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Dealing with Territorial Cleavages in Constitutional Transitions: Iraq

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Overview

Iraq's territorial cleavage between Arabs and Kurds was prioritized throughout the entire transition process but was so seriously mismanaged that it has caused detriment to the country's entire system of governance. The interim constitution was the first attempt to resolve the issue, at least on a temporary basis. It provided for the establishment of Iraq's first federal arrangement and for provinces to merge together and form larger regions, which had the potential to seriously change Iraq's internal arrangements. The text was conceived through a US-led and undemocratic negotiation process that excluded a large number of Iraqi actors. After January 2005, the newly elected interim parliament composed a 55 (later 70) member constitution drafting committee. That committee adopted a majoritarian approach to decision making, which pushed the draft in favor of a more traditional form of federalism, but which left minority views (generally those of the Kurdish negotiators) unrepresented. Rather than prolong the process and insist on a more consensual approach, the US embassy and a small number of Iraqi allies decided that the negotiations should continue on an invitation-only basis, which excluded a large number of actors. The draft constitution that emerged from that new process was heavily inspired by the interim constitution. Although that draft was approved in the October 2005 referendum, a large segment of Iraq's political class has refused to apply the federal system of government (the constitution's cornerstone) and its provision on natural resources. The result is that Iraq's territorial cleavage has been left unresolved and has been festering since 2005.

Background

Iraq's population is highly diverse and includes large numbers of religious and linguistic groups. Arabs form the country's largest group (at approximately 75% of the population) and speak Arabic as their mother tongue; by and large they do not speak any other languages.¹ They are not religiously homogenous, with Shia Muslims constituting a majority and Sunni Muslims a minority.² Kurds form the second largest community.³ They speak Kurdish as their mother tongue, although several dialects of the language exist.⁴

Many of Iraq's communities live in mixed areas, such as the capital Baghdad, Kirkuk, Mosul, Erbil, Basra and others. Other parts of Iraq's territory are nearly homogenous. Arabs live and form a majority in almost all of the country's territory apart from the Kurdistan Region. Kurds are spread across Iraq, Turkey, Syria, Iran and Lebanon and are often referred to as the world's largest stateless

¹ The Baath party and other nationalist movements argued for decades that Arabs constituted a unique ethnic group, but a survey of Iraq's own Arab population (which includes people of all colours) quickly dispels that notion.

² There is some argument as to how relevant that religious divide has been in history, but there is little point denying how important it has become since 2003, and in particular since 2014.

³ A number of other communities exist in Iraq, including the Turkoman and Assyrian communities, but while some are concentrated in specific geographic areas and while appeals were made (and continue to be made) for this to be addressed in the constitution, their situations provoked close to no interest amongst the constitutional negotiators at the time. This contribution will therefore limit itself to the controversies and discussions relating to the status of territories that were inhabited by Iraq's Kurdish population and to Kurdish language rights, as a reflection of the discussions that actually took place in the drafting chambers and not as a judgment on the validity of each community's position. There is some debate as to whether the controversies surrounding Sunnis and Shias are territorial in nature. I address this issue below.

⁴ The main Kurdish dialect that is spoken in Iraq is known as Sorani, which is part of the indo-european family of languages although it shares many words in common with Arabic. Several other Kurdish dialects are spoken in Iraq, including Badani and Fayli. Some Kurdish dialects are so far apart from each other in vocabulary and pronunciation that Kurds from different dialectical groups sometimes have to revert to a third language (usually Arabic, Turkish or Farsi) to communicate with each other.

minority.⁵ Iraq's Kurds are concentrated in the three northern provinces (Dohuk, Erbil and Suleimaniya), which make up the autonomous Kurdistan Region. Many were traditionally villagers and farmers living in the distant mountain ranges along the borders with Turkey and Iran, where there was often poor access to basic services, including education and health care. Kurds also live in many other parts of the country, including in Kirkuk province and city, which has been a source of major controversy during the recent constitutional drafting process.

Iraqi history has become highly politicized. Some scholars maintain that Iraq had no historical precedent prior to the 20th century and that its current territory had previously consisted of three Ottoman *vilayets* that had nothing to do with each other except all being controlled from distant Istanbul, so that Kurds and Arabs have little in common and should never have been made to live in the confines of the Iraqi state.⁶ A number of historical studies have argued in response that while Iraq's current territory was part of the much larger Ottoman State, it was governed as its own administrative entity prior to the 20th century, and that the three supposed Ottoman entities that housed what became Iraq's Arab and Kurdish populations themselves never existed, or at least never existed in the form that some assume.⁷ Others have also maintained that regardless of the precise administrative arrangement, the territory known as Iraq and the Iraqi people have existed since antiquity.⁸

Regardless, as World War I came to an end, Iraq's territory fell under the United Kingdom's 'protection' and it was under British auspices that the modern Iraqi state came into existence. The state quickly emerged as a monarchy. The country's population as a whole suffered from poverty, illiteracy and disease. Faisal bin Hussein, a wartime British ally who was originally from the Hijaz area of modern-day Saudi Arabia, and who had very little connection to Iraq or to its population, was chosen to be the country's king. Shortly after he settled in the country, he described a majority of his subjects in the following terms: "This government rules over a Kurdish part, most of which consists of a majority of ignorant people [...] and an ignorant Shi'a majority that belongs to the same [ethnicity as] the government. But the oppression they had under the Turkish rule did not enable them to participate in the governance or give them the training to do so."⁹ That contemptuous attitude towards Iraq's communities was reflected both in the legal rights that were afforded to them and to the treatment that they received.

By 1925, a new constitution had been adopted.¹⁰ It provided for a fully centralized state, which allowed for the country's new authorities in Baghdad to hoard all the powers that London had previously granted to itself. There was hardly any recognition of Iraq's rich history of multiculturalism. Arabic was the only recognized language (article 17) and the only provision dedicated to minority language rights left everything to law, thereby allowing the new authorities to give and take away community rights whenever they saw fit (article 16). In addition, the constitution created administrative districts, but left their borders, powers, and administration entirely to law, practically guaranteeing that they

⁵ Sonia Roy, 'The Kurdish Issue' (2011) 13 Foreign Policy Journal, 22 April 2011.

⁶ Anwar Anaid, 'Learning from Iraq's historical lessons' *Rudaw* (19 July 2014) <<http://rudaw.net/english/opinion/19072014>>; Peter W. Galbraith, *The End of Iraq: How American Incompetence Created a War Without End* (Simon & Schuster 2006).

⁷ Reidar Visser, 'Historical myths of a divided Iraq' (2008) 50 (2) *Survival*, 95.

⁸ Abbas Kadhim, *Reclaiming Iraq: The 1920 Revolution and the Founding of the Modern State* (Kindle Edition, University of Texas Press 2012).

⁹ *ibid*, location 2782.

¹⁰ All of Iraq's previous constitutions, including the 1925 constitution, are available here: Zaid Al-Ali's Website, 'Iraq's Constitution' (zaidalali.com) <www.zaidalali.com/resources/constitution-of-iraq/>.

would never have any authority whatsoever (articles 109-112). The absence of constitutional rights, combined with bigotry at the highest levels of government as well as geographic disadvantage of those who lived furthest from Baghdad, ensured that the state would continue to neglect the rights of the poorest and most destitute. The result was that Kurds who did not speak Arabic were often unable to read official documents, such as laws, regulations, court decisions and orders, none of which were translated on a regular basis; they were not afforded equal opportunities to employment; and the areas that they lived in were starved of public investment.

Although many other areas and communities in the country also suffered during that same period, discriminatory treatment against the Kurds was particularly acute firstly because human investment needs were so high, and secondly because their treatment was often coupled with military repression, including bombing campaigns first by the UK's Royal Air Force and secondly by the Iraqi military. A significant proportion of Iraq's Kurdish population was displaced from areas that were rich in natural resources (most notably from Kirkuk city) by virtue of government policy and as a result of the ongoing conflict, leading to serious charges of ethnic cleansing. In addition, successive governments redrew provincial boundaries to dilute Kurdish demographic weight in specific provinces.¹¹ A guerilla war that was concentrated in the northern mountains eventually broke out and lasted for decades.¹² An attempt was made in the 1970s by the then ruling Baath party to bring the conflict to an end, which included the introduction in the 1970 interim constitution of Kurdish national rights. Article 5 of the new constitution specifically stated that Iraq was composed of both an Arab and a Kurdish nation, and also "acknowledge[d] the national rights of the Kurdish People and the legitimate rights of all minorities within Iraq's unity". The new constitution was followed by the passage in 1975 of an autonomy law which provided for the existence of a Kurdistan autonomous region with an elected regional assembly for the first time. These reforms eventually failed to have any meaningful impact firstly because the autonomy that was offered actually left all real decision-making power firmly in Baghdad's hands and secondly because, modest as they were, the reforms were not properly implemented.

That failure was followed by a decade of conflict between Iraq and Iran during the 1980s. Kurdish fighters were often involved, ultimately culminating in a brutal military campaign by the Saddam Hussein's military against the bulk of the country's Kurdish citizens, including through the use of chemical weapons. Over a hundred thousand were killed, a million people were displaced, and thousands of villages were razed to the ground. That disaster was followed by the 1991 Gulf War, which ultimately led to the imposition by the United States of a 'no-fly zone' which prevented the Iraqi military from reasserting control over the country's Kurdish north. The result was that Iraq's three northern provinces established themselves as a semi-independent region, with Erbil as its capital, which had virtually no contact with the rest of Iraq. It was not recognized as an independent country internationally, but to all intents and purposes that is what it was: it adopted a different currency from the rest of Iraq, it maintained its own foreign relations and trade with surrounding nations (although much of that consisted of cross-border smuggling), and it was separated from the rest of the country by a military front. The region was jointly governed by the two main Kurdish parties, namely the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK). Each controlled

¹¹ Mainly in Kirkuk province, which was officially named Tamim province.

¹² Although the guerilla war received significant support from regional powers that were seeking to exert pressure on the Iraqi authorities Baghdad, foreign support alone would never have sustained operations against the Iraqi army for such a long period of time in the absence of strong support from the local population, which itself would not have been forthcoming without a strong sense of injustice. See Michael M Gunter, 'Foreign Influences on the Kurdish Insurgency in Iraq' (1992) 12 (4) Conflict Quarterly 7.

separate territories (with the KDP mainly concentrated in Dohuk and Erbil, and the PUK in control of Suleimania province) and also maintained separate armed factions with rival military commands.

Although the region was supposed to be democratic (and indeed, elections were organized and resulted in the formation of a parliament and government), tribal land disputes eventually spiraled into a full-scale internal civil war. Eventually, in 1996, this led to the formation of an internal border that remained in existence until 2003. Despite these (and many other) problems, the region nevertheless managed to improve standards of living considerably, particularly in comparison with the rest of the country. The political atmosphere was far more open than in the rest of Iraq, and international organizations were given a much freer hand to operate. The rest of the country languished under the Baath Party and the most comprehensive sanctions regime ever devised.

By 2003, Kurdish national aspirations had evolved to the point where Kurds could conceive establishing their own state. The Kurdish parties had administered the territories under their control with some (albeit qualified) success. They entered the post-2003 era with the intention of securing (and possibly expanding) the autonomy that they had gained in 1991. They also hoped to expand their mandate over territories that they claimed historical rights to. Finally, control over natural resources was vitally important to Kurdish ambitions in large part because it would improve the chances of financial self-sufficiency for any future Kurdish state. It was therefore equally important to extend control over Kirkuk province (which included some of Iraq's largest deposits) and over the unexplored fields that existed within the Kurdistan Region proper.

In March 2003, Iraq was invaded by the militaries of the United States and the United Kingdom with some small support from Australia, ultimately causing the end of Baath party rule in Baghdad a few weeks later. Many of Iraq's exiled opposition parties, including its main Kurdish parties, had long planned for the day after the Baath party's fall, in particular by preparing draft constitutions of their own. Some had even participated in major conferences in which the country's political future was discussed. There is no question however that the main catalyst for the transition and the subsequent constitutional drafting process was the US-led military invasion. Were it not for the invasion, there would not have been a transition from Baath-party rule.¹³

Prior to 2003, many of the political parties that were based in exile, as well as the two main Kurdish parties, engaged in indirect and direct discussions on a number of occasions to debate how the Iraqi state should be structured if ever the Baath party's regime should fall. On occasion, one of the opposition parties would publish a draft constitution that expressed that particular party's views on governance. For the most part, those documents were drafted without any significant debate, and were sometimes even the product of single individuals working without any significant oversight. Some of the draft constitutions that were produced during that period provided for federalism but included very little detail on how their proposed mechanisms would function. As the 2003 war approached, a small number of conferences and dialogue sessions were organized, mostly by the US and the UK governments, supposedly to allow for the opposition parties to debate their country's future constitutional framework in a more comprehensive manner. Although the sessions confirmed that the country's vertical distribution of power (and whether or not to adopt a federal model) was going to be crucial in any post-war environment, they were generally a failure in that the parties did not make any significant progress in reaching an agreement. The only principle that parties appeared

¹³ The question as to whether a transition from Baath party rule might have taken place pursuant to the wave of uprisings that swept the region starting in 2011 is beyond the scope of this paper.

to agree on was that Iraq should not be structured along ethno-sectarian lines, though this was with the notable exception of the two Kurdish parties.¹⁴

The Period of Constitutional Engagement

The dynamics of occupation dictated who participated in the constitution drafting process. The United States and the United Kingdom created the Coalition Provisional Authority (CPA), the country's highest civilian authority from 2003 to 2004, which played a major role in determining how the transition process would be organized. The CPA itself created a separate body known as the Governing Council, which was populated by all of the United States' closest political allies in the country. The KDP and the PUK were perhaps the most important beneficiaries of that arrangement. They were considered by the United States to be the only parties that wholeheartedly welcomed the invasion and subsequent occupation of Iraq (other parties were at best enthusiastic about the fall of the Baath party while being opposed to the US occupation that followed).¹⁵ They were also amongst the only sophisticated political actors in Iraq at the time, and benefited from the assistance of a number of foreign (including US) advisers who advocated on their behalf at the CPA and with the relevant authorities in Washington.¹⁶ The two Kurdish parties utilized their privileged relationship with the US to significant benefit during the subsequent constitutional negotiations.

The main (and in my view only) territorial issue that characterized the constitutional negotiation process was the relationship between the Kurdistan Region and the rest of Iraq, which related to who should have ultimate control over specific parts of territory. There were many controversies involving Sunni and Shia Arabs, but those were not territorial in nature. The main areas of contention between those two groups was first whether Iraqis should resist the US occupation,¹⁷ and then revolved around who should be in control over the government in Baghdad. There was never any suggestion of exerting direct physical control over other communities' territories; nor were there ever any genuine political disputes between the two sides either. Sunni parties were strongly in favor of a strongly centralized form of government (a position that they inherited from the pre-2003 era) as were most Shia parties and movements (including the Sadrist movement as well as the Dawa Party, which would come to play a dominant role in Iraq from 2005 onwards).¹⁸ Some years after the constitution entered

¹⁴ For more on the pre-2003 efforts by the US and the UK to forge an agreement between Iraqi opposition groups, see Conference of the Iraqi Opposition, 'Final Report on the Transition to Democracy in Iraq' (The Democratic Principles Workshop working document 2002) <http://www.wadinet.de/news/dokus/transition_to_democracy.pdf>.

¹⁵ Henri J Barkey, 'On-again, Off-again Alliance: The History of Washington and the Kurds' (*Foreign Affairs*, 21 August 2014) <www.foreignaffairs.com/articles/iraq/2014-08-21/again-again-alliance>.

¹⁶ This created a huge opportunity for foreign advisers to influence the process in ways that remain little understood today. Some of these individuals have in fact been remarkably forthcoming about the drafting process and about the influence that they had. Some advisers encouraged their Iraqi clients to adopt radical views that were very likely to increase tensions with other Iraqi actors over the long term, with little regard for the consequences. This applies to many issues including federalism, territorial rights and natural resources. See for example, Galbraith (n 7).

¹⁷ Neither group was entirely decided on this point. Most mainstream Sunni (including the Muslim Brotherhood affiliated Iraqi Islamic Party) and Shia groups were totally invested in the US-led process, but many components of both communities (including the Sadrist movement, which was perhaps the most powerful Shia group at the time) rejected and actively resisted the US occupation through the force of arms.

¹⁸ The only Shia party which held strongly federal positions was the Islamic Supreme Council of Iraq (ISCI). Although ISCI managed to dominate discourse within the Shia community at the time, it was only able to do so as a result of its superior organizational capacity and not because of the popularity of its views. In fact, based on subsequent electoral results, it emerged that ISCI enjoys between 5% and 7% popular support in the country (which is to say around 10% popular support within the Shia community). For more see Zaid Al-Ali, 'Constitutional Legitimacy in Iraq: What Role

into force, in 2011, a number of Sunni politicians argued that Sunni-majority provinces should invoke Article 119 and transform into regions (which they hoped would grant them as much autonomy from Baghdad as the Kurdistan Region),¹⁹ but even that evolution cannot be classified as a territorial dispute, given that an equal number of Shia politicians were also arguing in favor of the same outcome for Shia-majority provinces. The main motivation behind this changing political environment was uncontrolled and unchecked government corruption and brutality by Baghdad's security services that affected all Iraqi provinces, as opposed to a territorial dispute of any kind.²⁰

The CPA and the Governing Council spent the end of 2003 and the start of 2004 drafting a document known as the Law of Administration for the State of Iraq (also known as the "Transitional Administrative Law" or the "TAL"), which was designed as an interim constitution.²¹ It was similar in form to many other interim constitutions that were enacted during periods of transition: it established a new system of government for the country, which was supposed to be applied throughout the interim period, and also included a road map for how Iraq would transition to a new and permanent constitutional arrangement. The key difference between the TAL and its counterparts from other countries is that it was not the product of a true negotiation between Iraq's main political actors: much of the drafting was carried out by a very small group of American and Iraqi-American officials, and the key political disputes were negotiated between the CPA (which took on that responsibility without any legitimate basis to do so) and the Kurdistan Alliance, without any involvement from other Iraqi actors. The result was that the TAL was widely viewed as wholly inadequate by a large segment of Iraq's political class, which agitated against the document as soon as it entered into force.²²

Although the Kurdistan Region had already been in existence for 12 years at that point, the CPA did not immediately take it for granted that the Region would survive in its existing form. Senior level discussions took place during late 2003 and early 2004 between US and Kurdistan officials on how to resolve the issue – Iraqis from other parts of the country were not invited to participate. It was eventually decided that the Kurdistan Region would not surrender any of the autonomy that it had acquired since 1991.²³ That decision prompted some parties in the rest of Iraq to demand that they should also benefit from the same privileges that the Kurdistan Region was being granted.²⁴ Other issues of contention during the discussions included natural resources (namely which level of government should enter into contracts, should exploit resources, should market internationally, and should cash in revenues) and language rights.

Local Context?' in Rainer Grote and Tilmann J Röder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press 2011).

¹⁹ Article 119 of the Iraqi Constitution provides: "One or more provinces shall have the right to organize into a region based on a request to be voted on in a referendum submitted in one of the following two methods: (1) A request by one-third of the council members of each governorate intending to form a region. (2) A request by one-tenth of the voters in each of the provinces intending to form a region."

²⁰ Zaid Al-Ali 'Iraqi regionalism and its discontents' (*OpenDemocracy*, 3 December 2011) <www.opendemocracy.net/zaid-al-ali/iraqi-regionalism-and-its-discontents>.

²¹ For a history of how the TAL was negotiated, see Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq* (Holt Paperbacks 2006); see also L Paul Bremer III and Malcolm McConell, *My Year in Iraq: The Struggle to Build a Future of Hope* (Simon & Schuster 2006).

²² Hamza Hendawi, 'Shiites Won't Sign Interim Constitution' *The Washington Post* (Baghdad, Iraq, 5 March 2004) <www.washingtonpost.com/wp-dyn/articles/A34345-2004Mar5.html>.

²³ See Bremer and McConell (n 22).

²⁴ Saad Sarhan and Ellen Knickmeyer, 'Shiites Call for Own State in South', *The Washington Post*, (Najaf, Iraq, 12 August 2005) <www.washingtonpost.com/wp-dyn/content/article/2005/08/11/AR2005081101791.html>.

Naturally, the question of how to correct what became known as the “disputed territories” was critical in the drafting of the TAL. This included a number of issues that needed to be resolved including: (a) individual property (mainly owned by Kurds) that had been seized by the Iraqi state, and redistributed to state institutions, to government officials or to other individuals, many of whom were encouraged to move to specific geographic areas by the state; (b) the displacement of individuals and communities from these same areas with a view to rebalancing demographics in favor of specific groups; and (c) the state’s redrawing of internal provincial boundaries for the purpose of reducing the demographic weight of specific groups in a number of provinces (namely in Kirkuk province).

In 2004, the CPA established a Property Claims Commission, which had as its mandate to “resolve real property claims in a fair and judicious manner” for disputes arising from governmental actions that took place between 17 July 1968 and 9 April 2003. It allowed for immovable property that was “confiscated, seized, expropriated, forcibly acquired for less than full value, or otherwise taken, by the former governments of Iraq for reasons other than land reform or lawfully used eminent domain. Any taking that was due to the owner’s or possessor’s opposition to the former governments of Iraq, or their ethnicity, religion, or sect, or for purpose of ethnic cleansing, shall meet this standard” (Article 9).²⁵ The Commission’s establishment and the importance of its mandate were eventually incorporated into the TAL, which provided in relevant part that the “Iraqi Transitional Government, and especially the Iraqi Property Claims Commission and other relevant bodies, shall act expeditiously to take measures to remedy the injustice caused by the previous regime’s practices in altering the demographic character of certain regions, including Kirkuk, by deporting and expelling individuals from their places of residence, forcing migration in and out of the region, settling individuals alien to the region, depriving the inhabitants of work, and correcting nationality” (Article 58(A)).

On the issue of territorial boundaries, the TAL provided that, prior to 2003, the Iraqi state “the Presidency Council of the Iraqi Transitional Government shall make recommendations to the National Assembly on remedying these unjust changes in the permanent constitution. In the event the Presidency Council is unable to agree unanimously on a set of recommendations, it shall unanimously appoint a neutral arbitrator to examine the issue and make recommendations. In the event the Presidency Council is unable to agree on an arbitrator, it shall request the Secretary General of the United Nations to appoint a distinguished international person to be the arbitrator” (Article 58(B)). Finally, the TAL defers final settlement of the disputed territories issue until “a fair and transparent census has been conducted and the permanent constitution has been ratified” (Article 58(C)).

Article 60 of the TAL provided that a Transitional National Assembly would be elected in January 2005, that the entire drafting process should take place in 6 months and that it should be completed by 15 August 2005. A three-month public consultation process would follow, in which Iraqis would be given the opportunity to debate and discuss the draft, followed by a referendum that should take place on 15 October 2005. The TAL also provided that in the event an extension of time became necessary, a one-time-only six-month extension could be granted. Finally, the TAL stated that, assuming that the new constitution would be approved in the referendum, new parliamentary elections should take place by December 2005.²⁶ Naturally, those parties and individuals which disapproved of

²⁵ The Property Claims Commission was established by virtue of CPA Regulation Number 8, which itself was later amended by Regulation Number 12, dated 24 June 2004.

²⁶ The details of the transition plan are set out in Article 60 of the Transitional Administrative Law, Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004 (Iraq).

the occupation and who considered its influence over the country's political future to be illegitimate played no role over the process and subsequent discussions.

Following the completion of the TAL, sovereignty was formally transferred to an Iraqi administration in June 2004, which had as its main responsibility to organize elections that were eventually held in January 2005. The electoral law provided that Iraq's entire territory would consist of a single electoral district and that the 275 members of the Transitional National Assembly (TNA) would be elected on a proportional basis. The elections were marked by significant violence but were generally considered to be free and fair. The United Iraqi Alliance, which purported to represent Iraq's Shia majority obtained close to majority of seats in the new assembly, while the Kurdistan Alliance was close to a quarter of seats. Representatives of Iraq's Sunni Arabs, one of the country's main ethno-sectarian groups, boycotted the elections and as such were seriously underrepresented in the Assembly.²⁷

Following the elections, a 55-member constitution-drafting committee (CDC) was appointed from amongst the TNA's members.²⁸ Although the CDC commenced work in May, 15 additional members, who supposedly represented Iraq's Sunni Arabs, were allowed to join the committee in June. The first source of difficulty was the CDC's internal rules, which it drafted in May 2005, and which allowed for substantive issues to be decided on a majoritarian basis. That rule and the inclusion of the additional 15 members created an unforeseen dynamic within the committee. The CDC, particularly after it was expanded from 55 to 70 members, included a large majority of members who were determined to establish a federal system of government but one in which the federal government in Baghdad would play a key role in maintaining national unity and in which regional autonomy (even in the Kurdistan Region) would be greatly reduced. Most Arab members of the CDC (Sunni and Shia alike) were also socially conservative and sought to reflect that perspective in their work. Kurdish members, who were generally in favor of maintaining the same federal system that was established by the TAL and who were also broadly more socially liberal than their Arab counterparts, found that they were systematically in a minority in the discussions.

The drafts that were produced by the CDC reflected the views of the majority of its members. Over time, the list of exclusive federal powers expanded from 7 powers in the first iteration to more than 21 at the end of the CDC's tenure. The drafters had also included provisions that predetermined how any federal regions (including the Kurdistan Region) would have to be organized internally. During the CDC's tenure, the draft constitution was evolving in a way that would have brought Iraq closer to some of the world's most well-established federations. Kurdish members of the CDC resisted this trend but were consistently outvoted and found that they were unable to steer the discussions in a direction that was more to their liking. The CDC's drafts were also peppered with references to Islam and traditional family values. That was also particularly disconcerting to many US officials who were determined not to see Iraq establish itself as an Islamic republic under its watch.

By early August 2005, the CDC had made significant progress on a number of issues, but clearly required additional time to complete its work. The TAL included a provision that allowed for a single six-month extension and some members were calling for more time to be granted in order to allow for the negotiations to proceed. Instead, the CDC's work was discontinued, and a new informal body

²⁷ That level of underrepresentation was not reflected in the Constitutional Committee due to an ad hoc decision to include 15 Sunni members of the Committee (see. n 29).

²⁸ For a detailed account of Iraq's constitutional drafting process, see Zaid Al-Ali, *The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism Have Undermined Democracy* (Yale University Press 2014); Haider Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press 2013).

known as the “Leadership Council” was formed to continue drafting the text. The Council’s first meeting took place at the United States embassy in Baghdad, and then continued at the headquarters of the Kurdistan Alliance. Because the Council’s meetings were informal, it is unclear to this day who participated, although there is general agreement that American and British diplomats were involved and that members of the Kurdistan Alliance played a key role in the discussion.²⁹ The Council continued making changes to the draft constitution until 13 October 2005, which is to say, two days before the referendum date. The Transitional National Assembly, which was elected to draft the constitution, found that the drafting body that it appointed to carry out its work was dissolved and that it was not allowed to oversee, debate or vote on the draft constitution.

US and Iraqi officials who defended the Leadership Council did so on the basis that it was the only way in which the original referendum date (which was set for 15 October 2005 almost entirely for the benefit of US concerns about having a constitution before the US elections the following year) could be met. Violence increased steadily in the capital and elsewhere throughout the summer of 2005, and some US and Iraqi officials considered that a new election would bring into existence a new political settlement that would allow for a gradual return to normalcy. Because a new election could only be organized after the drafting of the constitution was completed, the implication was that the drafting process should be rushed, even if this meant doing so informally and without the formal mechanisms that had been agreed upon.

Not only did this justification turn out to be a terrible miscalculation (violence quadrupled following the December 2005 elections), it also obfuscates a key distinction between the CDC on the one hand and the Leadership Council on the other. As already noted, the Leadership Council’s work was generally dominated by representatives from the Kurdistan Alliance and the US embassy, which was reflected in its work. As soon as the Council assumed control over the process, the drafts that it produced deleted all of the provisions on the federal system of government that the CDC had prepared and replaced them with the provisions from the TAL, which reflected the outcome of negotiations that had taken place between the US-dominated CPA on the one hand and the Kurdistan Alliance on the other. As a result, the final draft of the Iraqi constitution, which was finalized by the Leadership Council, satisfied the interests of one party to Iraq’s constitutional negotiations (albeit a major one) and a foreign occupying force. As we shall see, this posed a major issue for the implementation of the constitution in the coming years.

The final constitution established a federal system of government that placed Baghdad at a distinct disadvantage in comparison to the regions and the provinces.³⁰ It includes a short list of exclusive federal powers (Article 110), and an even shorter list of shared powers (Article 114). The key provision is Article 115, which firmly tilts the balance of powers in favor of regions and provinces and provides that “[a]ll powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and provinces that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and provinces not organized in a region in case of dispute”. Taken together, these

²⁹ See this discussion at Chatham House, in which the former UK ambassador to Iraq clearly states that he played a role in the negotiations; Chatham House, ‘Iraq’s political systems’ (*YouTube*, 20 March 2013) <www.youtube.com/watch?v=7AkLGqmPjU8>; The same former UK ambassador makes the same admission in the following discussion, also at Chatham House, NCFAnalysis, ‘Ranj Alaaldin and Zaid Al-Ali discuss Iraq at Chatham House’ (*Youtube*, 18 March 2014) <www.youtube.com/watch?v=mXX10rbDEE>.

³⁰ An unofficial translation of Iraq’s final constitution is available at Zaid Al-Ali’s Website (n 11).

provisions leave the federal government significantly under-empowered. For example, Article 110 provides that the federal government is exclusively competent to “formulate and execute” national security policy while it is only responsible for “formulating” fiscal, monetary and customs policy. Given Article 115 which gives residual powers to the regions and provinces, this suggests that the federal government can formulate such policies but that it may not have the authority to execute its own policies. The federal government is therefore responsible for raising and maintaining a national army and police force but may not be allowed to directly raise any revenue to finance their operations.

The constitution recognizes the existence of the Kurdistan Region but also keeps open the possibility, as did the TAL, that other regions might be formed (Article 117). Thus, the informal arrangement that allowed for the Kurdistan Region to operate independently from Baghdad prior to 2003 was more or less adopted by the constitution with some modifications (Baghdad would be responsible for a small number of exclusive federal powers, including determining fiscal policy and defense). In addition, Article 118 provides that the federal parliament “shall enact, in a period not to exceed six months from the date of its first session, a law that defines the executive procedures to form regions [for other provinces], by a simple majority of the members present”. The constitutional drafters, clearly aware of the risk that a significant portion of the first post-constitution federal parliament might not agree with the constitutional framework’s spirit, established a normal threshold for passing such a law. In contrast, the parliamentary deputies and her two speakers can only be elected by “an absolute majority of the total number” of the parliament’s members (Article 55)). Although a region-formation law was eventually passed pursuant to Article 118 in October 2006, a large number of political parties from various political groups and communities boycotted the vote and many also alleged that there was no quorum and that the vote should not have been allowed to take place.³¹

The ownership and management of oil and gas revenues were also particularly contentious during the constitutional negotiations. The final text is once again the result of the flawed bargains that were struck and last-minute drafting behind closed doors by the Leadership Council and is perhaps the clearest illustration of the Kurdish Alliance’s influence over that body. Article 112 in particular is worthy of attention here. It provides that “[t]he federal government, with the producing provinces and regional governments, shall undertake the management of oil and gas extracted from current fields”. The reference to “current fields” is designed to create a distinction that had previously been unknown in Iraq and in other resource-rich countries between oil fields that are currently being exploited and those that have yet to have had any oil extracted from them. When read with Article 115, Article 112’s drafters clearly intended for oil fields that were unexploited at the time when the constitution was adopted to be under the sole control of “regions and provinces that are not organized in a region”. It was not without coincidence that the bulk of Iraq’s unexploited fields were located within the Kurdistan region or in Iraq’s disputed territories. The combination between Article 112 and 115 were specifically designed to grant the KRG exclusive authority over the region’s oil resources.

As such, not only does Article 112 create a distinction that has no technical or economic rationale in the management of national resources,³² it also creates a hierarchy amongst Iraq’s provinces and

³¹ The region formation law has yet to be applied and Kurdistan remains the only federal region in the country. As indicated above, residents in several provinces (most notably Basra province) have repeatedly expressed an interest in making use of these provisions to vastly expand their autonomy. Several formal initiatives to transform some of Iraq’s provinces into federal regions have been launched, but Iraq’s federal institutions (including the Independent High Electoral Commission) have refused to cooperate. See Peter Schwartzstein, ‘Welcome to Basra’ *Foreign Policy* (Basra, Iraq, 1 July 2015) <<http://foreignpolicy.com/2015/07/01/welcome-to-basra-iraq-basra-secession-oil-shiite-south/>>.

³² The only justification that was offered at the time was that other parts of Iraq could also benefit from this arrangement, and suggestions were made that significant unexplored deposits existed in what were considered to be resource poor

regions, given that the Kurdistan Region is the only part of the country that is known to have significant unexplored fields (reflecting the deliberate policy of Saddam Hussein's regime). Under the Kurdistan Region's interpretation of the provision, the Region shares with Baghdad the responsibility to "manage" oil and gas extracted from their own fields. Once again, under the Region's interpretation, this responsibility extends to allocating revenues that are generated from the sale of the relevant resources. The Region further argues that, given that Article 121(2) grants supremacy to regional law over national law in all areas apart from the powers that are exclusive to the federal government, the Region is entitled to disburse revenues generated from the sale of oil extracted from its own fields in accordance with its own, regional policies. Under its interpretation of these provisions, which were incorporated into the draft by Kurdish negotiators specifically to allow the Kurdistan Region to be able to make these arguments, the Region benefits from the distribution of national revenue that is raised through the sale of oil extracted from Iraq's vast southern oil fields, and it also keeps whatever revenue it raises from the exploitation of oil fields that were unexploited at the time the 2005 constitution was drafted. Because no other part of Iraq has significant undeveloped oil fields, no other province can benefit from this arrangement, even if they transform into a region pursuant to Article 118.

Proponents of the Kurdish position have argued that the privileges that they obtained for themselves in the negotiations are necessary to redress decades of discrimination and oppression that Kurds were made to suffer under successive Iraqi governments. In response, Arab politicians and observers have convincingly argued that southern provinces were just as deserving of such preferential treatment, and that the Kurdistan Region's privileged status would inevitably contribute to resentment towards the Kurdistan region in the long term. That feeling could only be strengthened by the fact that the Kurdistan Region's privileged status is not stated openly in the constitutional text and that it only became apparent after detailed review and interpretation of several provisions coupled with detailed knowledge of the status of Iraq's various oil fields. That such an important constitutional principle can only be understood in this way suggests deliberate obfuscation by the drafters, which is always cause for suspicion and discomfort in any type of negotiation, particularly constitutional negotiations.

On the disputed territories of Kirkuk and elsewhere, the final constitution does little more than to reiterate the provisions of the TAL on the same issue. It merely states that the "responsibility placed upon the executive branch of the Iraqi Transitional Government stipulated in Article 58 of the [TAL] shall extend and continue to the executive authority elected in accordance with this Constitution, provided that it accomplishes completely (normalization and 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" (Article 140). This therefore applies as much to individual property claims as well as to the effort to redraw administrative boundaries between Iraq's various provinces.

Outcome

The post-2005 phase of Iraq's transition was defined by the Leadership Council's coup against the constitutional process. The final constitution's provisions on the most critical areas were not the result

provinces, such as Anbar province. There remains significant doubt as to whether such deposits exist, but in any event, no benefit has accrued to the inhabitants of these areas. See Gloria Lalumia, 'Power plays: Massive Iraqi oil reserves – Fact or Fiction?' (*Truth-Out.org World Energy Watch*, 5 June 2007) <www.truth-out.org/buzzflash/commentary/power-plays-massive-iraqi-oil-reserves--fact-or-fiction>.

of a negotiated settlement by the country's dominant political forces. It instead reflected the outcome of an undeclared coup against what was supposed to be a democratic process. Naturally therefore, when individuals who did not play a leading role in the Leadership Council's secret negotiations were elected to government, they found little in the constitution that they agreed with and so simply refused to apply it. As a result, the constitution's provisions on federalism, disputed territories and oil and gas, all of which were essential to resolving Iraq's territorial cleavage, were ignored.

Following the October 2005 constitutional referendum, parliamentary elections were organized in December 2005, bringing into power parties that for the most part did not participate in the drafting of the constitution (particularly during the Leadership Council phase of the process). As soon as a new government was formed in May 2006, many parties and ministers immediately distanced themselves from the constitution, and in particular from the federal system of government. Over the following ten years, in the vast majority of cases, these politicians' statements and positions were largely based on the biases that they inherited from the pre-2003 era, during which the entire system of government was heavily centralized. The constitution's provisions on federalism were both alien and unclear to the bulk of Iraq's politicians outside the Kurdistan Region, who naturally refused to apply them.

As a result, the Arab parts of the country were administered on a strictly centralized basis. Even the Kurdistan Region, which managed to maintain significant levels of autonomy from Baghdad, was extremely centralized, causing officials in Suleimania and elsewhere to complain that every minor issue of policy would have to be approved by Erbil. Although provincial councils were directly elected by voters on several occasions, and governors were indirectly elected in every province, a provincial powers law that was passed in 2008 effectively stripped all of these offices of any authority. In addition, the federal government established ministries in a number of areas that it had no or limited constitutional authority over (including education and health care). Those ministries maintained offices in each of the country's provinces whose sole responsibility was to implement policy that was established at the federal level. The elected provincial authorities were powerless to influence the formulation of policy or its implementation.

In the meantime, corruption reached historic levels, while productivity in the country plummeted. Despite increased government revenue from oil exports, public services hardly improved for the general population. Over time, the general population grew increasingly frustrated with the federal government's failures to improve standards of living.³³ The justice sector was also in a lamentable state, with detainees constantly complaining of torture at the hands of security officials, and judges indifferent to their plight.³⁴ In response, groups of Iraqis in various provinces sought to make use of Article 118 to transform into regions and acquire the same status as the Kurdistan Region. This raised the possibility of the country fracturing along territorial lines. As a result, and despite the fact that it had no constitutional authority to do so, Baghdad blocked all these initiatives by refusing to allow the Independent Electoral Commission from organizing referenda on the issue. Instead, as a sop to the disaffected oil producing provinces, the federal authorities included a provision in the annual state

³³ Since 2005, Iraq has consistently ranked close to bottom of all international corruption-related rankings, including Transparency International. See for example Transparency International, *Corruption Perceptions Index 2016*, https://www.transparency.org/news/feature/corruption_perceptions_index_2016.

³⁴ See UNAMI Human Rights Office & Office of the High Commissioner for Human Rights, *Report on the judicial response to allegations of torture in Iraq* (United Nations in Iraq February 2015) <www.uniraq.org/index.php?option=com_k2&view=item&id=3429:report-on-the-judicial-response-to-allegations-of-torture-in-iraq-baghdad-february-2015&Itemid=650&lang=en>.

budget to grant each of them US\$1 for each barrel of oil produced. That innovation made close to no difference to the state of service delivery in these provinces (mainly because of corruption, mismanagement and an absence of accountability mechanisms), which remains lamentable to this day.

The failure to apply the constitution extended also to Article 140 on disputed territories. Although the Iraqi presidency did manage to produce reports on the matter as required by Article 58(C) of the TAL, the population census was never carried out. In December 2007, as the deadline imposed by Article 140 approached, the United Nations Assistance Mission to Iraq (UNAMI) was requested to make a series of proposals in the hope of resolving the matter. UNAMI's involvement lasted for three years and involved significant on the ground research to determine local context, dynamics and preferences.³⁵ That effort was completed in 2009 and led to the formation of a high-level task force which was theoretically mandated to reach a solution, but never did. Instead, the following few years were characterized by stagnation and growing polarization. The 2009 provincial and 2010 parliamentary elections led to the emergence of Arab coalitions that were defined mainly by their opposition to Kurdish demands rather than any clear political vision of their own. In addition, federal security forces confronted the Kurdistan Region's own security forces on a number of occasions during this period, raising fears of a new conflict.³⁶ Tensions were so high that many observers feared that the relationship could break down altogether.³⁷ In a dramatic turn of events, as the Islamic State of Iraq and Syria (ISIS) invaded parts of northern Iraq in June 2015 from neighboring Syria, Kurdish security forces forcibly took possession of additional territory including Kirkuk city and some of the surrounding areas, arguing that the issue of disputed territories has now been finally resolved by virtue of facts on the ground.³⁸ Although Baghdad has refused to recognize Kurdish claims over these areas, the matter is unlikely to evolve until significant progress is made in the war against ISIS.

The relationship between the two sides also deteriorated on the issue of oil and gas. As early as 2004, the Kurdistan Regional Government (KRG) entered into direct contractual agreements with foreign oil companies, at first for exploratory contracts, but eventually also for extraction and export as well. After the 2005 constitution entered into force, the KRG considered that these contracts were now retroactively brought into legal conformity, and also considered that it had full legal authorization to enter into new contracts with international oil companies to further its own industry.³⁹ Although the constitution would be used to argue both sides of this argument, Iraq's federal authorities in Baghdad ignored any legal argument that it may have had to support its position favoring the use of power politics instead. Baghdad simply declared that all contracts with international oil companies should be signed by the federal ministry of oil and blacklisted all the companies that were operating in the Kurdistan Region from operating in the remainder of the country (a significant disincentive given that the bulk of Iraq's natural resources were located in the country's southern provinces). Meanwhile,

³⁵ For a summary of the efforts that were made by UNAMI, see Sean Kane, *Iraq's Disputed Territories: A View of the Political Horizon and Implications for U.S. Policy* (Peaceworks No. 69, United States Institute of Peace 2011).

³⁶ See Abdel Hamid Zebari, 'Kurds Protest Iraqi Forces Sent to Syrian Border Region' *al-Monitor* (Erbil, Iraq, 8 March 2013) <www.al-monitor.com/pulse/originals/2013/03/maliki-new-force-jazeera.html>.

³⁷ See International Crisis Group, 'Iraq and the Kurds: Confronting Withdrawal Fears' (Middle East Report No 103, International Crisis Group 28 March 2011).

³⁸ See Hunar Ahmed, 'Official: Peshmerga control 90 percent of 140, previously 'Arabicized' zones', *Rudaw* (28 April 2015) <www.rudaw.net/english/kurdistan/280420151>.

³⁹ In order to bolster its own position, the KRG obtained a legal opinion by James Crawford (Matrix Chambers, Gray's Inn, London) on 29 January 2008. The opinion is available online here: Kurdistan Regional Government Cabinet, 'International law expert confirms KRG's authority to manage oil & gas resources' (*Kurdistan Regional Government*, 5 February 2008) <<http://cabinet.gov.krd/a/d.aspx?s=010000&l=12&a=22631>>.

Baghdad and the KRG worked to negotiate a federal oil and gas law; while a draft was published in 2007, it was never finalized, which has only contributed to the sense of uncertainty on this issue.⁴⁰

Over Baghdad's objections, the KRG negotiated an agreement with Turkey to allow for the construction of a pipeline that ran from southwest of Erbil to the Mediterranean port of Ceyhan. After oil started flowing through the pipeline and some initial hesitations by the Turkish authorities, several tankers were loaded and departed in the expectation of locating international customers. Although the KRG ostensibly located a purchaser in Texas, its tanker was barred from entering US territorial waters after legal representatives of the Iraqi government laid claim to the cargo before a federal court.⁴¹

With time, the dispute surrounding the KRG's right to exploit and sell oil internationally caused the relationship between the two sides to suffer considerably.⁴² Under former prime minister Nouri al-Maliki's administration, Baghdad sought to enforce its will by refusing to transfer the KRG's share of the national budget until the KRG accepted to work within the federal framework. The decision caused an unprecedented economic crisis in the Kurdistan Region. Construction contracts were frozen, and public servants were required to work for months without pay. Baghdad insisted that until the KRG allowed for all oil sales and international contracts to be managed by the federal authorities it would not resume any financial transfers to Erbil. Although the dispute was temporarily resolved through an agreement that was entered into in December 2014, it collapsed shortly thereafter.⁴³ Both parties accused the other of cheating, but more importantly, the sudden decline in world oil prices by 50% and the burdens brought by the war against ISIS have caused an economic crisis throughout Iraq. In particular, the KRG has found that it does not have sufficient funds to cover its administration's standard operating costs, causing many to doubt the KRG's claim to economic self-sufficiency.⁴⁴ The economic and security crisis was, in October 2015, compounded by

⁴⁰ An unofficial translation of the draft law is available here: Global Research, 'The Official Draft of the Oil and Gas Law of the Iraq Republic, English Translation of the Leaked Document' (*Global Research*, 20 February 2007) <www.globalresearch.ca/the-official-draft-of-the-oil-and-gas-law-of-the-iraq-republic/4868>.

⁴¹ The Iraqi government was eventually allowed to sue the KRG for possession of the oil. See Laurel Brubaker Calkins, 'Iraq allowed to sue Kurds over Texas Oil Tanker in US' *Bloomberg Business* (Iraq, 8 January 2015) <www.bloomberg.com/news/articles/2015-01-09/iraq-allowed-to-sue-kurds-over-texas-oil-tanker-in-u-s-1-> last updated 8 January 2015. The KRG eventually sold the oil to a buyer in Israel, which rendered the issue moot, according to the court. See Bruce Stanley and Laurel Brubaker Calkins, 'Iraqi Kurds Dealt Setback by US Court Ruling on Oil Sale' *Bloomberg Business* (Iraq, 22 September 2015) <www.bloomberg.com/news/articles/2015-09-22/kurds-lose-fight-to-sell-crude-oil-in-u-s-after-iraq-sues> last updated 22 September 2015.

⁴² Importantly, the traditional rivalry between the KDP and the PUK meant that the relationship did not breakdown altogether. During the worst periods of tension between Baghdad and Erbil, the PUK's political leadership maintained strong ties with Baghdad, even saving Prime Minister al-Maliki from a no-confidence vote in 2012.

⁴³ The agreement provides that the KRG will provide 550,000 barrels of oil a day that will be sold through the federal government, with the proceeds divided between Baghdad and Erbil. This includes 300,000 barrels a day from Kirkuk, which has been under the KRG's physical control since June 2014. The agreement also provides that Baghdad will resume its budget transfers to the region, with special allocations for security personnel. The agreement already appears to be at the point of collapsing, with the KRG claiming that it has not received its full budget transfer, and Baghdad complaining that the KRG has halted oil exports through the federal authorities. See Rudaw, 'Iraq PM calls on Erbil to honour oil agreement' *Rudaw* (Erbil, Iraq, 29 June 2015) <www.rudaw.net/english/kurdistan/28062015>.

⁴⁴ Mohammed Hussein, Patrick Osgood, and Rawaz Tahir, 'Strikes spreading over KRG salary delays' (*Iraq Oil Report*, 6 October 2015) <www.iraqoilreport.com/news/strikes-spreading-over-krq-salary-delays-16652/>.

a deep political rift between the KRG's main political forces which threatens to split the region apart, as during the 1990s.⁴⁵

The KRG also suffered from an acute internal political crisis. Article 120 of the 2005 constitution provides that regions were obliged to adopt regional constitutions that should “define the structure of powers of the region”. The Kurdistan Region's dominant parties tried to negotiate a text over a period of years but were unable to reach an agreement mainly over disagreements on the regional president's term. Instead, the president's term and powers were governed by a regional law that was adopted in 2005.⁴⁶ Article 3 provides that the president could only serve two four-year terms. By 2013, the Region's dominant parties could not agree on how the president should be replaced or by whom, and instead agreed to extend his term by another two years. In 2015, the war against ISIS was used as a pretext by the regional president's party to delay any discussion of his term, which meant that he illegally remained in his post for two years. President Barzani dissolved the regional parliament after an opposition party grew too critical of his situation.⁴⁷

By 2017, the KRG's economic and political crises continued to deteriorate. The regional president's party decided to organize an independence referendum on 25 September 2017. The regional president argued that independence was a constitutional right, based on a very particular interpretation of the constitutional preamble's final sentence.⁴⁸ In a 30 page report that was published on the day of the report, the KRG argued that that sentence meant that Iraq was a “voluntary union” in which Kurdistan has “retained its sovereign status.”⁴⁹ The report also listed a large number of constitutional violations by the Iraqi government, including the failure to resolve the status of disputed territories by the agreed deadline, which had expired 10 years before. The report argues that the “voluntary union” is therefore no longer valid, entitling Kurdistan to organize an independence referendum in the territory that it controlled in September 2017, including the city of Kirkuk.

The report asserts this wording was deliberately chosen to allow Kurdistan to preserve its sovereignty, which it could exercise at any point by withdrawing from the union. But the wording itself — particularly the Arabic original — is so vague that it is essentially devoid of meaning. The idea that Iraq is made up of several sovereign states is directly contradicted by a number of other provisions, including Article 1 that states Iraq is “a single federal, independent and fully sovereign state.” Iraq's Federal Supreme Court issued a decision ordering the KRG to stay its referendum pending a final decision on a case on the same issue that was brought before the prime minister.⁵⁰ The KRG ignored the decision, preferring to challenge the Court's legitimacy.

The Iraqi government, regional powers such as Turkey and Iran, and international powers such as the United States, the United Kingdom, European Union and the United Nations all encouraged the

⁴⁵ Kawa Hassan, ‘Kurdistan's Democracy on the Brink’ (*Carnegie Middle East Center*, 28 October 2015) <carnegie-mec.org/2015/10/28/kurdistan-s-democracy-on-brink-pub-61810>; David Romano, ‘Is the KRG failing the people?’ *Rudaw*, (23 October 2015) <www.rudaw.net/english/opinion/23102015>.

⁴⁶ See KRG Law 1 (2005), <<http://www.iraqlid.iq/LoadLawBook.aspx?page=1&SC=&BookID=28025>>.

⁴⁷ Luay al-Khateeb, ‘Kurdistan's slow rolling coup d'état’ (*Brookings Institution*, 15 October 2015) <<https://www.brookings.edu/opinions/kurdistans-slow-rolling-coup-detat/>>.

⁴⁸ The preamble provides in relevant part that “[t]he adherence to this Constitution preserves for Iraq its free union of people, of land, and of sovereignty”.

⁴⁹ See ‘The Constitutional Case for Kurdistan's Independence & A record of the violation of Iraq's constitution by successive Iraqi prime minister and ministers, the Council of Representatives, the Shura Council, the judiciary and the army’ (Kurdistan Regional Government, 24 September 2017) <<http://cabinet.gov.krd/a/d.aspx?s=040000&l=12&a=55856>>.

⁵⁰ Iraq Federal Supreme Court Decision 91 (2017) <https://iraqfsc.iq/krarat/1/2017/91_fed_2017.pdf>.

Kurdistan Region to abandon the independence referendum. The KRG pressed on however, based on an inflated appreciation of its own political importance, which was encouraged by a large number of international advisers who advised President Barzani that independence was assured.⁵¹ The KRG was also strongly encouraged to proceed by what considered to be its successes during the 2005 constitutional negotiations. The referendum did take place, and the results confirmed that over 90 per cent of voters chose independence.

However, in the days and weeks that followed, Baghdad used its reconstructed army and affiliated armed groups to militarily reassert control over large parts of territory, including the divided city of Kirkuk. The Kurdistan Region was greatly reduced in size and lost the majority of its oil resources in the process. Baghdad also forced the closure of the Kurdistan Region's airspace to all international travel, which all international airlines immediately complied with. Not a single regional or international power provided the KRG with any significant political support. The KRG was humiliated with the result and President Barzani resigned from his post and was not replaced.⁵²

Lessons

The Iraqi process is a powerful illustration of how negative negotiation tactics, and an unequal playing field, can impact the outcome of a constitutional drafting process. In an ideal situation, a constitution should seek to achieve a number of objectives. Firstly, it should reflect a sufficient degree of consensus between a country's political elites, particularly on the system of government. Majoritarianism, particularly in divided societies such as Iraq, can lead to disastrous outcomes, which is why whatever solution is reached should always be the product of a well-organized negotiation process.⁵³ Secondly, a constitution should clearly define the relationship between the individual and the state in a way that imposes a burden on the latter to protect the rights of the former. Thirdly, in countries that do not enjoy a strong judicial tradition, constitutions should be sufficiently clear and detailed (wherever possible) to prevent major surprises that may arise from the implementation of the constitution. In the event it is not possible to negotiate or draft detailed provisions on specific issues, the constitution should either provide broad guidance or remain silent, leaving the matter to be resolved (hopefully) through subsequent legislation.

In Iraq, none of these principles were respected. The CDC was designed in a way that a majority of its members could easily control the drafting process regardless of what the minority thought. Its majoritarian approach pushed the drafting process towards an outcome that would have been unacceptable to the two Kurdish parties, and could have caused the entire process to fail altogether. Regrettably, the remedy that was imposed to resolve this problem was even worse than the disease. The Leadership Council's innovation was to abandon majoritarianism in favor of a perverse form of

⁵¹ See Ben Cohen, 'Bernard-Henri Lévy Slams Turkish President Erdogan for Pushing 'Crudest, Worst' Antisemitic Campaign in Wake of Kurdish Independence Vote' (the Algemeiner, 9 October 2017). The article includes a by now infamous photograph of President Barzani surrounded by a dozen international advisers, including Peter Galbraith, Bernard Kouchner, Bernard-Henri Lévy. President Barzani is sitting at a table and cutting an apple, with the advisers sitting beside him and standing beside him, almost all smiling.

⁵² The decision not to replace President Barzani was only possible because of the constitutional vacuum in the Kurdistan Region. Because the regional constitution was never adopted, the ruling parties decided to devise a new governance framework on their own without consulting the general public.

⁵³ Sujit Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008).

‘minoritarianism’; only those individuals who agreed with a narrow version of federalism were allowed to participate in the discussions, creating a final constitution that was far outside the popular mainstream.⁵⁴ The consequence was that, for the following 10 years, the bulk of Iraq’s political elites refused to apply many of its key provisions, and in the absence of rules to govern their behavior, they allowed for Iraq’s key institutions (including its security apparatus) to completely fall apart.⁵⁵

In addition, the constitutional drafters allowed for the negotiations to be dominated by their single-minded focus on constructing (or imposing) an elite pact. The only interests that mattered in that context were those of the political parties that were represented in the discussions, almost none of which are democratic in any sense of the word.⁵⁶ In that context, the interests of ordinary Iraqis were virtually ignored: almost no progress was made on a series of state building issues (including improving the performance of the judiciary, and establishing mechanisms to improve the enforcement of rights), leaving ordinary Iraqis with very few tangible improvements to speak of.

Finally, the Iraqi constitution is hopelessly vague (and on occasion completely contorted) on a large number of crucial issues, particularly those relating to the territorial dispute discussed above. Constitutional ambiguity is a useful tool in many circumstances. Some analysts have even argued that Iraq’s constitutional negotiators were deliberately ambiguous on a number of issues.⁵⁷ There is no question that ambiguity can be useful to paper over disagreements on matters of general principle.⁵⁸ Fiscal issues are very different in that if governments are to operate there needs to be clarity regarding revenue raising authority. As soon as a constitution enters into force, the following year’s annual state budget will have to be drafted. In countries like Iraq, the same is true of natural resources given that, as a result of number of factors, monetary and fiscal prospects are entirely conflated with the state’s capacity to generate income from the extraction and export of natural resources. On these issues, constitutional negotiators can adopt a number of approaches, including (i) establishing clear constitutional rules that must be followed by future parliaments and government,⁵⁹ (ii) establishing

⁵⁴ Although the constitution was approved by a large majority of the population in a referendum that took place in October 2005, the referendum results are not a good measure to assess the population’s level of agreement with the actual text for a number of reasons, including but not limited to the following: (a) the final text of the constitution was only shared with the general public two days before the referendum date; (b) the final text of the constitution actually included a provision that specifically provided that the constitution should be amended within 4 months, hardly reassuring for anyone that may have cast their vote on referendum day; (c) security deteriorated considerably during the constitutional drafting process, leading the general population to vote not on the basis of the draft’s actual content (which, for the most part, no one had seen anyway) but on the basis of their own survival instincts; and (d) immediately after the new constitution entered into force, many of the country’s most senior leaders, including Moqtada Sadr and Nouri al-Maliki, who was prime minister from 2006 to 2014, insisted that the constitution’s federal system of government (the constitution’s cornerstone) should not be applied.

⁵⁵ Zaid Al-Ali, ‘Iraq’s House of Cards’ *Foreign Policy* (Iraq, 29 April 2014), <<http://foreignpolicy.com/2014/04/29/iraqs-house-of-cards/>>.

⁵⁶ Almost all of Iraq’s political parties are considered the personal property of families or specific individuals. To name but a few examples, the KDP has led by the Barzani family for decades. The same applies to the Islamic Supreme Council of Iraq, which has been led by the Al-Hakim family since 1982. Similarly, Al-Wifaq (a secular party) has been led by Ayad Allawi since 1991.

⁵⁷ Hamoudi (n 29).

⁵⁸ The negotiators successfully adopted that approach in relation to the status of Islam, which was granted the same status as the ‘principles of democracy’ (see Article 2 of Iraq’s final constitution). While that specific construction is yet to be understood, it allowed for what could potentially have become a major point of contention to be deferred until a later date.

⁵⁹ The German Basic Law is a good example of this type approach. See the Basic Law’s Chapter 10 on financial issues. A translation of the German Basic Law is available here: <https://www.constituteproject.org/constitution/German_Federal_Republic_2014?lang=en>.

broad principles that will have to be fleshed out in subsequent legislation in the immediate future, and (iii) remaining silent on the issue, therefore leaving the issue to be determined as soon as possible after the constitution is completed.

Once again however, the negotiators failed on this issue, and in spectacular fashion. They did not establish clear rules; nor did they set out broad principles; they did not even choose to remain silent. The final draft deliberately constructs a complex series of principles, which (only upon close inspection and through a feat of interpretation that would have been close to impossible during the drafting process) favored the Kurdistan Alliance in a unique way. Given the manner in which this arrangement was incorporated into the draft, it should not have come as a surprise that the bulk of Iraq's political class refused to respect it.

The long-term implications for this type of outcome are dire: the ruling elites' refusal to apply constitutional rules relating to federalism, natural resources and other crucial matters means that they are essentially running the country without any meaningful rules to govern their behavior. Iraq's ruling elites have learned not to trust the constitution, the highest law of the land, and they have applied that same attitude to all subsequent legislation and agreements, few of which are respected. To make matters worse, the balance of forces in Iraq has changed since 2005: for a time in 2013 and 2014, the Kurdistan Region was being starved of funds by Baghdad, something that would have been unimaginable in 2005. The debacle following the failed 2017 independence referendum is another illustration of the changed and evolving balance of forces that Iraq has experienced since 2003.

The clock cannot be turned back to 2005. But if Iraq were somehow given a second chance to negotiate a new grand bargain, it would seem intuitive to recommend that no party should seek to enforce an agreement, whether through majoritarianism, a temporal advantage or otherwise. All major decisions should be decided on the basis of consensus, which takes time. In Iraq, had more time been available and if the negotiation process had been constructed in a manner that encouraged consensus building, a more realistic and acceptable option for everyone might have been the construction of an asymmetric form of federalism, in which the Kurdistan Region enjoyed a greater level of autonomy than the rest of the country. Although analysts have been deliberating whether asymmetric federalism might have been appropriate for Iraq, we may never have the opportunity to apply that arrangement in practice.⁶⁰

Another obvious lesson is that, given how long consensus building can take, one has to make proper arrangements for what should happen in the interim period. And in that context, the effort of drafting an interim constitution should be taken far more seriously, both procedurally and substantively, than it was in Iraq. An interim constitution cannot and should not be considered merely as a 'stopgap' measure that will have no long-term implications. By negotiating its terms, inexperienced political actors can build significant experience in negotiating and drafting, which can be crucial in the run up to the drafting of a permanent constitution. In addition, the interim text's provisions, however conceived, will inevitably be reviewed and considered during the drafting of the permanent constitution, and so therefore its tone and tenure are both very significant. If, however the text is flawed and is the product of an undemocratic process, that will only encourage political actors to rush the drafting of the permanent constitution, in order to be rid of the interim text.

Finally, one should also not hesitate to recommend that whatever arrangement is agreed upon should be recorded as clearly as possible so as to reduce opportunities for deliberate misconstruction or

⁶⁰ Joost Hiltermann, Sean Kane, Raad Alkadiri, 'Iraq's Federalism Quandary' (2012) 118 *The National Interest* 20, 28.

obstruction in the future. The experience of watching Iraqi politicians argue over poorly constructed constitutional provisions since 2005 has been a painful one and could so easily have been avoided had more emphasis been placed on organizing a deliberative constitutional process that had as its dual objective to build consensus on key issues and to construct a functioning state. Hopefully ours is an experience that other countries and peoples in similar situations will learn from.

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CONTRIBUTING ORGANIZATIONS

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