modern Iraq. The Kurds and some members of al-Iraqia Party wanted to have a secular constitution with no mention of religion.

3. The relationship between the federal (decentralised entities) and the central government

The Kurds wanted a broad federal system in which the federal entity would have powers which superseded those of the central government. They were encouraged by the TAL's treatment of the regional authority of Iraqi Kurdistan. The Sunni members wanted an effective central government with only broad autonomy given to Iraqi Kurdistan.

4. The identity of the Iraqi state

The Sunni Arabs wanted to include a clause stating that Iraq was an Arab state and part of the Arab nation. This was vehemently opposed by Kurdish members who regarded their part of the country as part of their own divided Kurdish nation. Other minorities wanted mention of their groups while some Shia members wanted to include the Iranian nationality as a component of the Iraqi people. Language was also contentious and the Kurds insisted on official recognition of Kurdish in a bilingual state.

5. The issue of Kirkuk and the so-called disputed areas

Oil rich Kirkuk province was regarded by the Kurdish parties as part of the Kurdish region. They wanted it to be included in the Kurdish federal entity and described the city of Kirkuk as the capital of Iraqi Kurdistan. The Sunni and Shia Arabs refused to concede this point, as they regarded Kirkuk as a mixed province.

6. The De-Ba'thification law

The US removed all Ba'th Party members above a certain level from state organisations. The Arab Sunni members thought that the law was enforced excessively, and that sometimes it was used to silence any opposition to the Shia and Kurdish domination of the government. They also argued that in democracies nobody should be alienated from participating because of their political views.

7. Sharing the wealth of the country

The Kurds wanted a clause allowing their federal region to explore and control any wealth within its borders, and to pay only a share of the proceeds to the central government. The Sunnis argued that, as in all other federal systems, the central government should have the authority to manage national wealth, negotiate the ways of exploring these resources, and disburse a fair share to all parts of the country.

These disputes were not restricted to the constitutional committee of 69 members but soon involved the US administration and policymakers from neighbouring countries. The US was especially impatient in its interventions. The US Ambassador to Iraq, Zalmay Khalilzad,³⁰ urged the committee to finish by 15 August 2005, as stipulated in the TAL.³¹ Several of the early meetings of the Leadership Council³² took place at the US Embassy. By 10 August, the United States was strongly expressing its views on substantive constitutional issues. On 12 August, in efforts to accelerate the drafting process, the US Embassy circulated its own draft constitution in English.³³

An incomplete draft was finally submitted to the national assembly on 23 August 2005, despite strong Sunni discontent and calls for the prevention of its passage. To overcome the Sunni opposition and to avoid its rejection by some provinces (according to the draft itself, only three dissenting provinces were required to block the Constitution), the US mediators suggested the inclusion of a clause that facilitates its amendment. A paragraph was added stating that the parliament can form a committee from its members to present amendments (Article 142).³⁴

³⁰ Ali Allawi, p. 404.

³¹ For an account of the deep involvement of US officials in the process see Ashley S. Deeks and Matthew D. Burton, 'Iraq's Constitution: A drafting history', *Cornell International Law Journal*, Vol. 40, 2007. See also Morrow, p. 9 and p. 14. Morrow describes the pressure exerted by the Secretary of State, the Secretary of Defense and the president himself, and their refusal, together with the UK government, to extend the timetable.

³² The Leadership Council comprised the heads of the major Iraqi political coalitions who participated in the Constitutional Committee.

³³ K.B. Yousef, *Did the US Intervention in the Iraqi Constitution Help Make It Illegal?* <http://deafwalls.wordpress.com/2009/03/17/did-the-us-intervention-in-the-iraqi-constitution-help-make-it-illegal/>

³⁴ Interview with Dr Muamar al-Kubaisi, Sunni member of the constitutional committee. Dead Sea, Jordan, July 2005. This clause, although it contradicted a previous clause, 126, was given precedence over any other clause that referred to amendments.

The draft was finally put to a referendum on the date stipulated in the TAL, 15 October, and according to the official results it was approved by 78.59% of the voters. This result was strongly challenged by many Iraqi politicians, especially Sunnis.³⁵ Only the provinces of Salah al-Din and al-Anbar voted against the draft. Initial unconfirmed results suggested that a third province, Nineveh (Mosul), also voted against it.³⁶ But it was later announced that the negative votes did not amount to two thirds of the voters, and thus could not prevent the draft's passage.³⁷ Some Iraqi Sunni leaders claimed that other provinces such as Diyala, al-Muthana and al-Qadissiya (the last two having Shia majorities) also voted against the Constitution.³⁸ Those who opposed the draft argued that the delay in announcing the results of the referendum (more than 10 days) and the failure to open referendum centres in opposition areas suggested that the results were manipulated. The head of the Iraqi parliament, Dr Mahmood al-Mashehadani, spoke out publicly about the rigging of voting in Nineveh.³⁹ Yet, despite the objections to the results of the referendum, the constitution was declared as approved by the majority of the voters.

THE IMPACT OF THE CONSTITUTION

It is critical to examine the constitution to assess its viability and suitability for helping to unite and improve Iraq. The constitution has some positive and progressive clauses, these include: no law should be drawn that contradicts the principles of democracy and the rights and liberties of the citizens; the people are the source of power and its legitimacy; the submission of the armed forces to civil authority; the prohibition of torture; the independence of the legal system; and the importance of civil society organisations. Some of these rights existed in previous constitutions, but it was possible they would gain real meaning in a democratic environment.

The constitution also contained negative and divisive content. Rather than helping to solve many of Iraq's problems, it contributed to them and even created serious new ones. The main problematic issues are as follows:

1. The preamble

The constitution contains an unusually long preamble (330 words), which is best described as a sectarian and divisive political communiqué which bears no relationship to the constitution itself. As the Shia members of the constitutional committee failed to include the role of their religious leadership (*al-Marja'iya al-Diniya*) in the constitution itself, its role and status was emphasised in

³⁵ Morrow, p. 3.

³⁶ Charles Tripp, *A History of Iraq*, Third Edition, Cambridge University Press, 2006, p. 301.

³⁷ <http://www.alwasatnews.com/1146/news/read/500479/1.html>. The Independent High Electoral Commission-Iraq explained that Nineveh's vote was 55% against and thus did not constitute the 2/3 votes needed to reject the constitution. http://www.iraqiparty.com/news_item/567/. A similar finding was made about the result in Diyala province. See also, Morrow, p. 3.

³⁸ See the declaration of the Sunni leader Salih al-Mutlak: <http://almoslim.net/node/42080>.

³⁹ Interview with *al-Rashid*, Iraqi TV channel, 15 July 2012.

the preamble. This gave immediate focus on Iraq's old differences and tragedies, rather than on fraternity and unity. It seems that the idea of this preamble was taken from the US constitution, as it starts with the words, 'we the people of Mesopotamia, [not Iraq] the homeland of the apostles and prophets, resting place of the virtuous imams, cradle of civilization, crafters of writing, and home of numeration...'. While the US preamble contained only 51 words and stressed unity, freedom and prosperity, the Iraqi version has no mention of freedom.⁴⁰

2. The role of Islam⁴¹

Article 2 established Islam as the official religion of the state and as the fundamental source of legislation. Point A of the First Paragraph of the same article stated that, 'no law that contradicts the established provisions of Islam may be established'.⁴² While there may be no harm in stating Islam is the official religion of the state as the overwhelming majority of the population is Muslim, Point A rendered meaningless all the positive aspects that were mentioned in Chapter Two (The Liberties), Articles 14 – 46. In reality, practice, and with the domination of the religious parties, institutions and personalities, any liberty could be cancelled if a religious institution claimed that it contradicts Islamic beliefs, as we have seen in many Middle Eastern states.

Sectarian affiliations had never been mentioned in an Iraqi constitution, as the aim of previous governments was to strengthen the sense of unified identity. The 2005 constitution mentioned sects at least twice in addition to the preamble, (Articles 41 and 43). Article 43 went so far as to mention one sect's specific practices in affirming the freedom of 'practice of religious rites, including the Hussein (Shia) ceremonies'.⁴³

In line with this sectarian-conservative religious attitude, Article 41, which allowed the recreation of the Shia and Sunni personal status courts, is troublesome. It describes Iraqis according to their religious sects and beliefs in dealing with their personal status, a problem that old laws had managed to prevent through a unified personal status law since 1959.⁴⁴

⁴⁰ The preamble of the US constitution read (We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America).

⁴¹ For discussion of the considerable time and argument the committee spent on this issue see Deeks and Burton.

⁴² The Second Paragraph of Article 2 states, 'This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice such as Christians, Yazidis, and Mandaean Sabians.'

⁴³ This clause meant that all state institutions would be paralysed for days while these ceremonies were being practised (as happens in Iraq today). Universities, schools and government institutions, even Iraqi embassies abroad, suspend their activities in order to observe the Hussein ceremonies.

⁴⁴ This clause was strongly rejected by women's organisations as it stipulated the cancellation of a very progressive personal status law which was issued in 1959 and its advanced amendments in later years.

3. Relations between the central and regional governments

The constitution states that in the event of contradictions between central and local laws of any regional administration, authority is conferred on the local administration – perhaps the only time such a hierarchy has been established in modern constitutional history. Immediately after approving the constitution, the Kurdish federal region issued its own local constitution which included many clauses that contradicted those of the central government, especially in the field of exploiting national and regional wealth, such as oil. Article 115 of the Iraqi Constitution states: ‘The priority goes to the regional law in case of conflict between other powers shared between the federal government and regional governments’. Article 121, 2 states: ‘In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive powers of the federal government, the regional authority shall have the right to amend the application of the national legislation within that region’. In the absence of clear articles defining the powers of the federal central government, the region was left free to do whatever it wanted.

Article 126 states that ‘articles of the Constitution may not be amended if such amendment takes away from the powers of the regions that are not within the exclusive powers of the federal authorities, except by the approval of the legislative authority of the concerned region and the approval of the majority of its citizens in a general referendum’. In other words the drafters awarded the Kurdish region an iron clad veto.⁴⁵ The Shias were also allowed such rights because they were sure of the domination of their sect over most of the southern provinces.

4. The armed forces

Article 9 was also left loose and divisive as it does not speak about the authority of the state to establish one unified army. Although it describes the Iraqi armed forces as one body, it also states that ‘this body is composed of the components of the Iraqi people with due consideration given to its balance and its similarity without discrimination or exclusion and shall be subject to the control of the civilian authority’ (Article 9, 1, A). In Paragraph B it states that ‘the formation of military militia outside the framework of the armed forces is prohibited’. Yet in practice the Ministry of Defence has had no authority over the Kurdish armed force, the Peshmerga, which is officially regarded as part of the Iraqi military and is financed by the central government.

5. Foreign affairs

In a federal system the foreign affairs of the state normally fall under the authority of the central government. However, Article 121, 4, states: ‘The regions and governorates shall establish offices in the embassies and diplomatic missions, in order to follow up cultural, social and developmental affairs’. In reality, some of these offices became more influential than the main diplomatic mission itself, especially in some that were headed by ambassadors representing the two main Kurdish parties.⁴⁶ Another problem was raised when the Kurdish Regional Government started to initiate agreements with foreign countries without the approval of the central government.

⁴⁵ Arato, op.cit, p. 87

⁴⁶ See Nouri Al-Maliki’s complaints, al-Bawwaba, 23 October 2012, <http://www.albawwaba.net/news/111971>.

6. Kirkuk

This issue is perhaps the most problematic. Article 143, inserted upon the insistence of the Kurdish parties, retains Article 53(A) and Article 58 of the TAL in the new constitution. Article 53 (A) states: 'The Kurdistan Regional Government is recognised as the official government of the territories that were administered by that government on 19 March 2003 in the governorates of Dohuk, Erbil, Sulaimaniya, Kirkuk, Diyala and Nineveh'. Article 58 deals with the issue of Kirkuk and what it called the disputed areas in other regions, the census, immigration policies of previous governments and a referendum in order to determine the people's willingness to join the Kurdish region.

Article 140 of the constitution states: 'The executive authority shall undertake the necessary steps to complete the implementation of the requirements of all subparagraphs of Article 58 of the Transitional Administrative Law', and that 'the responsibility placed upon the executive branch of the Iraqi Transitional Government stipulated in Article 58 of the Transitional Administrative Law shall extend and continue to the executive authority elected in accordance with this Constitution, provided that it accomplishes complete normalisation and a census and concludes with a referendum in Kirkuk and other disputed territories to determine the will of their citizens', by a date not to exceed the 31st of December 2007. Thus one can understand the great tension which continues between the central government and the Kurdish Regional Government (KRG) and between the Kurds and the population of Nineveh and Diyala, as the KRG regards parts of them as disputed areas, while it regards the oil rich Kirkuk province as an integral part of Iraqi Kurdistan. Contrary to Article 53 of the TAL, before the US occupation in March 2003, Nineveh, Kirkuk and Diyala were not under the authority of the KRG.

7. Natural resources

The issue of exploring and exploiting natural wealth, especially oil, has also been highly divisive, with the constitution leaving this matter vague. It was not accidental that the southern region, which demanded federal status, was rich with natural resources; oil in Basra and Missan, and gas in Anbar. In fact some provinces started to defy the central government over many issues, and the latter was unable to respond. According to the constitution the KRG receives 17% of the national budget with the right to fully exploit the oil in the Kurdish region, while other provinces receive far less (for example the governor of Thi Qar province, another area demanding federal status, complained that his province receives only \$10 million, less than 1% of the national budget). In order to achieve greater equality, the central government drafted a new law for oil and gas by which it planned to remove the special privileges of the KRG. Before the law could be put to parliament, the KRG announced its rejection and threatened to withdraw from the federal government, thus stymying the bill.

8. The identity of the state

Arab Sunni members of the constitutional commission were insistent that the constitution should mention that Iraq is an Arab state and part of the Arab nation (75% - 80% of Iraqis are Arabs). This was adamantly refused by the Kurdish members. Ultimately, Article 3 stated: 'Iraq is a country of multiple nationalities, religions, and sects. It is a founding and active member in the Arab League and is committed to its charter, and it is part of the Islamic world', again stressing the Islamic and

sectarian nature of the state. The Shia members of the commission, who always criticised the Arab countries for supporting Saddam and the Arab League for not taking any action against the atrocities committed by his regime, allied with the Kurdish members in the drafting of this article, leaving the Sunni representatives disappointed.

9. Terrorism

The article about combating terrorism (Article 7, 2) was so broad and ill-defined that it could be used to condemn anybody who opposed the political process – a strategy that had been used before. The Sunni members in the drafting committee objected to this article. The articles about uprooting the Ba'th Party also pose a similar danger (Article 7, 1). It is true that Article 135 exempted the members of the old Ba'th Party from being held accountable for their membership, but this matter was left to the Higher Commission for De-Ba'thification, which had the power to determine who would be excluded. The al-Iraqia list of Iyad Alawi, which had many Sunni members, complained that many of its political candidates had been disqualified by decisions issued by this commission.

10. The issue of dual nationality

The constitution allowed Iraqis to hold two nationalities, but stipulated that whoever is appointed in a high sovereign or security position should relinquish the other nationality (Article 18, 4). However, no Iraqi official obeyed this regulation. Most of those officials condemned for corruption have fled the country and settled in the second country where they were naturalised.

11. Gender issues

Iraqi women were dissatisfied with the constitution as it stipulated the annulment of the progressive personal status law of 1959 with all its advanced amendments (Article 41).⁴⁷

12. Written style

Finally, the language used was incredibly weak and problematic, raising concerns about the ability of the body that drafted or translated the constitution.⁴⁸ Ali Allawi, a senior Iraqi politician, noted that the constitution was utterly alien in construction and phraseology from the Arabic language and the Iraqi experience.⁴⁹

⁴⁷ For details about this issue see; Sawsan I. al-Assaf & Saad N. Jawad, *Iraqi women between the democracy of the occupation and the American principle of humanitarian intervention*; (in Arabic), Dar al-Jinan, 2012, pp. 119-120. See also the report, *Searching for Peace in Iraq*, compiled by Sawsan I. al-Assaf, Ali Dahir Ali and Kai F Brand-Jacobsen, issued by NOVA Innovacio Social, 2012, pp. 90-91.

⁴⁸ Article 46 for example, starts with the words *La yakoon*, whereas the correct legal term is *La yajoz*. For the weak legal composition of the constitution see Zuhair K. Abbod, *A viewpoint of some of the Iraqi constitution articles* (in Arabic), <http://www.mokarabat.com/s833.htm>, also Abdul Husain Shaaban, *The mines of the Iraqi constitution* (in Arabic), <http://www.mokarabat.com/m763.htm>

⁴⁹ Ali Allawi, p. 222.

ATTEMPTS TO AMEND THE CONSTITUTION

When US negotiators felt that the proposed draft was going to be rejected by the predominately Sunni provinces, they suggested inserting a new clause (Article 142).⁵⁰ This stated: ‘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.’⁵¹

The second paragraph stated: ‘The proposed amendments shall be presented to the Council of Representatives all at once for a vote upon them, and shall be deemed approved with the agreement of the absolute majority of the members of the Council’. The third paragraph stated: ‘The articles amended by the Council of Representatives pursuant to item ‘Second’ of this Article shall be presented to the people for voting on them in a referendum within a period not exceeding two months from the date of their approval by the Council of Representatives’. And finally the fourth paragraph stated that ‘The referendum on the amended Articles shall be successful if approved by the majority of the voters, and if not rejected by two-thirds of the voters in three or more governorates’.

Because of the inclusion of this article the Sunni groups participating in the political process, especially the Islamic Party (IP) headed then by Tariq al-Hashimi, advised the Sunni community, only 48 hours before the referendum, to vote in favour of the constitution. This decision received much criticism, especially from the Sunni community. It was not clear what made the leaders of this party change their minds so drastically and at such short notice, but it seemed that this was due to the pressure exerted on them by the US, as well as their desire to be in the new government.⁵²

As soon as the constitution was approved demands for its amendment were made. The first response was from the Sunni members of the constitution committee who rejected the constitution, saying that they had not agreed the terms and calling for international support to block it.⁵³ In February 2006, anticipating the formation of a committee to review the constitution, an unofficial Sunni group of academics and politicians articulated demands including: relaxing Article 142; suspending the implementation of federalism; giving central government ownership of natural resources; repealing De-Ba'thification; and preventing any region annexing Kirkuk.⁵⁴

⁵⁰ Interview with Muamar al-Kubaisi, op.cit.

⁵¹ For the full text of the constitution see *Iraqi Constitution*, Ministry of Interior, The Republic of Iraq, 2006, www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf

⁵² Arato, op.cit, p. 244.

⁵³ Ali Allawi, op. cit. p.401.

⁵⁴ Jonathan Morrow, *Weak Viability: The Iraqi Federal State and the Constitutional Amendment Process*, USIP Special Report, July 2006, http://www.usip.org/files/resources/Morrow_SR168.pdf

Although the Iraqi parliament had established a committee to review the constitution, it did not convene. In September 2006 another committee was established, but this one was already illegal because the first paragraph of Article 142 permitted only four months to propose the amendments and this time had elapsed. At any rate the committee did not convene until December 2006. It initially included 27 members, with two more added later to represent small ethnic minorities. It decided that decisions should be made only after a consensus was reached. This committee was given four months to present its suggestions.⁵⁵ In May 2007 the committee presented 51 amendments, although it has been suggested that there were actually 70.⁵⁶ It decided that there were 3-5 amendments on which it could not agree, and that it needed input from the heads of the major political blocs in the parliament to reach a conclusion.

In November 2008 Prime Minister Nuri al-Maliki joined in criticising the Constitution and stressed the need for its amendment. He said, 'the Constitution was drafted in a hasty way and in an atmosphere when the quota system was overwhelming'. He added that 'because of the fears of the past some articles were included which restricted the powers of the centre, both for the time being and the future... Decentralisation should not be dictatorship and what we fear is that the federal region is confiscating the state'.⁵⁷

In 2011 the second largest group in the parliament, al-Iraqia, joined in calling for the amendment of the Constitution. Their reasons were different to al-Maliki's; they wished to curb his powers.⁵⁸ Only the Kurdistan coalition, the parties of Jalal Talbani and Massoud Barzani, continue to call for full adherence to the Constitution and they made their participation in the current governing coalition conditional on upholding it.⁵⁹

Despite all these criticisms and demands, the Iraqi constitution was not amended. This was mainly due to two factors. First: it has proved impossible to find a method to amend the most controversial issues. For example no amendment can touch the powers of the regions in general and the Kurdish region in particular. Article 126, 4, clearly states: 'Articles of the Constitution may not be amended [the Arabic version states 'cannot be amended'] if such amendment takes away from the powers of the regions that are not within the exclusive powers of the federal authorities, except by the approval of the legislative authority of the concerned region and the approval of the majority of its citizens in a general referendum'.

Yet most of the problems that Iraq is witnessing today are because of the struggle between the central government and the Kurdish federal entity and the way in which the prime minister continues to dominate Iraqi politics. The Iraqi political scene is in a state of impasse, as the Kurdish Regional

⁵⁵ <http://www.alquds.co.uk/data/2007/06/06-08/05m36.htm>. The committee was chaired by Shaikh Humam Hamoudi, the same person who led the constitutional committee in 2005.

⁵⁶ <http://www.ebaa.net/khaber/200709/06//khaberoo4.htm>

⁵⁷ Ibid.

⁵⁸ <http://www.albawwaba.net/news/62374/>

⁵⁹ See the full memorandum of the Kurdish coalition in: Sawsan I. Assaf and Saad N. Jawad, op. cit., pp. 326-328.

Government is not prepared to relinquish any of its powers in the field of the armed forces, the economy, or in claiming territory; because of the failure of the prime minister to find a way to reconcile with the other groups; and because of the intransigence of the other parties in the political process.

The second factor which has hindered the amendment process is the sharp divisions and differences among the Iraqi political blocs and parties. Ironically, all the conflicting parties refer to the Constitution when they want to support their demands. Because it is so vague and ambiguous, the Constitution can be used to support opposing demands.

THE CONSTITUTION'S CONTINUING DAMAGE

Considering the myriad confusions and divisions underlying the Constitution's drafting process, it is not surprising that the document has created more problems than it has solved. The Constitution has been a major factor in perpetuating the chaotic situation that pervades most of Iraq. More than ten years after the invasion, and following three rounds of elections, Iraq is now one of the most dangerous and corrupt countries in the world.⁶⁰ The security situation is fragile and municipal services like electricity, sewage, and clean water are almost non-existent. The food rations that Iraqi families received since sanctions were imposed on Iraq in 1990 rarely reach the population in adequate quantities. The coalition that formed the government in 2010 after a delay of eight months is still incomplete; it has no defence, interior or national security ministers and all these bureaus are currently run by the prime minister himself.

The ambiguity of the most sensitive articles in the constitution continues to have a negative influence on Iraq. For example, after the 2010 election, the largest party, al-Iraqia, felt it had a mandate to form the government. This was disputed because Article 76, 1 does not make it clear whether the largest party or the largest coalition has the right to form a new government. It took the federal court several months to determine the answer, after which it decided against al-Iraqia. This decision would have been less contentious had the president initially given the winning party the chance to form a government. Instead, Nuri al-Maliki, the incumbent prime minister and leader of the second-placed Dawa Party, refused to leave office, asking the head of the federal court, who was a member of his electoral list, to interpret Article 76, 1. The judge found in favour of al-Maliki.

A second point of contention emerged between the central government and the Kurdish regional leadership following the state visit of the Jordanian prime minister to Iraqi Kurdistan in September 2011. Similar tensions emerged after the Turkish foreign minister visited Iraqi Kurdistan in August 2012. Both visitors avoided the Iraqi central government. This has led to criticism from Baghdad and to the chilling of relations between Iraq and the two countries involved. The central government proclaimed that such visits should have been conducted through Baghdad and with the capital's prior knowledge. The Kurdish regional officials rejected this criticism, claiming that they had behaved according to the Constitution.

⁶⁰ Saad Jawad and Sawsan al-Assaf, *Iraq Today, The Failure of Reshaping a State*, LSE IDEAS Blog, 4 June 2013. <http://blogs.lse.ac.uk/ideas/2013/06/iraq-today-the-failure-of-re-shaping-a-state-on-sectarian-and-quota-lines/>

Another problem relates to the absence of a law to regulate the exploration of oil. Baghdad and Erbil have been at an impasse on the issue for the past three years. The central government claims that it is the sole power with the right to sign oil concessions in Iraq, according to Article 112, 1, while the Kurdish Regional Government says it holds this right, according to the same article. Ironically they are both correct due to the ambiguity of the article, which grants the federal government authority to explore the 'present fields', but gives the regional government the right to explore and sign agreements for any new fields. The Kurdish Regional Government has managed to sign a number of oil concessions with foreign companies since 2005, but these have led to tough confrontations with the central government, which eventually suspended the exportation of oil extracted from wells in Iraqi Kurdistan.

The Constitution contained more than 60 articles that required new laws to be activated. In the eight years since the Constitution was approved, Parliament has not issued many of these laws. Thus many important issues are still left pending, such as: the political associations law; the law on the freedom of peaceful demonstrations and free public meetings; the personal status law; the law to establish the union council; the law to regulate the sharing of national resources; and the law detailing the powers of the regions. Above all, sharp differences between the many blocs and lists in the parliament remain the main obstacle to civil discourse or progress. Attempts to implement these new laws could threaten the country's already fragile political foundations.

CONCLUSION

A permanent constitution is a very important document for any sovereign society, and governments usually draft them over a long period of time. Yet Iraq had no such luxury, being forced to draft its foundational document in only two months. In October 2005, Iraqis went to vote on a permanent constitution they had not seen, read, studied, debated, or drafted.⁶¹ Even stranger is the fact that they voted on an incomplete draft.⁶² They did so, perhaps naively, thinking that it would bring them the peace and prosperity they desperately desired. They followed the instructions that their political and religious leaders gave them, and the majority did not realise that this document would be another source of misery.

For the Iraqis, the permanent constitution remains controversial. Debate continues about who drafted it and the divisive and ambiguous nature of most of its articles. The drafters left too many loose ends and loopholes which threaten the unity, if not the existence, of the state (the Kurdish Regional Government has often threatened to secede from Iraq if key articles they included in the constitution are not implemented.)

The insistence of the drafters of the Constitution on keeping the central government weaker than the regional authorities has caused a chronic problem for the state. Attempts to establish federal

⁶¹ Larry Diamond, 'Consensus and Iraq's Constitution', *Los Angeles Times*, 15 October, 2005.

⁶² Arato explains how deadlines passed without the completion of the draft and how deliberations continued even while the constitution was voted on. Arato, pp. 240-242.

entities along the lines of the KRG, especially in the south, have hitherto failed. But the weak central government will always struggle to resist such efforts or force the Kurdish region to behave as part of a bigger federal state; the problem of Kirkuk and the so-called disputed areas is still pending, despite the stipulation that a census was to determine the region's future by the end of 2007. The elections of 2010 proved that the Kurdish parties did not have a majority in Kirkuk, Nineveh and Diyala, but these areas are still dominated by the presence of the Kurdish forces.⁶³

The Constitution, given its broad deficiencies, has garnered almost no respect from the government which it is supposed to guide. This situation is evinced by the government's reaction to the peaceful demonstrations across Iraq in 2011 known as the Iraqi Spring. This movement was organised to speak out against corruption and to demand an improvement of basic services. Yet, in blatant violation of the constitutional clauses that granted the protesters this right to free speech, the movement was brutally suppressed by government forces and Kurdish regional forces. The existence of some special prisons, which are not under the authority of the Interior Ministry or the Justice Ministry, but rather are run directly by the prime minister or Kurdish regional leaders, poses another related problem, although government officials claim that their actions are justified by Article 7 which gives the state the right to combat terrorism. The broad and loose nature of this article has allowed the government and the Kurdish regional authority to crush any opposing voices.

The hasty way the Constitution was drafted, the many external interventions, the absence of real Iraqi constitutional experts, the weakness of the central government and the sharp divisions undermining the country have all contributed to the precarious situation in Iraq in 2013.⁶⁴ Calls to amend the constitution are increasing, especially from the prime minister's bloc, yet all these calls, including the one to revive the committee established in 2005 to look into the amendments, have been strongly opposed, especially by the Kurdish parties.⁶⁵ To correct all these mistakes and solve the existing problems, a consensus should be reached by the different blocs that dominate the Parliament. Even the Kurdish Regional Government's refusal to consider amendments and the accompanying threat of secession should be mitigated, especially following the US administration's clear indication that a Kurdish independent state in Iraq is out of the question.⁶⁶ But the stark reality is that it will be extremely difficult to persuade those who derived the greatest advantage from the current legislation to drop it in the frail hope of establishing a united, settled, and more secure country.

⁶³ Seeing that the Kurdish Regional Government holds most of the advantages over Baghdad, (and confronted by the failure of the central government to do anything constructive), other southern and western regions are already demanding a status similar to the Kurds. At least five provinces are asking to be federal entities: Basra, Missan, Nineveh, Anbar and Salah ad Din. The first three have large oil and gas reserves, yet they have not been granted the same privilege as the KRG to collect revenue, although they are encouraged by the loose conditions anticipated in the Constitution. The related articles stipulate that one third of the members of any council of a province can submit a demand for a federal status before going to a referendum.

⁶⁴ Jonathan Morrow, *op. cit.*, p.21, accurately remarks that the deficiencies in the constitutional process are having an immediate and violent effect on the lives of the Iraqis.

⁶⁵ *Al-Mada* newspaper, (Baghdad), 3 September 2011.

⁶⁶ For example in October 2012, according to *Al-Sharq al-Awsat* newspaper, quoted by the Iraq Electronic Journal, (Amman) no. (308), 30 October 2012.

The US claimed that its objectives for occupying Iraq, apart from the unfounded claims of protecting against weapons of mass destruction, were first to remove a hostile dictatorial regime and replace it with one that complies to US plans for the region, second to rebuild Iraq into a democracy where human rights are respected, and third to transform Iraq into a democratic model that its regional neighbours could emulate. But now, after more than ten years of occupation and heavy US influence across the spectrum of Iraqi politics, it is difficult to reach any conclusion other than that these goals have all failed. The deep structural, legal and political failings of the Iraqi Constitution have contributed greatly to this failure.

FORTHCOMING PAPERS

The Emerging Interventionists of the GCC

Dr Karen Young

In a dramatic change of foreign policy, Qatar and the United Arab Emirates have emerged as activist states in their interest and willingness to intervene both militarily and financially in the politics of neighbouring Arab states. We can trace this policy shift through the simultaneous yet separate evolution of domestic, regional and international politics. The result is a moment of financial and military interventionism unprecedented in Arab Gulf politics.

The New Intellectuals in Iran: Trends in Contemporary Conscious Music

Dr Malihe Maghazei

Iran possesses a large youth population which has adopted critical and diverse attitudes towards the social and cultural establishment. A new cohort of intellectuals have expressed a belief in pluralism, political freedom, gender equality and cultural openness. This paper, the first in a series of three, examines how music is used as an expression of these trends.

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