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Iraq's Constitutional Moments and the Institutionalization of Ethno-Sectarianism

Jomana Qaddour

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IRAQ'S CONSTITUTIONAL MOMENTS AND THE INSTITUTIONALIZATION OF ETHNO-SECTARIANISM

*Jomana Qaddour**

ABSTRACT

What role did Iraq's ethno-sectarian cleavages play in the process of drafting its 2005 Constitution? And what role has that Constitution played in further entrenching those cleavages? The 2003 Iraqi invasion by U.S. and allied forces ultimately resulted in the drafting of two of the country's most important documents: the Transitional Administrative Law and the 2005 Constitution. These two documents—heavily influenced by the United States and Britain, as well as powerful Iraqi stakeholders (both local and exiled)—were approved despite their serious deficiencies, particularly in articles pertaining to power sharing, individual rights, and civil liberties. These deficiencies, some of which were inspired by ethno-sectarian cleavages, resulted in a constitution that has since fueled further turmoil in Iraq. Given the wave of new constitutions being drafted across the Arab world, this Article examines one of the Middle East's most pivotal constitutional processes. Lessons can be extracted for future constitutional processes, especially in diversely populated countries. Crucially, this Article dissects the ethno-sectarian bargaining that transpired between the many stakeholders in drafting the Constitution, resulting in a document that has set Iraq on an undemocratic trajectory ever since.

* Jomana Qaddour is a Senior Fellow at the Atlantic Council where she leads the Syria portfolio. Qaddour is also doctoral student at Georgetown University Law Center, focusing on ethno-sectarianism and its impact on constitutional frameworks in Iraq, Bosnia, and Syria. She is currently a member of the U.N.-facilitated Syrian Constitutional Committee as part of the Civil Society Group. She is the co-founder of Syria Relief & Development, a humanitarian organization working in Syria. Qaddour previously served as a Senior Policy Analyst at the U.S. Commission on International Religious Freedom, where she covered Syria, Iraq, Egypt, and Turkey. She also served as a Senior Research Assistant at the Brookings Institution's Center for Middle East Policy. She earned her B.A. as well as a J.D. with a Certificate in International Trade and Finance from the University of Kansas, and her LL.M. from Georgetown University Law Center. This Article would not have been possible without the generosity of Iraqi constitutional experts, including Zaid Al-Ali and Ambassador Feisal al-Istrabadi, who provided valuable feedback. A special thank you also to the London School of Economics and the Carnegie Corporation of New York for their financial support.

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INTRODUCTION

In October 2019, the world witnessed massive waves of protests in Iraq; across televisions all over the world, protesters—not for the first time—could be seen taking to the streets, demanding an end to the rampant corruption, lack of basic services, and unresponsive politicians. The Iraqi Human Rights Commission estimates that from October 2019 through July 2020, at least 550 Iraqis were killed during these protests.¹ And while the reality of COVID-19 coupled with state-led crackdowns has forced many of the protesters to go home, members of parliament—generally removed from the pulse on the ground and the needs of Iraqi citizens—doubled down on blaming parties other than their own for stagnation and avoided any discussion of corruption and misgovernment, a main source of Iraqi frustration.²

¹ *Nearly 550 Killed in Iraq Protest Violence: Commission*, FRANCE24 (July 2, 2020), <https://www.france24.com/en/20200207-nearly-550-killed-in-iraq-protest-violence-commission>.

² Telephone Interview with Zaid Al-Ali, Iraqi Constitutional Scholar (May 12, 2020).

Over sixty percent of Iraqis are under the age of twenty-five:³ they have grown up in a largely war-torn and corrupt society, and according to experts, at least ninety percent of the protests are made up of students and new college graduates.⁴ Most strikingly, southern Iraq, and particularly Basra—a location deemed Iraq's oil hub and largely made up of Iraq's majority Shia sect—is incredibly vocal in its rejection of Iraq's current state.⁵ But this is not the first time Shia protestors have mobilized against a Shia-led government.⁶ Indeed, contrary to what many observers may think, the newest wave of protests reinforces the reality that Iraq's problems are not centered around sectarian struggles for power, even though political rhetoric and political parties, as well as Iraq's constitution, have been designed to exploit such cleavages. In addition to calls to address high unemployment, lack of security, and ineffective governing institutions, there have been calls to amend, and in some cases totally re-write, the constitution which protestors appropriately consider lacking in legitimacy and contributing to much of the chaos seen in Iraq today.⁷ These justified complaints come from all sects and ethnicities.

In the minds of most people, the 2003 invasion is singled out as the moment when sectarianism broke out in Iraq. As Iraqi scholar Fanar Haddad points out, “if we restrict our understanding of ‘sectarianism’ solely to violent sectarian conflict, widespread sectarian hatred, and the empowerment of sect-centric political actors, then 2003 undoubtedly becomes the moment separating ‘sectarian’ Iraq from a ‘non-sectarian’ one.”⁸ However, expanding the definition of sectarianism to include “sect-centric bias, prejudice, stereotypes, and institutional discrimination,” Fanar argues, would mean “sectarianism in Iraq . . . was alive and well long before 2003.”⁹

³ *In Iraq, UN Youth Envoy Says Young People Are ‘Most Valuable Force We Have to Shape a Better Future’*, UNITED NATIONS (Aug. 12, 2017), <https://www.un.org/sustainabledevelopment/blog/2017/08/in-iraq-un-youth-envoy-says-young-people-are-most-valuable-force-we-have-to-shape-a-better-future>.

⁴ Telephone Interview with Rasha al-Aqeedi, Iraqi Expert (Feb. 25, 2020).

⁵ *Months of Protests Roil Iraq's Oil Capital Basra*, NAT'L PUB. RADIO (Sept. 27, 2018), <https://www.npr.org/2018/09/27/651508389/months-of-protests-roil-iraqs-oil-capital-basra>.

⁶ Renad Mansour & Ben Robin-D'Cruz, *The Basra Blueprint and the Future of Protests in Iraq*, CHATHAM HOUSE (Oct. 8, 2019), <https://www.chathamhouse.org/expert/comment/basra-blueprint-and-future-protest-iraq>.

⁷ Marsin Alshamary & Safwan Al-Almin, *Iraqi Protesters Demand Constitutional Change. Can They Make It Happen?*, WASH. POST (Nov. 7, 2019), <https://www.washingtonpost.com/politics/2019/11/07/iraqi-protesters-demand-constitutional-change-can-they-make-it-happen>.

⁸ Fanar Haddad, *Sectarian Relations Before “Sectarianization” in pre-2003 Iraq*, in SECTARIANIZATION: MAPPING THE NEW POLITICS OF THE MIDDLE EAST 101, 105 (Nader Hashemi & Danny Postel eds., 2017).

⁹ *Id.*

Those without knowledge of Iraq's history are unaware of the root causes of the sectarianism seen in its society today. Without such knowledge, it is difficult to address the institutionalization of societal cleavages, and even more difficult to develop solutions to address them. To correctly understand which events led Iraq to the place it is today, one must come to grips with the impact of the past and current legal framework—specifically the Iraqi constitution—on institutionalizing Iraq's sectarian elements. It is only in this way that appropriate recommendations can be made on how to move Iraq forward from its state of turmoil to a more sustainable, stable, and peaceful state.

This Article attempts to review Iraq's constitutional history and highlight the role it has played in solidifying the seeds of division which tear the country apart today. This Article begins by reviewing the most critical historical moments in Iraq's history which laid the seeds for solidifying sectarianism in society. It then addresses the role of constitutionalism in non-democratic societies. Next, this Article discusses the relevant constitutional history and institutionalized sectarian cleavages that are seen today, with a particular focus on two categories of articles in the constitution: power sharing and civil rights and liberties articles. The Article ends with thoughts on how Iraq can move forward from here.

I. IRAQ IN HISTORICAL CONTEXT

To understand today's Iraq, it is important to understand its history. An appropriate starting point is the reign of the Ottoman Empire. Like other European empires, interaction between the subject and the state was limited, with "the collection of taxes being its most important contact with the population."¹⁰ The state's function largely focused on the provision of basic security to its constituents.¹¹

Neither the Ottomans Empire nor Europeans embraced liberal constitutionalism until the advent of the modern nation-state; in that respect they were the same. However, they departed on one critical issue. As a result of the Enlightenment and the French Revolution, a universal "assumption of human reason, rational thought and the sovereignty of each individual" arose in Europe but remained absent in the Ottoman Empire's culture.¹² Although in the period immediately following the Enlightenment, democratic principles remained the exception rather than the norm in Europe; the governor—rather than the

¹⁰ Thomas Philipp, *From Rule of Law to Constitutionalism, in ARABIC THOUGHT BEYOND THE LIBERAL AGE* 142, 147 (Jens Hanssen & Max Weiss eds., 2017).

¹¹ *Id.* at 146.

¹² *Id.*

governed—remained the source of legislative authority.¹³ Meanwhile, Islam remained the Ottoman Empire's source of legitimacy; the Sultan served as "God's Shadow on Earth."¹⁴ The Empire's conservative political-legal culture developed no legal code as an alternative to Islamic law (*sharia*).¹⁵ The Sultan issued laws supplementing *sharia* which "were ad hoc and neither inclusive nor complete, nor permanent[.]"¹⁶ But supplementing laws did not constitute a definite legal code or political tradition. This existence of two sources of law—Islamic law and laws emanating from the political executive, i.e., the Sultan—was a result of functionality, and was not intended to create the semblance of separation of powers.¹⁷

Given that the Empire viewed subjects primarily through their tax status, which was determined by religious affiliation, an individual's religious identity became crucial in any interaction between the individual and the state.¹⁸ While the Ottoman Empire was committed to the notion of "Ottoman Muslim supremacy," it reigned over a multi-ethnic, multi-sectarian, and multi-religious empire.¹⁹ The Ottomans employed the *millet* system of taxation, which "reinforced the emphasis on religion in a profoundly unequal and political order" by prioritizing Muslims and giving *dhimmi*s (non-Muslims) a separate status.²⁰ It imposed *jizyah* (taxes) upon non-Muslims, and applied laws to them which differed from the laws imposed on Muslim populations.²¹ Muslims were prioritized in the Empire, and the outcome of the Ottoman management of its diverse subjects was coexistence, not equality, of diverse religious communities.²²

This *millet* system remained intact until the *tanzimat* (reforms) of 1839.²³ Under the Noble Edict of the Rose Chamber, new institutions were established mandating the security of life, honor, and property for all subjects of the Empire

¹³ *Id.*

¹⁴ Ussama Makdisi, *The Problem of Sectarianism in the Middle East in an Age of Western Hegemony*, in SECTARIANIZATION, *supra* note 8, at 23, 26.

¹⁵ *Id.* at 147.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Philipp, *supra* note 10, at 147.

¹⁹ *Id.*

²⁰ Makdisi, *supra* note 14, at 26.

²¹ *Id.* at 27.

²² It is helpful to note that during the Empire rule, modern day Iraq was divided into three provinces, Mosul, Baghdad, and Basra. The borders of each province were more or less drawn according to where Iraq's major ethno-sectarian groups resided (Kurds, Sunnis, and Shia respectively). *Id.*

²³ *Tanzimat*, BRITANNICA (Dec. 11, 2020), <https://www.britannica.com/event/Tanzimat>.

regardless of race and religion.²⁴ These reforms came about following the increased trade and economic relationships between Europe and the Ottoman Empire.²⁵ The Empire felt increasing pressure to implement reforms to protect themselves from the threat of political and military intervention by European powers as trade relationships increased.²⁶ By 1855, the *jizya* on *dhimmi*s was formally abolished, and in 1869 the concept of secular Ottoman citizenship was introduced.²⁷ The equality of subjects was temporarily enshrined in the constitution in 1876, but then quickly withdrawn. It did not return until the Young Turk movement in 1908—which itself adhered to these principles in theory more than practice.²⁸

The Empire's short-lived attempt to impose equality of citizenship did not settle well with the Muslim-majority population across its territories. The new policy of “non-discrimination” disrupted the centuries-old system which enshrined Muslim legal supremacy, leading to sectarian clashes.²⁹ Its “top-down disestablishment of a system of symbolic and legal Muslim supremacy” (without preparing its elite or subjects for the changes) spurred resentment within a Muslim majority.³⁰ This system created an impression that the community was making compromises to non-Muslim groups backed by hostile foreign powers which wanted to see the demise of the Empire.³¹

As a result, sectarian clashes could be seen across the Empire. In Aleppo in 1850, there was a massacre of Christians where several churches were burned and hundreds of Christian homes were destroyed and looted.³² A decade later, another mob similarly turned against Damascene Christians.³³ This uptick in violence against non-Muslim minorities prompted interested European powers to intervene—both to stop the violence against communities with which they felt a religious affinity, and to simultaneously promote their more mundane interests.

²⁴ *Id.*

²⁵ See E. Durangolu & G. Okutucu, *Economic Reasons Behind the Decline of the Ottoman Empire*, 3610 NHH MASTER THESIS 2 (2009).

²⁶ DAVID FROMKIN, *A PEACE TO END ALL PEACE: THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MIDDLE EAST* 28–29 (2001).

²⁷ Makdisi, *supra* note 14, at 27.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 28.

³¹ *Id.*

³² *Id.* at 27.

³³ *Id.*

One critical sectarian clash was the 1860 conflict of Lebanon between the Druze overlords and Maronite Catholic Christian peasants.³⁴ The Ottomans sided against the Maronites, spurring France—then ruled by Napoleon III, and which viewed itself as a protector of the Levant's Catholics—to directly intervene.³⁵ French intervention led to a series of conventions dubbed the “Organic Regulation,” which took place between 1861 and 1864.³⁶ The Organic Regulation ultimately leading to the autonomy of the Mount Lebanon Mutasarrifate in 1861 and the appointment of an Armenian Christian governor.³⁷ This divided the council seats under the governor by sect: twelve members, of them, four Maronites, three Druze, three Greek Orthodox and Greek Uniates, one Sunni and one Shia.³⁸ By making these concessions, the Empire formally institutionalized top-down, sectarian quotas as a show of commitment to non-discrimination against non-Muslims.³⁹ This was seen by Europeans as the only way to ensure religious pluralism and also served as a method of expanding European influence.⁴⁰ Minorities seized upon this moment and also pushed the Europeans to help them create their own statelets: in Lebanon, the Maronite-dominated statelet was created; Syria was carved into Alawite, Druze, and Arab states, based on the geographical location of these groups, with the cooperation of local leadership.⁴¹ Simultaneously, Europeans spurred the creation of previously nonexistent religious positions, including elevating the mufti of Beirut to represent of Sunnis in Lebanon, and creating the Supreme Muslim Council in Palestine.⁴² Ottoman-era personal status laws (which were applied based on sect) were welcomed and expanded during the mandatory period.⁴³

Iraq fell under the British Mandate in 1918 (referred to as the Mandate for Mesopotamia), during which the British High Commission became the only legislative and executive authority in the country.⁴⁴ The Iraq the Commission took control of was one with great diversity and a multitude of languages:

³⁴ *Id.*

³⁵ *Id.* at 28, 32.

³⁶ See 2 STANFORD J. SHAW & EZEL KURAL SHAW, HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY 142–44 (1977).

³⁷ *Id.*

³⁸ Bassel Salloukh, *The Architecture of Sectarianization in Lebanon*, in SECTARIANIZATION, *supra* note 8, at 215–16.

³⁹ Makdisi, *supra* note 14, at 29.

⁴⁰ *Id.* at 29.

⁴¹ *Id.* at 29.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Saad Jawad, *The Iraqi Constitution: Structural Flaws and Political Implications*, LON. SCH. ECON. 3 (Nov. 2013), http://www.constitutionnet.org/sites/default/files/the_iraqi_constitution-structural_flaws_and_political_implications.pdf.

Arabic, Kurdish, Turkish, Chaldean, Farsi, and others.⁴⁵ However, it was also deeply impoverished, underdeveloped, and money and influence were confined in the hands of a very few elites.⁴⁶ In rural areas, tribal and traditional norms superseded government authority.⁴⁷ Under the Mandate, the British did not seek to radically alter the fabric of Iraqi society or impose new hierarchies. The Ottomans had allowed local populations to more or less regulate the *local* affairs of *men*—regardless of religion—among and between one another.⁴⁸ This continued to evolve and paved the way for Arab nationalist movements to take root during the Mandate period.⁴⁹ Meanwhile, the British focused on their limited objectives based around the interests of the Kingdom: to shepherd the mandates which would become future allies to independence; to ensure access to crucial trade routes (both land and water); and to maintain the land route to India. They were also assigned to keep competing powers, namely the French, out of the region. Shortly after falling under the Mandate, the Great Iraqi Revolution broke out in May 1920, bringing together nationalists who pushed back on British rule.⁵⁰ Although the rebellion failed, it had a lasting impact on the way the British oversaw Iraq, feeling “compelled to shift their strategy in favor of ruling indirectly, through a weak Iraqi administration.”⁵¹ In 1921, the British selected Faisal bin Hussein as the King of the constitutional monarchy of Iraq.⁵² The Iraqi provisional authorities, led by Abdelrahman al-Gillani, negotiated a treaty of alliance with Britain, known as the Anglo-Iraqi treaty.⁵³ The treaty codified several requirements: the King must consult with the British High Commissioner on Iraq’s financial policy; the British are given access to Iraq’s air bases; and the British can place civilian and military advisers all across the state.⁵⁴ The King’s elite mostly consisted of Sunni Arabs, with little effort to include the rest of Iraq’s populations, although during his period the Kurds did push for autonomy on language, cultural, and educational issues—demands which were mostly ignored.⁵⁵ A number of rebellions against the monarch

⁴⁵ ZAID AL-ALI, *THE STRUGGLE FOR IRAQ’S FUTURE: HOW CORRUPTION, INCOMPETENCE AND SECTARIANISM HAVE UNDERMINED DEMOCRACY* 18, 20 (2014).

⁴⁶ *Id.* at 18.

⁴⁷ *Id.*

⁴⁸ Makdisi, *supra* note 14, at 30. Personal status and gender laws remained deeply problematic and disadvantageous towards women. *Id.*

⁴⁹ *Id.*

⁵⁰ Al-Ali, *supra* note 45, at 19.

⁵¹ *Id.* at 19.

⁵² *Id.*

⁵³ *Id.* at 20.

⁵⁴ *Id.*

⁵⁵ *Id.* at 21.

during this time period were also quashed by the United Kingdom's Royal Air Force.⁵⁶

In 1932, the Hashemite Kingdom of Iraq gained independence from the British.⁵⁷ The British-friendly monarchy⁵⁸ ruled until 1958, when it was deposed in a violent coup led by General Abdel Karim Qasim.⁵⁹ Around this time, Iraq's oil revenues increased, and the country saw the first robust investments in education, infrastructure, manufacturing, and health care. A middle class was finally created, lasting for another three decades.⁶⁰ Tribal courts and the use of tribal law were abolished.⁶¹

Although a contemporary of Egypt's Gamal Abdel Nasser, Qasim was not a pan-Arabist in the traditional sense and, in fact, was more West-leaning than most Arab leaders.⁶² Like Iraqi monarchists before him, he believed in Arab unity confined to specific areas of cooperation, such as foreign affairs, defense, and education, but not others.⁶³ He was alarmed by the proclamation of the United Arab Republic by the Syrians and the Egyptians.⁶⁴ He pushed back at the time, as did other West-leaning countries, such as Jordan and Lebanon.⁶⁵ Although Qasim's rule oversaw some progress in Iraq's development, eventually his leadership became authoritarian, allocating legislative and executive power exclusively to him, with no real power left for the parliament.⁶⁶ He completely monopolized power and authority in Iraq.⁶⁷

In February 1963, a coup organized by the Baath government removed Qasim and took control.⁶⁸ The Revolutionary Command Council, unelected and unaccountable individuals, came to power and defined themselves in the constitution as a "revolutionary body that led the people and national armed forces . . . to overthrow the regime of . . . Qasim . . . in the name of and for the

⁵⁶ *Id.* at 21.

⁵⁷ COURTNEY HUNT, *THE HISTORY OF IRAQ* 69 (2005).

⁵⁸ The monarchy had signed the Portsmouth Treaty, a military alliance with Great Britain in 1948. The agreement was later cancelled, but only after a series of violent protests and scores killed by police. Juan Romero, *Arab Nationalist Constitutions of 1958 in the Context of the Cold War: The Cases of Egyptian-Syrian United Arab Republic, the Iraqi-Jordanian Arab Union, and the Republic of Iraq*, 56 *MIDDLE E. STUD.* 585, 594 (2020).

⁵⁹ AL-ALI, *supra* note 45, at 25.

⁶⁰ *Id.*

⁶¹ *Id.* at 26.

⁶² Romero, *supra* note 58, at 586.

⁶³ *Id.*

⁶⁴ *Id.* at 595.

⁶⁵ *Id.*

⁶⁶ AL-ALI, *supra* note 45, at 26.

⁶⁷ *Id.*

⁶⁸ *Id.* at 27.

benefit of the people.”⁶⁹ The Council went on to endow itself with full executive and legislative authority.⁷⁰ They were led by Arab nationalist and Qasim’s second in command, Abdelsalaam Mohammed ‘Arif al-Jumayli, who became president in February 1963.⁷¹ He arrested officers who tried to depose him, including Saddam Hussein.⁷² He joined the Joint Presidency Council with Egypt in 1964 and went on to establish the Arab Socialist Union of Iraq that same year.⁷³ After he was killed in a helicopter crash in April 1966, his weaker brother, Abdelrahman ‘Arif al-Jumayli, survived him as president from 1966 until 1968.⁷⁴

The year 1968 saw the rise of the Arab Socialist Baathist Party, a system that blended the notions of socialism with Arab nationalism, not too dissimilar from what was witnessed in Syria and Egypt, yet still distinct. In the Iraqi context, Arab unity was more focused on Iraq revolutionary nationalism than the pan-Arab movements in Syria and Egypt.⁷⁵ Iraq wanted to maintain its independence and strength; it did not want to answer to other powers in the region. Like other socialist powers in the region, however, it was generous in its provision of welfare benefits to many citizens, including in the sectors of development, education, and infrastructure.⁷⁶ This came at the grave cost of personal freedoms; even those granted some freedoms were bound to the state-created framework and the image it sought to project to the outside world.

For the first ten years, Iraq was led by Saddam’s cousin, Ahmed Hassan al-Bakr, who had served as prime minister during the al-Jumayli years.⁷⁷ Iraq witnessed two additional provisional constitutions during this period: one in 1968 and the other in 1970.⁷⁸ The 1970 Constitution remained in force until 2003, when Saddam Hussein was toppled.

The rise of the Iraqi nation-state in the post-mandate period, even during Qasim’s time, was the first time Iraqi citizens felt any ownership over their country; prior to this, the idea of citizenship, with rights of citizens and

⁶⁹ *Id.* at 26.

⁷⁰ *Id.* at 28.

⁷¹ Lawrence Joffe, *Abdul-Rahman Aref*, GUARDIAN (Sept. 3, 2007), <https://www.theguardian.com/news/2007/sep/04/guardianobituaries.iraq>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Romero, *supra* note 58, at 586.

⁷⁶ AL-ALI, *supra* note 45, at 25.

⁷⁷ *Id.* at 28.

⁷⁸ Jawad, *supra* note 44, at 3.

obligations of the state, was virtually non-existent.⁷⁹ But, the creation of this nation also involved a reshaping of the notion of who an “Iraqi” would be: although different from the Ottoman Empire, it again instituted the idea of “insiders” and “outsiders,” solidifying and impacting communities asymmetrically.⁸⁰ The former religious and local rivalries began to interact with the desire of the state to dominate the creation of a new national identity.⁸¹ A competition began to develop in Iraq over who would define and determine “national truths”: demographics, national history, national memory, and entitlement within the state.⁸²

Saddam came to power in the eventful year of 1979.⁸³ The rise of the Islamic Republic of Iran challenged the notion of Arab nationalism, and proposed a new model for the region defined by the rise of an Islamic republic in the form of a Shia-centric political model.⁸⁴ The rise of Iran terrified the Arab Gulf States, who feared that Iran’s revolution would sweep across the region.⁸⁵ This fear directly led to huge investments by the Arab states to fund anti-Shia messaging across the Muslim world, including in Afghanistan and Pakistan.⁸⁶ The tension between Iran and Iraq reached its height during the eight-year Iran–Iraq War,⁸⁷ in which the Gulf Arab countries backed Saddam Hussein in the battle against Iran.⁸⁸

During the peak of Iranian-Saudi rivalry, as Lebanese journalist Kim Ghattas explains in *Black Wave*, Saddam seized the opportunity to crush any alternative to his regime. Saddam targeted Kurds, whom he chased down—even crossing into the Iranian border to do so—with air raids.⁸⁹ He went after leftists and Shias, the latter of which he expelled to Iran by the hundreds or put under house arrest.⁹⁰ Saddam remained wary of Shias, not exactly for sectarian reasons, but

⁷⁹ Haddad, *supra* note 8, at 108–09.

⁸⁰ *Id.* at 109–11. For example, the Nationality Law of 1924, and its restrictive Arabization policies, were utilized to justify the authority’s use of repressive tactics to create a unified nation-state identity. *Id.* at 112.

⁸¹ *Id.* at 109.

⁸² *Id.*

⁸³ *Saddam Hussein*, BRITANNICA, <https://www.britannica.com/biography/Saddam-Hussein> (last visited Sept. 12, 2021).

⁸⁴ Haddad, *supra* note 8, at 115.

⁸⁵ Nader Hashemi & Danny Postel, *Introduction: The Sectarianization Thesis*, in *SECTARIANIZATION*, *supra* note 8, at 11.

⁸⁶ *Id.*

⁸⁷ Taking place from September 1980 until August 1988. *Iran-Iraq War*, BRITANNICA, <https://www.britannica.com/event/Iran-Iraq-War> (last visited Nov. 11, 2021).

⁸⁸ Hashemi & Postel, *supra* note 85, at 81.

⁸⁹ KIM GHATTAS, *BLACK WAVE: SAUDI ARABIA, IRAN, AND THE FORTY-YEAR RIVALRY THAT UNRAVELED CULTURE, RELIGION, AND COLLECTIVE MEMORY IN THE MIDDLE EAST* 87 (2020).

⁹⁰ *Id.*

rather for the threat they posed to his power as the “oppressed majority,” whom he claimed were backed by his rival Iran.⁹¹ In 1980, when there was an assassination attempt on Iraqi Vice President Tariq Aziz, Saddam was quick to blame Shia activists backed by Iran.⁹² In response, Saddam executed high-profile characters from the Shia community, including Ayatollah Mohammed Baqer al-Sadr and his sister Amina bint al-Huda al-Sadr.⁹³ Ayatollah al-Sadr was the only cleric in Najaf who openly supported Iran’s Ayatollah Ruhollah Khomeini’s *wilayat al-faqih*.⁹⁴ He was encouraging followers to rebel against the Iraqi government and issued religious fatwas against joining the Baath Party.⁹⁵ His execution sparked a call to overthrow Saddam by Ayatollah Khomeini, who had spent fourteen years in Najaf after he was exiled from Iran by the Shah, only to be thrown out again by Saddam in 1978 at the behest of the Shah.⁹⁶

In August 1980, Saddam went to Saudi Arabia for a surprise twenty-four-hour visit to meet King Khaled in Taef, Saudi Arabia—his first foreign trip as president.⁹⁷ Shortly thereafter, on September 22, Saddam declared war on Iran. The Iraq–Iran War galvanized the region to support either side: Jordan sent volunteer fighters, and the Gulf loaned Saddam \$14 billion for war efforts.⁹⁸ Syria and the Amal Movement in Lebanon supported Iran.⁹⁹ This war came as a gift to Khomeini, who used it to solidify his support and unite Iranians against a common enemy, and sent thousands of young Iranian men and boys to their deaths.¹⁰⁰ During the war, Khomeini was direct about his appeals to Iraq’s Shia; he stated, “We are related by race, traditions, and religion . . . no other government or nation in the world has the right to be concerned about Iraq’s future.”¹⁰¹ The birth of the Supreme Council for the Islamic Revolution in Iraq

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* Wilayat al-faqih is the principle in Shia Islam that permits an Islamic jurist to have custodianship over people; this idea is enshrined in the Iranian Constitution. *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*; PETER W. GALBRAITH, THE END OF IRAQ: HOW AMERICAN INCOMPETENCE CREATED A WAR WITHOUT END 14 (2006).

⁹⁷ GHATTAS, *supra* note 89, at 87.

⁹⁸ *Id.* Saudi Arabia claimed it had not given Saddam the green light to attack, and there is no confirmed proof that it did so. *Id.*

⁹⁹ *Id.* at 88. Amal actually supported the Minister of Defense, Chamran, personally because he was formerly a comrade of theirs in Lebanon. *Id.* When Chamran died in battle in 1981, Amal withdrew support because it did not relate to Khomeini’s Iran, which was also trying to eliminate all possible competition to Khomeini. *Id.*

¹⁰⁰ *Id.*

¹⁰¹ GALBRAITH, *supra* note 96, at 16 (remarking on the ceasefire in 1982).

and an Iranian-based Iraqi government-in-exile came to fruition “with the express goal of creating an Iranian-style Islamic republic.”¹⁰² The Iraq–Iran War was viewed as the point of no return for two men, Saddam and Khomeini: “[T]wo men with delusions of grandeur reaching into ancient Persian and Arab history to justify their modern murderous campaigns.”¹⁰³

On August 2, 1990, Saddam invaded and temporarily occupied Kuwait for drilling on land that Saddam argued was Iraqi territory.¹⁰⁴ This was a turning point for Iraq and its relations with Western and Gulf countries which previously had backed him against Iran. America turned against him, pushing the U.N. Security Council to impose comprehensive sanctions on Iraq which remained in place even after the U.S.-led coalition ousted Iraq from Kuwait.¹⁰⁵ During the brutal sanction years from 1990 until 2003, aggrieved Shia-sect-centric and Kurdish dissidents led the opposition movement against Saddam’s regime. The fact that they remained politically underrepresented under Saddam despite their demographic weight only further fueled their “communal victimhood” narrative.¹⁰⁶ Iraqi expert Fanar Haddad argues the impact that marginalization had on both Shias and Kurds in the Iraqi state amounted to “[m]ismanagement of [c]ommunal [p]lurality.”¹⁰⁷

Meanwhile, the breakdown in Sunni–Shia relations was actually the result of state-versus-Shia tensions as opposed to communal Sunni–Shia tensions; Shia groups pushed back against the *state’s* “homogenizing impulses,” not against the greater Sunni community.¹⁰⁸ In fact, it was not until the invasion of 2003 that Sunnis galvanized behind their Sunni identity.¹⁰⁹ Limits placed on public expression of Shia identity were felt by some Shia communities on the ground and further laid the foundation for grassroots Shia-centric mobilization against

¹⁰² *Id.* at 16–17. The Supreme Council for Islamic Revolution in Iraq (SCIRI) also formed military brigades, the Badr Corp, which fought with Iran during the Iran–Iraq War. *Id.*; AL-ALI, *supra* note 45, at 41.

¹⁰³ GHATTAS, *supra* note 89, at 88.

¹⁰⁴ *Iraq Invades Kuwait*, HISTORY (July 30, 2021), <https://www.history.com/this-day-in-history/iraq-invades-kuwait>.

¹⁰⁵ *Sanctions Against Iraq*, GLOB. POL’Y F. (Dec. 28, 2005, 9:37 PM), <https://webarchive.loc.gov/all/20051228213710/http://www.globalpolicy.org/security/sanction/indexone.htm>.

¹⁰⁶ Haddad, *supra* note 8, at 115–16.

¹⁰⁷ *Id.* at 110–11.

¹⁰⁸ *Id.* at 113. Haddad discusses two examples of Shias making exclusive demands for their rights. In April 1922, Mahdi al-Khalisi, a militant cleric and opposition figure, demanded not only Iraqi independence from the British, but also that half the cabinet and half of all government officials be Shia. *Id.* at 113–14. In another incident in 1935, in the People’s Pact addressed to King Ghazi bin Faisal, tribal and religious leaders demanded that Shias be better represented in government and that Shia jurisprudence be better represented in the judiciary. *Id.*

¹⁰⁹ *Id.* at 110.

the state.¹¹⁰ While the government claimed to respect sectarian plurality, identifying by sect was near criminalized and perceived as a threat to national unity. Iraq was not alone in this regard: in many post-colonial states, in an effort to build a strong united front against the enemy, the state often diluted minority groups. Dissidents were seen as a “threat to national unity” or entities with possible “dual loyalties.”¹¹¹ Saddam’s paranoid autocratic rule monitored anyone and everyone seen as a potential threat, and entire groups of people were targeted on the basis of religious or ethnic background.¹¹²

During the invasion of 2003, the United States’ cooperation with specific Iraqi opposition leaders further exacerbated the sect-centric model in the country. The leading figures during the invasion were a cadre of exiles who made the moral compromise to collaborate with the United States and the United Kingdom to gain power. This defining characteristic ultimately went to the heart of their legitimacy, creating a ‘fruit of the poisonous tree’ situation, whereby whatever they created was usually deemed inadmissible by average Iraqis. These exiles were highly unqualified to oversee large projects, much less lead a country they had not stepped into for decades and did not understand.¹¹³ The United States’ coordination with a host of parties prior to the invasion via its Democratic Principles Working Group¹¹⁴ meant the pre-planning of 2003 happened almost exclusively with parties outside of Iraq which were either religious or sectarian, and “bore little resemblance to Iraqi society.”¹¹⁵ These groups included the Supreme Council for Islamic Revolution in Iraq (SCIRI),¹¹⁶ Ahmed Chalabi’s Iraqi National Congress (INC), and Iyad Allawi’s Wifaq.¹¹⁷ Their isolation from other Iraqis for decades, in part due to the atmosphere of extreme fear and distrust cultivated by the Baathists, meant that “officials who took control of the Iraqi state kept themselves to themselves, hardly interacted with each other, and proceeded with extreme caution and distrust in dealing with anyone from a different party.”¹¹⁸ As a result, as the gathering place for all of these exiles became parliament, the institution itself “became the most sectarian institution

¹¹⁰ *Id.*

¹¹¹ *Id.* at 111.

¹¹² AL-ALI, *supra* note 45, at 31–32.

¹¹³ *Id.* at 44–45.

¹¹⁴ A group that focused on “how Iraq should transition to democracy, human rights, the rule of law, civil society and democratization.” *Id.* at 49.

¹¹⁵ *Id.* at 59.

¹¹⁶ The Iraqi National Congress was headed by Ahmed Chalabi, and Wifaq was headed by Iyad Allawi. *Id.* at 40.

¹¹⁷ *Id.* at 59.

¹¹⁸ *Id.*

in the country.”¹¹⁹ As positions were divided to reflect the “balance” of the country, each ethno-sectarian grouping was given seats and influence based upon what demographic weight each group was perceived to have.¹²⁰

With this historical background, this Article will now turn to understanding the purpose of Iraq’s constitution in today’s context, and then analyze Iraq’s constitutional history.

II. CONSTITUTIONALISM

Before delving into what Iraq’s constitutional weaknesses are, it is key to understand why Iraq should have a constitution at all, and why constitutionalism matters, even in non-democratic and/or illiberal societies.

Constitutionalism is the “legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.”¹²¹ While many scholars limit constitutionalism as a concept to only being applicable to genuine democracies, culminating in what is referred to as liberal constitutionalism, other scholars have argued for the need to “pluraliz[e] the category of constitutionalism” so as to include governments that are less than full-fledged democracies.¹²² This latter category of scholars believe non-democratic countries can in fact be as stable as many democracies, and that normative distinctions between regimes can and should be possible in order to better predict legal outcomes.¹²³

The idea here is that even in non-democratic regimes, one may find some semblance of normative, thin constitutionalism which may be helpful in understanding the place a constitution holds within the political structure.¹²⁴ Extensive literature exists on bargaining in non-democratic settings; much of the bargaining revolves around the need for a ruler to stabilize domestic settings while maximizing the personal benefit of the ruler.¹²⁵ Research shows

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 21–22 (rev. ed. 1947).

¹²² Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 395 (2015).

¹²³ *Id.*

¹²⁴ *Id.* at 397–98.

¹²⁵ See, e.g., JENNIFER GANDHI, POLITICAL INSTITUTIONS UNDER DICTATORSHIP (2008); CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsberg & Alberto Simpser eds., 2013); NATHAN BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT (2002). There is also extensive research on the role of political parties, elections, and courts in authoritarian regimes. See GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (2005); Reinoud Leenders, *Prosecuting Political Dissent: Courts and the Resilience of*

authoritarians are more likely to create institutionalized regimes (often enshrined in constitutions), which include the creation of legislatures and parties—even those with limited decision-making power.¹²⁶ This alleviates potential opposition and creates a “conduit of information between the two sides” to reduce “the potential for political instability.”¹²⁷ Additional statistical analysis reveals that the creation of state institutions “ha[s] a positive effect on economic growth,” which of course is advantageous to a ruler who is the primary beneficiary of this growth.¹²⁸

Because Iraq is a system which operates on a balance of power between key elites, there is no one power that has a total veto over which laws are ultimately applied. The system is a result of many factors. The central government in Iraq itself is weak and is in constant flux. Furthermore, it is dependent on a variety of factors, including but not limited to international forces (the United States, Iran, and Turkey); armed groups (Iraq, as will be discussed later, has four different armies); and the political elite who dominate positions of power, many of whom have been playing a game of musical chairs since 2003. This is not to say there is no semblance of constitutionalism applied when it is advantageous to do so. But overwhelmingly, selective constitutionalism is applied in Iraq—particularly on issues of federalism and resources which depend mostly on whether the balance-of-power equation is in the interest of the constructed and loose elite bargain, or whether application of the law would instead produce no clear winner.

It is important to recognize that constitutions, even deeply flawed ones, should not be ignored. As in most undemocratic, unstable countries, the conflicts in Iraq do not emanate from, and are certainly not confined to, Iraq’s constitution. Reckless disregard for average citizens’ welfare, safety, health, and rights is a major weakness of governance in Iraq. From this stems the political elites’ theft of public funds, willful mismanagement of government institutions, and prioritization of personal interests and influence above the needs of the state and its citizens.

However, some of the very real troubles of Iraqis descend from arrangements brokered by powerful, non-democratic stakeholders in the constitutional ratification which have visible (and in some cases more hidden)

Authoritarianism in Syria, in MIDDLE EAST AUTHORITARIANISMS: GOVERNANCE, CONTESTATION, AND REGIME RESILIENCE IN SYRIA AND IRAN 169 (2013).

¹²⁶ GANDHI, *supra* note 125, at xxiii.

¹²⁷ *Id.*

¹²⁸ *Id.*

repercussions on the life of average Iraqis. The federalism articles, for example, have been a constant source of violence, both for the Kurdistan Regional Government (KRG) and the rest of Iraq.¹²⁹ The implications of resource allocation according to the constitution have also been profound, resulting in the halting of salaries of an arguably massive and bloated public sector.¹³⁰ Even the fact that the constitution recognizes by name only a portion of Iraq's minorities is symbolic for those communities, simultaneously alienating others. In other words, even in fragile states with thin constitutionalism and no clear liberal democratic system, constitutions do matter. Without a thorough understanding of what problems in Iraq exist or were created by constitutional arrangements, the constitution itself cannot be amended (or done away with), and calls for reform will continue to fall on deaf ears.

A. *Constitutional History Before 2005*

Like many other countries in the Middle East, Iraq experienced a tumultuous constitutional history following the collapse of the Ottoman Empire. In 1925, while still under the British Mandate, Iraq's first constitution was drafted by an elected Constituent Assembly.¹³¹ As mentioned previously, the British did not attempt to radically alter cultural and historical elements of Iraq outside of what impinged on British interests. As a result, the constitution under the British Mandate added some classical liberal elements as an additional layer atop traditions maintained under the Ottoman Empire, such as some elements of the personal status laws and courts, which largely remained intact.¹³²

The constitution of the Mandate years remained in full effect even post-Iraqi independence and through King Faisal (I and II)'s reigns.¹³³ In July 1958, a coup d'état overthrew King Faisal, and a series of provisional constitutions were drafted in the period after his removal.¹³⁴ A total of five provisional constitutions were produced in the following years: the 1958 constitution (following the coup); the 1964 constitution (following another coup); two provisional constitutions in 1968 (following another coup); and finally, the Constitution of

¹²⁹ AL-ALI, *supra* note 45, at 30.

¹³⁰ Adam Lucente, *Criticism Mounts in Iraqi Kurdistan over Unpaid Teacher Salaries*, AL-MONITOR (May 22, 2020), <https://www.al-monitor.com/pulse/originals/2020/05/criticism-kurdistan-iraq-teacher-salaries.html>.

¹³¹ Feisal Amin al-Istrabadi, *Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law*, 50 N.Y.L. SCH. L. REV. 269, 269 (2006).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

1970, dubbed the “New Interim Constitution.”¹³⁵ This 1970 “interim” constitution remained in effect until the invasion of Iraq in April 2003.¹³⁶

Briefly, the 1970 Constitution was in place during the reign of Ahmed Hassan al-Bakr, and thereafter during the rule of Saddam Hussein. Like other regional constitutions of Arab nationalist, socialist, secular, and authoritarian regimes, the 1970 Constitution did not directly include sectarian language. Iraq’s Baathist regime focused on forging a unified appearance in the face of the West, despite the protest of various domestic movements which resented such a false “unified” national identity. The primary objective of the Iraqi Arab nationalist constitution was to create a predictable system which provided the regime with exaggerated executive power in the name of stability. Indeed, at the time, socialist ideologies in the form of welfare provisions and a forged national identity, stability, and predictability were perceived as more necessary than democracy—which, frankly, was not put forth as an option by the Ba’ath Party.

The mention of rights and civil liberties in the 1970 Constitution, especially those directed at ethnicity or religion, is quite thin. Notable in the 1970 Constitution, Part I, Article 1 stated Iraq’s “principal aim [is] to fulfil the united Arab State”, and Article 5 stated “Iraq is a part of the Arab nation.”¹³⁷ These two articles followed the trend in the Arab world at the time and heralded above all the strong, paternalistic, Arab-nationalist state, with an agenda that intended to overlook and make invisible the non-Arab nations which existed in the region. Given that neither al-Bakr nor Hussein cared much about instrumentalizing religion at the time, Article 4 stating “Islam is the religion of the State” dealt with the ever-present debate over what role religion would play in the state without much detail and was deemed sufficient by both leaders.¹³⁸

In Part III of the constitution, under the section of Basic Rights and Obligations, Article 19 obligated the state to treat citizens equally under the Law, “without distinction for reason of race, origin language or social category or religion.”¹³⁹ Further, Article 25 guaranteed “[f]reedom of religions, beliefs and exercise of religious ceremonies . . . that should not contradict the provisions of Constitution or the Law and should not infringe the manners and the publicorder.”¹⁴⁰

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Articles 1, 5, al-Dustūr al-‘Irāqī al-Mu’aqqat [The Interim Iraqi Constitution] of 1970.

¹³⁸ *Id.* art. 4.

¹³⁹ *Id.* art. 19.

¹⁴⁰ *Id.* art. 25.

The 1970 Constitution initially did not articulate specific mention of a power-sharing agreement with the Kurds. When the Baathists came to power, they were keen to eliminate the chances of a coup and sought to bring an end to the perpetual Kurdish guerrilla wars.¹⁴¹ An agreement was reached between the Iraqi government and the main Kurdish party, Kurdistan Democratic Party, in May 1970.¹⁴² The agreement stipulated that Kurds would have equal access to employment; schools would be constructed in Kurdish areas; local administrative offices would be staffed by Kurds or Kurdish-speaking individuals.¹⁴³ Further, where the government had exercised eminent domain over property (mostly land with oil and gas, especially in Kirkuk), property owners would be resettled and given “proper compensation.”¹⁴⁴

This eventually culminated into a proper constitutional amendment in March 1974, which eventually set the stage for the creation of Iraq’s Kurdish autonomous region seen today.¹⁴⁵ In that brief amendment, Annex 2, Article 1 stated: “The area, whose majority of the population is from Kurds, shall enjoy Autonomy in accordance with what is defined by the Law.”¹⁴⁶ It did not take long before it was clear that the Baathist Party had no intention of operationalizing this amendment. Local authorities remained firmly under central government control, the president still had the right to dissolve the regional legislature, the central government was to approve all budgets, and security forces answered only to the Ministry of Interior.¹⁴⁷ As a result, this led to the resumption of hostilities between Baghdad and the Kurdish-held areas in the 1980s, and Saddam began to lose firm control over the areas in northwest Iraq shortly thereafter.¹⁴⁸

Although this amendment alone did not yield any tangible results for the Kurds at the time, they used this to further galvanize support for de facto independence in 1991, after Saddam’s invasion of Kuwait,¹⁴⁹ with American support.¹⁵⁰ This would forever change the landscape for Iraq’s Kurds. The area cultivated independent international relationships with the outside world (during

¹⁴¹ AL-ALI, *supra* note 45, at 29.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 30.

¹⁴⁶ Annex 2, Article 1, al-Dustūr al-‘Irāqī al-Mu’aqqat [The Interim Iraqi Constitution] of 1970.

¹⁴⁷ AL-ALI, *supra* note 45, at 30.

¹⁴⁸ *Id.*

¹⁴⁹ Feisal Amin al-Istrabadi, *A Constitution Without Constitutionalism: Reflections on Iraq’s Failed Constitutional Process*, 87 TEX. L. REV. 1627, 1631 (2009).

¹⁵⁰ GALBRAITH, *supra* note 96, at 60.

the time of severe and blanket sanctions on Iraq),¹⁵¹ which paved the way for the more formal delineation of the Kurdish areas—Dohuk, Erbil, Sulaimaniya, Kirkuk, Diyala, and Ninevah—to be referred to as the Kurdistan Regional Government in the Transitional Administrative Law (TAL) and the subsequent 2005 Constitution.¹⁵²

III. THE TRANSITIONAL ADMINISTRATIVE LAW

The invasion of Iraq on March 20, 2003 changed the previous balance of power in the country dramatically. Shortly after the invasion, from May 2003 until June 2004, U.S. Ambassador L. Paul Bremer was placed as the head of the Coalition Provisional Authority (CPA), becoming the Civil Administrator of all of Iraq.¹⁵³ His position gave him authority to legislate, although international humanitarian law generally prohibits an occupier from modifying the occupied country's legal system, except to defend the occupier's forces.¹⁵⁴ U.N. Security Council Resolution 1483(5), which lifted trade sanctions against Iraq but kept the arms embargo, emphasized compliance with those obligations.¹⁵⁵ However, UNSCR 1483(8), adopted May 2003, assigned legal and governing duties to the CPA instead of a sovereign Iraqi government:

Requests the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve... working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and *establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq*.¹⁵⁶

To meet the obligations of this resolution and establish representative governance, the CPA, Paul Bremer, and British government officials appointed twenty-five members to the Iraqi Governing Council (IGC) to draft the TAL.¹⁵⁷ The makeup of the IGC was largely drawn along openly sectarian lines, and consisted of the following categories: eleven Shia religious party members; the

¹⁵¹ AL-ALI, *supra* note 45, at 36.

¹⁵² Art. 53(A), Law of the Administration for the State of Iraq for the Transitional Period of 2004.

¹⁵³ al-Istrabadi, *supra* note 149, at 1633.

¹⁵⁴ al-Istrabadi, *supra* note 131, at 270.

¹⁵⁵ S.C. Res. 1483, ¶ 8 (May 22, 2003). It calls upon all concerned to fully comply with their obligations under international law including, in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907. *Id.*

¹⁵⁶ *Id.* (emphasis added).

¹⁵⁷ Toby Dodge & Renad Mansour, *Sectarianization and De-Sectarianization in the Struggle for Iraq's Political Field*, 18 REV. FAITH & INT. AFF. 1, 58, 61 (2020).

exiled Ahmed Chalabi (who also voted with the Shia parties); five Sunnis; one Iraq Muslim Brotherhood member; five Kurds (one from the Patriotic Union of Kurdistan (PUK); one from Kurdistan Democratic Party (KDP); and three independents Kurds, although their vote mirrored the PUK and KDP votes); one Christian; and one Turkman.¹⁵⁸ The latter two were added because they had strong support of external actors (the United States, United Kingdom, and Turkey); all of Iraq's other minorities were effectively sidelined. Such an arrangement was characterized as representing "all the strands from Iraq's complicated social structure."¹⁵⁹ Still, despite this problematic and publicly announced makeup of the IGC in November 2003, most of the critical discussions did not take place among IGC members. Rather, much of the TAL's negotiations occurred behind closed doors between unaccountable parties and involved bilateral compromises (primarily between the United States and other parties, instead of agreements between Iraqi stakeholders).¹⁶⁰ It came as no surprise that the IGC unanimously approved the TAL for the transitional period and subsequently signed it on March 8, 2004.¹⁶¹ Ambassador Bremer, who was also required to consent to the agreement per the UNSCR 1483, put it into force.¹⁶² An interim government, selected by the CPA and the United Nations and led by Iyad Allawi (the CPA's choice), assumed control on June 28, 2004, at which point the CPA and IGC were dissolved.¹⁶³

Transitional constitutions (and even the subsequent, permanent 2005 Iraqi constitution) are meant to embody the goal of "peacemaking . . . aimed at responding to past injustices by providing a new liberal framework for the State. . . . [T]ransitional constitutionalism uses the constitution as a tool to deliver peace."¹⁶⁴ Scholars have argued that the premise of having a transformative constitutional process, often following a conflict or revolution, is designed to create a constitution that will:

provide a focal point around which the citizens of the state can unite, representing the constitution of a nation. Through the liberal emphasis on the guarantees of human rights and the rule of law, whereby power is constrained within the new constitutional framework, it is intended that the constitution will provide a unifying focal point for a previously

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ AL-ALI, *supra* note 45, at 80.

¹⁶¹ al-Istrabadi, *supra* note 131, at 271.

¹⁶² *Id.*; S.C. RES. 1483, *supra* note 155, ¶ 9.

¹⁶³ AL-ALI, *supra* note 45, at 82.

¹⁶⁴ Catherine Turner, *Transitional Constitutionalism and the Case of the Arab Spring*, 64 INT'L & COMP. L.Q. 267, 267–70.

fractured polity. The underlying premise is that the constitution can replace politics with law, transcending political divisions with an impartial legal framework.¹⁶⁵

The reality was that the United States was eager to relieve itself of legal responsibility in Iraq. The TAL and subsequent 2005 Constitution are reflective of this being a primary, rushed goal, as opposed to the creation of a sustainable system which replaced politics with law. While both documents did have transformative roles in politics, their goal was not long-term stability couched in international legal norms, nor enshrining equality through the “prosecution of human rights abuses” and entrenching social and economic rights.¹⁶⁶ Instead, the notion of grievance politics, grievance competition, and power bargaining among ineffective national leaders became the cornerstone of how rights, resources, and power were divided across Iraq instead of being rooted in international law.

Ultimately, the TAL’s importance lies in the fact that many contentious articles within it set the stage for the 2005 Constitution which has been scrutinized immensely since its passage, for reasons expounded upon below. Understanding the background about what ultimately was or was not included in the text, therefore, becomes crucial. While nothing formal mandated that the TAL would serve as a “principle source” for drafting the constitution, in reality, this was debatable. Senior U.S. officials publicly stated that they expected “the TAL to be used as a ‘cornerstone’” for the drafting of the constitution and that the “Iraq constitution [would] draw heavily from transitional law”¹⁶⁷

A. Rights and Civil Liberties

The TAL is a sixty-two-article document which dives straight into rights and protections starting in the preamble.¹⁶⁸ The preamble also rejected the “previous tyrannical regime” and vows to “establish the mechanisms aiming, amongst other aims, to erase the effects of racist and sectarian politics and practices.”¹⁶⁹

Article 7, the article found in almost every Arab country’s constitution,¹⁷⁰ expanded the role of Islam in the state from what it was in the previous 1970 Constitution. It states:

¹⁶⁵ *Id.* at 279.

¹⁶⁶ *Id.* at 271.

¹⁶⁷ *Iraq: Don’t Rush the Constitution*, 42 INT’L CRISIS GRP. 7 (June 8, 2005).

¹⁶⁸ PmbL., Law of the Administration for the State of Iraq for the Transitional Period of 2004.

¹⁶⁹ *Id.*

¹⁷⁰ Lebanon and Sudan are the only countries without such an article. SUDAN CONST. of 2019,

Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenants of Islam . . . 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.¹⁷¹

This was the first step to inject religion into the Iraqi constitution, and heavy debate transpired about whether the text would use the phrase “*a source of legislation*,” “the source of legislation,” “a principle [sic] source amongst other principle sources,” or other phrases.¹⁷² As expected, it was one of the most contentious articles in the TAL. Because the IGC was not an elected body, this factor ultimately played in favor of pushing back on the religious parties. The IGC was able to argue that this was not an elected body and that it was not drafting a final constitution, so details could be renegotiated later in a more permanent document. The secular IGC members were able to convince religious IGC members to keep Iraq’s historical language of declaring Islam as the official state religion and declaring Islam “*a source of legislation*,” so long as other language which prohibited laws that contradicted Islam would be added as well.¹⁷³

Article 9 declared both Arabic and Kurdish as official languages of Iraq and also gave Iraqis the right to educate their children in their mother language, including “Turcomen, Syriac, or Armenian in government educational institutions in accordance with educational guidelines”¹⁷⁴ Like the selective make-up of the IGC, the inclusion of some languages was determined by who had the support of strong backers, including the CPA; those who did not were excluded.¹⁷⁵ Chapter Four¹⁷⁶ also employed similar language by singling out—while simultaneously excluding—some of Iraq’s minorities.¹⁷⁷ By ratifying this article, however, Iraq became one of the first and only countries in the Middle East to recognize more than one language as its official language, which is still no minor accomplishment to this day.¹⁷⁸

CONSTITUTEPROJECT.ORG, https://www.constituteproject.org/constitution/Sudan_2019.pdf?lang=en (last visited Oct. 20, 2021).

¹⁷¹ Art. 7, Law of the Administration for the State of Iraq for the Transitional Period of 2004.

¹⁷² al-Istrabadi, *supra* note 131, at 276.

¹⁷³ *Id.* at 277.

¹⁷⁴ Art. 9, Law of the Administration for the State of Iraq for the Transitional Period of 2004.

¹⁷⁵ Telephone Interview with Zaid Al-Ali, *supra* note 2.

¹⁷⁶ *See infra* text accompanying notes 202–06.

¹⁷⁷ Chapter 4, Law of the Administration for the State of Iraq for the Transitional Period of 2004.

¹⁷⁸ al-Istrabadi, *supra* note 131, at 278.

Chapter Two in the TAL, regarded as its Bill of Rights, articulated the right of anyone with Iraqi nationality to be an Iraqi citizen, with all the rights that entails.¹⁷⁹ Article 11(D)'s language is especially important: "Any Iraqi whose Iraqi citizenship was withdrawn for political, religious, racial or sectarian reasons has the right to reclaim his Iraqi citizenship."¹⁸⁰ Members of the IGC have stated that Article 11 was the most contentious article in Chapter Two because of the implications this had on Iraqi expatriate Jews who had Israeli citizenship. Article 11 would now restore their Iraqi citizenship.¹⁸¹ This was indeed a major difference from how other Arab countries treated Jews that were exiled and had Israeli (or other) citizenship.

The equal rights clause in Article 12 was also notable, as it was far more comprehensive than most Western constitutions, and indeed more so than any country in the region:

All Iraqis are equal in their rights without regard to gender, sect, opinion, belief, nationality, religion, or origin, and they are equal before the law. Discrimination against an Iraqi citizen on the basis of his gender, nationality, religion, or origin is prohibited.¹⁸²

Articles 31(B)(3) and 35(B)(3) discuss de-Baathification, a concept introduced formally in the TAL and later codified in the 2005 Constitution.¹⁸³ Dubbed "de-Sunnification" by some, it was an extended process designed to prevent any Baathist members (which included membership from across Iraq's sects) from participating in the post-2003 government.¹⁸⁴ De-Baathification is one of the most controversial outcomes of the invasion because it "dismissed people based on rank, not behavior."¹⁸⁵ This dismissal took place in the aftermath of a regime which was widely understood to be run by one man's will, not one party, despite the impression that Saddam tried to give.¹⁸⁶ There was also a lack of understanding by outsiders about what party membership meant in the Iraqi context. At the time of the regime's fall, at least 400,000 were full party members, of which 150,000 were civil service members and 250,000 served in

¹⁷⁹ Chapter 2, Law of the Administration for the State of Iraq for the Transitional Period of 2004.

¹⁸⁰ *Id.* art. 11(D).

¹⁸¹ al-Istrabadi, *supra* note 131, at 280–81.

¹⁸² Article 12, Law of the Administration for the State of Iraq for the Transitional Period of 2004.

¹⁸³ *Id.* arts. 31(B)(3), 35(B)(3).

¹⁸⁴ MIRANDA SISOONS & ABDULRAZZAQ AL-SAIEIDI, A BITTER LEGACY: LESSONS OF DE-BAATHIFICATION IN IRAQ 17, INT'L CTR. TRANSITIONAL JUST. (Mar. 2013), <https://www.ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf>.

¹⁸⁵ *Id.* at 1.

¹⁸⁶ *Id.* at 4.

the military, and party sympathizers across the country exceeded 1.2 million.¹⁸⁷ But these numbers do not reflect actual supporters of Saddam or his policies. Without Ba'ath party membership, one could not secure a civil servant position, and so many opted to become Ba'ath party members solely for job security.¹⁸⁸

Further, most criticism has been directed at the disbanding of the military, specifically because of the superficial assessment by U.S. officials to do so on ethno-sectarian terms: “[B]ecause the previous army had been dominated by Sunni Arabs, Shia soldiers would never willingly follow their orders.”¹⁸⁹ There was little regard to the fact that most soldiers did not employ blind sectarian hatred and that most, in fact, would have “welcomed an opportunity to resume service, if only because that would have meant a regular income” at salaries registering almost 100 times higher than during the sanction years.¹⁹⁰

It is also important to note that de-Baathification preceded the TAL. Within four days of Bremer's arrival to Baghdad, he issued Orders 1 and 2.¹⁹¹ This dissolved the party and all associated entities, most important of which was the civil service, and set the stage for the state's lustration policy to play out over the next ten years.¹⁹² Various institutions carried out the vetting process, beginning with the Higher National De-Baathification Commission (HNDC) and later, the Higher National Commission for Accountability and Justice (AJC).¹⁹³ Both were led by Ahmed Chalabi, who pushed strongly for the inception of the de-Baathification idea and oversaw its implementation for several years, despite his clear conflict of interest as a candidate for office and sitting government official.¹⁹⁴ According to reviews of both the HNDC and AJC, the organizations' most high-ranking staff were Shia, which undermined the appearance of objectivity, and while the institutions themselves had oversight boards, they rarely met and did not exercise oversight in practice.¹⁹⁵ Due process and appellate review were almost non-existent.¹⁹⁶ The process was perceived to be a mostly politicized process, with the power to fire teachers, engineers, and doctors who had never committed a crime in their life save being civil

¹⁸⁷ *Id.* at 6.

¹⁸⁸ *Id.* at 5.

¹⁸⁹ AL-ALI, *supra* note 45, at 70.

¹⁹⁰ *Id.*

¹⁹¹ SISOONS & AL-SAEIDI, *supra* note 183, at 11.

¹⁹² *Id.*

¹⁹³ *See id.* at 9, 12, 18.

¹⁹⁴ *Id.* at 34.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 12–13.

servants.¹⁹⁷ Although there was pushback by key Iraqi figures to lustration—namely from interim head of government Iyad Allawi, who saw this as a real impediment to luring Sunnis to participate in the ongoing negotiations in 2004 and 2005—the Americans ultimately supported Chalabi’s pursuit of ex-Baathists.¹⁹⁸

Beyond the general exclusion of Baathists from government service, there were other, more detailed restrictions on individuals who participated in specific crimes during the Saddam era. Article 35(B)(4) restricted anyone who participated in the Anfal campaign of 1988, during which approximately 2000 Kurdish villages were wiped out and land mines were placed throughout the area to discourage return, from gaining positions of power.¹⁹⁹ Human Rights Watch claims at least 50,000 Kurds were brutally murdered during this campaign.²⁰⁰

Article 35 also singled out those who committed crimes against the Iraqi people during the 1991 *intifada* (uprising) that involved rebellions in both north and south Iraq, mostly by Shia Arab Islamists, Kurdish nationalists, and leftist groups, but was squashed brutally by Saddam and the Iraqi Republican Guard.²⁰¹ Following the uprising, Saddam conducted a mass relocation of rebellious populations and also drained the Mesopotamian marshes, in a clear move to weaponize Iraq’s most precious resources.²⁰²

Finally, Chapter Four, which outlined the Transitional Legislative Authority in Article 30(C), articulated “fair representation for all communities in Iraq, including the Turcomans, ChaldoAssyrians, and others.”²⁰³ This section singled out these two groups in a country with more than seven well-known religious denominations (Yazidis, Sabeen-Mandaeans, Baha’is, Zoroastrians, Buddhists, Hindus, Jews, and adherents of folk religions),²⁰⁴ as well as several ethnic minority groups (including Turkmen, Shabak, Chaldeans, Assyrians, Armenians, Black Iraqis, and Roma)²⁰⁵ and thus is puzzling. Similarly, Article 53(D) “guarantee[d] the administrative, cultural, and political rights of the

¹⁹⁷ AL-ALI, *supra* note 45, at 68.

¹⁹⁸ SISOONS & AL-SAEIDI, *supra* note 183, at 14.

¹⁹⁹ *Genocide in Iraq: The Anfal Campaign Against the Kurds*, HUM. RTS. WATCH, <https://www.hrw.org/reports/1993/iraqanfal/ANFALINT.htm> (last visited Sept. 12, 2021).

²⁰⁰ *Id.*

²⁰¹ *Endless Torment: The 1991 Uprising and Its Aftermath*, HUM. RTS. WATCH, <https://www.hrw.org/reports/1992/Iraq926.htm> (last visited Sept. 15, 2021).

²⁰² *Id.*

²⁰³ Article 30(C), Law of the Administration for the State of Iraq for the Transitional Period of 2004.

²⁰⁴ *Iraq*, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM (2018), https://www.uscirf.gov/sites/default/files/Tier2_IRAQ_2019.pdf.

²⁰⁵ *Iraq*, MINORITY RTS. GRP. INT’L (May 2018), <https://minorityrights.org/country/iraq>.

Turcomens, ChaldoAssyrians, and other citizens.”²⁰⁶ As mentioned earlier, in interviews with constitutional scholars present at the time, the only explanation given was that some groups were backed by the CPA and other actors in the IGC, while others—those excluded—were not. This ultimately provided legal preference for those two minority groups over others.²⁰⁷

B. Power Sharing

The new power-sharing structures in the TAL appear early in the document and are expounded upon later in Chapter Three (which laid out the central government's authorities) as well as Chapter Eight (which focused on the regional and provincial authorities).

From the outset, Article 4 articulated the new framework for Iraq's political structure, which would be, among many other things, a federal system “based upon geographic and historical realities and the separation of powers, and not upon origin, race, ethnicity, nationality, or confession.”²⁰⁸ It is important to note that the struggle for decentralization and federalism is primarily rooted in almost exclusive negotiations which took place between the two Kurdish parties and the Americans. Although most Iraqis were concerned about the possibility of creating yet another dictator in Baghdad who would oppress the whole state, many Iraqis did not share the Kurdish vision of a federalist state system.²⁰⁹

The United States, through Bremer, initially pushed for a unified Iraq, with a central government with a monopoly on resources, such as water and oil, as well as on military force, with some devolved powers to the provinces.²¹⁰ However, according to Peter Galbraith, lead advisor to the Kurds, this is not what the Kurds were pushing for.²¹¹ They sought a loose federal system as close to independence as possible.²¹² In fact, what they were pushing for was federalism, where the “basic organizing unit of the country is the province or state. The state or province is constituted first and then delegates certain powers (of its choice) to the central government.”²¹³

²⁰⁶ Article 53(D), Law of the Administration for the State of Iraq for the Transitional Period of 2004.

²⁰⁷ Telephone Interview with Feisal Amin al-Istrabadi, Law Professor and Member of TAL Drafting Team (Apr. 22, 2020).

²⁰⁸ *Id.* art. 4.

²⁰⁹ *Id.* art. 52.

²¹⁰ GALBRAITH, *supra* note 96, at 139.

²¹¹ *Id.* at 160.

²¹² *See id.*

²¹³ *Id.*

The proposed Kurdish draft left monopoly over control of the KRG in the hands of the KRG itself: laws passed by the Kurdish National Assembly would be supreme and its elections would be conducted in parallel with the Iraqi National Assembly.²¹⁴ It would have its own military force (and any presence of Iraqi military forces would require the Assembly's approval), own its own land, water, minerals, and oil, and would manage its future commercial oil fields and keep the revenues.²¹⁵ It is important to note that at the time of drafting the TAL, there were no commercial oil fields *currently* operating within Kurdistan, but this would give the KRG exclusive rights over any future commercial oil fields.²¹⁶ Only Kirkuk had existing commercial oil fields, which would remain under Baghdad's management.²¹⁷ It is important to highlight that Kirkuk's status—both then and now—remains extremely controversial.²¹⁸

Ultimately the language of the TAL did not deliver the expected outcome for the Kurds, who walked back some of their demands for this phase of the state building process.²¹⁹ Bremer's TAL gave the central government power over water and oil resources, and there was no recognition of the Kurdish armed force, the Peshmerga.²²⁰ However, Kurdistan would still remain an entity along the borders recognized prior to the invasion.²²¹ Kirkuk remained in flux, but the TAL allowed displaced Kurds to return to Kirkuk, while Arabs in Kirkuk were supposed to return to their place of origin, the latter of which was not implemented.²²² Despite what the TAL mandated, the Kurds nonetheless ignored the document:²²³ they continued to apply their own constitution, maintained the Peshmerga force, developed their own oil, and managed customs along their border.²²⁴

The TAL ultimately articulated a short list of seven powers for the central government in Article 25. These included the federal government's control over foreign policy and diplomatic representation;²²⁵ national security policy and

²¹⁴ Article 57(B), Law of the Administration for the State of Iraq for the Transitional Period of 2004.

²¹⁵ GALBRAITH, *supra* note 96, at 166–67.

²¹⁶ *Id.* at 167.

²¹⁷ *Id.*

²¹⁸ *Id.* at 166–68.

²¹⁹ *Id.* at 167–68.

²²⁰ *Id.*

²²¹ *Id.* at 168.

²²² *Id.*; Article 58, Law of the Administration for the State of Iraq for the Transitional Period of 2004.

²²³ Outside of the Green Zone, many human and women's rights articulated in the TAL were also never applied by the dominant Shia parties. GALBRAITH, *supra* note 96, at 140.

²²⁴ *Id.*

²²⁵ Article 25(A), Law of the Administration for the State of Iraq for the Transitional Period of 2004.

maintaining armed forces to secure the country's borders;²²⁶ as well as fiscal policy, currency, customs, and the national budget.²²⁷ Baghdad would have no authority over Iraq's airspace, roads, railways, education, agriculture, or health sector—those would be left in the hands of regions and provinces.²²⁸ Article 25(E) stated that Iraq's resources belong

to all the people of all of the regions and governorates of Iraq . . . in consultation with the governments of the regions and their administration of the governorates, and distributing the revenues resulting from their sale through the national budget in an equitable manner proportional to the distribution of population throughout the country, and *with due regard for areas that were unjustly deprived of these revenues by the previous regime*, for dealing with their situation in a positive way, for their needs, and for the development of the different rest of the country.²²⁹

Iraq's principal resources are oil and water. It one of the world's top crude oil producers,²³⁰ and both of the Middle East's most important rivers, the Euphrates and the Tigris, flow through Iraq.²³¹ These resources are largely found outside of the capital, in the provinces. While one-third of Iraq's oil wealth is located in the Kurdistan Regional Government, the remainder is located in the Shia dominated south, including in Basra and Khor al-Amaya, two prominent port cities.²³²

Article 53(A) of Chapter Eight focused on Regions, Governorates and Municipalities.²³³ It officially created the KRG, and defined it as the governorates of Dohuk, Erbil, Sulaimaniya, Kirkuk,²³⁴ Diyala, and

²²⁶ *Id.* art. 25(B).

²²⁷ *Id.* art. 25(C).

²²⁸ AL-ALI, *supra* note 45, at 81.

²²⁹ Article 25(E), Law of the Administration for the State of Iraq for the Transitional Period of 2004 (emphasis added).

²³⁰ *Iraq - Country Commercial Guide*, INT'L TRADE ADMIN. (Nov. 2, 2021), <https://www.trade.gov/country-commercial-guides/iraq-oil-and-gas-equipment-services>.

²³¹ Benjamin Elisha Sawe, *Major Rivers of Iraq*, WORLD ATLAS (Apr. 25, 2017), <https://www.worldatlas.com/articles/the-major-rivers-of-iraq.html>.

²³² *Update: Kurdistan and the Battle Over Oil*, N.Y. TIMES (Oct. 8, 2018), <https://www.nytimes.com/2018/10/08/business/update-kurdistan-and-the-battle-over-oil.html>; *Background Reference: Iraq*, U.S. ENERGY INFO. ADMIN. (Jan. 7, 2019), https://www.eia.gov/international/content/analysis/countries_long/Iraq/background.htm.

²³³ Article 53(A), Law of the Administration for the State of Iraq for the Transitional Period of 2004.

²³⁴ It is important to point out that Kirkuk is arguably Iraq's most disputed territory due to its vast oil wealth that has been producing oil since 1934. *Iraq: Fixing Security in Kirkuk*, 215 INT'L CRISIS GRP. (June 15, 2020), <https://reliefweb.int/sites/reliefweb.int/files/resources/215-iraq-fixing-security-in-kirkuk.pdf>. Since the 1960s, Iraq's governments have tried to modify Kirkuk's demographic composition—which is diverse and includes Sunni Arabs, Shia Arabs, Kurds, Turcomans, Assyrians, and Chaldeans. *Id.* at 1. In the 1980s, Saddam

Ninevah.²³⁵ The TAL took what had been an exception in Iraq—one region (the other tiers of government were all central government or provincial)—and applied it as a general rule throughout the country.²³⁶ Article 53(C) permitted the creation of more regions like the KRG, with the exception of Kirkuk and Baghdad, which were not allowed to join any other region (Baghdad is a region on its own).²³⁷ With regard to the rest of Iraq, regions could be formed by three or more governorates, with a proper referendum of the constituents in such governorates, followed by approval by the National Assembly.²³⁸

The final article in the TAL worthy of mention, Article 58, reinserts Iraq's history into its future to “remedy the injustice caused by the previous regime's practices in altering the demographic character of certain regions . . . forcing migration in and out of the region, settling individuals alien to the region, depriving the inhabitants of work, and correcting nationality.”²³⁹ The article goes on to call out Saddam's manipulation of administrative boundaries for political ends and calls on the Presidency Council of the Iraqi Transitional Government to make recommendations to the National Assembly to address those changes in a permanent constitution.²⁴⁰ Like other sections of the TAL, this article is one without operational authority and was included to appease or address aggrieved communities, primarily the Kurds. What scholars like Zaid Al-Ali argue is that there was never any political will in Baghdad, or institutional backing, to operationalize it.²⁴¹ Thus, it became another article of empty rhetoric in the TAL, inserted to give the appearance of addressing grievances without actually doing so.

expelled Kurds and began repopulating the area with Iraqi Arabs. *Id.* Although the Iraqi government controlled Kirkuk until 2014, it lost control over Kirkuk with the emergence of ISIS in 2014. *Id.* at 6. Following the defeat of ISIS in that area, the KRG seized control over Kirkuk. *Id.* at 8. The KRG remained in control until October 2017, when KDP leader Masoud Barazani pushed for a referendum on the KRG's independence, a move opposed by the United States, Turkey, and other countries. *Id.* Following the referendum, the Iraqi government moved into Kirkuk militarily, displacing local populations and bringing Kirkuk back to its status as stipulated under the 2005 Constitution—under Baghdad's control. *Id.* at 11.

²³⁵ Article 53(A), Law of the Administration for the State of Iraq for the Transitional Period of 2004.

²³⁶ AL-ALI, *supra* note 45, at 81.

²³⁷ Article 53(C), Law of the Administration for the State of Iraq for the Transitional Period of 2004.

²³⁸ *Id.*

²³⁹ *Id.* art. 58(A).

²⁴⁰ *Id.* art. 58(B).

²⁴¹ See AL-ALI, *supra* note 45, at 84.

IV. IRAQ'S 2005 CONSTITUTION

A. *Drafting*

Before delving into the sections detailing power-sharing and civil liberties in the 2005 permanent Iraqi constitution, it is important to highlight two concerns about the constitutional drafting *process* that severely impacted the drafting of the constitution from the outset. The first is the composition of the committee, and the second is the tight timeline which prevented adequate discussion and genuine compromise on the text.

1. *Composition of the Committee*

The composition of the constitutional committee, while made up of representatives who won the January 2005 elections, was problematic. This was due to the fact that the committee initially included a very limited number of Sunnis (because of their boycott), and other smaller ethnic and religious groups who did not win sufficient seats to be represented on the committee. Further, it has since been discovered that the final draft of the constitution was actually produced by small, elite parties which did not represent more than twenty percent of Iraqi public opinion—an issue expounded upon later.²⁴²

From the time the TAL went into force in March 2004 until December 2004, an insurgency in Iraq was in full swing. National Assembly elections held in January 2005 were boycotted by the majority of the Arab Sunni population. In the Sunni-dominated Anbar province, only two percent of registered voters showed up at the polls; however, Sunni inclusion in the constitutional process was only addressed much later.²⁴³ Shia parties, including the influential Shia United Iraqi Alliance (UIA), contested the results of the election, although the UIA eventually joined the assembly after pressure from the Shia community to ensure their inclusion.²⁴⁴ Primary victory in the elections went to UIA, which won 140 of the 275 total seats. In second place came the Kurdistan Coalition List, made up of both Jalal Talabani's PUK and Masoud Barazani's KDP parties, which won seventy-five seats.²⁴⁵ The liberal/secular parties, headed by Iyad Allawi, the former interim head of government, came in at forty representatives.²⁴⁶ The Sunni Arabs, due to the mass boycott, secured merely

²⁴² *Id.*

²⁴³ al-Istrabadi, *supra* note 149, at 1638.

²⁴⁴ AL-ALI, *supra* note 45, at 85.

²⁴⁵ *Iraq: Don't Rush the Constitution*, *supra* note 167, at 2.

²⁴⁶ AL-ALI, *supra* note 45, at 85.

seventeen seats (six percent of the total), a sharp contrast with what is approximated to be the total Sunni population of Iraq (29–34 percent).²⁴⁷ Before progress could be made on the constitutional committee's formation, tensions between the frontrunners and fighting over government positions following the elections raged for months. This in-fighting hindered addressing of the lack of sufficient Sunni representation; unfortunately, internal debates among the winners "derailed the effort to draw Sunni Arabs in, despite the near-universal recognition that this was necessary for stability."²⁴⁸

The constitutional committee was eventually formed on May 10, 2005, and reflected on the make-up of the Assembly. From the outset, American officials knew the Sunni representation needed to be addressed given the insurgency and lack of ownership over the process by the Sunni community. Because of the boycott, only two Arab Sunnis (from the seventeen that were elected), were included; reports indicate that neither fully represented any Arab Sunni political party.²⁴⁹ The Bush Administration made urgent appeals to the Shia and Kurds to draw in more Sunni Arabs,²⁵⁰ but identifying representative leaders from the community posed a significant hurdle, as there was no political party that enjoyed broad support in the Sunni Arab community. A mix of initiatives and conferences eventually provided support for the selection of fifteen additional Sunni and civil societies, which were added to the fifty-five-member constitutional committee on June 16, 2005.²⁵¹ Efforts to sabotage the committee's work by insurgents went on nonetheless, as two Sunni members were assassinated in July, most likely by extremists.²⁵²

Despite some attention to address the Sunni gap, other representational problems were never addressed. "Only a few women were included in this process—none of whom participated in any serious constitutional conversations; youth representatives were also excluded."²⁵³ That being said, the constitutional committee, unlike the TAL, was not dominated by exiles.²⁵⁴

²⁴⁷ See *The World Factbook: Iraq*, CENT. INTEL. AGENCY (Dec. 14, 2020).

²⁴⁸ *Iraq: Don't Rush the Constitution*, *supra* note 167.

²⁴⁹ *Id.*

²⁵⁰ See John F. Burns, *Shiites Offer to Give Sunnis Larger Role on Broader Panel Writing a Constitution*, N.Y. TIMES (May 26, 2005), <https://www.nytimes.com/2005/05/26/world/middleeast/shiites-offer-to-give-sunnis-larger-role-on-broader-panel.html>.

²⁵¹ *Iraq: Don't Rush the Constitution*, *supra* note 167.

²⁵² Kirk Semple, *2 Sunnis at Work on Constitution Are Shot Dead in Car in Baghdad*, N.Y. TIMES (July 20, 2005), <https://www.nytimes.com/2005/07/20/world/middleeast/2-sunnis-at-work-on-constitution-are-shot-dead-in-car-in.html>.

²⁵³ AL-ALI, *supra* note 45, at 85.

²⁵⁴ *Id.*

2. *Timeline of the Committee*

Given the challenges of inclusion discussed above, meeting the deadline of August 15, 2005, for the submission of a constitutional draft became one of the most problematic aspects of the process. The goal was to have a draft by the August date (eligible for a one-time extension), followed by a two-month public awareness period, and ending with a national referendum on October 15.²⁵⁵ By the time the process incorporated an expanded number of Arab Sunnis, and the power struggles between the United Iraqi Alliance and Kurdistan Coalition List were finally resolved, six months had passed.

The Iraqi constitutional members knew they had a huge task ahead of them, and they needed to delay. First, there was a severe deficiency in trust between all parties. Second, the participants needed to better understand the current Iraqi system and needed to consider possible government formulations—this required study, negotiation, and compromise,²⁵⁶ which in turn required time. South Africa, for example, took seven years from start to finish to draft a constitution.²⁵⁷ Iraqis, following the trauma of an invasion and now a full-blown insurgency, had a mere two months. Initially, even the chairman of the committee, SCIRI's Shaikh Humam Hammoudi, asked for more time, despite changing his position later.²⁵⁸

The Americans, as relayed to the Iraqis by the American Ambassador at the time, Zalmay Khalilzad, had no intention of allowing an extension.²⁵⁹ Pressure was mounting on the Bush Administration to extract itself from Iraq as quickly as possible, and it was necessary to hold the referendum and pass the constitution in advance of the 2006 U.S. congressional elections.²⁶⁰ A large portion of the clerical establishment fell in line with U.S. desires as well, assuming that if it did so, it would “lead to an improvement in security.”²⁶¹ They were also comfortable with the expanded role of religion that the constitutional draft permitted.²⁶²

²⁵⁵ Article 61, Law of the Administration for the State of Iraq for the Transitional Period of 2004.

²⁵⁶ AL-ALI, *supra* note 45, at 86.

²⁵⁷ *Id.* at 87.

²⁵⁸ *Id.*

²⁵⁹ *Iraq: Don't Rush the Constitution*, *supra* note 167, at 9.

²⁶⁰ Craig S. Smith & Dexter Filkins, *U.S. and Iraq to Plan Military Transfer; Iraqis Push to Meet Constitution Deadline*, N.Y. TIMES (Aug. 2, 2005), <https://www.nytimes.com/2005/08/02/world/middleeast/us-and-iraq-to-plan-military-transfer-iraqis-push-to-meet.html>.

²⁶¹ AL-ALI, *supra* note 45, at 87.

²⁶² *Id.*

In early August, the committee was officially dissolved without the ability to see and approve a final draft.²⁶³ Senior members of the Assembly took over the process and asked the United Nations to print millions of copies that were distributed across the country without approval by the entirety of the National Assembly.²⁶⁴ In September, Hussein al-Shahristiani of the UIA read the draft to the National Assembly, but no opportunity was offered to that same elected assembly to even vote on it.²⁶⁵

What happened at this point became a mystery to most Iraqis: the final draft was finalized by a newly formed “leadership council.”²⁶⁶ The council consisted of selected parties, including the two Kurdish parties, SCIRI, the Da’wa Party, and the United States.²⁶⁷ Various participants recall the extent to which Iraqis were uncomfortable with the pressure exerted by the United States about what to include in the final product.²⁶⁸ It also became abundantly clear by mid-August that the elected members of the National Assembly were no longer involved in the drafting of the final document, thus severely damaged the democratic process and alienating average Iraqis at a time when violence in Iraq was rapidly escalating.²⁶⁹ The Sunni constituency—which had become sidelined in the leadership council as well—was close to withdrawing, until they were assured that an amendment to the constitution could be proposed within four months upon the approval of the referendum.²⁷⁰ The Sunnis agreed to this, but of course there was no appetite by the dominant parties to allow for an amendment after the referendum. Despite the fact that very few Iraqis actually knew, much less understood, the contents of the rushed constitution, a referendum was held on October 15, 2005, with the leadership of both the Kurds and Shias urging approval.²⁷¹ The constitutional draft was approved by eighty percent of the population in a manner that reflected Iraq’s ethno-sectarian communities and their involvement: Shias and Kurds voted largely in favor, Sunnis overwhelmingly against.²⁷²

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 88.

²⁶⁸ *Id.* at 89.

²⁶⁹ *Id.* at 89–90.

²⁷⁰ *See id.* at 90.

²⁷¹ *Id.* at 89–90.

²⁷² *Id.* at 90.

B. Contents

1. Preamble

Before diving into the operational parts of the constitution, from the outset, the Preamble is striking to a reader interested in an introduction of what is to come in modern Iraq's founding document. Preambles, in general, can be either legal or non-legal in nature.²⁷³ In the case of Iraq, its Preamble is non-legal in nature, and unable to technically impose any legal obligations on Iraqis. However, the language and tone of the Preamble still have implications on the prioritization of selective ethnocentric groups in Iraqi society, a message reinforced later by operational articles in the constitution.

Iraq's Preamble employs noticeable language which signals attention to particular cross-sections of Iraqi society while bypassing the mention of others, thus creating a tiered victimization system.²⁷⁴ The Preamble offers little comfort to a reader searching for signs that Iraqi society will successfully unite its citizens following the trauma of brutal dictatorship and subsequent foreign invasion. Its language is highly ethno-sectarian in nature, mentioning the "soil the saints and companions of the Prophet [Muhammad] prayed [on]" and goes on to remind readers of the

pains of sectarian oppression inflicted by the autocratic clique and inspired by the tragedies of Iraq's martyrs, Shiite and Sunni, Arabs and Kurds and Turkmen and from all other components of the people, and recollecting the darkness of the ravage of the holy cities and the South in the Sha'abaniyya uprising and burnt by the flames of grief of the mass graves . . . and articulating the sufferings of racial oppression in the massacres of Halbcha, Barzan, Anfal, and the Fayli Kurds . . . Turkmen in Bashir . . . and sufferings of the people of the western region. As in the case in the remaining areas of Iraq where the people suffered from the liquidation of their leaders, symbols, and Shaikhs²⁷⁵

Although the Preamble includes a clause about how "sectarianism and racism have not stopped us from marching together to strengthen our national unity," those reading the Preamble understand that particular traumas have not and will not be forgotten. This is because the Preamble carries Iraq's bloody past with it into the first enshrined words of the country's new constitution.

²⁷³ WIM VOERMANS, MAARTEN STREMLER & PAUL CLITEUR, CONSTITUTIONAL PREAMBLES: A COMPARATIVE ANALYSIS 89 (2017).

²⁷⁴ *See id.*

²⁷⁵ PmbL., *Dustūr Jumh. ūriyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005.

2. *Rights & Protections & Civil Liberties*

The constitution begins with one of the most contentious, as well as most debated, articles.²⁷⁶ Article 2, Section 1, similar to but not exactly like the TAL, outlines the role of Islam in Iraq.²⁷⁷ It states that “Islam is the official religion of the State and is a foundation source of legislation,” adding in Section A “no law may be enacted that contradicts the *established provisions* of Islam.”²⁷⁸ The first of these two rely on translations of the constitution made by the Americans, which translated “*tawabit ahkam*” to “established provisions.”²⁷⁹ Arabic-speaking scholars have determined was mistranslated and instead should be read as “established judgments.”²⁸⁰ Scholars argue that such a mistranslation was pivotal. The term “established judgments” opened the door for clerical and formal rulings to have a place in Iraq’s judicial system because that is what was intended for the use of the word “judgments.”²⁸¹ In other words, this would guarantee that Iraqi laws would not be able to contradict Islamic judgments. Secular negotiators argued that the use of the word “foundation” guaranteed that Islamic sources would be given priority amongst different types of law. Other scholars argued that such a clause would likely only be enforced as a “gap-filling provision” in the event that Iraqi laws are silent on an issue.

In the same article, another problematic subclause appears: “No law may be enacted that contradicts the principles of democracy.”²⁸² This section worried scholars who argued that such a clause would permit an entry point for religion in the public space under the guise of a direct democracy that could possibly harm religious minorities. Unfortunately, this was not just a theory. The chairman of the drafting committee, Shaikh Humam Hammudi, a member of the Shia-dominated SCIRI, wrote publicly that it is not incumbent on “the majority. . . to consider all that is demanded by the minority; this would be the reverse of democracy.”²⁸³ Analysis of the statements of other well-respected Shia leaders, such as Grand Ayatollah Sistani, also reflects a similar

²⁷⁶ Ashley S. Deeks & Matthew D. Burton, *Iraq’s Constitution: A Drafting History*, 40 CORNELL INT’L L.J. 1, 6 (2007).

²⁷⁷ Article 2, Section 1, *Dustūr Jumh. ūrīyat al-’Irāq* [The Constitution of the Republic of Iraq] of 2005.

²⁷⁸ *Id.*

²⁷⁹ Feisal Amin al-Istrabadi, *Islam and the State in Iraq: The Post-2003 Constitutions*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 614 (Ranier Grote & Tilmann J. Roder eds., 2012).

²⁸⁰ *Id.*

²⁸¹ *Id.* Judgments would require decision making by religious clergy to determine which laws do or don’t violate the constitutional mandate. *Id.* at 607, 612.

²⁸² Article 2, Section 1(B), *Dustūr Jumh. ūrīyat al-’Irāq* [The Constitution of the Republic of Iraq] of 2005.

²⁸³ al-Istrabadi, *supra* note 279, at 613 (citing Humam Hamoudi, *My Perceptions on the Iraqi Constitutional Process*, 59 STAN. L. REV. 1315, 1316 (2007)).

understanding that democracy would be interpreted as “one person, one vote.”²⁸⁴ However, they do not repudiate the argument that this intertwines the notion of Iraqi democracy with Islam concretely. This is not the first time regional religious actors display such open entanglement between the two. Concerns about the lack of safeguards to simultaneously protect democracy and those who do not want to live according to Islamic law is a struggle seen across the region, and Iraq is no exception. Scholars have argued that the articles were vaguely worded intentionally, intended to be interpreted broadly by the courts.²⁸⁵ Further, subsequent articles in the constitution which refer to the courts at a later stage reinforce a system that does depend, at least partially, on reviving the clerical involvement in lawmaking. While some legal experts argue that this article was nothing more than a symbolic gesture to Iraq's majority population,²⁸⁶ there are clear examples that this article has been used to justify laws consistent with Islamic law. An example of the operationalization of this article occurred during the fight to defeat ISIS in 2016, when the Iraqi Parliament passed a law to ban the consumption and sale of alcohol—a ban that many minorities in Iraq protested.²⁸⁷ Lawmakers explicitly cited Article 2 as justification for the law.²⁸⁸

Article 2, Section 1 is followed by Section 2, which technically guarantees freedom of religion.²⁸⁹ However, it does so in a manner which distinguishes Muslims from other faith communities: it guarantees Muslim rights first, guaranteeing freedom for members of other faiths to practice without harassment afterwards.²⁹⁰ Article 2 “guarantees the *Islamic* identity of the majority of the Iraqi people” and thereafter guarantees the full religious rights of “all individuals such as Christians, Yazidis, and Mandeian Sabeans.”²⁹¹ Like the TAL, this pronouncement of *some* but not all of Iraq's religions has spurred resentment among minorities who were not named. Further, both Iraq's Arab character as a founding member of the Arab League, and its identity as part of the “Islamic world,” is reinforced in Article 3, touching on long-standing sensitivities about

²⁸⁴ Ernesto H. Braam, *All Roads Lead to Najaf: Grand Ayatollah al-Sistani's Quiet Impact on Iraq's 2010 Ballot and its Aftermath*, 2 J. INT'L & GLOBAL STUD. 1, 4 (2010).

²⁸⁵ Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 720–22 (2004) (explaining the constituent parts of Islamic law).

²⁸⁶ Deeks & Burton, *supra* note 276, at 11.

²⁸⁷ Samuel Osborne, *Iraqi Parliament Bans Alcohol in Surprise Vote*, INDEPENDENT (Oct. 23, 2016), <https://www.independent.co.uk/news/world/middle-east/iraq-alcohol-ban-baghdad-parliament-islam-a7376216.html>.

²⁸⁸ *Id.*

²⁸⁹ Article 2, Dustūr Jumh. ūriyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005.

²⁹⁰ *Id.*

²⁹¹ *Id.* (emphasis added).

which ethnic and religious communities would be privileged and prioritized in the new Iraq.²⁹²

There are other articles sprinkled throughout the constitution that are clearly the result of religious party lobbying. Article 10 protects holy shrines and religious sites in Iraq: the “State is committed to assuring and maintaining their sanctity, and to guaranteeing the free practice of rituals in them.”²⁹³ Article 43 follows along these lines as well, guaranteeing that the “followers of all religions and sects are free in the . . . [p]ractice of religious rites, including the Hussein rituals.”²⁹⁴ These sections are a direct result of pressure coming from Shia party members represented on the committee, given these are significant religious monuments and rituals for those of the Shia faith.

Relatedly, Articles 41 and 42 are also a direct result of religious party bargaining. Article 41, for the first time since Iraq’s 1925 Basic Laws, enshrines religious personal status courts in the constitution.²⁹⁵ A hallmark of the Ottoman era, these types of courts allowed different sects to go to religious leaders (Muslim, Christian, and Jewish) for matters pertaining to divorce, marriage, child custody, inheritance, and alimony.²⁹⁶ At the time, the thinking was that these were matters outside of the purview of the state, which shouldn’t interfere in such personal affairs.²⁹⁷ The 1958 Provisional Constitution was silent on the issue of personal status courts (although they continued to exist) as the state would issue laws tangentially related to the issues covered by the personal status courts (age of marriage for women was increased to eighteen, for example).²⁹⁸ The TAL made no mention of personal status laws or religious courts.²⁹⁹ The insertion of them here, therefore, was undoubtedly deliberate, and was part of a concerted effort to weaken the civil judiciary more generally, an issue to be discussed below in the power-sharing section.³⁰⁰

Finally, it is important to mention a positive feature of the constitution built along ethnic lines,: the protection provided for speaking native languages, a concept introduced in the TAL and enshrined in the constitution. Articles 4, Sections 1 declares that “Arabic language and the Kurdish language are the two

²⁹² *Id.* art. 3.

²⁹³ *Id.* art. 10.

²⁹⁴ *Id.* art. 43.

²⁹⁵ *Id.* art. 41; al-Istrabadi, *supra* note 279, at 626.

²⁹⁶ al-Istrabadi, *supra* note 279, at 625.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 626.

³⁰⁰ *Id.* at 626–27.

official languages of Iraq” and announce “the right of Iraqis to educate their children in their mother tongue, such as Turkmen, Assyrian, and Armenian shall be guaranteed in government educational institutions.”³⁰¹ Further, Article 4, Section 4 guarantees Turkmen and Syriacs to include their languages as official languages in the administrative units where they “constitute density of population.”³⁰² Finally, Article 4(5) permits each region or governorate to adopt any local language as an additional language if the majority of the population votes to do so in a general referendum.³⁰³ On a similar note, the constitution later guarantees that the local administrations would also protect the “administrative, political, culture, and educational rights of the various nationalities, such as Turkomen, Chaldeans, Assyrians.”³⁰⁴

Finally, as mentioned and elaborated on above, de-Baathification was a common, contentious theme in both the TAL and the 2005 Constitution. De-Baathification was reinforced in constitutional Articles 7(1), 135, and 138(3)(C) and (D).³⁰⁵ While the initial draft stated that “[a]ny *thinking* that adopts radicalism, terrorism, taqfir . . . , or incites, glorifies, initiates or promotes thereto, especially the Saddamist Ba’ath, shall be prohibited in thought and in practice,” by late August, the “leadership council” including Kurdish, secular Shia, and Sunni negotiators, removed reference to “thought” after much Sunni objection.³⁰⁶ Further, initial attempts to include the word “Baath Party” were also repudiated, given that many civil servants had a superficial relationship to the Party in Saddam’s Iraq, instead resulting in reference only to “Saddamist Baath.”³⁰⁷ Article 7(1)’s final language reads as follows: “Any entity or program that adopts, incites, facilitates, glorifies, promotes, or justifies racism or terrorism or accusations of being an infidel (takfir) or ethnic cleansing, especially the *Saddamist Ba’ath* in Iraq and its symbols, under any name whatsoever, shall be prohibited.”³⁰⁸

3. Power Sharing

While the first and second sections of the constitution are concerned with basic principles and freedoms, Sections 3, 4, and 5 focus on delineating the

³⁰¹ Article 4, Section 1, *Dustūr Jumh. ūrīyat al-’Irāq* [The Constitution of the Republic of Iraq] of 2005.

³⁰² *Id.* art. 4(4).

³⁰³ *Id.* art. 4(5).

³⁰⁴ *Id.* art. 125.

³⁰⁵ *Id.* arts. 7, 135, 138.

³⁰⁶ Deeks & Burton, *supra* note 276, at 25 (emphasis added).

³⁰⁷ *Id.* at 25, 29.

³⁰⁸ Article 7(1), *Dustūr Jumh. ūrīyat al-’Irāq* [The Constitution of the Republic of Iraq] of 2005 (emphasis added).

powers of the legislature, executive, and judiciary as well as the federal, provincial, and regional governments.³⁰⁹

Most of the controversial issues of the constitution are focused on articles pertaining to power sharing between the central, regional, and provincial governments. However, there were also debates surrounding the powers of the individual branches of government as groups scrambled to maximize their ability to seize more control.

a. Judiciary

One of the most important debates concerned who was eligible to become a judge.³¹⁰ Initially, the Constitutional Court's nine members were determined to be "Sharia canonists, law professors, and lawyers with at least twenty years of experience, nominated by the Council of Ministers, and also approved by a two-thirds vote of the [Council of Representatives]."³¹¹ By mid-August, it was clear that there were tensions between the religious parties and secularists who debated over the use of the words "Shari'a canonists," and whether they would be used to exclude judges and lawyers trained in Iraqi civil law, but not religious Shari'a law.³¹² Secular pushback paved the way for only slightly compromised wording; Article 92(2) instead states "the Federal Supreme Court shall be made up of a number of judges, *experts* in Islamic jurisprudence, and legal scholars, whose number, the method of their selection and the work of the Court shall be determined by a law"³¹³ In this way, the inclusion of the word "experts" opened the door for non-traditional legal experts with religious qualifications.³¹⁴ The judiciary would now be a branch of government that did not solely include civil servants, but would also facilitate the formal entry of Shia clerics into a branch of government.³¹⁵

b. Legislature

The Iraqi system, a parliamentary system, was technically designed to be a bicameral one, consisting of a Council of Representatives and a Federation Council. Whereas the Council of Representatives was to be elected directly by

³⁰⁹ *Id.* arts. 1, 2.

³¹⁰ Deeks & Burton, *supra* note 276, at 45.

³¹¹ *Id.* at 50.

³¹² *Id.* at 52.

³¹³ Article 92, Section 2, *Dustūr Jumh. ūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005 (emphasis added).

³¹⁴ al-Istrabadi, *supra* note 279, at 620.

³¹⁵ *Id.*

the people at a ratio of one seat per 100,000 Iraqis,³¹⁶ the Federation Council would include representatives from the regions and governorates,³¹⁷ and is mentioned in one article in the constitution but was meant to be further delineated in laws outside of the constitution.³¹⁸ Unfortunately, a Federation Council was never actually created. The purpose of the Federation Council was to enable the formation of a more structured, decentralized system by inducting into the legislative branch representatives chosen directly from each region and governorate to represent their constituents.³¹⁹ However, competition between those in Baghdad (who fought for increased central power) and those in regions and governorates outside of Baghdad (like the KRG, who were fighting for increased local power) left the two in a power struggle that—until today—continues to hinder the creation of decentralized institutions, even those initially conceived to come to fruition in the constitution.

c. *Central vs. Local Power*

The real power sharing struggle unfolded in debates concerning Section 4, where the powers of the federal government as well as the regions are enshrined.³²⁰ Recall that the Kurdish leaders did not achieve the goals they set out to achieve in the TAL; in the 2005 Constitution, they remained firm about realizing their demands.

A reading of this section reveals a glaring issue: the constitution creates a very tense (and sometimes vague) understanding of who is entitled to create regions. The parties did not share a vision about whether this would be a federalist system, local units of power coming together, or a decentralized system where power emanated from the central government with allocation to local units. Further, there was confusion amongst committee members because

³¹⁶ Article 49, Section 1, *Dustūr Jumh. ūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005.

³¹⁷ Members of the Council of Representatives are elected by proportional representation with semi-open list balloting. A new electoral law in 2013 increased the size of the Council from 325 members to 328 members (formerly 310 seats from party lists in each governorate and 7 national compensatory seats). Under the new system, 320 seats are apportioned among 18 governorates and 8 are reserved to minority groups (Christian (5), Sabeen (1), Shabak (1), and Yizidi (1)) in specific governorates. Constitutionally, the membership of the Council is to seek to achieve at least 25% (82 seats) representation of women. Each list must have 1 female candidate after each 3 male candidates.

See *Republic of Iraq, Election Guide: Democracy Assistance & Election News*, ELECTIONGUIDE (Dec. 14, 2020), http://www.electionguide.org/elections/id/2425/#_ftnref1.

³¹⁸ Article 65, *Dustūr Jumh. ūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005.

³¹⁹ Kamal Chomani, *Iraq's Missing Federation Council*, TAHRIR INST. MIDDLE E. POL'Y (Nov. 8, 2018), <https://timep.org/commentary/analysis/iraqs-missing-federation-council>.

³²⁰ See Article 4, *Dustūr Jumh. ūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005.

in many instances, the creation of regions was envisioned to be asymmetrical to accommodate the KRG. However, at one point, there were conversations that the Shia SCIRI was pushing for the creation of a nine-governorate Shia “super-region” that would be close to Iran.³²¹ Although one in six Iraqis at the time, both Shia and Sunni, refused federation of the rest of Iraq (outside of Kurdish areas), the constitution’s language opened the door for the future creation of additional regions, with the exception of Baghdad and Kirkuk, which—as explained above for the TAL—would not be permitted to join any region.³²²

The constitution then outlines the federal government’s limited rights and responsibilities: formulating foreign policy and diplomatic representations; executing national security policy, including the armed forces, fiscal and customs policy and creating the national budget; regulating citizenship and immigration, broadcast frequencies and mail, and water resource policy that concerns water coming into Iraq from the outside, as well as census statistics.³²³ Additionally, the federal government is allowed to manage oil and gas extracted from *present* (not future) fields.³²⁴ The federal government may distribute this oil throughout the country based on population, specifying a portion for a specific period for regions unjustly deprived of such resources during the Saddam era.³²⁵ This mostly speaks to the gross negligence of the Saddam era which deprived Kurds of their oil resources.³²⁶ The KRG was also adamant about ensuring it would be able to control foreign contracts with oil companies for oil wells within its territory without central government interference.³²⁷

The federal and regional governments are then asked to *share* the following areas of authority, knowing that power struggles between the two are meant to prefer regional control: managing customs; regulating electric energy; and formulating environmental, development, health, educational, and water resource policy.³²⁸ Article 115 states clearly that all powers not within the exclusive competency of the federal government belong to the regions and

³²¹ al-Istrabadi, *supra* note 149, at 1631; Deeks & Burton, *supra* note 276, at 81.

³²² al-Istrabadi, *supra* note 149, at 1631.

³²³ Article 110, Dustūr Jumh. ūrīyat al-’Irāq [The Constitution of the Republic of Iraq] of 2005.

³²⁴ *Id.* art. 112. This was a deliberate omission pushed for by the Kurdish parties, who had unopened oil fields, the profits of which they didn’t want to have to divide up with the rest of Iraq. Deeks & Burton, *supra* note 276, at 55. Similarly, although to a lesser extent, some of the Shia blocs also pushed for this given that there were some unopened oil wells in Shia-dominated governorates as well. *Id.*

³²⁵ Article 112, Section 1, Dustūr Jumh. ūrīyat al-’Irāq [The Constitution of the Republic of Iraq] of 2005.

³²⁶ Deeks & Burton, *supra* note 276, at 55.

³²⁷ *Id.*

³²⁸ Article 114, Dustūr Jumh. ūrīyat al-’Irāq [The Constitution of the Republic of Iraq] of 2005.

governorates.³²⁹ Article 121(2) adds that regions can amend application of federal laws if the matter is not solely within the authority of the federal government.³³⁰

The constitution then delineates the articulated powers of the region. This is where it becomes complicated. From the outset, the KRG, true to what was promised since 1974, is enshrined as a region in the 2005 Constitution.³³¹ The constitution allows one or more governorates to create regions, so long as they conduct a referendum submitted by one-third of the council members in each governorate or by one-tenth of voters in each of the governorates.³³² The constitution then permits regions to create structures within the regions, and gives them the power to amend the application of any national legislation as long as it doesn't fall into areas marked as solely belonging to the federal government.³³³ This particular section of the constitution alarmed Sunnis who, being a minority, feared the creation of a Shia region created from several Shia-majority provinces, resulting in Sunnis being sidelined by both a KRG and a Shia region.³³⁴

Pivotaly, the constitution permits the establishment of an internal security force, such as police or guards, in any region.³³⁵ This has directly justified the creation of the Peshmerga, a security force which falls under the command of the Ministry of the Peshmerga in the KRG, which is divided between the authorities of both the Kurdistan Democratic Party (led by Barzani in western KRG and influenced by Turkey) and Patriotic Union of Kurdistan (led by Talabani in eastern KRG and influenced by Iran).³³⁶ It has also allowed for the creation of two other security forces: the Shia dominated Popular Mobilization Forces and the Iraqi Security Forces.³³⁷ The lack of coordination and control of forces by the central government has led to a series of serious security breaches which allowed ISIS to create cells in disputed territories where security forces have refused to coordinate (the KRG and Popular Mobilization Forces refused

³²⁹ *Id.* art. 115.

³³⁰ *Id.* art. 121(2).

³³¹ *Id.* art. 117(1).

³³² *Id.* art. 119.

³³³ *Id.* art. 121(2).

³³⁴ Deeks & Burton, *supra* note 276, at 79–80, 83.

³³⁵ Article 121, Section 5, *Dustūr Jumh. ūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005.

³³⁶ Sardar Aziz & Erwin Van Veen, *A State with Four Armies: How to Deal with the Case of Iraq*, WAR ON ROCKS (Nov. 11, 2019), <https://warontherocks.com/2019/11/a-state-with-four-armies-how-to-deal-with-the-case-of-iraq>.

³³⁷ *Id.*

to coordinate at various points during the fight against ISIS, for example).³³⁸ The idea of multiple security forces—established out of lack of trust in groups following massacres that took place in the Saddam era—has set up a security system in Iraq with four different centers, all armed, and all concerned with separate spheres of influence.³³⁹ As a result, militia leaders have grown in strength and influence, and many now serve as members in the National Assembly,³⁴⁰ even those with a record of executing documented, sectarian crimes.³⁴¹

Finally, Article 121(4) of the 2005 Constitution permits regions and governorates to open offices in embassies and launch diplomatic missions.³⁴² In practical terms, this has created tensions in foreign countries where the KRG has independent offices, issues its own visas, announces separate official messages, and employs entirely separate staff from the Iraqi Embassy.

d. Unwritten Ethno-Sectarianism

Arguably, the most interesting part of the Iraqi system is what is *not* written in the 2005 Constitution, particularly regarding the President's ethnicity and sect. The Iraqi Provisional Constitution of 1964 had articulated that the President must be Muslim,³⁴³ but this requirement was not included in the 1970 Constitution, the TAL, or 2005 Constitution. Nonetheless, a tradition arose following the January 2005 elections that has been followed as if it is black letter law.

According to Ambassador Feisal al-Istrabadi, one of the drafters of the TAL, Adnan Pachachi, who served in the Iraqi Governing Council, pushed for the appointment of the first non-Arab leader of Iraq, Jalal Talabani, to become head of state.³⁴⁴ It is recalled that Pachachi stated, “we have to break the notion that the presidency belongs to the Arab Sunnis.”³⁴⁵ According to al-Istrabadi, there

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ Philip Smyth, *Iranian Militias in Iraq's Parliament: Political Outcomes and U.S. Response*, WASH. INST. (June 11, 2018), <https://www.washingtoninstitute.org/policy-analysis/iranian-militias-iraqs-parliament-political-outcomes-and-us-response>.

³⁴¹ This author previously worked at the U.S. Commission for International Religious Freedom, where she authored reports documenting sectarian crimes by various militia groups that specifically targeted Sunni populations in a post-ISIS environment. *Iraq*, U.S. COMM'N ON INT. RELIGIOUS FREEDOM (2017), https://www.uscirf.gov/sites/default/files/Tier2_IRAQ.pdf.

³⁴² Article 121, Section 4, *Dustūr Jumh. ūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005.

³⁴³ *Id.* art. 41; *al-Dustūr al-'Irāqī al-Mu'aqqat* [The Interim Iraqi Constitution] of 1964.

³⁴⁴ Telephone Interview with Feisal Amin al-Istrabadi, *supra* note 206.

³⁴⁵ *Id.*

was no pushback on Talabani's appointment and the precedent that it might set. Scholars, such as Zaid Al-Ali, acknowledge that while this particular story is unknown to them, there was never any doubt that the Shias were going to win the premiership—the most powerful position—and thus they would always be ensured the position of Prime Minister. The other two posts, President and Speaker of Parliament, would have been delegated to the other two stakeholders. Of those two, the presidency was arguably more important and the Kurds, being the more powerful of the two, took the presidency.³⁴⁶ The Sunnis were left with the Speaker of the Parliament. Since 2005, the delegation of these posts along ethnic and sectarian lines has not changed. This tradition is arguably more problematic than some of the penned articles: if the article was written, at least it could be amended. But how can one amend a custom that is not even written into law?

CONCLUSION

Reflecting on Iraq's history and constitutional process, one can safely conclude that sectarianism did not begin with the 2003 invasion, as traumatic of an episode as that was in Iraq's history. The origins of societal divisions are rooted in Iraq's past, particularly its Ottoman past, that instituted a hierarchy prioritizing Muslims over non-Muslims as a matter of policy for hundreds of years. The European powers that stepped in to push the dying Empire to impose quotas and institutionalize non-Muslims in governance—an opportunity they had limited access to before—ultimately forced minorities to maintain their ethnic and sectarian cloaks. Without it, it can be argued, they might not have survived, much less participated in the governance of their communities. The most critical role the invasion played was to provide a path for ethno-sectarianism to be institutionalized in the current constitutional framework, exacerbating already-existing historical tensions, even if they remained under the surface.

In response to this grim reality, some scholars have argued that Iraq is better off to embrace its sectarianism, to accept that its communities have zealous religious tendencies, and that by doing so, the state is protecting “diversity” and surrendering to what Iraq actually is.³⁴⁷ Scholars like Noah Feldman and Stephen Townley argue that establishment of religion is a necessary prerequisite in state

³⁴⁶ Telephone Interview with Zaid Al-Ali, *supra* note 2.

³⁴⁷ Stephen Townley, *Mosque and State in Iraq's New Constitution*, 34 DENV. J. INT'L L. & POL'Y 197, 210 (2006).

and nation-building projects in the Middle East.³⁴⁸ Townley, in particular, relies on James Madison to justify the establishment of religion in Iraq because it “encourag[es] a multiplicity of mutually balancing sects, all competing for adherents and defining themselves in relation to each other, thus achieving a creative equilibrium.”³⁴⁹ But this quote cannot reasonably apply to a context where there is no set, unifying identity, as in Iraq, and one where each group perceives the situation as a zero-sum game, where the survival and thriving of one community threatens the survival and future of another. The benign, open marketplace of ideas that Townley paints—that he claims would foster a more responsive government in Iraq—is not a realistic outcome in the Iraqi context. Townley argues that when a “government cooperates with belief associations” it begets tolerance.³⁵⁰ He argues that there should be an embrace of religion in governance.³⁵¹ He hones in on supposed benefits of Islamic courts for Muslim women, which he believes are better for Muslim women because Islamic courts will have to compete with secular courts to attract their “business.”³⁵² He also asserts that the threat of a Muslim woman possibly “exiting” this system and turning to the secular system to settle her dispute is powerful enough to incentivize evolution in the court system to favor women.³⁵³

But there is no indication that personal status courts in Iraq, or in other countries in the region where they still exist, are more favorable to women in their judicial holdings or that they pander to them to gain their approval to maintain existence. Even today, countries attempting to impose egalitarian inheritance schemes, such as Tunisia, are unable to do so precisely because the bulk of personal status courts and schools remain wedded to orthodox Islamic rulings, notwithstanding the fact that by imposing those schemes, women (and other cross-sections of society) will continue to seek restitution elsewhere if such an outlet exists.³⁵⁴ Thus, the idea that operationalizing religious articles in the constitution and embracing religion in the public space is the key to the evolution of Iraqi society towards liberalism, is unfounded. The competition among religious groups does indeed exist, but it is almost exclusively used as a galvanizing tool to exploit societal wedges to prevent unity among Iraqis, and in

³⁴⁸ *Id.* at 210–212.

³⁴⁹ *Id.* at 211.

³⁵⁰ *Id.* at 214.

³⁵¹ *Id.*

³⁵² *Id.* at 229.

³⁵³ *Id.* at 234.

³⁵⁴ *Tunisia: Cabinet Approves Bill Requiring Equal Inheritance Shares for Men and Women*, LIBR. CONG. (Dec. 4, 2018), <https://loc.gov/law/foreign-news/article/tunisia-cabinet-approves-bill-requiring-equal-inheritance-shares-for-men-and-women/#:~:text=>

fact spur illiberalism in the country. Groups are financially supported (and rewarded) by members of parliament, local leaders, and foreign countries to maintain their distinct identity. Security is also provided based on community affiliation. Advocating for national unity across Iraq's many groupings jeopardizes access to such benefits because—by and large—access to resources and security has become a winner(s)-take(s)-all phenomenon given to loyal group members.

Whether liberal democracy in highly fragmented societies can succeed is debated among scholars. The United States remains almost an anomaly, in that it is one of the only states with a highly diverse population, not unified in sect or religion, that is held together by constitutionalism.³⁵⁵ In the cases where dominant nationalities do not exist, such as Switzerland or Belgium, a federal system steps in to break down the federation by ethnicity and/or linguistic group, drawing lines that align closely with where such groups are located geographically. Most European countries, in fact, usually have one dominant nationality with much smaller minority groups.³⁵⁶ In the case of Iraq's highly fragmented society, federalism and/or de-centralization has not been properly enforced and designed in good will, and attempts to partition have failed.³⁵⁷ Even the most powerful brokers in Iraq—the Shia and their strong militias—failed to partition the state from the rest of Iraq, despite arguably having the power to do so. To enable this, they would have needed to figure out how to properly run Iraq in a way that ensures stability, security, and welfare, and eliminates widespread corruption and mismanagement. In this case, it can be safely argued that partition—at least alone—would not have healed Iraq's many ills.

Iraq's many constitutional processes involved largely undemocratic actors in what was meant to (theoretically) culminate in a liberal democracy in 2005. But such systems cannot be created by illiberal, undemocratic actors. At the same time, they cannot be imposed inorganically by outside forces. What the Iraqi situation reflects is that external liberal actors—who believed themselves to know “better” than local Iraqis—failed just as much as, if not more than, the local actors to bring about a liberal, democratic Iraq. Undemocratic forces will

³⁵⁵ The United Kingdom is also another state usually considered as diverse and held together by constitutionalism, despite not having a written constitution.

³⁵⁶ It should be noted, however, that more recent refugee flows are destabilizing this balance, leading to instability and in some cases, violence.

³⁵⁷ For example, the KRG attempted to declare independence in 2017, but failed to do so. Loveday Morris, *How the Kurdish Independence Referendum Backfired Spectacularly*, WASH. POST (Oct. 20, 2017), https://www.washingtonpost.com/world/how-the-kurdish-independence-referendum-backfired-/2017/10/20/3010c820-b371-11e7-9b93-b97043e57a22_story.html. Baghdad, in addition to all neighboring states, and the United States, refused to recognize or authorize it. *Id.*

always lead back to a monopoly on power; the only question is which branch of government will end up with that monopoly. While Saddam's system suffered from hyper-executive power, the pendulum swung fully towards a hyper-parliamentary system after the invasion of Iraq—in both cases preventing the creation of checks and balances that would have been pivotal to power dispersion across the state. But at the heart of this is also the purpose of the state: when such systems were created, they were not created with the individual, and his or her ability to thrive, in mind. As a result, inclusivity of the public is ignored (as we saw in the processes above), and stability becomes the primary goal. On the other hand, employing inclusivity and consulting with the public for manipulative purposes, such as to give an undemocratic process a false veneer of legitimacy, is also deceiving. Neither of these scenarios leads to the end goal of a democratic, inclusive Iraq.

It is important to end with a clear acknowledgment that despite the undercurrent of now-institutionalized ethno-sectarian discrimination, Iraq's downfall is intertwined with problems that plague many countries, especially those with conflicts or in the post-conflict phase. Iraqi politicians' insatiable greed and desire to maintain power at all costs will continue to cripple Iraq's ability to pry itself out of its dysfunction. According to Transparency International, Iraq ranks 160 out of 180 countries on its corruption index.³⁵⁸ The bargaining that took place during the drafting of the constitution, as articulated above, was between political powers that more or less have maintained their firm grip on Iraq's institutions as well as its precious, valuable resources since 2003. Their design of the Iraqi State has aided them in their efforts to exploit resources and positions of authority: vague language has been weaponized to maintain lack of transparency, and where the constitution has been inconvenient to apply, it has been ignored (i.e., the existence of multiple armed groups). Reformers that have entered the scene, and whistleblowers and activists that have attempted to highlight abuses of politicians and militias, have become victims to kidnapping, detention, or even worse—assassination.³⁵⁹

While it was inspiring to watch Iraq's protests unfold in October 2019, yet again, there is little reason to believe such revolts alone will push Iraq in the direction of liberal democracy. So long as its society remains fixated (and incentivized) to maintain its historical cleavages and there is no serious

³⁵⁸ *Iraq*, TRANSPARENCY INT'L, <https://www.transparency.org/en/countries/iraq#> (last visited Sept. 25, 2021).

³⁵⁹ Lyse Doucet, *Hisham al-Hashimi: Leading Iraqi Security Expert Shot Dead in Baghdad*, BBC (July 7, 2020), <https://www.bbc.com/news/world-middle-east-53318803>.

contemplation of re-imagining federalism and decentralization, Iraq will remain rooted in despair. Most importantly, so long as ineffective politicians continue to serve their personal financial interests and insist on maintaining power, and Iraqis insist on a zero-sum game paradigm as the key to their survival, the current constitution will be either selectively ignored or used to oppress Iraq's population instead of being used as a consensus document providing a pathway to a more fruitful future.